Case No. CV 11-30445 WMF (ABCx)

United States Court of Appeals, Ninth Circuit

UNITED STATES,

Plaintiff,

v.

LOUIS WHEATLEY,

Defendant.

Appeal From The United States District Court Central District of California

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BRIEF FOR DEFENDANT-APPELLANT

LOUIS WHEATLEY

Team 12

Counsel for Defendant

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ISSUES PRESENTED FOR REVIEW

1. Does Federal Law § 999.2(3) violate the First Amendment Free Speech Clause in the U.S. Constitution, on its face or as applied to Wheatley, such that his conviction under that statute (Count 1) should be overturned?

2. Should Wheatley's conviction under Count 1 be overturned as a matter of public policy, or in the alternative, because his actions were justified under the defense of necessity?

3. Does 18 U.S.C. § 43 exceed congressional authority under the Commerce Clause of the U.S. Constitution?

4. Did the District Court properly overturn the jury verdict convicting Wheatley under Counts 2 and 3 because 18 U.S.C. § 43 does not apply to Wheatley's conduct under the evidence presented in this case?

STATEMENT OF THE CASE

This is an appeal from Louis Wheatley's conviction under the Agricultural Products Protection Act (APPA), Federal Law § 999.2(3), and the Animal Enterprise Terrorism Act (AETA), 18 U.S.C. § 43. The Government indicted Wheatley, and a jury convicted him, of one count of violating the APPA and two counts of violating the AETA. Both convictions stem from Wheatley rescuing a dying baby chick and producing a four-minute video about the cruelties of industrialized farming during his employment at *Eggs R Us* ("the Corporation").

Following that conviction, Wheatley filed a motion for judgment of acquittal with the District Court in the Central District of California. The Court denied Wheatley's motion on Count 1, upholding the APPA conviction, but granted the motion on Counts 2 and 3, vacating the AETA convictions. *United States v. Wheatley*, 2011 CV 11-30445 WMF, 19 (C.D. Ca. Aug. 29, 2011). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF FACTS

A. The Video

On or about June 17, 2010, Louis Wheatley posted a video on his Facebook page showing a worker at the Corporation laughing while he throws live chicks into a grinder and crushes other chicks to death. *Wheatley*, at 3. Wheatley posted the video with the comment, "This is what happens every day—business as usual. I'll never be able to eat another egg again. The public has to see this to believe it." *Id*. The public saw it: a friend posted the video to YouTube, prompting local news reports, and exposing the public to routine cruelties on factory farms. *Id*. Over 1.2 million people have now watched Wheatley's video. *Id*.

Two weeks later, a manager at the Corporation saw the video. *Id*. at 4. He did not discipline the worker seen crushing live chicks in the video. *Id*. Instead, he fired Wheatley and contacted federal authorities, who promptly charged Wheatley under both the APPA and the AETA. *Id*. They charged Wheatley with crimes punishable by over seven years imprisonment for rescuing a baby chick dying at the Corporation and filming the four-minute video. *Id*. Prosecutors did not charge the Corporation or the worker shown in the video violating California's animal cruelty laws. *Id*.

B. Wheatley and the Corporation

Louis Wheatley is a journalism student who first learned about cruelty to farm animals during the campaign for Proposition Two, a 2008 California farm animal welfare ballot initiative. *Id*. at 2. In the next two years, Wheatley researched farm animal issues on the Internet and joined a farm animal protection group. *Id*. Increasingly curious, and wanting to earn money over his summer break from college, Wheatley decided to get a farm job. *Id*. He applied for a job

at the Corporation, and was hired as a "poultry care specialist." *Id*. He hoped to write an article about the experience for his journalism class and maybe blog about it online. *Id*.

The Corporation is an agri-business that operates facilities in California, Nevada, and North Dakota. *Id*. at 1. At its California facility, the Corporation confines layer hens in industrial grade battery cages. *Id*. at 2. The federal government heavily subsidizes the Corporation's operations through the National School Lunch Program, which buys eggs for school children. *Id*.

Wheatley started work at the Corporation on June 1, 2010. *Id*. Every day he fed and watered the hens, and cleaned the cages when he had time. *Id*. Soon Wheatley noticed something wrong with these cages: each housed an average of six hens, all too crammed to spread their wings. *Id*. at 3. From his research, Wheatley knew that Proposition Two required all farm animals have enough space to fully spread their wings and turn around—a requirement that California's egg industry concedes requires at least 116 square inches per hen, and may require much more.[1] *Id*. By contrast, each hen at the Corporation had just 48 square inches of space. *Id*.

Wheatley alerted his supervisor to this apparent violation of California law. *Id*. His supervisor replied that Wheatley "needn't be concerned." *Id*. But Wheatley was concerned, so he informed his farm animal protection group about the apparent legal violation, and blogged about it online. *Id*. at 3-4. He also created a short video of the battery cages. *Id*. at 3. He posted this video, along with the video of a worker laughing while he crushed live chicks to death, on Facebook on July 17, 2010. *Id*.

That same day, Wheatley saw a male chick breathing atop a pile of living and dead chicks at the grinder. *Id*. at 4. The chick caught Wheatley's eye and he found himself unable to

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[1] Proposition Two did not specify how many square inches of space each hen must have. Its sponsor, the Humane Society of the United States, argues it requires cage-free housing. Egg producers disagree, but accept that it requires at least 116 square inches per bird. *See* Terrence O'Keefe, *California egg producer moving forward after Proposition 2*, Jun. 9, 2011, http://www.wattagnet.com/California_egg_producer_moving_forward_after_Proposition_2.html.

just walk away, so Wheatley picked up the chick, put it in his coat pocket, and took it home with him. *Id*. The rescued chick, named "George", continues to recover. *Id*.

C. Procedural History

In February 2010, a federal grand jury sitting in the Central District of California indicted Wheatley on three counts: (1) entering an animal facility and using or attempting to use a camera, video recorder, or any other video or audio recording equipment, in violation of section 999.2(3) of the APPA; (2) using the internet as a means of interstate commerce for purposes of damaging or interfering with the operations of an animal enterprise, in violation of the AETA, 18 U.S.C. §43(a)(1); and (3) in connection with such purpose, intentionally damaging or causing the loss of any real or personal property (including animals or records) used by an animal enterprise, in violation of the AETA, 18 U.S.C. §43(a)(2)(A). *Id*. at 4-5.

Wheatley filed a motion to dismiss the indictment. *Id*. at 5. The District Court denied Wheatley's motion, sending the case to the jury, which convicted Wheatley on all counts. *Id*. Wheatley then filed a motion for judgment of acquittal. *Id*. He argued that both the APPA and the AETA are unconstitutional: the APPA because it restricts First Amendment speech; the AETA because it exceeds congressional power under the Commerce Clause. *Id*. at 6-7. Alternatively, he argued that the doctrines of necessity and public policy justify any violations of the APPA, and that the AETA does not apply to his conduct. *Id*.

The Court denied the motion on Count 1 (the APPA charges), but granted it on Counts 2 and 3 (the AETA charges). *Id*. at 19. On Count 1, the Court found the APPA constitutional as applied to Wheatley, and not overbroad. *Id*. at 11. The court also dismissed Wheatley's public policy argument and rejected the necessity defense because it deemed Wheatley's acts "indirect civil disobedience" not covered by the necessity defense. *Id*. at 13, 14.

On Count 2, although the Court rejected Wheatley's Commerce Clause challenge, it concluded that Wheatley's conduct did not meet the elements for an AETA conviction. *Id*. at 15, 18. Specifically, the Court found that Wheatley did not take the dying chick from the Corporation "in connection with" the purpose of damaging or interfering with an animal enterprise, as required by the AETA. *Id*. at 19. Instead, "he took 'George' for the purpose of saving that one chick's life and for no other purpose," rendering the AETA inapplicable. *Id*.

SUMMARY OF ARGUMENT

I. Section 999.2(3) of the APPA violates the First Amendment both facially and as applied to Wheatley. The Section is overbroad: a substantial number of its applications are unconstitutional because it sweeping prohibitions could criminalize the conduct of 175 million people and outlaw photography on 19% of the United States' territory. The Section is also unconstitutional as applied to Wheatley because the restrictions on speech at the Corporation were both unreasonable and viewpoint discriminatory.

II. Wheatley's conviction under Count 1 should be overturned as a matter of public policy and because his actions were justified by the defense of necessity. Two public policies support overturning Wheatley's conviction: California's policy of protecting whistleblowers from retaliation, and the federal policy of encouraging whistleblowing under the False Claims Act. Moreover, the defense of necessity applies because Wheatley chose the lesser of two evils—videotaping cruelty rather than letting it continue—and had no reasonable legal alternatives.

III. The AETA exceeds congressional authority under the Commerce Clause of the U.S. Constitution. The Internet is not per se a channel of interstate commerce because it is often used for purely intrastate purposes. Yet the District Court construed the AETA to regulate all uses of the Internet for alleged animal terrorism, regardless of whether the actual use crossed state lines.

Under this interpretation, the AETA exceeds the Commerce Clause's limits because it regulates purely intrastate channels of commerce.

IV. The District Court properly overturned the jury verdict convicting Wheatley under Counts 2 and 3, because neither the Facebook posts nor the taking of the chick satisfies all the requisite elements of an AETA offense. First, neither act made use of a facility of interstate commerce, as required by Section 43(a) of the statute. Second, neither act was committed with the intent to damage or interfere with an animal facility, as required by Section 43(a)(1). Third, neither act constituted the intentional causation of damage or loss of the Corporation's personal property, as required by Section 43(a)(2).

ARGUMENT

I. SECTION 999.2(3) OF THE APPA VIOLATES THE FIRST AMENDMENT

Section § 999.2(3) of the APPA violates the First Amendment both facially and as applied to Wheatley. It criminalizes all unauthorized filming at animal facilities—a sweeping prohibition on speech. *See Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing a "First Amendment right to film matters of public interest"). Because Section 999.2(3) restricts speech, the Government must prove its constitutionality. *See United States v. Playboy Entertainment Group*, 529 U.S. 803, 804 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.").

The Government cannot meet that burden. Section § 999.2(3) is overbroad because it has a substantial number of unconstitutional applications—from restricting nature photography to criminalizing camera-carrying zoo visitors. And the Section is unconstitutional as applied to Wheatley because its application here was unreasonable and viewpoint discriminatory.

A. The Standard of Review Is De Novo

Federal appeal courts review constitutional issues de novo. *Ram v. INS*, 243 F.3d 510, 516 (9th Cir. 2001). A district court's determinations on mixed questions of law and fact that implicate constitutional rights are also reviewed de novo. *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1066 (9th Cir. 1995).

B. Section 999.2(3) Is Facially Unconstitutional Because It Is Overbroad

Section 999.2(3) violates the First Amendment because it is substantially overbroad. The overbreadth doctrine permits litigants "to challenge a statute not because their own rights of free expression are violated, but because … the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). A law is unconstitutionally overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010) (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n. 6 (2008)).

A substantial number of Section 999.2(3)'s applications are unconstitutional because the APPA does not limit the Section's sweeping criminal prohibition on photography. First, the APPA is not limited to intentional trespass; it applies to anyone who "enter[s]" an "animal facility" without the owner's "effective consent." § 999.2. For example, a driver who stops to photograph horses in a paddock, and stands on farm-owned roadside land while taking the photo, violates the APPA. The same is true of anyone photographs on any of the 409 million acres of pastureland in America. *See* USDA, "Farm Characteristics," 2007 Census of Agriculture. The APPA thus prohibits photography on 19% of the land area of the United States. *Id*.

Second, the APPA is not limited to photos of the animal facility's animals, or indeed to photos of animals at all. Once a person enters an animal facility, the APPA prohibits any use of

"a camera, video recorder, or any other video or audio recording equipment," regardless of what is being photographed. § 999.2(3). Thus a birdwatcher could be liable for photographing wild birds nesting on farmland, and a hiker crossing farmland could be liable for photographing the sunset, or even herself. Both the birdwatcher and the hiker would be guilty of felonies, punishable by up to seven years in jail. Given 46 million Americans go bird watching every year,[2] this creates "a criminal prohibition of alarming breadth." *Stevens*, 130 S. Ct. at 1588.

Third, the APPA is not limited to trespassers; even authorized visitors to an animal facility are liable if they lack "effective consent" to take photos. § 999.2. For example, a hunter who crosses private land that is explicitly open to hunting nonetheless commits a felony if he photographs wildlife without the owner's express consent. Given 77% of American farmers and ranchers allow hunting on their land, and 12.5 million Americans go hunting every year,[3] that application of the APPA alone creates substantial overbreadth.

Fourth, the APPA is not limited to farmland; its expansive definition of "animal facility" could criminalize all camera-carrying visitors to zoos, circuses, and even university campuses. The APPA defines an "animal facility" as "any vehicle, building, structure, research facility, premises, or defined area where an animal is kept, handled, housed, exhibited, bred, or offered for sale." § 999.1(2). Zoos and circuses—premises where animals are exhibited—clearly meet this definition. So the 175 million annual visits to zoos and aquariums[4] could result in 175 million felony convictions under the APPA if zoo visitors take photos without first securing the zoo's express consent. Indeed, photography could be criminalized on entire American university

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[2] U.S. Fish and Wildlife Service, *Birding in the United States: A Demographic and Economic Analysis* (2001), 4; and *Number of U.S. hunters dwindles*, Associated Press (Sep 2, 2007).
[3] *See* Robert L. Ryan, *Protecting and managing private farmland and public greenways in the urban fringe*, Landscape and Urban Planning 68 (2004) 193.
[4] *See* Association of Zoos and Aquariums, *Zoo and Aquarium Statistics*, http://www.aza.org/zoo-aquarium-statistics/ (last accessed Jan 18, 2010).

campuses because animals are kept for research at most major American universities,[5] and these campuses could therefore be designated "animal facilities".

By contrast, what the Government alleges to be Section 999.2(3)'s "plainly legitimate sweep" is tiny. The Government asserts that the APPA's goal is to protect animal facilities from terrorist activities. *Wheatley*, at 10. But it cites no case where videotaping has accompanied an alleged act of terrorism at an animal facility, suggesting Section 999.2(3) may have no legitimate sweep.[6] And even if this court counts unauthorized undercover videos like Wheatley's within the Section's legitimate sweep, the numbers are still miniscule. Over the last five years, animal activists have made an average of eight videos at animal production facilities nationwide each year; last year, they made just three.[7] Even allowing for a few more videos produced at animal research or exhibition facilities, this number is trifling.

Section 999.2(3)'s substantial restrictions on photographic expression, judged in relation to its narrow legitimate sweep, render it unconstitutional under the overbreadth doctrine. The Supreme Court has found a "substantial" amount of lawful speech restricted in speech prohibitions within just one airport. *See Board of Airport Commissioners v. Jews for Jesus,* 482 U.S. 569, 575-77 (1987) (holding prohibitions on speech inside LAX terminals overbroad). The potential criminalization of 12.5 million hunters, 46 million bird watchers, 175 million visitors of

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[5] Several hundred American universities receive taxpayer money for animal experimentation; in California alone, 46 universities do. *See* Office of Laboratory Animal Welfare, *Domestic Institutions with a PHS Approved Animal Welfare Assurance*, http://grants.nih.gov/grants/olaw/assurance/300index.htm ?State=CALIFORNIA&StateCode=CA#GridTop.

[6] Similarly, the Federal Bureau of Investigation has not cited videotaping as an element of animal terrorism cases in its reports or before Congress. *See* Testimony of John E. Lewis, Deputy Assistant Director, FBI, Before the Senate Judiciary Committee (May 18, 2004) (detailing cases of animal terrorism, none involving videos); Terrorism 2002-2005, FBI Report (same). More recent terrorism reports make no reference to animal terrorism attacks at all. *See* National Counterterrorism Center, *2010 Report on Terrorism*, Apr. 30, 2011, http://www.nctc.gov/

[7] There were 41 documented undercover investigations at animal production facilities involving videotaping between 2007 and 2011. This figure is based on the self-reporting of animal activists (who have every incentive to not under-report). *See* http://www.animalvisuals.org/investigations (last accessed Jan. 18, 2012).

zoos and aquariums, and the entire camera-owning student body of American research universities presumably meets this standard.

The District Court rejected this conclusion because it misapplied the overbreadth test. The Court accepted the Government's argument that Section 999.2(3) is not overbroad because it had "limited means" to achieve its "valid" and "substantial" interests. *Wheatley*, at 10, 11. But that is the test for strict scrutiny, not overbreadth. *See*, *e.g.*, *Playboy*, 529 U.S. at 813 (requiring "least restrictive means" and a "compelling interest" for strict scrutiny). And the Court specifically rejected heightened scrutiny, let alone strict scrutiny. *Wheatley*, at 9. Instead of this test, the Court should only have considered whether a substantial number of Section 999.2(3)'s applications are unconstitutional, judged in relation to the Section's plainly legitimate sweep. *See Stevens*, 130 S. Ct. at 1587. Because the statute criminalizes the speech of potentially millions of people beyond its legitimate sweep, it is overbroad.

C. Section 999.2(3) Is Unconstitutional As Applied to Wheatley

Section 999.2(3) cannot be constitutionally applied to Wheatley's conduct because the Section regulates speech in an unreasonable and discriminatory manner. Even conceding that the Corporation is a nonpublic forum,[8] the Government may only restrict speech there in a manner that is both "reasonable in light of the purpose served by the forum" and "viewpoint neutral." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985). The District Court wrongly conflated these two requirements, finding the Section reasonable because it is viewpoint neutral. *Wheatley*, at 10. But reasonableness and viewpoint neutrality are independent requirements—and neither is met by the Section's application to Wheatley.

[8] At trial, Wheatley argued that the Corporation was a public forum. For appeal, Wheatley concedes that the Corporation is a non-public forum.

First, the Section is unreasonable because it broadly restricts speech without regard to the forum's purpose, or Wheatley's interference with that purpose. The Government has not alleged that Wheatley's videoing at the Corporation was incompatible with the facility's purpose of egg production. Indeed, the Government has presented no evidence of how Wheatley's video is not "reasonable in light of the purpose served by the forum." *Cornelius*, 473 U.S. at 806. Wheatley's videoing did not cause physical damage to the facility or prevent him from fulfilling his duties as an employee. In fact, the impact of his videoing was so slight that the Corporation never actually noticed Wheatley's videoing; they only became aware of the video when a manager saw it online.

Moreover, the Section is unreasonable because it imposes a sweeping restriction on speech. Speech restrictions in nonpublic forums are more reasonable where "substantial alternative channels … remain open for … communication to take place." *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 53 (1983). By contrast, absolute restrictions on speech are presumptively unreasonable. *See Jews for Jesus*, 482 U.S. at 575 ("We think it obvious that [prohibiting all First Amendment activity in an airport terminal] cannot be justified even if LAX were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech.").

The restriction here is absolute: the Section criminalizes all videoing at animal facilities without the owner's consent, regardless of the video's purpose, length, or effect. § 999.2(3). And it closes all alternative channels for communication: animal facilities are typically closed to the public, and seldom admit journalists, so without unauthorized videos like Wheatley's no videos will be created. The Section will therefore deprive the American people of the documentary

evidence to engage in an informed debate about society's use of animals. Such a sweeping prohibition on speech and debate is unreasonable.

Second, the Section is viewpoint discriminatory because it only applies to activists criticizing animal facilities. A law is viewpoint discriminatory if it is "impermissibly motivated by a desire to suppress a particular point of view." *Cornelius*, 473 U.S.at 812-13. The District Court ruled that in the absence of legislative history to deduce the Section's intent it should be presumed to be viewpoint neutral. But this ruling got it the wrong way around: the Government has the burden of proving the constitutionality of speech restrictions. *See Playboy*, 529 U.S. at 804. Because the Government has not proven the Section is viewpoint neutral, it is presumptively unconstitutional.

Moreover, the Section is viewpoint discriminatory as applied here because it granted the Corporation a veto over viewpoints it wished to suppress. Wheatley was not charged immediately after he videoed at the Corporation for the viewpoint neutral act of videoing. Instead, he was charged after a manager saw his documentary, which has a viewpoint critical of the Corporation, online. Because the Section only bars unauthorized videos, the Corporation could have immunized Wheatley from prosecution by authorizing his video. Presumably, the Corporation would have authorized the video had it complimented, rather than criticized, the Corporation. The Section thus gave the Corporation the power to restrict Wheatley's speech based on his viewpoint.

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Because Section 999.2(3) is substantially overbroad on its face, and because the Section was unconstitutionally applied to Wheatley's speech at the Corporation, Wheatley's conviction under Count 1 should be overturned.

II. WHEATLEY'S CONVICTION SHOULD BE OVERTURNED AS A MATTER OF PUBLIC POLICY AND UNDER THE DEFENSE OF NECESSITY

Wheatley was convicted for producing a video at the Corporation that revealed widespread animal cruelty and lawlessness that would not otherwise have come to light. As such**,** his conviction under Count 1 should be overturned as a matter of public policy and because his actions were justified under the defense of necessity.

A. The Standard of Review Is De Novo For Sufficiency of Evidence

Federal appellate courts "review a district court's denial of a motion for judgment of acquittal and its interpretation of the elements of a criminal statute de novo." *United States v. Anaya-Acosta*, 629 F.3d 1091, 1093 (9th Cir. 2011) (citing *United States v. McNeil,* 320 F.3d 1034, 1035 (9th Cir. 2003)). Appellate courts "review the sufficiency of the evidence to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." *McNeil*, 320 F.3d at 1035.

B. Public Policy Protects Wheatley's Whistleblowing

Wheatley's conviction should be overturned on public policy grounds. This case implicates two policies: California's policy of protecting whistleblowers from retaliation, and the federal policy of encouraging whistleblowing under the False Claims Act, 31 U.S.C. § 3729.

First, Wheatley's conviction violates California's public policy of protecting whistleblowers from retaliation. "In California, public policy concerns uphold 'protection of employees against retaliatory dismissal for conduct which, in light of the statutes, deserves to be encouraged, rather than inhibited.'" *DeSoto v. Yellow Freight System*, 957 F.2d 655, 658 (9th Cir. 1992) (quoting *Hentzel v. Singer Co.,* 138 Cal. App. 3d 290, 298 (Cal. Ct. App. 1982)). Wheatley's conduct at the Corporation "deserves to be encouraged"—he revealed widespread violations of three state laws: Penal Code Sections 597t and 597(b), and Health and Safety Code

Section 25990.[9] Indeed, California courts have recognized that public policy forbids punishing employees for revealing "illegal, unethical, or unsafe practices," *Collier v. Superior Court*, 228 Cal. App. 3d 1117, 1123 (Cal. Ct. App. 1991), or poor health and safety conditions. *Hentzel*, 138 Cal. App. 3d at 165. Wheatley's video revealed both illegal conduct and poor health conditions at the Corporation. Moreover, the APPA's criminal penalties will chill whistleblowing more forcefully than any retaliatory employment termination could. As such, the public policy to protect whistleblowers from retaliation applies particularly strongly to Wheatley.

Second, Wheatley's conviction violates the federal policy of encouraging whistleblowing under the False Claims Act (FCA). The FCA encourages whistleblowers to reveal fraud against the federal government. *See Campbell v. Redding Medical Center*, 421 F.3d 817, 823 (9th Cir. 2005) ("the congressional intent to encourage whistleblowers to come forward is clear."). The Act allows whistleblowers to bring actions against federal contractors for their failure to follow contract provisions—including environmental, health and safety provisions. *See*, *e.g.*, *Rockwell Int'l Corp. v. United States,* 549 U.S. 457, 460 (2007) (evaluating FCA action based on federal contractor's alleged failure to follow environmental, health, and safety provisions in contract). Videos are often crucial evidence in actions proving fraud under the FCA. *See*, *e.g.*, *United States v. Universal Health Services*, 2011 WL 2559552 (W.D. Va. June 28, 2011) (considering video evidence in FCA action). Yet Section 999.2(3) criminalizes the production of videos that could reveal fraud and the violation of environmental and safety standards at federally funded

[9] Penal Code Section 597(b) prohibits the mutilation and cruel killing of any animal. The practice of grinding up live baby chicks at the Corporation, as depicted in Wheatley's video, violates this provision. Penal Code Section 597t provides, "Every person who keeps an animal confined in an enclosed area shall provide it with an adequate exercise area." And Cal. H&S Code Section 25990 provides that farms may not confine animals "in a manner that prevents such animal from: (a) Lying down, standing up, and fully extending his or her limbs, (b) Turning around freely." The battery cages at the Corporation, as depicted in Wheatley's video, violate both provisions.

animal facilities. As such, Section 999.2(3) should not be enforced in cases where it will thwart the FCA's policy of encouraging whistleblowing.

This is such a case. Wheatley's video revealed violations of the law at the Corporation, a federal contractor. Because the Corporation receives substantial federal funding to supply eggs to the National School Lunch Program, it is bound by the regulations governing procurement under the Program, 7 C.F.R. § 210.21. These regulations incorporate the general federal procurement requirements that all contractors be in "compliance with public policy, 7 C.F.R. § 3016.36(b)(8), and report all "[v]iolations of law" to authorities, 7 C.F.R. § 3016.36(b)(11). Wheatley's video reveals that the Corporation is neither in compliance with public policy nor reporting violations of three state laws at its facility. Public policy opposes convicting Wheatley for revealing legal violations that would support a claim under the False Claims Act.

C. The Necessity Defense Justifies Wheatley's Actions

Alternately, Wheatley's conduct is justified by the necessity defense. The necessity defense applies when "physical forces beyond the actor's control render[] illegal conduct the lesser of two evils." *United States v. Bailey*, 444 U.S. 394, 410 (1980). Necessity is "a utilitarian defense": it "justifies criminal acts taken to avert a greater harm, maximizing social welfare by allowing a crime to be committed where the social benefits of the crime outweigh the social costs of failing to commit the crime." *United States v. Schoon*, 971 F.2d 193, 196 (9th Cir. 1991). For example, the necessity defense protects a landowner who destroys a dike to save property from flooding. *Bailey*, 444 U.S. at 410. Wheatley faced a similar dilemma: allow mass cruelty and lawlessness to continue unabated, or video those abuses in possible breach of the APPA. In opting to video the abuses, instead of ignoring them, Wheatley chose the lesser evil.

The District Court rejected the necessity defense based on a misinterpretation of *United States v. Schoon*. In *Schoon*, the Ninth Circuit held that the necessity defense cannot justify acts of indirect civil disobedience. *Schoon*, 971 F.2d at 196. The District Court interpreted *Schoon* to mean that violations of the law must either be direct or indirect civil disobedience. *Wheatley*, at 14. The Court then found that because Wheatley's video was not direct civil disobedience, it must have been indirect civil disobedience, barring the necessity defense. *Id*. But this logic ignores a third category of cases: those not involving civil disobedience at all. *Schoon* did not end the necessity defense in such cases. For example, the landowner who destroys a dike is no civil disobedient—he is not destroying the dike to protest the prohibition on destroying dikes–yet he may invoke the necessity defense. Similarly, Wheatley is not a civil disobedient: as the District Court acknowledged, he did not video the Corporation's operations to protest the APPA, or any other law. *Id*. Rather, Wheatley sought the enforcement of an existing law—the antithesis of civil disobedience. As such, *Schoon* does not bar Wheatley's necessity defense.

Wheatley's actions meet the test for the necessity defense. Defendants claiming necessity must show "(1) they were faced with a choice of evils and chose the lesser evil; (2) they acted to prevent imminent harm; (3) they reasonably anticipated a direct causal relationship between their conduct and the harm to be averted; and (4) they had no legal alternatives to violating the law." *Schoon*, 971 F.2d at 195. The District Court concluded, "Wheatley cannot meet all four prongs," without considering any of the prongs. In fact, Wheatley meets all four.

First, Wheatley was faced with a choice of evils and chose the lesser evil. At the Corporation, he witnessed rampant violations of state cruelty laws. He saw workers crushing live chicks to death, and management condoning the use of cages so small that hens could barely turn around. *Wheatley*, at 3. The California Legislature has judged such cruelty an evil by designating

it as a felony offense. *See* Cal. Penal Code §§ 597(b) and (d). And California's populace has made a similar judgment—passing Proposition Two, which criminalizes the tight confinement of farm animals, with the largest number of votes in the history of California ballot initiatives.[10] These laws reflect a general social consensus that cruelty to animals is a social evil. *See Stevens*, 130 S. Ct. at 1585 (noting, "the prohibition of animal cruelty itself has a long history in American law"). By contrast, Wheatley's filming of this cruelty was a lesser evil. He filmed only enough evidence to prove cruelty—just four minutes of footage—and used it only to publicize the Corporation's systematic breaches of state cruelty laws.

Second, Wheatley acted to prevent imminent harm. The harm was widespread lawlessness—an entire facility flouting the requirements of Cal. Health & Safety Code Section 25990—and systemic cruelty to animals, in violation of Cal. Penal Code Sections 597t and 597(b). The harm was also imminent: Wheatley saw ongoing cruelty, and a supervisor with no intention of stopping it. That the Corporation now denies the cruelty is irrelevant: a court should independently evaluate the existence of imminent harm. *See*, *e.g.*, *United States v. Maxwell*, 254 F.3d 21, 27 (1st Cir. 2001) (evaluating defendant's evidence of imminent harm from Trident submarines in assessing necessity defense). Wheatley's video shows that imminent harm existed at the Corporation; in publicizing this harm, Wheatley acted to prevent it.

Third, Wheatley reasonably anticipated a direct causal relationship between his conduct in creating the video and the harm to be averted—animal cruelty and lawlessness. From his involvement with a farm animal protection group, Wheatley would have known that past undercover videos revealing animal cruelty had spurred law enforcement investigations. For example, he would have know that in 2006, after an employee at a Chino slaughterhouse filmed

[10] *See* Tracie Cone, *Calif lawmakers rally around animal welfare issues*, San Jose Mercury News, May 5, 2009.

workers abusing downed cows, the San Bernardino County District Attorney filed felony charges against the slaughterhouse manager. *See* Felony Complaint, 2006 WL 5414171 (Cal. Superior, Feb. 15, 2008). And Wheatley could have reasonably assumed that law enforcement could end the cruelty at the Corporation, since it had in previous cases of farm animal cruelty. *See*, *e.g.*, *Meatpacker To Shut Down Permanently After Recall: Report*, Reuters, Feb. 24 2008 (reporting that Chino slaughterhouse shut down following release of undercover video exposing cruelty).

Fourth, Wheatley had no reasonable legal alternatives to violating the APPA. Wheatley tried the most obvious alternative—alerting his supervisor to the violations—but was told he "needn't be concerned." *Wheatley*, at 3. Complaining to higher management—even if Wheatley as an entry-level employee had access to them—would have been futile; when a Corporation manager saw the video, he did nothing to rectify the cruelty; instead, he fired Wheatley. *Id.* at 4. Wheatley could have gone to the district attorney, but the district attorney's failure to prosecute the Corporation even with video evidence of cruelty suggests he likely would not have prosecuted the Corporation without such evidence. Wheatley could not have sued the Corporation himself because the cruelty statute lacks a private suit provision—and even if he could have, the suit would have gone nowhere without video evidence. Finally, unlike in civil disobedience cases, Wheatley could not have petitioned the legislature for relief. The *Schoon* Court held that for civil disobedients "legal alternatives will never be deemed exhausted when the harm can be mitigated by congressional action." *Schoon*, 971 F.2d at 198. But here congressional action would have been futile because the problem was not the law (cruelty to animals is already illegal), but its enforcement. Hence, Wheatley had no reasonable legal alternatives to filming the conditions at the Corporation.

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Because Wheatley's videoing of animal cruelty at the Corporation was justified by public policy and necessity, his conviction under Count 1 should be overturned.

III. THE ANIMAL ENTERPRISE TERORRISM ACT, 18 U.S.C. § 43, AS CONSTRUED BY THE DISTRICT COURT, EXCEEDS CONGRESSIONAL AUTHORITY UNDER THE COMMERCE CLAUSE

As construed by the District Court, the Animal Enterprise Terrorism Act, 18 U.S.C. Section 43 (the "AETA"), is an unconstitutional extension of Congress' commerce power because it treats *any* use of the Internet, including those that are demonstrably intrastate, as *per se* interstate and thus covered by the statute. The mere use of the Internet, which by design allows purely intrastate transmissions, cannot trigger federal criminalization of truly local activity.

A. The Standard Of Review Is De Novo

Federal appeal courts review constitutional issues de novo. *Ram*, 243 F.3d at 516. A district court's determinations on mixed questions of law and fact that implicate constitutional rights are also reviewed de novo. *American-Arab Anti-Discrimination Comm.*, 70 F.3d at 1066.

B. Congress May Only Regulate Channels of Commerce for Interstate, not Intrastate, Activity

The Commerce Clause forbids Congress from legislating over truly local matters. *United States v. Morrison*, 529 U.S. 598, 617-18 (2000) (emphasizing the distinction "between what is truly national and what is truly local" in striking down the Violence Against Women Act). The Supreme Court's recent Commerce Clause jurisprudence has limited the scope of the commerce power to three categories of activity. *United States v. Lopez*, 514 U.S. 549 (1995) (striking down the Gun-Free School Zones Act). These are: (1) the "use of the channels of interstate commerce," (2) the "instrumentalities of interstate commerce," and (3) "activities having a substantial relation to interstate commerce." *Id*. at 558-9. Congress may only regulate the

channels of interstate commerce, like the Internet, where interstate activity is actually present; purely intrastate uses of such channels are not within Congress' regulatory power[11]. *Morrison*, 529 U.S. at 608-9; *see also* Nathaniel Clark*, Tangled In a Web: The Difficulty of Regulating Intrastate Internet Transmissions Under the Interstate Commerce Clause*, 40 MacGeorge L. Rev. 947, 955 (2009) ("Channels of interstate commerce may only be regulated for interstate activity—which is consistent with the spirit of the Interstate Commerce Clause and the rich case history it has spawned"). The one exception to this rule – that Congress may regulate purely intrastate uses of interstate channels if they impede interstate movement - is narrow and not relevant to the AETA. *See Gibbons v. Ogden*, 22 U.S. 1 (1824).

C. The AETA Exceeds Congressional Authority Because the Internet Can Be Used for Purely Intrastate Transmissions

The Internet, by design, can be and often is used for purely intrastate transmissions. The Ninth Circuit recognized this fact in *United States v. Wright*, 625 F.3d 582 (9th Cir. 2010), which held that Internet transmission of child pornography purely within the state of Arizona was insufficient to trigger the "interstate commerce" requirement of a federal child pornography law. The AETA contains a similarly worded "interstate commerce" requirement that, following *Wright*, cannot constitutionally be satisfied by purely intrastate Internet transmissions. 18 U.S.C. § 43(a).

Indeed, purely intrastate transmissions over the Internet are a common and intentional consequence of its design, which routes data from endpoint to endpoint using a "shortest path

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[11] The Government may argue that, though the use of the Internet may be purely intrastate, it is still permissibly regulated under the AETA because it has a "substantial relation to interstate commerce" following *Lopez*' third category. *Lopez*, 514 U.S. at 558-9. The District Court explicitly did not reach this question, instead holding that *any* use of the Internet is *per se* interstate without regard to the relation to interstate commerce of the conduct regulated. Accordingly, we do not brief it here. Wheatley maintains, in any case, that the conduct regulated by the AETA does *not* have a substantial relation to interstate commerce.

possible" protocol. Clark, at 952-3. When a computer user triggers an Internet transmission, a signal is routed from her computer to her Internet service provider (typically located in the same city), and then to a regional "backbone server" which routes the signal to its intended destination. *Id.* at 952-3. These transmissions are often accomplished entirely intrastate because Internet protocol is designed to use the shortest path possible between users, Internet service providers, and backbone servers. *Id.* at 952-3.

In fact, purely intrastate transmissions are *probable* when transmitting information between users in the same state, because the U.S. – and particularly California – contains such a heavy concentration of backbone servers. *Id.* at 953 ("Technological circumstances in the United States make [intrastate transmission] *probable* because there are many national IXPs. In California there are a combined ten IXPs in Los Angeles and San Francisco alone."). In the parlance of Silicon Valley, intrastate Internet transmissions are "a feature, not a bug." *See* Steve Gibbard, *Geographic Implications of DNS Infrastructure Distribution*, 10 Internet Protocol J. 1, 12 (2006) ("Internet traffic now stays local in many places where it once would have traveled to other continents, lowering costs while improving performance and reliability").

The District Court held that any Internet use is *per se* interstate because it misapplied persuasive authority. It correctly assessed that there is no binding authority regarding the question of which uses of the Internet are permissibly regulated under the commerce power as a "channel" of interstate commerce – it is a matter of first impression before the Ninth Circuit. *Wheatley*, at 16**.** In reaching its holding that *any* use of the Internet must be considered *per se* interstate and thus subject to federal regulation, the District Court relied on the persuasive guidance of three cases, none of which are applicable here. *Id.*, at 15.

The District Court first relied on *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997), which found Internet use subject to regulation under the Commerce Clause. This case should not guide the court for two reasons. First, *Pataki* is mere persuasive authority from a district court in another circuit. Secondly, *Pataki* was decided in 1997, when Google was still a Stanford experiment and only 18 percent of American households had Internet access.[12] As such, it did not consider the actual operating structure of the Internet in reaching its holding – perhaps understandably, given the "novelty of the technology" at the time. *Id.,* at 172-3. In light of the increasing probability of intrastate Internet use, *Pataki*'s outdated analysis should be rejected.

The District Court cited two additional cases to support its holding that any Internet use is *per se* interstate: *United States v. Panfil*, 338 F.3d 1299 (11th Cir. 2003) and *Planned Parenthood of the Columbia/Willamette, N.C. v. American Coalition of Life Activists*, 244 F.3d 1007 (9th Cir. 2001). But neither of these cases actually dealt with a Commerce Clause challenge. *Panfil* only mentions the Commerce Clause in one-sentence passing as the issue was not before the court, and *Planned Parenthood* (the text of whose opinion does not even contain the word "interstate") does not reach it at all for the same reason.

* * *

Because Congress' power to regulate channels of interstate commerce only extends to actual interstate uses of such channels, and because, as the Ninth Circuit recognized in *Wright*, the Internet's infrastructure allows and promotes genuinely intrastate uses, the District Court's holding that any Internet use is sufficient to trigger an AETA violation renders the statute an unconstitutional extension of Congress' power under the Commerce Clause.

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[12] Eric C. Newburger, *Home Computers and Internet Use in the United States*, Special Study, U.S. Census Bureau (September 2001), www.census.gov/prod/2001pubs/p23-207.pdf.

IV. THE AETA DOES NOT APPLY TO WHEATLEY'S CONDUCT AS ALLEGED UNDER COUNTS 2 AND 3

The District Court correctly vacated Wheatley's convictions under Counts 2 and 3 because neither of his actions satisfies all the requisite elements of an AETA offense. The crime of animal enterprise terrorism as defined by the AETA requires the satisfaction of three statutory elements: (1) travel in interstate commerce or use of a facility of interstate commerce (the "jurisdictional hook" element), (2) the purpose of damaging or interfering with the operations of an animal enterprise (the "scienter" element), and (3) in connection with such a purpose, the intentional causation of damage or loss of real or personal property used by an animal enterprise (the "intentional causation" element). 18 U.S.C. § 43(a).

The District Court correctly concluded that neither of Wheatley's alleged acts meets all three of these elements. The Court concluded that although the Facebook post (charged in Count 2) may have violated Section 43(a)(1) and the taking of the chick (charged in Count 3) may have violated Section 43(a)(2), neither act satisfied *all* of the AETA's requisite statutory elements. *Wheatley*, at 19. Because the jury merely found that Wheatley's Internet use violated Section 43(a)(1) and his taking of the chick violated Section 43(a)(2)(A) but crucially *did not find* that either act violated *all* the requisite elements of an AETA offense, the District Court correctly granted Wheatley's motions for judgment of acquittal.

Following the District Court's ruling, and the indictment and convictions, which separated Wheatley's acts into two charges (Count 2 for the Internet conduct, Count 3 for the taking of the chick) the two unrelated acts must be considered independently. Even accepting all of the jury's findings of fact, neither act satisfies all three elements of an AETA violation.

A. The Standard Of Review Is De Novo for Criminal Statutory Interpretation and Sufficiency of the Evidence for Factual Issues.

Federal appellate courts "review…interpretation of the elements of a criminal statute de novo." *Anaya-Acosta*, 629 F.3d 1091, 1093. For factual issues, appellate courts "review the sufficiency of the evidence to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." *McNeil*, 320 F.3d at 1035.

B. Neither of Wheatley's Actions Satisfies the AETA's Jurisdictional Hook Element.

The first requisite element of an AETA violation is the "jurisdictional hook," which requires "[traveling] in interstate or foreign commerce, or [using] or [causing] to be used the mail or any facility of interstate or foreign commerce." 18 U.S.C. § 43(a). Neither Wheatley's Facebook posts nor his taking of the chick satisfy this element of the crime.

1. Wheatley's Facebook Posts Do Not Satisfy the Jurisdictional Hook Element

Wheatley's Facebook posts do not satisfy the first element of an AETA offense for two reasons. First, the AETA is not intended to reach Internet use of any kind. The AETA's jurisdictional hook, Section 43(a) does not explicitly include Internet or computer use. This stands in contrast to the child pornography statute 18 U.S.C. Section 2252A, which in an otherwise parallel statutory provision appends the phrase "by any means including by computer" following "interstate or foreign commerce." 18 U.S.C. § 2252A. That the same language is absent from AETA, even though it was passed in 2006, at which time Congress was acutely aware of the importance of the Internet, signals an intent to exclude computer use. Furthermore, that AETA Section 43(a) *does* specifically mention "the mail," a different channel of commerce, indicates that the Internet should be excluded.

Even if Section 43(a) is construed to cover Internet use, Wheatley's Facebook postings still do not constitute use of the Internet as a "facility of interstate commerce" because they

occurred entirely within the state of California. Section 43(a) must be narrowly interpreted to avoid the Commerce Clause issues raised by treating Internet use as *per se* interstate. *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (Holmes, J.) (1916) (holding that courts should construe statutes so as to avoid constitutional problems or doubts). Because Congress' power to regulate channels of interstate commerce only extends to actual interstate uses, and because the Internet's infrastructure allows and promotes genuinely intrastate uses, Section 43(a) must be interpreted to require proof of actual interstate transmission to avoid Commerce Clause issues. *See Wright*, 625 F.3d at 595 (interpreting parallel provision in child pornography statute to require proof of actual interstate transmission).

Under *Wright*, purely intrastate Internet use did not satisfy a similarly worded jurisdictional hook. *Id*. The District Court rejected *Wright* because it wrongly assumed that Wheatley's Facebook posting must have crossed state borders to pass from server to server. *Wheatley*, at 16. But Wheatley's Internet use was entirely intrastate, so *Wright* is applicable.

Wheatley's Facebook postings were an entirely intrastate transaction. He posted the videos on June 17, 2010 from within the state of California. At the time of the postings, Facebook's main server center was located in Santa Clara, California and all modifications to user-generated Facebook content, including uploading new photos and videos, were handled by the California servers.[13] Facebook has since opened a new data center in Prineville, Oregon but it was not online at the time of the posting or the removal of the videos. Cade Metz, *Welcome to Prineville, Oregon: Population: 800 Million*, Wired Magazine (December 1, 2011) (reporting that the Oregon servers went online in the Spring of 2011). Wheatley's postings to Facebook

[13] Jason Sobel, Software Engineer, Facebook, *Keeping Up*, official Facebook blog (December 21, 2007), http://blog.facebook.com/blog.php?post=7899307130 ("Whenever that person goes to change some data—uploading a photo album, or changing profile info for example—we send them off to California so that all our modifying operations happen in the same location").

were therefore transmissions from a computer in California to Facebook's servers in California. Given the "shortest path possible" infrastructure of the Internet and the particular concentration of Internet backbone servers in the state of California, it is nearly certain that both transmissions, from start to finish, occurred entirely intrastate within California. This places Wheatley's Internet conduct outside the reach of Section 43(a).

2. Wheatley's Taking of the Chick Does Not Satisfy the Jurisdictional Hook Element

Wheatley's second act, the taking of the chick alleged in Count 3, also fails to satisfy the jurisdictional hook of § 43(a). Wheatley removed the chick from the Company's California facility to his California residence for his personal use. In doing so, he neither "traveled in interstate or foreign commerce" nor "used or caused to be used the mail or any facility of interstate commerce." § 43(a). By the plain meaning of the statute, the taking of the chick fails to satisfy this element of the crime.

C. Neither of Wheatley's Actions Satisfies the AETA's Scienter Element.

Neither Wheatley's video postings nor his taking of the chick satisfy the second requisite element of an AETA offense - the "scienter" prong. The act of "traveling in" or "using or causing to be used any facility of" interstate commerce must be "for the purpose of damaging or interfering with the operations of an animal enterprise." § 43(a)(1). This provision requires that "the government must present the trier of fact with evidence that establishes that, beyond a reasonable doubt, the accused had the requisite intent to disrupt the functioning of an animal enterprise." *United States v. Fullmer*, 584 F.3d 132, 153 (3rd Cir. 2009).

1. Wheatley's Facebook Postings Do Not Satisfy the Scienter Element.

Wheatley's Facebook postings do not satisfy the AETA's scienter element because he did not intend to "damage" or "interfer[e]" with the Corporation's operations. Moreover, any

damage that resulted to the Corporation was caused by lawful public and governmental responses to the disclosure of information - consequences excluded from criminalization by the plain terms of the statute. § 43(d)(3)(B).

The District Court found that Wheatley's Internet activities were conducted "for the purpose of damaging or interfering with" the Company's operations for two reasons: he intended to "damage" via the economic loss visited by public reaction to his video and he intended to "interfere" via operating changes resulting from the same public reaction. *Wheatley*, at 17-18. But the AETA specifically exempts damages from lawful public and governmental reaction to the disclosure of information. § 43(d)(3)(B) ("Economic damage… does not include any lawful economic disruption (including a lawful boycott) that results from lawful public, governmental, or business reaction to the disclosure of information about an animal enterprise.") This definition should guide the court in interpreting "damaging or interfering" in Section 43(a)(1) because it clearly evinces Congressional intent to only criminalize damage and interference directly caused by the defendant. This makes sense: otherwise, defendants would be criminally liable for the lawful speech of third parties, creating a potential overbreadth problem.

Additionally, that the video's *disclosure itself* may have been unlawful (under the APPA or otherwise) is of no moment, as Section 43(d)(3)(B) exempts damages from "lawful economic disruption" caused by "lawful…reaction" resulting from "disclosure of information." Because "disclosure" is not modified by "lawful," the statute exempts damages resulting from lawful public reaction to even an unlawful disclosure. § 43(d)(3)(B). Because Wheatley's sole intent in posting the video was to generate a lawful public and/or governmental response, the scienter element is not satisfied.

Furthermore, purely economic damages like those alleged by the Government and found by the District Court may only be used to increase penalties for an AETA offense, not to prove the offense itself. *United States v. Buddenberg*, 2009 U.S. Dist. LEXIS 100477, 17-18 (N.D. Ca. 2009). This conclusion is buttressed by the placement of the "economic damages" provision in the statute: the phrase only appears in the "Penalties" section, where escalating penalties are available if "the offense results in economic damage" of varying amounts. § 43(b); *see also Buddenberg*, 2009 U.S. Dist. LEXIS 100477 at 17-18. Because the offense must "result" in economic damage to trigger these provisions, economic damage cannot constitute a substantive offense in and of itself without rendering this section of the statute meaningless.

2. Wheatley's Taking of the Chick Does Not Satisfy the Scienter Element.

Wheatley's taking of the chick does not satisfy the AETA's scienter element because he rescued the chick to save its life, not "for the purpose of damaging or interfering with the operations of an animal enterprise." § 43(a)(1). The District Court correctly 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. Rather, he took George for the purpose of saving that one chick's life and for no other purpose." *Wheatley*, at 19.

D. **Neither of Wheatley's Actions Satisfies the AETA's Intentional Damage Element.**

Finally, neither of Wheatley's actions satisfies the intentional damage element of an AETA violation, which requires an offender to "intentionally damage or cause the loss of any real or personal property used by an animal enterprise" "in connection with" the purpose required by the scienter element. § 43(a)(2).

1. Wheatley's Facebook Postings Do Not Satisfy the Intentional Damage Element.

Wheatley's Facebook postings do not constitute the intentional damage or loss of animal enterprise property for three reasons. First, as with the scienter element, the statute excludes those damages caused by lawful public or governmental reactions. The word "damage" in Section 43(a)(2)(A) should be interpreted in light of the same intratextual considerations as the word "damaging" in Section 43(a)(1). This means that the indirect economic damages that may have been caused by Wheatley's postings do not satisfy this element of the crime.

Second, unlike the scienter element which merely requires the *purpose* of "damaging or interfering," the intentional damage element requires the *actual infliction* of damage or loss. §43(a)(2)(A). The District Court only contemplated hypothetical damages, those that "potentially may result in economic loss to the Company…if and to the extent operations have been modified." *Wheatley*, at 17-18. Such hypothetical damages are not sufficient to satisfy demonstrate that loss has actually occurred. The Government must, and has not, provided concrete evidence of actual damage to the Corporation.

Third, even if indirect economic damages are within the scope of the statute and even if Wheatley's postings did generate such damages, the Facebook posts did not "damage or cause the loss of any real or personal property" of the Corporation. §43(a)(2)(A). The Supreme Court and the Ninth Circuit have maintained a distinction between money and real or personal property. *See United States v. Sperry Corp.*, 493 U.S. 52, 62 n. 9 (1989) ("Unlike real or personal property, money is fungible"); *Wash. Legal Found. v. Legal Found. Of Wash.*, 271 F.3d 835, 846 (9th Cir. 2001) ("Money -- as opposed to real or personal property -- cannot be physically appropriated"). Because Wheatley's postings did not themselves damage, destroy, or otherwise cause the loss of the Company's real or personal property, and because loss of money or changes

in operating procedure do not constitute a loss of "real or personal property" as the term has been interpreted by high courts, the postings do not satisfy this element of the crime.

2. Wheatley's Taking of the Chick Does Not Satisfy the Intentional Damage Element.

Wheatley's taking of the chick does not satisfy the intentional damage element of an AETA violation. Even if Wheatley's action caused the Company to lose "personal property" in the chick[14], such loss was not "in connection with" the purpose of "damaging or interfering with the operations of an animal enterprise" since Wheatley's sole purpose, as found by the District Court, was to save the chick's life. §43(a)(1)-(2); *Wheatley*, at 19. Section 43(a)(2)'s "in connection" requirement modifies Section 43(a)(2)(A)'s "intentionally damages or causes the loss of any real or personal property" language. This means that mere proof of the taking of the Corporation's property, without proof of connection to a purpose to damage or interfere with the Corporation's operations, is insufficient to satisfy this element of the crime.

* * *

Because neither of Wheatley's actions satisfy *any*, let alone *all*, of the three elements of an AETA offense the District Court properly granted his motion of acquittal on Counts 2 and 3.

CONCLUSION

This Court should overturn Wheatley's conviction under Count 1 because Section 999.2(3) of the APPA violates the First Amendment, and public policy and the defense of necessity justify his actions. This Court should affirm the District Court's acquittal of Wheatley on Counts 2 and 3 because the AETA exceeds congressional authority under the Commerce Clause and does not apply to Wheatley's conduct under the evidence presented.

[14] At trial, Wheatley argued that because the chick was abandoned by the Company, its taking did not constitute a loss of property. On appeal, he concedes this point.