Case No. 11-11223

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES,
Respondent/Cross-Appellant,

v.

LOUIS WHEATLEY
Appellant/Cross-Respondent.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANT/CROSS-RESPONDENT, LOUIS WHEATLEY

TEAM NUMBER
13

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

United States Court of Appeals Cases

United States District Court Cases

State Cases

Statutes

Miscellaneous

QUESTIONS PRESENTED

I. Does the Agriculture Products Protection Act unconstitutionally limit the freedom of speech guaranteed by the First Amendment?

II. Does the conviction of Wheatley undermine public policy goals, or in the alternative, does Wheatley satisfy the required elements of the defense of necessity?

III. Does the Animal Enterprise Terrorism Act (AETA) exceed Congress' power under the Commerce Clause?

IV. Does the AETA apply to Wheatley under the facts of this case?

JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 18 U.S.C. § 3231. *Gonzales v. United States*, 301 F.2d 31, 31 (9th Cir. 1962). This Court has jurisdiction under 28 U.S.C. § 1291. *Id*.

STATEMENT OF THE CASE

This case comes before the Court on the parties' cross-appeals from the judgment in the United States District Court for the Central District of California, Case No. CV 11-030445 WMF (ABCx). The government charged Defendant Louis Wheatley with three counts: 1) entering an animal facility and using or attempting to use a camera in violation of the Agriculture Products Protection Act (APPA) section 999.2(3); 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 Animal Enterprise Terrorism Act (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 used by an animal enterprise in violation of the AETA, 18 U.S.C. § 43(a)(2)(A).

The District Court denied Wheatley's motion to dismiss the indictment based on three defenses. First, Wheatley asserted that section 999.2(3) of the APPA is an unconstitutional infringement on the defendant's First Amendment rights. Second, the AETA is unconstitutional because it exceeds congressional power under the Commerce Clause. Third, public policy and

the law suggest that a defendant should not and cannot be convicted for an action that brings to light the illegal conduct of others. After the District Court denied the motion to dismiss, a jury convicted Wheatley on all three counts.

Following the verdict, Wheatley moved for a Rule 29 motion for acquittal asserting the same defenses and arguments based on the evidence. Fed. R. Crim. Proc. 29. The District Court set aside the convictions on Counts 2 and 3, but denied the Rule 29 motion for Count 1. Defendant Louis Wheatley appeals the District Court's denial of the motion to dismiss the indictment and the District Court's denial of the Rule 29 motion for judgment of acquittal as to Count 1 of the jury verdict.

STATEMENT OF THE FACTS

Louis Wheatley is a journalism student who worked as a poultry care specialist at Eggs R Us, an egg production company in California ("Eggs R Us" or "the Company"). After witnessing the cruel and possibly illegal conditions to which Eggs R Us subjected its chickens, Wheatley created two short videos of the facility's treatment of animals, rescued a chick that the company intended to kill and discard, and blogged about conditions at the facility. Wheatley was charged with three criminal acts under federal law.

From 2008 until 2010, Wheatley devoted considerable attention to educating himself about animal farming. *United States v. Wheatley*, Case No. CV 11-30445, slip op. at 15 (C.D. Cal. Aug. 29, 2011). Wheatley joined a farmed animal protection organization, but did not participate or become involved in any activities with the organization. During the summer of 2010, Wheatley gained employment at Eggs R Us with the intention of raising money for tuition and writing an unbiased journalism article for class and blogging about his experiences. Wheatley's duties included feeding and watering chickens and cleaning their cages. *Id*.

Eggs R Us is a mid-sized egg producer with facilities in California, Nevada, and North Dakota. *Id*. at 1. The Company receives compensation from the federal government for providing eggs to California schools. *Id*. at 2. The California facility is subject to California state law and operates under typical industry practices for egg laying producers. *Id*. These practices include confining an average of six egg-laying hens per cage in "battery cages." *Id*. at 3. The battery cages provide an average chicken with 48 square inches of floor space. The national egg producer trade organizations recommend not less than 67 square inches per chicken, which is still less space than required for chickens to spread their limbs or wings. *Id*. Eggs R Us hatched chickens and treated male chicks as a waste product; it disposed of male chicks by tossing the animals into piles and grinding, or macerating, the pile of living and dead chicks. *Id*. at 2.

On or about June 17, 2010, Wheatley made a four-minute video of an unidentified coworker at Eggs R Us destroying a pile of male chicks. *Id*. at 3. The video depicted the coworker laughing and intentionally killing male chicks before dumping them into the grinder. Wheatley posted the video on his personal Facebook page the same evening. An unnamed third party copied Wheatley's video onto Youtube.com where it gained over 1.2 million views. *Id*.

Wheatley made a second, shorter video of the hens confined in the battery cages. *Id*. Wheatley believed that the video depicted violations of California state law (Proposition 2). He was aware that Proposition 2 required egg-laying producers to keep farmed animals in cages large enough for the animals to spread their limbs or wings. Before taking the video of the alleged illegal conditions, Wheatley asked his supervisor if the conditions were legal. The supervisor told Wheatley that, "he needn't be concerned." Wheatley posted the second video on his personal Facebook page, but later removed it. The second video was never posted on Youtube.com. *Id*. Wheatley wrote about the alleged violations on his blog. *Id*. at 4.

On the same day that Wheatley made the two videos of conditions at the facility, Wheatley also rescued a discarded, live male chick. *Id*. Wheatley observed a live male chick on top of the pile headed to the grinder. The one chick caught Wheatley's eye, and he found himself unable to let the live chick be ground to death. Wheatley picked up the chick, put it in his coat pocket, and took it home where Wheatley cared for and raised the chick. *Id*.

About two weeks later, a manager at Eggs R Us became aware of Wheatley's personal Facebook page postings of the videos from the facility. *Id*. Eggs R Us fired Wheatley and notified federal authorities about the incident. Wheatley was arrested and charged with violations of the Animal Enterprise Terrorism Act (AETA) and the Agriculture Products Protection Act (APPA) for making videos of the facility. Later, federal authorities learned that Wheatley had rescued the male chick and added the charges based on taking company property. *Id*.

SUMMARY OF THE ARGUMENT

This Court should find that the Agriculture Products Protection Act (APPA) § 999.2(3) is unconstitutional because the statute violates the First Amendment Free Speech Clause. The APPA unconstitutionally restricts the free speech rights of individuals with certain views and discriminates based on the content of speech. Moreover, the statute is unconstitutionally overly broad because a substantial number of its applications would be unconstitutional. The conviction of Wheatley on Count 1 should be overturned.

First, the APPA unconstitutionally restricts free speech from individuals who disagree with animal facility owners. Photography and videotaping are recognized as exercises of free speech. Congress may pass reasonable restrictions to free speech in non-public fora, but the restrictions must be viewpoint neutral. The APPA is not viewpoint neutral because the government enforces the decision of the property owners with criminal sanctions.

Second, the APPA is unconstitutional overly broad because a substantial number of applications are unconstitutional. The APPA contains vague and limitless terms and definitions, which would more often apply the restrictions on free speech to non-commercial, innocent activities. The overbreadth of § 999.2(3) is substantial and cannot be saved by prosecutorial discretion or a narrow statutory interpretation. Therefore, this Court should find that the APPA is unconstitutional on its face, and overturn the conviction of Wheatley on Count 1.

Even if this Court determines that the APPA is constitutional, the conviction of Wheatley should be overturned as a matter of public policy and based on the necessity defense. Public policy favors the protection of whistleblowers, including Wheatley, who acted to expose the illegal and inhumane conduct of his employer. In addition, Wheatley satisfies the elements of the necessity defense. Wheatley chose the lesser of two evils by publicizing information about illegal activities, acted to avoid imminent harm, anticipated the causal connection between his actions and the cessation of harm, and acted reasonably in perceiving that he had no legal alternatives. Therefore, this Court should overturn the conviction of Wheatley on Count 1.

Furthermore, this Court should find that the Animal Enterprise Terrorism Act ("AETA") 18 U.S.C. §43 exceeds congressional authority under the Commerce Clause. Even if this Court does not find that the AETA is unconstitutional, it should rule that the language of the AETA does not apply to Wheatley under the evidence of this case. This Court should affirm the District Court's order vacating Wheatley's conviction on Counts 2 and 3.

First, the AETA exceeds Congress' Commerce Clause power. Regulation of Wheatley's conduct does not constitute protection of interstate commerce. The instruments of the internet at issue are not channels or instrumentalities of interstate commerce. In addition, Wheatley's activity does not have a substantial relation to interstate commerce.

Second, the AETA does not prohibit Wheatley's conduct. Wheatley did not use the internet for the purpose of damaging or interfering with the operations of an animal enterprise. He also did not "in connection with such purpose" cause the loss of the company's personal property when he removed the male chick from the facility. Therefore, this Court should affirm the District Court as to Counts 2 and 3.

ARGUMENT

Standard of Review

This Court reviews *de novo* the district court's denial of a Rule 12(b) motion to dismiss an indictment on constitutional grounds. *United States v. McCalla*, 545 F.3d 750, 753 (9th Cir. 2008). The district court must enter a "judgment of acquittal" regarding any offense "for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. 29. In deciding whether the district court properly granted or denied a Rule 29 motion for judgment of acquittal, this Court determines whether "viewing the evidence in the light most favorable to the government, a rational trier of fact could have found the defendant guilty beyond a reasonable doubt." *United States v Alston*, 974 F.2d 1206, 1210 (9th Cir. 1992).

I. The Agriculture Products Protection Act (APPA) § 999.2(3) violates the First Amendment Free Speech Clause.

The conviction of Wheatley based on the Agriculture Products Protection Act (APPA), § 999.2(3), should be overturned because the Act violates the First Amendment Free Speech Clause. The federal law prohibiting videotaping on private property unreasonably restricts free speech because the law is viewpoint discriminatory and overly broad. The law is unconstitutional on its face; therefore, this Court should overturn Count 1 of Wheatley's conviction.

The First Amendment provides that Congress shall make no law "abridging the freedom of speech." U.S. CONST., amend. i. The freedom of speech includes a wide range of expressive

and communicative activities, including an individual's conduct and actions. *United States v. O'Brien*, 391 U.S. 367 (1968); *Texas v. Johnson*, 491 U.S. 397 (1989). Numerous circuits for the federal court of appeals have determined that photography or videotaping is an activity protected by the First Amendment. *Iacobucci v. Butler*, 193 F.3d 14, 18 (1st Cir. 1999); *Schnell v. City of Chicago*, 407 F.2d 1084, 1085 (7th Cir. 1969); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000). Specifically, the Ninth Circuit recognizes a "First Amendment right to film matters of public interest." *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 2005). In *Fordyce*, this Court ruled that a plaintiff may bring a civil rights lawsuit against a city for preventing the plaintiff from videotaping a public demonstration. *Id*. Therefore, recording matters of public concern is an action of free speech that is protected by the First Amendment.

Congress may not abridge the freedom of speech except under limited circumstances. Protected speech, such as videotaping, may be prohibited in certain places and times by the government in order to prevent disruptions that might be caused by the speaker's activities. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc*., 473 U.S. 788, 799 (1985). Courts employ a forum analysis to determine the level of scrutiny applied to free speech restrictions. *Greer v. Spock*, 424 U.S. 828, 836 (1976). Restrictions on free speech may be aimed at public, limited public, or non-public fora. *Perry Educ. Ass'n v. Perry Local Educs. Ass'n*, 460 U.S. 37, 45 (1983). In public fora, or "those places which by long tradition or by government fiat have been devoted to assembly and debate," the government may not restrict free speech unless there is a compelling governmental interest. *Cornelius*, 473 U.S. at 802 (quoting *Perry*, 460 U.S. at 45). Non-public fora consist of places where the there is not a tradition of assembly, debate, or free speech activities. *Perry*, 473 U.S. at 45. The government may only restrict free speech in

non-public fora if the restrictions "are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view." *Id*. at 46.

Wheatley concedes that the Eggs R Us facility is a non-public forum and subject to the lowest level of constitutional scrutiny. The Eggs R Us facility is on private property, and although the company receives money from the government, private agricultural facilities are not traditional public fora. Nevertheless, the restriction on free speech activities contained in APPA § 999.2(3) fails to satisfy the standard of scrutiny set by the Supreme Court in *Perry*. The restriction on videotaping is viewpoint discriminatory because it suppresses the viewpoints of some members of the public and favors the viewpoints of the facility owners. This provision opens the door for criminal prosecution based on the exercise of free speech by anyone with whom the facility owners disagree. In addition, the restriction on videotaping is unconstitutionally overly broad because there are a substantial number of applications of the provision that are unconstitutional. Therefore, this Court should determine that the APPA is an unconstitutional restriction on free speech and overturn the conviction of Wheatley on Count 1.

A. Section 999.2(3) of the APPA is unconstitutional on its face because it restricts the free speech rights of individuals with a particular viewpoint.

The federal law at issue, APPA § 999.2(3) is unconstitutional on its face because it is not viewpoint-neutral. The law criminalizes the exercise of free speech activities, specifically videotaping matters of public concern: "No person who uses or causes to be used the mail or any facility of interstate or foreign commerce may without the effective consent of the owner may: . . . (3) Enter an animal facility and use or attempt to use a camera, video recorder, or any other video or audio recording equipment." APPA § 999.2.

Restrictions on free speech in non-public fora must be reasonable and viewpoint neutral. The reasonableness of the restriction is to be assessed in light of the purpose of the forum and all

the surrounding circumstances. *Cornelius*, 473 U.S. at 809; *Intern'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 681 (1992). Yet, even if the restriction is reasonable based on the purpose of the act, the restriction must also be viewpoint neutral. *Cornelius*, 473 U.S. at 811; *United States v. Kokinda*, 497 U.S. 720, 730 (1990). "The mere existence of reasonable grounds for limiting access to a non-public forum will not save a regulation that is in reality a façade for viewpoint-based discrimination." *Wheatley*, No. CV 11-30445, slip op. at 9.

The provision restricting photography and videotaping is viewpoint discriminatory because the law favors the viewpoint of one type of citizen, namely owners of animal facilities. The law requires that an individual receive permission, or the "effective consent" of the owner of an animal facility before photographing or videotaping within the facility. This leaves the discretion to permit or deny free speech activities to the private landowner.

Although the Supreme Court has stated that the First Amendment does not apply to private property landowners, this is a case where the federal government enforces the discriminatory views of private property owners. *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972). In *Lloyd Corp*., the question before the Supreme Court was whether a private landowner could restrict free speech activities on private property. The Court ruled that the First Amendment protections only applied to government regulations, not those of private landowners. *Id*. In the case at hand, however, the private landowner determines which free speech activities may be prohibited or allowed, but it is the federal government that enforces the decision through criminal sanctions. Therefore, the federal government may enforce a prohibition on free speech based purely on the viewpoint of the speaker. Importantly, the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v.*

Am. Civil Liberties Union, 535 U.S. 564, 573 (2002). The APPA § 999.2(3) is contrary to the assertion in *Perry* that any restriction on free speech must be viewpoint neutral.

The Court should conclude that the restriction on photography or videotaping in § 999.2(3) of the APPA is unconstitutional because it is not viewpoint neutral. The law sets up a scheme where private owners of animal facilities can pick which viewpoints to permit to photograph or videotape facilities and have the federal government enforce those viewpoint determinations through criminal law. Wheatley's conviction of violating the APPA should be overturned due to the unconstitutional restriction on free speech.

B. Section 999.2(3) of the APPA is overly broad because a substantial number of applications of the law are unconstitutional.

In addition to being an unconstitutional restriction on free speech based on viewpoint, the APPA § 999.2(3) is unconstitutional because it is overly broad. A substantial number of applications of the law are unconstitutional; therefore, the law cannot be applied to Wheatley. The Court should overturn Wheatley's conviction on Count 1.

The Supreme Court has recognized that the government may restrict the time, place, and manner of speech under certain circumstances but cannot enact a law that is overly broad. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 451 (2008). "[A] sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals." *New York v. Ferber*, 458 U.S. 747, 772 (1982). Therefore, a law cannot be so overbroad that many of its applications unconstitutionally limit the exercise of free speech, even if the statute may be constitutionally applied in some instances.

An individual may bring a facial challenge to the constitutionality of a statute even if the statute has some constitutional applications. Attacking a statute on its face is disfavored in constitutional jurisprudence, and the traditional rule for facial challenges to regulations is that the

litigant must demonstrate that the statute is unconstitutional in all of its applications. *Washington State Grange*, 552 U.S. at 449. The over-breadth doctrine is an exception to this traditional rule. *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 615 (1973).

In order to demonstrate that a statute is unconstitutionally overbroad, a litigant must show that a "substantial" number of applications of the statute are unconstitutional. "We have . . . insisted that the overbreadth involved be "substantial" before the statute involved will be invalidated on its face." *Ferber*, 458 U.S. at 769. The Supreme Court has been clear that "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615. Overbreadth of a statute is analyzed on a case-by-case basis, and applying the overbreadth doctrine to find statutes unconstitutional is "strong medicine" that should only be applied as a last resort. *Id*. at 613.

In *United States v. Stevens*, the Court applied a three-part analysis to determine whether a statute prohibiting depictions of animal cruelty was unconstitutionally overbroad. 130 S.Ct. 1577 (2010). "The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Id*. at 1587 (quoting *United States v. Williams*, 553 U.S. 285, 293 (2008)). The Court looked at whether the statute involved had ambiguous terms, and whether the applications of the law would lead to absurd or confusing results. *Stevens*, 130 S.Ct. at 1588. The second step in the analysis involved determining if the statute's practical limitations were apparent, or whether the reasonable application of the law relied on prosecutorial discretion. *Id*. at 1591. The third step determined whether the canon of construction that "ambiguous statutory language [should] be construed to avoid serious constitutional doubts" should be applied. *Id*. at 1591 (quoting *Fed. Commc'n Comm'n v. Fox Television Stations, Inc.,* 129 S.Ct. 1800, 1811 (2009)). "[T]his Court

may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction." *Id*. at 1592 (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 884 (1997)). The Court determined that the statute was overbroad because of the ambiguous language and reliance on prosecutorial discretion to prevent unconstitutional applications. *Stevens*, 130 S.Ct. at 1592.

In the case at hand, the APPA, § 999.2(3) is unconstitutionally overbroad because a substantial number of applications of the criminal prohibition are unconstitutional limits on free speech. First, the language of the statute is ambiguous and vague. "Animal facility" as defined by the statute means "any vehicle, building, structure . . . premises, or defined area where an animal is kept." APPA, § 999.1(2). This could mean almost anything, including a house, barn, farm, front yard, or field. The prohibition on using or attempting to use a camera, video recorder, or any "other video or audio recording equipment" is similarly vague and seemingly limitless. APPA, § 999.2(3). An iPhone, or any other modern cellular phone with a camera could be construed as a recording device. Therefore, using a camera phone to take a picture of a horse in an open field implicates the APPA and could result in criminal charges. The limitless reach of the APPA will reasonably lead to absurd results: where any individual who enters a fenced field and photographs an animal is subject to criminal charges.

Second, the ambiguous and vague language of the statute will lead to a substantial number of applications that are unconstitutional. The government claims that the main purpose of the APPA is to protect commercial animal enterprises. *Wheatley*, at 11. Even if this were accepted as the true purpose of the Act, the majority of instances where § 999.2(3) would be implicated have nothing to do with commercial animal enterprises. Given the relatively small number of commercial animal enterprises compared to independent, noncommercial "animal

facilities" (including personal yards, farms, and fields), the vast majority of instances where video or audio recording would occur without an owner's consent would be innocent actions. Therefore, the only protection for the substantial number of applications that do not involve real threats to animal enterprises is prosecutorial discretion. The Supreme Court indicated that reliance on prosecutorial discretion to determine which applications of the statute are legitimate is not enough to save an act from overbreadth. *Stevens*, 130 S.Ct. 1591.

Finally, the canon of construction construing ambiguous statutes to avoid constitutional doubts is not enough to save the APPA § 999.2(3) from overbreadth because the statute is not readily susceptible to such a narrow construction. The APPA's definitions leave a wide berth for construing "animal facilities" and no indication that the definition should be narrowed to only commercial animal enterprises that need trade-secret or anti-terrorism protections. Additionally, the lack of legislative history compounds the problem of relying on a narrowed interpretation of the statute because Congress has not provided any indication of intent or purpose for the statute.

The APPA is overly broad because it contains vague and limitless terms, and will lead to a substantial number of applications that unconstitutionally infringe on the freedom of speech. This Court should find the APPA unconstitutional on its face; therefore, the conviction of Wheatley on Count 1 should be overturned.

II. Wheatley's conviction should be overturned based on public policy and the defense of necessity.

This Court should overturn Wheatley's conviction on Count 1, violating the Agriculture Products Protection Act § 999.2(3) because Wheatley's actions were justified by public policy considerations and the defense of necessity. Public policy favors a broad protection for political expression and corporate whistleblowers that expose the illegal actions of their employers. Wheatley videotaped the conditions at Eggs R Us in an effort to expose the possibly illegal

actions of the company. As a matter of public policy, Wheatley should not be punished for his efforts to bring a matter of public concern to light. In addition, Wheatley satisfies the elements for the defense of necessity. Therefore, this Court should overturn the district court's decision and dismiss Count 1 of the indictment against Wheatley.

A. The conviction on Count 1 should be overturned as a matter of public policy because Wheatley acted as a corporate whistleblower.

Wheatley's conviction on Count 1 should be overturned because Wheatley acted as a whistleblower in an attempt to expose the illegal actions of Eggs R Us. Congress and the states have long recognized that whistleblowers provide a public service by exposing the illegal actions of their employers. Public policy favors the protection of whistleblowers and those who attempt to bring matters of public concern to the attention of the public. Wheatley's actions were aimed at exposing possibly illegal conditions in the animal facility of Eggs R Us; therefore, Wheatley's conviction on Count 1 should be overturned as a matter of public policy.

Whistleblower statutes provide protection for employees who disclose the illegal activities of their employer. The Whistleblower Protection Act of 1989 prevents federal agencies from taking retaliatory actions against federal employees who disclose illegal acts or misconduct within the government. 5 U.S.C. § 1211–3352 (2006). The Sarbanes-Oxley Act of 2002 extends whistleblower protections to employees of private companies, and prevents employers from retaliating against employees that disclose illegal activities. 18 U.S.C. § 1514A (2006). These statutes make it clear that the policy of the federal government is to encourage and protect whistleblowers that disclose illegal activities or other matters of public concern.

Wheatley is a corporate whistleblower because he was an employee of Eggs R Us and disclosed the illegal activities conducted at the company. The issues that Wheatley disclosed, including illegal conduct by Eggs R Us and the inhumane treatment of animals were matters of

public concern. *See Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty, U.S.A., Inc*., 129 Cal. App. 4th 1228, 1246 (2005) (concluding that animal welfare is a matter of public concern). California law requires animal facilities to provide cages large enough for chickens to stretch their wings. Cal. H&S Code §§ 25990, 25991. The video taken by Wheatley evidences the illegal conditions that Eggs R Us provided for its chickens. That there was no conviction or charges against Eggs R Us is irrelevant for purposes of whistleblower protection.

As a matter of public policy, Wheatley's conviction under Count 1 should be overturned. Wheatley acted as a whistleblower by gathering evidence and disclosing illegal activities that occurred at Eggs R Us. Federal statutes that encourage the same sort of activity from other employees demonstrate that public policy favors the protection of whistleblowers such as Wheatley. Therefore, the conviction should be overturned.

B. The conviction on Count 1 should be overturned because Wheatley was justified under the defense of necessity.

Even if the Agriculture Products Protection Act (APPA) is found to be constitutional, Wheatley's conviction on Count 1 for violating § 999.2(3) should be overturned based on the defense of necessity. The necessity defense is an affirmative defense based on the utilitarian principle that the good that comes from violating the law outweighs the harm that will result from abiding by the law. In the case at hand, Wheatley was faced with the choice of allowing the continued operation of an illegal and inhumane animal facility or violating the APPA by gathering and distributing video evidence, which actually led to changes in how the facility operated. This Court should conclude that Wheatley satisfies the required elements of the defense of necessity and overturn the conviction on Count 1.

The defense of necessity has four elements. *United States v. Schoon*, 971 F.2d 193, 197 (9th Cir. 1991). First, the defendant must show that given a choice between two evils, the

defendant chose the lesser evil. *Id*. at 195. Second, the defendant must have acted to prevent imminent harm. *Id*. Third, the defendant must have reasonably anticipated a direct causal relationship between their conduct and the evil to be avoided. *Id*. Fourth, the defendant must not have had a legal alternative to violating the law. *Id*. For the final element, the law "implies a reasonableness requirement in judging whether legal alternatives exist." *Id*. at 198. Wheatley's actions in videotaping the conditions at the Eggs R Us facility satisfy each of these elements.

Wheatley faced a choice between two evils: either Wheatley could allow the illegal and inhumane conditions at Eggs R Us to continue, or act to change the conditions through public awareness. Wheatley chose to create a video of the illegal conditions and posted the video on the internet for others to view. The record demonstrates that over 1 million people viewed the video, and that the conditions at Eggs R Us received considerable media attention. *Wheatley*, at 3.

Wheatley's video of the conditions in the Eggs R Us facility also served to avoid imminent harm. The imminent harm in this case was the abuse of animals conducted by Eggs R Us in violation of California law. Cal. H&S Code §§ 25990, 25991. By posting a video of the conditions at the facility, Wheatley brought public attention to the plight of the animals, and almost immediately prompted a response by Eggs R Us to address the situation. *Wheatley*, at 4.

Wheatley anticipated a direct causal relationship between his conduct and the evil to be avoided. Wheatley anticipated that posting the video of the Eggs R Us facility would inform other members of the public. Wheatley reasonably foresaw that posting evidence of the illegal actions would cause the company to cease or lessen the illegal and inhumane conduct.

Wheatley had no reasonable alternatives to violating the law. Wheatley acted reasonably by creating the video of the Eggs R Us facility because this was the only way to get evidence of actual conditions in the facility. Faced with a choice of allowing the illegal and inhumane

treatment of animals to continue, or providing evidence for his assertions that Eggs R Us violated the law, Wheatley chose to acquire video evidence. There was no practical, reasonable alternative at the moment that Wheatley witnessed the illegal activity. The Ninth Circuit has recognized that an individual does not have to contemplate every possible alternative legal action, but rather take the action that is most reasonable at the time, even if that action is illegal. *Schoon,* 971 F.2d at 198 (describing a situation where a prisoner fleeing a fire may leave his cell in violation of the law).

Wheatley's actions satisfy the four elements for the defense of necessity. Wheatley faced a choice between two evils, and chose the lesser evil, which involved illegally making a video of his employer's facility. The action that Wheatley engaged in was aimed at avoiding imminent harm, or the continuation of illegal conditions. Wheatley anticipated a causal connection between his actions and the cessation of the ongoing harm. Wheatley also acted reasonably given the circumstances, and did not have a practicable legal alternative. Wheatley made the video because of necessity; therefore, this Court should overturn Wheatley's conviction on Count 1.

III. The AETA exceeds congressional authority under the Commerce Clause.

Congress has the power to "regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes." U.S. CONST. art. I, §8, cl. 3. Pursuant to its commerce clause authority, Congress can 1) "regulate the channels of interstate commerce," 2) "regulate and protect the instrumentalities of interstate commerce," and 3) regulate "those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-559 (1995). The AETA exceeds Congress' commerce clause authority because regulation of Wheatley's conduct does not qualify as 1) protection of interstate commerce, 2) regulation of a channel or instrumentality of commerce, or 3) regulation of an activity with a substantial affect on interstate

commerce. Further, the AETA must be narrowly interpreted because it at least raises serious constitutional concerns and it must be interpreted in favor of Wheatley to the extent that it is ambiguous.

A. The AETA as applied to Wheatley does not constitute protection of interstate commerce.

Congress can protect persons, things, and businesses in interstate commerce and punish activity that "interferes with, obstructs or prevents" interstate commerce. *United States v. Dinwiddie*, 76 F.3d 913, 919 (8th Cir. 1996) (quoting *United States v. Coombs*, 37 U.S. 72, 74 (1838)). There is no question that Congress can regulate, generally, the industry involved in the "production and sale of animal food products" pursuant to its commerce power. *Wheatley*, No. CV 11-30445, slip op. at 15. However, the government has not established that the Company is "in interstate commerce" and even if it is, Wheatley did not interfere with or obstruct interstate commerce.

For a business to be in interstate commerce it must be "directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce." *Dinwiddie*, 76 F.3d at 919 (quoting *United States v. Am. Bldg. Maint. Industries*, 422 U.S. 271, 283 (1975)). In *Dinwiddie*, a woman who protested against abortion outside Planned Parenthood was charged with violating the Freedom of Access to Clinic Entrances Act (FACE) and argued that the statute was enacted in excess of Congress' commerce power. *Id.* The court found that Planned Parenthood was in interstate commerce because staff and patients crossed state lines to access the clinic. *Id.* at 919-920. Here, it is known that Eggs R Us has facilities in three states, however, nothing indicates involvement among the facilities. *Wheatley*, No. CV 11-30445, slip op. at 1. The California facility receives federal compensation to provide children with eggs intrastate. *Id.* at 2. Thus, there is no indication that the Company is in interstate commerce.

Even if the Company is in interstate commerce, Wheatley's conduct did not disrupt interstate commerce. Where courts have found disruption, it involved physical or direct behavior threatening actual commercial activity. For example, the court has upheld an act that prohibited theft from wrecked ships as a valid exercise of commerce power. *Coombs*, 37 U.S. at 74. In *Dinwiddie* the defendant threatened the life of a doctor who crossed state lines daily to commute to work and directly provided a service to patients who also crossed state lines to receive treatment. *Dinwiddie,* 76 F.3d at 919. In contrast, Wheatley merely engaged in two short videos, blogging and removal of one chick. Posting of the video on YouTube generated negative press; however, this does not rise to the level of disruption with commerce and is two steps removed from *Dinwiddie*. First, Wheatley in no way directly threatened purchasers or producers of food products. Second, Wheatley did not disrupt a commercial act. Wheatley merely displayed the conditions of a facility and did not protest the actual sale of goods being provided in interstate commerce. Further, the removal of the chick in no way interfered with interstate commerce because it was a "waste product" of the process and would have been disposed of, not used in a commercial process. *Wheatley*, No. CV 11-30445, slip op. at 1.

B. The AETA as applied to Wheatley does not constitute regulation of the channels or instrumentalities of interstate commerce.

The channels of interstate commerce are the "interstate transportation routes through which persons and goods move." *United States v. Ballinger,* 395 F.3d 1218, 1225 (11th Cir. 2005). Examples include *"*highways, railroads, air routes, navigable rivers, and telecommunications networks*." United States v. Ho*, 311 F.3d 589, 597 (5th Cir. 2002). The "channels" category "is confined to statutes that regulate interstate transportation itself, not manufacture before shipment or use after shipment." *United States v. Patton*, 451 F.3d 615, 621 (10th Cir. 2006). The instrumentalities of interstate commerce are the "persons or things"

themselves moving in interstate commerce. *Lopez,* 514 U.S. at 558. The Ninth Circuit has held that the internet is both a channel and an instrumentality of interstate commerce as "both the means to engage in commerce and the method by which transactions occur." *United States v. Sutcliffe,* 505 F.3d 944, 953 (9th Cir. 2007) (citing *United States v. Trotter,* 478 F.3d 918, 921 (8th Cir.2007)). However, there are many instruments of the internet, such as those Wheatley used, that do not involve the means or methods of commerce. Wheatley's internet activity, thus, cannot be regulated as use of a channel or instrumentality of interstate commerce.

The government has not shown that Facebook and YouTube are channels or instrumentalities of interstate commerce. In *Sutcliffe,* the Ninth Circuit held that "interstate transfer of information by means of the internet" was "in or affecting interstate commerce." *Sutcliffe,* 505 F.3d at 953. The court reached this holding, however, after the government had put forth evidence that Defendant posted threats and social security numbers on a website in California, that he continued this activity when he moved to New Hampshire and that the information was uploaded on servers in several other states. *Id.* In the absence of this type of evidence, the Tenth Circuit was unwilling to assume that all internet activity constitutes the crossing of state lines. *United States v. Schaefer*, 501 F.3d 1197, 1198 (10th Cir. 2007). The court read a statute's prohibition on the movement of child pornography "in commerce" to require the government to "prove that the Internet transmission also moved the images across state lines." *Id.* at 1201.

Here, in order to use a facility of interstate commerce, that use of a facility must involve the crossing of state lines. The government has put forth no evidence to support that Wheatley's internet posting constitutes the transmission across state lines. This court should be unwilling to assume that any posting on the internet necessarily constitutes use of a facility of interstate

commerce. Wheatley is merely a journalism student who posted two short videos on his "personal Facebook page;" one of his friends posted one of the videos on YouTube and he "blogged" about the facility. *Wheatley*, No. CV 11-30445, slip op. at 3-4. Even if it is likely that the transmissions crossed state lines, this category does not apply; as in *Lopez,* this category did not apply "despite the fact that the regulated guns likely traveled through interstate commerce." *United States v. Patton,* 451 F.3d 615, 622 (10th Cir. 2006) (quoting *Gibbs v. Babbitt,* 214 F.3d 483, 491 (4th Cir.2000)).

Cases that have held that the internet is "tantamount" to moving something across state lines are distinguishable.[1] In *United States v. Carroll*, for example, the court merely recognized the use of the internet as an acceptable mode of transport of information in the context where it was unquestioned that something had crossed state lines. 105 F.3d 740, 742 (1st Cir. 1997). The court in *Carroll* held that "[t]ransmission of photographs by means of the Internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce." *United States v. Schaefer,* 501 F.3d 1197, 1204 (10th Cir. 2007) (quoting *Carroll,* 105 F.3d at 742). In *Carroll* there was no question that there was an "intention to move the photographs 'across state lines'—as opposed to simply an intention to place them on the Internet." *Schaefer*, 501 F.3d at 1204.[2] The internet serves a role in interstate commerce but not every website is a channel of interstate commerce, and merely posting information online is insufficient to establish use of a channel or instrumentality of commerce.

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[1] Cases addressing the dormant commerce clause are also distinguishable. *Pataki* involved the constitutionality of a state statute and involved multiple national organizations, many of which were involved in interstate sales transactions; it thus does not bear on this case. *Am. Libraries Ass'n v. Pataki*, 969 F Supp 160, 172-173.

[2] Similarly, in *United States v. Thomas*, on which *Carroll* relies, the court noted that "the manner in which the images moved does not affect their ability to be viewed on a computer screen in Tennessee or their ability to be printed out in hard copy in that distant location." *United States v. Thomas,* 74 F.3d 701, 707 (6th Cir. 1996).

Even if it is established that YouTube and Facebook involved the transmission across state lines, they did not involve the transmission of a good across state lines and so cannot be considered channels or instrumentalities of commerce. Further, even if Facebook and YouTube are considered channels of interstate commerce, regulation of their use is beyond Congress' commerce clause authority. The channels of interstate commerce can be regulated to protect against their misuse. *Perez v. United States,* 402 U.S. 146, 150 (1971) (Congress can regulate, "for example, the shipment of stolen goods.") Congress can also protect the instrumentalities of commerce; for example protection against the "destruction of an aircraft." *Id.* Reporting on the general conditions of the facility is not "misuse" as is the shipment of stolen goods and thus the regulation of this activity violates the commerce clause. The posting on Facebook and YouTube does not harm the instrumentalities of commerce; if anything it promotes their use.

C. The AETA as applied to Wheatley does not constitute regulation of an activity with a substantial affect on interstate commerce.

Congress can regulate economic activities with a substantial affect on interstate commerce. *Lopez*, 514 U.S. at 558-559. A court reviewing the validity of a statute in this category must determine "whether a rational basis existed for concluding that the regulated activity sufficiently affected interstate commerce." *Id.* at 557. The AETA as applied to Wheatley does not constitute regulation of an activity with a substantial effect on interstate commerce and, to the extent that use of a facility includes his website activity, Congress did not have a rational basis to conclude that the regulated activity substantially affects interstate commerce.

When an activity is non-economic, the court cannot analyze whether in the aggregate there is a substantial effect on interstate commerce. *United States v. Morrison,* 529 U.S. 598, 599 (2000). In *Lopez* the court noted that even "perhaps the most far reaching example of commerce clause authority over intrastate activities" in *Wickard*, "involved economic activity in a way that

the possession of guns in school zones does not." *Lopez*, 514 U.S. at 560. In *Lopez,* the provision was "not an essential part of a larger regulation of economic activity in which the scheme would be undercut unless the intrastate activity were regulated" and thus was unconstitutional. *Id.* at 561. Examples of the valid exercise of commerce power include regulation of restaurants using a substantial amount of products from interstate commerce and the production of wheat because of its effect on the national market for wheat. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-253 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942). General posting on the internet is not an activity with a substantial relation to interstate commerce. *See United States v. Adams*, 343 F.3d 1024, 1033-34 (9th Cir. 2003) (child pornography has a substantial effect on interstate commerce such that related internet transmissions can be regulated.)

Here, Wheatley's posting on the internet is not an economic activity because he was merely reporting his observations in an online forum and his activity had no effect on any type of national market. In contrast, courts that have found a substantial relation to commerce involved an activity such as child pornography, which clearly has an effect on a national market. *Adams*, 343 F.3d 1033. Here, the only possible nexus to economic activity is potential advertising on the websites or the internet customers' subscriptions. Wheatley, however, was not involved in either capacity. He merely shared information on the internet with a group of "friends." This activity cannot be viewed in the aggregate and does not have a substantial effect on interstate commerce.

In addition, there was no rational basis for Congress to conclude that the AETA as applied to Wheatley constitutes regulation of an activity that substantially affects interstate commerce. In *Lopez*, the act at issue prohibited possession of guns in school areas and the government argued that possession of guns leads to lower productivity and thus substantially affects interstate commerce. *Lopez*, 514 U.S. at 563-564. However, there was no tie in the

statute or the facts of the case to interstate commerce; the court noted there was no indication that the person subject to the act had recently moved in interstate commerce and no requirement in the statute that the gun have a "concrete tie to interstate commerce." *Id.* at 549. Thus, the court reasoned that finding a connection to interstate commerce would impermissibly involve piling "inference upon inference." *Id.* at 567. In *Dinwiddie*, the court found that Congress had a rational basis for finding that the conduct prohibited by FACE had a substantial effect on interstate commerce. *Dinwiddie* 76 F.3d at 920. Legislative history indicated that "blockading of clinics," violence and threats "depressed interstate commerce in reproductive-health services." *Id*. The court distinguished *Lopez* by noting that first, FACE prohibits "interference with a commercial activity," the receipt of health services, (unlike education which is not a commercial activity) and second, finding a rational basis in this case did not require making multiple inferences because there is a "quite direct" causal link between interference of this type with a business and a decline in availability of that business' services. *Id*. at 921.

Here, there is no link between Wheatley's allegedly "terrorist" acts and the Company's ability to provide a service in interstate commerce. Legislative history of the AETA demonstrates that Congress contemplated that certain types of harassment tactics are of an "interstate nature" thus leaving gaps and loopholes to the problem and necessitating a federal law to address animal enterprise terror effectively. 152 Cong. Rec. H8590-01 (Nov 13, 2006) (statement of Rep. Scott). When Congress enacted the AETA it sought to protect animal enterprises from actions such as "death threats, vandalism, animal releases and bombings." 152 Cong. Rec. H8590-01 (Nov 13, 2006) (statement of Rep. Petri). It is reasonable to infer that true "terror" would inhibit facilities in their ability to engage in commerce. It requires inference upon inference, however, to establish that posting a video on Facebook would result in a decline of the Company's ability to sell

animal products. Like in *Lopez*, the record here does not indicate that Wheatley traveled in interstate commerce or that the online activity was in interstate commerce. Thus, there was no rational basis for Congress to conclude that the activity substantially affects interstate commerce.

D. Constitutional doubt and statutory ambiguity require this court to interpret the AETA in Wheatley's favor.

It is the court's duty to interpret statutes to avoid "grave and doubtful constitutional questions" where possible. *Jones v. United States,* 529 U.S. 848, 857 (2000) (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.,* 213 U.S. 366, 408 (1909)). In *Jones,* the court held that "an owner-occupied residence not used for any commercial purpose" does not constitute "property 'used in' commerce" under the Arson Act. *Id.* The court reasoned that interpreting the statute otherwise would make "virtually every arson in the country a federal offense," which would raise constitutional doubts and that such interpretation is to be avoided. *Id.* at 858-859. Similarly, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* the court noted that whether protection of migratory birds can serve as the basis for commerce clause authority in asserting Clean Water Act jurisdiction over non-navigable ponds raised a "significant" constitutional question. 531 U.S. 159, 173 (2001). The court interpreted the statute narrowly to invalidate the migratory bird rule. *Id.* For the above reasons, even if this Court does not find that the AETA is unconstitutional, it raises serious constitutional doubts and must be interpreted such that usage of YouTube, Facebook, and a blog are not usage of a "facility" of interstate commerce.

The rule of lenity "requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos,* 128 S.Ct. 2020, 2025 (2008). The underlying principle of the rule, due process, requires "that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited." *Dunn v. United States,* 442 U.S. 100,

112 (1979). To the extent that the AETA is ambiguous as to whether Wheatley's internet activity constitutes the usage of a facility of interstate commerce, this ambiguity must be resolved in Wheatley's favor. Because the language of the Act does not clearly apply to him, Wheatley had no way of knowing that this conduct was prohibited. Thus, the court should find at that because of the rule of lenity, the AETA does not apply to Wheatley's conduct.

IV. The AETA does not apply to Wheatley's conduct under the evidence of this case.

The AETA prohibits the use or causing the use of "any facility of interstate commerce for the purpose of damaging or interfering with the operations of an animal enterprise" when "in connection with such purpose" one "intentionally damages or causes the loss of any real or personal property used by an animal enterprise" or "conspires or attempts to do so" 18 U.S.C. §43(a). The District Court properly overturned the jury verdict convicting Wheatley under Counts 2 and 3 because the AETA does not apply to Wheatley's conduct. First, Wheatley did not act with the purpose of damaging or interfering with an animal enterprise. Second, Wheatley did not "in connection with" such purpose cause of loss of property.

A. Wheatley did not use the internet for the purpose of damaging or interfering with operations of an animal enterprise.

The court interprets a statutory provision in the context of the statute as a whole, in light of its purpose and while giving effect to congressional intent. *Padash v. I.N.S.,* 358 F.3d 1161, 1168-1170 (9th Cir. 2004). Lacking a clear statutory meaning, the court may refer to a dictionary definition. *United States v. Lettiere,* 640 F.3d 1271, 1274 (9th Cir. 2011). The court must make "every effort" to interpret a provision so as not to render other provisions of the statute "inconsistent, meaningless or superfluous." *Id*. (quoting *Boise Cascade Corp. v. EPA,* 942 F.2d 1427, 1432 (9th Cir.1991)). The relevant inquiry under 18 U.S.C. §43(a)(1) is whether the defendant had the "purpose" to damage or interfere with operations of an animal enterprise.

Under the plain language of the statute and in light of legislative intent, Wheatley's purpose was in no way to damage or interfere with the Company's operations.

The AETA does not define "damage" as used in 18 U.S.C. §43(a)(1). "Damage" is defined by the dictionary as "destruction or a loss in value, usefulness, or ability resulting from an action or event." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE ("The American Heritage Dictionary") (5th ed. 2011). Operation is defined as "the act or process of operating or functioning." THE AMERICAN HERITAGE DICTIONARY (5th ed. 2011). Nothing that Wheatley did was aimed at the company's process of functioning. The district court summarily concluded that Wheatley acted "with the purpose of changing" the conditions at the facility. *Wheatley*, No. CV 11-30445, slip op. at 17. However, the evidence does not establish that his purpose was to damage the facility. Wheatley's purpose in posting the video on his "personal Facebook page" was to inform others of typical conditions in egg production. *Wheatley*, No. CV 11-30445, slip op. at 3. He did not decide whether he would post the video to a wider audience, rather one of his Facebook "friends" posted it on YouTube. Thus, any economic loss due to the local news reports and viewers were the result of someone else's actions. Wheatley could not have had the purpose in posting a video on his personal Facebook page alone to damage the facility.

Further, the AETA defines "economic damage" to include "replacement costs of lost or damaged property or records, the costs of repeating an interrupted or invalidated experiment, the loss of profits, or increased costs…" 18 U.S.C. §43 (b). The definition specifically excludes "any lawful economic disruption" resulting from the public's reaction to "the disclosure of information about an animal enterprise." 18 U.S.C. §43 (d)(3)(B). Wheatley's conduct was lawful and any potential economic damage is the result of the public's reaction to his disclosure

of information regarding the facility. Even if the court were to find Wheatley's behavior unlawful on other grounds, this definition shows that Congress contemplated that only certain more direct economic damage be recognized; nothing in 18 U.S.C. §43 b(3)(A) indicates that the more remote possibility of costs in responding to media attention resulting from an accurate description and footage at the facility would qualify as economic damage.

To interfere is "to be or create a hindrance or obstacle" or "to intervene or intrude in the affairs of others; meddle." The American Heritage Dictionary (5th ed. 2011). To interfere goes beyond merely neutral involvement and contains an element of direct negative involvement. Wheatley's purpose was to share information from an "unbiased journalistic perspective." *Wheatley*, No. CV 11-30445, slip op. at 2. He thus merely intended to make information available to the public, not create a "hindrance or obstacle" in the Company's operations. He may have hoped one day that the conditions would improve, but hoping for improvement of conditions does not amount to becoming a hindrance.

In addition, The AETA was enacted "to provide the Department of Justice the necessary authority to apprehend, prosecute, and convict individuals committing animal enterprise terror." 152 Cong. Rec. H8590-01 (Nov 13, 2006) (statement of Rep. Sensenbrenner). It came about in response to "an increase in the number and the severity of criminal acts and intimidation against those engaged in animal enterprises." *Id.* at 3. The legislative history indicates that what Congress meant by acts of "terror." Such acts included threats and defamatory statements and even "arson, pouring acid on cars, mailing razor blades, and defacing victims' homes." *Id*. at 4. In contrast, there is no indication that Congress intended to expand the notion of "terrorism" to include mere Facebook postings containing no threat whatsoever and blogging activity. See *United States v. Nader*, 542 F.3d 713, 717 (9th Cir. 2008) ("Titles are also an appropriate source

from which to discern legislative intent.") The AEPA was also amended because it was found that the law did not protect "affiliates and associates" of animal enterprises. *Id.* at 5. Members of Congress were thus concerned with true animal "terrorism" and the scope of who would be protected by the AEPA. It is clear that Wheatley did not act with the purpose of damaging or interfering with the Company's operations.

B. Wheatley did not "in connection with such purpose" intentionally cause the loss of property when he removed the chick.

Wheatley's removal of the chick does not constitute intentional damage or causing the loss of property used by an animal enterprise. If interpretation of a statute would "produce absurd results" such interpretation is to be avoided "if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.,* 458 U.S. 564, 575 (1982). Reading the language in the statute prohibiting damaging or causing the loss of property to cover rescuing of a small animal that is a "waste product" of a process is an absurd result. This interpretation is to be avoided and this court should adopt a narrower interpretation, consistent with legislative intent. As mentioned above, the type of property loss or damage Congress contemplated was that resulting from "bombings" and "vandalism." 152 Cong. Rec. H8590-01 (Nov 13, 2006) (statement of Rep. Petri). It is thus consistent with legislative intent to interpret the Act to only prohibit the types of "terrorism" Congress contemplated in enacting the AETA. Further, the required nexus between the property destroyed or lost and a purpose to damage or interfere with the animal enterprise demonstrates that it contemplated only the type of property loss or damage associated with acts of terror.

Alternatively, this court should find that the chick was already "abandoned" and thus no longer considered property of the Company. The doctrine of abandonment applies when there is "total desertion by an owner without being pressed by necessity, duty or utility to himself, but

simply because he no longer desires to possess the thing and willingly abandons it to whoever wishes to possess it." *State Mutual Life Assurance Co of Worcester, Mass v. Hein*, 141 F. 2d 741 (6th Cir. 1944). The record does not establish that the Company abandoned the chicks because of utility, rather that this practice was customary. Further, when Wheatley took the chick it was already in the pile to be ground up and would have become garbage within minutes. *Wheatley*, No. CV 11-30445, slip op. at 18. To avoid absurd results the court should not interpret the statute so as to protect property that is already in the process of being disposed of.

Wheatley did not remove the chick in connection with the purpose of damaging or interfering with the operations of an animal enterprise. The AETA prohibits damaging or causing the loss of property only when it is connected to the purpose of damaging or interfering with the operations of an animal enterprise. 18 U.S.C. §43(a). The particular male chick caught Wheatley's attention and he felt that he "couldn't walk away from him." *Wheatley*, No. CV 11-30445, slip op. at 4. This activity was entirely directed at rescuing this one chick and in no way was an attempt to damage or interfere with the Company's operations. The District Court properly concluded that the evidence establishes that Wheatley did not cause the loss of property in connection with a purpose to damage or interfere with an animal enterprise.

CONCLUSION

For the foregoing reasons, this Court should overturn Wheatley's conviction on Count 1 and affirm the District Court's order vacating Wheatley's conviction on Counts 2 and 3.

APPENDIX A

Agriculture Products Protection Act, Federal Law §§ 999.1–4

§ 999.1 Definitions

In this chapter, unless the context otherwise requires:

1. "Animal" means any living organism that is used in food, fur, or fiber production, agriculture, research, testing, or education. The term does not include a human being, plant, or bacteria.

2. "Animal facility" means any vehicle, building, structure, research facility, premises, or defined area where an animal is kept, handled, housed, exhibited, bred, or offered for sale.

3. "Deprive" means to:
   a. Withhold an animal or other property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the animal or property is lost to the owner;
   b. Restore the animal or property only upon payment of a reward or other compensation; or
   c. Dispose of an animal or other property in a manner that makes recovery of the animal or property by the owner unlikely.

4. "Effective consent" includes consent by a person legally authorized to act for the owner. Consent is not effective if:
   a. Induced by force or threat;
   b. Given by a person the offender knows is not legally authorized to act for the owner; or
   c. Given by a person who by reason of age, mental disease or defect, or influence of drugs or alcohol is known by the offender to be unable to make a reasonable decision.

5. "Owner" means a person who has title to the property, possession of the property, or a greater right to possession of the property than the actor.

6. "Possession" means actual care, custody, control or management.

7. "Research facility" means any place at which any scientific test, experiment, or investigation involving the use of any living animal is carried out, conducted, or attempted.

§ 999.2 Animal facility—Damage or destruction

No person who uses or causes to be used the mail or any facility of interstate or foreign commerce may without the effective consent of the owner may:

1. Intentionally damage or destroy an animal facility, an animal or property in or on the animal facility, or any enterprise conducted at the animal facility.

2. Acquire or otherwise exercise control over an animal facility or an animal or other property from an animal facility with the intent to deprive the owner and to damage the enterprise conducted at the facility.

3. Enter an animal facility and use or attempt to use a camera, video recorder, or any other video or audio recording equipment.

4. Enter an animal facility, not then open to the public, with the intent to commit an act prohibited by this section.

5. Enter an animal facility and remain concealed with the intent to commit an act prohibited by this section.

6. Enter an animal facility and commit or attempt to commit an act prohibited by this section.

This section does not apply to lawful activities of a governmental agency carrying out its duties under law.

§ 999.3 Entry forbidden—Notice

No person may without the effective consent of the owner, and with the intent to damage the enterprise conducted at the animal facility, enter or remain on an animal facility, if the person had notice that the entry was forbidden or received notice to depart but failed to do so. Notice includes communication by the owner or someone with apparent authority to act for the owner, fencing or other enclosures designed to exclude intruders or to contain animals, or a sign posted on the property or at the entrance to the animal facility indicating that entry is forbidden.

§ 999.4 Penalty

Any person who violates section 999.2 or section 999.3 shall be fined under this title, imprisoned for not more than 7 years, or both.

Animal Enterprise Terrorism Act, 18 U.S.C. § 43

Section 1. Short Title

This Act may be cited as the "Animal Enterprise Terrorism Act."

Sec. 2 Inclusion of economic damage to animal enterprises and threats of death and serious bodily injury to associated person.

(a) In general – Section 43 of title 18, United States Code, is amended to read as follows:

"§ 43. Force, violence, and threats involving animal enterprises

(a) Offense. – Whoever travels in interstate or foreign commerce, or uses or causes to be used the mail or any facility of interstate or foreign commerce—

(1) for the purpose of damaging or interfering with the operations of an animal enterprise; and

(2) in connection with such purpose –

(A) intentionally damages or causes the loss of any real or personal property (including animals or records) used by an animal enterprise, or any real or personal property of a person or entity having a connection to, relationship with, or transactions with an animal enterprise;

(B) internationally places a person in reasonable fear of the death of, or serious bodily injury to that person, a member of the immediate family (as defined in section 115) of that person, or a spouse or intimate partner of that person by a course of conduct involving threats, acts of vandalism, property damage, criminal trespass, harassment, or intimidation; or

(C) conspires or attempts to do so; shall be punished as provided for in subsection (b).

(b) Penalties. – The punishment for a violation of section (a) or an attempt or conspiracy to violate subsection (a) shall be—

(1) a fine under this title or imprisonment not more than 1 year, or both, if the offense does not instill in another the reasonable fear of serious bodily injury or death and—

(A) the offense results in no economic damage or bodily injury; or

(B) the offense results in economic damage that does not exceed $10,000;

(2) a fine under this title or imprisonment for not more than 5 years, or both, if no bodily injury occurs and—

(A) the offense results in economic damage exceeding $10,000 but not exceeding $100,000; or

(B) the offense instills in another the reasonable fear of serious bodily injury or death;

(3) a fine under this title or imprisonment for not more than 10 years, or both if—

(A) the offense results in economic damage exceeding $100,000; or

(B) the offense results in substantial bodily injury to another individual;

(4) a fine under this title or imprisonment for not more than 20 years, or both, if—

(A) the offense results in serious bodily injury to another individual; or 2

(B) the offense results in economic damage exceeding $1,000,000; and

(5) imprisonment for life or for any terms of years, a fine under this title, or both, if the offense results in death of another individual.

(c) Restitution.—An order of restitution under section 3663 or 3663A of this title with respect to a violation of this section may also include restitution—

(1) for the reasonable cost of repeating any experimentation that was interrupted or invalidated as a result of the offense;

(2) for the loss of food production or farm income reasonably attributable to the offense; and

(3) for any other economic damage, including any losses or costs caused by economic disruption, resulting from the offense.

(d) Definitions.—As used in this section—

(1) the term "animal enterprise" means—

(A) a commercial or academic enterprise that uses or sells animals or animal products for profit, food or fiber production, agriculture, education, research, or testing;

(B) a zoo, aquarium, animal shelter, pet store, breeder, furrier, circus, or rodeo, or other lawful competitive animal event; or

(C) any fair or similar event intended to advance agricultural arts and sciences;

(2) the term "course of conduct" means a pattern of conduct composed of 2 or more acts, evidencing a continuity of purpose;

(3) the term "economic damage"—

(A) means the replacement costs of lost or damaged property or records, the costs of repeating an interrupted or invalidated experiment, the loss of profits, or increased costs, including losses and increased costs resulting from threats, acts or vandalism, property damage, trespass, harassment, or intimidation taken against a person or entity on account of that person's or entity's connection to, relationship with, or transactions with the animal enterprise; but

(B) 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;

(4) the term "serious bodily injury" means—

(A) injury posing a substantial risk of death;

(B) extreme physical pain;

(C) protracted and obvious disfigurement; or

(D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty; and

(5) the term 'substantial bodily injury' means—

(A) deep cuts and serious burns or abrasions;

(B) short-term or nonobvious disfigurement;

(C) fractured or dislocated bones, or torn members of the body;

(D) significant physical pain;

(E) illness;

(F) short-term loss or impairment of the function of a bodily member, organ, or mental faculty; or

(G) any other significant injury to the body.

(e) Rules of Construction.—Nothing in this section shall be construed—

(1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution;

(2) to create new remedies for interference with activities protected by the free speech or free exercise clauses of the First Amendment to the Constitution, regardless of the point of view expressed, or to limit any existing legal remedies for such interference; or

(3) to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this section, or to preempt State or local laws that may provide such penalties or remedies.

California Penal Code § 597. Cruelty to animals.

(b) Except as otherwise provided in subdivision (a) or (c), every person who overdrives, overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, drink, or shelter, cruelly beats, mutilates, or cruelly kills any animal, or causes or procures any animal to be so overdriven, overloaded, driven when overloaded, overworked, tortured, tormented, deprived of necessary sustenance, drink, shelter, or to be cruelly beaten, mutilated, or cruelly killed; and whoever, having the charge or custody of any animal, either as owner or otherwise, subjects any animal to needless suffering, or inflicts unnecessary cruelty upon the animal, or in any manner abuses any animal, or fails to provide the animal with proper food, drink, or shelter or protection from the weather, or who drives, rides, or otherwise uses the animal when unfit for labor, is for every offense, guilty of a crime punishable as a misdemeanor or as a felony or alternatively punishable as a misdemeanor or a felony and by a fine of not more than twenty thousand dollars ($20,000).

California Penal Code § 597t. Confined animals.

Every person who keeps an animal confined in an enclosed area shall provide it with an adequate exercise area. If the animal is restricted by a leash, rope, or chain, the leash, rope, or chain shall be affixed in such a manner that it will prevent the animal from becoming entangled or injured and permit the animal's access to adequate shelter, food, and water. Violation of this section constitutes a misdemeanor.

This section shall not apply to an animal which is in transit, in a vehicle, or in the immediate control of a person.

Prevention of Farm Animal Cruelty Act (Prop 2)
California Health & Safety Code

§ 25990. Prohibitions
<Section operative Jan. 1, [2010]>

In addition to other applicable provisions of law, a person shall not tether or confine any covered animal, on a farm, for all or the majority of any day, in a manner that prevents such animal from:

(a) Lying down, standing up, and fully extending his or her limbs; and

(b) Turning around freely.

§ 25991. Definitions
<Section operative Jan. 1, [2010]>

For the purposes of this chapter, the following terms have the following meanings:

(a) "Calf raised for veal" means any calf of the bovine species kept for the purpose of producing the food product described as veal.

(b) "Covered animal" means any pig during pregnancy, calf raised for veal, or egg-laying hen who is kept on a farm.

(c) "Egg-laying hen" means any female domesticated chicken, turkey, duck, goose, or guinea fowl kept for the purpose of egg production.

(d) "Enclosure" means any cage, crate, or other structure (including what is commonly described as a "gestation crate" for pigs; a "veal crate" for calves; or a "battery cage" for egg-laying hens) used to confine a covered animal.

(e) "Farm" means the land, building, support facilities, and other equipment that are wholly or partially used for the commercial production of animals or animal products used for food or fiber; and does not include live animal markets.

(f) "Fully extending his or her limbs" means fully extending all limbs without touching the side of an enclosure, including, in the case of egg-laying hens, fully spreading both wings without touching the side of an enclosure or other egg-laying hens.

(g) "Person" means any individual, firm, partnership, joint venture, association, limited liability company, corporation, estate, trust, receiver, or syndicate.

(h) "Pig during pregnancy" means any pregnant pig of the porcine species kept for the primary purpose of breeding.

(i) “Turning around freely” means turning in a complete circle without any impediment, including a tether, and without touching the side of an enclosure.