No. 11-11223

In the

United States Court of Appeals

for the

Ninth Circuit

UNITED STATES,

Respondent/Cross-Appellant,

- v. -

LOUIS WHEATLEY

Appellant/Cross-Respondent.

On appeal from the United States District Court for the Central District of California in Case No. CV 11-30445 WFM (ABCx), the Honorable Judge Wilma M. Fredericks, United States District Judge

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BRIEF OF RESPONDENT

Attorneys Team Six

Dated: January 25, 2012

Counsel for Respondent/Cross-Appellant

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1. Did the District Court correctly find that FED. LAW § 999.2(3) does not violate the First Amendment Free Speech Clause of the United States Constitution on its face or as applied to Wheatley, such that his conviction under count 1 should be affirmed?

2. Did the District Court correctly dismiss Wheatley's claim that his conviction under Count 1 should be overturned as a matter of public policy, or in the alternative, because his actions were justified under the defense of necessity?

3. Is 18 U.S.C. § 43, which prohibits the use of a facility of interstate commerce for the purpose of damaging or interfering with an animal enterprise, a proper exercise of the congressional authority under the Commerce Clause of the United States Constitution?

4. Did the District Court err when it overturned Mr. Wheatley's convictions under 18 U.S.C. § 43, despite the fact that he interfered with and damaged an animal enterprise when, on the same day, he stole an animal and posted sensational videos on the internet?

STATEMENT OF THE CASE

Appellant/Cross-Respondent Louis Wheatley ("Wheatley") took a job with Eggs R Us (the "Company") intending to document the cruel treatment of animals in the egg industry. He did just that when he recorded videos of two common industry practices—the disposal of male chicks in a grinder and the crowding of hens in a "battery cage." That same day, Wheatley stole a chick that was destined for disposal. Wheatley posted these videos on the internet, sparking a controversy that damaged the Company's reputation and diverted its resources.

Wheatley's actions amounted to violations of the Agriculture Products Protection Act ("APPA"), FED. LAW §§ 999.1-.4, and the Animal Enterprise Terrorism Act ("AETA"),

18 U.S.C. § 43. After he was convicted of violating these statutes, he filed a motion for acquittal pursuant to FED. R. CRIM. P. 29(c).

Wheatley argued that the APPA violates the First Amendment and the AETA exceeds the scope of the Commerce Clause. The district court disagreed. The district court also rejected Wheatley's claim that his actions were justified by public policy. The court granted Wheatley's motion only in respect to the AETA, overturning his convictions on Counts 2 and 3. The court found that the empathy that inspired the theft was not sufficiently connected to Wheatley's intent to harm the Company. Both parties filed timely cross-appeals, pursuant to FED. R. APP. P. 4(b)(3)(A)(i), urging reversal of the final judgment. The standard of review is de novo. The facts are not in dispute and should be viewed in the light most favorable to the prosecution.

STATEMENT OF THE FACTS

Wheatley is a resident of California, a journalism student, and a member of a farmed animal protection organization. *Wheatley* at 2, 4. On June 1, 2010, Wheatley took a job at Eggs R Us, a commercial egg producer with operations in three states that receives compensation from the federal government for providing eggs to schools. *Id*. at 2. He did so in part to verify and document the cruel treatment of animals in the egg industry. *Id*.

On June 17, 2010, Wheatley recorded two videos at Eggs R Us, showing the disposal of male chicks in a grinder and the crowding of hens in a "battery cage." *Wheatley* at 2-3. That same day, Wheatley stole a chick that was destined for disposal after the chick "caught his eye" and he found that "he just couldn't walk away." *Id*. at 4.

Male chicks, a byproduct of the egg industry, are commonly disposed of in grinders. *Wheatley* at 2-3. These "waste" chicks may be alive or dead before disposal. *Id*. at 3.

Wheatley's video showed a coworker laughing, joking, and intentionally squashing live chicks as he loaded them into the grinder. *Id*.

Battery cages are wire cages that house egg-laying hens. *Wheatley* at 3. Wheatley saw that battery cages at Eggs R Us did not provide enough floor space for the hens to spread their wings. *Id*. California law prohibits confining hens in a manner that prevents them from spreading their wings. *Id*. See CAL. HEALTH & SAFETY CODE §§ 25990-91(c).

Later on June 17, 2010, Wheatley posted both videos on his personal Facebook page. *Wheatley* at 3. Wheatley commented, in reference to the chick disposal, "This is what happens every day – business as usual. I'll never be able to eat another egg again. The public has to see this to believe it." *Id*. at 2-3. Wheatley also wrote a "blog" about the battery cages. In it he alleged that the Company violated California law and complained that his supervisor dismissed his concerns. *Id*. at 3-4. Wheatley shared his allegations with members of his farmed animal protection organization, but he did not report the matter to an enforcement authority. *Wheatley* at 4.

Before Wheatley had a chance to decide what forum he would use to write about the incidents, or whether he would post the video clip to a wider audience, one of Wheatley's Facebook friends posted the video of the chick disposal on YouTube, an open access forum for online videos. *Wheatley* at 3. There the video was seen by 1.2 million people. *Id*. Wheatley's videos, comment, and blog attracted the attention of the media. *Id*. The Company responded to the negative media attention by announcing that it was considering modifying practices in its California operations. *Id*.

SUMMARY OF THE ARGUMENT

Wheatley was properly convicted under Count 1. Count 1 alleged violation of the APPA, which prohibits using a video recorder after entering an animal facility without the effective consent of the owner. FED. LAW § 999.2(3). Wheatley's illicit act of videotaping at an animal facility violated this statute.

Although Wheatley alleges that the APPA violates his First Amendment Right to free speech, Wheatley's conduct does not constitute "speech." It lacks the requisite expressive elements of protected conduct. Even if his conduct were "speech," the APPA is constitutional as applied to Wheatley because his conduct took place on private property, which fails to trigger strict scrutiny. The APPA is constitutional on its face because it is content-neutral, narrowly tailored, it relates to a substantial government interest, and it leaves open alternative channels for communication.

Wheatley asserts that his actions were permissible as a matter of public policy, because they brought to light criminal acts and touched on matters of animal welfare, a matter of public interest. Notoriety of an issue, however, does not grant an unfettered right of access to private property, and there are limitations when government interests are at stake. In the alternative, Wheatley asserts a defense of necessity. This defense fails primarily because Wheatley could have alerted the proper authorities of the alleged crimes and he failed to do so. Rejecting both is constitutional and policy claims, the court properly upheld Wheatley's conviction under Count 1.

Wheatley's convictions under Counts 2 and 3 were also proper, though they were ultimately overturned. Count 2 alleged a violation of the AETA, 18 USC § 43, which prohibits using the facilities of interstate commerce for the purpose of damaging an

animal enterprise. Count 3 alleged that Wheatley's actions constituted the final element of an offense under the AETA, an affirmative act of harm connected with the aforementioned purpose. Wheatley violated the AETA when he used the internet, a facility of interstate commerce, to post videos that harmed the Company's reputation. That same day, Wheatley stole a chick, a harmful act that is specifically contemplated by the plain language of the AETA.

The district court erred when it impermissibly narrowed the intent requirement and acquitted Wheatley on Counts 2 and 3. The court found that Wheatley's empathy for the chick could not coexist with his intent to harm the Company. The jury, however, recognized that the feelings were not in tension but were two sides of the same coin.

The district court correctly found that the AETA is a permissible regulation under the Commerce Clause. The AETA is proper under the Commerce Clause because it regulates the use of a facility of interstate commerce, and it protects things in interstate commerce. It also prevents undesirable behavior that could substantially affect the flow of goods into interstate commerce.

ARGUMENT

I. THE APPA DOES NOT VIOLATE THE FIRST AMENDMENT AS APPLIED TO WHEATLEY'S CONDUCT BECAUSE IT IS NOT SPEECH ON PUBLIC GROUNDS, OR ON ITS FACE BECAUSE THE STATUTE IS REASONABLE AND NOT OVERLY BROAD AS CONSTRUED.

The Federal Agricultural Products Protection Act ("APPA") imposes liability on any person who "uses or causes to be used the mail or any facility of interstate or foreign commerce without the effective consent of the owner" and "[e]nter[s] an animal facility and use[s] or attempt[s] to use a camera, video recorder, or any other video or audio

recording equipment." FED. LAW § 999.2(3). This court reviews the trial court's ruling on Rule 29 motions for acquittal de novo in the light most favorable to the government. *United States v. Giorgies*, 29 F. App'x. 472, 474 (9th Cir. 2002).

Wheatley asserts that the jury verdict on Count 1 must be overturned because Section 999.2(3) of the APPA is unconstitutional as applied to him and on its face, violating the First Amendment right of free speech, and is overly broad. The District Court properly found that it did not violate the First Amendment and affirmed the jury verdict on Count 1. The APPA does not violate Wheatley's First Amendment right to free speech because his videotape of the Company's facility does not constitute "speech," and even if it was speech, his conduct was on private property and subject to a lesser standard of scrutiny. On its face, the statute is also constitutional because it is content-neutral and meets the proper restrictions. Finally, the statute is not overly broad in an absolute sense and relative to its plainly legitimate sweep.

A. The APPA does not violate the First Amendment as applied to Wheatley because his videotaping does not constitute "speech" and is therefore not subject to First Amendment protections.

Courts have long rejected the notion that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). As an initial matter, the courts have rejected the idea that all visual expression, namely videography, is protected "speech." In *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.,* the Supreme Court, citing *O'Brien,* explained that they extended First Amendment protection only to conduct that was inherently expressive and that videography *which has that communicative or expressive purpose* enjoys *some* First Amendment protection.

(emphasis added) 547 U.S. 47, 65-66 (2006). However, courts have not read this to mean that videography, without more, is protected by the First Amendment. One district court held that "the First Amendment is not implicated because a person uses a camera, but rather, when that camera is used as a 'means of engaging in protected expressive conduct' or, less commonly, to 'gather information about what public officials do on public property.'" *Larsen v. Fort Wayne Police Dept*., 1:09-CV-55, 2010 WL 2400374 (N.D. Ind. June 11, 2010) (citing *Smith v. City of Cumming,* 212 F.3d 1332, 1333 (11th Cir. 2000)). In that case, the court held that videotaping for personal archival purposes or purely private recreational purposes was not protected by the First Amendment.

In this instance, Wheatley's use of a video camera within the egg production facility was not expressive or communicative speech. The facts do not support a conclusion that Wheatley was videotaping with an intent to use the video for more than personal use. The videotaping was akin to mounting a surveillance camera, with no added expressive elements. In fact he later uploaded the video to a website for personal use and had made no decisions about whether this video would be posted on a wider network. *Wheatley* at 3. Despite his comment that he felt "the public had to see it" the record does not support an inference that this was his intent when he was videotaping the facility. *Id.*

Wheatley's videotaping of the facility also does not receive protection because it was merely a means of gathering information, subject to restrictions. The Supreme Court asserted that there were "few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow" and that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965). In the context of upholding a prohibition banning at

videotaping a planning committee meeting, the Third Circuit has "declined to apply the speech forum doctrine because it '[t]raditionally . . . applies to 'expressive' or 'speech' activity,' and the alleged constitutional violation 'consisted of a . . . right to receive and record information,' not 'speech or other expressive activity.'" *Whiteland Woods, L.P. v. Township of West Whiteland*, 193 F.3d 177, 183 (3d Cir. 1999). The content of what is being videotaped will not transform the medium with which it is captured into "speech," particularly where alternative mediums for communicating the information exist. *Id.* In the instant case, Wheatley had alternative mediums for reporting what he saw, such as blogging or writing class articles. *Wheatley* at 3. Access to information is not an unlimited right vindicated by the first amendment. For these reasons, Wheatley's first amendment rights were not violated by the statute as applied to him.

B. Even if Wheatley's conduct constitutes speech, the APPA is not unconstitutional as applied to Wheatley because his conduct was not executed in a public forum and therefore not subject to a heightened standard of scrutiny.

Restrictions on speech protected by the First Amendment fall under a heightened standard of scrutiny if conducted within a "public forum." *Hague v. CIO*, 307 U.S. 496 (1939). Public forums are public property and are divided under three categories: the traditional public forum (such as a street or park), a designated public forum, and a non-public forum. *San Leandro Teachers Ass'n v. Governing Bd. of San Leandro Unified Sch. Dist.*, 46 Cal. 4th 822, 838 (2009). Under California's Liberty of Speech Clause the "public forum" doctrine is broadened to occasionally reach beyond traditional public forums, which are customarily dedicated to communicative activity. "The test under California law is whether the communicative activity is basically incompatible with the

normal activity of a particular place at a particular time." *Kuba v. 1-A Agr. Ass'n*, 387 F.3d 850, 856-57 (9th Cir. 2004). The Ninth Circuit held that in *Kuba* the protest activity at the Cow Palace's parking lots and walkways, where people travel to attend events or exhibitions, were conducted in a "public forum," although the Cow Palace was a private venue. As such, the protest activity was not inherently incompatible with the activities the parking lots and walkways outside the Cow Palace were dedicated to, and that those areas were "public fora." Eggs R Us does not constitute a public forum since the activities found within the facility do not resemble those you would find at a public venue. Eggs R Us is a privately owned facility, closed to the public, and hosts sensitive information and activities.

For similar reasons, the Company is also not a "designated public forum," as it was not so designated implicitly or explicitly by the government, and is also not public property. Wheatley posits that because it receives government funding and is overseen by the USDA, the Company might fall under the category of a non-public forum, which is a residual category for all *public property* that is not a classic or designated public forum. The district court reached the conclusion that Eggs R Us was a non-public forum on the basis of the government's limited involvement in the operations of the facility. *Wheatley* at 9. This finding is based on the erroneous starting point that the facility is or could be considered public property, which is a prerequisite for consideration of the public forum analysis. This is a stretch and there is no precedent with which to base an assumption that receiving government funds and oversight might render private property a non-public forum. If this were the case, any private business with a government contract, regardless of its scope, and that is subject to government regulation would also be a nonpublic

forum subject to heightened scrutiny. If the facility is not public property, it cannot be a non-public forum, since it does not fall under the residual category's ambit. As such, even if Wheatley's conduct was in fact "speech," it would not be subject to a higher standard of scrutiny because it is not conducted within a facility that falls under any of the three categories in the public forum analysis, and accordingly do not violate his first amendment rights.

C. The statute does not violate the first amendment on its face because it is content-neutral and narrowly tailored to meet a substantial government interest, and leaves alternative mediums open for expression.

In *United States v. O'Brien,* the Supreme Court held that in public settings "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." 391 U.S. at 376-77. Courts, however, apply a more lenient analysis to content-neutral regulations. *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996). Assuming that the facility in question was considered public fora and was subject to scrutiny, the APPA would still not violate the First Amendment because it is content-neutral and narrowly tailored to meet substantial government interests, while leaving open alternative channels for communication.

The main inquiry in determining content neutrality is "whether the government has adopted a regulation of speech because of disagreement with the message it conveys. . . . A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Wheatley argues that the APPA

is not content-neutral because it is viewpoint- discriminatory and aimed generally at thwarting attempts to uncover illicit facility practices that do not account for animal welfare or interests. *Wheatley* at 10. The Supreme Court has observed, that "Courts will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive" and that "[i]nquiries into congressional motives or purposes are a hazardous matter. . . [and] the stakes are sufficiently high for us to eschew guesswork." *O'Brien*, 391 U.S. at 383. In the present case, not only do we lack a legislative record to assess whether legislature's motives were clearly viewpoint-discriminatory, but even if we did have such a record the case law suggests that it would be unwise to try and interpret legislative intent based upon it.

The APPA's sole purpose for prohibiting videotapes can go far beyond fear of exposure by animal activists. To name just one example, the World Health Organization's (WHO) publication on food terrorism addresses the potential impact of contaminated food on human health from deliberate acts of sabotage, which can be seriously debilitating to the population and on the economy, even in minor incidents. Protecting sensitive information that may lead to sabotage is a primary concern, according to the WHO. Speaking to this concern, the report's Recommendation 5.1 is to "not allow employees and visitors to bring cameras into the facility." See World Health Organization, *Terrorist Threats to Food: Guidance for Establishing and Strengthening Prevention and Response Systems* (2008), *available at* http://www.who.int/foodsafety/publications/general/en/terrorist.pdf (last visited Jan. 10, 2012). The APPA bans all videotaping without consent, regardless of the content or persons who engage in videotaping it. Content-neutral but valuable information, such as

food processes and safety procedures, information found in laboratories, or the identities of parties that work in the facility are what the statute seeks to protect.

A content-neutral regulation may "restrict the time, place, and manner of protected speech, provided it is 'narrowly tailored to serve a significant governmental interest' and 'leave[s] open ample alternative channels for communication.'" *Ward,* 491 U.S. at 791 (citation omitted). The APPA's purpose is to prevent damage or destruction to animal facilities, a significant governmental interest, as illustrated by the example above. Section 999.2(3) is narrowly tailored to only cover video or audio recordings in the facility, and even further restricted to those who use facilities of interstate commerce. As previously noted, the Third Circuit upheld a similar prohibition against videotaping "particularly where the public is granted alternative means of compiling a comprehensive record." *Whiteland Woods*, 193 F.3d at 183. The APPA's prohibition also leaves other alternative channels, such as blogging, writing, or public speaking, open to communicate information gathered by non-restricted means. Therefore, the regulation is content-neutral, narrow, and leaves open channels for communication. Consequently it survives a constitutionality analysis under the proper test.

D. The statute is not overly broad because, in an absolute sense, it may be construed to limit its reach, and its plainly legitimate sweep is relatively greater than any harmful application it may have.

Wheatley alternatively poses that if the statute is constitutional, it is overly broad and would result in chilling whistleblowing provisions of other states. Courts have held, as the district court points out, that application of the overbreadth doctrine is "strong medicine" and has been employed by the Court sparingly and only as a last resort. In general, overbreadth scrutiny has been less strict in the context of a statute "regulating

conduct in the shadow of the first amendment, but doing so in a neutral, noncensorial manner." *Broadrick v. Oklahoma*, 413 U.S. 601, 614 (1973).

Facial overbreadth analysis begins by construing the challenged statute. *United States v. Williams*, 553 U.S. 285, 293 (2008). In *United States v. Alvarez,* the Ninth Circuit, taking guidance from *Broadrick*, broke down this analysis into two requirements: that the statute's overbreadth be substantial (1) in an absolute sense and (2) relative to the statute's plainly legitimate sweep. 617 F.3d 1198, 1236 (9th Cir. 2010) cert. granted, 132 S. Ct. 457 (2011).

In an "absolute" sense, "even if the act could possible be interpreted to reach some constitutionally protected speech, the Act will not be held unconstitutionally broad if it is also readily susceptible to a construction that eliminates such overbreadth." *Alvarez*, 617 F.3d at 1237. In construing Section 999.2 of the APPA, which specifically deals with damage and destruction of an animal facility, it is clear that § 999.2(3) is aimed at preventing acts of terrorism. This subsection is couched among five other subsections that punish activities that directly damage a facility. It is clear, therefore, that the aim of prohibiting video or audio recording is to prevent the harm it may cause the animal facility by releasing sensitive information about it, and not aimed at harmless videography inside an animal facility, for which permission may be obtained from the owner to record. Therefore, it is possible to construe the statute in such a way that does not punish harmless and protected conduct. Further, videotaping is a very particular activity that the statute prohibits, and whistleblowing cannot be chilled when various other methods of reporting exist to alert the proper authorities of alleged wrongdoing.

Secondly, the statute must be overly broad relative to the statute's plainly legitimate

sweep. The Ninth Circuit in *Alvarez* noted that in holding that the statute was unconstitutionally overbroad, the Court in *United States v. Stevens* determined that the statute created criminal prohibitions of "alarming breadth" since it would have an impact on the enormous national market for hunting videos, by criminalizing the possession, sale, or production of these. *Alvarez*, 617 F.3d at 1239. The APPA seeks to prevent disastrous harm from potential terrorist attacks that could devastate the economy and the health of the American population. This "legitimate sweep" must be assessed relative to the remote possibility that one form of communication, namely video or audio, may be excluded as a means of whistleblowing or animal welfare awareness, where other mediums for such activity are readily available. This is not a sweep of "alarming breadth." In this case, therefore, the legitimate scope of the statute is much greater, and dwarfs any potential it may have for punishing protected conduct. As such, the district court appropriately held that the statute was not overly broad and was constitutional.

II. WHEATLEY'S CONVICTION UNDER COUNT 1 WAS PROPERLY AFFIRMED BECAUSE HIS ACTIONS WERE NOT JUSTIFIED AS A MATTER OF PUBLIC POLICY OR UNDER A DEFENSE OF NECESSITY.

Wheatley contends that as a matter of public policy he should not be convicted for conduct that revealed the company's violation of state laws (CAL. PENAL CODE § 597t(b) and CAL. HEALTH & SAFETY CODE §§ 255990-91), which would otherwise continue behind closed doors. He further asserts a defense of necessity in conjunction with this argument. Wheatley asserts that the Company has violated the provisions that allow for adequate exercise space, and those that forbid the mutilation and cruel killing of any animal by disposing of the baby male chicks by means of grinding them, and that videotape was the only practical means of exposing these alleged crimes.

The district court appropriately held that the right to debate issues of public concern, and that general concerns of public policy were insufficient to merit second guessing state legislative intent. In connection with these holdings, the court rightfully concluded that Wheatley's necessity defense fails to meet all four prongs of the necessity test.

A. Protection of Wheatley's actions under a defense of public policy fails because not all matters of public interest are exempted in favor of a public policy debate and videotaping was not the only means of exposing alleged wrongdoing.

In *Buckley v. Valeo*, within the context of political campaign contributions, the Supreme Court asserted that the First Amendment affords the broadest protection to political expression in order to ensure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people." 424 U.S. 1, 14 (1976). Animal rights viewpoint is an area of public interest. The right to express these viewpoints, as discussed earlier in this brief, does not grant limitless rights to access information and is subject to countervailing governmental concerns. The Eighth Circuit, in examining a claim that a prohibition on videotaping executions was unconstitutional, held that the state had legitimate safety and security concerns with regards to prisons, and while the death penalty is a matter of wide public interest, "we disagree that the protections of the First Amendment depend upon the notoriety of an issue. . . . Moreover, even if we assume arguendo that executions are so important that public access is required, we believe that videotaping and the use of cameras would not be necessary to vindicate the right of access*." Rice v. Kempker*, 374 F.3d 675, 680 (8th Cir. 2004). Similarly, in this instance, the state's interest in protecting the safety and security of animal facilities is substantial, and Wheatley is not restricted from recounting to the

proper authorities or the public at large whatever experiences he had at the facility.

Finally, the statute carves out an exception for the proper authorities to be able to use video or audio recording in the course of their duties. Wheatley's argument that public policy calls for *his* use of videography in the facility is challenged by the statute's allowance for such videography when the proper authorities deem it necessary. As such, Wheatley's public policy considerations surrounding the prohibitions on non-consensual video recording are properly outweighed by governmental concerns and the existence of alternative means of access.

B. Wheatley's actions are not protected by a necessity defense because he does not meet the four prongs of the necessity test, nor does his conduct qualify as direct civil disobedience.

Wheatley's necessity defense fails for similar reasons to the ones identified above. The Ninth Circuit established that "[n]ecessity is, essentially, a utilitarian defense. It therefore justifies criminal acts taken to avert a greater harm . . ." *United States v. Schoon*, 971 F.2d 193, 196 (9th Cir. 1991). To invoke the defense, one must show that (1) they were faced with a choice of evils and chose the lesser evil; (2) they acted to prevent imminent harm; (3) they reasonably anticipated a direct causal relationship between their conduct and the harm to be averted; and (4) they had no legal alternatives to violating the law. *Schoon,* 971 F.2d at 195. Whether necessity exists is a question of fact. *In re Eichorn*, 69 Cal. App. 4th 382, 389 (1998).

Wheatley's conduct does not satisfy the first prong of the test because his actions did not avert harm with certainty and have in fact caused it. The Ninth Circuit has held that "[w]hat all the traditional necessity cases have in common is that the commission of the 'crime' averted the occurrence of an even greater 'harm.' In some sense, the necessity

defense allows us to act as individual legislatures, amending a particular criminal provision or crafting a one-time exception to it, subject to court review, when a real legislature would formally do the same under those circumstances." *Schoon,* 971 F.2d at 196-97. The legislature, however, sought to prevent exactly the kind of conduct that Wheatley engaged in by creating the statute: they sought to protect confidential information from reaching the hands of those who could use it to harm the animal facility. Wheatley's abstention from videotaping could have prevented a potentially greater harm to the facility. It is unclear whether Wheatley's conduct prevented harm, but it did not prevent harm to the animals in the video clip. Further there is no proof that the Company committed any "evils" that Wheatley could prevent, since no investigation was conducted to corroborate his allegations regarding the Company's violations.

The second prong calls for action that prevents imminent harm. "The situation presented to the defendant must be of an emergency nature, threatening physical harm, and lacking an alternative, legal course of action" *People v. Heath*, 207 Cal. App. 3d 892, 900-01 (Cal. Ct. App. 1989). In connection with this prong, the third prong calls for a direct causal relationship between the criminal conduct and the harm to be averted. *Schoon*, 971 F.2d at 197. In the present instance, Wheatley did not face imminent danger: the battery cages would not be immediately changed by his videotaping. Nor would the baby male chicks in the video be spared from the grinder by his actions or the hens be provided with enough space to expand their wings, so there was no direct causal relationship between his conduct and the conduct to be averted. Therefore, by his actions he fails to meet the second and third prongs of the test.

Finally, the fourth prong, is where Wheatley's argument certainly must fail. Wheatley

had plenty of legal alternatives that were not related to videotaping the incident. One obvious alternative was reporting the incidents in question to the authorities for proper investigation. Wheatley's necessity defense also fails as a method of direct civil disobedience. Direct civil disobedience involves protesting the existence of a law or preventing the execution of that law in a specific instance in which particular harm would otherwise follow. *Schoon*, 971 F.2d at 196. The Ninth Circuit has held that '"[t]he defense of necessity does not arise from a 'choice' of several sources of action; it is instead based on a real emergency.' Consequently, 'if there was a reasonable, legal alternative to violating the law,' the defense fails." *United States v. Dorrell*, 758 F.2d 427, 431 (9th Cir. 1985) (citing *United States v. Lewis,* 628 F.2d 1276, 1279 (10th Cir. 1980)). The Court concluded by asserting that those who wish to protest in an unlawful manner are frequently impatient with "less visible and more time-consuming alternatives. Their impatience does not constitute the 'necessity' that the defense of necessity requires." *Dorrell*, 758 F.2d at 431. Not only is there no evidence that Wheatley even knew of the statute, as the district court points out, but the fact that other legal alternatives were present which might address the problems he saw, and even to address the law he may have disagreed with, invalidates his necessity defense in the context of direct civil disobedience. For these reasons Wheatley's necessity defense fails.

III. THE AETA IS A PROPER EXERCISE OF CONGRESSIONAL POWER BECAUSE IT REGULATES ACTIVITIES THAT FALL WITHIN THE SCOPE OF THE COMMERCE CLAUSE AS DEFINED IN *UNITED STATES V. LOPEZ*.

The Animal Enterprise Terrorism Act ("AETA"), 18 U.S.C. § 43, is a permissible exercise of the power granted to Congress under the Commerce Clause. The Commerce Clause grants Congress the power "to regulate commerce . . . among the several states."

U.S. CONST. art. 1, § 8, cl. 3. Under this grant, Congress may (1) "regulate the *use of the channels of interstate commerce*"; (2) "*protect* the instrumentalities of interstate commerce, or persons or *things in interstate commerce*, even though the threat may come only from intrastate activities"; or (3) "regulate those activities . . . that *substantially affect* interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (emphasis added). A challenge to the constitutionality of a federal statute is reviewed de novo. *Doe v. Rumsfeld*, 435 F.3d 980, 984 (9th Cir. 2005).

A law is permissible if it regulates any one of the three *Lopez* categories. The AETA regulates all three. The AETA is violated when a person (1) "*uses . . . any facility of interstate commerce*," (2) "for the purpose of *damaging or interfering* with the operations of an animal enterprise," and (3) "in connection with this purpose" a person takes an affirmative action including "damag[ing] or caus[ing] the loss of any . . . personal property (including animals or records) used by an animal enterprise." 18 U.S.C. §§ 43(a)(1), 43(a)(2)(A) (emphasis added). The AETA thus directly regulates the *use* of the channels of interstate commerce in order to *protect* animal enterprises, which produce goods sold in interstate commerce. The AETA protects these enterprises from actions that could damage or interfere with their operations, thereby preventing actions that could *substantially affect* the production and sale of animal products. Because the AETA fits within at least one of the *Lopez* categories, it is a permissible exercise of the power granted to Congress under the Commerce Clause.

A. The AETA falls within the first *Lopez* category because it regulates the "use" of "any facility of interstate commerce."

The plain language of the AETA places it squarely within the first *Lopez* category. Under *Lopez*, Congress may regulate the use of a facility of interstate commerce. *Lopez*, 514 U.S. at 558. As a threshold matter, the AETA is violated only by a person who "travels in interstate . . . commerce, or *uses* or causes to be used the mail or any facility of interstate . . . commerce." 18 U.S.C. § 43(a). Although the AETA punishes this use only when it is motivated by a specific purpose and when a second affirmative act is taken or attempted, the core of the AETA operates on the *use* of a facility of interstate commerce. Because the AETA regulates the use of a facility of interstate commerce, it fits within the first *Lopez* category, and is a permissible exercise of the power granted to Congress under the Commerce Clause.

1. Because the Ninth Circuit considers the internet a channel of interstate commerce, the AETA properly regulates the use of the internet.

Although the constitutionality of the AETA is settled on its plain language alone, the district court questioned the application of the AETA to the use of the internet generally, and to Facebook and YouTube specifically. The application of the AETA to the use of internet is valid if the internet is a channel of interstate commerce. *Lopez*, 514 U.S. at 558. The Ninth Circuit has explicitly stated "the Internet is an instrumentality of interstate commerce." *United States v. Sutcliffe*, 505 F.3d 944, 952-953 (9th Cir. 2007) (citing *United States v. Trotter*, 478 F.3d 918, 921 (8th Cir. 2007) (per curiam)). See also *United States v. Satterlee*, 286 F. App'x 390, 392 (9th Cir. 2008) (unpublished) (affirming a "conviction for the attempted use of a facility of commerce (here, the

Internet) to induce a minor to engage in criminal activity."). Because the internet is a channel of interstate commerce and because Congress may regulate the use of channels of interstate commerce, the application of the AETA to the use of the internet is proper.

2. The application of the AETA to Facebook and YouTube is proper because they are part of the internet and they function like a traditional channel of interstate commerce.

Although the district court recognized the internet as a channel of interstate commerce, it characterized the application of the AETA to the use of Facebook and YouTube as "a case of first impression," *Wheatley* at 16. Though no case has addressed the use of these sites in the context of the Commerce Clause, the absence of case law speaks more to an implicit assumption than to an unsettled question. When deciding cases involving the use of internet chat rooms or standalone websites, this Court has not subjected the form of communication to a separate Commerce Clause analysis. See *Sutcliffe*, 505 F.3d at 953 (website); *Satterlee*, 286 F. App'x at 392 (chat room)). If a separate analysis was performed, Facebook and YouTube would survive a Commerce Clause challenge. Like the traditional forms of interstate commerce—the mail, the railroad, and the telephone—Facebook and YouTube facilitate the transfer of words, ideas, and sounds across state lines. In fact, the use of these traditional forms of interstate commerce by Congress has declined since Congress members began using Facebook and YouTube to communicate with their constituents. See Matthew Glassman et al., Cong. Research Service, R41066, *Social Networking and Constituent Communications: Member Use of Twitter During a Two-Month Period in the 111th Congress* (2010) *available at* http://www.fas.org/sgp/crs/misc/R41066.pdf (last visited Jan. 25, 2012). Because Facebook and YouTube function like traditional channels of interstate

commerce, and because Congress may regulate the use of channels of interstate commerce, the application of the AETA to Facebook and YouTube is proper.

3. The AETA properly applies to Wheatley's "mere use" of the internet because the AETA does not require a strict nexus between the use of a facility of interstate commerce and actual interstate activity.

Although some statutes require a nexus between the *use* of a facility of interstate commerce and *actual* interstate activity, the regulation of purely intrastate activity is sometimes proper under the Commerce Clause. Compare *United States v. Wright*, 625 F.3d 583, 590 (9th Cir. 2010) (actual interstate activity required) with *Gonzales v. Raich*, 545 U.S. 1 (2005) (intrastate medical marijuana production prohibited by federal law). See also *Wickard v. Filburn*, 317 U.S. 111 (1942) (wheat grown for personal consumption is still in interstate commerce); *United States v. Nader*, 542 F.3d 713 (9th Cir. 2008) (telephone calls not required to cross state lines). The AETA does not impose a strict nexus requirement. An offense is complete when a facility of interstate commerce is used with the requisite intent, and when this intent is connected with an act of harm or an attempted harm. 18 U.S.C. § 43. Because the AETA contemplates only the *use* of the internet, evidence of *actual* interstate activity is not required for conviction. This construction is consistent with the ruling in *Gonzales v. Raich*, proving that the application of the AETA to the intrastate use of the internet is proper.

B. The AETA falls within the second *Lopez* category because the AETA protects animal enterprises and because animal enterprises produce goods sold in interstate commerce.

The AETA also falls under the second prong of the *Lopez* test, which allows Congress to pass laws that "regulate or protect . . . persons or things in interstate

commerce." *Lopez*, 514 U.S. at 558. These laws are proper "even though the threat may come from intrastate activities." *Id*. To violate the AETA, a person must act with the "purpose of damaging or interfering with the operations of an animal enterprise." 18 U.S.C. § 43. Animal enterprises produce animal products, such as food, that are sold in interstate commerce. If successful, actions taken for the purpose of damaging an animal enterprise will actually damage the enterprise. A damaged enterprise may be less able to produce goods for interstate sale. Because the AETA punishes actions that may reduce the availability of animal products for sale, the AETA protects things in interstate commerce. Because the AETA protects things in interstate commerce, it is a permissible exercise of the powers granted to Congress by the Commerce Clause.

In this case, the AETA has more than a theoretical connection to interstate commerce. The AETA, as applied to Wheatley's actions, works to protect the Company from harm. The Company is an entity of interstate commerce. It operates production facilities in three states. It sells its product to the federal government. Even though the eggs sold to the government are consumed within the state of California, it is likely that the Company exports eggs or eggs products to other states. See California Foundation for Agriculture in the Classroom, *Commodity Fact Sheet: Eggs* (2011) ("Of the 215.7 million cases of . . . eggs produced [in California] . . . 6.4 million cases were exported."), *available at* http://www.cfaitc.org/factsheets/pdf/Eggs.pdf (last visited Jan. 25, 2012).

Because the AETA protects an industry that produces goods for interstate commerce from Wheatley's damaging use of the internet, and because the second *Lopez* prong authorizes laws that protect things in commerce, the AETA is a proper exercise of the power granted to Congress under the Commerce Clause.

C. The AETA falls within the third *Lopez* category and satisfies the "Substantial Effects" test because the AETA prohibits behavior that could affect the flow of products into interstate commerce.

Although a finding under any one of the *Lopez* categories is sufficient to establish the constitutionality of the AETA, it is worthwhile consider the third prong of *Lopez*.

The AETA fits within the third *Lopez* category as defined in *United States v. Morrison*. *United States v. Morrison*, 529 U.S. 598, 610-12 (2000). In *Morrison*, the Supreme Court set forth a four prong test to find that an activity "substantially affects" interstate commerce. *Id*. A statute survives this test if it (1) regulates an "economic activity" or has "an evident commercial nexus" and it (2) contains an "express jurisdictional element" to limit its reach. *Id*. at 610-11. If the commercial nexus is not "visible to the naked eye," this deficiency may corrected by (3) congressional findings that "the activity in question substantially affects interstate commerce." *Id*. at 611-12. Although these finding are helpful, they are not required. *Id*. at 612. Finally, (4) the link between the regulated activity and the effect on commerce must not be attenuated. *Id*.

1. The AETA properly applies to Wheatley's use of the internet absent a financial motive because the Commerce Clause may reach "economic activity" that is not explicitly commercial.

Just as the Commerce Clause authorizes the regulation of interstate commerce that is wholly intrastate, it also reaches activities that are not overtly commercial. For example, both *Raich* and *Filburn* upheld federal regulation of the intrastate production of goods that were not intended for commercial sale. Similarly, Congress may require a sex offender to record his address with a national registry, even if he never travels across state lines. *United States v. George*, 625 F.3d 1124, 1129 (9th Cir. 2010). After *Raich*, the Ninth Circuit found that the Commerce Clause allows a statute prohibiting child

pornography to reach a mother who took a single photograph of her daughter with a camera that was manufactured out of state. *United States v. McCalla*, 545 F.3d 750, 753-54 (9th Cir. 2008) (overruling *United States v. McCoy*, 323 F.3d 1114 (9th Cir. 2003).).

Of course, not every intrastate noncommercial activity can be characterized as an "economic activity" amendable to regulation under the first prong of the *Morrison* test. The Supreme Court cautioned that the Commerce Clause should not be applied so broadly that it "obliterate[s] the distinction between what is national and what is local." *Nat'l Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). Accordingly, the Supreme Court invalidated regulations that punished crimes of violence and the possession of a gun. *Morrison*, 529 U.S. 598 (crime); *Lopez* 514 U.S. 549 (guns). The AETA does not regulate a simple crime or possession of a gun. Because the AETA regulates behavior that targets an animal enterprise, and because animal enterprises are largely commercial in nature, the commerical nexus requirement of the first prong of the *Morrison* test is satisfied.

2. The AETA satisfies the second prong of the Morrison test because it contains an express jurisdictional element.

The AETA satisfies the second prong of the Morrison test with the threshold provision that limits the reach of the AETA to people who "travel in" or "use any facility of interstate commerce." 18 U.S.C. § 43. Courts may use this language to prevent the AETA from reaching wholly intrastate behavior that does not involve the use of a facility of interstate commerce. For instance, an activist could participate in a on-site protest of an animal enterprise facility. Similarly, a consumer is free to boycott an enterprise's

products. Because the plain language of the statute provides this express jurisdictional element, the AETA satisfies the second prong of the Morrison test.

3. The AETA satisfies the final two prongs of the Morrison test because the link between the AETA and interstate commerce is evident and not attenuated.

Finally, the AETA satisfies the third and fourth prongs of the *Morrison* test. As explained above, the link between an attempt to damage an animal enterprises and the impact this damage could have on the production of goods for market is fairly clear. The link is far from "[in]visible to the naked eye." *Morrison*, 529 U.S. at 612. Accordingly, the link is not attenuated and the court does not require congressional findings connecting the activity to interstate commerce.

In sum, because the AETA fits within all three categories set forth in *Lopez*, and because it satisfies all four prongs of the *Morrison* test, the AETA is a permissible exercise of the powers granted to Congress under the Commerce Clause. The AETA regulates the use of the internet, which is a facility of interstate commerce. The AETA protects animal enterprises, which produce goods for interstate commerce. The AETA regulates activities that have the potential to substantially affect the flow of animal products into interstate commerce. Thus, the district court was correct when it found the AETA is a proper regulation authorized by the Commerce Clause.

IV. THE DISTRICT COURT ERRED WHEN IT OVERTURNED WHEATLEY'S CONVICTIONS ON COUNTS 2 AND 3 BECAUSE A RATIONAL TRIER OF FACT COULD HAVE FOUND THAT WHEATLEY'S ACTIONS MEET ALL THREE ELEMENTS OF THE CRIME DEFINED BY THE AETA.

The district court erred when it granted Wheatley's motion for acquittal on Counts 2 and 3. The court based this acquittal solely on a tortured interpretation of the AETA's

intent provision. *Wheatley* at 19. The grant of a judgment of acquittal is reviewed de novo. *United States v. Young*, 458 F.3d 998, 1003, n 14 (9th Cir. 2006). "[A]cquittal is improper if, viewing the evidence in the light most favorable to the government, a rational trier of fact could have found the defendant guilty beyond a reasonable doubt." *United States v. Alston*, 974. F.2d 1206, 1210 (9th Cir. 1992). A district court's interpretation and construction of a federal statute is also reviewed de novo. *Doe v. Rumsfeld*, 435 F.3d 980, 984 (9th Cir. 2005).

A. Wheatley's actions satisfy the first two elements of the crime defined by the AETA because Wheatley used the internet to share damaging details about the Company's egg production for the purpose of causing economic loss.

Wheatley violated the first two elements of the AETA when he used the internet to damage the Company. The AETA is violated when a person (1) "uses . . . any facility of interstate commerce," (2) "for the purpose of damaging or interfering with the operations of an animal enterprise," and (3) "in connection with this purpose" a person takes an affirmative action including "damag[ing] or caus[ing] the loss of any . . . personal property (including animals or records) used by an animal enterprise." 18 U.S.C. §§ 43(a)(1), 43(a)(2)(A). Wheatley satisfied the first provision when he used the internet, a facility of interstate commerce, to share sensational videos.

Evidence of Wheatley's intentions, required to prove the second element, abounds. Wheatley posted these videos because he thought the "public ha[d] to see this to believe it." *Wheatley* at 2-3. The practices that Wheatley recorded convinced him that he would "never be able to eat another egg again." *Id*. Wheatley could have deduced that others who viewed the videos would also swear off eggs. This would reduce the demand for

eggs, causing a loss of sales. Lost sales become lost profits, or economic loss. The AETA prohibits the use of the internet for the purpose of causing an animal enterprise to suffer economic loss. 18 U.S.C. §§ 43(a)(2)(A), 43(b)(1)(B). Together, Wheatley's actions and intentions satisfied the first two elements of an offense under the AETA.

Wheatley's comment was not the only evidence of his intent. Already a member of a farmed animal protection organization, Wheatley pursued the job with the Company specifically so he could verify and document conditions he expected might be cruel. *Wheatley* at 2. Further, when Wheatley blogged about the crowding in the battery cages, he did not simply report the facts, he alleged that the Company willfully violated state law. *Id*. at 4. More telling is the fact that Wheatley complained about the battery cage crowding only to his supervisor, his activist cohorts, and the public at large. Had Wheatley shared the video with an enforcement authority, he could have been heralded as a whistleblower. Instead, he chose to present his case to the court of public opinion. Wheatley could have calculated that public backlash would be more meaningful to the Company than an industry slap on the wrist. Because his choice of forums favored the option that maximized the negative impact on the Company, Wheatley was clearly acting with the purpose of damaging an animal enterprise in violation of the AETA.

B. Wheatley's empathy for the chick should not negate his other motives because the plain language of the AETA expressly applies to the theft of an animal.

The district court's acquittal on Counts 2 and 3 hinged solely on the court's erroneous finding that Wheatley removed the chick from the disposal pile purely out of empathy. *Wheatley* at 19. Although Wheatley's theft was inspired after the chick "caught his eye" and he "couldn't just walk away," Wheatley's motives were not pure. *Id.* at 4. Empathy

and anger are not mutually exclusive. Rather, Wheatley's intent to damage the Company likely stems from the empathy he feels for animals. The court's failure to connect the theft and Wheatley's greater purpose resulted in a miscarriage of justice.

The plain language of the AETA supports Wheatley's conviction. Under the AETA, the third and final element of an offense may be satisfied by "caus[ing] the loss of any . . . personal property (including animals or records)." 18 U.S.C. § 43(a)(2)(A). The AETA also contemplates, and punishes, offenses that occur in the absence of economic damage. 18 U.S.C. § 43(b)(1)(A).) Although this misdemeanor punishment may have been designed to punish offenses under 18 U.S.C. § 43(a)(2)(C), the conspiracy and attempt provision, it is likely that the punishment was also included for animal stealing activists. Animals raised in animal enterprises frequently hold little value before they are processed, sold, or spent. Many animals that are "rescued" by activists have even less economic value because they are near death and not marketable. See U.S. Dept. of Justice, Report to Congress on the Extent and Effects of Domestic and International Terrorism in Animal Enterprises (1993), *available at* http://www.the-aps.org/publications/tphys/legacy/1993/issue6/207.pdf (last visited Jan. 25, 2012). Congress recognized that in order to deter the actions of activists who want to simultaneously harm the industry and "rescue" needy animals, it had to punish thefts of sympathetic animals. The court should have recognized that Wheatley's empathy was in fact connected with his intention to harm the Company.

The district court impermissibly narrowed the scope of the AETA when it required a substantial connection between the theft of the chick and Wheatley's intent to harm the Company. Although the action and the intent were intertwined and temporally related, the

court wanted more. This Court, however, has interpreted the phrase "in connection with" to require only a loose connection. In *Madden v. Cowen & Co*., this Court looked for a link between a fraud and a sale that was "more than tangentially related." *Madden*, 576 F.3d 957, 966 (9th Cir. 2009). In *Af-Cap Inc. v. Chevron Overseas (CONGO) Ltd.*, this Court found that "in connection with" and "related to" are largely synonymous. *Af-Cap*, 475 F.3d 1080, 1089 n.1 (9th Cir. 2007). In *Smith v. United States*, the Supreme Court interpreted the phrase broadly when looking for a connection between guns and drug crimes. *Smith*, 508 U.S. 233, 238-39 (1993). When the lower court required more, it hobbled the statute. Because the theft is more than tangentially related to Wheatley's intent, his convictions under Counts 2 and 3 should be restored.

Finally, Wheatley's theft of the chick satisfies the third element of the AETA because it was actual loss. Although the chick was destined for the trash, it had not yet been discarded. Thus, the Company had not yet abandoned it. Accordingly, the act was indeed theft, and Wheatley's convictions were proper under Counts 2 and 3.

CONCLUSION

For the foregoing reasons, the ruling below should be affirmed on Count 1 and reversed on Counts 2 and 3.

Respectfully submitted,

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