Case No. 11-11223

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

United States, *Respondent/Cross-Appellant*

vs.

Louis Wheatley, *Appellant/Cross-Respondent*

APPELLANT'S BRIEF

Appeal from the United States District Court
for the Central District of California

Honorable Wilma M. Frederickson
United States District Judge

Team No. 16
ATTORNEYS FOR APPELLANT

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT DENIED WHEATLEY'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNT 1 BECAUSE FEDERAL LAW § 999.2(3) VIOLATES THE FIRST AMENDMENT FREE SPEECH CLAUSE ON ITS FACE AND AS APPLIED TO WHEATLEY.

A. Federal Law § 999.2(3) is viewpoint-discriminatory because its ban on the use of camera equipment in animal facilities is intended to restrict the dissemination of information by animal activists.

B. Federal Law § 999.2(3) is overbroad because it prohibits a substantial amount of protected speech in excess of the statute's legitimate sweep.

II. WHEATLEY'S CONVICTION AS TO COUNT 1 MUST BE OVERTURNED ON THE BASIS ON PUBLIC POLICY, OR, IN THE ALTERNATIVE, ON THE BASIS OF NECESSITY.

A. Federal Law § 999.2(3) restricts free expression in a manner contrary to public policy.

B. Federal Law § 999.2(3) usurps state police power and is duplicative.

C. Federal Law § 999.2(3) is contrary to the public policy of California because it makes the enforcement of "Prop 2" a practical impossibility.

D. To the extent that the Company can be charged with violations of Cal. Pen. Code §§ 597(b); 597t and Cal. Health & Saf. Code §§ 25990; 25991, application of Federal Law § 999.2(3) contravenes public policy and constitutional principles based on the concept of preemption.

E. Wheatley's violation of Federal Law § 999.2(3) should be overruled based on the affirmative defense of necessity.

III. THE DISTRICT COURT JUSTLY ACQUITTED ON COUNT 2 BECAUSE 18 U.S.C. § 43 EXCEEDS CONGRESSIONAL AUTHORITY UNDER THE COMMERCE CLAUSE.

IV. THE DISTRICT COURT JUSTLY ACQUITTED ON COUNTS 2 AND 3 BECAUSE 18 U.S.C. § 43 DOES NOT APPLY TO WHEATLEY'S CONDUCT UNDER THE EVIDENCE PRESENTED IN THIS CASE.

A. Whould be overruled based on the affirmative defense of necessity.

B. Wheatley did not "damage" the Company within the meaning of 18 U.S.C. § 43(a).

C. Wheatley did not act "for the purpose of damaging or interfering with the operations of an animal enterprise" so as to bring him within the scope of 18 U.S.C. § 43(a)(1).

D. Wheatley's taking of the chick did not cause the loss of any real or personal property within the meaning of 18 U.S.C. § 43(a)(2)(A) falls outside the scope of the AETA.

STATEMENT OF THE CASE

In February of 2011, a federal grand jury in the Central District of California returned a three-count indictment against Appellant/Cross-Respondent Louis Wheatley ("Wheatley"), a resident of California, charging him with (1) entering an animal facility and using or attempting to use a camera, video recorder, or any other video or audio recording equipment, in violation of Federal Law § 999.2(3) of the Federal Agricultural Products Protection Act ("APPA"); (2) using the internet as a means of interstate commerce for purposes of damaging or interfering with the operations of an animal enterprise, in violation of 18 U.S.C. § 43(a)(1) of the Animal Enterprise Terrorism Act ("AETA"); 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 18 U.S.C. § 43(a)(2)(A) of the AETA. United States v. Wheatley, No. CV 11-30445 WMF (ABCx), mem. op. at 4:20-26, 5:1-2 (C.D. Cal. Aug. 21, 2001) ("Mem. Op.").

Wheatley filed a motion to dismiss the indictment in the United States District Court for the Central District of California, asserting that (1) Federal Law § 999.2(3) unconstitutionally violates his First Amendment rights; (2) 18 U.S.C. § 43(a)(1) is unconstitutional because it exceeds congressional power under the Commerce Clause; and (3) as a matter of law and public policy, he should not and could not be convicted for conduct that brings to light the illegal activity of others, namely, the Company's alleged violation of Proposition 2 ("Prop 2"), or the Prevention of Farm Animal Cruelty Act, and California's state anti-cruelty statutes. Cal. Health & Safety Code §§ 25990, *et seq*. (West); Cal. Penal Code §§ 597(b) and 597t (West). (Mem. Op. 5:3-10). The district court denied

the motion on all counts, and the case proceeded to the jury. (Mem. Op. 5:11-13). At trial, the jury convicted Wheatley on all three counts. (Mem. Op. 5:13).

Subsequently, Wheatley filed a motion for judgmental of acquittal under Rule 29 of the Federal Rules of Criminal Procedure, asserting anew the arguments he previously raised in his motion to dismiss the indictment and also presenting arguments on evidence. Fed. R. Crim. P. 29. (Mem. Op. 5:13-16). The district court denied the motion as to Count 1, holding that Wheatley did not meet the standard of establishing that a substantial number of Federal Law § 999.2(3)'s applications are unconstitutional or that the overbreadth doctrine should be applied. (Mem. Op. 11:15-17). However, the district court granted Wheatley's motion as to Counts 2 and 3, holding that a violation of 18 U.S.C. § 43(a)(1) alone is not sufficient to constitute a violation of, and conviction under, the AETA as a whole. (Mem. Op. 18:10-12).

This matter comes to this Court on the parties' cross-appeals from the judgment entered in the district court. Wheatley appeals the district court's denial of his motion to dismiss the indictment and the district court's subsequent denial of his motion for judgment of acquittal as to Count 1 of the jury verdict against him. Respondent/Cross-Appellant the United States ("the Government") appeals the district court's grant of Wheatley's motion as to Counts 2 and 3, and the district court's order vacating Wheatley's conviction on Counts 2 and 3.

STATEMENT OF THE FACTS

Wheatley worked as a poultry care specialist at Eggs R Us ("the Company") in the summer of 2010 to earn money to pay for his journalism studies. (Mem. Op. 2:8, 12-15). The Company is a private, mid-size factory farm that receives government funding to provide eggs to schools in California. (Mem. Op. 1:20, 2:21-21).

At the Company, Wheatley fed and watered the chickens. (Mem. Op. 2:15-16). He saw that the Company packed an average of six egg-laying hens into every industrial grade battery cage, confining the hens to only 48 square inches of floor space apiece. (Mem. Op. 3:15-17). National egg producer trade organizations' guidelines recommend 67 square inches per hen at the very least—a space smaller than a typical piece of paper. (Mem. Op. 3:18-20). Wheatley was familiar with Prop 2, which prohibits factory farms from confining animals in spaces so small they are not able to spread their limbs or wings. When he asked the Company supervisor about the size of the battery cages, the supervisor retorted that he "needn't be concerned." (Mem. Op. 3:23-24). However, Wheatley was truly worried about the hens, so he spoke to a farm animal welfare group. (Mem. Op. 4:1-2). He also made a short video of the hens that he posted to Facebook. (Mem. Op. 3:24-25).

On or around June 17, 2010, Wheatley saw a co-worker throwing baby chicks into the meat grinder. (Mem. Op. 3:5-7). Male chicks are a waste product in the egg industry, and factory farms dispose of them when they are born by tossing the chicks into piles to be macerated alive. (Mem. Op. 2:24-25, 3:1). In 1998, the commercial egg industry killed 219 million chicks by grinding. (Mem. Op. 3:2). At the Company, Wheatley's co-worker snickered and joked as he chucked the baby chicks into the grinder, purposely squashing a few of them as he went. (Mem. Op. 3:7-8). Wheatley made a four-minute video of the co-worker that he posted to Facebook 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." (Mem. Op. 3:5, 3:8-11). A friend of Wheatley's re-posted the video on YouTube, and to date over 1.2 million people have viewed it. (Mem. Op. 3:12-13). The video also inspired news reports and increased media coverage about animal abuse. (Mem. Op. 3:13-14).

Also that day, a baby chick caught Wheatley's eye. (Mem. Op. 4:9). The chick was on top of the heap of dying and dead chicks at the grinder, and Wheatley felt the need to help. (Mem. Op. 4:8-9). He tucked the baby chick into his coat pocket and took him to his home beyond the city limits, where the zoning permits the keeping of chickens. (Mem. Op. 4:9-11). Wheatley named the baby chick George, and he nurtures and cares for him to this day. (Mem. Op. 4:11-12).

A manager at the Company, however, fired Wheatley two weeks later for the videos that he posted to Facebook. (Mem. Op. 4:13-14). The Company reported Wheatley to the federal government; subsequently, the police arrested and charged Wheatley with violations of the AETA and the APPA. (Mem. Op. 4:14-15). When the Government heard that Wheatley had rescued the baby chick, it added to the charges based on the taking of Company property. (Mem. Op. 4:15-17).

STANDARD OF REVIEW

1. The district court's decision whether to dismiss an indictment based on its interpretation of a federal statute is reviewed *de novo*. United States v. Aikens, 243 F.3d 1199, 1202 (9th Cir. 2001).
2. A district court's ruling on a motion for judgment of acquittal pursuant to Rule 29, Federal Rules of Criminal Procedure, is reviewed *de novo*. United States v. Yoshida, 303 F.3d 1145, 1149 (9th Cir. 2002). The same standard is applied as for a challenge to the sufficiency of the evidence: viewing the facts in the light most favorable to the judgment, the court determines whether a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. United States v. Senchenko, 133 F.3d 1153, 1155 (9th Cir. 1998).

Accordingly, a *de novo* standard of review is appropriate for all questions presented.

SUMMARY OF THE ARGUMENT

The district court erred by denying Wheatley's Rule 12 and Rule 29 motions to dismiss and motion for judgment of acquittal regarding Count 1 because Fed. Law § 999.2(3) is an unconstitutional restriction on free speech. The Agricultural Products Protection Act is viewpoint discriminatory because aims to silence only the viewpoint of animal advocates/activists. The APPA is also substantially overbroad. Further, Wheatley's conviction on Count 1 is contrary to public policy, and, arguendo, excused by the affirmative defense of necessity.

The district court was correct to grant Wheatley's motion for acquittal as to Count 2 because the Animal Enterprise Terrorism Act exceeds Congress's power under the Commerce Clause. The district court rightly aquitted on Counts 2 and 3 because the evidence, taken in the light most favorable to the prosecution, was insufficient to sustain a conviction.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT DENIED WHEATLEY'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNT 1 BECAUSE FEDERAL LAW § 999.2(3) VIOLATES THE FIRST AMENDMENT FREE SPEECH CLAUSE ON ITS FACE AND AS APPLIED TO WHEATLEY.

A. Federal Law § 999.2(3) is viewpoint-discriminatory because its ban on the use of camera equipment in animal facilities is intended to restrict the dissemination of information by animal activists.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend I. As a general matter, the government may not restrict expression based on its content, message, ideas, or subject matter. Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 573 (2002). Therefore, a content-based restriction of

speech is presumptively invalid and subject to strict scrutiny, Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 358 (2009); to justify a content-based restriction, the government must show that it is narrowly drawn to serve a compelling state interest. United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 804 (2000). The forum doctrine, however, provides an exception to the standard of strict scrutiny with respect to non-public fora,[1] in which the government may limit speech based on content[2] so long as the restriction is viewpoint-neutral and reasonable in light of the forum's intended purpose. Perry Educ. Ass'n v. Perry Local Educators' Association, 460 U.S. 37, 49 (1983).

Wheatley does not contest the district court's conclusion that the Company is a non-public forum. However, because the Company is a private organization with which the government has limited involvement on a daily basis, restrictions of speech on Company property must be subjected to heightened scrutiny. At any rate, Federal Law § 999.2(3)'s ban on the use of camera equipment in animal facilities is viewpoint-discriminatory and, therefore, in violation of the First Amendment.

Viewpoint discrimination is an "egregious" aspect of content-based restriction in which the government limits speech based on the ideology or opinion of the speaker. Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 829 (1995). The Supreme Court has recognized that "viewpoint discrimination is censorship in its purest form" and threatens the vitality of free speech. Perry Educ. Ass'n, 460 U.S. at 62. Therefore,

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[1] A non-public forum is government-owned property that is not by tradition or designation devoted to assembly and free expression. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985).

[2] For example, the government may restrict speech based on subject matter or speaker identity. Cornelius, 473 U.S. at 806.

restrictions that are viewpoint-discriminatory blatantly violate the First Amendment. Rosenberger, 515 U.S. at 829.

Federal Law § 999.2(3) is viewpoint-discriminatory because it restricts the dissemination of information by animal activists. By and large, cameras are used in animal facilities to document and expose practices that neglect animal welfare. The statute is intended to silence the activists and, thereby, prevent the adverse exposure based on its viewpoint.

The Government asserts that Federal Law § 999.2(3) is reasonable in that it prevents the disruption of the Company's intended purpose, which is to produce eggs. However, the fault lies not with the activist but with the Company itself, which may avoid the disturbance by adopting humane practices in the first instance. Moreover, "the mere existence of reasonable grounds for limiting access to a non-public forum will not save a regulation that is in reality a façade for viewpoint-based discrimination." Cornelius, 473 U.S. at 811. Therefore, the statute cannot be saved by reasonableness.

Because Federal Law § 999.2(3) is viewpoint-discriminatory, it is invalid as applied to the Company, a non-public forum. As a result, this Court should vacate Count 1 of Wheatley's conviction in order to preserve his First Amendment right to free expression.

B. Federal Law § 999.2(3) is overbroad because it prohibits a substantial amount of protected speech in excess of the statute's legitimate sweep.

The First Amendment doctrine of overbreadth is derived from the "recognition that unconstitutional restriction of expression may deter protected speech by parties not before the court and thereby escape judicial review." Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 568, n.8 (1980). "Many persons, rather than undertake

the considerable burden . . . of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." Virginia v. Hicks, 539 U.S. 113, 119 (2003) (internal citations omitted). Additionally, the existence of an overly broad statute "may cause persons whose expression is constitutionally protected to refrain from exercising their rights for fear of criminal sanctions." Massachusetts v. Oakes, 491 U.S. 576, 581 (1989). Accordingly, an overly broad statute that criminalizes protected speech is markedly repugnant. *See* Virginia, 539 U.S. at 119.

Due to the concern for the First Amendment rights of unrepresented third parties, the overbreadth doctrine is an exception to the "traditional rule is that a person to whom a statute may constitutionally be applied may not challenge the statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the [c]ourt." New York v. Ferber, 458 U.S. 747, 767 (1982). A party need not show that his or her First Amendment rights were violated, but rather that the statute restricts the protected speech of hypothetical third parties. Id. Therefore, Wheatley has the required standing to assert that Federal Law § 999.2(3) is overbroad on its face.

For a statute to be invalidated as overbroad, the speech restriction must be substantial in the absolute sense and when "judged in relation to the statute's plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). For example, in United States v. Stevens, 130 S. Ct. 1577 (2010), the Supreme Court invalidated as overbroad a federal statute that criminalized the sale or possession of depictions of animal cruelty, holding that it restricted a substantial amount of protected speech, such as videos that depict hunting or the arguably inhumane treatment of livestock. Id. Similarly, in

Erznoznik v. Jacksonville, 422 U.S. 205 (1975), the Supreme Court invalidated as overbroad a city ordinance that made it illegal to screen movies with nudity at a drive-in theater if the screen is visible from a public street. Id. There, the Supreme Court reasoned that the ordinance restricted the screening of newsreel footage of an art exhibit, an image of a baby's buttocks, or a film of bare-breasted African dancers; as a result, the ordinance exceeded its legitimate sweep as a traffic regulation. Id.

Here, Federal Law § 999.2(3) is overbroad because the terms "animal" and "animal facility" are defined so broadly as to exceed its legitimate sweep, which the Government asserts is the prevention of terrorist activity and a loss of business or property in animal facilities. Fed. Law § 999.1(1) and (2). The statute defines "animal" as "any living organism that is used in food, fur, or fiber production, agriculture, research, testing, or education."[3] Fed. Law § 999.1(1). "Animal facility" is defined to include "any vehicle, building, structure, research facility, premises, or defined area where an animal is kept, handled, housed, exhibited, bred, or offered for sale." Fed. Law § 999.1(2). The definitions in the statute criminalize a wide range of protected speech. For instance, living organisms are used for research and education at zoos in structures where they are kept, handled, housed, exhibited and bred. Consequently, the use of a camera at a zoo is a violation of the statute and, as a result, the protected dissemination of information via camera equipment is criminalized. The statute also restricts the use of camera equipment at the restaurant Red Lobster, where live lobsters are kept on site in a tank to be sold and served as food to patrons. Numerous other examples exist wherein the statute restricts speech that is not correlated with terrorist activity or a loss of business or property; therefore, Federal Law §

[3] The term does not include a human being, plant, or bacteria. Fed. Law § 999.1(1).

999.2(3) has a substantial amount of unconstitutional applications that exceed its plainly legitimate sweep.

Additionally, the statute is overbroad because it limits the means by which employees may report illegal activity in the workplace and, therefore, has a deterrent effect on protected speech. As a result, it is in direct conflict with the government's stated interest in the prevention of terrorist activity in animal facilities. Moreover, the statute is at odds with the whistleblower protections in many states.

Because the statute restricts a substantial amount of protected speech, judged against its plainly legitimate sweep, this Court should invalidate the statute as overbroad on its face and, therefore, in blatant violation of the First Amendment. As a result, Count 1 of Wheatley's conviction must be vacated.

II. WHEATLEY'S CONVICTION AS TO COUNT 1 MUST BE OVERTURNED ON THE BASIS ON PUBLIC POLICY, OR, IN THE ALTERNATIVE, ON THE BASIS OF NECESSITY.

A. Federal Law § 999.2(3) restricts free expression in a manner contrary to public policy.

This Court reviews *de novo* a district court's denial of a motion for judgment of acquittal pursuant to Rule 29, Federal Rules of Criminal Procedure. Fed. R. Crim. P. 29. *See* United States v. Pacheco-Medina, 212 F.3d 1162, 1163 (9th Cir. 2000). Consequently, this Court must review the evidence presented against the defendant in a light most favorable to the Government to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Pacheco-Medina, 212 F.3d at 1163.

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or

disagreeable." Texas v. Johnson, 491 U.S. 397, 414 (1989); Hill v. Colorado, 530 U.S. 703, 716 (2000) ("The right to free speech, of course, includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker's message may be offensive to his audience"). The public policy of California is to respect the free exchange of ideas protected under the U.S. Constitution. California's own constitution, as well as its anti-SLAPP statute,[4] evidence this policy. "SLAPP" stands for "strategic lawsuit against public participation."

"Commenting on a matter of public concern is a classic form of speech that lies at the heart of the First Amendment." Schenck v. Pro-Choice Network 519 U.S. 357, 377 (1997). "Animal [welfare] is an area of widespread public concern and controversy, and the viewpoint of animal rights activists contributes to the public debate." Huntingdon Life Sci., Inc. v. Stop Huntingdon Animal Cruelty USA, Inc., 129 Cal. App. 4th 1228, 1246 (2005). However, animal welfare is not the only matter the APPA seeks to stifle discussion of. The practices that animal researchers and food producers employ behind closed doors impacts human health and wellness. Matters concerning the food supply and other products derived from or tested on animals for human use are clearly matters of public concern. Here, the APPA limits the sharing of information regarding egg production and prohibits the revelation of truths discoverable only by industry insiders, including employees like Wheatley. As applied to the case at Bar, the APPA also restricts discourse on other matters of public concern implicated by Wheatley's speech, such as government efficiency, Government's entanglement as a customer of an industry that citizens

[4] So-called "anti-SLAPP" laws are designed to bar meritless lawsuits filed merely to chill someone from exercising his First Amendment rights on a matter of public interest. California's version is codified at Cal. Civ. P. Code § 425.16 (West).

entrust it to regulate, the inefficacy of regulatory mechanisms and agencies such as the USDA, and the safety of food served to children within the school system.

B. Federal Law § 999.2(3) usurps state police power and is duplicative.

The APPA regulates crimes that are traditionally covered under state law (e.g., trespass, larceny, destruction of property, vandalism, etc.) and removes these crimes from state or local jurisdiction to federal jurisdiction. In doing so, the APPA usurps the state's police power and uses limited federal resources to prosecute crimes that can and should be handled by the individual states in which they occur. *Cf.* Animal Research Facility Protection: Joint Hearing Before the Subcomm. on Dep't Operations, Research, and Foreign Agric. and the Subcomm. on Livestock, Dairy, and Poultry of the House Comm. on Agric., 101st Cong. 86 (1990) (statement of Paul L. Maloney, Deputy Assistant Att'y Gen., Dep't of Justice Criminal Div.) (discouraging the enactment of The Animal Enterprise Protection Act). In a hearing on the APPA, Deputy Assistant Attorney General John Maloney testified: "[The Justice] Department cannot endorse the creation of new federal criminal legislation which, in our view, would add nothing to the prosecution of these types of offenses." Id. This overlapping of coverage is an inefficient use of taxpayer dollars, particularly because the APPA only serves the interests of deep-pocketed animal exploiting industries, including food animal lobbyists, furriers, ranchers, biomedical researchers, and pharmaceutical companies.

C. Federal Law § 999.2(3) is contrary to the public policy of California because it makes the enforcement of "Prop 2" a practical impossibility.

The Government assumes that the absence of whistleblower protection clauses in the California statutes shows that California did not intend to protect the revealing of illegal actions. Although the California Penal Code provisions do not contain a so-called whistleblower provision, the provisions *are* worded to permit sanctioning of persons who are merely complicit

in the perpetration of animal cruelty. *See* Cal. Pen. Code §§ 597(g)(1) (stating that a person can be charged under this section for "causing *or permitting* an act of cruelty . . . ") (emphasis added). This is a strong statement of the legislative intent to encourage anyone who has witnessed cruelty to expose such wrongdoing. The importance placed on "insider tips" is also evident from California Penal Code § 599a (2012):

> When complaint is made . . . to any magistrate . . . that the complainant believes that any provision of law relating to, or in any way affecting, dumb animals or birds, is being, or is about to be violated . . . the magistrate must issue and deliver immediately a warrant . . . to enter and search that building or place, and to arrest any person there present violating, or attempting to violate, any law relating to, or in any way affecting, dumb animals or birds, and to bring that person before some court or magistrate of competent jurisdiction . . . to be dealt with according to law, and the attempt must be held to be a violation of Section 597.

Furthermore, the intent of the legislature in encouraging and protecting those who expose violations of the California Penal Code and the California Health & Safety Code is evident from the statutes themselves. Most illegal action takes place out of plain sight, and the farmed animal industry, much like cruel dog fighting operations, is difficult to penetrate. In the words of Sir Paul McCartney: "If slaughterhouses had glass walls, everyone would be a vegetarian." It is for precisely this reason that animal food producers do not open their operations to the view of outsiders. Thus, with the exception of the occasional, and arguably ineffective, visits from state regulatory officials, no one is privy to detailed information about the treatment of farmed animals other than the employees of those industries—many of whom will nonetheless have compelling financial incentives not to expose the cruelties within for fear of losing their jobs. The State of California has addressed the challenges of investigating animal abuse in part by creating a "comprehensive legislative scheme for enforcement of anticruelty laws, including an explicit avenue for enforcement upon the complaint of any person." Animal Legal Def. Fund v. Mendes, 160 Cal. App. 4th 136, 143-44 (Cal. App. 5th Dist. 2008). The APPA is, therefore, not

only duplicative in purpose, reflecting the Government's attempt to reach into state law domain at the behest of the animal production and research lobbies, but also contrary to the public policy of California in that it impedes the conscientious citizen's ability to expose criminal activity within animal facilities, including those facilities that have repeatedly violated existing animal protection laws.

D. To the extent that the Company can be charged with violations of Cal. Pen. Code §§ 597(b); 597t and Cal. Health & Saf. Code §§ 25990; 25991, application of Federal Law § 999.2(3) contravenes public policy and constitutional principles based on the concept of preemption.

Although the state of California has not charged the Company with violations of California Penal Code §§ 597(b) and 597t, and California Health & Safety Code §§ 25990 and 25991, at this time, to the extent that the Company can be charged under this statutes, application of the APPA is against public policy and constitutional principles based on the concept of preemption.

"In all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, [the preemption analysis begins] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (internal quotations omitted). "That approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." Id. Here, the Government advocates an operation of the APPA that interferes with the state's traditional police power to regulate crime and protect the health and safety of its citizens within its borders.

Perhaps the simplest way for Congress to preempt state law is by the federal law's express terms. *See* Aguayo v. United States Bank, 653 F.3d 912, 918 (9th Cir. 2011). The

dispositive issue in any federal preemption question is congressional intent. Id. But where, as here, the federal law encroaches on an area traditionally within the state's purview, intent can be inferred from the absence of an express preemption clause. The Government offered no evidence of congressional intent to preempt state law and frustrate the public policy objectives of California. Indeed, passage of the APPA in light of state laws criminalizing the same offenses described therein may have been little more than elected officials "throwing a bone" to the factory farming lobby—one which Congress had no intention of aggressively enforcing against the interests and laws of the states.

E. Wheatley's violation of Federal Law § 999.2(3) should be overruled based on the affirmative defense of necessity.

A district court's application of the necessity defense is also reviewed de novo. *Eg*, United States v. Lin, 191 Fed. Appx. 526, 527 (9th Cir. 2006).

"The defense of necessity is available when a person commits a particular offense to prevent an imminent harm which no available options could similarly prevent." United States v. Arellano-Rivera, 244 F.3d 1119, 1125 (9th Cir. 2001). "In some sense, the necessity defense allows us to act as individual legislatures, . . . crafting a one-time exception" to a criminal offense. United States v. Schoon, 971 F.2d 193, 196-97 (9th Cir. 1992). "For example, by allowing prisoners who escape a burning jail to claim the justification of necessity, we assume the lawmaker, confronting this problem, would have allowed for an exception to the law proscribing prison escapes." Id.

The affirmative defense of necessity, also known as justification or choice of evils, remains imbedded in the common law tradition; in modernity, it is also included in the Model Penal Code, which serves as the basis for numerous state statutes codifying the defense. *See*

Model Pen. Code §§ 3.01; 3.02 (1962). The Supreme Court has recognized the general applicability of the necessity defense to federal criminal cases. In United States v. Bailey, 444 U.S. 394 (1980), federal prisoners pled that their escape from prison in violation of 18 U.S.C.S. § 751(a) was justified by necessity. The Supreme Court acknowledged the viability of the defense in certain circumstances by citing the decisions of its lower courts and the Model Penal Code, but ultimately found the defense inapplicable because the prisoners in that case surrendered after escaping the allegedly intolerable conditions. Id. at 415.

Ninth Circuit decisions prior to 1978 tended to confuse the common law defenses of duress and necessity, often requiring a defendant claiming necessity to show that physical forces beyond his control rendered his illegal act "the lesser of two evils." Contento-Pachon, 723 F.2d at 695; United States v. Perdomo-Espana, 522 F.3d 983, 987 (9th Cir. Cal. 2008); Bailey, 444 U.S. at 410. Later, the Ninth Circuit declared a "choice of evils" to be the threshold issue, making the necessity defense available "when the actor is faced with a choice of two evils and finds himself in a position where he may 'either do something which violates the literal terms of the criminal law and thus produce some harm or not do it and so produce a greater harm.'" United States v. Richardson, 588 F.2d 1235, 1239 (9th Cir. 1978) (citations omitted); *accord* United States v. Contento-Pachon, 723 F.2d 691, 695 (9th Cir.1984); *cf.* United States v. Dorrell, 758 F.2d 427, 431, n.2 (9th Cir. 1985) (stating that Dorrell's defense—though ultimately unsuccessful—was properly characterized as necessity because he assertedly acted in the interest of the general welfare).

This Court subsequently articulated a four-prong test for applicability of the necessity defense. *See* United States v. Dorrell, 758 F.2d 427, 430-31 (9th Cir. 1985). "As a matter of law, a defendant must establish the existence of four elements to be entitled to a necessity

defense: (1) that he was faced with a choice of evils and chose the lesser evil; (2) that he acted to prevent imminent harm; (3) that he reasonably anticipated a causal relation between his conduct and the harm to be avoided; and (4) that there were no other legal alternatives to violating the law." *E.g.*, United States v. Arellano-Rivera, 244 F.3d 1119, 1125-1126 (9th Cir. 2001); United States v. Perdomo-Espana, 522 F.3d 983, 987 (9th Cir. 2008). The defendant's belief as to each of these elements must be reasonable, as judged from an objective point of view. United States v. Perdomo-Espana, 522 F.3d 983, 988 (9th Cir. 2008). If there was a reasonable, legal alternative to violating the law, (i.e., a chance to both refuse to do the criminal act and to avoid the threatened harm), the necessity defense will fail. United States v. Bailey, 444 U.S. 394, 410 (1980).

In Schoon, the Ninth Circuit concluded that "necessity can never be proved" in instances of indirect civil disobedience because three of the four prongs of the Dorrell necessity test never be met. United States v. Schoon, 971 F.2d 193, 197 (9th Cir. 1992). Schoon defines "civil disobedience" as "the willful violation of a law, undertaken for the purpose of social or political protest." United States v. Schoon, 971 F.2d 193, 195-196 (9th Cir. 1992) (citations omitted).

In the case at Bar, the Government's reliance on Schoon is misplaced. As the district court correctly observed, "there is no evidence in the record that Wheatley knew about the APPA." (Mem. Op. 14:5). Thus, Wheatley did not willfully violate the APPA, and his actions could not have been in protest of a policy he was unfamiliar with. It is therefore unnecessary to discuss the distinction between direct and indirect civil disobedience, as described in Schoon, or to discuss the reasons why Schoon precludes civil disobedients from defending based on necessity. If Wheatley did in fact violate the APPA, he did so inadvertently, which removes his actions from the category of civil disobedience entirely, and Schoon's *per se* rule against the

necessity defense for indirect civil disobedience cases is inapplicable here. The appropriate inquiry is therefore the same as in any traditional case, requiring Wheatley to establish that a reasonable jury could find that he meets the elements of the Dorrell test: (1) Wheatley reasonably believed he was faced with a choice of evils and chose the lesser evil. "[T]he test for necessity requires that the defendant faced with a choice of evils choose the lesser evil; it does not require that the evil perceived must be illegal under the law." United States v. Hill, 893 F. Supp. 1044, 1046 (N.D. Fla. 1994). (2) Wheatley reasonably believed that he acted to prevent imminent harm. Anti-nuclear protestors cannot hold a reasonable belief that the harm they seek to prevent (nuclear warfare) is "imminent." *See, e.g., United States v. Dorrell,* 758 F.2d 427 (9th Cir. 1985). (3) Wheatley reasonably anticipated a causal relation between his conduct and the harm to be avoided; and (4) Wheatley reasonably believed that there were no other legal alternatives to violating the law. Although the Ninth Circuit has found that some protestors can pursue their goals by marching or distributing literature, Zal v. Steppe, 968 F.2d 924, 929 (9th Cir. 1992), "If the identified alternatives are illusionary, then there may well be no legal alternative . . . . [E]vidence that a defendant exhausted all available legal alternatives, and that such alternatives as a class had been futile over a long period, might be sufficient to allow a defendant to present his necessity defense to the jury." United States v. Hill, 893 F. Supp. 1044, 1047-1048 (N.D. Fla. 1994).

The district court properly recognized the viability of a necessity defense as a matter of law and that decision is further supported by public policy. As a criminal defendant, Wheatley is entitled to a "meaningful opportunity to present a complete defense." California v. Trombetta, 467 U.S. 479, 485 (1984). This means Wheatley had a right to present "any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." Mathews v.

United States, 485 U.S. 58, 63 (1988); *see also* Bradley v. Duncan, 315 F.3d 1091, 1098-99 (9th Cir. 2002). Further, note that Congress did not legislatively preclude the use of the necessity defenses in APPA cases, thereby leaving it to the judicial system to analyze each case on its own merits. *See* United States v. Dagnachew, 808 F. Supp. 1517, 1522 (D. Colo. 1992).

III. THE DISTRICT COURT JUSTLY ACQUITTED ON COUNT 2 BECAUSE 18 U.S.C. § 43 EXCEEDS CONGRESSIONAL AUTHORITY UNDER THE COMMERCE CLAUSE.

The Commerce Clause of the U.S. Constitution grants Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Specifically, the Supreme Court in United States v. Lopez, 514 U.S. 549 (1995) ("Lopez"), articulated three categories of activity that Congress has the power to regulate under the Commerce Clause: (1) "Congress may regulate the use of the channels of interstate commerce," (2) "Congress is empowered to 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," and (3) "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce." United States v. Lopez, 514 U.S. 549, 558-59 (1995). Channels of commerce are the interstate transportation routes through which persons and goods move, such as highways, railroads, airspace, national securities markets, and telecommunications networks. Morrison v. United States, 529 U.S. 598, 613, n.5 (2000). Conversely, instrumentalities of commerce are "the people and things themselves moving in commerce, including automobiles, airplanes, boats, and shipments of goods" as well as pagers and telephones. United States v. Ballinger, 395 F.3d 1218, 1226 (11th Cir. 2005). The third category in Lopez is the broadest expression of the commerce power and

enables Congress to regulate intrastate commerce when it substantially affects interstate commerce. United States v. Ballinger, 395 F.3d 1218, 1226 (11th Cir. 2005).

Wheatley was convicted of 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 §43(a)(1). However, the AETA's regulation of the internet exceeds Congress' power under the Commerce Clause because, when used solely intrastate, the internet is not a channel or instrument of and does not have a substantial effect on interstate commerce per se. While most courts have held that the internet is a channel and instrumentality of interstate commerce, *e.g.*, United States v. Trotter, 478 F.3d 918, 921 (8th Cir. 2007), United States v. MacEwan, 445 F.3d 237, 245 (3d Cir. 2006), United States v. Hornaday, 392 F.3d 1306, 1311 (11th Cir. 2004), to do so is to construe narrow statutory language too broadly to include any use of the internet, regardless of whether the transmission in fact traversed state borders or was commercial in nature.

Before Congress amended 18 U.S.C. § 2252 (2008)[5] to explicitly include the phrase "by computer" in its description of interstate activity, the federal circuits differed markedly in their interpretation of the statute's commerce requirement[6] with respect to the internet. 18 U.S.C. § 2252 (2008). *Compare* United States v. Schaefer, 501 F.3d 1197 (10th Cir. 2007) (holding that the government must prove that internet transmissions traversed state borders to convict under 18 U.S.C. § 2252, amended by Effective Child Pornography Prosecution Act of 2007), *and* United States v. Lewis, 554 F.3d 208 (1st Cir. 2009) (holding

[5] A statute that prohibits knowingly receiving images involving the use of a minor in sexually explicit conduct. 18 U.S.C. § 2252 (2008).

[6] Before Congress passed the Effective Child Pornography Act of 2007, 18 U.S.C. § 2252 had interstate Commerce Clause jurisdiction if the image was "shipped or transported in interstate or foreign commerce."

that "shipped or transported in interstate commerce" required the actual interstate movement of the images, but evidence that the defendant received the images that were transmitted via the internet was sufficient to prove they traveled interstate), *with* United States v. MacEwan, 445 F.3d 237 (3d Cir. 2006) (holding that the internet is a channel and instrumentality of interstate commerce that Congress may regulate regardless of whether transmissions traverse state borders), *and* United States v. Runyan, 290 F.3d 223 (5th Cir. 2002) (holding that linking the images to the internet was sufficient evidence to convict under 18 U.S.C. § 2252, amended by Effective Child Pornography Prosecution Act of 2007). Many circuits held that the mere use of the internet is equivalent to traversing state borders. *E.g.*, United States v. Runyan, 290 F.3d 223 (5th Cir. 2002); United States v. Carroll, 105 F.3d 740 (1997). However, the Tenth Circuit required the government to prove that internet transmissions were in fact transferred in interstate commerce to obtain a conviction under the statute. United States v. Schaefer, 501 F.3d 1197 (10th Cir. 2007), *superseded by statute*, Effective Child Pornography Prosecution Act of 2007, *as recognized in* United States v. Geiner, 443 F. App'x 378 (10th Cir. 2011). Federal regulation of the internet as a channel or instrumentality of commerce should, as it did the Tenth Circuit, require actual proof that the internet transmission crossed state lines, as not every transmission does so. Accordingly, courts must recognize that internet transmissions often travel entirely intrastate.[7] Truly local internet transmissions are in fact "a hallmark of an

[7] "Although considerable work remains to be done, [i]nternet traffic now stays local in many places where it once would have traveled to other continents, lowering costs while improving performance and reliability." Steve Gibbard, *Geographic Implications of DNS Infrastructure Distribution*, 10 Internet Protocol J. 1, 12 (2006), available at http://www.cisco.com/web/about/ac123/ac147/archived_issues/ipj_10-1/101_dns-infrastructure.html.

effective [i]nternet infrastructure[,]" "especially in a state like California that contains many [internet exchange points]."[8]

Similar to the Tenth Circuit's analysis, this Circuit held in United States v. Wright, 625 F.3d 583 (9th Cir. 2010) ("Wright"), that statutes that criminalize the transmission of material in interstate or foreign commerce require the material itself to traverse state borders. United States v. Wright, 625 F.3d 583 (9th Cir. 2010). The district court attests that Wright is inapposite here because there the government did not contest that the material was sent from the defendant in Arizona directly to the client, also in Arizona. United States v. Wright, 625 F.3d 583 (9th Cir. 2010). However, the Government here has provided no evidence that Wheatley's internet use traversed state lines; in fact, his Facebook posts may have been entirely intrastate, as were the transmissions in Wright, and the intrastate use of the internet does not have a substantial affect on interstate commerce *per se*. Mere e-mail transmissions or Facebook posts that remain intrastate, for example, have little, if any, effect on interstate commerce. Wheatley posted the video in question on his personal Facebook profile, a webpage that is accessible only to persons approved of by Wheatley, not by the public at large; therefore, it is conceivable that Wheatley's post was transmitted only in California, where he lives and works. Because the post was non-commercial in nature, it is unlikely that it had any effect on interstate commerce, let alone a substantial effect.

Consequently, this Court should affirm the district court's grant of the motion for judgment of acquittal as to Count 2. Wheatley was convicted under the AETA §43(a)(1) for his use of the internet as a facility of interstate commerce; however, the internet is not per

[8] An IXP, or internet exchange point, is a physical infrastructure through which internet service providers exchange internet traffic between their networks.

se a channel or instrumentality of interstate commerce within the scope of the Commerce Clause, and internet use is not per se an activity that substantially affects interstate commerce. Specifically, Wheatley's use of the internet does not amount to the use of a facility of interstate commerce. The AETA §43(a)(1)'s sweeping regulation of the internet as a whole, therefore, exceeds congressional authority under the Commerce Clause and is, as a result, unconstitutional on its face and as applied to Wheatley.

IV. THE DISTRICT COURT JUSTLY ACQUITTED ON COUNTS 2 AND 3 BECAUSE 18 U.S.C. § 43 DOES NOT APPLY TO WHEATLEY'S CONDUCT UNDER THE EVIDENCE PRESENTED IN THIS CASE.

A. Wheatley did not "damage" the Company within the meaning of 18 U.S.C. § 43(a).

To determine whether Wheatley damaged the Company, we must interpret the language of the AETA. 18 U.S.C. §43. The Government argues that 18 U.S.C. 43 (a)(1) should read as if the term "damaging" is used in conjunction with "operations." (Mem. Op. 17:10). However, an equally valid grammatical interpretation is that "operations" should only be read in conjunction with the word "interfering," meaning that Wheatley could not have violated 18 U.S.C. 43 (a)(1) unless he damaged the animal enterprise itself rather than just its operations, which means that physical damages are a violation of 18 U.S.C. 43 (a)(1), whereas economic damages are not.

Application of the AETA to Wheatley's conduct is also unclear because, although the statute defines "economic damages" in 18 U.S.C. 43(d), the generic term "damages" as used in 18 U.S.C. 43 (a)(2)(A) is not defined. Thus it is unclear whether one commits the offense by intentionally causing economic damage, intentionally causing physical damage, or both.

"[T]he canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. . . . [A]lthough clarity at the requisite level may be supplied by judicial gloss on an

otherwise uncertain statute, . . . due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." United States v. Lanier, 520 U.S. 259, 266-267 (1997) (internal citations omitted). In these circumstances—where text, structure, and history fail to establish that the Government's position is unambiguously correct — the Court must apply the *rule of lenity* and resolve the ambiguity in Wheatley's favor. *See, e.g.*, United States v. Granderson, 511 U.S. 39, 54 (1994). The common understanding of the verb "to damage" is to cause physical harm. Here, Wheatley did not cause physical harm to the Company, and could not have known from a plain meaning reading if the AETA that is proscribed broader conduct. Thus the Court should construe "damages" in 18 U.S.C. §43 narrowly so as to exclude conduct that allegedly resulted in economic damages in this case. If the Court wishes to clarify the meaning of the statute as inclusive of economic damages, the Constitution prohibits *ex post facto* application to Wheatley. U.S. Const. art 1, § 9; art. 1 § 10; see, e.g. Collins v. Youngblood, 497 US 37 (1990); California Dep't of Corrections v. Morales, 514 U.S. 499 (1995).

Even if the Court interpret the AETA to encompass economic damages, the Government cannot prove that Wheatley's actions damaged the Company—economically or physically. There is no evidence in the record that the enterprise or its operations suffered any physical loss or property damage. The Government alleges that the Company's operations "may" be damaged by economic loss as a result of Wheatley's actions, (Mem. Op. 17:20) but the Government failed to establish whether these losses will actually occur or manifest in any significant manner. There is no evidence that the Company has suffered or will suffer a loss of business as a result of Wheatley's recording a video or commenting on his recording on his personal Facebook page. Without conceding that the uploading of the video to YouTube and the ensuing media attention

are actions attributable to Wheatley, note that the Government has not identified any actual damages incurred by the Company as a result of these events, either. The Government claims only that the Company *might* incur expenditures (Mem. Op. 17:10) in order to present a more humane image as a result of the media attention given to the currently abysmal conditions is merely an assertion of speculative damages – the cost of which is uncertain and could be negligible.

A fundamental rule of remedies in contract and tort is that damages must be reasonably certain. Whereas the civil burden of proof to establish contract and tort remedies is preponderance of the evidence, the burden for imposing criminal sanctions is the significantly greater "beyond a reasonable doubt." Here, the damages which form the basis of the Government's indictment are purely speculative, and a jury could not have reasonably concluded based on the evidence that Wheatley caused damage to the Company as prohibited by the AETA. While it is possible that Congress intended "damages" in 18 U.S.C. §43(a) to include economic loss, "damages" cannot be interpreted as including hypothetical, uncertain loss.

B. Wheatley did not act "for the purpose of damaging or interfering with the operations of an animal enterprise" so as to bring him within the scope of 18 U.S.C. § 43(a)(1).

Even if this Court finds that Wheatley's actions resulted in damage within the meaning of 18 U.S.C. §43(a)(2), the Government cannot establish beyond a reasonable doubt that Wheatley's posting of a video and commentary to his personal Facebook page was done with the purpose of damaging or interfering with the Company's operations per 18 U.S.C. §43(a)(1).

"The scienter requirement means that the government must present the trier of fact with evidence that establishes that, beyond a reasonable doubt, the accused had the requisite intent to disrupt the functioning of an animal enterprise." United States v. Fullmer, 584 F.3d 132, 153 (3d

Cir. 2009). In. Fullmer, the Third Circuit upheld defendants' conviction under the AETA. However, that case is distinguishable from the case at Bar because defendants were charged with causing *physical* disruption to the functioning of an animal enterprise. So, unlike Wheatley, the Fullmer defendants had fair notice that their conduct was prohibited. United States v. Fullmer, 584 F.3d 132, 153 (3d Cir. 2009). Fullmer is also distinct in that there was ample circumstantial evidence from which the jury could have inferred that the defendant's objective was to cause a physical disruption to an animal enterprise and to intentionally damage or cause the loss of property. United States v. Fullmer, 584 F.3d 132, 155 (3d Cir. 2009). Unlike the Fullmer defendants, Wheatley did not hold a leadership role in an animal advocacy group and was not involved in coordinating any such group's activities and objectives. *Compare* United States v. Fullmer, 584 F.3d 132, 161 (3d Cir. 2009). Even if the Court infers from Wheatley's interest in animal welfare issues that he intended to improve the conditions of chicks like those in the Eggs R Us factory farm, this intention does not translate to a purposeful intent to disrupt or sabotage the Company in any way. In fact, Wheatley had a financial motivation for seeking and maintaining employment with the Company; he needed money to pay for his college journalism studies. It is therefore unlikely that Wheatley would purposely act in way that would lead to his termination and loss of income. Furthermore, given Wheatley's background in journalism, a jury could reasonably infer that Wheatley knew how to reach a wide audience with his video if that were his true objective. It is quite a leap to conclude that a media and technology savvy college student sought to cripple a company merely by posting an insider video to his personal Facebook page, given the numerous other options with greater reach to the public at large. At most, Wheatley was reckless in posting a video to his Facebook page that another user could cross-post on YouTube. But, when a *mens rea* component is included in a criminal

statute, it becomes an essential element of the offense that must be proven beyond a reasonable doubt. In Jones v. United States, 526 U.S. 227 (1999), the Supreme Court reiterated that every element of the offense "must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." Id. at 252. Here, the evidence was insufficient for a jury to reasonably conclude that Wheatley acted intentionally "with the purpose of" damaging the Company.

C. Wheatley's taking of the chick did not cause the loss of any real or personal property within the meaning of 18 U.S.C. § 43(a)(2)(A) falls outside the scope of the AETA.

Wheatley did not cause a loss of personal property by rescuing a baby chick, "George." The Government does not dispute that George was destined to be killed by the grinder and subsequently discarded as a "waste product." The Government maintains that waste remains the property of the Company, while it is on Company premises. (Mem. Op. 8:6).

If the Court finds that Wheatley caused the loss of real property by taking the baby chick, it must nonetheless uphold the district court's acquittal on Count 3 because Wheatley did not use a facility of interstate commerce to remove the chick from the Company's premises as required to bring an action within the scope of 18 U.SC. §43(a). Additionally, Wheatley's altruistic motivation in taking the chick is not disputed by the Government. Thus a jury could not reasonably find the taking to be in connection with a purpose to damage or interfere based on the evidence. The absence of this element removed Wheatley's act from the scope of 18 U.S.C. § 43(a)(2)(A).

CONCLUSION

For the forgoing reasons, Appellant respectfully requests this Court to remand this case with direction to the district court preserve acquittal as to Counts 2 and 3 and to overturn the

jury's conviction of Wheatley on Count 1. If the Court denies this request, Appellant respectfully requests this Court to remand this case for a new trial.