CASE NO. 11-11223

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

_____

January 2012

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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 – Hon. Wilma M. Fredericks; Case No. CV 11-30445 WMF (ABCx)

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BRIEF OF APPELLANT / CROSS-RESPONDENT LOUIS WHEATLEY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

Constitutional Provisions

STATEMENT OF THE ISSUES

The following issues are presented to this Court: (1) Whether § 999.2(3) violates the First Amendment on its face or as applied to Wheatley, such that his conviction under that statute should be overturned; (2) Whether Wheatley's conviction under Count 1 should be overturned as a matter of public policy; (3) Whether the district court properly overturned the jury verdict convicting Wheatley under Counts 2 and 3 because 18 U.S.C. § 43 does not apply to him; and (4) Whether 18 U.S.C. § 43 exceeds congressional authority under the Commerce Clause.

STATEMENT OF THE CASE

In February 2011, a federal grand jury sitting in the Central District of California returned a three-count indictment against Louis Wheatley ("Wheatley") for: (1) entering an animal facility and using a video recorder in violation of the Agricultural Products Protection Act, Federal Law § 999.2(3) (APPA); (2) using the Internet as a means of interstate commerce for purposes of damaging or interfering with the operations of *Eggs R Us* ("Company"), in violation of the Animal Enterprise Terrorism Act, 18 U.S.C. § 43 (a)(1)(2006) (AETA); and (3) in connection with such purpose, intentionally causing the loss of the Company's property, in violation of 18 U.S.C. § 43(a)(2)(A). Wheatley moved to dismiss the indictment, asserting constitutional and public policy defenses. The district court denied Wheatley's motion and allowed the case to go to a jury, which convicted him on all three counts. Wheatley then moved for a judgment of acquittal pursuant to FED. R. CRIM. P. 29 ("Rule 29"), asserting all of the arguments previously raised, as well as arguments on the evidence. On August 29, 2011, the district court (Hon. Wilma M. Fredericks) denied the motion as to Count 1, but granted it as to Counts 2 and 3. *U.S. v. Wheatley,* No. CV 11-30445 WMF (C.D. Cal. 2011) at 4.[1] Wheatley appeals the district court's

[1] References to the district court opinion in this brief are indicated by "R." followed by the page number.

denial of his motion for acquittal on Count 1. The U.S. appeals the district court's order vacating Wheatley's conviction on Counts 2 and 3.

STATEMENT OF FACTS

Wheatley is a journalism student who took a job as a "poultry care specialist" with the Company on June 1, 2010 to help pay for college. R.2. Although he had followed the media surrounding the passage of Cal. H&S Code §§ 25990, *et seq*. (2010) ("Prop 2"), Wheatley had never been involved in any animal rights activities. *Id.* Around June 17, Wheatley made a four-minute video of an unidentified employee throwing live chicks into a grinder and posted this video on his Facebook page. R.3. One of his "friends" posted it on YouTube. *Id.* Upon discovering that the Company was confining hens in a manner that prevented them from spreading their wings, Wheatley confronted his supervisor who dismissed his concerns. *Id*. In response, Wheatley made a second video of the battery-caged hens and blogged about the alleged Prop. 2 violation. *Id.* Wheatley also "rescued" a male chick that was on a pile of living and dead chicks at the grinder. R.4. Wheatley was promptly fired and arrested about two weeks after his Facebook post. *Id*. Over 1.2 million people have viewed his first video. R.3.

SUMMARY OF THE ARGUMENT

This Court should overturn Wheatley's conviction on Count 1 because § 999.2(3) is facially overbroad and unconstitutional as applied to Wheatley. Section 999.2(3) is facially overbroad because in most applications, it punishes lawfully obtained, truthful speech on matters of public concern. The APPA is not justified by a state interest of the highest order because private commercial interests are subordinate to the public's interest in obtaining accurate news on food safety and animal welfare. Furthermore, § 999.2(3) cannot be characterized as a valid time, place, or manner restriction because it fails to leave open ample alternatives for communication and is not narrowly tailored, as it is both overbroad and underinclusive. The

APPA is unconstitutional as-applied to Wheatley because it is viewpoint discriminatory and because his speech involved truthful information on matters of public concern.

Wheatley's conviction under Count 1 should also be overturned as a matter of public policy because whistleblowers are implicitly exempt from the APPA. Without a whistleblower exception, anticruelty statutes would become unenforceable. This Court has the authority to read an implied whistleblower exception into the APPA to avoid such absurd results. Furthermore, California law protects private sector employees who expose violations of federal and state statutes. Wheatley's actions in exposing the Company's practices were tantamount to reporting a violation of California's anticruelty laws because he brought mass media attention to the issue.

Finally, this Court lacks jurisdiction to review Counts 2 and 3 because a reversal will violate Wheatley's Double Jeopardy Clause rights as his acquittal was based on the fact that the government failed to prove one of the essential elements of the AETA necessary for each charge - a factual resolution barring the government's appeal. Even assuming jurisdiction is proper, the district court properly ruled that the AETA does not apply to Wheatley. For Count 2, Wheatley's Internet post was not the cause of the Company's damages. Any loss of business attributed to the public's reaction is due to the Company's own practices exposed in the video. Wheatley cannot be convicted of Count 3 because his taking of the chick did not involve a facility of interstate commerce. Moreover, the AETA exceeds Congress' authority under the Commerce Clause as it lacks a legitimate interest and contravenes the spirit of the Constitution. Characterizing a journalist as a terrorist threatens the very foundation upon which our country was built.

ARGUMENT

I. STANDARD OF REVIEW FOR COUNT 1

All of the issues involved in Count 1 (sections II, III, IV) are reviewed *de novo*. The Ninth Circuit reviews a district court's denial of a motion for judgment of acquittal, *U.S. v.*

Anaya-Acosta, 629 F.3d 1091, 1093 (9th Cir. 2011), and a district court's denial of a motion to dismiss an indictment on constitutional grounds, *U.S. v. Gallenardo*, 579 F.3d 1076, 1081 (9th Cir. 2009), *de novo.* This Court also reviews *de novo,* constitutional and statutory interpretation questions. *U.S. v. Hernandez-Orellana*, 539 F.3d 994, 1000 (9th Cir. 2008); *U.S. v. Gomez-Rodriguez*, 96 F.3d 1262, 1264 (9th Cir. 1996).

II. SECTION 999.2(3) VIOLATES THE FIRST AMENDMENT FREE SPEECH CLAUSE ON ITS FACE BECAUSE IT IS SUBSTANTIALLY OVERBROAD.

A. Section 999.2(3) is overbroad because it punishes truthful speech on matters of public concern, which cannot be justified by a state interest of the highest order.

1. The lower court erred in applying rational basis review.

Section 999.2(3) is facially overbroad in violation of the First Amendment because "a substantial number of its applications are unconstitutional." *Wash. State Grange v. Wash. State Repub'n Party*, 552 U.S. 442, 449, n.6 (2008). Facial challenges to specific statutory provisions are treated the same as those made to the entire enactment. *Hoye v. City of Oakland,* 653 F.3d 835, 857 (9th Cir. 2011). Section 999.2(3) is overbroad because in most applications, it punishes the publication of lawfully obtained, truthful speech on matters of public concern, which is constitutionally protected speech absent a state interest of the highest order. *Smith v. Daily Mail Publ'g Co.,* 443 U.S. 97, 103 (1979). The district court therefore erred in applying the forum analysis and rational basis review to determine whether § 999.2(3) violated the First Amendment. R.9. When the government attempts to penalize speech on matters of public concern, the forum in which that speech takes place is immaterial. *Id.* (no forum analysis for government restrictions on private newspaper); *Landmark Commc'n, Inc. v. Virginia*, 435 U.S. 829 (1978) (same); *Bartnicki v. Vopper*, 532 U.S. 514, 528 (2001) (no forum analysis for restrictions on media's use of wiretapping). In *New York Times Co. v. Sullivan,* 376 U.S. 254, 264-65 (1964), the Court did not apply the forum analysis in a libel suit between two private

parties because the newspaper was not government property. The state action was based on the state's attempt to punish protected speech, not on the forum in which the speech occurred:

> Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which . . . impose[s] invalid restrictions on [petitioners] constitutional freedoms of speech and press . . . . The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.

Id. at 265 (citations omitted). The forum analysis is only used to analyze restrictions placed on private speech on government property. *Cornelius v. NAACP*, 473 U.S. 788, 800-802 (1985). Even a "nonpublic forum" is government property. *Id.* at 802. The Company is not a public forum created by the government, as the acceptance of federal funds alone does *not* convert private fora into government property. *Blum v. Yaretsky*, 457 U.S. 991, 1002-12 (1982) (private nursing home not state actor despite extensive payments from state); *Alexander v. Pathfinder, Inc.,* 189 F.3d 735, 740 (8th Cir. 1999) (fact that care facility, a private corporation, received Medicaid funds did not convert it into state actor); *Langdon v. Google, Inc.,* 474 F.Supp.2d 622, 631 (D.Del. 2007) (argument that "Google works with . . . public universities and that this government entwinement with a private entity results in state action," was meritless). Because § 999.2(3) regulates speech on private property, the forum analysis is simply inapplicable.

2. The APPA punishes truthful speech on matters of public concern.

Section 999.2(3), which forbids *inter alia,* the publication of accurate depictions of animal cruelty on the Internet, is facially unconstitutional because it categorically bans the publication of truthful information on matters of public concern. Section 999.2(3) determines conclusively and in every case that the privacy interests of an animal facility outweigh the public's interest in receiving truthful information. *WXYZ, Inc. v. Hand*, 658 F.2d 420, 427 (6th Cir. 1981) (statute unconstitutional insofar as it determines conclusively and in every case that privacy interests of rape victim outweigh public need to know victim's identity). But the public's

interest in knowing whether a facility is engaged in animal abuse cannot be outweighed in every case by privacy interests. Indeed, government "action to punish the publication of truthful information seldom can satisfy constitutional standards." *Smith,* 443 U.S. at 102. The Supreme Court has repeatedly held that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order." *Id.* at 103. See also *Florida Star v. B.J.F.,* 491 U.S. 524, 541 (1989) (no liability for publishing name of rape victim).

Section 999.2(3) flips the constitutional presumption that truthful speech on matters of public concern is protected, on its head. Pursuant to *Smith* and its progeny, the publication of (1) lawfully obtained; (2) truthful information; (3) on matters of public concern; (4) may not be punished absent a state interest of the highest order. *Smith,* 443 U.S. at 103. Because § 999.2(3) punishes the publication of lawfully obtained truthful information on matters of public concern, *infra*, the statute must be justified by a state interest of the *highest order,* not one that is merely "reasonable in light of the purpose of the statute." R.9.

First, the APPA clearly restricts speech on matters of public concern. Many courts have recognized the public's interest in the humane treatment of animals. See, e.g., *U.S. v. Stevens,* 130 S.Ct. 1577, 1585 (2010) ("the prohibition of animal cruelty itself has a long history in American law."); *Huntingdon Life Sci., Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.,* 129 Cal. App. 4th 1228, 1246 (2005) ("Animal testing is an area of widespread public concern."); *Farm Sanctuary, Inc. v. Dep't of Food & Agric.,* 63 Cal. App. 4th 495, 504 (1998) (statute requiring that animals be treated humanely involves an issue of public concern); *Alexanian v. Brown,* Slip Copy, 2009 WL 2356443, 7 (W.D. La. 2009) ("methods of euthanasia . . . are matters of public concern"); *Ouderkirk v. PETA,* 2007 WL 1035093, 19 (E.D. Mich., 2007)

("practices of raising and destroying animals" is "of public concern."); *McGill v. Parker,* 582 N.Y.S. 2d 91, 96 (1992) ("treatment of carriage horses has been a matter of public concern"); *Safarets, Inc. v. Gannett Co., Inc.,* 361 N.Y.S. 2d 276, 280 (1974) (humane treatment of animals is public concern). Food safety is also a matter of public concern. *Steaks Unlimited, Inc. v. Deaner,* 468 F.Supp. 779, 784 (W.D. Pa. 1979) ("large-scale sale of meat to the public is a matter of legitimate public concern."); *Pace v. McGrath,* 378 F.Supp. 140 (D. Md. 1974) (picture of restaurant and announcement that persons had become ill after eating its crabs was public concern); *Lanning v. Morris Mobile Meals, Inc.,* 308 Ill.App.3d 490, 493 (1999) (compliance with food health codes is "a public concern of the highest magnitude"). Hence, images of animal cruelty and food handling, proscribed by § 999.2(3), are "matters of public concern."

Second, § 999.2(3) punishes otherwise lawfully obtained speech. The APPA restricts the ability to lawfully gather news about animal cruelty, through photograph or film, and further restricts the ability to publish such information on the Internet or through other channels of communication. There are protected "First Amendment interests in newsgathering," *In re Shain*, 978 F.2d 850, 855 (4th Cir. 1992) (Wilkinson J., concurring), including an "undoubted right to gather news 'from any source by means within the law,'" *Houchins v. KQED, Inc.,* 438 U.S. 1, 11 (1978) (citation omitted), and a range of "conduct related to the . . . dissemination of information." *Glik v. Cunniffe,* 655 F.3d 78, 82 (1st Cir. 2011). See also, *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) ("First Amendment right to film matters of public interest"); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) (First Amendment "prohibit[s] government from limiting the stock of information from which members of the public may draw"). The right to gather and publish news is not limited to reporters. *Glik,* 655 F.3d at 83. Rather, "the public's right of access to information is coextensive with that of the

press." *Id.* (citations omitted). See *Cirelli v. Town of Johnston Sch. Dist.,* 897 F.Supp. 663 (D.R.I. 1995) (teacher had First Amendment right to videotape hazardous working conditions at school). As the court observed in *Glik*, "[t]he proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders," and news stories are "just as likely to be broken by a blogger . . . as a reporter." 655 F.3d at 84.

Section 999.2(3) is overbroad because it makes non-tortious newsgathering activities criminal, which seriously interferes with the First Amendment right to gather news on animal welfare. The APPA not only punishes those who are in fact trespassers, or who use unreasonably deceptive means to enter the property, but also those who enter the property lawfully, such as employees, tourists, and other invitees or licensees. As such, it clearly punishes speech from those who otherwise lawfully obtained it. Although the use of hidden cameras has given rise to claims of invasion of privacy and trespass where the reporter obtains access to a business or home by assuming a false identity, such claims are tested by the traditional criteria of privacy law and are not automatically illegal. *Medical Lab. Mgmt. Consultants v. ABC, Inc.,* 306 F.3d 806 (9th Cir. 2002). If the surreptitious recording discloses facts that are not highly offensive and are of legitimate public concern, there is no tort claim. *Id.* at 819. See also, *Comeaux v. Brown & Williamson Tobacco Co*., 915 F.2d 1264 (9th Cir. 1990) (deceiving a credit bureau to obtain credit reports on employee was not unreasonably intrusive for tort liability). Thus, even news obtained through fraudulent means can be considered "lawful" under the First Amendment. See also, *New York Times Co. v. U.S.*, 403 U.S. 713, 754 (1971) (upheld right to publish information of public concern obtained from documents stolen by a third party). Speech that does not even give rise to tort liability certainly should not give rise to criminal liability because the threat of

criminal punishment "poses greater First Amendment concerns than those implicated by . . . civil regulation." *Reno v. ACLU,* 521 U.S. 844, 871-72 (1997).

Moreover, if the public interest is sufficiently important, the means of obtaining the news need not be legal. Although the Supreme Court in *Smith, Florida Star,* and *Cox* did not settle the issue of whether the government "may ever punish" information acquired *unlawfully, Florida Star,* 491 U.S. at 535, or "whether truthful publications may ever be subjected to civil or criminal liability," *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975), later federal cases have suggested that truthful publications on matters *unlawfully* obtained may be protected as well. In *Jean v. Mass. State Police,* 492 F.3d 24, 25 (1st Cir. 2007), a political activist posted on an Internet site, an illegally recorded videotape of a warrantless arrest. In the activists' First Amendment action for a preliminary injunction, the district court enjoined the police from interfering with her posting via threats to enforce the Massachusetts wiretap statute. *Id.* The First Circuit affirmed, finding that the state had only a weak interest in protecting the communication, which was outweighed by the public's interest in permitting publication of truthful information of public concern. *Id.* at 30-31. Although the court assumed that her conduct was "unlawful," the court held that "Jean's publication of the recording on her website" was entitled to "First Amendment protection," and that her conduct could not be criminalized. *Id.* at 31- 33.

In *Bartnicki*, the Supreme Court considered "what degree of protection, if any, the First Amendment provides to speech that discloses the contents of an illegally intercepted communication." 532 U.S. at 517. The Court assumed that the defendants knew the interception was "unlawful." *Id.* at 525. Hence, the plaintiffs would have been entitled to recover damages under the wiretapping statute unless it violated the First Amendment. *Id.* After surveying the many cases in which it had protected truthful speech on matters of public concern, the Court held

that "privacy concerns give way when balanced against the interest in publishing matters of public importance." *Id.* at 534-35.

A defendant who lawfully (i.e. without trespass or invasion of privacy) gathers truthful news should not be *criminally* penalized, as he would under § 999.2(3). Without "protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). Section 999.2(3) undermines a free press because "access to newsworthy facts is denied." *Watson v. Cronin*, 384 F. Supp. 652, 657 (D. Colo. 1974).

Third, § 999.2(3) is substantially overbroad because it punishes truthful speech without a need to satisfy *Sullivan's* First Amendment requirements. 376 U.S. at 271. Pursuant to *Sullivan*, truth is a defense to punishing speech on matters of public concern. *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). Furthermore, a statement that is true cannot support a claim for business disparagement. *Texas Beef Group v. Winfrey*, 201 F.3d 680, 689-90 (5th Cir. 2000). To punish truthful speech, the speech must *inter alia,* invade a cognizable privacy interest or amount to a defamatory falsehood. *Bartnicki*, 532 U.S. at 532-34. In *Sullivan*, the Supreme Court famously recognized that "debate on public issues should be uninhibited, robust, and wide-open," and held that neither factual error nor defamatory content sufficed to remove the First Amendment shield from criticism of official conduct. 376 U.S. at 270. Section 999.2(3) punishes truthful speech by making it a crime to publish information obtained by "camera [or] video recorder" about an animal facility without the consent of the owner. Because an accurate photo cannot be a defamatory falsehood, the statute unconstitutionally punishes truthful speech.

Significantly, the First Amendment places the burden of proving falsity on the plaintiff, not the speaker, *Sullivan,* 376 U.S. at 271, and even protects speech that is demonstrably false, "to protect speech that matters." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). See, *U.S.*

v. Alvarez, 617 F.3d 1198, 1200 (9th Cir. 2010) ("regulations of false factual speech must . . . be subjected to strict scrutiny."), *cert. granted,* 132 S. Ct. 457 (U.S. Oct. 17, 2011). The APPA unconstitutionally eliminates this burden of proof by making the publication of truthful speech presumptively criminal.

A factually accurate public disclosure of a newsworthy event cannot constitute an invasion of privacy either. *Cox*, 420 U.S. at 490; *Capra v. Thoroughbred Racing Ass'n*, 787 F.2d 463 (9th Cir. 1986). Known as the newsworthiness defense, a plaintiff cannot recover for invasion of privacy where the publication involves a matter of public concern. In determining newsworthiness, this Court considers the (1) social value of the facts published, (2) the depth of the intrusion into private affairs, and (3) the extent to which the individual acceded to a position of public notoriety. *Id.* at 464. Section 999.2(3) punishes speech with great social value because animal welfare is a matter of significant public concern, *supra.*

As to the second factor, the speech prohibited by § 999.2(3) will rarely be intrusive enough to support a privacy claim because the APPA most often applies to speech involving businesses, § 999.1(1)-(2), not private affairs. When free speech rights are pitted against a business' alleged right to privacy, the former usually trumps the latter. As this Court explained, "[p]rivacy is personal to individuals and does not encompass any corporate interest." *Medical Lab.*, 306 F.3d at 814. In *Medical Lab.,* this Court held that there was no privacy tort when ABC reporters with a hidden camera obtained an interview with the head of a medical pap smear testing lab by posing as persons interested in going into the business. The Court emphasized that the "covert videotaping of a business conversation among strangers in business offices does not rise to the level of an exceptional prying into another's private affairs." *Id.* at 819. See also, *Wilkins v. NBC, Inc.,* 71 Cal. App. 4th 1066, 1078 (1999) (no privacy recovery where undercover

reporters posed as potential investors and videotaped conversation about business matters with plaintiff).

Likewise, in *Food Lion, Inc. v. Capital Cities/ABC, Inc.,* 194 F.3d 505, 509-12 (4th Cir. 1999) ABC reporters obtained employment at a supermarket chain to conduct an undercover investigation about its unwholesome food handling practices. The court held that the supermarket could not recover damages resulting from ABC's broadcast showing secret footage of those practices, including, "grinding expired beef with fresh beef" and statements by "employees alleging even more serious mishandling of meat," even though the reporters obtained the footage by misrepresentation. *Id.* at 511. Since § 999.2(3) primarily targets speech relating to commercial activity, the public's interest will usually trump the interests of an animal facility.[2] *Cf. Katz v. U.S.,* 389 U.S. 347, 351 (1967) ("the Fourth Amendment protects people, not places."); *Lewis v. U.S.,* 385 U.S. 206, 211 (1966) (where invasion is "into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on . . . the street.")

3. Section 999.2(3) is not justified by a state interest of the highest order.

Finally, § 999.2(3) is not justified by a state interest of the highest order because the privacy interests of animal facilities are far less compelling than the public's interest in obtaining accurate information about their operations. In evaluating government "action to punish the publication of truthful information," *Smith,* 443 U.S. at 102, the foremost concern is the interest of the public. *CBS, Inc. v. Democratic Nat'l Comm.,* 412 U.S. 94, 122 (1973). The interest must be more than protecting privacy. *Butterworth v. Smith,* 494 U.S. 624 (1990) (interest in preserving grand jury secrecy was insufficient to warrant proscription of truthful speech on

[2] The third factor on notoriety is only relevant when the publicized facts are about a person.

matters of public concern); *Florida Star,* 491 U.S. 524 (interest in protecting privacy of sexual assault victims, while highly significant, was insufficient to impose liability on press). The fear that people would make bad decisions if given truthful information cannot justify a basis for silencing it either. *Sorrell v. IMS Health Inc*., 131 S. Ct. 2653, 2670 (2011); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Indeed, the First Amendment directs courts to be "skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 503 (1996). Thus, the APPA is not justified by a state interest of the highest order.

B. Section 999.2(3) is not a valid time, place, or manner restriction because it is not narrowly tailored and does not leave open ample alternatives for communication.

Facial "overbreadth claims have also been entertained where statutes, by their terms, purport to regulate the time, place, and manner of expressive or communicative conduct." *Broadrick v. Oklahoma*, 413 U.S. 601, 612-13 (1973) (listing cases). Generally, the government may impose reasonable restrictions on the time, place, and manner of protected speech, if the restrictions are content-neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication of the information. *44 Liquormart,* 517 U.S. at 501. Thus, even assuming § 999.2(3) is content-neutral, it is not a valid restriction because it is not narrowly tailored and fails to leave open ample alternatives for communication.

First, § 999.2(3) does not leave open ample alternatives for communication because it forecloses the most widely used medium to convey information – the Internet. "[A]n alternative is not ample if the speaker is not permitted to reach the intended audience," *Berger v. City of Seattle,* 569 F.3d 1029, 1049 (9th Cir. 2009) (internal quotation omitted), or when it takes significantly more time to reach the same audience. *Horina v. City of Granite*, 538 F.3d 624, 636 (7th Cir. 2008). While § 999.2(3) seemingly permits a person to take a photo of a facility,

without consent, and distribute it to a group of people by hand, that person may not post it on Facebook, e-mail it to a family member, or even mail it since each of these involves a facility of interstate commerce. § 999.2. In today's world, it may be impossible for someone to reach their intended audience without using one of the above methods of communication.

Second, § 999.2(3) is not narrowly tailored because it is grossly overbroad. A statute that is "substantially overbroad . . . cannot satisfy the requirement that the restriction be 'narrowly tailored.'" *United Bhd. of Carpenters v. N.L.R.B.,* 540 F.3d 957, 969 (9th Cir. 2008). The APPA is overbroad because it punishes the speech of anyone who uses a recording device on property containing animals that are used for *inter alia,* education, testing, or research. § 999.1(1). Thus, a person cannot post a picture on Facebook of Columbia University or any other school that conducts research on animals, without consent.[3] Moreover, the image need not be of animals. An innocuous image of a tree, building, or person is enough to trigger § 999.2(3). The numbers of facilities that contain animals used for such purposes are so expansive that it would be impossible to list them all. Suffice it to say that punishing the publication of a photo taken on any premise, without consent, that contains even just one animal used for such purposes, chills far more speech than necessary, making the APPA grossly overbroad.[4]

Furthermore, § 999.2(3) is not narrowly tailored because it is underinclusive as it punishes truthful speech but not equally damaging, non-truthful speech. Underinclusiveness suggests that a law is not narrowly tailored. *U.S. v. Friday*, 525 F.3d 938, 958 (10th Cir. 2008). The goal of APPA is to protect animal facilities from losing business and property. R.10. But § 999.2(3) only punishes factual speech taken from recording devices. It does not prohibit for example, exaggerated, defamatory, but hyperbolic depictions of animal facilities, which could be

[3] Because educational purposes are undefined, a family pet could be considered educational to children.
[4] Although the APPA is facially overbroad, and poorly drafted for that reason, it is applied in a much more discriminating fashion, punishing only speakers who condemn animal facilities, *infra* at III-B.

equally, if not more, damaging than an accurate photo. See, *Hustler, Inc. v. Falwell*, 485 U.S. 46, 47-48 (1988) (reversing award of $150,000 from parody portraying Jerry Falwell and his mother as drunk and immoral because it was protected by First Amendment). The definitions, while overbroad, are also underinclusive. "Animal facility" does not include entities that use animals for entertainment. § 999.1(1). While research labs, farms, and educational institutions enjoy extra privacy rights under § 999.2(3), zoos, circuses, and production studios do not. By protecting some businesses and not others, § 999.2(3) is underinclusive and thus, not narrowly tailored.

C. Alternatively, § 999.2(3) violates the First Amendment because it amounts to an unconstitutional prior restraint.

If the Court finds that the Company is a governmental forum, albeit a limited or designated one, based on its receipt of federal funds, then § 999.2(3) amounts to an unconstitutional prior restraint on speech because it requires consent before gathering or publishing news.[5] A statute that gives a licensing officer the latitude to discriminate on the basis of content or viewpoint is a prior restraint. *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958). Section 999.2(3) is a prior restraint because it places unfettered discretion in the hands of animal facility owners to deny access to reporters seeking newsworthy information. Such discretion is unconstitutional because under § 999.2, an owner (a government actor) can simply deny access based on the speaker's viewpoint. *Id.* By forbidding communications before they occur, a prior restraint creates an "irreversible impact," which is particularly acute "when the restraint falls upon the communication of news." *Shadid v. Jackson*, 521 F. Supp. 85, 86 (E.D. Tex. 1981).

For a prior restraint to be valid, it must be precisely tailored and be the least restrictive means to avert the anticipated evil. *Carroll v. President and Com'rs of Princess Anne,* 393 U.S. 175, 184 (1968). A prior restraint that is premised merely on protecting business interests "fails

[5] As a governmental forum, the government would also be considered a facility owner, as it is governmental property upon which such speech is regulated.

first amendment scrutiny." *Bailey v. Sys. Innovation, Inc.,* 852 F.2d 93, 99 (3rd Cir. 1988). Because § 999.2(3) seeks only to protect the business interests of an animal facility, it cannot be justified under the First Amendment. However § 999.2(3) is characterized, it must withstand strict scrutiny. In *Smith* the Court explained, "[w]hether we view the statute as a prior restraint or as a penal sanction for publishing lawfully obtained, truthful information is not dispositive because even the latter action requires the highest form of state interest." 443 U.S. at 101-02.

III. WHEATLEY'S CONVICTION UNDER COUNT 1 SHOULD BE OVERTURNED BECAUSE § 999.2(3) IS UNCONSTITUTIONAL AS APPLIED TO WHEATLEY.

A. Section 999.2(3) is unconstitutional as applied to Wheatley because his video contained lawfully obtained, truthful speech on matters of public concern.

Section 999.2(3) is unconstitutional as applied to Wheatley because he published truthful information on animal abuse - a matter of public concern - which he obtained through non-tortious means. Since Wheatley's video displayed truthful images, it is not a defamatory falsehood under *Sullivan* and because it depicted non-personal facts about a business, it cannot be punished as an invasion of privacy either. As an employee, Wheatley did not trespass or use fraudulent means to obtain the information. Thus, he cannot be punished for publishing his video absent a state interest of the highest order. Wheatley's conviction is not so justified because the public's interest in viewing his video outweighs the Company's business interests*, supra.*

Without § 999.2(3), Wheatley's speech would otherwise be protected. Videography that has a communicative purpose typically enjoys First Amendment protection. *Gilles v. Davis,* 427 F.3d 197, 212 n.14 (3rd Cir. 2005). The First Amendment also protects speech on the Internet, *Reno v. ACLU*, 521 U.S. 844, 885 (1997), including postings to Facebook and MySpace. *Evans v. Bayer*, 684 F. Supp. 2d 1365 (S.D. Fla. 2010) (Facebook postings expressing dislike for teacher was protected); *Layshock v. Hermitage Sch. Dist.,* 650 F.3d 205 (3rd Cir. 2011)

(student's fake profile of principal on MySpace was protected). The First Amendment protects "internet communications disclosing personal information about others — even when that speech may . . . expose them to unwanted attention." *U.S. v. White*, 779 F.Supp.2d 775, 804 (N.D. Ill. 2011). For instance, a "distasteful and repugnant" "epic" published by church members on its website several weeks after a marine's funeral, stating that the marine's father "raised him for the devil" and taught him "to commit adultery" was entitled to First Amendment protection, even though it caused the family emotional hardship. *Snyder v. Phelps*, 580 F.3d 206, 225-26 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011). Since Wheatley's speech was not directed at any individual and depicted matters of public concern, his speech should also be constitutionally protected.

B. Section 999.2(3) is unconstitutional as applied to Wheatley because it impermissibly discriminates against him on the basis of his viewpoint.

Section 999.2(3) is unconstitutional as applied to Wheatley because it is only enforced against speakers critical of animal facilities. Viewpoint discrimination is presumed unconstitutional even where no governmental forum is created. *Rosenberger v. Rector,* 515 U.S. 819, 828-29 (1995). When "the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.* at 829. Government "regulation may not favor one speaker over another." *Id.* at 828. Thus when a restriction favors certain speakers over others, it violates the First Amendment. *Id.* at 829.

Although this Court calls non-facial challenges to viewpoint discriminatory regulations "selective enforcement" challenges instead of "as-applied" challenges, "[a]ny difference between these two approaches is . . . semantic rather than substantive." *Hoye*, 653 F.3d at 855. Whatever the label, "[c]ourts must be willing to entertain the possibility that content-neutral enactments are enforced in a content-discriminatory manner. If they were not, the First Amendment's guarantees

would risk becoming an empty formality." *Id.* at 854. Under both approaches, it must be shown that discriminatory enforcement is the result of an intentional policy. *Id.* at 855.

Wheatley's conviction under § 999.2(3) is a result of Congress' intent to punish exclusively, speakers critical of animal facilities. Although the text of § 999.2(3) appears to apply to *any person*, the title of the section makes clear that it applies only where there is ensuing "damage or destruction" to an animal facility. In other words, the statute only punishes speakers who "damage" an animal facility with their speech. A provision's title provides the first clue in interpreting a statute's meaning, *Cybernetic Services, Inc*., 252 F.3d 1039, 1050 (9th Cir. 2001) and is an appropriate source from which to discern legislative intent. *U.S. v. Nader*, 542 F.3d 713, 717 (9th Cir. 2008). Because APPA's title reveals Congress' intent to discriminate against certain speakers, namely, those who damage an animal facility by their speech, the statute is viewpoint discriminatory. And since Wheatley's speech was unfavorable to an animal facility, the statute is unconstitutional as applied to him. Indeed, it is unlikely that a person would be prosecuted under § 999.2(3) for posting a favorable image of an animal facility.[6] In the ironical words of Anatole France "[t]he law, in its majestic equality, forbids the rich as well as the poor to sleep under the bridges, to beg in the streets, and to steal bread." *Le Lys Rouge,* ch. VII (1894).

IV. COUNT 1 SHOULD BE OVERTURNED AS A MATTER OF PUBLIC POLICY BECAUSE WHEATLEY ENGAGED IN ESSENTIAL WHISTLEBLOWER ACTIVITY.

A. Whistleblowers such as Wheatley are implicitly exempted from the APPA because they are necessary to enforce other federal and state statutes.

This Court should overturn Wheatley's conviction under Count 1 because whistleblowers are implicitly exempted from APPA's proscriptions as a matter of public policy. Wheatley's actions in exposing the Company's practices were tantamount to reporting a violation of

[6] For instance, an artist would probably not be prosecuted for taking a photo of a pasture of cattle, without consent, if used for conservation efforts. See, e.g., www.baywoodartists.org.

California's animal cruelty laws. CAL. PENAL CODE §§ 597(b) &597t; Prop 2; R.6. After the Company failed to respond to Wheatley's concerns regarding the violations, Wheatley took the next logical step by posting evidence of the abuse on Facebook. R.3. In so doing, he successfully informed the authorities of the violations by bringing mass media attention to the issue. *Id.*

That the APPA does not contain a specific whistleblower exception does not mean that Congress intentionally omitted one or that this Court is without the authority to create one. To the contrary, Congress implicitly intended to exempt whistleblowers such as Wheatley from the APPA because without an exception, other federal statutes would become unenforceable. It is proper for a court to imply exceptions in a statute to obviate a construction that would be unjust, oppressive, unreasonable, or absurd. *U.S. v. Rutherford*, 442 U.S. 544, 552 (1979); *Helvering v. Hammell*, 311 U.S. 504, 510-511 (1941). Whistleblowers are necessary to ensure "compliance with anti-cruelty laws and maintain the integrity of the food supply." Michael Hill, *The Animal Enterprise Terrorism Act: The Need for a Whistleblower Exception*, 61 CASE W. RES. L. REV. 651, 658 (2010). The Animal Welfare Act (AWA) is notoriously underenforced, in part because the USDA, the body charged with enforcement, is understaffed and underfunded. *Id.* at 661. Because there is no citizen-suit provision, the public is forced to rely on USDA's grossly inadequate inspection process. *Id.* Indeed, the House Judiciary Committee expressed concerns that a similar statute could be used to prosecute whistleblowers. H.R. REP. NO. 102-498(II), at 4 (1992), *reprinted* in 1992 U.S.C.C.A.N. 816 (referring to the Animal Enterprise Protection Act).

Recognizing this strong need for whistleblower protection, the Secretary of Agriculture created a regulation under the AWA that specifically prohibits retaliation against employees who report violations of the Act. 9 C.F.R. § 2.32(c)(4) (1994). Whistleblowers are implicitly exempt from the APPA because otherwise, the AWA exception would be meaningless. Since the AWA

protects employees who report violations without limiting the type of evidence used, the APPA is irreconcilable with the AWA without an exception.[7] And since photographic evidence is far more probative than verbal, potentially hearsay, evidence, whistleblowers should not be limited by § 999.2(3). Significantly, without offering tangible proof, a whistleblower is less likely to be protected from retaliatory termination. See *Morgan v. Regents of Univ. Cal*., 105 Cal. Rptr. 2d 652, 666 (2000) (statements by staff that employee's filing a racial discrimination claim was detrimental to his being rehired were hearsay and not party admission).

Even if Congress did not intend to create an exception to the APPA, this Court has the authority to imply one based on public policy, in order avoid such absurd results. *Rutherford,* 442 U.S. at 552; *U.S. v. Hughes Aircraft Co.*, 243 F.3d 1181, 1187 (9th Cir. 2001). Although the court declined to create a private *cause of action* for whistleblowers in *Moor-Jankowski v. Board of Trustees of NYU,* 1998 WL 474084, 10 (S.D. N.Y. 1998) (unreported decision) it sought neither "to encourage retaliation by employers against employees who 'blow the whistle' on AWA violations [n]or to discourage employees who have knowledge of such violations from coming forward." The court suggested that, "without a whistleblower provision, the statute lacks an effective means by which to achieve its goals." Note, *Silencing the Whistleblower: The Gap Between Federal and State Retaliatory Discharge Laws,* 85 IOWA L. REV. 663, 686-687 (2000). Unlike the plaintiff in *Moor-Jankowski,* Wheatley is not seeking to institute a private *cause of action* against the Company. Instead, he simply urges the Court not to convict him for exposing the Company's illegal activity. Convicting Wheatley would certainly discourage other employees who have knowledge of such violations from coming forward. To avoid such a chilling effect on whistleblowers, an exception to the APPA must be implied.

[7] An employee would be limited to offering a verbal rendition of the violation since e-mailing or mailing a photo could be punishable by § 999.2(3). The only way to show the photograph would be to physically hand it in. But even then, there is no guarantee that the photo will not be leaked onto the Internet.

B. California's strong public policy in protecting whistleblowers and in preventing animal cruelty support overturning Wheatley's conviction.

Finally, California law protects whistleblowers from retaliation, thereby reflecting a strong public policy in favor of exempting whistleblowers like Wheatley from criminal liability. The district court erred in concluding that California does not protect whistleblowers who report violations of animal welfare laws. R.13. The California Government and Labor Codes offer whistleblower protection to public and private employees, respectively. CAL. GOV'T. CODE §§ 8547-8547.12, 53296-53299 (public sector); CAL. LAB. CODE § 1102.5(b) (private sector).

To establish a prima facie case for retaliation under the Code, an employee must show that he (1) engaged in protected activity, (2) was thereafter subjected to adverse employment action by his employer, and (3) that there was a causal link between the protected activity and employment action. *Love v. Motion Indus., Inc.*, 309 F.Supp.2d 1128, 1134 (N.D. Cal. 2004). The Company terminated Wheatley after he engaged in protected First Amendment activity. R.4. Hence, he could potentially have a prima facie case *against* the Company, as California is one of the few states that protect employees from termination stemming from lawful "conduct occurring during nonworking hours away from the employer's premises." CAL. LAB. CODE §§ 96(k) - 98.6(a) (West 2003).[8] However, Wheatley is simply seeking whistleblower protection from criminal liability. Because the whistleblower laws protect against action that is likely to materially affect an employee's opportunity for career advancement, *Patten v. Grant Joint Union High Sch. Dist*., 37 Cal. Rptr. 3d 113, 119 (2005), Wheatley's conviction should be overturned as a matter of public policy as a criminal record is likely to affect his career opportunities.

That Wheatley reported the violation on Facebook rather than directly to law enforcement does not change this conclusion. Even if Wheatley is not directly protected by the Code,

[8] Wheatley was not at work when he posted the video that ultimately led to his termination. R.3.

California's "broad public policy interest in encouraging workplace whistle-blowers to report unlawful acts without fearing retaliation" would be undermined if people like him were criminally prosecuted simply because they chose to inform the public of the violation first. *Green v. Ralee Eng'g Co.,* 19 Cal. 4th 66, 77 (1998). See, *Passaic Valley Sewerage Comm'rs v. U.S. Dept. of Labor*, 992 F.2d 474, 478 (3rd Cir. 1993) (whistleblower protection in CWA would be "hollow if it were restricted to the point of filing a formal complaint with the appropriate external law enforcement agency"). Indeed, a public policy is violated by retaliating against an employee for an *internal* disclosure of "illegal, unethical or unsafe practices" which affect the public at large. *Collier v. Superior Ct. of LA Cnty.*, 228 Cal. App. 3d 1117, 1123 (1991) (reporting to management that executives were violating bribery laws); *Green,* 19 Cal. 4th at 85 (complaining internally that company was shipping defective parts). In *Green* the court found that even though the Code did not protect "plaintiff, who reported his suspicions directly to his employer," it nonetheless "show[ed] the Legislature's interest in encouraging employees to report workplace activity that may violate important public policies." *Id.* at 77. The policy behind the Code was sufficient to protect the employee who fell outside the statutory requirements. *Id.* Thus, Wheatley's failure to initially disclose the violations to outside authorities is not fatal to his public policy defense.

Moreover, that the State has not yet filed charges against the Company does not diminish California's public policy interest in protecting Wheatley because under the Labor Code, an "employee need not prove an actual violation of law." *Id.* at 87. It suffices if he was fired for "reporting his 'reasonably based suspicions' of illegal activity." *Id.* "Any other conclusion would open the door to employee intimidation and chill the exercise of statutory rights." *Barbosa v. Impco Tech., Inc*., 179 Cal. App. 4th 1116, 1123 (2009).

California also recognizes a common law tort action for termination in violation of public policy. *Green,* 19 Cal. 4th at 71. Public policy prohibits the retaliatory discharge of employees for blowing the whistle in the public interest. *Colores v. Bd. of Trustees,* 130 Cal. Rptr. 2d 347, 361 (2003). Wheatley reported what he reasonably believed were violations of California's anticruelty statutes for the public's benefit. R.3. California's public interest in preventing animal cruelty is strongly reflected in its statutes. "'California has one of the nation's toughest anticruelty laws.'" *H.S.U.S. v. State Bd. of Equalization*, 152 Cal. App. 4th 349, 359 (2007) (citation omitted). These laws rely on whistleblowers because, like the AWA, they do not provide a private right of action. *A.L.D.F. v. Mendes*, 72 Cal. Rptr. 3d 553, 556-57 (2008). The Supreme Court recently commented on the difficulty of enforcing state animal cruelty laws in *Stevens,* where it explained that while "[t]he acts depicted in crush videos are . . . prohibited by the animal cruelty laws enacted by all 50 States," the "videos rarely disclose the participants' identities, inhibiting prosecution of the underlying conduct." 130 S.Ct. at 1583. Thus, Wheatley's video capturing the employee "laughing" while he was "intentionally squashing some of the living chicks" facilitated in the enforcement of California's anticruelty laws. R.3. Likewise, reporting violations of health and safety laws are clearly for the public's benefit. *Hentzel v. Singer Co.* 138 Cal. App. 3d 290, 298 (1982) (public policy claim for employee discharged after complaining about unsafe conditions). Because Prop. 2 is a "health and safety" law, Wheatley's reporting of a potential violation of it was clearly for the public's benefit.

In view of the overwhelming necessity for a whistleblower exception, Wheatley's conviction should be overturned as a matter of public policy. Wheatley recorded images of potentially illegal animal cruelty towards a protected class of animals, and acted in the public's interest by publishing this evidence. Thus, he should not be prosecuted under the APPA.

V. STANDARD OF REVIEW FOR COUNTS 2 AND 3

This Court lacks jurisdiction to review the district court's judgment acquitting Wheatley of Counts 2 and 3 because a successful appeal on those issues would violate Wheatley's Double Jeopardy Clause rights. U.S. CONST. amend. V. "Unless barred by the Double Jeopardy Clause, appeals by the Government from the judgments of acquittal entered by the District Court under Rule 29(c) are authorized by [18 U.S.C.A. §] 3731." *U.S. v. Martin Linen Supply Co.,* 430 U.S. 564, 568 (1977). In *U.S. v. Sorenson*, 504 F.2d 406, 410 (7th Cir. 1974) the court held that where a defendant's motion for judgment of acquittal following a jury's guilty verdict was granted because the district court found that the government had not proved one of the essential elements of the crime charged, the judge's action involved a factual resolution so that the government could not appeal from the acquittal. Similarly, the district court granted Wheatley's motion for Counts 2 and 3 based on the fact that the government had not proved one of the essential elements of the AETA necessary for each charge. 18 U.S.C. § 43. For Count 2, the government failed to establish that Wheatley met the second element, § 43(a)(2), and for Count 3, the government failed to establish that Wheatley met the first element, § 43(a)(1). R.18-19. Both elements are required as the statute is framed conjunctively. As in *Sorenson,* the "'factual resolution' involved in the acquittal here was the failure of the government to prove all the elements of the offense." 504 F.2d at 410. The government "is not granted the right to appeal under 18 U.S.C. § 3731 under [these] circumstances." *Id.*

An "appeal from a judgment of the trial court acquitting a defendant because of the insufficiency of the evidence has never been permitted in Federal Courts." *Umbriaco v. U. S.,* 258 F.2d 625, 626 (9th Cir. 1958). It makes no difference whether the "trial is to a jury or to the bench;" subjecting "the defendant to postacquittal factfinding proceedings . . . violates the Double Jeopardy Clause." *Smalis v. Penn.*, 476 U.S. 140, 145 (1986) (citation omitted). Here, the

government cannot appeal the district court's judgment acquitting Wheatley of Count 2 because the court found that there was insufficient evidence to "constitute a violation of . . . the AETA." R.18. The same is true for Count 3, as the court properly found that the "evidence establishes that Wheatley did not take the chick in connection with any purpose of damaging or interfering with the Company's operations," as required by the AETA. R.19.

However, if the Court finds that it has jurisdiction to review Counts 2 and 3, the "clearly erroneous" standard of review governs. Where a case calls for a "strictly factual test," such as a question of state of mind, the standard of review is "clearly erroneous." *Lozier v. Auto Owners Ins. Co*., 951 F.2d 251, 254 (9th Cir. 1991); *U.S. v. Page*, 302 F.2d 81, 82 (9th Cir. 1962). Review of Counts 2 and 3 call for a strictly factual test because the question of whether the AETA applies to Wheatley falls of his state of mind. For Count 2, Wheatley did not have the requisite state of mind to meet § 43(a)(2) and for Count 3, Wheatley did not have the requisite state of mind to meet § 43 (a)(1). R.18-19. Thus, the "clearly erroneous" standard applies.

VI. THE DISTRICT COURT PROPERLY OVERTURNED COUNTS 2 AND 3 BECAUSE THE AETA DOES NOT APPLY TO WHEATLEY'S CONDUCT.

A. Wheatley did not violate the AETA by posting the video on Facebook because his video is protected by the First Amendment.

The district court properly overturned the jury verdict convicting Wheatley of Count 2 because 18 U.S.C. § 43(a)(1) does not apply to his conduct, and even if it did, Wheatley's actions are protected by the First Amendment, *supra.* The court below correctly noted that a violation of (a)(1) alone is insufficient under the AETA. R.18. To violate the AETA, the government must prove that (a)(1) and (a)(2) are both satisfied because the statute is written in the conjunctive form.[9] Thus, Wheatley must have: (i) used a facility of interstate commerce for the purpose of

[9] The only relevant portion of 18 U.S.C. § 43(a)(2) for this case is subsection "A" since Wheatley clearly did not threaten any person (B), or conspire with anyone else to do so, (C).

damaging or interfering with the Company's operations *and* (ii) in connection with such purpose, (iii) intentionally damaged or caused the loss of its property.[10] Wheatley's actions cannot satisfy (a)(2) because any damages the Company suffered as a result of his video are barred by the First Amendment, *supra*. Moreover, convicting Wheatley of Count 2 would render the rules of construction in 18 U.S.C. § 43(e) meaningless. The legislative history of the AETA indicates that Congress desired to "ensure that legitimate, peaceful conduct is not chilled by the threat of federal prosecution." 152 CONG. REC. S10793-05, 2006 WL 2797200, 1 (2006).

Even assuming *arguendo* that the First Amendment does not protect Wheatley's Internet video, his conviction still cannot be sustained because *he* was not the cause of the Company's damages. In *Medical Lab.,* this Court made clear that the lab, not ABC, was the *cause* of its damages. 306 F.3d at 820-21. This Court explained, "[d]octors that terminated their business relationships with Medical Lab after *Rush To Read* aired testified that they did so because of Medical Lab's 'problems with processing . . . pap smears.'" *Id.* See also, *Food Lion,* 194 F.3d at 522 (finding undercover reporters were not the proximate cause of supermarket's damages: it "was [Food Lion's] food handling practices themselves—not the method by which they were recorded or published—which caused the loss of consumer confidence."). Likewise, Wheatley was not the *cause* of the Company's "negative media attention" and any ensuing lost profits. R.4. The Company is responsible for driving away customers based on its appalling practices of animal cruelty depicted in his video. Thus, Wheatley cannot be said to have "intentionally damaged" or caused the loss of the Company's property. 18 U.S.C. § 43(d)(3)(B)(economic damage does not include "reaction to the disclosure of information about an animal enterprise.").

B. Wheatley did not violate the AETA by taking the chick because he did not intend to harm the Company and he did not use a facility of interstate commerce.

[10] Wheatley's taking of the chick is unrelated to Count 2.

The district court also properly overturned the jury verdict convicting Wheatley under Count 3 because 18 U.S.C. § 43(a)(2) does not apply to him. To sustain his conviction for taking the chick, Wheatley must *also* have: (i) traveled in, or used a facility of interstate commerce (ii) for the *purpose* of damaging or interfering with the Company's operations. *Id.* at (a)(1). Neither element is met. While Wheatley intentionally caused the loss of property within the meaning of (a)(2)(A), he did not use a facility of interstate commerce to do so, as required by (a)(1). Specifically, he "took the chick to his home outside city limits," not outside state limits. R.4.

As to the second prong, the district court's emphasis on the fact that Wheatley did not steal the chick for the *purpose* of interfering with the Company's operations, while correct, highlights the vagueness of the AETA. A statute is void-for-vagueness if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. *Hill v. Colorado,* 530 U.S. 703, 732 (2000). "Purpose" as a mens rea requirement means "conscious desire." *U.S. v. Gracidas-Ulibarry,* 231 F.3d 1188, 1196 (9th Cir. 2000). Surely, Wheatley's taking of the chick interferes with the Company's operations because it impedes on its power to control its business. See, *Continental Airlines, Inc. v. Intra Brokers Inc.*, 24 F.3d 1099, 1105 (9th Cir. 1994) (finding that "certain harm to Continental was to its power, not its purse"). In this way, the AETA is void-for-vagueness because it fails to notify defendants of what constitutes "interfering with." When a person consciously desires one result (saving an animal) that necessitates another result (interfering with an operation), it is hard, if not impossible, to discern the controlling motive. Although the Third Circuit upheld the earlier version of the AETA against a void-for-vagueness challenge, that version did not "prohibit *mere* interference with the operations of an animal enterprise." *U.S. v. Fullmer,* 584 F.3d 132, 168 (3rd Cir. 2009) (Fisher, J., dissenting) (emphasis added). Nevertheless, the district court properly

overturned Wheatley's conviction under Count 3 because he neither intended to "interfere" with the Company nor did he use a facility of interstate commerce to steal the chick.

VII. EVEN IF THE AETA APPLIED TO WHEATLEY'S CONDUCT, IT EXCEEDS CONGRESSIONAL AUTHORITY UNDER THE COMMERCE CLAUSE.

This Court reviews Congress' authority under the Commerce Clause, *de novo*. *U.S. v. Dorsey*, 418 F.3d 1038, 1045 (9th Cir. 2005).

Even assuming, *arguendo,* that the AETA applies to Wheatley's conduct, his conviction still cannot be sustained because the AETA exceeds congressional authority under the Commerce Clause. U.S. CONST. art. I § 8 cl 3. When "Congress has determined that an activity affects interstate commerce," the statute must be rationally related to a legitimate congressional purpose. *Hodel v. Virginia Surface Min. & Reclamation Ass'n.,* 452 U.S. 264, 276-80 (1981); *Preseault v. I.C.C.*, 494 U.S. 1, 18 (1990). Whatever category of interstate commerce the AETA regulates,[11] it exceeds Congress' power because it is not rationally based on a legitimate congressional interest and is inconsistent with the spirit of the Constitution.

Chief Justice Marshall famously wrote, "[l]et the end be legitimate . . . and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819). Although the Court upheld Congress' authority to create a national bank, it made clear that Congress' limited powers are only legitimate when they are exercised "in the manner most beneficial to the people." *Id*. The public benefit of a national bank was clear: Congress wanted to draw taxes to be distributed for the "common welfare." *Id.* at 399. In contrast, Congress' interest in insulating factory farms such as the Company from public scrutiny

[11] The district court found that among the three categories of activity Congress may regulate, the AETA falls under category 2, "instrumentalities" of interstate commerce. R.15.

by prohibiting *inter alia,* the use of the Internet to inform the public about a facility's unwholesome practices is not legitimate.

Moreover, it is "not enough that the 'end be legitimate'; the means to that end chosen by Congress must not contravene the spirit of the Constitution." *Garcia v. San Antonio MTA,* 469 U.S. 528, 585 (1985) (O'Connor, J., dissenting). Thus, the AETA must be "consistent with the letter and spirit of the constitution." *Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring). For example, in *Printz v. U.S.*, 521 U.S. 898, 923-24 (1997), the Court held that that a law is not proper under the Commerce Clause "[w]hen [it] violates [a constitutional] principle of state sovereignty." The AETA is inconsistent with constitutional principles of free speech and equality. Like the APPA, the AETA violates the First Amendment insofar as it punishes the online publication of speech on matters of public concern (the savings clause in 18 U.S.C. § 43(e) is of no avail).[12] By including economic damage as a type of "interference," it is virtually impossible for the public to know what actions are punishable. 18 U.S.C. § 43(b). Convicting journalists as "terrorists" most certainly chills reporting on topics of great public interest.

In *Planned Parenthood of Columbia/Willamette, Inc. v. ACLA,* 244 F.3d 1007, 1014-15 (9th Cir. 2001), this Court stated that anti-abortion activists could only be held liable under the Freedom of Access to Clinic Entrances Act of 1994 (FACE), 18 U.S.C. § 248, if they "'authorized, ratified, or directly threatened' violence . . . But if their statements merely encouraged unrelated terrorists, then their words are protected by the First Amendment." The Court found that their actions, in publicly disclosing on the Internet, the names and addresses of abortion providers, and offering rewards for persons who were able through nonviolent means to stop providers from continuing to perform abortions, were protected under the First Amendment.

[12] Had it not been for the district court's grant of Wheatley's motion for acquittal on Count 2, Wheatley would have been convicted for publishing a truthful video on matters of public concern, *supra.*

Id. If the First Amendment protected activity from civil liability that clearly "interfered" with the operations of clinics, then it certainly should protect truthful speech about animal facilities from *criminal* punishment.

Although FACE has been found constitutional under the Commerce Clause, *U.S. v. Weslin*, 156 F.3d 292, 296 (2d Cir. 1998), it is distinguishable from the AETA. First, FACE furthers the legitimate interest of protecting women who obtain reproductive-health services. *Id.* Unlike FACE, AETA does not further a legitimate interest such as "ensuring public safety and order." *Id.* at 297-98 (citation omitted). Instead of protecting individual persons, AETA protects private commercial interests, to the detriment of public safety. Second, FACE only regulates force, threats of force, and physical obstruction. 18 U.S.C.A. § 248. The AETA goes so far as to criminalize the mere "interference with the operations of an animal enterprise." 18 U.S.C. § 43(a)(1). While anti-abortion activists may interfere with the operations of health clinics without violating FACE, animal welfare activists engaged in the same conduct face prosecution under the AETA. This discrepancy in turn, contravenes the constitutional principal of equality. U.S. CONST. amend. XIV, § 1. Congress has offered no reasons why the animal industry deserves special protection beyond preexisting criminal protections such as trespass or vandalism.

While Congress has the authority under the Commerce Clause to regulate animal enterprises and the Internet, it may not abuse that authority. Since the AETA violates the spirit of the Constitution, it lacks a legitimate interest and exceeds Congress' authority.

CONCLUSION

Accordingly, Wheatley respectfully requests this Court to overturn the district court's denial of his Rule 29 motion for judgment of acquittal as to Count 1. Wheatley further requests that this Court affirm the district court's decision to vacate his conviction on Counts 2 and 3.