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 from the U.S. District Court for
the Central District of California

BRIEF FOR RESPONDENT/CROSS-APPELLANT

Team No. 19

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

STATEMENT OF THE ISSUES

1. 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 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

The Defendant, Louis Wheatley (Wheatley), a California resident, was an employee at the California egg production facility *Eggs R Us* (the Company) and made a video of the working conditions during his employment. *United States v. Louis Wheatley*, Case No. CV 11-30445 WMF (ABCx) at 1 (C.D. Cal Aug. 29, 2011). He posted the video on his personal Facebook page and it subsequently ended up on YouTube. *Id.* Wheatley also pocketed a male chick from the facility and took it home. *Id*. As a result of these actions, charges were brought against him for violating the Animal Enterprise Terrorism Act (AETA), 18 U.S.C. § 43 (2006), and the Federal Agricultural Products Protection Act (APPA), Federal Law § 999.2(3). *Id*.

In February 2011, a federal grand jury sitting in the Central District of California indicted Wheatley and charged him with (1) violating § 999.2(3) of the APPA by entering an animal facility and using a video recorder; (2) violating § 43(a)(1) of the AETA by using the internet for

purposes of damaging or interfering with the operations of an animal enterprise; and (3) violating § 43(a)(2)(A) of the AETA by intentionally damaging or causing the loss of real or personal property. *Wheatley*, Case No. CV 11-30445 WMF (ABCx) at 4–5.

Wheatley filed a motion to dismiss the indictment in the District Court for the Central District of California, which the court denied. *Id.* at 5. A jury then convicted Wheatley on all three counts at trial, and he subsequently filed a Federal Rules of Civil Procedure Rule 29 motion for judgment of acquittal. *Id*. The District Court denied his motion as to Count 1, but granted an acquittal on Counts 2 and 3. *Id*. The United States and Wheatley have each filed cross-appeals from the judgment with the United States Court of Appeals for the Ninth Circuit, with the United States (Respondent/Cross-Appellant) appealing the District Court's grant of Wheatley's motion as to Counts 2 and 3, and Wheatley (Appellant/Cross-Respondent) appealing the District Court's denial of his motion to dismiss the indictment and of his Rule 29 motion of acquittal as to Count 1. *United States v. Wheatley*, Briefing Order, Case No. 11-11223 (9th Cir. Oct. 5 2011).

STATEMENT OF THE FACTS

The Company is a mid-sized egg producer with facilities in several states, including California, and has been in business since 1966. *Wheatley*, Case No. CV 11-30445 WMF (ABCx) at 1–2. Through the National School Lunch Program, it receives considerable subsidies from the federal government to provide eggs for school lunches. *Id*. at 2.

Wheatley, a journalism student, was hired at the Company as a "poultry care specialist" during his 2010 summer break from school. *Id.* at 2. He had become concerned with living conditions of farmed animals during the "Proposition 2" initiative campaign in California in 2008, and after reading about farmed animal issues on the internet and joining a farmed animal protection group for several years. *Id*. Wheatley says that he wanted to find out how accurate the claims he had heard about farmed animal conditions were and applied for the poultry care

specialist position. *Id*. He had also hoped to write an article for a class and to blog online about his experience at the Company. *Id*.

On June 1, 2010, Wheatley started the job at the Company. *Id*. His duties at this job were to feed and water the chickens and to occasionally clean out their cages. *Id.* As is standard industry practice, male chicks, a byproduct of egg production, are disposed of by the Company via a machine that grinds and macerates the animals. *Id*. at 2–3. Wheatley took an approximately four minute long video of another worker at the Company performing this task. *Id*. at 3. He then posted the video on his personal Facebook page, with the comment, "[t]he public has to see this to believe it." *Id*. Another Facebook user reposted Wheatley's video onto YouTube, where it has received over 1.2 million views to date and was featured on various local news reports. *Id*.

Wheatley also made a second video of the hens in their cages at the Company, in an effort to show that their cages were too confined and the hens could not spread their limbs or wings as required by Proposition 2. *Id*.; *see also* Cal. Health & Safety Code §§ 25990(a) and 25991(f) (West 2012). This video was posted on Wheatley's Facebook page as well, but was removed before the trial. *Wheatley*, Case No. CV 11-30445 WMF (ABCx) at 3. Further, Wheatley blogged about this alleged violation of Proposition 2 and about a conversation he had with his supervisor at the Company regarding the hens' cage size. *Id*. at 3–4. Wheatley also told the farmed animal protection group he had joined about the Company's practices. *Id.* at 4.

Finally, on June 17, 2010, Wheatley slipped a male chick belonging to the Company into his coat pocket as he was walking by the waste bin near the disposal machine. *Id*. He took the chick to his home and continues to care for it, claiming he "rescued" the animal. *Id*.

As a result, the Company has suffered negative media attention and has had to make public statements about modifying their practices in California, *id*., despite no evidence of having committed any violations and no charges having been filed against the Company. *Id*. at

13. The Company fired Wheatley and forwarded the information to the federal authorities, leading to Wheatley's arrest and charges of violating the APPA and the AETA. *Id*. at 4.

SUMMARY OF ARGUMENT

The United States argues that the District Court was correct in denying Wheatley's motion of acquittal under Count 1, but incorrect in its acquittal of Wheatley's convictions under Counts 2 and 3. The government asks that this court review these issues using the de novo standard of review. *See United States v. Rosales*, 516 F.3d 749, 751–52 (9th Cir. 2008) ("[W]e apply a de novo standard when reviewing a decision on a Rule 29 motion, we must affirm the trial court if, viewing the evidence in the light most favorable to the prosecution, 'any rational trier of fact could have found the essential elements of the offenses charged beyond a reasonable doubt.'" (citing *United States v. Hinton,* 222 F.3d 664, 669 (9th Cir. 2000))).

With respect to Count 1, the District Court was correct in holding that the APPA does not violate the First Amendment to the U.S. Constitution. The Company is a private business, and a non-public forum at best, wherein the government can regulate speech as long as such regulation is reasonable and content-neutral. Because there is no evidence that the purpose of the law is to censor or discriminate, and the government has legitimate reasons for protecting the food production industry, the regulation meets the content-neutral and reasonableness requirements. Nor is the statute overly broad, because Wheatley has not shown that a substantial number of its applications would be unconstitutional. There are more public policy reasons to support the government's position, such as protecting the industry and discouraging individuals from taking the law into their own hands, than there are to support Wheatley's argument that the First Amendment protects his conduct. Additionally, the elements of the necessity defense are not met under Wheatley's circumstances.

Turning to Counts 2 and 3, the United States maintains that the Animal Enterprise Terrorism Act (AETA) is appropriately regulated by Congress through the Commerce Clause. Congress' authority to regulate and protect the instrumentalities of interstate commerce under the AETA even if the transaction in question occurred intra-state, is in line with the Court's support of an expansive reading of Commerce Clause powers. Likewise, we support the District Court's finding that Facebook and YouTube postings are channels or instrumentalities or interstate commerce appropriately regulated by Congress through the AETA. Moreover, the United States contends that this court should reinstate Wheatley's convictions on Counts 2 and 3. We agree with the District Court that Wheatley used a "facility of interstate or foreign commerce . . . for the purpose of damaging or interfering with the operations of an animal enterprise" as required by the AETA, and is thus guilty of Count 2. However, controvert to the District Court, we argue that Wheatley's interference was connected with his taking of the chick as Company property, therefore satisfying the intent to "cause the loss of any real or personal property" required by the AETA. As a result, Wheatley's conduct satisfies the requirement for Count 3 and for prosecution under the AETA.

ARGUMENT

I. Wheatley's Conviction Under Count 1 Should Be Upheld and the District Court Correctly Denied His Rule 29 Motion for Judgment of Acquittal

A. *The Federal Agricultural Products Protection Act Does Not Violate the U.S. Constitution's First Amendment Right to Free Speech*

Wheatley contends that § 999.2(3) of the Federal Agricultural Products Protection Act (APPA) is unconstitutional as applied to him and in general as a violation of the First Amendment to the U.S. Constitution's free speech clause. *Wheatley*, Case No. CV 11-30445 WMF (ABCx) at 6. Section 999.2(3) provides, "No person . . . may without the effective consent of the owner . . . (3) [e]nter 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). Conversely, the First Amendment prohibits Congress from making any law "abridging the freedom of speech." U.S. Const. amend. I. However, the District Court was correct in holding that Eggs R Us, as a private organization, is a non-public forum in which free speech can be regulated so long as it is reasonable and content neutral. *Wheatley,* Case No. CV 11-30445 WMF (ABCx) at 9. Additionally, as the court held, the language of the APPA is not unreasonable based on its purpose, nor is it too broad to be enforceable, and Wheatley's conviction of violating the APPA should be upheld.

1. *Eggs R Us is a Private Company and a "Non-Public Forum" Wherein the Government May Regulate or Prohibit Certain Types of Speech*

Though the First Amendment prohibits Congress from making any law that infringes upon the freedom of speech, U.S. Const. amend. I, there are specific exceptions that exist depending on the location, or "forum," of the speech. In *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), the U.S. Supreme Court laid the groundwork for these exceptions depending on the nature of the forum and the degree to which the forum is government-owned. Since then, "the Court [has] identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.,* 473 U.S. 788, 802 (1985).

In brief, "public forum" refers to the "quintessential" public place, such as a park or street, in which the government can only enforce restrictions on the content of speech if a compelling state interest is served, and it is narrowly drawn to achieve that end. *Perry*, 460 U.S. at 45; *see also Carey v. Brown*, 447 U.S. 455, 461 (1980). A "designated" or "limited" public forum is a place that is not traditionally public, but the government has "opened for expressive activity by part or all of the public." *Int'l Soc. for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672, 678–79 (1992). As in traditional public forums, government exclusion of viewpoint-neutral speech that

would otherwise fit within the scope of the forum is subject to strict scrutiny. *Ark. Educ. Television Co. v. Forbes*, 523 U.S. 666, 677 (1988).

Non-public forums are those that are owned or controlled by the government but are not "by tradition or designation a forum for public communication." *Perry,* 460 U.S. at 46. The government may restrict the time, place, and manner of speech, as long as such regulation is reasonable pursuant to the purpose of the forum and is not merely in order to facilitate suppression of particular viewpoints. *Id*.; *see also Cornelius*, 473 U.S. 788 at 811.

Eggs R Us is a private company, and the First Amendment rights are only enforceable on public property or on private property sufficiently devoted to public use. *Cornelius*, 473 U.S. at 788. *See also Marsh v. State of Alabama* 326 U.S. 501, 506–07 (1946) (holding that free speech rights trumped private property rights in a company-owned town); *Hudgens v. NLRB,* 424 U.S. 507, 516–21 (1976) (discussing the exception in *Marsh*, clarifying that it is only applicable when the private property has taken on the qualities of a municipality); *Int'l Soc. for Krishna Consciousness, Inc*., 505 U.S. 672, 672 (holding that an airport terminal was a non-public forum and that the Port Authority prohibition of solicitation material was reasonable). As the Company does not fit within this narrow exception, and is clearly not "devoted to public use," *Cornelius*, 473 U.S. at 788, the United States urges this court to determine that the videos were taken on private property, wherein Wheatley does not have First Amendment free speech rights.

However, the government, through the U.S. Department of Agriculture (USDA), does oversee the facility and provides substantial funding through the National School Lunch Program. *Wheatley*, Case No. CV 11-30445 WMF (ABCx) at 2, 9. The District Court found, based on this level of government involvement, that the Company is a non-public forum, where speech can be regulated as long as such regulation is reasonable and content-neutral. *Id.* at 9. Even assuming the Company is a non-public forum as the District Court found, the APPA does not violate the

reasonableness and content-neutrality requirements and is not unconstitutional in general or as applied to Wheatley.

2. *The Government's Prohibition of Video Recording at Eggs R Us, a Non-Public Forum, is Reasonable and Content-Neutral*

Wheatley argues that Federal Law § 999.2(3) is both unreasonable and viewpoint-discriminatory and thus violates his First Amendment rights because the Company is a non-public forum. *Wheatley,* Case No. CV 11-30445 WMF (ABCx) at 9–10. The Supreme Court has articulated that a restriction is content-neutral if it is "justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Thus, the inquiry that a court should make is "whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id*. A regulation may affect some speakers or messages but not others, and still be deemed content-neutral. *Id*.

There is no indication that the government enacted the APPA because of disagreement with any particular "message" or that the purpose of the law is to censor or discriminate. *See Ward*, 491 U.S. at 791 ("The government's purpose is the controlling consideration" in determining content neutrality). There is no legislative history to determine whether or not the APPA was enacted specifically to thwart animal rights activists, or had a broader, viewpoint-neutral purpose, such as to prevent competitors from obtaining information or to ensure food safety. *Wheatley,* Case No. CV 11-30445 WMF (ABCx) at 10. Other states have enacted similar statutes that prohibit video recordings at animal facilities, *see, e.g.,* Kan. Stat. Ann. § 47-1827 (West 2011); N.D. Cent. Code Ann. § 12.1-21.1-02 (West 2011); S. 5172, 235th Sess. (N.Y. 2012); S.F.341 (I.A. 2011), and Wheatley contends that the legislative intent of these similar statutes should serve as persuasive authority to this court. *Wheatley,* Case No. CV 11-30445 WMF (ABCx) at 10.

The District Court declined to even consider the legislative intent of the related state statutes, *Id.* at 10, but even if this court were to do so, it would not support Wheatley's argument. For example, the New York proposed bill's purpose statement refers to "unlawful tampering" with animals, and the justification for the bill further discusses the safety of the food supply, the security of the facility, and avoiding theft of fertilizer to make methamphetamines as a concern. S. 5172, 235th Sess. (N.Y. 2012). The Iowa House Republican Majority Leader has said of the proposed bill in that state that it is about "helping to ensure that Iowa's role as a leading producer of food continues for my children and grandchildren." Carolyn Orr, *Some state lawmakers want to shoot down use of undercover video at farm operations*, Stateline Midwest (May 2011). The bill's sponsor, Iowa Republican Representative Annette Sweeney, also has expressed concern about videos being released to the press instead of the appropriate government authorities, and that the videos are often staged. *Id*. Both Representatives also say they are concerned with food safety, as animal-abuse whistleblowers could potentially spread disease as they travel among different farms. *Id*.

There is no indication that the federal government's goal with the APPA was to discriminate against a particular viewpoint, and even if this court did look to the legislative intent of similar state statutes as Wheatley suggests, no evidence of discrimination is found either. In fact, the state statutes' purpose statements and sponsors tend to articulate a valid government interest in enacting the statutes and support the United States' argument. This court should agree with the District Court that protecting animal facilities from loss of business and property, as well as from terrorist activities, is a reasonable and valid interest. *Wheatley,* Case No. CV 11-30445 WMF (ABCx) at 10. Further, many different states have similar statutes or proposals, for a wide variety of reasons, and there is no reason to assume that the APPA, a federal law, should

be interpreted based on the same intentions of the states. As the District Court articulated, Wheatley's theory is not enough to overturn a federal statute as unconstitutional. *Id*.

3. *Wheatley Has Not Shown That the APPA Should Be Subject to the Narrow Overbreadth Doctrine, Which Requires That a Substantial Number of the Law's Applications be Unconstitutional*

Wheatley also argues that the statute is overly broad pursuant to *United States v. Stevens*, 559 U.S. __, 130 S. Ct. 1577 (2010), which held that a federal statute criminalizing the commercial creation, sale, or possession of depictions of animal cruelty was unconstitutional because it was substantially overbroad. By substantially overbroad, the Court meant, "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id*. at 1587. The Court only applies the overbreadth doctrine, declaring a statute unconstitutional, as a very narrow "last resort," *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973), and only when a substantial number of the law's applications are unconstitutional. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, n. 6 (2008).

Wheatley argues that the APPA is too broad in that it sweeps too far and prevents important activities such as uncovering evidence of animal abuse or food safety violations. *Wheatley,* Case No. CV 11-30445 WMF (ABCx) at 10. However, even if others may potentially be victim to an unconstitutional application of the APPA under a different set of facts, this does not excuse Wheatley's violation of the APPA in this situation or mean that this instance is also unconstitutional. *See New York v. Ferber*, 458 U.S. 747, 767 (1982). The District Court was correct in finding that Wheatley did not demonstrate why the narrow overbreadth doctrine should be applied in these circumstances.

Wheatley also contends that statutes like the APPA and similar state provisions may directly compete with whistleblower protections; however, his concern is unfounded. The California Whistleblower Protection Act, Cal. Gov. Code § 8547.1 (West 2011), for example,

protects state employees from retribution for reporting violations of law in the workplace, but nothing in the APPA conflicts with these protections. The APPA refers to those who commit intentional, destructive acts or who make recordings at an animal facility, not genuine employees who simply report illegal activity. *See* Federal Law § 999.2. In sum, prohibiting video recordings does not interfere with allowing whistleblower employees to come forward and report violations.

As discussed in the prior section, protecting the economic interests of the agriculture industry, as well as preventing terrorist activists or industry competitors from accessing their facilities, are valid, viewpoint-neutral reasons for prohibiting videotaping at these properties. Further, Wheatley has not shown how the application of the APPA is subject to the very narrow overbreadth doctrine. Based on this reasonable purpose, this court should uphold the ruling of the District Court and refuse to acquit Wheatley of his violation of the APPA § 999.2(3).

B. *Wheatley's Conviction Should Not Be Overturned Pursuant to Public Policy, Nor Are His Actions Justified by the Defense of Necessity*

Wheatley also argues that he should not be convicted for his actions because they illuminated the fact that the Company was allegedly violating California law with its treatment of its chickens. *Wheatley,* Case No. CV 11-30445 WMF (ABCx) at 6. He asserts that such a conviction against him would be in violation of public policy, and says that his actions are further defended by the "necessity" doctrine. *Id*. at 6.

1. *Wheatley's Conviction is Not in Violation of Public Policy or Contradictory to the Purpose of the First Amendment*

Wheatley's conduct allegedly revealed violations of several California state laws: Proposition 2, Cal. Health & Safety Code §§ 25990(a) and 25991(f) (West 2012), which prohibits agricultural facilities from confining animals in such a way that prevents them from extending their limbs and/or turning around freely; Cal. Penal Code § 597(b) (West 2012), which prohibits the mutilation or cruel killing of any animal; and Cal. Penal Code § 597(t) (West 2012),

which requires that confined animals (notably without excepting farmed animals) have adequate exercise areas. The State of California has not filed charges against the Company, so it is unclear whether any violations actually occurred. *Wheatley,* Case No. CV 11-30445 WMF (ABCx) at 13.

Wheatley contends that it is controvert to the First Amendment to limit his freedom to further the public discourse about animal abuse and to expose illegal conduct. *Wheatley,* Case No. CV 11-30445 WMF (ABCx) at 12–13. Though the First Amendment is especially concerned with fostering the discussion of public policy, *see, e.g., Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (the First Amendment protects free speech in order to ensure the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people."), there are other ways to do so without violating federal law such as the APPA.

Wheatley is concerned that without his undercover videos, the Company's allegedly illegal conduct would not have been revealed, and that prohibiting actions such as his, the only way to reveal such violations, is against the public policy of the State of California and the federal government. *Wheatley*, Case No. CV 11-30445 WMF (ABCx) at 13. However, there are many ways to uncover violations without violating the APPA. Under the APPA, Wheatley is not prohibited from reporting what he saw to the appropriate authorities or to an animal welfare organization without taking a video recording, nor are government agencies prohibited from lawfully investigating, including by taking video recordings. It was the taking of the video recording, without the owner's consent that led to his violation of the APPA, not his discovery of potential illegal conduct at the Company. Additionally, such protections serve to encourage individuals to report conduct to the appropriate authorities instead of trying to privately enforce the laws themselves, an important public policy and law enforcement prerogative. If a potential violation does exist and the media (or social media), rather than law enforcement, is informed first, the investigation can be severely hampered. Via the media or social networking, the

potential wrongdoers can find out about the prospective evidence against them before the actual investigators do. This gives them the opportunity to remedy the situation or dispose of evidence before law enforcement is able to establish that a violation did in fact occur.

Finally, Congress did not put any language into the APPA about safeguarding individuals who are uncovering illegal conduct, and there is no indication that this was one of their concerns when drafting the APPA. The California statutes similarly have no such protections. This court should exercise deference to the state legislature and to Congress pursuant to its intent to protect the significant economic interests of the Company and other agricultural businesses, rather than try to make its own policy judgments.

2. *Wheatley Does Not Meet the Elements of Invoking the Necessity Defense and Did Not Commit the "Direct Civil Disobedience" Necessary to Do So*

Lastly, Wheatley proposes that his conduct is protected by the necessity defense. The defense requires that defendants show: (1) they chose the lesser of a choice of evils they were faced with; (2) they acted to prevent imminent harm; (3) they reasonably anticipated a direct casual relationship between the harm to be averted and their conduct; and (4) they had no legal alternatives other than to violate the law. *United States v. Schoon*, 971 F.2d 193, 195 (9th Cir. 1992). In cases of "civil disobedience," defined by the Ninth Circuit in *Schoon* as "willful violation of a law, undertaken for the purpose of social or political protest," *id*. at 195–96, the necessity defense may apply. *Id*. More specifically, "direct civil disobedience," describes "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*., while "indirect civil disobedience" refers to the violation of a law or interference with government policy that is not the object of the protest. *Id*. The court in *Schoon* held that only direct civil disobedience could invoke the necessity defense. *Id*.

As the District Court correctly noted, Wheatley's circumstances do not fit within the framework of the "direct civil disobedience" described in *Schoon,* which would be the only way he could utilize the necessity defense. *Wheatley,* Case No. CV 11-30445 WMF (ABCx) at 14. Wheatley did not establish that he was intentionally or specifically protesting the APPA with his actions, or that he even knew about the APPA when he violated the statute. *Id*.

Assuming Wheatley did know about the APPA and intended to protest it with his actions, thus meeting the direct civil disobedience requirement, he did not satisfy the four elements of the necessity defense. While making the videos and violating the APPA might have been a lesser evil than letting the Company allegedly commit animal cruelty, there were other ways Wheatley could report the Company's alleged violations without violating the statute. He could have reported the Company to the appropriate government authorities, a much more appropriate option than taking it upon himself to enforce the law or interfering with a potential investigation by passing video to his online social network. With respect to the second prong, it is unclear whether the Company has even violated any animal cruelty laws or Proposition 2, so the imminence requirement is probably not met either. Finally, prong four is not met, because Wheatley had many other alternatives discussed above instead of violating the APPA. As such, Wheatley's necessity defense should be dismissed.

II. The District Court Erred by Vacating Wheatley's Convictions Under Counts 2 and 3

A. *The Animal Enterprise Terrorism Act Does Not Exceed Authority Under the Commerce Clause Given the Traditionally Broad Interpretation of this Power by the Courts*

Article I, Section 8 of the United States Constitution provides Congress with 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. The trend by the courts has been an expansive view of this power. The 1942 Supreme Court decision in *Wickard v. Filburn* established a broad reading of

the Commerce Clause with its introduction of the aggregate theory, or the idea that an activity may be reached by Congress if the activity "exerts a substantial economic effect on interstate commerce," *Wickard v. Filburn*, 317 U.S. 111, 125, 127–28 (1942).

In *United States v. Lopez,* 514 U.S. 549 (1995), the Supreme Court recognized the following "three broad categories of activity" that Congress may regulate under its commerce power: (1) "the 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." *Id.* at 558–59. Ten years after *Lopez*, the Supreme Court's decision in *Gonzales v. Raich*, 545 U.S. 1, 17, 19 (2005) established that the government can regulate a commodity that has a substantial effect on supply and demand in the national market for that commodity, even if the transactions occurred solely within one state. Referring back to *Wickard v. Filburn* for authority, the Court found that the federal Controlled Substances Act (CSA), which criminalized the manufacture and distribution of marijuana, regulated "purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce" (*Raich*, 545 U.S. at 17, quoting *Wickard*, 317 U.S. at 128–29).

Similar to the California-grown marijuana at issue in *Raich,* Congress has the ability to regulate California-raised eggs transported within the state because the supplies of these eggs impact the distribution of eggs not only among the Company's other two out-of-state facilities, but also the distribution of eggs among national wholesalers across the country. *United States v. Louis Wheatley*, Case No. CV 11-30445 WMF (ABCx) at 1 (C.D. Cal Aug. 29, 2011). As *Lopez* recounted, during the twentieth century, the Court, in "recognition of the great changes that had occurred in the way business was carried on in this country," expanded Congress' Commerce Clause authority to reach intrastate activity as interstate commerce grew. *Lopez*, 514 U.S. at 555.

Accordingly, Congress' authority to regulate and protect the instrumentalities of interstate commerce under the Animal Enterprise Terrorism Act (AETA), 18 U.S.C. § 43 (2006), even if the transaction in question occurred intra-state, is in line with the Court's support of an expansive reading of Commerce Clause powers.

1. *The Animal Enterprise Terrorism Act Protects the Instrumentalities of Interstate Commerce and Regulates Conduct that has a Substantial Effect on Interstate Commerce, Thereby Meeting the Supreme Court's Standard for Acceptable Regulation*

The AETA is appropriately regulated by Congress given the *Lopez* Court's express authority to Congress to regulate the instrumentalities of interstate commerce and conduct that has a substantial effect on interstate commerce. *Lopez*, 514 U.S. at 558–59. The text of the AETA indicates that its purpose is to protect "animal enterprises":

> Whoever travels in interstate or foreign commerce, or uses or causes to be used the mail or any facility of interstate or foreign commerce– (1) for the purpose of damaging or interfering with the operations of an animal enterprise; and (2) in connection with such purpose– (A) intentionally damages or causes the loss of any real or personal property (including animals or records) used by an animal enterprise, 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. § 43. Given that the Company is a mid-sized egg producing business with facilitates in three states, it falls within the definition of "animal enterprise" outlined in the definition section of the AETA: "a commercial or academic enterprise that uses or sells animals or animal products for profit, food or fiber production, agriculture, education, research, or testing . . . ." More importantly, however, Congress may regulate conduct that "interferes with, obstructs, or prevents" interstate commerce. *United States v. Dinwiddie*, 76 F. 3d 913, 919 (8th Cir. 1996), quoting *United States v. Coombs*, 12 Pet. 72, 77, 9 L. Ed. 1004 (1838). As the government argued in the District Court, Wheatley's conduct interfered with and obstructed the interstate commerce activity of the Company in its production and sale of animal food products, an industry regulated by the federal government. *Wheatley*, Case No. CV 11-30445 WMF (ABCx)

at 16. More than one million people have viewed Wheatley's video detailing operations inside the plant, and, as a result, a high level of negative publicity was generated against not only the Company, but egg-producing facilities as a whole. *Id.* at 3. Wheatley's conduct therefore is appropriately regulated by Congress through the AETA given its "substantial relation to interstate commerce" (*Lopez*) and a substantial effect on supply and demand in the national market for that commodity (*Raich*).

2. *Judicial Trend to View Facebook Postings as Any Other Internet Activity, Which is an Acknowledged Tool of Interstate Commerce*

Establishing that both the Company and Wheatley's conduct are the types of operations appropriately regulated by Congress through AETA under the Commerce Clause, we now focus on the text of the first part of the offense, and specifically Wheatley's Facebook posting as a "facility of interstate or foreign commerce." Because courts in other jurisdictions have considered the internet to be a "channel" or "instrumentality" of interstate commerce, *United States v. MacEwan*, 445 F.3d 237, 245 (3rd Cir. 2006), equivalent to moving files across state lines, *see, e.g.*, *United States v. Machtley*, 163 Fed. App'x. 837, 839 (11th Cir. 2006); *United States v. Runyan*, 290 F.3d 223, 239 (5th Cir. 2002), it is within Congress' authority to regulate internet use under the AETA. While there is no authority controlling the specific use of Facebook or YouTube, the judicial trend to recognize the internet as a "channel" or "instrumentality" of interstate commerce coupled with the expansive interpretation of Congress' Commerce Clause powers are highly persuasive. These trends thus suggest that both Facebook and YouTube postings are channels or instrumentalities or interstate commerce appropriately regulated by Congress through the AETA.

B. *The District Court Wrongly Overturned the Jury Verdict Convicting Wheatley Under Counts 2 and 3 Because the Animal Enterprise Terrorism Act Does Apply to Wheatley's Conduct*

The United States argues that Wheatley's conduct is appropriately charged under the AETA because he purposefully sought to damage and interfere with the Company's operations in connection with his removal of Company property.

1. *By Posting and Blogging About the Events at the Company, Wheatley Purposefully Sought to Change Its Conditions, and Caused Both Damage and Interference with the Operations of an Animal Enterprise*

The next issue is whether Wheatley acted "for the purpose of damaging or interfering with the operations of an animal enterprise" as required by the AETA. As discussed above, the Company is an "animal enterprise" within the meaning of the AETA. In addition, Wheatley damaged and interfered with the Company's operations by posting the video and causing the Company a significant amount of negative press, which may require the Company to expend money to change its operations and procedures in order for it to maintain its customer base. Finally, it was precisely this type of damage and interference that Wheatley intended when he posted his video with a caption to his Facebook account.

Judicial interpretation of statutory provisions should give effect to every word in a statute, *United States* v. *Menasche,* 348 U.S. 528, 538–39 (1955), without making any words mere surplusage. *Ratzlaf v. United States*, 510 U.S. 135, 140–41 (1994). Here, "for the purpose of damaging or interfering" is modified by "operations of an animal enterprise." Damage can be economic in nature, and this particular type of damage is one envisioned by the AETA. For instance, the term "economic damage" appears in the penalties section of the AETA and is accompanied by a lengthy definition that includes "the loss of profits, or increased costs, including losses and increased costs resulting from threats, acts or vandalism, property damage, trespass, harassment, or intimidation . . . ." 18 U.S.C. § 43(d)(3)(A). By posting the video of the Company with a caption on an internet forum where one can reasonably expect the information to be viewed and reposted on other sites such as YouTube, Wheatley set off a chain of events

culminating in negative media attention that may result in economic damage to the Company.

Moreover, we support the District Court's finding that Wheatley's posting and blogging about the Company indicate his intent to change conditions at the Company. *Wheatley*, Case No. CV 11-30445 WMF (ABCx) at 17. In this manner, Wheatley not only damaged, but also interfered with Company operations by drawing media and public scrutiny to the Company's procedures. *Id*. While the Company may not have been in compliance with state statutes such as Proposition 2, it was following industry protocol in its treatment of the chickens at the facility. *Id*. at 18. Wheatley's postings and blogging about conditions he found unacceptable, and the subsequent public reaction to his posted information, forced the Company to reevaluate its processes and to consider changing these processes in order to maintain its customers, thereby interfering with the Company's normal operations. *Id*. at 17. For these reasons, we maintain that Wheatley is guilty of Count 2.

2. *Wheatley's Taking of the Chick Caused a Loss of Property Within the Meaning of the Animal Enterprise Terrorism Act and Thus Applicable to His Actions*

Despite the fact that the male chick was a waste product of the Company's operations, Wheatley's taking of the chick amounted to a loss of Company property; the Company had not abandoned it at the point of Wheatley's removal. "Abandonment of property under California law requires non-use accompanied by unequivocal and decisive acts showing an intent to abandon." *United States v. Crawford*, 239 F.3d 1086, 1093 (9th Cir. 2001) (citing *Pacific Gas & Elec. Co. v. Zuckerman,* 189 Cal. App.3d 1113, 1145, 234 Cal. Rptr. 630, 650 (Cal. Ct. App. 1987)). Other circuits have long supported a similar definition. *See Equitable Life Assur. Soc. Of U.S. v. Mercantile-Commerce Bank & Trust Co.*, 155 F.2d 776 (8th Cir. 1946) (abandonment "is a fact made up of an intention to abandon, and the external act by which the intention is carried into effect,"); *The No. 105, Belcher Oil Co. v. Griffin*, 97 F.2d 425, 426 (5th Cir. 1938) (abandonment of property is "a voluntary intention to abandon, or evidence from which such

intention may be presumed,"); *State Mut. Life Assur. Co. of Worcester, Mass. v. Heine*, 141 F.2d 741 (6th Cir. 1944) (abandonment does not apply unless there is a "total desertion by an owner without being pressed by necessity, duty, or utility to himself," but because he no longer desires to possess the thing and willingly abandons it to whomever wants it). There is no evidence to support that the Company's actions with regard to the chick fit within any of these definitions of abandonment. As we maintained in the District Court, the Company did not abandon the chick because it was going to destroy the chick out of utility and as part of its business operations. *Wheatley*, Case No. CV 11-30445 WMF (ABCx) at 19. We thus agree with the District Court's finding that Wheatley's removal of the chick, no matter how altruistic his motivations, cannot override the fact that he intentionally caused a loss of the Company's property within the meaning of the AETA. *Id.*

However, we disagree with the District Court's conclusion that Wheatley's taking of the chick was not connected with any purpose of damaging or interfering with the Company's operations as required by the AETA. *Id*. Rather, we support the same reasoning used by the District Court to find that Wheatley's posting and blogging about operations at the plant were done for the purpose of changing and interfering with the operations of the plant. In the same manner, Wheatley's "rescue" of the chick and naming it George, *Wheatley*, Case No. CV 11-30445 WMF (ABCx) at 4, is evidence of the same purposeful interference with company operations. Wheatley's decision to remove the chick was not isolated from his earlier postings and blog entries. Likewise, this earlier conduct and his connection with the animal activist group also makes it more likely that he would have published similar material about George, the chick he "rescued" from the Company, as part of his purpose to change Company operations.

Moreover, supporting Wheatley's "rescue" operations would set a dangerous precedent and would ultimately be detrimental to public policy. Stealing private property under the guise of

a "rescue operation" threatens the very sanctity of property. There are enforcement mechanisms in place to address these types of concerns; Wheatley had other legal channels to report behavior that he found offensive to animal welfare and possibly in violation of the law. Thus, Wheatley's removal of the chick is part of his larger purpose to damage or interfere with the operations of an animal enterprise, and thus satisfies the connection required by the AETA between this interference and damage to private property. As a result, Wheatley's convictions under Counts 2 and 3 should stand.

CONCLUSION

The United States urges this court to uphold Wheatley's conviction under the APPA (Count 1) and to reverse the District Court's acquittal of Wheatley under Counts 2 and 3 for his violation of the AETA. Wheatley's First Amendment rights were not violated by the APPA because the Company is a private facility, or at most a non-public forum, and the government's restriction on videotaping in agricultural operations is both reasonable and content-neutral. Public policy reasons, such as protection of the food industry and safety of the food supply, and the preservation of evidence for potential investigations of violations, in addition to the absence of an intent to censor a particular viewpoint, offer further support. The statute is also not subject to the narrow overbreadth doctrine, which requires that a substantial number the APPA's applications would be unconstitutional. The necessity defense also is inapplicable to Wheatley's conduct as he does not fit within the elements of the defense nor the circumstances when it can be invoked.

In addition, the AETA does not exceed authority under the Commerce Clause given the traditionally broad interpretation of this power by Congress. It protects the instrumentalities of interstate commerce and regulates conduct that has a substantial effect on interstate commerce, therefore meeting the Supreme Court's standard for acceptable regulation. The internet is an

acknowledged tool of interstate commerce; postings on Facebook and YouTube logically fall into this category as well. Moreover, by posting and blogging about the events at the company, Wheatley purposefully sought to change its conditions. These actions were connected to Wheatley's removal of the chick from the Company. Therefore, Wheatley's conduct satisfies the requirements for Counts 2 and 3 and for prosecution under the AETA.