IN THE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES, Respondent/Cross-Appellant, v. LOUIS WHEATLEY, Appellant/Cross-Respondent.	Case No. 11-11223

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUES

I. Whether Defendant has First Amendment rights to film an animal enterprise in violation of the Agricultural Products Protection Act, and whether this Act is substantially overbroad in relation to the statute's plainly legitimate sweep.

II. Whether courts of law should protect Defendant from prosecution under the Agricultural Products Protection Act as a matter of public policy, and whether Defendant's violation of the Act is justified under the necessity defense.

III. Whether the Animal Enterprise Terrorism Act is within Congress' Commerce Clause authority, and whether Defendant's conduct was within the scope of the Commerce Clause.

IV. Whether a rational trier of fact could find that Defendant acted with the purpose of damaging or interfering with an animal enterprise within the meaning of the Animal Enterprise Terrorism Act, and whether a rational trier of fact could find that Defendant caused a loss of property in conjunction with such purpose.

STATEMENT OF THE CASE

Appellant/Cross-Respondent Louis Wheatley ("Defendant") was charged with (1) entering an animal facility and using video . . . in violation of the Animal Products Protection Act ("APPA"), Fed. L. § 999.2(3); (2) using the Internet as a facility of interstate commerce "for the purpose of damaging or interfering with the operations of an animal enterprise" in violation of the Animal Enterprise Terrorism Act ("AETA"), 18 U.S.C. § 43(a)(1) (2006); and (3) "in connection with such purpose" intentionally damaging or causing the loss of any real or personal property, including animals, used by the animal enterprise, 18 U.S.C. § 43(a)(2)(A). *United States v. Wheatley*, No. CV 11-30445 WMF (ABCx), slip op. at 4-5 (C.D. Cal. August 29, 2011).

Defendant filed a motion to dismiss the indictment under Federal Rule of Criminal Procedure 12(b), and the United States District Court for the Central District of California denied the motion. *Id.* at 5. At trial, the jury convicted Defendant on all three counts, and Defendant filed a motion for judgment of acquittal on all counts under Federal Rule of Criminal Procedure 29 (renewing the arguments raised in his motion to dismiss). *Id.* On August 29, 2011, the District Court denied Defendant's motion for acquittal as to Count 1 dealing with the APPA, but granted the motion as to Counts 2 and 3 dealing with the AETA. *Id.* Defendant and the United States cross-appeal from the judgment entered on August 29, 2011 in the District Court. *Id.* at 19. Both parties filed timely notices of appeal with this Court. Briefing Order Oct. 5, 2011. Defendant appeals the disposition of the District Court as to Count 1 for a violation of the APPA § 999.2. Respondent/Cross-Appellant, the United States, appeals the District Court's disposition acquitting Defendant of Counts 2 and 3 filed under the AETA.

STATEMENT OF FACTS

Defendant recorded two videos of an animal enterprise, *Eggs R Us* (the "Company"), and took a male chick in violation of the AETA and the APPA. *United States v. Wheatley*, No. CV 11-30445 WMF (ABCx), slip op. at 1, 3 (C.D. Cal. August 29, 2011). The Company is an egg production business with facilities in California, Nevada, and North Dakota.[1] *Id.* at 1. Defendant, a journalism student, says he learned about factory farming during the California's Proposition 2 voter campaign in 2008, a campaign advocating for the Prevention of Farm Animal Cruelty Act. *Id.* at 2, 28. From that time until May 2010, Defendant was a member of a farm animal protection organization. *Id.*at 2. On June 1, 2010, Defendant was hired by the Company to be a poultry care specialist. *Id.* Defendant's duties included feeding and watering the chickens and

[1] California's National School Lunch Program is a client of the Company. Consequently, the Company receives substantial compensation from the federal government. *United States v. Wheatley*, No. CV 11-30445 WMF (ABCx), slip op. at 2 (C.D. Cal. August 29, 2011).

cleaning out the cages. *Id.* Defendant says he accepted the position to help pay for college, but he also "thought it would be an opportunity to find out for himself how accurate the poor and cruel conditions customary in the industry really were." *Id.* Defendant hoped to write an article for class and blog about his experiences at the Company. *Id.*

On June 17, 2010, Defendant recorded a four-minute video of an employee macerating male chicks.[2] *Id.* at 3. Defendant posted the video on Facebook with the following caption: "This is what happens everyday--business as usual. I'll never be able to eat another egg again. The public has to see this to believe it." *Id.* at 3. Subsequently, one of Defendant's friends posted the video on Youtube, and the video received media attention and 1.2 million views. *Id.* Defendant also believed that the Company was violating a California Proposition 2 regulation on the confinement of farm animals. *Id.* Therefore, Defendant recorded a second video of the Company, blogged about cage sizes, and then informed a farmed animal protection organization. *Id.* at 3-4. At trial, Defendant presented evidence suggesting that the Company's battery cages were in violation Proposition 2. *Id.* at 3. The Company denied all of Defendant's accusations regarding violations of Proposition 2 but stated that it was reviewing the feasibility of modifying some of the practices in its California facility. *Id.* at 4. California has not filed charges against the Company. *Id.* at 5 n. 5.

On the same day that Defendant posted the two videos on Facebook, Defendant also seized a live male chick prior to maceration at the Company. *Id.* at 4. Defendant placed the chick into his coat pocket, removed the chick from the facility, and brought the chick to his home. *Id.* The Company received negative media attention because of the Youtube video and Defendant's

[2] In the egg industry, male chicks are considered a waste product. The customary industry practice is to dispose of male chicks through a process of maceration where the chicks are sent to a grinder. *Id.* at 2-3.

blogging. *Id.* Two weeks after Defendant's Facebook postings, Defendant was fired from the Company. *Id.* The United States charged Defendant with violating the APPA and the AETA. *Id.*

SUMMARY OF THE ARUMENT

I. Defendant's free speech rights were not violated by the APPA. The Company is a private business, and, therefore, Defendant had no constitutional right to record a video of the Company. Even if the Company were subject to First Amendment forum analysis, the Company would only be a non-public forum, and Defendant's rights were not violated because the APPA is a reasonable, viewpoint neutral restriction to protect animal facilities. Also, the APPA is not overbroad because it does not target a substantial amount of speech outside its plainly legitimate sweep.

II. The District Court properly denied Defendant's motion for acquittal after the jury convicted him for videotaping the Company without its consent in violation of the APPA. This Court should defer to Congress on issues of public policy, such as animal welfare and the protection of animal enterprises. Additionally, the defense of "necessity" is inapplicable in this case because this Court rejects applying this defense to cases of indirect civil disobedience as a matter of law.

III. The AETA is within Congress' Commerce Clause power because it regulates instrumentalities of commerce such as the Internet and animal enterprises. The Act is also within Congress' authority because it regulates terrorism against animal enterprises, which substantially affects interstate commerce. Additionally, Defendant's conduct was within the scope of the Commerce Clause because Defendant used the Internet to commit his crimes.

IV. Defendant's conduct falls within the ambit of the AETA and violated the sections as charged. Defendant's purpose was to videotape the animal enterprise and publish the video footage on the Internet and to release an animal from the Company. Both acts intentionally interfered with the operations of the Company. Consequently, Defendant used a facility of interstate commerce for the purpose of damaging or interfering with the operations of the Company, and "in connection with such purpose" intentionally took the Company's property, a male chick.

STANDARD OF REVIEW

This Court reviews *de novo* the District Court's decision to grant or deny a motion for a judgment of acquittal. *United States v. Alston*, 974 F.2d 1206, 1210 (9th Cir. 1992); *see* Fed. R. Crim. P. 29(c). A judgment of acquittal is improper if the court views the evidence in a light most favorable to the government and decides a rational trier of fact could have found the defendant guilty of the charge beyond a reasonable doubt. *Alston*, 974 F.2d at 1210.

This Court also reviews *de novo* the District Court's decision to grant or deny a motion to dismiss the indictment. *United States v. Yakou*, 428 F.3d 241, 245 (D.C. Cir. 2005). *See* Fed. R. Crim. P. 12(b). "A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue." In a criminal case, the "general issue" is "defined as evidence relevant to the question of guilt or innocence." *Yakou*, 428 F.3d at 246 (quotation marks omitted). A court may properly dismiss an indictment under Rule 12(b) if the facts are undisputed and only questions of law exist. *United States v. Phillips*, 376 F.3d 846, 855 n. 25 (9th Cir. 2005).

This Court also reviews *de novo* the District Court's decision to bar a necessity defense. *United States v. Schoon*, 971 F.2d 193, 195 (9th Cir. 1992); *United States v. Boulware*, 558 F.3d

971, 974 (9th Cir. 2009). "A district court may preclude a necessity defense where the evidence, as described in defendant's offer of proof, is insufficient as a matter of law to support the proffered defense." *Schoon*, 971 F.2d at 195 (quotations omitted).

ARGUMENT

I. The APPA IS CONSTITUTINAL UNDER THE FIRST AMENDMENT BECAUSE IT IS A REASONABLE, VIEWPOINT NEUTRAL RESTRICTION AND IS NOT OVERBROAD.

The APPA does not violate Defendant's First Amendment rights because he has no First Amendment rights protecting his conduct at a private business. However, if the Company is subjected to forum analysis, it is a non-public forum and the APPA is a reasonable, viewpoint neutral restriction of speech. Additionally, the APPA is not constitutionally overbroad.

A. Defendant did not have First Amendment rights protecting his conduct at the Company's facility because it is a private company and not subject to forum analysis under the First Amendment.

Defendant did not have a First Amendment right to record videos at the Company because it is a private facility. Generally, there is no right to use private property for speech purposes. *See Lloyd Corp. v. Tanner*, 407 U.S. 551, 568 (1972) ("[T]his Court has never held that a trespasser or uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only"). The District Court applied forum analysis, despite the Company's private ownership, because the Company is regulated by the federal government and receives public funding under the National School Lunch program. *See United States v. Wheatley*, No. CV 11-30445 WMF (ABCx), slip op. at 2, 9 (C.D. Cal. August 29, 2011). If this Court finds the Company to be a private forum, absence of state action precludes the application of constitutional standards, including the First Amendment. *Hudgens v. NLRB*, 424 U.S. 507, 520-521 (1976). Courts consider the following factors to determine whether private property is a public forum: (1) the historical character of property; (2)

whether the property is currently in public use; (3) the property's similarity and interconnection to other public forums; and (4) whether the private property is dedicated to the public use. *Venetian Casino Resort v. Local Joint Exec. Bd.*, 257 F.3d 937, 943-49 (9th Cir. 2001).

The Company's facility does not encompass any of these characteristics. The record lacks of any evidence suggesting that the Company's facility has historically been of public use. Also, the Company's facility is not currently in public use; it is a private business producing eggs. *United States v. Wheatley*, No. CV 11-30445 WMF (ABCx), slip op. at 2 (C.D. Cal. August 29, 2011). The District Court relies on the Company's receipt of federal funding in its analysis, which is not comparable to the public using the property to exercise free speech rights. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) ("Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts."). Finally, there is no evidence that the Company's property is interconnected with any other public forum or that the Company has dedicated its property to public use. Therefore, Defendant had no First Amendment rights to videotape the facility.

B. Defendant's First Amendment rights were not violated if Company is a non-public forum.

Even if the Company is subjected to forum analysis, Defendant's First Amendment rights were not violated. In the Ninth Circuit, there are three categories of forums under First Amendment analysis: public forums, designated public forums, and non-public forums. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985).

i. The Company is not a public forum or a designated public forum.

A public forum is a place where "by long tradition or government fiat [a place has] been devoted to assembly and debate." *Perry Educ. Ass'n. v. Perry Local Educator's Ass'n.*, 460 U.S.

37, 45 (1983). Since the Company is a private business, the record lacks any evidence indicating that the Company was devoted to assembly and debate.

The Company is also not a designated public forum. A designated public forum is "public property which the state has opened for use by the public as a place of expressive activity." *Id.* Courts look for clear government intent to create a designated public forum and will not infer government intent. *Cornelius*, 472 U.S. at 802. The Company was not a designated public forum because the record does not indicate that the government or the Company opened the property for speech or that there was clear government intent to do so. This Court should consider the Company a non-public forum if the Company is subjected to forum analysis at all.

ii. Defendant's First Amendment rights were not violated if the Company was a non-public forum.

If the Company is a non-public forum, Defendant's First Amendment rights were not violated. "Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Id.* at 799-800. In a non-public forum, the government can restrict expression as long as the restrictions are reasonable and are not a viewpoint restriction. *Id.* at 800.

The APPA is reasonable because Congress has a reasonable interest in protecting facilities that keep, handle, house, exhibit, breed, or sell animals, and Congress acted reasonably in taking steps to ensure that the owners' properties are protected from unwanted intrusion. Moreover, Congress has a reasonable interest in protecting owners and other employees of animal facilities from harmful conduct while they are operating their business. Indeed, Defendant does not contest whether Congress has a reasonable interest in protecting animal facilities.

The APPA is viewpoint neutral because the Act is an absolute prohibition against videotaping an animal facility without the consent of the animal enterprise. To be viewpoint neutral, the government "must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Univ. of Virginia*, 515 U.S. 819, 829 (1995). The APPA expressly prohibits the conduct of using a video recorder within an animal facility, without any reference to the defendant's perspective or motive. Fed. L. § 999.2. Thus, on its face, the APPA does not prohibit any specific viewpoint and instead targets all unconsented video recordings.

Defendant argues that the statute is viewpoint discrimination because the only purpose of the Act is to prevent animal activists from recording animal enterprises. *United States v. Wheatley*, No. CV 11-30445 WMF (ABCx), slip op. at 10 (C.D. Cal. August 29, 2011). As recognized by the District Court, there is "no congressional record to support (or contradict) his position in this regard." *Id.* at 10. However, the statute viewed in its entirety demonstrates Congress' intent to prevent damage and destruction to animal facilities regardless of the person's motives. For instance, a competitor who attempts to film the animal enterprise could be equally as liable under the APPA as an animal rights protestor. *See id.* (*"No person* . . . may . . . [e]nter an animal facility and use or attempt to use a camera.") (emphasis added). Without any legislative intent indicating otherwise, Defendant's speculation in light of the facial neutrality of the statute does not provide enough support that APPA is viewpoint discrimination. In summary, the APPA is both a reasonable restriction on speech and viewpoint neutral, and Defendant's First Amendment rights were not violated.

C. The APPA is not constitutionally overbroad under the First Amendment.

The APPA is not constitutionally overbroad because Defendant does not suggest a substantial amount of speech inappropriately covered by the statute in relation to the statute's

plainly legitimate sweep. This Court can invalidate a law "as impermissibly over broad [if] a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Washington State Grange v. Washington State Republican Party*, 552 U.S 442, 449 n. 6 (2008) (internal citations and quotations omitted). In reviewing an overbreadth challenge to a statute, this Court considers the constitutionality of the statute on its face. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

The first step in overbreadth analysis is to construe the challenged statute because it is impossible to determine whether the statute reaches too far without first knowing what the statute covers. *United States v. Stevens*, 130 S. Ct. 1577, 1588 (2010). As suggested by the Act's title and text, the APPA protects agricultural products and animal facilities from damage or destruction. Fed. L. § 999.2. Congress' clear prohibition against any person recording an animal facility, except for government agents, demonstrates a concern that video recording of an animal facility can result in damage or destruction to it. Therefore, for the APPA to be overbroad, it should cover speech that is outside the statute's plainly legitimate sweep of protecting agricultural products and animal facilities.

Defendant argues that the APPA is overbroad because it serves to prevent people from collecting evidence of wrongdoing in situations where the government is not acting. *United States v. Wheatley*, No. CV 11-30445 WMF (ABCx), slip op. at 10 (C.D. Cal. August 29, 2011). Defendant cites no authority supporting his position that a private citizen's videotaping of wrongdoing is outside the APPA's plainly legitimate sweep. Indeed, the statute expressly indicates otherwise by providing clear and absolute language that "*No person* . . . without the effective consent of the owner may . . . [e]nter an animal facility and use or attempt to use a camera . . . [except for the] lawful activities of a government agency carrying out its duties under

law." Fed. L. § 999.2 (emphasis added). In addition, the express statutory language of the APPA indicates that Congress intended to exempt government agencies that are legally responsible for regulating animal facilities—not private citizens with video cameras. Therefore, Defendant's first overbreadth hypothetical is insufficient because private citizens who videotape an animal facility for evidence of wrongdoing are still within the plainly legitimate sweep of the APPA.

Defendant also argues that the APPA is overbroad because it conflicts with state whistleblower statutes. As mentioned, the APPA speaks in clear language that no person, other than government agents, can videotape an animal facility without its consent. Therefore, state whistleblower statutes that conflict with the APPA by allowing the recording of an animal facility are within the Act's plainly legitimate sweep. Under the Supremacy Clause, constitutional federal regulations reign supreme over inconsistent state laws. *E.g.*, *McCulloch v. Maryland*, 17 U.S. 316 (1819). Therefore, Defendant's assertion that the APPA conflicts with state statutes is not a persuasive argument because Congress was within its authority to prevent the videotaping of animal enterprises regardless of existing state laws.

Even if Defendant's hypotheticals were outside the plainly legitimate sweep of APPA, the Act is still not overbroad because these two hypotheticals do not constitute substantial overbreadth. *See Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (stating that the defendant "bears the burden of demonstrating, from the text of [the law] and from actual fact, that substantial overbreadth exists") (internal quotations and citations omitted). The APPA's scope is narrow by only prohibiting the videotaping, damaging, and exercising control over the property of animal facilities, and nothing within the Act prevents persons from engaging in other whistleblowing activities to expose wrongdoing. Agriculture Products Protection Act § 999.2 Therefore, any overbreadth of APPA that exists is less than substantial overbreadth because APPA prohibits

narrow and specific conduct and not whistleblowing in its entirety. In summary, Defendant has not met his burden because he has not established that the APPA is substantially overbroad by covering speech that is clearly outside its plainly legitimate sweep. The First Amendment overbreadth doctrine is "strong medicine" that this Court should only employ "with hesitation" and "only as a last resort." *New York v. Ferber*, 458 U.S. 747, 769 (1982). The strong medicine of the overbreadth doctrine should not be applied to the APPA.

II. THE DISTRICT COURT PROPERLY RESERVED ISSUES OF PUBLIC POLICY FOR CONGRESS AND DENIED DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL FOR VIOLATING THE APPA.

The District Court properly denied Defendant's motion for acquittal because no basis exists to overturn the jury's verdict with regard to the APPA as a matter of public policy. This Court should defer to Congress' intent to protect animal facilities and find that the defense of "necessity" is inapplicable to this case.

A. Defendant videotaped the Company without its consent in violation of the APPA, and the District Court properly deferred to Congress to decide issues of public policy.

Defendant clearly violated the APPA because Defendant videotaped the animal facility without the consent of the Company; the District Court properly deferred further public policy debate to Congress. As charged, the APPA prohibits any person to "enter an animal facility and use or attempt to use . . . a video recorder" without the effective consent of the owner. Fed. L. § 999.2(3). The separation of powers doctrine creates a presumption of constitutionality for congressionally enacted statutes. *United States v. Morrison*, 529 U.S. 598, 607 (2000). "Due respect for the decisions of a coordinate branch of Government demands that [the judiciary] invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *Id.* Defendant's public policy arguments fail to make such a showing.

Defendant argues as a matter of public policy that this Court should interpret the APPA to allow whistleblowers to enter animal facilities with video recording equipment. *United States v. Wheatley*, No. CV 11-30445 WMF (ABCx), slip op. at 11-12 (C.D. Cal. August 29, 2011). Defendant asserts that this is the most practical means to ensure that agencies enforce anti-animal cruelty statutes. Further, he asserts that interpreting the APPA without this policy exception would inhibit the public debate on animal welfare. *Id.* at 12-13. However, "whatever merits . . . policy arguments may have, it is not the province of [the courts] to rewrite the statute to accommodate them." *Artuz v. Bennett*, 531 U.S. 4, 10 (2000) (declining to evaluate policy arguments because "the only permissible interpretation of the [statute's] text . . . may, for all we know, have slighted policy concerns on one or the other side of the issue as part of the legislative compromise that enabled the law to be enacted").

The APPA provides no statutory language to support Defendant's policy argument. If Congress had intended to exempt acts that result in the disclosure of illegal activity by an animal facility, it would have drafted the APPA accordingly. Furthermore, Congress included an exception to the APPA's proscription against videotaping for the lawful activities of a government agency. Fed. L. § 999.2(3). This exception demonstrates that Congress considered appropriate exceptions to the APPA. Defendant's policy argument to exempt whistleblowers would amount to a judicial rewriting of the APPA as enacted; therefore, the District Court properly declined to rewrite the statute and deferred to Congress' language.

Although Defendant suggests that without his intervention the Company would have continued to violate state laws against animal cruelty, California has not filed charges against the Company for violating the California Penal Code or Health & Safety Code. *United States v. Wheatley*, No. CV 11-30445 WMF (ABCx), slip op. at 12-13 (C.D. Cal. August 29, 2011). Thus,

whether the Company was in violation of these statutes is a question of fact not properly before this Court. In conclusion, the District Court properly deferred the public policy debate to the legislature and denied Defendant's Motion as to Count One, Fed. L. § 999.2(3).

B. Individuals engaged in indirect civil disobedience cannot claim a defense of necessity as a matter of law, and Defendant's conduct was indirect civil disobedience.

The District Court properly rejected Defendant's "necessity" defense as a matter of law. To prevail on a necessity defense, a defendant must show:

> (1) that he was faced with a choice of evils and chose the lesser evil; (2) that he acted to prevent imminent harm; (3) that he reasonably anticipated a causal relation between his conduct and the harm to be avoided; and (4) that there were no other legal alternatives to violating the law.

United States v. Arellano-Rivera, 244 F.3d 1119, 1125-26 (9th Cir. 2001). "The threshold test for admissibility of a necessity defense is a conjunctive one." *Schoon*. 971 F.2d at 195. The defense is precluded if "proof is deficient with regard to any of the four elements." *Id.*

In *United States v. Schoon*, this Court upheld a district court's rejection of the necessity defense in a civil disobedience context. 971 U.S. at 195 ("[T]hirty people . . . gained admittance to the IRS office in Tucson, where they chanted 'keep America's tax dollars out of El Salvador,' splashed simulated blood on the counters, walls, and carpeting, and generally obstructed the office's operation."). The Court defined "civil disobedience" as "the willful violation of a law, undertaken for the purpose of social or political protest." *Id.* at 195-96. However, the Court distinguished between direct and indirect civil disobedience. Indirect civil disobedience is "violating a law or interfering with a government policy that is not, itself, the object of protest." *Id.* at 196. In contrast, direct civil disobedience "involves protesting the existence of a law by breaking that law or by preventing the execution of that law in a specific instance in which a particularized harm would otherwise follow." *Id.*

Defendant's actions are clearly indirect civil disobedience. Defendant entered into the Company's egg production facility for the purpose of videotaping the animal facility without authorization. Fed. L. § 999.2(3). However, Defendant was not protesting the APPA, but rather the agricultural practices videotaped. As recognized by the District Court, "there is no evidence in the record that Wheatley [even] knew about the APPA." *United States v. Wheatley*, No. CV 11-30445 WMF (ABCx), slip op. at 14 (C.D. Cal. August 29, 2011).

Evidence showing indirect civil disobedience is *per se* insufficient to support defense necessity. *Schoon*, 971 F.2d at 196; *United States v. Springer*, 51 F.3d 861, 866 (9th Cir. 1995). This Court in *Schoon* reasoned that in cases of indirect civil disobedience,

> [T]he real problem . . . is that litigants are trying to distort to their purpose an age-old common law doctrine meant for a very different set of circumstances. What these cases are really about is gaining notoriety for a cause—the defense allows protestors to get their political grievances discussed in a courtroom.

971 F.2d at 199. Furthermore, "[t]he law could not function were people allowed to rely on their *subjective* beliefs and value judgments in determining which harms justified the taking of criminal action." *Id.* at 197 (emphasis in original).

The necessity defense is not applicable in this case because the record contains no evidence that Defendant knowingly acted to oppose the APPA. *United States v. Wheatley*, No. CV 11-30445 WMF (ABCx), slip op. at 14 (C.D. Cal. August 29, 2011). Instead, Defendant violated the law to draw public attention to the Company's practices, like the *Schoon* defendants who "violate[d] a law, not because it is unconstitutional or otherwise improper, but because doing so calls public attention to their objectives." *Schoon*, 971 F.2d at 199. Therefore, necessity defense is inapplicable to Defendant's act of indirect civil disobedience as a matter of law.

Even if this Court permitted the application of the necessity defense, Defendant cannot meet all four elements of the "necessity" defense. Defendant's video recording was not an act "to

prevent imminent harm," and he could not have "reasonably anticipated a causal relation between [the videotaping] and the [perceived animal cruelty] to be avoided." *Arellano-Rivera,* 244 F.3d at 1125-26. Further, the record shows that Defendant chose not to pursue any "legal alternatives to violating the law" before the videotaping. *Id*. at 1126. Thus, Defendant's necessity defense fails even if he was not prevented as a matter of law from using the defense.

III. THE AETA IS CONSTITUTIONAL UNDER CONGRESS' COMMERCE CLAUSE POWER BECAUSE IT REGULATES INSTRUMENTALITIES OF COMMERCE AND ACTIVITIES SUBSTANTIALLY AFFECTING COMMERCE, AND DEFENDANT'S ACTIVITIES FALL WITHIN IN THE SCOPE OF THE COMMERCE CLAUSE.

The AETA is constitutional under Congress' Commerce Clause power because it regulates instrumentalities of commerce and activities substantially affecting commerce. "The fundamental principle is that the power to regulate commerce is the power to enact all appropriate legislation for its protection and advancement . . . ." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37 (1937) (citations and internal quotations omitted). "[T]he grant of authority to Congress under the Commerce Clause, though broad, is not unlimited." *Solid Waste Agency v. United States Army Corp of Eng'rs,* 531 U.S. 159 (2001).

There are three broad categories of activity that Congress may regulate under its commerce power. "First Congress may regulate the use of the channels of interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558 (1995) (citations omitted). "Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." *Id.* (citations omitted). Third, "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *Id.* at 558-59 (citations omitted). With the AETA, Congress regulates instrumentalities of commerce and conduct substantially affecting interstate

commerce. Also, Defendant's conduct falls within the scope of commerce. Each of these arguments will be discussed in turn.

A. The AETA is constitutional under Congress Commerce Clause power because it regulates instrumentalities of commerce, which includes the Internet and the Company.

The Internet and the Company are both instrumentalities of commerce. Therefore, the AETA is constitutional under Congress' Commerce Clause authority.

i. The AETA regulates the Internet, and the Internet is an instrumentality of commerce.

The AETA regulates instrumentalities of commerce because the Act regulates facilities of interstate commerce, which includes the Internet. Defendant incorrectly argues that the AETA does not regulate the Internet. *United States v. Wheatley*, No. CV 11-30445 WMF (ABCx), slip op. at 15 (C.D. Cal. August 29, 2011). Although the AETA does not expressly define "facility of interstate commerce," federal courts have accepted this phrase as including the Internet in other statutes. *See, e.g.*, *United States v. Tykarsky*, 446 F.3d 458, 470 (3d Cir. 2006); *United States v. Kaye*, 451 F. Supp. 2d 775 (E.D. Va. 2006). Therefore, the District Court correctly found the Internet to be a facility of interstate commerce regulated by AETA. *United States v. Wheatley*, No. CV 11-30445 WMF (ABCx), slip op. at 16 (C.D. Cal. August 29, 2011).

The Internet is often an instrumentality or channel of commerce. *See, e.g.*, *United States v. Sutcliffe*, 505 F.3d 944, 953 (9th Cir. 2007) ("We are therefore in agreement with the Eighth Circuit's conclusion that [a]s both the means to engage in commerce and the method by which transactions occur, 'the Internet is an instrumentality and channel of interstate commerce.'"). *See also United States v. MacEwan*, 445 F.3d 237, 245 (3d Cir. 2006); *United States v. Lewis*, 554 F.3d 208, 215 (1st Cir. 2009). Whether the Internet is an instrumentality of commerce under the AETA specifically has yet to be reviewed by appellate courts, but case law on the use of the

Internet in the child pornography context is particularly applicable. Specifically, "where it is impossible to determine whether the receipt of child pornography images crossed state lines, a defendant's use of the Internet may serve as a proxy for satisfying the interstate commerce requirement." *MacEwan*, 445 F.3d 237; *Lewis*, 554 F.3d 208.

Using this case law as guidance, it is clear that Defendant's use of the Internet to upload the video to Facebook sufficiently invokes the commerce clause. *United States v. Wheatley*, No. CV 11-30445 WMF (ABCx), slip op. at 3 (C.D. Cal. August 29, 2011). Since it is impossible to determine whether Defendant's video on the Internet crossed state lines, the Internet should, once again, be treated as a proxy for satisfying the interstate commerce requirement. Therefore, the Internet is within the definition of "facility of interstate commerce" in the AETA, and that the Internet is also an instrumentality of commerce within Commerce Clause jurisprudence.

ii. The Company is an instrumentality of commerce.

Defendant argues that the Company is not an instrumentality of commerce. *Id.* at 14. As recognized by the Fifth Circuit, "an instru-mentality [sic] of interstate commerce is something which effectuates the movement of goods, commodities, or information from a place in one state to a place in another state." *United States v. Miles*, 122 F.3d 235, 247 (5th Cir. 1997).

The Company is an instrumentality of commerce because it is directly involved with the interstate production and movement of animal products as commodities. *United States v. Wheatley*, No. CV 11-30445 WMF (ABCx), slip op. at 15 (C.D. Cal. August 29, 2011). For instance, as recognized by the District Court, "the food industry is unquestionably regulated by the federal government," and the Company provides eggs for California schools (receiving funding from the National School Lunch Program). *Id.* at 2. Additionally, the Company has facilities in three different states. *Id.* at 1. Because the Company is an instrumentality of

interstate commerce in its production and distribution of commodities, Congress has the ability to pass legislation protecting it from harmful acts, including Defendant's conduct.

B. Even if the AETA does not regulate instrumentalities of commerce, the Act is still constitutional under Congress's Commerce Clause power because it regulates activities substantially affecting commerce.

The AETA also regulates activities substantially affecting commerce. Congress has the ability to regulate conduct "if it exerts a substantial economic effect on interstate commerce." *Gonzales v. Raich*, 545 U.S. 1 (2005) (citations and quotations omitted). For this category of commerce regulation, the Supreme Court distinguishes between the regulation of economic and noneconomic activity. The regulation of economic activity allows courts to consider the aggregated effect of that activity on commerce. *See, e.g.*, *Wickard v. Filburn*, 317 U.S. 111 (1942). In contrast, Congress cannot regulate noneconomic activity on grounds that the aggregate effect of that activity on commerce is substantial. *See, e.g.*, *Morrison*, 529 U.S. at 617, 637 (2000). The AETA regulates economic activity under Congress' power to regulate commerce because terrorism against animal enterprises often attempts to shape the business practices of animal enterprises. However, even if the AETA only regulated noneconomic activity, it still substantially affects commerce.

i. Terrorism that intentionally harms animal enterprises attempts to shape business practices, and, therefore, is an economic activity that substantially affects commerce.

The AETA regulates economic activity because the criminalized conduct intentionally harms economic activity and attempts to influence business models for the production of animal commodities. "Where an economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Lopez*, 524 U.S. at 560. In *Gonzales v. Raich*, the Supreme Court cites the definition of "economics" as referring to "the production, distribution, and consumption of commodities." 545 U.S. at 25. Courts "need not determine whether

[Defendant's economic] activities, taken in the aggregate substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Id.* at 22.

The AETA regulates an economic activity because the targeted conduct harms the production, distribution, and consumption of animals as commodities. As put by Representative Tom Petri, "This legislation is in response to rising incidents of violence and threats against these entities as a way to adversely impact animal enterprises . . . ." 152 Cong. Rec. H8590-01, H8591 (daily ed. November 13, 2006) (statement of Representative Tom Petri). The AETA also regulates economic activity because terrorism against animal enterprises is often motivated by a desire to effectuate change in the living conditions for animals, even though the animals are used as commodities. Regardless of whether animal rights organizations succeed in making the lives better for the animals, their tactics are predicated on a goal to change the companies' business models. *United States v. Fullmer*, 584 F.3d 132, 152 (2009) ("Defendants primarily argue that the goal of their political speech was to apply pressure to Huntingdon directly, as well as indirectly, by targeting associated companies, to force Huntingdon to change its practices."). *See also United States v. Wheatley*, No. CV 11-30445 WMF (ABCx), slip op. at 3-4 (C.D. Cal. August 29, 2011) (discussing Defendant's blogging about and videotaping of the alleged violations of Prop 2)..

Since the AETA regulates an economic activity, there is a rational basis for concluding that terrorism against animal enterprises substantially affects interstate commerce—both directly and in the aggregate. The substantial effect on commerce is demonstrated by looking at the financial damage that can be caused to animal enterprises. For example, in *United States v. Fullmer*, the Third Circuit stated,

> the government presented evidence that the cyberattacks [alone] against Huntingdon caused the company's computer systems to crash on two separate

> occasions, resulting in $400,000 in lost business, $50,000 in staffing costs to repair the computer systems and bring them back online, and $15,000 in costs to replace computer equipment.

584 F.3d at 142. Moreover, during the House debate of the AETA, representatives discussing the bill mentioned that since 1992 there have been approximately 1,100 complaints of such incidents with reported property losses of more than $120 million. 152 Cong. Rec. H8590-01, H8591, H8592 (daily ed. November 13, 2006) (statements of Representatives Bobby Scott and Tom Petri). Therefore, terrorism committed against animal enterprises is an economic activity and substantially affects commerce when considered both directly and in the aggregate.

ii. Even if terrorism committed against animal enterprises is considered a noneconomic activity, these activities still substantially affect commerce.

Terrorism against an animal enterprise substantially affects commerce even if it is considered a noneconomic activity. "Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Raich*, 545 U.S. at 18. In other words, Congress can regulate conduct that substantially affects commerce even if it is "purely *intra* state . . . activities that nonetheless have substantial *inter* state effects." *United States v. Robertson*, 514 U.S. 669, 671 (1995).

The Supreme Court, in *United States v. Lopez*, invalidated a federal gun-free school zone law by expressly rejecting "the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Morrison*, 529 U.S. at 617 (discussing *Lopez*, 514 U.S. at 568). Nevertheless, the conduct criminalized in this case is distinct from the conduct criminalized in *Lopez* because there is a clear relationship that terrorism against animal enterprises substantially affects interstate commerce. Notwithstanding *Lopez*, there are several federal criminal laws appropriately justified

under Congress' Commerce Clause authority. *See, e.g.*, *United States v. Serang*, 156 F.3d 910, 914 (9th Cir. 1998) (finding that the "arson of a restaurant is a commercial activity that *per se* substantially affects interstate commerce."); *cf. Westfall v. United States*, 274 U.S. 256, 259 (1927) (finding that extortionate credit transactions, though purely intrastate, may affect commerce); *Perez v. United States*, 402 U.S. 146 (1971) (holding that loan sharking committed intrastate has national implications because it is often tied to organized crime).

Unlike the statute in *Lopez*, terrorism against animal enterprises does *not* tenuously relate to commerce. *See Lopez*, 514 U.S. at 564 (mentioning that the "Government admits, under "its costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce."). Specifically, it directly targets businesses and other enterprises that are large consumers and producers of animal commodities within our national economy. *See United States v. Wheatley*, No. CV 11-30445 WMF (ABCx), slip op. at 1-2 (C.D. Cal. August 29, 2011) (The Company has "facilities in California, Nevada, and North Dakota" and "receives substantial compensation from the federal government to provide eggs for school children in California through the National School Lunch Program."). Harming an animal enterprise affects the production of animal commodities, which harms the supply and demand of that product within the economy. *See United States v. Stewart*, 451 F.3d 1071, 1078 (9th Cir. 2006) (finding that homemade guns can enter the interstate market and affect supply and demand).

Moreover, the House debates regarding the AETA demonstrate that Congress considered the interstate nature of terrorism against animal enterprises, which made state protection of animal enterprises a difficult endeavor. As recognized by Congressman Scott of Virginia in discussing the AETA as a House bill,

> [S]erious gaps and loopholes have been identified in current law with respect to protecting employees and associates of animal enterprises . . . Since the Animal Enterprise Terrorism law was enacted in 1992, there have been some 1,100 complaints of such incidents, with property losses reported of being more than $120 million . . . the *interstate nature* of the planning and execution of the criminal harassment tactics used by some individuals or groups skilled at exploiting gaps or weaknesses in the law have made it difficult for States to get at problems effectively.

152 Cong. Rec. H8590-01, H8591 (daily ed. November 13, 2006) (statement of Representative Bobby Scott). In summary, the AETA is distinguishable from purely local criminal conduct because terrorism against animal enterprises often has interstate features that makes local enforcement difficult. Furthermore, there is a rational basis for concluding that terrorism against animal enterprises substantially affects commerce since it targets businesses and has proven to cause substantial property losses for businesses, which, in turn, affects supply and demand.

C. Defendant's conduct was within the scope of the Commerce Clause.

Defendant's conduct was within the scope of the Commerce Clause because Defendant used the Internet. Defendant incorrectly argues that even if the AETA was within Congress' Commerce Clause authority, the Commerce Clause does not apply to his use of the Internet. *United States v. Wheatley*, No. CV 11-30445 WMF (ABCx), slip op. at 15 (C.D. Cal. August 29, 2011). Defendant's argument makes two assertions: (1) His use of the Internet is analogous to the limited circumstances of *United States v. Wright* where Internet usage did not invoke commerce; and (2) his actions were not commerce because his postings were not for-profit or commercial gain. *Id.* at 15-16. Both of Defendant's assertions are mistaken.

Defendant's use of the Internet is not analogous to the limited circumstances of *Wright*. This Court in *Wright* held "that a defendant's mere connection to the Internet does not satisfy the jurisdictional requirement where there is *undisputed evidence* that the files in question *never crossed state lines*." 625 F.3d 583, 593 (9th Cir. 2010) (emphasis added). In this case, there is

not undisputed evidence that the files in question never crossed state lines. Therefore, Defendant's reliance on *Wright*'s analysis for this case is misplaced.

This case is even further removed from the holding in *Wright* because the AETA is a distinctly different than the statute in *Wright*. In *Wright*, the statute contained "in interstate commerce" language, which this Court recognized as limiting language that actually requires the crossing of state lines. *Wright*, 625 F.3d at 594. In contrast, the AETA language at issue is whether the Internet is a "facility of interstate commerce," which is an entirely separate jurisdictional hook to Congress' Commerce Clause authority. 18 U.S.C. § 43(a)(1). Indeed, this Court in *Wright* even recognized that the child pornography statute "does not include the word 'facility.'" 625 F.3d at 594. As established previously, the Internet is interpreted as a "facility" of interstate commerce, and the Internet is an instrumentality of commerce. Therefore, Defendant's conduct implicates interstate commerce because he uploaded his video directly to the Internet on Facebook and blogged about the Company on the Internet. *United States v. Wheatley*, No. CV 11-30445 WMF (ABCx), slip op. at 3-4 (C.D. Cal. August 29, 2011).

Even though Defendant's postings were not-for-profit, his actions still substantially impact interstate commerce. Defendant's argument "ignores the plain statutory language, which applies to the 'use of a facility of interstate commerce.'" *Id.* at 16 (quoting 18 U.S.C. § 43). Moreover, the unique threat of animal enterprise terrorism implicates commerce even though the individual defendant may have non-monetary motives. As demonstrated by the Stop Huntingdon Animal Cruelty campaign, direct action protestors often have non-monetary motives and, instead, wish to effectuate change in the businesses practices of producing and consuming animal commodities—a goal that implicates interstate commerce nonetheless. *See Fullmer*, 584 F.3d at

152 (stating that defendant's goal was to change business practices). In other words, a person's monetary motives are inconsequential when their actions implicate interstate commerce.

Moreover, this Court rejected Defendant's argument in a recent child pornography case. This Court held that "[g]iven Congress's broad interest in preventing sexual exploitation of children, it is eminently rational that Congress would seek to regulate intrastate production of pornography even where there is no evidence that it was created for commercial purpose." *United States v. McCalla*, 545 F.3d 750, 755 (9th Cir. 2008). Congress has a similar broad interest in preventing harm to animal enterprises even where the harm was not for a commercial purpose. Therefore, Defendant's argument should be rejected because it is contrary to the express language in AETA and existing precedent.

IV. DEFENDANT'S CONVICTIONS UNDER THE AETA SHOULD BE REINSTATED BECAUSE DEFENDANT VIOLATED THE ACT BY USING THE INTERNET FOR THE PURPOSE OF INTERFERING WITH THE OPERATIONS OF THE COMPANY, AND, IN CONNECTION WITH SUCH PURPOSE, CAUSED THE LOSS OF AN ANIMAL USED BY THE COMPANY.

This Court should reverse the District Court's judgment of acquittal and reinstate the jury verdict. Defendant violated the AETA by using a facility of interstate commerce for the purpose of damaging or interfering with the operations of the Company, an animal enterprise, and "in connection with such purpose" intentionally took the male chick causing a loss of property to the Company. 18 U.S.C § 43(a)(1)-(2)(A).

A. Defendant acted for the purpose of damaging or interfering with the operations of an animal enterprise in violation of AETA.

Defendant acted for the purpose of damaging or interfering with the operations of the Company by videotaping the animal enterprise and blogging about the conditions therein. The AETA prohibits an intentional act that (1) causes a loss of property, including animals, and (2)

was conducted with the purpose of interfering with animal enterprise operations.[3] 18 U.S.C. § 43(a)(1)-(2)(A). Congress does not require acts that violate the statute to result in economic damage. 18 U.S.C. § 43(b).

The AETA does not define "damaging" or "interfering" with the operations of an animal enterprise. Defendant argues that the common definition of "damaging" is "to cause physical harm," and Defendant suggested no definition of "interfering." *United States v. Wheatley*, No. CV 11-30445 WMF (ABCx), slip op. at 17 (C.D. Cal. August 29, 2011). Defendant argued that he did not act to cause physical harm, and therefore, lacked the requisite purpose to damage the Company's operations. *Id.* However as the District Court concluded, "[W]hen [Defendant] posted and blogged about conditions at the Company, he did so with the purpose of changing those conditions. While his intentions may have been for what he perceived as a greater good . . . this does not negate the fact that he violated the statute by his actions." *Id.* at 18.

This Court should interpret the AETA by "taking each word into account in the context in which it is used" and not treating any words as "surplusage." *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994) ("Judges should hesitate . . . to treat statutory terms [as words of no consequence,] in any setting, and resistance should be heightened when the words describe an element of the offense."). The AETA penalizes offenses that "result[] in no economic damage or bodily injury." 18 U.S.C § 43(b)(1). The "no economic damage" language in the AETA is inconsistent with Defendant's suggestion that "to damage" means "to harm physically." *See United States v. Wheatley*, No. CV 11-30445 WMF (ABCx), slip op. at 17 (C.D. Cal. August 29, 2011) ("[T]he term "damaging" is used in conjunction with "operations" rather than any

[3] Both parties stipulate that the Company is an "animal enterprise" within the meaning of the AETA. *United States v. Wheatley*, No. CV 11-30445 WMF (ABCx), slip op. at 17 (C.D. Cal. August 29, 2011). "The term 'animal enterprise' means . . . a commercial or academic enterprise that uses or sells animals or animal products for profit, food or fiber production, agriculture, education, research, or testing." 18 U.S.C. § 43(d)(1)(A).

particular property. Certainly, operations can be damaged by economic loss, which is what may happen here as a result of Wheatley's actions.")

Defendant's actions and statements demonstrate his purpose to change, and therefore damage or interfere, with the operations of the Company within the meaning of the AETA. Specifically, he researched anti-animal cruelty statutes, compared the statutes with the conditions at the Company, and brought allegations of violations to his supervisor. When his supervisor did not agree to the change the Company's present operations, Defendant recorded and posted a second video on Facebook. He then "blogged about the alleged violation of Prop 2 and the allegedly cavalier attitude of his supervisor, and informed the farmed animal protection organization he has previously joined." *Id.* at 3-4. Regardless of whether Defendant's videotaping of and blogging about the Company resulted in economic loss, his conduct satisfies the AETA's requirement of damaging or interfering with the operations of the Company because "he did so with the purpose of *changing* those conditions." *Id.* at 17 (emphasis added).

B. The AETA criminalizes the taking of an animal from the Company.

Defendant's conversion of the male chick owned by the Company falls squarely within the ambit of the AETA because he intentionally took the animal causing loss of property to the Company and acted in connection with the purpose of damaging or interfering with the animal enterprise operations. 18 U.S.C § 43(a)(1)-(2)(A). Defendant argues that taking the male chick was not "terrorism" as contemplated by Congress. *United States v. Wheatley*, No. CV 11-30445 WMF (ABCx), slip op. at 18 (C.D. Cal. August 29, 2011). The District Court held that although taking the male chick caused a loss of property, Defendant's conduct was not performed with the purpose of damaging or interfering with the operations of the Company. *Id.* at 18. However, both the Act's express language and legislative history show that the intentional taking of an animal violates the statute.

The express language of the AETA supports Defendant's conviction. The AETA as charged prohibits using a facility of interstate commerce to damage or interfere with the operations of an animal enterprise, and with such purpose intentionally causing the loss of any property used by the animal enterprise, including an animal. 18 U.S.C. § 43(a)(1)-(2)(A). After Defendant videotaped the maceration process, he took the chick with this purpose of releasing the chick from the Company. *United States v. Wheatley*, No. CV 11-30445 WMF (ABCx), slip op. at 17-18 (C.D. Cal. August 29, 2011). This conduct interfered with the Company's operations, specifically its proper waste disposal procedures. *Id.* at 2. Therefore, Defendant violated the AETA, when he acted with such purpose to interfere with the operations and caused loss of property to the Company.

The AETA's legislative history also shows that the taking of the chick is within the conduct proscribed by the Act. In 1992, Congress responded to acts of domestic terrorism committed by animal rights activists by passing the Animal Enterprise Protection Act ("AEPA"). 18 U.S.C § 43 (1992)). *See* United States Dep't of Justice & United States Dep't of Agric., Report to Congress on the Extent and Effects of Domestic and International Terrorism on Animal Enterprises 1 (Oct. 1993). Congress passed the AEPA "to protect animal enterprises," including research labs, zoos, and agribusinesses. Pub. L. 102-346, Preamble, 106 Stat. 928 (1992). The AEPA prohibited certain conduct with "the purpose of causing *physical disruption* to the functioning of an animal enterprise," including "stealing, damaging, or causing the loss of, any property . . . and thereby causes economic damage [in excess of $10,000]." *Id.* at § 2(a) (emphasis added). The term "physical disruption" was not statutorily defined. However, Congress excluded from the term's definition the "lawful disruption that results from the lawful

public, governmental or animal enterprise employee reaction to the disclosure of information about an animal enterprise." *Id.*

In 2006, Congress enacted the AETA to amend and expand the AEPA. *See* 145 Cong. Rec. Index 68 (1999) (describing the proposed crime as relative to animal rights movement and to "increase penalties for attacks on businesses and research facilities"); 151 Cong. Rec. 24965 (daily ed. Nov. 4, 2005) (speech by Rep. Petri) ("Current federal law is inadequate to address the threats posed by violent acts committed by these animal rights extremists. They have recognized the limits and ambiguities in our current statutes, such as the Animal Enterprise Protection Act, and have tailored their campaign to exploit them."). Notably, Congress replaced the AEPA's "physical disruption" element with "*damaging* or *interfering* with the operations of an animal enterprise." 18 U.S.C. 43(a)(1) (emphasis added). Congress also changed APEA's "*functioning* of an animal enterprise" language to "*operations* of an animal enterprise." *Compare* Pub. L. 102-346, § 2, 106 Stat. 928 (1992) (emphasis added); *with* 18 U.S.C § 43(a)(1) (emphasis added).

When interpreting the AETA, this Court should take notice of the change in the statutory language from actual "physical disruption" of animal enterprise functioning to "damaging or interfering" with animal enterprise operations. While the terms "damaging" and "interfering" are not defined within the statute, *Black's Law Dictionary* defines criminal damage to property as "[i]njury, destruction, or substantial impairment to the use of property . . . without the consent of a person having an interest in the property," and defines the term "interference" as "the act of meddling in another's affairs," and, alternatively, "an obstruction or hindrance." *Black's Law Dictionary* (9th ed. 2009) ("critical damage to property" and "interference"). Using these common definitions, the legislative history of AETA demonstrates that taking an animal from an

animal enterprise interferes with the Company's operations. Specifically, Defendant's taking of the chick meddled in the affairs and obstructed the Company's lawful disposal of waste products.

In conclusion, this Court should find that the District Court improperly granted Defendant's motion for acquittal. The language of the AETA and its legislative history demonstrate that the taking of an animal from an animal enterprise is within the scope of the statute. By reviewing the evidence of Defendant taking chick in a light most favorable to the government, a rational trier of fact could have found Defendant guilty of animal enterprise terrorism beyond a reasonable doubt. *See Alston*, 974 F.2d at 1210 (discussing the standard of review for motions for acquittal).

CONCLUSION

For the foregoing reasons, the United States respectfully urges that this Court sustain the District Court's denial of Defendant's motion as to Count 1, but reverse the District Court's granting of Defendant's motion as to Counts 2 and 3.

Respectfully submitted:

Team 8