IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11-11223

UNITED STATES,

Respondent/Cross-Appellant,

v.

LOUIS WHEATLEY,

Appellant/Cross-Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
THE HONORABLE HARLAND SANDERS, DISTRICT JUDGE

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE ISSUES ON APPEAL

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

Appellant/Cross-Respondent Louis Wheatley ("Wheatley") was charged for violating the Federal Agricultural Products Protection Act ("APPA") and the Animal Enterprise Terrorism Act ("AETA") in connection with activities that allegedly occurred while he was working for Eggs R Us ("the Company"), an egg production company with facilities in California, Nevada and North Dakota. The APPA prohibits videotaping within an agricultural animal facility unless expressly authorized by an owner, proprietor or manager of the facility. Federal Law §999.2. The AETA prohibits any person from engaging in certain conduct "for the purpose of damaging or interfering with the operations of an animal enterprise." 18 U.S.C. §43.

"[A] federal grand jury sitting in the Central District of California returned a three-count indictment against W, charging him with 1) entering an animal facility and using or attempting to use a camera, video recorder, or any other video or audio recording equipment, in violation of the 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 AETA, section (a)(1); and (3) in connection with such purpose, intentionally damaging

or causing the loss of any real or personal property (including animals or records) used by an animal enterprise, in violation of AETA, section (a)(2)(A). Wheatley filed a motion to dismiss the indictment which was denied by the District Court. At trial, the jury convicted Wheatley on all three counts. Wheatley then filed a Federal Rules of Civil Procedure, Rule 29 motion for judgment of acquittal, asserting all of the arguments he previously raised on his motion to dismiss the indictment, and also presenting new arguments on the evidence. The District Court denied the motion as to Count 1 but granted it as to Counts 2 and 3.

This matter comes to this Court on the parties' cross-appeals from the judgment entered in the United States District Court for the Central District of California, Case No. CV 11-30445 WMF (ABCx). Wilma M. Frederickson, District Judge, Presiding. Wheatley appeals the District Court's denial of his motion to dismiss the indictment and the District Court's subsequent denial of his Federal Rules of Criminal Procedure, Rule 29, motion for judgment of acquittal as to Count 1 of the jury verdict against him.

STATEMENT OF THE FACTS

Wheatley is a journalism student who learned about the poor conditions of factory farming during a California voter campaign in 2008. Memorandum Opinion ("Op'n.') 2:8. Despite joining joining a farmed animal protection organization and reading about farm issues on the internet, Wheatley did not get involved in any animal activist activities. In May of 2010, Wheatley needed a job to help pay for his college education. He applied for a position at the Company during his summer vacation. He felt that it would be a good opportunity to find out whether the claims of poor and cruel conditions customary in the egg industry were accurate. Since he was a journalism student, he also thought it would be interesting to write an article for class and possibly 'blog' about his experiences on the internet from an unbiased perspective.

While working at the Company, Wheatley learned first-hand that male chicks are considered to be a 'waste product' of the industry. Op'n. 2:24. As part of his journalistic pursuits, Wheatley filmed an unidentified co-worker at the Company throwing living and dead male chicks into the grinder to be macerated. The worker was laughing and intentionally squashing some of the living chicks as he dumped them into the grinder. Horrified, Wheatley posted the video on his personal Facbook page that evening with the comment: "This is what happens every day - business as usual. I'll never be able to eat another egg again. The public has to see this to believe it." Op'n. 2:24. Without Wheatley's knowledge or permission, one of his Facebook "friends" posted the video on YouTube. Since the posting, more than 1.2 million people have viewed it. The video has also prompted local news reports and increased media attention on this issue. Op'n. 3:14.

Wheatley also observed that the Company kept an average of six egg-laying hens in a cage with a floor area approximately 16 inches by 18 inches, giving each hen only an average of 48 square inches of floor space. Op'n. 3:17 The national egg producer trade organizations provide guidelines that recommend at least 67 square inches per hen which is still less than a typical 8.5 by 11 inches piece of paper and not enough space for hens to flap their wings. Wheatley was also familiar with the requirements of California's Proposition 2 from his internet research. The law prohibits confining farm animals in a manner that prevents them from spreading their limbs or wings. When Wheatley asked his supervisor about this practice, he was told that he "needen't be concerned." Op'n. 3:24. Wheatley then made a second, shorter video of the hens in the battery cages, which he also posted on Facebook. There was no evidence indicating this video was ever posted on YouTube. Wheatley also blogged about the alleged Proposition 2 violation and cavalier attitude of his supervisor. Finally, he informed the farmed animal protection organization that he had previously joined. Op'n. 4:2.

As a result of the negative media attention focused on the Company due to YouTube video and Wheatley's blogging, the Company made public statements denying all allegations regarding violations of Prop 2, but stating that it was looking into the feasibility of modifying some of its practices at its California facility. Op'n. 4:6. Two weeks after Wheatley posted the videos, the manager of the Company was alerted to the postings and fired Wheatley. It also alerted federal authorizes who arrested and charged Wheatley with violations of the APPA and the AETA.

Wheatley "rescued" a male chick that was on top of the pile of living and dead chicks at the grinder on the same day that he posted the videos on Facebook. Op'n. 4:8. He testified that this particular chick caught his eye and he just couldn't want away from him. He took the chick home and named him "George." He continues to raise and care for him as his pet.

SUMMARY OF THE ARGUMENT

The Agriculture Products Protection Act section 999.2(3) is facially invalid under the Free Speech Clause of the First Amendment because this law is unduly viewpoint discriminatory. In a nonpublic forum like the Company's premises, the regulation must be reasonable as well as viewpoint neutral. *Adderly v. Florida*, 385 U.S. 39 (1966). While the content of this regulation may seem content-neutral, the effect of APPA section 999.2(3) is to prohibit any exposure of wrongdoing by farm facilities, and in this case, any animal enterprise like the Company. Because the effect is viewpoint discriminatory, APPA section 999.2(3) is facially invalid.

Furthermore, APPA section 999.2(3) is overly broad and encompasses constitutionally protected speech. If the Court looks to similar statutes in various states banning recording devices in animal facilities, a stark contrast appears and this court should

invalidate this legislation and call for Congress to re-draft this law so that people have notice of what is construed as criminal behavior under this statute.

Even if this Court finds that APPA section 999.2(3) is not facially invalid under the First Amendment, public policy dictates that Wheatley's conviction should be overturned. California courts have already recognized that animal welfare is an important area of concern, and public discussion and interests is a very important factor in determining what speech is encompassed and protected by the First Amendment. *See Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty, U.S.A., Inc*., 129 Cal. App. 4th 1228, 1236 (2005). Moreover, Wheatley's violation of APPA section 999.2(3) is justified by the defense of necessity. The reasons set forth by the *Schoon* Court in making this test should not apply the case at hand and although Wheatley engaged in indirect civil disobedience, this Court should apply the *Schoon* test. *United States v. Schoon*, 971 F.2d 193, 195 (9th Cir. 1992). Wheatley's actions on said day satisfy all four prongs of the *Schoon* test. Therefore, Wheatley's conviction as to Count 1 should be overturned.

Because the AETA does not regulate economic or commercial activity, it exceeds Congress's regulatory powers under the Constitution's Commerce Clause. The law has the potential to apply to individuals whose actions have absolutely no economic or commercial affects, simply because he or she is found to have used a facility of interstate commerce. In order to prevent Congress from circumventing adequate judicial review by virtue of boilerplate jurisdictional language, the AETA should be subject to the constitutional scrutiny set forth in *United States v. Lopez,* 514 U.S. 549, 558 (1995). Under this analysis, it is clear that the AETA regulates non-commercial activities that have the potential to result in entirely intrastate, non-economic harm. As a result, the law does not regulate activity that may aggregate to substantially affect interstate commerce. It therefore violates the Constitution's Commerce Clause.

In addition, the AETA does not apply to the type of peaceful advocacy in which Wheatley was engaged. The law's legislative history confirms that the terms "damage" and "interfere" refer only to violent and threatening acts. In fact, an examination of the statute and the context in which it was passed reveal that the law was expressly designed to exempt non-violent behavior. Furthermore, the evidence is insufficient to prove that Wheatley posted the videos on Facebook for the purpose of damaging or interfering with the Company. Instead, the evidence shows that he did so in order to educate his friends and family and disseminate information, a purpose beyond the reach of the statute. For these reasons, the AETA does not apply to Wheatley's conduct.

ARGUMENT

I. The Agriculture Products Protection Act section 999.2(3) violates the United State's First Amendment Free Speech Clause on its face because it is neither viewpoint neutral nor valid due to public policy reasons.

In assessing whether an applicable law is a facial violation of the First Amendment, courts must first determine the type of forum in which the speech occurred. In turn, the type of forum dictates the level of review applied. There are three types of forums: (1) public forums (2) designated public forums (3) nonpublic forums. While public forums are government-owned properties that the government is constitutionally obligated to make available for speech, designated public forums are places at which the government could close to speech, but voluntarily, affirmatively opens to speech. *Widmar v. Vincent*, 454 U.S. 263 (1981). Nonpublic forums, alternatively, are government properties that the government may prohibit or restrict speech as long as the regulation is reasonable and viewpoint neutral. *Adderly v. Florida*, 385 U.S. 39 (1966). Because the Company is government funded and subject to regulation by government agencies, but is not part of the Company's daily operations, the Company is a nonpublic forum. As a result, the APPA is reviewed under the standard that the law must be reasonable and viewpoint neutral. *Florida*, 385 U.S. at 40. This

court should review the constitutionality of APPA under a *de novo* standard. *Gerling Global Reins. Corp. v. Low,* 296 F.3d 832, 837 (9th Cir. 2002).

1. Section 999.2(3) of the APPA violates Wheatley's First Amendment Free Speech Clause on its face since the effect of this federal law is viewpoint discriminatory.

Courts must distinguish between whether the law is a content-based or content-neutral law in a First Amendment Free Speech Clause analysis. The United States Supreme Court has repeatedly declared that the very core of the First Amendment restricts the government from regulating speech based on its content. *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972). Furthermore, while courts generally rule that content-based restrictions on speech must meet strict scrutiny, content-neutral regulation only need meet intermediate scrutiny. *Turner Broadcasting System v. Federal Communication Commission*, 512 U.S. 622 (1994). As a result, the government must be both viewpoint neutral, as well as subject matter neutral, when regulating speech. *See Perry Education Assn. v. Perry Local Educators' Assn*., 460 U.S. 37, 45 (1983). In other words, the government can neither regulate speech based on the ideology of the message nor speech based on the topic of the speech. This analysis applies to all speech regardless of the message and regulates conduct and even content that has an effect on speech without regard to the content. *Turner Broadcasting system*, 512 U.S. 622 at 626.

In *Renton v. Playtime Theatres, Inc.*, the Supreme Court ruled that a facially content-based restriction will be deemed content-neutral if it is motivated by permissible content-neutral purpose. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986). In this case, a zoning ordinance prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single or multifamily dwelling, church, park, or school. However, the court reasoned that because the law was motivated by the desire to control the secondary effects of adult movie theaters, such as crime, this zoning ordinance did not in fact restrict

speech. *Id.* at 48. Therefore, the Court rejected the First Amendment challenge on grounds that the ordinance was consistent with their definition of content-neutral speech. The Court further explained that this ordinance was consistent with "our definition of 'content-neutral' speech regulations as those that are justified without reference to the content of the regulated speech." *Id.* Therefore, the *Renton* test deems that whether a law is content-based or content-neutral is based upon its justification, not it's terms, and aims to evaluate the secondary effects of speech. However, the law is not completely clear as courts have subsequently ruled against the *Renton* test. *See City of Erie v. PAP's A.M.*, 529 U.S. 277 (2000); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). Nonetheless, it appears that a law that is facially content-neutral can be treated as content-based if its purpose and/or effects are content-based.

In this case, the Agriculture Products Protection Act, Federal Law section 999.2(3) prohibits any person from entering an animal facility to "use or attempt to use a camera, video recorder, or any other video or audio recording equipment." Agriculture Products Protection Act § 999.2(3). The government contends that this law is facially neutral since the APPA's regulation is reasonable in light of the statute's purpose and congressional intent. However, applying the *Renton* test to the case at bar indicates that the APPA is, in fact, viewpoint discriminatory. Just as the *Renton* Court looked to the justification of the law in determining whether the ordinance was a unconstitutional restriction on the freedom of speech, this court should too look at the justification for the law in determining its validity. Photography, video, and audio recordings taken at these animal facilities only reasonably serve one purpose, that being to raise awareness about facilities practices that do not take into account animal welfare or interests. The government cannot argue that the purpose of this federal regulation is to protect against competitors in the egg production industry. Because

the APPA is hindering the discovery of truth in relation to animal and food practices, this court should deem this law an unfair burden on the freedom of speech.

Furthermore, similar bills regarding audio and video recordings at farm facilities have been considered by various states in the United States. According to the New York Times, this legislation is "part of a broader effort by large agricultural companies to pre-emptively block the kind of investigations that have left their operations uncomfortably — and unpredictably — open to scrutiny."[1] As federal law supersedes state law, the Court should not take for granted the motive behind state legislation. As these agricultural companies are attempting to sway state legislation in their favor and prevent any evidence of possible wrongdoing in their facilities, the APPA would too serve this unjust purpose.

In addition, scholars have consistently argued that laws should be treated as facially discriminatory based on the purpose or impact of the regulation in question. In other words, if its purpose is to restrict a particular message or if its effect is to discriminate against specific topics or views, the court should find the law as content-based.[2] The purpose of the APPA, if scrutinized under a reasonableness standard, is to restrict the awareness of animal facility practices. The government might argue that this is not the case, and the APPA is intended to protect individual animal facilities in the egg production industry. However, even if that is the case, the effect of APPA is also to discriminate against the discussion of animal rights. Because the APPA restricts any exposure of these animal facility practices through photography, video, or audio recordings, the freedom of discussion about possible issues and concerns is halted. As a result, this Court should extend this scholarly view to the case at bar and hold that the APPA unconstitutionally restricts the freedom of speech clause in the First Amendment.

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[1] A.G. Sulzberger, "States Look to Ban Efforts to Reveal Farm Abuse," N.Y. TIMES, April 13, 2011.
[2] *See* Laurence H. Tribe, American Constitutional Law 792 (2d ed. 1998); Susan Williams, Content Discrimination and the First Amendment, 139 U. Pa. L. Rev. 615 (1991).

2. Because the Agriculture Products Protection Act section 999.2(3) is overly broad and regulates substantially more speech than the United States Constitution allows to be regulated, this law facially violates the First Amendment.

When courts determine whether a law is unconstitutionally overbroad, it looks to whether the law in question regulates much more expression than the Constitution allows to be restricted. If so, the law is unconstitutional on overbreadth grounds. However, the Court has consistently held that the statute must be "substantially overbroad" in order for the statute to be invalidated on its face. *See City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). For instance, in *Broadrick v. Oklahoma*, the Court ruled that "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973). Furthermore, the Court explained in *Vincent* that "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Vincent*, 466 U.S. at 800-01.

In *United States v. Stevens*, the Court addressed a law that prohibited the creation, sale, or possession of depictions of animal cruelty. *United States v. Stevens*, __ U.S. __, 130 S. Ct. 1577 (2010). In making its ruling, the Court declared that the statute encompassed "criminal prohibition of alarming breadth, appl[ying] to any conduct that is illegal." *Id.* at 1588. In looking at whether APPA section 999.2(3) is overly broad, the court should look to similar statutes that states have proposed regarding this very subject matter. For instance, a bill proposed in Iowa, S.F. 341, would make it a crime to produce, distribute, or possess photos and video taken without permission at an agricultural facility. S.F. 341 (Ia 2011). Legislatures in Florida, New York, North Dakota, Kansas, and Minnesota have also

considered similar legislation.[3]

If the Court looks at the Iowa's bill, S.F. 341, the stark contrast between this bill and the APPA is readily apparent. The applicable portion of the bill follows:

> "A person is guilty of animal facility interference, if the person acts without the consent of the owner of an animal facility to willfully do any of the following: (1) Produce a record which reproduces an image or sound occurring at the animal facility as follows: (a) The record must be created by the person while at the animal facility. The record must be a reproduction of a visual or audio experience occurring at the animal facility, including but not limited to a photographic or audio medium. S.F. 341 (Ia 2011).

In contrast, APPA § 999.2(3) simply states:

> No person who uses or causes to be used the mail or any facility of interstate or foreign commerce may without the effective consent of the owner may: (3) Enter animal facility and use or attempt to use a camera, video recorder, or any other video or audio recording equipment. Agriculture Products Protection Act § 999.2(3).

While the proposed Iowa bill is both clear and specific, the APPA is not. APPA section 999.2(3) simply provides that any use or attempt to use various recording equipment is illegal. However, this statute may include conduct that is constitutionally acceptable. In *City of Houston v. Hill*, the court deemed a city code unconstitutional on overbreadth grounds since the code gave police officers unrestrained discretionary authority to arrest anyone interrupting their duties in any manner. *City of Houston v. Hill*, 482 U.S. 451, 456 (1987). Similarly, the APPA unconstitutionally restricts any type of recording equipment in the said animal facility. However, there can be situations in which the First Amendment must protect conduct that is deemed illegal under the APPA. What if a person turns on the camera or video recorder, but does not obtain an image. Is this enough to procure the punishment of this statute? If the government wants to protect animal facilities from terrorist activities and a loss of business and property, as it claims, it should redraft the APPA to include clear, specific

[3] Sulzberger, *supra* at note 1.

language that indicates what types of specific behavior constitutes illegal recording that would hinder this government interest.

However, even if the Court finds that Wheatley's conduct was not protected under the Freedom of Speech Clause in the First Amendment, the APPA is facially unconstitutional as applied to others. A person can bring an overbreadth challenge even if he or she is engaged in unprotected speech. *New York v. Ferber*, 458 U.S. 747 (1982). With this analysis in mind, the definition of what constitutes an "animal facility" as applied in § 999.2(3) is also overly broad. Section 999.1(2) of the APPA states that an "animal facility" "means any vehicle, building, structure, research facility, premises, or defined area where an animal is kept, handled, house, exhibited, bred, or offered for sale." Agriculture Products Protection Act § 999.1. However, as applied in section 999.2(3), this section covers areas and public property that the government cannot so constitutionally regulate under the First Amendment. What can be considered a "premises" is so broad that this definition can and will cover almost any imaginable area, including the privacy of one's home. As a result, this statute criminalizes protected speech under the First Amendment, and this Court should find APPA § 999.2(3) violates the First Amendment of the Constitution and overturn Wheatley's conviction.

II. As a matter of public policy, as well as under the necessity defense, Wheatley's conviction under Count 1 should be overturned.

1. Wheatley's conviction should be overturned as a matter of public policy since his actions promote the public interest of uncovering wrongdoing by large agriculture businesses like the Company.

Protecting the Freedom of Speech Clause in the First Amendment as a fundamental right necessarily includes the discussion of public policy and the discovery of truth. As Justice Oliver Wendell Holmes declared in *Abrams v. United States*, the "best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only round upon which their wishes safely can be carried out." *Abrams v. United*

States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Furthermore, Justice Brandeis stated that "[if] there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). In regards to animal testing, a California appellate court noted that the protection of animals "is an area of widespread public concern and controversy, and the viewpoint of animal rights activists contributes to the public debate." *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty, U.S.A., Inc*., 129 Cal. App. 4th 1228, 1236 (2005).

In addition, the Company's practices violate several California statutes. Penal Code section 597t states that "[every] person who keeps an animal confined in an enclosed area shall provide it with an adequate exercise area." Cal. Penal Code § 597t. Subsection (b) prohibits the mutilation and cruel killing of any animal. Furthermore, Proposition 2 provides that "a personal shall not tether or confine any covered animal [defined to include egg-laying hens], on a farm [defined to include facilities like the Company], for all or majority of the day, in a manner that prevents such animal from…fully extending his or her limbs ["in the case of egg-laying hens, fully spreading both wings without touching the side of an enclosure or other egg-laying hens"]. Cal. H&S Code §§ 25990, 25991.

Even if the Court finds that APPA does not violate the First Amendment Free Speech Clause of the Constitution, public policy dictates that Wheatley's actions were necessary. California law has already deemed that it is in the public's interest to take into account animal rights and welfare. Not only do Wheatley's videos illustrate that the Company violates two California statutes, but the Company clearly violates an important category of speech. In other words, there exists a significant concern that laws like APPA will chill significant constitutionally protected speech, and that individuals to whom law is unconstitutional may

refrain from expression rather than bring challenge to statute. As expressed in *Gooding v. Wilson*, Justice Brennan wrote that discussion of public policy is "necessary because persons whose expression if constitutionally protected may well refrain from exercising their rights for fear or criminal sanctions provided by a statute susceptible of application to protected expression." *Gooding v. Wilson*, 405 US 518, 521 (1972).

Furthermore, the Court expressed in United States v. Stevens that the First Amendment's guarantee of free speech extends to categories of speech that survive an ad hoc balancing of relative social costs and benefits. Stevens, 130 S. Ct. at 1584. While the government contends that the benefit of APPA section 999.2(3) is that of protecting against "terrorism," the social costs of enforcing this provision outweigh this legitimate interest. Without any means of recording what occurs behind closed doors in these animal facilities, there are no reasonable avenues of exposing any possible wrongdoing. Although government enforcement agencies are responsible for this oversight, as a practical matter, these prohibited audio and video recordings may be the only means with which these government agencies will become aware of any wrongdoing. In addition, because these government agencies are not on sight observing daily operations, the APPA simply defers to the judgment of administrators controlling access to this property, who will have the tendency to restrict all speech and hide any wrongdoing.

The lower court improperly concluded that Congress did not carve out acts intended to disclose illegal activity by an animal enterprise since the APPA does not explicitly mention any exceptions. Op'n 13:7. Furthermore, the lower court noted that Prop 2, as well as the other penal statutes, neither contained a whistleblower provision nor a private prosecutor or citizen suit provision. Op'n 13:9. However, the lower court failed to consider instances in which the Court has implied a private cause of action from the statute. See The Exchange Act

of 1934 § 10(b); Securities Exchange Commission Rule 10b-5. As a result, this Court should consider the implications of upholding Wheatley's conviction as to Count 1 since his conviction would both chill expression rather than bring challenge to this statute, as well as simply defer judgment to the Company's administrators, who will have the tendency to restrict too much speech.

2. Even if the Court believes that public policy interests do not validate Wheatley's actions, Wheatley should be able to use the affirmative defense of necessity justify his civil disobedience in recording images in the Company's facilities.

As noted in the lower court's opinion, in order to invoke the defense of necessity, a defendant must colorably show that: (1) he or she was faced with choice of evils and chose the lesser evil; (2) he or she acted to prevent imminent harm; (3) he or she reasonably anticipated a direct causal relationship between his or her conduct and the conduct to be averted; (4) he or she had no legal alternatives to violating the law. *United States v. Schoon*, 971 F.2d 193, 195 (9th Cir. 1992). Furthermore, *Schoon* distinguished direct civil disobedience from indirect civil disobedience. While direct civil disobedience protests the existence of a specific statute, indirect civil disobedience protests without the motive to violate a specific statute. *Schoon* bars the necessity defense for indirect civil disobedience, the type of civil disobedience with which Wheatley acted. In other words, because Wheatley did not film the Company employee with the specific intent to violate APPA section 999.2(3), he committed indirect civil disobedience. *Id.*

However, The *Schoon* court did not properly apply the necessity defense. In making it's ruling, the *Schoon* court reasoned that judicial economy was a factor in barring the necessity defense for indirect civil disobedience. *Id.* at 199. However, eliminating this important defense for a particular class of defendants in order to provide judicial economy is not a sufficient basis for superseding a policy in favor of allowing the accused to present all defenses available. Furthermore, the *Schoon* court reasoned that eliminating the risk of

intruding into other branches of government served as another of the court's policy rationales. *Id.* at 197. However, this policy rational applies to both direct and indirect civil disobedience cases. Defendants invoking the necessity do not ask the Court to pass judgment on other branches. Even more importantly, the right to present an adequate defense is safeguarded by the Fifth and Fourteenth Amendments. *See Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *Webb v. Texas*, 409 U.S. 95, 98 (1972); *Washington v. Texas*, 388 U.S. 14, 17-18, 22-23 (1967).

Strong policy arguments weigh in favor of permitting indirect civil disobedient to raise the defense. For instance, there exists a need to amplify individual viewpoints in today's bureaucratically run society, a social value of empowering the jury, and the goal of enhancing the quality and quantity of public discourse.[4] These concerns are intrinsic to the democratic process, and *Schoon* failed to address these issues. Therefore, this court should allow the *Schoon* test to apply to Wheatley's case.

Applying the *Schoon* test to the case at bar, the lower court improperly determined that Wheatley did not meet all four prongs of this test. The first prong states that the defendant faced evils and chose the lesser of two evils. Wheatley faced a choice between videoing his co-worker mutilate live baby chicks or simply stand by while watching this heinous act occur; Wheatley chose to video this inhumane act in order to document the reality of animal facility practices, surely the lesser of two evils. The second prong dictates that the defendant acted to prevent imminent harm. In Wheatley's case, he documented the occurrence in order to expose the harm that was taking place. It is not reasonable to expect Wheatley to actually physically stop his co-worker from killing the baby chicks; by taking a non-violent stance and simply documenting his co-worker's actions, he acted to prevent any imminent harm that could have taken place if he reacted otherwise. Third, the defendant must

[4] Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18 (1910).

have reasonably anticipated a direct causal relationship between his or her conduct and the conduct to be averted. Wheatley documented his co-worker's actions in order to expose the wrongdoings in the Company's facilities. By exposing this wrongdoing, one would hope that the Company considers it's policies regarding the mutilation of baby chicks. Therefore, this prong is satisfied as well. Finally, the fourth prong states that the defendant had no legal alternatives to violating the law. As argued above, there exists no alternative to audio or visual recordings of practices occurring inside animal enterprises since APPA prohibits all recordings. As a result, Wheatley had no choice but to personally take a stake and abide by the moral, higher law. Because Wheatley's disobedience satisfies all four prongs of the Schoon test in order to invoke the necessity defense, this Court should overturn Wheatley's conviction as to Count 1.

III. The AETA exceeds congressional authority because it does not regulate inherently economic or commercial activity.

Although the Commerce Clause is broad, "it does not grant Congress unlimited authority to enact legislation intended to address *any* national issue." *United States v. Nasci*, 632 F.Supp.2d 194, 201 (S.D.N.Y. 2009). Instead, activity regulated by Congress must fall into the three categories set forth by the Supreme Court in *United States v. Lopez*, 514 U.S. 549, 558 (1995). First, Congress may regulate the "use of channels of interstate commerce." Id. This category includes waterways and byways between the states as well as "the interstate transportation of a commodity through those channels." *United States v. Valverde*, No. CR. S-08-187 LKK, , 2009 WL 4172384 at *4(E.D. Cal. Feb. 9, 2009) *aff'd,* 628 F.3d 1159 (9th Cir. 2010) (quotations omitted). Under the second category, Congress may regulate and protect the "instrumentalities of interstate commerce, or persons or things in

interstate commerce, even though the threat may come only from intrastate activities." *Lopez*, 514 U.S. at 558. Once an item is deemed to fall into this category, Congress's ability to regulate it is generally considered a foregone conclusion. *See United States v. Clayton*, 108 F.3d 1114, 1117 (9th Cir. 1997) (explaining that because telephones are considered to be instrumentalities of interstate commerce, "they fall under category two of Lopez, and no further inquiry is necessary to determine that their regulation . . . is within the Commerce Clause authority.") Finally, Congress may regulate activities "that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59 (1995).

Neither Wheatley nor the Company contends that the AETA should be scrutinized under the first category. The question remains, however, whether the activities regulated by the AETA fall into the second or third *Lopez* category. Given that the AETA regulates activity that is neither economic nor commercial in nature, the law should be scrutinized under *Lopez's* third category, and thus subjected to the substantial effects test. The court of appeals reviews the constitutionality of a statute *de novo*. *SeaRiver Mar. Fin. Holdings, Inc. v. Mineta,* 309 F.3d 662, 668 (9th Cir. 2002).

1. Regardless of the AETA's jurisdictional language, the law falls into the third category set forth by the Supreme Court in *Lopez* because it regulates non-economic activity.

While *Lopez* articulated three categories of activity that are within Congress's reach, the Court failed to explain how lower courts may distinguish one category from another. As a result, courts may disagree on whether a particular law falls into the ambit of *Lopez*'s first, second, or third category. Thus one law may be subject to varying levels of scrutiny from one court to another. *See Valverde,* at *8 (E.D. Cal. Feb. 9, 2009) (finding that both 18 U.S.C § 16913 and § 2250 fall into *Lopez's* third category while acknowledging that various other courts scrutinize it under *Lopez's* second category). Such disagreements among the courts

show "that caselaw is unsettled ... as the method for determining the category in which to place a particular statute." *United States v. Goldberg*, 928 F.Supp. 89, 98 (D. Mass. 1996).

The AETA applies to:

> Whoever travels in interstate or foreign commerce, or *uses or causes to be used the mail or any facility of interstate* or foreign commerce...for the purpose of damaging or interfering with the operations of an animal enterprise

18 U.S.C.A. § 43(a)(1) (West 2006). At first blush, this jurisdictional language seems to place the AETA firmly within Congress's power to regulate the instrumentalities of interstate commerce. Indeed, Wheatley concedes that several federal circuits have treated statutes with similar jurisdictional statements as such. *See United States v. Giordano*, 442 F.3d 30 (2d Cir. 2006); *United States v. Ballinger*, 395 F.3d 1218 (11th Cir. 2005); *United States v. Marek,* 238 F.3d 310 (5th Cir. 2001). This circuit, however, has not addressed this particular issue.[5]

In determining whether the AETA exceeds Congressional authority under the Commerce Clause, the court should be cautious in relying on the boilerplate jurisdictional language used in the AETA. Instead, the analysis should focus on the "nature of the subject matter" being regulated. *United States v. Jones,* 231 F.3d 508, 515 (9th Cir. 2000) (upholding a law it deemed to be regulating activity of a commercial nature). Jurisdictional statements like that of the AETA can be attached to just about any activity, whether or not such activity has a genuine bearing on interstate commerce. Upholding the law on the basis of this language would enable Congress to regulate activities traditionally within the states' police powers, regardless of their non-commercial nature, by simply inserting the words "instrumentality" or "facility" into a law. The AETA is a prime example "of when Congress complies with the formalities, but evades the spirit, of the [Supreme] Court's federalism

[5] While this circuit upheld 18 U.S.C.A. § 1952 (West 2002), a law having similar jurisdictional language, it did so on the basis of an as-applied challenge. It did address the facial constitutionality of the law. *United States v. Nader*, 542 F.3d 713 (9th Cir. 2008).

jurisprudence." Joshua A. Klein, *Commerce Clause Questions After Morrison: Some Observations on the New Formalism and the New Realism*, 55 Stan. L. Rev. 571, 597 (2002). Summarily placing laws like the AETA into *Lopez's* second category on the basis of boilerplate jurisdictional statements would hand Congress a blank check of regulatory power. After all, courts across the country have found that the term "instrumentalities of commerce" include people in commerce, cars, airplanes, boats, shipments, telephones, and perhaps in this case, a Facebook page. *United States v. Ballinger*, 395 F.3d 1218, 1226 (11th Cir. 2005). By this logic, an individual who decides to picket a pet-shop, and causes property loss or scares the shop-owner, may be prosecuted under the AETA by virtue of driving their car to the protest or calling a friend on the telephone to join.

In *United States v. Valverde*, the District Court focused on the subject matter regulated by two sex offender registration laws to determine whether they passed Congressional muster. *Valverde*, at *7 (E.D. Cal. Feb. 9, 2009). While it acknowledged that other courts had upheld these laws under *Lopez's* second category, the court subjected the laws to the substantial affects test typically reserved for third category laws. *Id.* at 8. The court's choice of analysis hinged on the non-economic nature of the activity being regulated. It explained that:

> Like *Lopez'* s first prong, the second prong encompasses innately economic goods and activities or, in other words, those goods and activities that move within a national market. These have been the only types of regulations upheld by the Supreme Court or Ninth Circuit upon invocation of the language of the second category.

Id. at 7. The court rejected the notion that the sex offender registration laws should be deemed constitutional by virtue of falling into *Lopez's* second category, stating that "[s]uch a reading would mean Congress has greater power under the second *Lopez* category than it does under the third." *Id*. Looking to Supreme Court decisions

before and since *Lopez,* the district court concluded that activities of a non-commercial nature could simply not be regulated by Congress under the guise of regulating instrumentalities of interstate commerce. *Id.* at 8.

Like the sex offenders at issue in *Valverde,* the individuals whose actions are regulated by the AETA need not have any "necessary relationship to economic activities" nor to interstate commerce. *Id.* They need not engage in commercial transactions, target facilities of a commercial nature, or even cause economic harm.[6] "Put plainly, nothing about them or the conduct proscribed by the statutes is innately economic and, hence, the statute cannot be sustained under *Lopez*' s second category." *Id*. Because of the non-economic nature of the activities regulated by the AETA, the law should be subject to the substantial affects test to ensure that it does not exceed congressional authority.

2. The AETA exceeds congressional authority because it does not regulate activity that substantially affects interstate commerce.

In order to determine whether the AETA regulates activities that substantially affect interstate commerce, and is therefore constitutional, the statute should be analyzed under the test employed by the Supreme Court in *United States v. Morrison*, 529 U.S. 598 (2000).

a. Whether the Statutes Regulate Economic Activity

As discussed above, the AETA does not regulate economic or commercial activities. The law does not apply to animal enterprises, but instead regulates individuals' activities directed towards such enterprises. Given AETA's broad definition of animal enterprises, individuals prosecuted under the law need not even direct their activities at enterprises of a commercial nature. 18 U.S.C.A. § 43 (d)(1)(A)&(C) (West 2006). Nor do they need they

[6] Under the AETA, the definition of an "animal enterprise" is broad enough to encompass non-economic ventures. An individual may be also prosecuted under the law without having caused any damages or financial losses. (18 U.S.C.A. § 43 (d)(1)(A)&(C) & (b)(1)(A)) (West 2006)).

need to have an economic impact. 18 U.S.C.A. § 43 (b)(1)(A) (West 2006). Regulating this type of activity goes beyond any law that has been upheld by Supreme Court. Indeed, "[e]ven Title II of the Civil Rights Act of 1964, upheld by the Supreme Court in cases widely regarded as the 'high water mark' of broad Commerce Clause interpretation, is limited to the regulation of discriminatory *business* practices by hotels, motels, and restaurants." *United States. v. Wilson*, 73 F.3d 675, 692 (7th Cir. 1995) (dissenting).

Although the economic nature of the regulated activity is just one element of the substantial affects test, it carries the most weight. This was indicated by the Supreme Court in *Morrison* when it explained, "[b]oth petitioners and Justice Souter's dissent downplay the role that the economic nature of the regulated activity plays in our Commerce Clause analysis. But a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case." *Morrison,* 529 U.S. at 610. The Court went on to say that of the laws it has held up based on the substantial effects test, the activity being regulated had been "some sort of economic endeavor." *Id.* at 611. This is simply not the case under the AETA. Just like the Violence Against Women Act struck down by the Court in *Morrison,* and the Gun-Free School Zones Act struck down in *Lopez*, the AETA seeks to regulate a non-economic law. This "militates against finding that it is encompassed by the Commerce power." *Valverde,* at *8 (E.D. Cal. Feb. 9, 2009).

b. Presence of a Jurisdictional Element

The AETA includes a jurisdictional element limiting its reach to one who "travels in interstate or foreign commerce, or uses or causes to be used the mail or any facility of interstate or foreign commerce." 18 U.S.C.A. § 43 (West 2006). Because this category can include just about anybody, however, the jurisdictional hook is "too broad for Commerce Clause purposes." *Valverde*, at *8 (E.D. Cal. Feb. 9, 2009). In *Valverde*, the district court struck down a sex offender registration law despite its inclusion of a jurisdictional element.

Like the AETA, that statute focused on activities which had the potential to be entirely intrastate. The court was unwilling to accept that the jurisdictional statement alone garnered Congressional power. It explained that if the jurisdictional statement were considered sufficient, "there would be no limit to Congress's ability to penalize any crime whatsoever, so long as the defendant at some point in the course of his life travelled across state lines." *Id.* . The same is true for the AETA. Given its broad jurisdictional language, it provides no practical limit to Congress's regulatory power as long as the individual prosecuted under the law is found to have used facilities of interstate commerce for the purpose of committing the crime. The court in *Valverde* also noted that the sex offender registration law punished a type of activity traditionally reserved for the states' police powers, that is, violent crime. As evidenced by its name, the AETA is also intended regulate violent crime, "the suppression of which has always been the prime object of the States' police power." *United States v. Morrison*, 529 U.S. at 615. Like the law at issue in *Valverde*, the AETA is "a plain usurpation of the state's police power" regardless of its purported nexus to interstate commerce. *Valverde,* at *9 (E.D. Cal. Feb. 9, 2009). For these reasons, the court should reject the notion that "the mere recitation of [a jurisdictional statement renders] the statute immune from judicial review" and instead "examine the quality of the connections between" the activity regulated by the AETA and interstate commerce. *United States v. Ballinger*, 395 F.3d 1218, 1255 (11th Cir. 2005) (dissenting).

c. Existence of Congressional Findings Identifying the Nexus to Interstate Commerce

"[T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." *Morrison,* 529 U.S. at 614. However, the AETA's sparse legislative history does show that the activities it seeks to regulate has resulted in some economic harm. The congressional record shows that at least one Congressman alleged that the activity targeted by the AETA had resulted in "some 1,100

complaints of [illegal] incidents, with property losses reported of being more than $120 million" since 1992. 152 CONG. REC. H8590-01 (2006). Victims of such attacks were said to have included "employees of banks, underwriters, insurance companies, investors, university research facilities, and even the New York Stock Exchange." Id. The alleged damage, while significant, remains vague and unsubstantiated, however. Furthermore, the Court in *Morrison* explained that the existence of congressional findings alone is not sufficient to render a statute constitutional. *Morrison,* 529 U.S. at 614. "[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Id.* (quoting *Lopez)*.

d. Whether the Statutes Exist in a Broader Regulatory Scheme That Itself Implicates Interstate Commerce

The AETA is located within chapter 18 of the United States Code. This chapter relates to criminal law and therefore does not necessarily implicate interstate commerce any more than the AETA.

Despite the fact that Congress inserted a jurisdictional statement into the AETA, and that a statement was made by a Congressman that the AETA regulates activities that have resulted in significant costs, the fact remains that the AETA does not regulate economic activities. Under the law, an individual whose actions have no bearing or nexus whatsoever with commercial activities, and whose activities remain entirely intrastate, has the potential to be prosecuted under the law. Allowing Congress to reach this type of activity would encroach onto the states traditional police powers and grant it limitless regulatory powers. This is just the type of regulation that the Supreme Court struck down in *Morrison* when it held, "[w]e accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. *Morrison,* 529 U.S. at 617. Because the AETA regulates non-commercial activity, it fails the

substantial effects test under *Lopez* and thus exceeds congressional authority under the Commerce Clause.

IV. The District Court properly overturned the jury verdict under Counts 2 and 3 because the AETA does not apply to Wheatleys conduct

While Wheatley's actions ultimately resulted in economic and reputational damage to the Company, these actions were a far cry from the type of behavior that Congress sought to deter when it passed the AETA. The AETA was a response to perceived violent and threatening behavior by animal rights "extremists" in the years leading up to the law's passage. 152 CONG. REC. H8590-01 (2006). Furthermore, the evidence is insufficient to show that Wheatley used the internet for the purpose of damaging or interfering with the Company. The sufficiency of the evidence to support a conviction is reviewed *de novo*. Viewing the evidence in the light most favorable to the government, the court must determine whether any rational jury could have found Wheatley guilty under the AETA beyond a reasonable doubt. *United States v. Esquivel-Ortega*, 484 F.3d 1221, 1224 (9th Cir. 2007).

1. The AETA does not apply to petitioner because it contemplates acts of a violent and threatening nature

This circuit's starting point for interpreting a statute is "always its language." *United States v. Gallegos*, 613 F.3d 1211, 1214 (9th Cir. 2010). However, neither "damage" nor "interfere" is defined by the AETA. "When a statute does not define a term, [courts] generally interpret that term by employing the ordinary, contemporary, and common meaning of the words that Congress used." *Id.* Websters Dictionary defines the term "damage" as "loss or harm resulting from injury to person, property, or reputation." WEBSTER'S NEW WORLD DICTIONARY 704 (3d College ed.1998). It defines the term "interfere" as to "oppose, intervene, hinder, or prevent." *Id.* Either of these definitions could encompass non-violent

behavior. The definitions provided by Websters dictionary, however, only provide part of the story. In order to determine the plain meaning of the word in question, reference may be made to "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341 (1997). An examination of the AETA shows that the words "damage" and "interfere" are limited to violent or threatening actions.

As an initial matter, the title of the act itself, the Animal Enterprise Terrorism Act, indicates that non-violent activities are beyond the ambit of the law. Logic suggests that the act of terrorism necessarily involves acts that are of a violent and dangerous nature, that is, acts which are meant to terrorize. The FBI defines terrorism as:

> the unlawful use of *force* and *violence* against persons or property to *intimidate* or *coerce* a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.

28 C.F.R. § 0.85 (2011) (italics added). The USA Patriot Act of 2001 and the United States Code also define terrorism as encompassing "dangerous" acts which are meant to "intimidate" the civilian population. 18 U.S.C.A. § 2331 (West 2001); 18 U.S.C.A. § 2332b (West 2008). In tandem with the law's section header, "*Force*, *violence*, and *threats* involving animal enterprises," the title of the AETA indicates that the law's purpose is to punish activity of a violent and terroristic nature only.

Even more revealing is the type of behavior to which the law does *not* apply. In its definition section, the AETA states that term "economic damage" does not "include any lawful economic disruption…that results from lawful public…reaction to the disclosure of information about an animal enterprise." 18 U.S.C.A. § 43(d)(3)(B) (West 2006). This exclusion contemplates the very activity that in which Wheatley was engaged, that is, disclosure of how the Company treats its chicks. The AETA also explicitly states that it is not to be construed "to prohibit any expressive conduct (including *peaceful* picketing or other

peaceful demonstration) protected from legal prohibition by the First Amendment." *Id.* at (e)(1) (italics added). These clauses support the notion that individuals such as Wheatley cannot be prosecuted under the AETA for non-violent acts that "damage" or "interfere" with an animal enterprise. Looking at the statute as a whole, it is clear that the words "damage" and "interfere" must necessarily denote violent or threatening behavior.

In light of this analysis, the lower court incorrectly concluded that "damage" and "interfere" embrace non-violent acts. At the very least, these terms are equally susceptible to the notion that they require threatening of physical acts. Because of this ambiguity, it is proper to consult the legislative history for clarity. *Heppner v. Alyeska Pipeline Service Co.*, 665 F.2d 868, 871 (9th Cir. 1981).

The legislative history of the AETA confirms that the statute does not apply to the type of peaceful and non-threatening activity in which Wheatley was engaged. During a debate on the statute, a Congressman noted that the AETA was a reaction to "rising incidents of violence and threats against [animal enterprises]." 152 CONG. REC. H8590-01 (2006). The Congressman was likely referring to the highly-publicized incidents involving an animal advocacy group called Stop Huntingdon Life Sciences, or SHAC. Prior to the passage of the AETA, SHAC had engaged in an aggressive campaign to put Huntingdon Life Sciences, an animal-research company, out of business. The group encouraged various forms of illegal civil disobedience such as break-ins, liberating research animals, detonating a "stink bomb," destroying ATMs, windows and other property. *United States v. Fullmer*, 584 F.3d 132, 140 (3d Cir. 2009). It also posted a list of "Top 20 Terror Tactics" illustrating various forms of intimidation including firebombings, bomb threats, threatening telephone calls and letters and smashing cars while the occupant was inside. Id. Alluding to SHAC and perhaps to other groups, the Congressman explained that law was a response to animal rights activists who "advance their cause through direct action, which includes death threats, vandalism, animal

releases and bombings." 152 CONG. REC. H8590-01 (2006). Such actions, "calculated to aggressively intimidate and harass those identified as targets," do not encompass the peaceful advocacy in which Wheatley was engaged.

In addition to illustrating Congress's focus on preventing violent crime, the AETA's history also reveals that Congress intended to exclude non-violent advocacy from the law's reach. After amending the AETA to strike a misdemeanor provision from the law, a Senator explained that the change would "ensure that legitimate, *peaceful conduct* is not chilled by the threat of Federal prosecution, and that prosecution is reserved for the worst offenders." 152 CONG. REC. S10793-05 (2006) (italics added). Addressing similar concerns, a Congressman explained that the law would not" criminalize nonviolent activities designed to change public policy or private conduct." 152 CONG. REC. H8590-01 (2006). Moreover, the Congressman explained that the AETA was not intended to "as a restraint on freedoms of expression such as lawful boycotting, picketing or otherwise engaging in *lawful advocacy* for animals." *Id.* at 5 (italics added). This shows that the terms "damage" and "interfere" do not contemplate acts of a non-violent nature.

The legislative history of the AETA confirms that the law was designed to apply exclusively to violent actions. In light of this history, it is clear that the terms "damage" and "interfere" refer to threatening or violent acts. As such, they do not encompass the type of non-violent activities in which Wheatley was engaged. Therefore, the AETA is not applicable to the facts of this case.

2. The evidence is insufficient to show that Wheatley disclosed information about the Company for the purpose of damaging or interfering with its affairs.

The evidence fails to conclusively show that Wheatley posted the videos on his Facebook page, and blogged about his experiences at the Company, for the purpose of damaging or interfering with the Company. A stronger possibility is that Wheatley posted

the videos to educate his friends and family and to advocate for public policy change. Congress expressly exempted this motive when it passed the AETA's. 152 CONG. REC. H8590-01 (2006) (explaining that the AETA will not "criminalize nonviolent activities designed to change public policy or private conduct.")

In order to be prosecuted under the AETA, the evidence must show, beyond a reasonable doubt, that the defendant specifically intended to damage or interfere with an animal enterprise when they used a facility of interstate commerce. In other words, Wheatley must have posted the videos for the purpose of harming the Company. The evidence is simply insufficient to draw that conclusion. Like many college students, Wheatley gained employment at the Company because he needed money to help pay for college. Op'n. 2:13. He also thought that he could use the experience to educate himself and to hone his journalism skills. Op'n. 2:13,19. There is no evidence to suggest that these reasons were disingenuous. Since learning about the plight of farm animals, Wheatley had not become involved in animal rights at all besides procuring membership with a farmed animal advocacy group and looking at farmed animal information on the internet. Op'n. 2:10. Neither of these activities are out of the ordinary or unique, as attested to by the millions of Americans who have joined groups like the Humane Society of the United states and the 1.2 million people who viewed the video Wheatley himself created. Op'n. 3:13. Simply put, nothing in the record suggests that Wheatley took the job at the Company to harm it in anyway.

Wheatley's posting of the video of the Facebook page is also insufficient to show the requisite intent. The evidence shows that Wheatley merely intended to educate his friends and family when he posted the video. His statements the he would " never be able to eat eggs again" and that the "public has to see this to believe it," reveal that the experience clearly had an impact on him and he hope to educate his "Facebook friends" as well. Op'n. 3:10. Even more telling than what Wheatley did is what he *did* not do. If he had intended to harm the

company, he could have posted the video on YouTube himself, or have sent it to the animal welfare organization in which he was in contact or directly to the media. Instead, he merely posted the videos on his *private* Facebook page. Op'n. 3:9. While it is arguable that Wheatley should have known or anticipated that a friend might re-post the video to YouTube, this level of intent is not punishable under the AETA. The requisite intent under the statute is specific intent, not negligence. Here, the evidence fails to show the Wheatley had the requisite intent. Based on the evidence, no rational trier of fact could have found that Wheatley specifically intended to harm the Company beyond a reasonable doubt. For the above reasons, this court should affirm the lower court's decision.