No. 13-1490

IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

SARAHJANE BLUM; RYAN SHAPIRO;
LANA LEHR; LAUREN GAZZOLA;
IVER ROBERT JOHNSON, III

Plaintiffs-Appellants

v.

ERIC H. HOLDER, Jr. in his official capacity as
Attorney General of the United States

Defendant-Appellee

On Appeal from the United States District Court
For the District of Massachusetts
Case No. 11-cv-12229
The Honorable Joseph L. Tauro

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this matter pursuant to 28 U.S.C. § 1331 (2013). It granted Defendant's[1] motion to dismiss on March 18, 2013, and Plaintiffs timely noticed their appeal on April 17, 2013. *See* Appendix 73. As the court's dismissal for lack of standing was a final order, disposing of all Plaintiffs' claims, this Court has jurisdiction over Plaintiffs' appeal pursuant to 28 U.S.C. § 1291 (2013).

STATEMENT OF THE ISSUES

1. Whether the District Court erred by dismissing Plaintiffs' claims for lack of standing despite the credible threat that Plaintiffs' desired advocacy would subject them to prosecution under the Animal Enterprise Terrorism Act ("AETA"), 18 U.S.C. § 43 (2013)[2].
2. Whether the District Court erred by interpreting the reference to "any real or personal property" in 18 U.S.C. § 43(a)(2)(A) narrowly, to exclude intangible property.
3. Whether, assuming this Court reverses the lower court's erroneous ruling, Plaintiffs have adequately pled three claims for relief, specifically, that the

[1] Defendant below is the Appellee before this Court. In accordance with the Court's local rules, we refer to him by his original status. In turn, we refer throughout the brief to Appellants as Plaintiffs.

[2] The full text of the Animal Enterprise Terrorism Act is set forth in the Addendum, at pages 19 through 22.

AETA is substantially overbroad, void for vagueness, and an unlawful content- and viewpoint-based restriction on speech.

STATEMENT OF THE CASE

Plaintiffs are five animal rights activists who filed a pre-enforcement facial challenge to the Animal Enterprise Terrorism Act, 18 U.S.C. § 43 (2013), on December 15, 2011, as a violation of due process and the First Amendment to the United States Constitution. Defendant Eric Holder moved to dismiss the complaint in its entirety on March 12, 2012, for lack of standing and failure to state a claim. Memorandum in Support of Defendant's Motion to Dismiss Pursuant to Rules 12(b)(1) and 12(b)(6), District Ct. Dkt. No. 12 (hereafter "Def's MTD").

On March 18, 2013, the District Court granted Defendant's motion, finding that Plaintiffs lacked standing to bring a pre-enforcement challenge. District Court's Memorandum, "Addendum" at 17. Plaintiffs disagree, and take this appeal.

STATEMENT OF FACTS

Plaintiffs Sarahjane Blum, Ryan Shapiro, Lana Lehr, Lauren Gazzola, and Iver Robert "J" Johnson III have long been committed to changing public opinion and corporate policies regarding animal mistreatment and cruelty through protected speech and expressive conduct. Part of their constitutionally-protected activism is specifically designed to persuade fellow citizens that certain agricultural and scientific business practices are immoral, and discourage them from patronizing

such businesses. Plaintiffs bring a pre-enforcement challenge to AETA because it has chilled their ability to engage in this socially useful and lawful activity.

AETA criminally penalizes one who, for the purpose of damaging or interfering with the operations of an animal enterprise, "intentionally damages or causes the loss of any real or personal property" belonging to such enterprise, "intentionally places a person in reasonable fear of … death … or serious bodily injury," or "conspires or attempts to do so." 18 U.S.C. § 43(a).

AETA and its predecessor, the Animal Enterprise Protection Act ("AEPA"), 18 U.S.C. § 43 (1992), were passed in reaction not only to violence and property damage, but also to "disruptive expressions of extremism on behalf of animal rights." *See* Appendix 27 (¶ 27), (*citing* DEP'T JUST., REPORT TO CONGRESS ON THE EXTENT AND EFFECTS OF DOMESTIC AND INTERNATIONAL TERRORISM ON ANIMAL ENTERPRISES 1 (1993)); *see also* Appendix 28 (¶ 28). Because of the breadth and vagueness of its terms, AETA effectively proscribes expressive activity that causes animal enterprises to lose profit. It thus chills animal rights activists' lawful and non-violent advocacy based on the potential economic impact of that advocacy.

Each Plaintiff has a long history of engagement in speech and expressive conduct now criminalized as "terrorism" by AETA. Appendix 39-62 (¶¶ 67-161). Each would continue his/her advocacy, absent the chill cast by the credible threat of their prosecution under AETA.

SUMMARY OF THE ARGUMENT

Below, Plaintiffs advanced three distinct constitutional claims. *See* Section III, *infra.* First, AETA is substantially overbroad in violation of the First Amendment, as it threatens to punish *all* who have the purpose and effect of causing an animal enterprise to lose profits, even if undertaken through constitutionally-protected conduct and speech, rather than through properly proscribed violence and property damage. Second, AETA's undefined terms render it unconstitutionally vague, in violation of due process. Finally, AETA unlawfully discriminates on the basis of content and viewpoint, and is not narrowly tailored to protect a compelling governmental interest.

The lower court did not reach the substance of these claims, instead dismissing the entire case for lack of standing by interpreting AETA narrowly, to punish only harm to tangible property. Addendum at 14-17. As Plaintiffs will show in Section I, the District Court erred. First, it was improper for the Court to conduct a merits inquiry into the statute's scope, but cloak that analysis as a decision on standing. To allege standing, Plaintiffs need only show a credible threat of prosecution under their *reasonable* interpretation of the statute; this they have done, as each has alleged the desire to engage in concrete forms of animal advocacy for the purpose of harming animal enterprises through lost profits or other economic damage.

In Section II, Plaintiffs further show that their interpretation of AETA is not only reasonable; it is correct. Among other interpretive errors, the lower court's textual interpretation of AETA's prohibition on "intentionally damage[ing] or caus[ing] the loss of any real or personal property (including animals or records) used by an animal enterprise" incorrectly assumed that the parenthetical "animals or records" was not simply illustrative, but actually constricted the provision to exclude harm caused to intangible property, contravening firm tenets of statutory interpretation and precedent. The error is significant, because Plaintiffs' theory of standing is premised on the reasonable fear that their expressive activity may damage an animal enterprises' intangible property (e.g. by causing loss of profit)—a fear that remains despite the District Court's incorrect interpretation of Section 43(a)(2)(A). In addition, the court placed undue weight on the statute's broad and ill-defined First Amendment savings clause.

Finally, in Section III, Plaintiffs urge this Court to reach the question of whether Plaintiffs have adequately pled constitutional challenges to AETA. Once the Court properly interprets the reach of Section 43(a)(2)(A), the statute's overbreadth is clear, as it could criminalize a vast quantity of lawful protest and advocacy undertaken to impact the profitability of organizations who abuse animals for profit, science, or entertainment. Plaintiffs will also show that AETA must be struck down as unconstitutionally vague, as it leaves core terms like

"damage," "interfere," "causes the loss," and "personal property," completely undefined. Finally, while arguably neutral on its face, AETA discriminates on the basis of content and viewpoint, singling out for special protection businesses and individuals who occupy only one side of a contentious political debate, and punishing expressive conduct and speech that have the purpose and effect of undermining the profitability of such enterprises.

Because Plaintiffs have standing to challenge AETA, and because it violates the First Amendment and the Due Process Clause, the lower court's decision should be reversed, all Plaintiffs' claims should be reinstated, and the case should be remanded for discovery and summary judgment.

STANDARD OF REVIEW

The existence of standing is a legal question; the District Court's dismissal is thus subject to *de novo* review. *Culhane v. Aurora Loan Servs.*, 708 F.3d 282, 289 (1st Cir. 2013) (*citing People's Alliance & Natural Res. Def. Council v. Mallinckrodt, Inc.,* 471 F.3d 277, 283 (1st Cir. 2006)).

ARGUMENT

I. The District Court Failed to Conduct the Proper Standing Inquiry.

Contrary to the District Court's ruling, Plaintiffs have standing to challenge AETA. Standing requires (1) an actual or threatened injury, (2) that is fairly traceable to the challenged conduct, and (3) will likely be redressed by a favorable

decision. *R.I. Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 30 (1st Cir. 1999).

In this type of pre-enforcement facial challenge, only the first prong has independent significance. *See id.* (holding "to the extent that [plaintiff] had suffered a cognizable injury at the time of filing … that injury can be traced directly to the looming enforcement of [the law at issue] and can be fully redressed by declaratory and injunctive relief"). It is on this ground that the lower court dismissed Plaintiffs' case. Addendum at 14.

When a criminal statute is alleged to infringe on First Amendment interests, the law recognizes as a cognizable injury the chill that causes a plaintiff to refrain "from exercising her right to free expression … to avoid enforcement consequences …. In such situations the vice of the statute is its pull toward self-censorship." *N.H. Right to Life PAC v. Gardner,* 99 F.3d 8, 13-14 (1st Cir. 1996) (internal citations omitted); *Mangual v. Rotger-Sabat*, 317 F.3d 45, 57 (1st Cir. 2003). A subjective fear of prosecution is not enough; a plaintiff must allege the existence of a "credible threat that the challenged law will be enforced." *N.H. Right to Life PAC,* 99 F.3d at 14. Where such a threat exists, individuals must choose "either to engage in the expressive activity, thus courting prosecution, or to succumb to the threat, thus forgoing free expression. Either injury is justiciable." *Id.*

The standard for assessing whether a threat is credible is "forgiving." *Id.* at 14; *see also Mangual*, 317 F.3d. at 57 (describing credible threat evidentiary bar as "extremely low"). Indeed, "when dealing with pre-enforcement challenges to recently enacted (or, at least, non-moribund) statutes that facially restrict expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence." *N.H. Right to Life PAC,* 99 F.3d at 15.

Plaintiffs allege that they are chilled from engaging in concrete forms of advocacy and speech because they reasonably believe them punishable under AETA. Appendix 42-46, 48-51, 53-55, 57-59, 62 (¶¶ 85-98, 107-15, 126-33, 142-48, 160-61). Ms. Blum, for example, made a documentary film showing animal abuse on a foie gras farm, but has refrained from screening the film out of fear that it might cause loss of property to foie gras producers. Appendix 43-44 (¶¶ 87, 91). Ms. Lehr has stopped attended fur protests for similar reasons. Appendix 54 (¶¶ 128-30).

Despite these concrete allegations of chill, and the "extremely low" credible threat threshold, the District Court found that Plaintiffs faced no credible threat of enforcement, because their desired conduct did not fall within the court's own unprecedented and narrow reading of 18 U.S.C. § 43(a)(2)(A). Addendum at 17. But a plaintiff has standing so long as she reasonably interprets a statute to apply to

her conduct, even if that interpretation is ultimately incorrect. *See e.g., Virginia v. Am. Booksellers Ass'n, Inc.,* 484 U.S. 383, 392-95 (1988). For this reason, the District Court's decision must be reversed.[3]

Moreover, the court below barely addressed Plaintiffs' theories of standing under 18 U.S.C. § 43(a)(2)(B) (punishing threats to animal enterprise employees and others) and ignored § 43(a)(2)(C) (conspiracy) altogether. Addendum at 17. At least one Plaintiff has adequately pled a credible threat of injury under the former, and all Plaintiffs have a claim under the latter, presenting an independent basis for reversal.

A. The District Court Failed to Consider Whether Plaintiffs Have Alleged a Credible Threat of Injury Based on their Reasonable Interpretation of 18 U.S.C. § 43(a)(2)(A).

AETA punishes one who, for the purpose of damaging or interfering with the operations of an animal enterprise, "intentionally damages or causes the loss of any real or personal property" belonging to such enterprise. 18 U.S.C. § 43(a)(2)(A). The District Court interpreted this provision to outlaw only *physical* damage to *tangible* property, contradicting its plain meaning. Addendum at 17. Because Plaintiffs allege a desire to engage in expressive activity that could cause profit loss to an animal enterprise, but no physical damage, the lower court found

[3] As discussed in Section II, below, Plaintiffs' proffered interpretation of Section 43(a)(2)(A) is more than reasonable; it is correct and dispositive of the merits of Plaintiffs' challenge.

that they failed to allege "an intention to engage in any activity 'that could reasonably be construed' to fall within this provision," and thus lacked standing. *Id.* at 14 (*quoting Ramirez v. Sanchez Ramos*, 438 F.3d 92, 98 (1st Cir. 2005)). To buttress this finding, the court erroneously relied on the absence of prior AETA prosecutions based on the same factual circumstances alleged by Plaintiffs.

As Plaintiffs show in Section II, the lower court's interpretation of the statute is incorrect. But even if it is not, it was error for the District Court to deny standing given Plaintiffs' objectively reasonable, albiet *disputed*, interpretation of the statute. A plaintiff has standing in First Amendment pre-enforcement cases even if "there may be other, perhaps even better" interpretations of the challenged statute. *Vt. Right to Life Comm. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000). "If a plaintiff's interpretation of a statute is 'reasonable enough' and under that interpretation the plaintiff 'may legitimately fear that it will face enforcement of the statute,' then the plaintiff has standing to challenge the statute." *Pac. Capital Bank v. Connecticut*, 542 F.3d 341, 350 (2d Cir. 2008) (*citing Vt. Right to Life Comm.*, 221 F.3d at 383).

The credible threat inquiry is distinct from a merits analysis of the reach of a given statute; were it not, most overbreadth cases would be barred at the courthouse door. In *Virginia v. American Booksellers Ass'n,* 484 U.S. 383, 392 (1998), for example, the question of a statute's reach was central to the Court's

merits analysis. A Virginia law prohibiting the display of prurient books to juveniles was capable of differing interpretations: bookseller plaintiffs (and the district court) read the statute broadly, to reach up to 25% of the works in a typical bookstore; the State Attorney General conceded that if the statute were so broad it should be enjoined, but interpreted it much more narrowly, to cover only that material which bordered on the obscene, and none of the books identified by plaintiffs. *Id.* at 393-95. The Supreme Court found the question of the statute's reach dispositive of the First Amendment analysis, certifying the question to Virginia's Supreme Court. *Id.* at 395-97. But, importantly, plaintiffs had standing to challenge the law regardless of the correct interpretation of the statute. *Id.* at 392-93.

When the court decides a case on its merits, it may choose to accept a binding and narrow construction that "settle[s] the issue" of the statute's constitutionality, "but that would not affect the objectively reasonable belief that plaintiffs had when they filed suit that they could have run afoul of the Act." *R.I. Med. Soc'y v. Whitehouse* 66 F. Supp. 2d 288, 302 (D.R.I. 1999), *aff'd,* 239 F.3d 104, 105 (1st Cir. 2001) (doctors have standing for pre-enforcement challenge where their conventional abortion procedures might or might not fall under the "murk[y]" language of Rhode Island's partial birth abortion ban); *see also Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 661, 664 (5th Cir. 2006)

(plaintiffs have standing despite dispute as to statute's reach, and ultimate use of limiting instruction to cabin that reach); *Hoover v. Wagner*, 47 F.3d 845, 847 (7th Cir. 1995) (reversing district court dismissal on standing despite question as to whether the injunction at issue covered the expressive conduct in which plaintiffs desired to engage).

Were the meaning of Section 43(a)(2)(A) as clear as the District Court suggests, Plaintiffs would have no cause for complaint. But that is far from the case. Indeed, in briefing the case below, the Government never provided its own definition of critical words used in AETA, such as "interfering," "damaging," or "personal property." And the District Court's novel interpretation of Section 43(a)(2)(A) contradicts definitions found in the dictionary, other cases, briefs of *amici curiae* supporting the Government below, and prior prosecutions under the indisputably narrower predecessor to the AETA. *See infra*, Section II; *see also Br. of Amici Curiae Nat'l Ass'n For Biomedical Research, et al,* at 15 (District Ct. Dkt. No. 17-1) (arguing that AETA's prohibition on activity that causes loss to an animal enterprise is not vague, as Plaintiffs are able to interpret it themselves to include loss of profits and increased security costs); Appendix 36 (¶ 58). Even the FBI has implicitly endorsed Plaintiffs' broader interpretation. Appendix 67-68 (FBI memo describing illegal entry onto farm, videotaping animals, and taking animals, *each* as violations of AETA).

The fact that Plaintiffs did not cite "any case charging as an AETA violation the type of conduct in which they seek to engage," Addendum at 16, is irrelevant as a matter of law. *See New Hampshire Right to Life PAC v. Gardner,* 99 F.3d 8, 13 (1st Cir. 1996) (*citing Babbit v. United Farm Workers,* 442 U.S. 289, 298-99 (1979) (plaintiffs faced credible threat of prosecution even though no criminal penalties had ever been levied under the relevant statute); *Doe v. Bolton,* 410 U.S. 179, 188 (1973) (physicians faced credible threat of prosecution even though no physician had ever been prosecuted or threatened under the relevant statute); *Chamber of Commerce v. FEC,* 69 F.3d 600, 603 (D.C. Cir. 1995) (plaintiffs had standing to challenge FEC regulation despite FEC split on advisability of rule, because one Commissioner might change his/her mind in the future)); *see also R.I. Ass'n of Realtors v. Whitehouse*, 199 F.3d 26, 32 (1st Cir. 1999) (finding credible threat of prosecution even though criminal penalties had never been pursued in the 20 years the statue was on the books).[4] Moreover, the court's conclusion ignores historical prosecutions under earlier iterations of the Act. *See* Section II, *infra.*

[4] Further, past use has no bearing on the meaning of a statute. That prosecutors have not yet sought to prosecute a certain type of conduct says nothing about whether such conduct falls within a "reasonable construction" of the statute: it says only that prosecutors have not sought to extend AETA's application as far as the statutory language permits. *See United States v. Cabaccang*, 332 F.3d 622, 652 (9th Cir. 2003) (en banc) (Kozinski, J., dissenting) (stating that absence of past prosecutions "shows the effectiveness of prosecutorial discretion"). This contrasts with a situation where the Government has formally adopted a binding position that a given statute does not reach the conduct in which plaintiffs seek to engage.

Had the lower court considered whether Plaintiffs face a credible threat of prosecution under their reasonable interpretation of the statute, each individual's standing would have been clear. Appendix 43-46 (¶¶ 86-98) (Sarahjane Blum chilled from engaging in community campaign designed to discourage purchase of foie gras); 48-50 (¶¶ 108-14) (Ryan Shapiro chilled from undercover investigation and documentation of conditions on factory farms); 53-55 (¶¶ 126-32) (Lana Lehr chilled from handing out literature, organizing and attending anti-fur protests); 57-59 (¶¶ 142-48) (Lauren Gazzola chilled from re-engaging in campaign that combines statements of support for illegal action with lawful home protests); 61-62 (¶¶ 158-61) (J Johnson unable to engage in animal rights campaign).

B. The District Court Failed to Address Lauren Gazzola's Standing to Challenge the Constitutionality of 18 U.S.C. § 43(a)(2)(B).

Plaintiffs' challenge is not limited to Section 43(a)(2)(A). Section (a)(2)(B) of AETA punishes one who "intentionally places a person in reasonable fear" of death or serious bodily injury "by a course of conduct involving threats, acts of vandalism, property damage, criminal trespass, harassment, or intimidation." Plaintiffs challenge this provision of AETA as unconstitutionally vague, and

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See Ward v. Rock Against Racism, 491 U.S. 781, 795-96 (1989) (finding relevant limiting interpretations that have been adopted by courts or agencies); *see also McGuire v. Reilly*, 386 F.3d 45, 58-59, 64 (1st Cir. 2004) (disputes over correctness of Massachusetts Attorney General's interpretation and its binding nature was "irrelevant" to facial challenge, but was relevant to as-applied challenge that addressed past conduct, not "future enforcement patterns").

content- and viewpoint-based. Appendix 31, 63-64 (¶¶ 41, 166-69). The court below ignored this provision entirely, except to state that no plaintiff's "proposed activities fall within the statutory purview of … intentionally placing a person in reasonable fear of death or serious injury." Addendum at 16. Based on her past experience, however, Plaintiff Gazzola has standing to challenge Section 43(a)(2)(B).

Ms. Gazzola was prosecuted under AETA's predecessor statute, the Animal Enterprise Protection Act, for her involvement in a campaign that combined expressions of support for illegal activity with home protests. Appendix 57 (¶ 141); *see also United States v. Fullmer*, 584 F.3d 132, 157 (3d Cir. 2009). In rejecting Ms. Gazzola's First Amendment defense, the Third Circuit held that, in the context of Ms. Gazzola's prior expressions of support for unlawful actions undertaken by others, she should have reasonably foreseen that her political chant (she called out "what goes around comes around" and other protestors answered "burn his house to the ground") would be taken by the protest's target as a serious expression of intent to harm that individual. 584 F.3d at 157; *see also Commonwealth v. Gazzola*, 17 Mass. L. Rep. 308, 2004 Mass. Super. LEXIS 28, *15 (Sup. Ct. 2004) (recounting Ms. Gazzola's chant). Ms. Gazzola understands that, taken separately, aggressive but non-inciting protests and advocacy of illegal activity are protected by the First Amendment, but she now reasonably fears that voicing general support

for illegal action, and then subsequently taking part in a lawful home protest, could be punished under AETA's Section 43(a)(2)(B) as "intentionally plac[ing] a person in reasonable fear of … death … or serious bodily injury ... through a course of conduct." Appendix 57 (¶¶ 141-143); 584 F.3d at 157. Ms. Gazzola's past prosecution, along with her current desire to engage in similar campaigns, establishes standing. *See Rock for Life-UMBC v. Hrabowski*, 411 Fed. Appx. 541, 548 (4th Cir. 2010)(unpublished) ("To demonstrate a credible threat that a … policy is likely to be enforced in the future, a history of threatened or actual enforcement of the policy against the plaintiff or other similarly-situated parties will often suffice") (collecting cases).

C. The District Court Failed to Address Plaintiffs' Standing to Challenge 18 U.S.C. § 43(a)(2)(C).

Plaintiffs also challenge Section 43(a)(2)(C) of AETA as unconstitutionally vague, because it appears to criminalize the incredibly broad offense of conspiring or attempting to use interstate commerce for the purpose of damaging or interfering with the operations of an animal enterprise. Read together, Sections 43(a)(1) and 43(a)(2)(C) provide: "Whoever [uses interstate commerce] for the purpose of damaging or interfering with the operations of an animal enterprise; and conspires or attempts to do so; shall be punished." The provision does not appear to relate back to 43(a)(2)(A) or (a)(2)(B), and thus could be interpreted to criminalize conspiracy to interfere alone, even without resulting property damage or a threat.

All Plaintiffs' desired activities (like exposing cruelty on a foie gras farm or bringing bunnies to restaurants serving rabbit meat) could easily be interpreted as "interference" with an animal enterprise, and thus Plaintiffs have standing to challenge this provision. Appendix 43-46, 49-50, 54, 55, 57-59, 61-62 (¶¶ 87-88, 91-96, 111-14,128, 131, 142-43, 146-48, 158-61); Section III.A, *infra.*

For all these reasons, Plaintiffs have adequately alleged a credible threat of prosecution under AETA, and have standing to challenge the law's constitutionality. The District Court, never having considered whether Plaintiffs offered a reasonable (rather than correct) interpretation of AETA, should be reversed. But even on its merits, the District Court's reading of AETA is erroneous.

II. The District Court Erred in Interpreting AETA.

Subsection (a) of the Act provides,

> Whoever travels in interstate or foreign commerce, or uses or causes to be used the mail or any facility of interstate or foreign commerce . . . for the purpose of damaging or interfering with the operations of an animal enterprise; and . . . in connection with such purpose . . . 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 . . . shall be punished as provided for in subsection (b).

18 U.S.C. § 43(a).

Proper interpretation of this provision of AETA is central to both standing and the merits of this case. Specifically, this Court must decide whether AETA's statutory prohibition on "intentionally damag[ing] or caus[ing] the loss of any real or personal property" criminalizes advocacy that causes an animal enterprise to lose money in some way, whether through lost business or increased costs. The District Court held that it does not, based on its opinion that (1) the term "personal property" cannot be read to include intangibles; and (2) AETA's rules of construction prohibit its use in cases involving First Amendment protected activity. Both assertions are incorrect.

Plaintiffs reasonably fear that AETA allows for liability when an individual causes harm or loss to any animal enterprise property – including lost profit or other intangible harm like diminution of business goodwill – by acting in interstate commerce with the purpose of damaging an animal enterprise. This liability provision uses different language than AETA's penalty provision, which is based on how much "economic damage" results. While Plaintiffs concede that the Act is unclear (indeed, this is what gives rise to their vagueness claim), under the best reading of AETA, economic damage is one type of loss or harm to property that may trigger liability under the Act. Basic tenets of statutory interpretation, prior precedent, and the history of AETA support this interpretation.

A. The District Court's Conclusion that "Personal Property" Does Not Encompass Intangible Property is Based on a Misreading of the Statutory Text and a Disregard of Relevant Precedent.

The District Court offered two text-based reasons for interpreting Section 43(a)(2)(A) to exclude from "personal property" intangibles such as lost profits and security costs. Addendum at 17. First, the court interpreted the reference in Section 43(a)(2)(A) to "any . . . personal property" to be limited to *tangible* personal property. *Id.* at 17. Second, the court relied on the definition of "economic damage" in the penalty provision of the statute to limit the meaning of "loss of … property" in the liability provision. *Id.* Both of these arguments contradict fundamental tenets of statutory interpretation and relevant precedent.

1. Section 43(a)(2)(A)'s Reference to "Any Real or Personal Property" Must Be Read Broadly to Include Intangibles such as Lost Profits.

The lower court looked first to the words surrounding "personal property" in the statute – "animals or records" and "real . . . property." Addendum at 17. Without support or elucidation, the court stated "[i]n this context, personal property cannot reasonably be read to include an intangible such as lost profits." *Id.* Perhaps the District Court meant that because "real property" and "animals or records" are each tangible, "personal property" could not also include intangible items. This interpretation is erroneous for several reasons.

First, the District Court's interpretation suggests that the three terms are part of a list. In fact, the statute denotes "*any* real *or* personal property" as the key

phrase – the parenthetical "including animals or records" merely ensures the reader understands that those potentially overlooked items are included. The parenthetical emphasizes the type of property Congress was most keen to protect; it does not limit the meaning of the broad terms "real or personal property."

It is a basic tenet of statutory interpretation that a parenthetical beginning with "including" is meant to "expand, not restrict." *See Am. Sur. Co. of New York v. Marotta*, 287 U.S. 513, 517 (1933) ("In definitive provisions of statutes and other writings, 'include' is frequently, if not generally, used as a word of extension or enlargement rather than as one of limitation or enumeration.") (citations omitted); *see also P.C. Pfeiffer Co., v. Ford*, 444 U.S. 69, 77 n.7 (1979) ("including" indicates that examples following word are "part of a larger group . . . that make up" the broader term); *Westfarm Associates v. Wash. Suburban Sanitary Comm'n*, 66 F.3d 669, 679 (4th Cir. 1995) (parenthetical beginning with "including" was meant to "emphasize [a] point") (internal quotation marks and alterations omitted).

Indeed, to the extent that "including" ever does more than illustrate or emphasize, it typically expands the meaning of the terms it modifies "beyond the ordinary and commonly accepted meaning of those words." *Pinellas Ice & Cold Storage, Co., v. C.I.R.* 287 U.S. 462, 469-70 (1933). Going against this common interpretive convention, the District Court found that the parenthetical "including

animals or records," limits the broad sweep of AETA's plain language. But Congress understands the conventions of statutory interpretation, and thus uses vastly different language in parentheticals when it wishes to limit the effect of potentially far-reaching language. For example, the Immigration and Nationality Act (INA) § 1101(a)(43)(F), defines an aggravated felony as "a crime of violence (as defined in section 16 of title 18, *but not including a purely political offense*) for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(F) (2013) (italics added). Similarly, INA § 1101(a)(43)(J), defines an aggravated felony as "an offense described in [18 U.S.C. § 1962] (relating to racketeer influenced corrupt organizations), or an offense described in [18 U.S.C. § 1084] (*if* it is a second or subsequent offense)." 8 U.S.C. § 1101(a)(43)(J) (italics added). In these examples, Congress uses clearly restrictive or limiting language where it intends a parenthetical to limit or refine a given provision. *See also United States v. Johnson*, 953 F.2d 110, 113 (4th Cir. 1991) (holding that parenthetical clarified plain meaning of Sentencing Guideline where it was introduced by "i.e.").

Congress's use of the modifier "any" further supports Plaintiffs' broad reading of the statute. *Harrison v. PPG Industries,* 446 U.S. 578, 589 (1980) (concluding "that the phrase, 'any other final action,' in the absence of legislative history to the contrary, must be construed to mean exactly what it says, namely, *any other* final action." (emphasis in original)); *see also Ali v. Bureau of Prisons*,

552 U.S. 214, 221 (2008) ("Congress could not have chosen a more all-encompassing phrase than 'any other law enforcement officer'"). The lower court's reading ignores the plain meaning of this adjective. Indeed, to the extent that the District Court's reliance on the parenthetical constitutes a form of *ejusdem generis*,[5] reliance on that principle is inappropriate when Congress has used expansive language such as "any real or personal property." *See Harrison*, 446 U.S. at 588-89 (finding that principle of *ejusdem generis* is inapplicable to statute that uses word "any" because that word admits of no ambiguity); *accord United States v. Turkette*, 452 U.S. 576, 581 (1981).

Thus, fundamentals of statutory interpretation, in combination with the obvious breadth of the word "any," show that the parenthetical in AETA simply emphasizes some types of property encompassed by the phrase "personal property." It does not limit this phrase to tangible items.

Second, the District Court's interpretation ignores the rest of the relevant sentence. The provision addresses one who "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*." 18

[5] The canon of *ejusdem generis* "limits general terms [that] follow specific ones to matters similar to those specified." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2171 (2012). It would turn this tenet on its head to limit the reach of expansive terms when they are *followed by* more specific ones.

U.S.C. § 43(a)(2)(A) (emphasis added). The District Court ignored that the parenthetical "animals or records" does not appear after the second reference in the statute to "real or personal property." If the court's reasoning were correct – i.e. if the terms "(including animals or records)" modified or limited the definition of the preceding terms – then "personal property" would mean something different in these two clauses. Illogically, AETA would protect only tangible property belonging to an animal enterprise, but all property (tangible and intangible) belonging to a person or entity with a relationship to an animal enterprise.

Finally, the court's reading failed to account for the numerous cases establishing that a business's lost profits are routinely characterized as damage or loss to "property." *See, e.g., Martco Ltd. v. Wellons, Inc.*, 588 F.3d 864, 879 (5th Cir. 2009) (lost profits properly considered "property damage" for purpose of insurance claim); *Gully v. Sw. Bell Tel. Co.*, 774 F.2d 1287, 1294 n.20 (5th Cir. 1985) (damages to property include lost business profits); *Radiation Sterilizers, Inc. v. United States*, 867 F. Supp. 1465, 1471-72 (E.D. Wash. 1994) (property damage includes damage to intangible property, including lost profits and business goodwill); *Geurin Contractors, Inc. v. Bituminous Cas. Corp.*, 636 S.W.2d 638, 641 (Ark. 1982) (lost profits resulting from road closure satisfied policy definition of "loss of use" of tangible property); *see also St. Paul Fire & Marine Ins. Co. v. N. Grain Co.*, 365 F.2d 361, 365-66 (8th Cir. 1966) (finding that diminution in the

value of a wheat crop amounted to property damage within the scope of liability policy); *Labberton v. General Cas. Co. of Am.*, 332 P.2d 250, 254 (Wash. 1958) ("property is a term of the very widest significance" and "when used without qualification may reasonably be construed to include … intangibles"); *cf. In re C.R. Stone Concrete Contractors, Inc.*, 462 B.R. 6, 23 (Bankr. D. Mass. 2011) ("personal property" within meaning of estate law includes intangible assets like good will).

AETA's reference to "*any* personal property" distinguishes it from other contexts in which the lower court's reasoning might hold sway. In the insurance context, for instance, most coverage is explicitly limited to damage to "tangible" property, thus clearly excluding lost profits. *See*, *e.g.*, *Nat'l Union Fire Ins. Co. of Pittsburgh v. Ready Pac Foods, Inc.*, 782 F. Supp. 2d 1047, 1056 (C.D. Cal. 2011); *see also* Calum Anderson, *Insurance Coverage for Employment–Related Litigation: Connecticut Law*, 18 W. NEW ENG. L. REV. 199, 237–38 (1996). AETA does not limit the definition of "property" in this way.

2. AETA's Definition of "Economic Damage" in Section 43(d)(3) Does Not Limit the Meaning of "Any Real or Personal Property."

The District Court's second text-based reason for a narrow interpretation of AETA – the relationship between the terms "economic damage" and "property" – is equally unavailing. AETA determines punishment, in part, based on the amount

of "economic damage" a defendant causes. 18 U.S.C. § 43(b). According to AETA's definitions section, "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 … 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.

Id. § 43(d)(3).

According to the District Court, because the term "economic damage" includes loss of profits, "personal property" cannot be read "to have the same meaning." Addendum at 17. But Plaintiffs do not argue that "personal property" and "economic damage" have the same meaning. Rather, the meanings must inform each other. "Economic damage" is *one type* of loss or damage to property, and AETA's definitions section assures that only some forms of economic damage will enhance the penalty under the law. That there is no similar provision limiting the type of damage or loss to real or personal property punishable as a substantive offense supports Plaintiffs' broad reading.

The argument adopted by the District Court was never raised by the Government, and for good reason: it defies logic. Congress could not have intended for the penalty under AETA to be based on the amount of intangible loss caused by a defendant's act if such intangible loss could not give rise to a substantive offense in the first place. Plaintiffs' reading of the statute is far more

logical: AETA criminalizes conduct that causes loss of tangible and intangible property. Some types of loss lead to heightened penalty, some do not.

This reading is also consistent with the FBI's; Plaintiffs attached to their complaint an FBI memo describing undercover investigation on a farm as a violation of AETA. Appendix 67-68. The memo endorses AETA prosecution not just for "subject 2" – alleged in the memo to have taken an animal from the farm – but also for "subject 1," whose only acts on the farm involved illegal entry and videotaping, neither of which would presumably result in damage to tangible property. *Id*. Tellingly, Mr. Shapiro himself is named in this FBI memo about potential AETA charges as one who "disrupts … business" and "causes economic loss." *Id.*

The history of AETA confirms its broad reach. AETA is the successor statute to the Animal Enterprise Protection Act of 1992 (AEPA). 18 U.S.C. § 43 (1992). AEPA read as follows:

> (a) OFFENSE – Whoever—
> (1) travels in interstate commerce … for the purpose of causing physical disruption to the functioning of an animal enterprise; and
> (2) intentionally causes physical disruption to the functioning of an animal enterprise by intentionally stealing, damaging, or causing the loss of, any property (including animals and records) used by the animal enterprise, and thereby causes economic damage exceeding $10,000 to that enterprise … shall be fined under this title or imprisoned not more than one year, or both.

Id. § 43(a) (1992). Under this earlier iteration, it was quite clear that liability under AEPA flowed from causing profit loss, as causing "economic damage" was

required for liability and was defined in the act to include loss of profits. *Id.* § 43(a)(2) & (d)(3) (1992).

In 2002, AEPA was amended to delete the reference to economic damage in the liability provision, making the extent of damage relevant solely to penalty. 18 U.S.C. § 43(b) (2002). The "physical disruption" language was retained. *Id.* When AEPA was amended again and renamed AETA in 2006, Congress critically eliminated the need for "physical disruption," requiring only that one intentionally cause damage or loss to an animal enterprise, for the purpose of damaging or interfering with the same. 18 U.S.C. § 43 (2006). From 1992's AEPA to the present AETA, the scope of criminal liability continually widened, from a statute that focused on physical harm to the operation of an animal enterprise to one that focuses on causing loss or harm by any broader "interference." What has not changed, under any of the revisions, is the relevance of lost profits and other harm to intangible property. Thus, for example, the Government's 2007 AEPA prosecution of animal rights activists applied the law to conduct causing intangible loss in the form of increased expenses or lost profits. *See* Consol. Br. for Appellee, *United States v. Fullmer*, No. 06-4211, 2008 U.S. 3d Cir. Briefs LEXIS 1334, at *27, 46 (3d Cir. June 17, 2008) (arguing that AEPA prohibits such actions as placing repeated telephone calls to an animal enterprise with the goal of causing employees "to waste their time," and coordinated email "attacks" that required the

purchase of "new hardware, new fire walls, and additional software."). Indeed, key to the Government's rebuttal of one of the points raised by the *Fullmer* defendants on appeal was that there was a logical and inextricable link between the term "economic damage" as used in the penalty provision and the element of causing damage or loss of property in the liability provision. *Id.* at *125 ("The penalty provisions for 'economic damage' and 'major economic damage' that are described in subsection (b) are themselves expressly linked to the damage or loss of property specified in subsection (a)."). If that same principle is applied here, the District Court's denial of a connection between AETA's liability provision and its definition of "economic damages" must be rejected.

Compounding its error, the District Court also ignored the relevance of what is *excluded* from the definition of "economic damage." Section 43(d)(3) of AETA creates an exception for "economic damage" flowing from the "disclosure of information." The Government argued below that this exclusion was further evidence of AETA's constitutionality, on the assumption that the exclusion of information disclosure from the penalty provision also meant that one could not be criminally liable for such disclosure. Def's MTD at 19-20. But this confuses the respective roles of the penalty and liability provisions of AETA.

First, the exception in the penalty provision does not alter the definition of damage or loss in the statute's liability provision. It affects only the penalty that a

defendant may face *after* criminal liability has been determined. Thus, if the only damage caused by Plaintiffs' conduct is the result of "lawful" actions by third parties, no *economic damage* results, thereby limiting Plaintiffs' potential prison sentence to one year. 28 U.S.C. § 43(b)(1)(A). In other words, an activist like Ms. Blum, who would intend to cause harm to an animal enterprise by encouraging consumers to stop purchasing foie gras, may cause "damage or loss," without causing any "economic damage" within the meaning of the Act. Indeed, the exception itself contemplates that liability could be based on speech like Ms. Blum's; otherwise it would not be necessary to exclude harms caused by the disclosure of information.

Second, by its terms the "economic damage" exception applies only to some First Amendment protected conduct – lawful economic disruption that results from the disclosure of information. The First Amendment protects much more than the dissemination of information – it protects advocacy, opinion, and many other kinds of expression that are not informational.

Finally, the exception applies only to the *lawful* actions of third parties that result from "disclosure of information" about an animal enterprise. But unlawful third party conduct could "result[]" from such disclosure and cause significant damage, whether or not the speaker had the intention of causing this result. Premising liability on the actions of others is prohibited by the First Amendment.

See, e.g., NAACP v. Claiborne Hardware Co., 458 U.S. 886, 920 (1982); *McCoy v. Stewart*, 282 F.3d 626, 632-33 (9th Cir. 2002).

B. AETA's Rules of Construction Do Not Alter the Plain Meaning of the Statute.

18 U.S.C. § 43(e)(1) directs that AETA shall not be construed "to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment." The lower court held this rule of construction works to "dispel any … doubt about the plain meaning of the statutory offense." Addendum at 17. This is incorrect. Congress cannot shield an unconstitutional statute from scrutiny simply by adding a provision that puts the burden on would-be challengers to determine whether the First Amendment protects certain activity. Several federal statutes contain the same kind of disclaimer, and no court reviewing the constitutionality of those statutes has rested its conclusions on the disclaimer.[6] When reviewing a constitutional

[6] Certain legislators were reassured by the rule of construction that AETA would protect First Amendment rights, but this is irrelevant, especially because other legislators expressed the opposite interpretation. *See, e.g.,* 152 CONG. REC. E2100 (daily ed. Nov. 13, 2006) ("The bill criminalizes conduct that 'intentionally damages or causes the loss of any real or personal property,' however, the bill fails to define what 'real or personal property' means. As a result, legitimate advocacy—such as a boycott, protest, or mail campaign—that causes an animal enterprise to merely lose profits could be criminalized.")(comments of Rep Israel).

challenge to 18 U.S.C. § 112 (2013),[7] for instance, the Fifth Circuit recognized that such a disclaimer "is a mere restatement of well-settled constitutional restrictions on the construction of statutory enactments." *CISPES v. FBI*, 770 F.2d 468, 474 (5th Cir. 1985). At most, such language can "validate a construction" that is supportable by the statutory language, but it cannot save an otherwise unlawful statute. *Id.* at 474; *see also Am. Life League v. United States,* 855 F. Supp. 137, 143 (E.D. Va. 1994) (savings clause may be helpful in rejecting plaintiffs' attempt to inject ambiguity into the otherwise plain meaning of a statute, but "Congress could not make a fatally flawed law constitutional merely by including a savings clause"), *aff'd*, 47 F.3d 642 (4th Cir. 1995); *United Food & Commer. Workers Local 99 v. Bennett*, No.CV-11-00921, 2013 U.S. Dist. LEXIS 46422, *88-89 (D. Ariz. Mar. 29, 2013); *United States v. Brock*, 863 F. Supp. 851, 856, 859 n.13 (E.D. Wisc. 1994), *aff'd sub nom., United States v. Soderna,* 82 F.3d 1370 (7th Cir. 1996).

Indeed, the Supreme Court noted that concerns about the impact of 18 U.S.C. § 112 on protected speech *increased* after Congress included a broad savings clause, prompting a subsequent amendment to the substance of the statute so as to eliminate any concerns about the statute's coverage of First Amendment

[7] 18 U.S.C. § 112 prohibits threats and violence directed at certain categories of foreign officials. Section (d) of the statute provides "[n]othing contained in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the first amendment to the Constitution of the United States."

activity. *Boos v. Barry*, 485 U.S. 312, 325-26 (1988). Similarly, in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), the Supreme Court considered a First Amendment exception similar to AETA's as evidence of Congress' stated intent not to violate the First Amendment. *Id*. at 2728 (*citing* 18 U.S.C. § 2339B(i) (2013)). But the Court looked to § 2339's substantive provisions and definitions to determine whether the statute violated the Constitution. *Id.*

Like the savings clauses found at 18 U.S.C. § 2339(B)(i) and 18 U.S.C. § 112(d), AETA's broad First Amendment exception cannot dispel Plaintiffs' reasonable fears, because it fails to clarify what is protected under the First Amendment and what is not. *See Rubin v. City of Santa Monica*, 823 F. Supp. 709, 712 (C.D. Cal. 1993) (discounting a broad "First Amendment Activities" exception because it did not and could not "define this concept"). An individual need not run the risk that her conduct will be considered outside the bounds of First Amendment protection in order to challenge the constitutionality of a criminal statute. The purpose of permitting a pre-enforcement facial challenge is to avoid this dilemma. *See Nat'l People's Action v. City of Blue Island*, 594 F. Supp. 72, 78 (N.D. Ill. 1984) (stating that a would-be activist must be knowledgeable of "all law applicable to her or his activities" to know whether a broad exemption or a more specific provision applies).

Moreover, even on its terms, the statute fails to offer the protection assumed by the District Court. To take just one example, the exception does not cover much of the advocacy in which Plaintiffs wish to engage, like the dissemination of information harmful to a factory farm. Appendix 45, 49 (¶¶ 94, 111). This speech, well within the core of First Amendment protections, can run afoul of AETA in numerous ways, yet is not protected by Section 43(e)(1) because it is not "expressive conduct."

Finally, given Plaintiffs' reasonable belief that their desired advocacy – whether characterized as "expressive conduct" or pure speech – falls within the more specific offense provisions of AETA (*see* Part III.A, *infra*), the rule of construction has little impact. When a statute by its specific terms prohibits First Amendment protected activity, but also broadly claims that it does no such thing, it is reasonable to fear enforcement under the more specific provisions. *See, e.g., NAACP v. Button*, 371 U.S. 415, 438 (1963) (when there is "internal tension between proscription and protection in the statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights"); *Fisher v. King*, 232 F.3d 391, 395 (4th Cir. 2000) (a savings clause for constitutionally protected rights is meaningless where it contradicts other provisions of the statute). As Professor Laurence Tribe has noted, otherwise the following law would be permissible: "[I]t shall be a crime

to say anything in public unless the speech is protected by the first and fourteenth amendment." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-26, at 716 (1st ed. 1978).

III. Plaintiffs Have Properly Stated Three Claims for Relief

Assuming the Court agrees with Plaintiffs, and reverses the lower court's dismissal for lack of standing, Plaintiffs urge the Court to also consider whether Plaintiffs' three claims are adequate to survive a motion to dismiss. *See, e.g., Mangual v. Rotger-Sabat*, 317 F.3d 45, 64 (1st Cir. 2003) ("where the merits comprise a purely legal issue, reviewable de novo on appeal and susceptible of determination without additional factfinding, a remand ordinarily will serve no useful purpose.") *(quoting N.H. Right to Life PAC v. Gardner,* 99 F.3d 8, 18 (1st Cir. 1996)); *see also*, *United States v. Pierro,* 32 F.3d 611, 622 (1st Cir. 1994); *Cohen v. Brown Univ.,* 991 F.2d 888, 904 (1st Cir. 1993); *Societe Des Produits Nestle, S.A. v. Casa Helvetia, Inc.,* 982 F.2d 633, 642 (1st Cir. 1992). Efficiency counsels the same approach here.

Plaintiffs have adequately pled claims that AETA is substantially overbroad, void for vagueness, and an unlawful content- and viewpoint-based restriction on speech.

A. AETA Is Substantially Overbroad

Overbreadth doctrine protects individuals who "may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *Gooding v. Wilson*, 405 U.S. 518, 521 (1972). "[W]here conduct and not merely speech is involved," overbreadth must be substantial to result in invalidity. *Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973). A plaintiff may succeed by establishing a "realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court," *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984), a "substantial *risk* that application of the provision will lead to the suppression of speech," *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) (emphasis added), *or* that the "arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach." *New York v. Ferber*, 458 U.S. 747, 773 (1982).

Thus, there are at least two ways for a plaintiff to demonstrate that a statute is substantially overbroad. First, as suggested by *Taxpayers for Vincent*, a court may focus on both the risk and the potential extent of the interference with First Amendment rights. 466 U.S. at 801. Second, as *Ferber* suggests, a court may focus on the number of instances in which the statute as applied will violate the First Amendment as compared to the amount of times it will regulate unprotected

conduct. 458 U.S. at 773; *see also United States v. Williams* 553 U.S. 285, 303 (2008) (rejecting overbreadth challenge when statute is constitutional in the "vast majority of its applications"); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 256 (2002) (finding law overbroad where it "covers materials beyond the categories" of child pornography and obscenity). Criminal statutes must be examined particularly carefully. *City of Houston v. Hill*, 482 U.S. 451, 459 (1987).

The first step in overbreadth analysis is to interpret the challenged statute. *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010). As demonstrated above, the District Court's interpretation of AETA as protecting only tangible property is untenable, even as an attempt to construe the statute to avoid difficult constitutional questions. *Reno v. ACLU,* 521 U.S. 844, 884 (1997) (statute must be "readily susceptible" to limited reading) (internal quotation marks omitted).

Once one rejects the District Court's unreasonably narrow interpretation of AETA, its overbreadth is easily demonstrated. Indeed, Plaintiffs' own desired activities demonstrate the breadth of First Amendment protected advocacy criminalized under AETA. As detailed in their complaint, Plaintiffs seek to publicize the horrific treatment of animals at certain businesses and to organize community campaigns in opposition to such treatment. *See, e.g.,* Appendix 43-46 (¶¶ 87-96). This conduct easily falls within AETA's prohibition. First, "animal enterprise" is defined broadly, as essentially any entity that uses animals or animal

products in any way.[8] Any target of Plaintiffs' efforts will be considered an animal enterprise. Second, Plaintiffs' conduct involves interstate communication under 18 U.S.C. § 43(a). *See, e.g.,* Appendix 44 (¶ 91). Third, Plaintiffs have the intent of "damaging or interfering" with the corporations' operations – the purpose of their advocacy is to cause businesses to suffer economically and be forced either to change their practices or to cease doing business entirely because of public outrage. 18 U.S.C. § 43(a); *see, e.g.,* Appendix 44-45 (¶ 93). If the targeted businesses suffer losses including lost profits, Plaintiffs will thereby have "intentionally damage[ed] or cause[d] the loss of . . . personal property . . . used by an animal enterprise." 18 U.S.C. § 43(a)(2)(A). It is not hard to imagine such a scenario. Animal enterprises may spend more money on security as a result of public demonstrations. Disgusted consumers may stop purchasing goods manufactured by animal enterprises. Some members of the public may be so enraged by what they learn from Plaintiffs' campaigns that they respond by targeting a company for harassing and threatening conduct, be it legal or illegal.

[8] "(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." 18 U.S.C. § 43(d)(1).

None of Plaintiffs' activities need result in "economic damage" for them to be punished, but to the extent such damage flows from Plaintiffs' activities, they will be subject to heightened penalties. 18 U.S.C. § 43(b) & (d)(3) (hinging AETA penalties on resulting economic damage, including illegal third party reaction to disclosure of information about an animal enterprise).

The Government argued below that AETA's terms could not be read as broadly as Plaintiffs contend, but neither the statute nor the Government offers definitions of AETA's key terms ("damaging," "interfering," "damages," "causes the loss," or "personal property"). Absent any limiting definition, the commonly understood meaning of these terms establishes the broad reach of the statute.

Plaintiffs already have addressed the well-accepted meaning of "personal property." *See supra* Section II.A. Black's Law Dictionary defines "damage" to mean "[l]oss or injury to person or property." BLACK'S LAW DICTIONARY 445 (9th ed. 2009); *see also* MERRIAM-WEBSTER COLLEGIATE DICTIONARY 314 (11th ed. 2003) (defining "damage" as "loss or harm resulting from injury to person, property, *or reputation*.") (emphasis added). Thus, it is hard to accept the Government's proposition below that speech directed at exposing animal cruelty at a particular animal enterprise does not fit within the definition of "damaging." Def's MTD at 12. Clearly Plaintiffs intend to inflict a "loss . . . to property" (or, on the more expansive definition, loss to "reputation").

The statute fares no better with respect to "interfering." Black's defines "interference" as "[t]he act of meddling in another's affairs" or "[a]n obstruction or hindrance." BLACK'S LAW DICTIONARY at 888. By their speech, Plaintiffs intend to be an obstruction and hindrance to the operation of at least some animal enterprises. Indeed, longstanding precedent recognizes both that speech has the power to interfere with or damage a business' operations, and that the Government lacks power to regulate speech solely on that basis. *See Waters v. Churchill*, 511 U.S. 661, 674 (1994) (recognizing that speech by public employees and private citizens can disrupt government operations, but government does not have power to restrict the latter); *Thornhill v. Alabama*, 310 U.S. 88, 104-05 (1940) (recognizing that protected expression may harm business interests, but finding that "the danger of injury to an industrial concern is neither so serious nor so imminent" as to justify speech restriction); *United Bhd. of Carpenters & Joiners of Am. Local 848 v. NLRB*, 540 F.3d 957, 966 (9th Cir. 2008) (holding unconstitutional rule designed to restrict speech, but not conduct, that "would interfere with normal business operations").

Given this straightforward interpretation of AETA, it is overbroad. It "inhibit[s] free speech and …[is] unsupported by a sufficiently compelling state interest …[nor] tailored narrowly to such an interest." *Auburn Police Union v. Carpenter,* 8 F.3d 886, 896 (1st Cir. 1993); *see also Am. Booksellers Found. for*

Free Expression v. Coakley, No. 10-11165, 2010 U.S. Dist. LEXIS 114750, at *12 (D. Mass. Oct. 26, 2010). As illustrated above, there is a "realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court," *Taxpayers for Vincent*, 466 U.S. at 801, as well as a "substantial *risk* that application of [AETA] will lead to the suppression of speech," *Finley*, 524 U.S. at 580 (emphasis added). Nor can it be said that the speech restricted by AETA is essentially criminal conduct. *Cf. United States v. Johnson*, 952 F.2d 565, 577-79 (1st Cir. 1991) (rejecting overbreadth challenge to 18 U.S.C. § 957).

B. AETA Is Void for Vagueness

AETA is also void for vagueness. An unclear statute like AETA will "inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (citations and punctuation omitted). For this reason, "standards of permissible statutory vagueness are strict in the area of free expression" and a court must not presume that an ambiguous line between permitted and prohibited activity will minimally impact protected expression. *NAACP v. Button*, 371 U.S. 415, 432 (1963). Although "some degree of inexactitude is acceptable in statutory language," to comply with the requirements of due process, a law must define an offense so that an ordinary reader can

understand what is prohibited, and it must do so in a way "that does not encourage arbitrary and discriminatory enforcement." *See URI Student Senate v. Town of Narragansett*, 631 F.3d 1, 13-14 (1st Cir. 2011) (internal quotation marks omitted).

In a facial vagueness challenge, the court must first determine whether the enactment reaches a substantial amount of constitutionally protected conduct. *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 494 (1982). As explored fully in Section III.A, *supra*, AETA does. In this context, a statute is unconstitutionally vague if its "deterrent effect on legitimate expression is ... both real and substantial, and if the statute is [not] readily subject to a narrowing construction." *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 60 (1976) (internal quotation marks omitted).

As illustrated above, each of Plaintiffs' complaints of vagueness is exemplified by his or her own desired conduct. Plaintiff Blum, for example, is hindered in her ability to effectively advocate against the foie gras industry, based on her uncertainty as to whether or not her conduct could be punished as "interfering" and "causing the loss" of "personal property" belonging to an "animal enterprise." *See, e.g.,* Appendix 44-45 (¶¶ 91, 93). Similarly, Plaintiff Gazzola fears engaging in a campaign that combines advocacy for illegal action with targeted residential protests, due to the uncertainty surrounding AETA's "course of conduct" definition, described below. *Id.* at 57 (¶¶ 142-43).

1. "Interfere"

AETA's vagueness stems first from the statute's failure to define "interfering," one of the key words used to establish liability under the Act. *Compare* 18 U.S.C. § 43(a)(1); *with* the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248(e)(2) (2013) (defining "interfere with" as "to restrict a person's freedom of movement."). When a statute fails to define a term that forms an element of criminal liability, there is a greater risk that individuals will not understand the breadth of the law and will be subject to the whim of law enforcement's discretion. *See Kolender v. Lawson*, 461 U.S. 352, 358-60 (1983) (finding statute vague for failure to define "credible" or "reliable"); *Mass. Fair Share, Inc. v. Town of Rockland*, 610 F. Supp. 682, 690 (D. Mass. 1985) (finding statute vague for failure to define "sunset" and "daylight hours" in ordinance prohibiting door-to-door canvassing).

By omitting a statutory definition of "interfering," AETA leaves ordinary readers in the dark about its precise meaning. The Second Circuit struck down similar language on vagueness grounds in *Dorman v. Satti*, 862 F.2d 432, 433 (2d Cir. 1988), which analyzed the Hunter Harassment Act's prohibition on "interfere[nce] with the lawful taking of wildlife by another person." In finding the statute impermissibly vague, the court characterized "interfere" as an imprecise term that can "mean anything." *Id.* at 436. Indeed, prohibitions on "interfering"

have been repeatedly struck down. *See Hirschkop v. Snead*, 594 F.2d 356, 371 (4th Cir. 1979) ("reasonably likely to interfere with a fair trial" is vague); *Nitzberg v. Parks*, 525 F.2d 378, 383 (4th Cir. 1975) ("substantial disruption of or material interference with school activities" is vague); *Young v. City of Roseville*, 78 F. Supp. 2d 970, 975 (D. Minn. 1999) ("interfere[s] with the use and enjoyment of adjacent land" is vague).

Courts have upheld the use of the term "interfere" only when it is defined or limited within the statute or regulation in question. *See*, *e.g.*, *Cameron v. Johnson*, 390 U.S. 611, 616 (1968) (prohibition on "picketing . . . in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any . . . county . . . courthouses" is not vague nor overbroad); *Riely v. Reno*, 860 F. Supp. 693, 705 (D. Ariz. 1994) (FACE not void for vagueness as "interfere with" is defined within the statute). Similarly, in *United States v. Buddenberg,* No. 09-cr-263, 2009 U.S. Dist. LEXIS 100477 at *20-23 (N.D. Cal. Oct. 28, 2009), the district court rejected defendants' arguments that AETA's failure to define "interfering" rendered the statute vague, but it did so only after considering the term as bounded by Section 43(a)(1)(B)'s requirement of interfering with an animal enterprise by a threatening course of conduct. Indeed, the court noted that "[d]efendants are correct that a wide variety of expressive and non-expressive conduct might plausibly be undertaken with the purpose of interfering with an

animal enterprise—a public protest, for example … but that conduct is not prohibited under § 43(a)(2)(B).” *Id.* at *23.

2. “Animal Enterprise”

Second, AETA’s definition of “animal enterprise” is so expansive as to give ordinary citizens no notice of when they risk criminal liability. *See* 18 U.S.C. § 43(d)(1)(A) (defining “animal enterprise” as, *inter alia*, “a commercial or academic enterprise that uses or sells animals or animal products for profit, food or fiber production, agriculture, education, research, or testing”). It is hard to imagine any commercial or academic enterprise that does not fall within this definition; the First Circuit courthouse for example, qualifies as an “animal enterprise,” as meat is sold in the cafeteria. Further, AETA criminalizes intentionally damaging or causing loss not only to all animal enterprises but also to “any real or personal property of a person or entity having a connection to, relationship with, or transactions with an animal enterprise.” *Id.* at § 43(a)(2)(A). This magnifies the potential reach of the statute without providing any meaningful guidance to a person of ordinary intelligence.

Broad proscriptions such as AETA’s pass constitutional muster only when the statutory scheme is specific enough to limit potential liability. For example, in *United States v. Cassel,* 408 F.3d 622, 635 (9th Cir. 2005), the Ninth Circuit declined to void a statute prohibiting “intimidation” because the limited context of

the statute – prohibiting intimidation that occurs in connection to the sale of public land – gave fair notice to those who might violate the statute. *See also Grayned*, 408 U.S. at 113 (upholding anti-picketing ordinance specifically targeted to avoid disruption of normal school activities). Given the breadth of the statute's description of an animal enterprise, AETA's proscriptions have nearly unlimited potential application, and thus fail to provide fair notice to potential violators.

3. "Damage," "Cause the Loss," and "Economic Damage"

Third, even if the Court determines that the failure to define "damage" and "cause the loss," along with the unclear meaning of "economic damage," does not make AETA unconstitutionally overbroad, these terms nonetheless evidence AETA's vagueness. As the legislature chose to define one set of terms and not the other, a law-abiding citizen must guess whether "lawful economic disruption," such as profit loss caused by a successful advocacy campaign, excepted from consideration in the penalty stage, fits the defined offense. Additionally, the definition of "economic damage" taken in conjunction with the exception set forth in Section 43(d)(3)(B) is itself hopelessly vague. The statute instructs that "economic damage" does not include "lawful economic disruption" resulting from "lawful public, governmental, or business reaction to the disclosure of information about an animal enterprise." Does this also exclude increased costs that may result from public, governmental, or business reaction to information disclosure? If, for

example, an animal enterprise chooses to hire additional security in the face of a peaceful and lawful picket on a public sidewalk across the street from enterprise headquarters, a reasonable person will not know whether economic damage has occurred.

4. "Course of Conduct"

Fourth, the phrase "course of conduct," appearing in Section 43(a)(2)(B), is also unconstitutionally vague. Most problematically, the phrase is defined only as "a pattern of conduct composed of 2 or more acts, evidencing a continuity of purpose." 18 U.S.C. § 43(d)(2). Notably omitted is any set time frame, meaning that an actionable course of conduct could include disparate acts across years or even decades.[9] It is unclear whether such acts must both fall within the statute of limitations, *see Toussie v. United States*, 397 U.S. 112, 115, 120 (1970) (describing "continuing offenses" that toll the statute of limitations period), *superseded by statute*, 50 U.S.C. § 462(d)), and whether they must be undertaken by the same individual or may be part of a pattern of group activity. *See Undergraduate Student Ass'n v. Peltason*, 367 F. Supp. 1055, 1057 (N.D. Ill. 1973) (asking, of a disorderly course of conduct statute, "[w]hat if, in an orderly demonstration, a few create a

[9] The RICO statute, by contrast, provides that a "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of the Act and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity. 18 U.S.C. § 1961(5) (2013).

'disorderly disturbance'? Are the rest in violation?") The requirement of "continuity of purpose" adds to AETA's uncertainty, as an animal rights activist's larger political purpose would presumably tie together otherwise attenuated acts of protest. Thus, a protest at a researcher's home, followed by years of inactivity, could potentially resurface as a basis for AETA liability if 5, 10, or 20 years later, a member of the same group that organized the initial protest again targets the same individual.

Conversely, it is not clear if attendance at one protest, involving, for example, multiple chants, or multiple actors, could comprise a "course of conduct." *Compare* MICH. COMP. LAWS § 750.411h (1)(a)(2013) ("Course of conduct" defined as "pattern of conduct composed of a series of 2 or more *separate noncontinuous acts* evidencing a continuity of purpose") (emphasis added) *with United States v. Carmichael*, 326 F. Supp. 2d 1267, 1278 (M.D. Ala. 2004) (noting that "website's continuous presence on the internet could arguably be equivalent to 'a series of acts over a period of time'").

5. Conspiracy

Finally, Section 43(a)(2)(C) of AETA is unconstitutionally vague because it appears to criminalize conspiring or attempting to use interstate commerce for the purpose of damaging or interfering with the operations of an animal enterprise, without tying such an attempt or conspiracy to intentional damage or threat of

injury. While a judge or lawyer might interpret this provision to implicitly refer back to Sections 43(a)(2)(A) and (B), *see, e.g., Buddenberg*, 2009 U.S. Dist. LEXIS 100477 at *35, a lay person would likely take at face value AETA's apparent allowance of liability without reference to these sections.

The full offenses specified at Section 43(a)(2)(C) read: "Whoever [uses interstate commerce] for the purpose of damaging or interfering with the operations of an animal enterprise; and conspires or attempts to do so; shall be punished." The textual, plain meaning of "to do so" refers back to interfering with an animal enterprise under Section 43(a)(1). AETA's structure appears clear: Section 43(a)(2)(C) does not prohibit a conspiracy or attempt to damage property under Section 43(a)(2)(A), nor threats of injury under Section 43(a)(2)(B). Rather, Section 43(a)(2)(C)'s inclusion on a list of three offenses, joined together by "or," seems to permit Section 43(a)(2)(C)'s application in the absence of the conduct described in either (a)(2)(A) or (a)(2)(B). Just as threats under Section 43(a)(2)(B) do not require any damage to property under Section 43(a)(2)(A), so does Section 43(a)(2)(C) appear to stand alone as a basis for criminal liability.

The structure of other federal criminal statutes further demonstrates this ambiguity. AETA appears unique in that other federal criminal statutes that incorporate attempt and/or conspiracy language either include such language in each subsection it applies to (*see, e.g.*, 18 U.S.C. § 33 (2013)); include a separate

attempt/conspiracy subsection explicitly identifying other subsections it incorporates (*see, e.g.,* 18 U.S.C. § 32 (2013)); or have attempt/conspiracy language separate and apart from the list of subsections of offenses separated by "or," thus indicating that the conspiracy/attempt language applies to all subsections in the list (*see, e.g.,* 18 U.S.C. § 37 (2013)). Each of the above three methods is clear in its text and structure as to how attempt or conspiracy operates vis-à-vis other sections of the statute. AETA, alone in its flawed structure, is not.

C. AETA Impermissibly Discriminates Based on Content and Viewpoint

Finally, AETA discriminates on the basis of content by targeting core political speech that impacts the operation of animal enterprises. Even worse, it discriminates on the basis of viewpoint by privileging speech that is supportive of animal enterprises and criminalizing certain speech that is opposed to these enterprises. And even if AETA were limited to regulating otherwise unprotected speech like "true threats," it would still engage in unconstitutional content and viewpoint discrimination. *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Virginia v. Black*, 538 U.S. 343 (2003).

Content-based regulation is impermissible because it allows the Government to "effectively drive certain ideas or viewpoints from the marketplace." *R.A.V.* 505 U.S. at 387, 391 (finding regulation to be impermissibly content-based because it proscribed speech based on subject matter). Viewpoint-based restrictions are an

even more dangerous form of content-based discrimination, because they represent the Government picking sides in a disputed issue. *See Rosenberger v. Rector,* 515 U.S. 819, 829 (1995). The First Amendment is offended by both kinds of regulations because directly or indirectly, they suggest that "the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994) (internal quotation marks omitted). While this showing may be based upon explicit or implicit legislative intent, a content-based purpose is not necessary. *Id.* at 642. "Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content." *Id*. at 642-43. Such laws must be distinguished from those which impose limitations on the "time, place, and manner of protected expression" and are subject to less rigorous scrutiny. *McGuire v. Reilly*, 260 F.3d 36, 43 (1st Cir. 2001).

AETA discriminates based on content and viewpoint because it singles out for punishment speech and expression that have the purpose and effect of diminishing the profitability of animal enterprises, while ignoring otherwise identical speech and conduct that aid such an enterprise. AETA does not regulate the timing or location of speech and expressive conduct. *Cf. McCullen v. Coakley,* 573 F. Supp. 2d 382, 403 (D. Mass. 2008) (restriction on speech near a health care facility "does not directly regulate speech … [but] merely [] the places *where*

communications may occur") (internal quotation omitted, emphasis in original), *aff'd,* 571 F.3d 167 (1st Cir. 2009), *cert. granted*, 2013 U.S. LEXIS 4811 (June 24, 2013). Nor can AETA be characterized as a *manner* restriction, as the act focuses on the effect of certain speech. *See AIDS Action Comm. v. MBTA*, 42 F.3d 1, 8 (1st Cir. 1994) ("[I]n order to be considered a valid manner restriction, a regulation cannot be aimed at the communicative impact of expressive conduct"). Far from regulating place or manner, AETA outlaws altogether speech that, by nature of its communicative effect (and sometimes its viewpoint), takes one side of a controversial public issue.

While the two liability prongs of AETA work differently, they are each impermissibly discriminatory. The Supreme Court's decision in *Boos v. Barry*, 485 U.S. 312 (1988), is instructive as to Section 43(a)(2)(A). In *Boos*, the Court struck down a Washington, D.C. provision prohibiting the display of any sign within 500 feet of a foreign embassy, if the sign tended to bring a foreign government into "public odium" or "disrepute." *Id.* at 315. The Government defended the provision as concerned not with the content or viewpoint of potential protestors' speech, but rather with the secondary effects of such protest—"namely, our international law obligation to shield diplomats from speech that offends their dignity." *Id.* at 320. This argument relied heavily on the Supreme Court's previous holding in *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), upholding as content-neutral a

restriction on speech by theaters specializing in adult films, because of the secondary effects of such theaters on the surrounding communities. *Boos,* 485 U.S. at 320. The Supreme Court distinguished *Boos* from *Renton*, explaining the "emotive impact of speech on its audience is not a 'secondary effect.'" *Id.* at 321 (plurality opinion); *see also id*. at 334 (Brennan, J., concurring in part and concurring in judgment). Even the *Renton* ordinance would be content-based if it were justified by the city's interest in preventing psychological damage caused by viewing adult movies. *Id.* at 321.

Unlike the restriction in *Renton*, but like the one in *Boos*, AETA's prohibitions against damaging or causing loss to an animal enterprise depend on the direct impact of an advocate's speech on his or her audience. AETA prohibits speech because of its intended impact—if the speech has the purpose and effect of causing a business to lose profits, it is criminalized. For example, if pro-foie gras and anti-foie gras advocates organized simultaneous and equally aggressive protests at a food convention, the latter could be prosecuted under AETA if their angry speech caused the convention organizers to hire extra security; the former, whose equally angry speech would presumably present the same security concerns, but whose speech was not intended to damage or cause loss, could not. This distinction impermissibly allows the Government to interfere "with the

marketplace in ideas and opinions." *United States v. Soderna*, 82 F.3d 1370, 1375 (7th Cir. 1996).

The Government defended AETA in the lower court as punishing only "criminal conduct" and "violence," without regard to any particular message. Def's MTD at 27. But this is too narrow a reading. *See* Section II, *supra*. And as the Supreme Court explained in *Texas v. Johnson*, 491 U.S. 397, 406 (1989), a "law *directed at* the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires." Thus, in *United States v. Eichman*, 496 U.S. 310, 315 (1990), the Government sought to defend a flag-burning statute as distinguishable from the one struck down in *Johnson* because it proscribed only *conduct* that damages a flag, regardless of the actor's motive or intended message. Despite its facial neutrality, the act suffered "the same fundamental flaw: it suppresses expression out of concern for its likely communicative impact." *Id.* at 317. That AETA may succeed in punishing some who commit criminal or violent acts cannot excuse this fundamental flaw. *See, e.g., Ackerley Commc'ns v. City of Cambridge*, 88 F.3d 33, 39 (1st Cir. 1996) (finding ordinance that disadvantaged off-site commercial speech content-based despite its success in banning the "worst aesthetic offenders").

As for Section 43(a)(2)(B), even if this section of AETA prohibits only otherwise unprotected speech, such as "true threats," its content- and viewpoint-based discrimination is impermissible. In *R.A.V.*, for example, the ordinance at issue criminalized "fighting words" that the speaker "knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." 505 U.S. at 380-81. The Court made clear that even though "fighting words" are generally unprotected by the First Amendment, the Government may not choose to criminalize a subset of unprotected speech using content- or viewpoint-based discrimination. *Id.* at 391-94. As the Supreme Court elaborated in *Black*, the Government may only make content-based distinctions within a category of speech that is generally unprotected when the distinction is drawn for the same reasons that the category of speech is unprotected as a general matter. 538 U.S. at 361-63. Thus, in *Black*, burning a cross with the intent to intimidate could be criminalized because the category of "true threats" is unprotected precisely because of its intimidating nature, and burning a cross is simply one especially pernicious mode of intimidating speech. *Id.* at 363.

AETA is more like *R.A.V.* than *Black*, in that it criminalizes a subset of true threats made to interfere or damage an animal enterprise, for none of the purposes held to be permissible in *Black*. Illustrated simply, an animal rights protestor who threatens a fur store owner may be prosecuted under the Act; the same threat,

issued in an equally intimidating manner, but made by the owner to the protestor, may not be prosecuted. Unlike the statute in *Black*, such content discrimination cannot be explained by the reason threats may be prescribed in the first place. It may be that some animal researchers have experienced serious intimidation and harm as a result of threats by animal activists not before this Court, but the same could certainly be said for African Americans subjected to fighting words meant to arouse racial tension, given the long, divisive, and violence-ridden history of racism in this country. *See R.A.V.,* 505 U.S. at 393-94. Because AETA does not single out a *mode* of threats that are extra-threatening, *see Black*, 538 U.S. at 363, but rather proscribes threats distinguishable only in that they are aimed at a specific industry, the Act discriminates based on content and viewpoint, and must be subjected to strict scrutiny.

In arguing that AETA does not discriminate based on content and viewpoint in the district court, the Government placed heavy reliance on other circuits' rejection of content/viewpoint challenges to FACE. *See* Def's MTD at 28. This reliance is misplaced. First, FACE challenges are relevant only to the Court's analysis of AETA's threats prong, 18 U.S.C. § 43(a)(2)(B); these cases say nothing of relevance to Section 43(a)(2)(A), as FACE has no analogous provision. Unlike AETA, FACE criminalizes three specific types of activity: use of "force," "threats of force," or "physical obstruction" to injure, intimidate, or interfere with one who

is obtaining or providing reproductive health services. 18 U.S.C. § 248(a)(1). To "interfere" is defined narrowly (unlike in AETA), as restricting a person's freedom of movement. *Id.* at § 248(e)(2). Unlike the broad array of advocacy that may "damage[] or cause . . . loss," 18 U.S.C. § 43(a)(2)(A), the use of physical obstruction or force is wholly distinct from speech and expressive conduct. *See United States v. Dinwiddie*, 76 F.3d 913, 921-22 (8th Cir. 1996); *United States v. Soderna*, 82 F.3d 1370, 1375-76 (7th Cir. 1996).

That said, FACE challenges are of some relevance to AETA's threats prong, as several courts have considered whether FACE's prohibition on using a "threat of force" to intimidate a person involved in obtaining or providing reproductive health services discriminates based on content or viewpoint. In support of this argument, FACE plaintiffs have attempted to show that, despite its neutral patina, FACE was actually adopted based on hostility toward pro-life protestors' message. *See, e.g., Am. Life League v. Reno*, 47 F.3d 642, 649 (4th Cir. 1995); *Soderna*, 82 F.3d at 1374. The courts have disagreed, finding that the act protects equally access to *all* reproductive health services, whether they provide abortion or pregnancy counseling, and punishes equally those who engage in the prohibited conduct (like physically blocking a clinic entrance) regardless of viewpoint. *See, e.g., Am. Life League,* 47 F.3d at 649. While the courts have acknowledged that the law is primarily used against pro-life activists, a statute is not "rendered non-

neutral simply because one ideologically defined group is more likely to engage in the proscribed conduct." *Id.* at 651.

AETA Plaintiffs' content- and viewpoint-discrimination claims are distinct. Plaintiffs do not complain merely because animal rights activists will be disproportionately prosecuted under the Act. Unlike FACE, AETA cannot even *theoretically* punish equally loss or threats that emanate from both sides of the debate; it is only animal enterprises and their employees – the likely targets of animal rights activists – that are singled out for protection under the law.[10] FACE's threats prohibition, in contrast, may be applied against pro- and anti-abortion advocates alike. *See, e.g., United States v. Weslin*, 156 F.3d 292, 296-97 (2d Cir. 1998) (citing *United States v. Mathison*, CR-95-085-FVS (E.D. Wa. 1995) (FACE prosecution for threats against workers at pro-life facility)).

AETA could be more directly analogized to FACE if the latter prohibited interfering with or intimidating a woman *seeking an abortion*, as the Government has no legitimate interest in promoting abortion (as opposed to promoting access to reproductive care facilities in general, or protecting those who choose to access such services), just as it has no legitimate interest in promoting or protecting the

[10] It is true that AETA does not *only* punish threats by animal rights activists – it could also be used against labor activists or others who target animal enterprises for diverse reasons, but this breadth of application does not eliminate the distinction AETA draws between two distinct sides in a controversial political debate.

profit margins of foie gras farms. *See Nat'l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 738 (1st Cir. 1995) ("[E]ven when a municipality passes an ordinance aimed solely at the secondary effects of protected speech (rather than at speech *per se*), the ordinance may nevertheless be deemed content-based if the municipality differentiates between speakers for *reasons unrelated to the legitimate interests that prompted the regulation.*") (emphasis in original).

As a content-based restriction on speech and expressive conduct, AETA can only stand if it is "narrowly tailored to promote a compelling Government interest." *United States v. Playboy Entm't Group*, *Inc.,* 529 U.S. 803, 813 (2000). If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative. Here, the Government *already* successfully punishes threats without discriminating based on content or viewpoint. *See, e.g.,* 18 U.S.C. § 2261A (2013) (prohibiting interstate stalking). And conduct which causes *physical* damage to an animal enterprise could be prohibited by the Federal government where it has an impact on interstate commerce, just as it is already punished by the States. *See, e.g.,* MASS. GEN. LAWS ch. 266, § 104 (2013) (injury to building); MASS. GEN. LAWS ch. 266, § 104B (2013) (removal or injury to research animals). Such legislation would accomplish all the expressed goals of AETA, without burdening speech that *lawfully* impacts animal enterprises. *See R.A.V.* 505 U.S. at 395-96 (noting that an ordinance "not limited to the favored

topics … would have precisely the same beneficial effect. In fact the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out").

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court reverse the lower court, reinstate all Plaintiffs' claims, and remand for discovery.

Dated: April 22, 2013

Respectfully submitted,

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Certificate of Compliance with Rule 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,963 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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(s)*Rachel Meeropol*
Attorney for Plaintiffs (Appellants)
Dated: July 22, 2013

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I certify that on this day I caused a true copy of the above document to be served upon attorneys of record listed below via ECF and e-mail (with advance permission) at the addresses listed below:

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Dated: July 22, 2013

ADDENDUM

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SARAHJANE BLUM; RYAN SHAPIRO; LANA LEHR; LAUREN GAZZOLA; and IVER ROBERT JOHNSON III,	*	
Plaintiffs,	*	
v.	*	Civil Action No. 11-12229-JLT
ERIC HOLDER, in his official capacity as Attorney General of the United States of America,	*	
Defendant.	*	

MEMORANDUM

March 18, 2013

TAURO, J.

I. Introduction

Plaintiffs Sarahjane Blum, Ryan Shapiro, Lana Lehr, Lauren Gazzola, and Iver Robert Johnson III, dedicated animal rights activists, bring this facial and as-applied challenge to the Animal Enterprise Terrorism Act ("AETA"),[1] a criminal statute that prohibits acts of violence against animal enterprises and the persons and entities connected with those enterprises. Plaintiffs argue that the AETA is overly broad and discriminates on the basis of content and viewpoint, in violation of the First Amendment to the Constitution, and is impermissibly vague, in violation of the Fifth Amendment. Before the court is Defendant U.S. Attorney General Eric Holder's motion to dismiss the complaint for lack of standing and failure to state a claim. After carefully

[1] 18 U.S.C. § 43 (2006).

considering both sides' oral arguments and written briefs,[2] the court concludes that Plaintiffs lack Article III standing to bring their challenges. Accordingly, Defendant Holder's Motion to Dismiss [#11] is ALLOWED.

II. Factual Background[3]

Each plaintiff has a strong, personal commitment to animal rights advocacy. In total, they have devoted more than eighty years to animal rights efforts, and some of the plaintiffs have dedicated their life's work to advancing the humane and ethical treatment of animals. Their efforts span a wide range of issues and tactics. Plaintiffs have fought to improve conditions for rabbits, ducks and geese, and dolphins and other cetaceans. They have exposed cruelties in the foie gras industry, educated the public about slaughter and factory farming, and organized public charities and anti-fur protests. They have engaged in letter-writing campaigns, public protests, and lawful picketing, and undertaken non-violent acts of civil disobedience. Because Defendant Holder challenges Plaintiffs' Article III standing to sue, the court summarizes each plaintiff's prior activities and future intentions regarding animal rights advocacy in some detail.

a. Sarahjane Blum

Blum has devoted twenty-three years to animal rights advocacy.[4] After one year of college, she decided to delay her education to throw herself full-time into her animal rights work.[5] Her early efforts focused on an anti-fur campaign spearheaded by the New York City Animal

[2] The court acknowledges the helpful contributions of amici on both sides of these important constitutional issues.
[3] The facts are presented as alleged in the Complaint [#1] and in the light most favorable to Plaintiffs.
[4] Compl. ¶ 14 [#1].
[5] Compl. ¶ 68.

Defense League ("NYC ADL").[6] She participated in lawful public demonstrations, engaged in non-violent civil disobedience, and led trainings on non-violence and advocacy.[7]

After three years traveling the country to engage in animal-specific campaigns and public speaking, Blum shifted her focus to exposing the cruelties of the foie gras industry.[8] She co-founded GourmetCruelty.com, a grassroots coalition, with Plaintiff Shapiro. The coalition conducted a nationwide investigation of foie gras farms, and Blum personally visited one farm many times, both during the day, when the farm was open to the public, and at night.[9] At the end of their investigation, Blum, Shapiro, and other organizers "rescued and rehabilitated" a number of animals from the foie gras farm.[10]

Blum's work culminated in the release of a short documentary, *Delicacy of Despair: Behind the Closed Doors of the Foie Gras Industry*. She openly acknowledged her role in both the undercover investigation and the open rescue operation, which led to her arrest in 2004 for trespassing.[11]

Although Blum remains committed to her efforts to expose the practices of the foie gras industry, her willingness to engage in activism has declined significantly in the past several years. In 2006, seven members of the United States branch of Stop Huntingdon Animal Cruelty[12] ("SHAC") were convicted of violating the Animal Enterprise Protection Act of 1992 ("AEPA"),[13]

[6] Compl. ¶ 69.
[7] Compl. ¶¶ 69-70.
[8] Compl. ¶ 75.
[9] Compl. ¶¶ 77-78.
[10] Compl. ¶ 79.
[11] Compl. ¶¶ 79, 81.
[12] Although Plaintiffs refer to the organization as "Stop Huntington Animal Cruelty," the court notes that the correct spelling is "Huntingdon." See United States v. Fullmer, 584 F.3d 132, 137 (3d Cir. 2009).
[13] 18 U.S.C. § 43 (1992).

the predecessor statute to the AETA, and sentenced to between one and six years in prison. Blum had worked closely and developed friendships with several of the defendants, and she was shocked and devastated by their prosecution and imprisonment as terrorists.[14] She became even more concerned when Congress passed the AETA in 2006. Blum had knowingly violated the law through acts of civil disobedience in the past, but she did not want to risk prosecution and sentencing as a terrorist under the AETA.[15] For a combination of reasons, including depression caused by her friends' imprisonment, fear of prosecution, and increased responsibilities as her mother's caretaker, Blum withdrew from advocacy.[16]

Recently, Blum has decided to reengage in animal rights activism. The Minneapolis Animal Rights Collective has approached her, hoping to learn from her expertise in raising public awareness of the foie gras industry and pushing for a ban on foie gras production.[17] To assist its efforts, Blum would like to lawfully investigate conditions at the Au Bon Canard foie gras farm in Minnesota by obtaining permission to enter the farm and document conditions, entering the farm during the day while it is open to tours, and documenting conditions visible from public property. She would like to publicize the results of her investigation online and at local and national events and organize letter-writing and protest campaigns to raise public awareness and pressure local restaurants to stop serving foie gras.[18] But Blum has refrained from undertaking any of these actions for fear of prosecution under the AETA.

[14] Compl. ¶ 82.
[15] Compl. ¶ 83.
[16] Compl. ¶ 84.
[17] Compl. ¶ 86.
[18] Compl. ¶ 87.

Blum would also like to resume her work as a public speaker. In 2010, she received an invitation to speak at an animal rights conference in Seattle. She wanted to show *Delicacy of Despair*, but she refrained from doing so, as she has refrained on other occasions, for fear that if she successfully convinces people to stop buying foie gras, the farms will lose profits and she will be vulnerable to prosecution under the AETA for causing a loss of personal property.[19] Blum would like to speak openly and specifically about her belief that undercover investigation and open rescue are effective advocacy tools, even if sometimes illegal.[20] But she feels chilled from doing so for fear of prosecution. In short, passage of the AETA has chilled Blum's speech and left her feeling inadequate as an animal rights activist.[21]

b. Ryan Shapiro

Shapiro has spent twenty years furthering animal rights causes.[22] He began as a member of his high school's Animal Rights Club, where he focused on vegetarian outreach and anti-factory farming issues.[23] Shapiro subsequently earned a film degree from New York University's Tisch School of the Arts, where he coordinated an anti-fur campaign in 1995 and co-founded the NYC ADL. He also co-founded an NYU organization, Students for Education and Animal Liberation ("SEAL"), which remains active under a different name.[24] Through these groups, Shapiro organized non-violent civil disobedience and lawful protests at fur stores, circuses, laboratories,

[19] Compl. ¶ 91.
[20] Compl. ¶ 88.
[21] Compl. ¶ 94.
[22] Compl. ¶ 15.
[23] Compl. ¶ 100.
[24] Compl. ¶ 101.

and universities. He participated in outreach efforts, led civil disobedience trainings, and spoke at grassroots animal conferences across the country.[25]

In 2001, Shapiro moved to Washington, D.C., where his advocacy focused on investigation and public education relating to the foie gras industry. He joined forces with Plaintiff Blum to spearhead a bi-coastal movement to ban foie gras.[26] Like Blum, Shapiro was arrested in 2004 for his involvement in open rescue, pleaded guilty to misdemeanor trespass, and was sentenced to perform community service.[27] He has been arrested many times in relation to his animal rights work.[28]

During the anti-foie gras campaign, Shapiro became convinced that animal rights activists should focus on issues of factory farming. He concluded that exposing the actual conditions on these farms through video documentation was the most effective way to garner change, more effective than either the civil disobedience or public protest he had undertaken in the past. Because of his background in film and experience with the anti-foie gras campaign, Shapiro felt particularly qualified for this work.[29] But the arrest and prosecution of SHAC members stunned him as well. He had lived and worked with several of the defendants, and he worried that peaceful protest and civil disobedience had become too risky. In particular, he worried that he may have been charged as a terrorist for his 2004 open rescue, had it occurred just years later.[30]

Shapiro's concerns led him to withdraw significantly from animal rights advocacy. Instead, he pursued a Ph.D., focusing on national security conflicts over animal protection and the

[25] Compl. ¶ 102.
[26] Compl. ¶ 104.
[27] Compl. ¶ 105.
[28] Compl. ¶ 102.
[29] Compl. ¶ 106.
[30] Compl. ¶¶ 107-08.

marginalization of animal protectionists as security threats.[31] He still engages in leafleting, public speaking, and campaign work, but he worries that these methods are less effective than exposing the underlying industry cruelties.[32] He would like to lawfully document animal rights abuses, but he has refrained from doing so out of fear of prosecution under the AETA.[33] The AETA has chilled him from participating in lawful protest and investigation of animal cruelty.[34]

c. Lana Lehr

Lehr has approximately fifteen years of experience as an animal rights activist.[35] She is the founder and managing director of RabbitWise, an all-volunteer, public charity committed to the proper care and treatment of companion rabbits. RabbitWise focuses on improving rabbit retention rates, educating owners on best practices, and advocating for general rabbit welfare.[36] Lehr had worked with Friends of Rabbits, a non-profit organization focused on rescue and care, but her desire to focus on a wider range of issues, including experimentation and use of rabbit fur, led her to found RabbitWise.[37]

RabbitWise has provided Lehr with numerous advocacy opportunities. In 2005, the organization convinced a hotel to cancel an Easter "rabbit raffle" when Lehr learned that the hotel did not have a permit to raffle live animals. When another hotel planned a "bunny brunch," using live rabbits as decorations, Lehr convinced it to allow RabbitWise members to attend the brunch with information on rabbit care. The hotel later informed Lehr that it would not feature live

[31] Compl. ¶ 110.
[32] Compl. ¶ 111.
[33] Compl. ¶ 111.
[34] Compl. ¶ 115.
[35] Compl. ¶ 116.
[36] Compl. ¶ 117.
[37] Compl. ¶ 120.

animals at future events. These successes encouraged Lehr to organize a letter-writing campaign to hotel chains explaining the repercussions of rabbit giveaways. Her efforts resulted in a local county ordinance prohibiting distribution of live animal prizes on county property.[38]

Lehr has also participated in anti-fur campaigns. She organized monthly protests in front of a store that sells fur and sometimes brought rabbits with her to facilitate meaningful interaction and education. All of the protests that Lehr attended were completely lawful and properly permitted.[39] She has never engaged in civil disobedience or been arrested.[40] Indeed, she pays particular attention to the legality of the events she attends because, as a licensed psychotherapist, she worries that an arrest would cause her to lose her license and livelihood. She must renew her license annually and is routinely asked whether she has been arrested.[41]

The AETA has chilled Lehr's participation in advocacy efforts. She has stopped attending anti-fur protests for fear of prosecution. She no longer brings rabbits with her to restaurants that serve rabbit meat. Although Lehr would like to continue attending lawful, peaceful protests, she has not attended any anti-fur or animal rights protest since 2009. She has stopped passing out literature at events attended by rabbit breeders and limits her advocacy to letter-writing campaigns, petitions, and conferences.[42]

d. Lauren Gazzola

Gazzola has devoted at least fifteen years to animal rights activism.[43] While attending NYU, she worked with Plaintiff Shapiro in the NYC ADL and SEAL. She focused primarily on

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[38] Compl. ¶ 121.
[39] Compl. ¶ 124.
[40] Compl. ¶ 125.
[41] Compl. ¶ 128.
[42] Compl. ¶¶ 126-28, 130-31, 133.
[43] Compl. ¶ 135.

fur use and vivisection, and she has participated in both lawful protests and non-violent acts of civil disobedience. She has been arrested on several occasions.[44]

During her last year of college, Gazzola interned with In Defense of Animals, a national animal rights organization. She secured a full-time position with the organization after college and worked there for approximately six months.[45] She then moved on to SHAC, where from 2001 to 2004 she organized protests, drafted educational materials and press releases, gave interviews, conducted Internet research on Huntingdon and affiliated companies, and collaborated with other organizers to steer the direction of the SHAC campaign.[46] Gazzola was arrested and convicted under the AEPA in 2004 for her involvement with SHAC, including for making true threats against individuals and for planning and executing SHAC's illegal activities.[47] She was sentenced to fifty-two months in prison and is currently on probation.[48]

Having served her sentence, Gazzola would like reimmerse herself in lawful animal rights campaigns protected by the First Amendment. She understands that the First Amendment protects theoretical advocacy of illegal action and expressions of support for violations of the law. She also understands that the First Amendment protects lawful residential protests, as long as they comply with municipal and state ordinances.[49] But the AETA, and her previous arrest, have chilled her from engaging in advocacy that involves both of these tactics. For example, in 2011 she received an invitation to speak at a law school about her AEPA criminal conviction. She said that, "I'd do

[44] Compl. ¶¶ 135-36.
[45] Compl. ¶¶ 137-38.
[46] Compl. ¶ 138.
[47] Compl. ¶¶ 139-41; see United States v. Fullmer, 584 F.3d 132, 157 (3d Cir. 2009).
[48] Compl. ¶ ¶ 134, 139.
[49] Compl. ¶ 142.

it again. It was all worth it."[50] She wanted to conclude by adding, "So go do it," but she refrained for fear that this statement could serve as evidence of a conspiracy to violate the AETA.[51] The AETA has chilled her from participating in provocative advocacy that seems to her obviously protected by the First Amendment.

e. Iver Robert Johnson III

Johnson first came to animal rights advocacy about ten years ago, when he was in middle and high school.[52] He organized and attended weekly, lawful anti-fur protests at a department store and participated in some acts of peaceful civil disobedience. He attended protests at circuses, rodeos, and fur farms.[53]

After graduating from high school in 2001, Johnson worked part time as a delivery driver for a vegan restaurant and devoted most of his energy to the emerging SHAC campaign. A native of Chicago, Johnson became a leader in the SHAC Chicago movement. He organized weekly protests of businesses associated with Huntingdon Life Sciences, which usually drew between ten and twenty protestors.[54] He also organized several regional SHAC demonstrations each year. These attracted between one and two hundred people.[55] Johnson's SHAC advocacy focused primarily on lawful and peaceful picketing, public education, and outreach.[56] He has been arrested many times for disorderly conduct and similar offenses.[57]

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[50] Compl. ¶ 146.
[51] Compl. ¶ 147.
[52] Compl. ¶ 18.
[53] Compl. ¶¶150-51.
[54] Compl. ¶¶ 152-53.
[55] Compl. ¶ 154.
[56] Compl. ¶ 155.
[57] Compl. ¶ 157.

Since the 2006 convictions of the SHAC members, Johnson has faced significant obstacles to his advocacy efforts. He attended a 2007 protest in Chicago when Huntingdon Life Sciences sought to be re-listed on the New York Stock Exchange. Upon arrival, Johnson encountered more than forty police officers in riot gear and not a single other protestor.[58] Johnson spent approximately six months organizing protests attended by only four or five people. The activists that he reached out to said they were too afraid of terrorism charges to protest.[59] In response, Johnson shifted his focus from lawful protest to public education and support for imprisoned animal rights activists.[60]

Johnson moved to New York City in 2011 to attend the New School.[61] He had hoped to recommit himself to animal rights activism. Unfortunately, Johnson has not found an active animal rights community in which to participate. Local activists are chilled from engaging in protests out of fear of prosecution under the AETA. Johnson has attended individual protests, but he has not found sustained and carefully planned campaigns. After delaying his education and devoting more than a decade to animal rights, Johnson feels dismayed at the effect the AEPA and AETA have had on his community.[62]

III. Analysis[63]

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[58] Compl. ¶ 158.
[59] Compl. ¶ 158.
[60] Compl. ¶ 159.
[61] Compl. ¶ 160.
[62] Compl. ¶ 161.
[63] "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." Warth v. Seldin, 422 U.S. 490, 501-02 (1975); see Benjamin v. Aroostook Med. Ctr., Inc., 57 F.3d 101, 104 (1st Cir. 1995) (explaining that the appropriate standard of review "differs little from that used to review motions to dismiss under Fed. R. Civ. P. 12(b)(6)").

Defendant Holder moves to dismiss Plaintiffs' complaint under Rule 12(b)(1) for lack of subject matter jurisdiction. He argues that Plaintiffs lack Article III standing to sue because they have not alleged any specific, actual harm suffered. He also asserts that their claims are not ripe for review because they have not alleged any concrete plan to engage in proscribed activity.

Every plaintiff bringing suit in federal court must establish Article III standing. Standing consists of both constitutional and prudential dimensions. To satisfy the constitutional aspect, a plaintiff must establish three elements.

> "First, the plaintiff must have suffered an 'injury in fact'–an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical." ' Second, there must be a causal connection between the injury and the conduct complained of–the injury has to be 'fairly trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' "[64]

Over this constitutional framework, the Supreme Court has laid several prudential limitations on standing. These include " 'the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.' "[65]

A plaintiff always must establish the constitutional elements of standing.[66] In certain situations, however, courts relax the prudential requirements. Most relevant here, the Supreme Court has relaxed the prohibition on raising the rights of others in the context of pre-enforcement

[64] Nat'l Org. for Marriage v. McKee, 649 F.3d 34, 46 (1st Cir. 2011) (quoting Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1442 (2011)).
[65] Osediacz v. City of Cranston, 414 F.3d 136, 139 (1st Cir. 2005) (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)); see Nat'l Org. for Marriage, 649 F.3d at 46.
[66] Osediacz, 414 F.3d at 141.

facial challenges.[67] Because a facial challenge necessarily implicates the rights of others, relaxing this prudential requirement allows important First Amendment cases to proceed.[68] Nevertheless, "the constitutional requirements apply with equal force in every case."[69]

Thus, every plaintiff bringing a pre-enforcement facial challenge to a criminal statute must establish an injury-in-fact. This presents a challenge for Plaintiffs because "[b]y definition, . . . the government has not yet applied the allegedly unconstitutional law to the plaintiff, and thus there is no tangible injury."[70] Plaintiffs therefore have two options. First, they may allege "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the] statute," where "there exists a credible threat of prosecution."[71] Second, they may allege that they are "chilled from exercising [their] right to free expression or forgoe[ ] expression in order to avoid enforcement consequences."[72]

In each case, the issue turns on whether there is a credible threat of enforcement.[73] In other words, "fear of prosecution must be 'objectively reasonable.' "[74] "Determining objective reasonableness demands a frank consideration of the totality of the circumstances, including the nature of the conduct that a particular statute proscribes."[75] Although a court "will assume a

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[67] Id. at 140-41.
[68] Id.
[69] Nat'l Org. for Marriage, 649 F.3d at 46.
[70] Id. at 47.
[71] Mangual v. Rotger-Sabat, 317 F.3d 45, 56-57 (1st Cir. 2003) (quoting Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979)).
[72] Id. at 57 (quoting N.H. Right to Life Political Action Comm. v. Gardner, 99 F.3d 8, 13 (1st Cir. 1996)).
[73] N.H. Right to Life, 99 F.3d at 14.
[74] Mangual, 317 F.3d at 57 (quoting R.I. Ass'n of Realtors, Inc. v. Whitehouse, 199 F.3d 26, 31 (1st Cir. 1999)).
[75] R.I. Ass'n of Realtors, Inc., 199 F.3d at 31.

credible threat of prosecution in the absence of compelling contrary evidence,"[76] a plaintiff must allege an intention to engage in activity "that could reasonably be construed to fall within the confines" of the act.[77] A subjective chill does not suffice.[78] Rather, the plaintiff "must establish with specificity that [he or] she is 'within the class of persons potentially chilled.' "[79] Thus, to determine whether Plaintiffs have alleged an objectively reasonable chill, this court must make an initial determination of whether a reasonable reading of the AETA would proscribe their proposed conduct.[80]

After carefully considering Plaintiffs' allegations, this court concludes that they have failed to allege an objectively reasonable chill and, therefore, failed to establish an injury-in-fact. The court does not doubt Plaintiffs' deeply held commitment to animal welfare or the sincerity of their personal fear of prosecution under the AETA. Nevertheless, Plaintiffs have not alleged an intention to engage in any activity "that could reasonably be construed" to fall within the statute.[81]

In reaching this conclusion, the court focuses primarily on two of the AETA's five subsections. First, the AETA defines the offense as follows:

> 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

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[76] N.H. Right to Life, 99 F.3d at 15; see Mangual, 317 F.3d at 57.
[77] Ramirez v. Sanchez Ramos, 438 F.3d 92, 99 (1st Cir. 2006); see Osediacz v. City of Cranston, 414 F.3d 136, 141 (1st Cir. 2005).
[78] Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1152 (2013); Laird v. Tatum, 408 U.S. 1, 13-14 (1972); Nat'l Org. for Marriage v. McKee, 649 F.3d 34, 47 (1st Cir. 2011).
[79] Nat'l Org. for Marriage, 649 F.3d at 47 (quoting Osediacz, 414 F.3d at 142).
[80] See Ramirez, 438 F.3d at 99; R.I. Med. Soc'y v. Whitehouse, 66 F. Supp. 2d 288, 302 (D.R.I. 1999), aff'd, 239 F.3d 104 (1st Cir. 2001).
[81] Ramirez, 438 F.3d at 99.

(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) intentionally 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).[82]

After establishing penalties, restitution, and statutory definitions, the AETA concludes with 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 action, or to preempt State or local laws that may provide such penalties or remedies.[83]

[82] 18 U.S.C. § 43(a) (2006).
[83] 18 U.S.C. § 43(e) (2006).

Read straightforwardly, the AETA criminalizes: 1) intentionally damaging or causing the loss of real or personal property; 2) intentionally placing a person in reasonable fear of death or serious bodily injury; and 3) conspiring or attempting to commit either of these two acts.

And this is how both the AETA and its predecessor AEPA have been enforced. For example, the Third Circuit affirmed SHAC members' convictions under the AEPA of conduct including campaigns of intimidation and harassment, unlawful electronic civil disobedience, and true threats, such as threatening to burn someone's house down.[84] As another example, two defendants pleaded guilty to violating the AETA by allegedly trespassing on a mink farm, releasing 500 animals, and vandalizing the property.[85] Plaintiffs have not directed this court to any case charging as an AETA violation the type of conduct in which they seek to engage.[86]

Plaintiffs have not alleged an intention to engage in any activity prohibited by the AETA.[87] The conduct they seek to participate in - lawful and peaceful advocacy - is very different: documenting factory conditions with permission, organizing lawful public protests and letter-writing campaigns, speaking at public events, and disseminating literature and other educational materials. None of Plaintiffs' proposed activities fall within the statutory purview of intentionally damaging or causing loss of real or personal property or intentionally placing a person in reasonable fear of death or serious injury.

Plaintiffs' main argument to the contrary, that "personal property" must be read to include loss of profits, is unavailing. First, the court must read the term "personal property" in light of the

[84] See United States v. Fullmer, 584 F.3d 132 (3d Cir. 2009).
[85] See United States v. Viehl, No. 2:09-CR-119, 2010 WL 148398, at *1 (D. Utah Jan. 12, 2010).
[86] See Compl. ¶¶ 53-66.
[87] See Osediacz v. City of Cranston, 414 F.3d 136, 141 (1st Cir. 2005) ("It is, therefore, not surprising that . . . the party mounting a facial challenge at the very least desired or intended to undertake activity within the compass of the challenged statute.").

words around it, specifically "animals or records" and "real property."[88] In this context, personal property cannot reasonably be read to include an intangible such as lost profits. Second, the definitions section of the statute specifically defines the term "economic damage" to include "loss of profits."[89] The court cannot reasonably read these two distinct terms - "personal property" and "economic damage" - to have the same meaning.

The AETA's rules of construction dispel any remaining doubt about the plain meaning of the statutory offense. Rather than exempting otherwise prohibited conduct, as Plaintiffs propose, the rules provide that any ambiguities be resolved in favor of granting full First Amendment rights. But Plaintiffs do not present an ambiguous case. Indeed, the rules of construction explicitly confirm the plain meaning of the offense: it does not prohibit "peaceful picketing" and "other peaceful demonstration."[90] Because by their own allegations Plaintiffs seek to engage only in lawful conduct protected by the First Amendment, they have failed to allege an objectively reasonable chill.[91]

III. Conclusion[92]

This court recognizes the significance of Plaintiffs' challenges to the AETA's constitutionality. An allegation that a statute chills fundamental First Amendment rights is very serious, and the court accords their challenge careful scrutiny and attention. The court also appreciates that, in pre-enforcement challenges, issues of standing may appear to blur into

[88] See 18 U.S.C. § 43(a)(2)(A) (2006).
[89] See 18 U.S.C. § 43(d)(3) (2006).
[90] See 18 U.S.C. § 43(e)(1) (2006).
[91] The court notes that Plaintiff Johnson does not appear to feel chilled at all. In addition to failing to establish an injury-in-fact, his claims raise concerns about causation and redressability.
[92] Because the court concludes that Plaintiffs lack standing, it need not reach Defendant Holder's ripeness argument or the merits of the case.

determination of the merits.[93] Nevertheless, even in this sensitive context, Plaintiffs must establish all of the constitutional requirements for Article III standing. Although Plaintiffs personally fear prosecution under the AETA, they have failed to establish an objectively reasonable chill on their First Amendment rights. Where Plaintiffs seek to engage in lawful and peaceful investigation, protest, public-speaking, and letter-writing, the court cannot reasonably conclude that these actions fall within the purview of a statute requiring intentional damage or loss to property or creation in an individual of a reasonable fear of death. Because Plaintiffs have therefore failed to establish Article III standing, Defendant Holder's Motion to Dismiss [#11] is ALLOWED.

AN ORDER HAS ISSUED.

/s/ Joseph L. Tauro
United States District Judge

[93] See, e.g., R.I. Med. Soc'y v. Whitehouse, 66 F. Supp. 2d 288, 302 (D.R.I. 1999).

*** Current through PL 113-18, approved 7/12/13 ***

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 3. ANIMALS, BIRDS, FISH, AND PLANTS

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18 USCS § 43

§ 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) intentionally 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 [*18 USCS § 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 [subsection] (a) or an attempt or conspiracy to violate subsection (a) shall be--

(1) a fine under this title or imprisonment [for] 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

(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 [18 USCS § 3663* or *3663A*] 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 action, or to preempt State or local laws that may provide such penalties or remedies.

HISTORY:
(Aug. 26, 1992, P.L. 102-346, § 2(a), 106 Stat. 928; Oct. 11, 1996, P.L. 104-294, Title VI, § 601(r)(3), 110 Stat. 3502; June 12, 2002, P.L. 107-188, Title III, Subtitle C, § 336, 116 Stat. 681; Nov. 27, 2006, P.L. 109-374, § 2(a), 120 Stat. 2652.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

The bracketed word "subsection" has been inserted in the introductory matter of subsec. (b) to indicate the word probably intended by Congress.

The bracketed word "for" has been inserted in the introductory matter of subsec. (b)(1) to indicate the probable intention of Congress to include it.

A prior § 43 (Act June 25, 1948, ch 645, § 1, 62 Stat. 687; Sept. 2, 1960, P.L. 86-702, § 2, 74 Stat. 754; Dec. 5, 1969, P.L. 91-135, §§ 7(a), 8, 83 Stat. 281) was repealed by Act Nov. 16, 1981, P.L. 97-79, § 9(b)(2), 95 Stat. 1079. The section forbade the transportation, acquisition or purchase of wildlife taken in violation of State, National, or foreign laws and making false records of such illegal transactions. For similar provisions, see *16 USCS § 3372(a)*.

Amendments:

1996. Act Oct. 11, 1996, in subsec. (c), inserted "or 3663A".

2002. Act June 12, 2002, substituted subsecs. (a) and (b) for ones which read:

"(a) Offense. Whoever--

"(1) travels in interstate or foreign commerce, or uses or causes to be used the mail or any facility in interstate or foreign commerce, for the purpose of causing physical disruption to the functioning of an animal enterprise; and

"(2) intentionally causes physical disruption to the functioning of an animal enterprise by intentionally stealing, damaging, or causing the loss of, any property (including animals or records) used by the animal enterprise, and thereby causes economic damage exceeding $ 10,000 to that enterprise, or conspires to do so;

shall be fined under this title or imprisoned not more than one year, or both.

"(b) Aggravated offense.

(1) Serious bodily injury. Whoever in the course of a violation of subsection (a) causes serious bodily injury to another individual shall be fined under this title or imprisoned not more than 10 years, or both.

"(2) Death. Whoever in the course of a violation of subsection (a) causes the death of an individual shall be fined under this title and imprisoned for life or for any term of years.";

and, in subsec. (c), in para. (1), deleted "and" following the concluding semicolon, in para. (2), substituted "; and" for a concluding period, and added para. (3).

2006. Act Nov. 27, 2006, substituted this section for one which read:

"§ 43. Animal enterprise terrorism

"(a) Offense. Whoever--

"(1) travels in interstate or foreign commerce, or uses or causes to be used the mail or any facility in interstate or foreign commerce for the purpose of causing physical disruption to the functioning of an animal enterprise; and

"(2) intentionally damages or causes the loss of any property (including animals or records) used by the animal enterprise, or conspires to do so,

shall be punished as provided for in subsection (b).

"(b) Penalties.

(1) Economic damage. Any person who, in the course of a violation of subsection (a), causes economic damage not exceeding $ 10,000 to an animal enterprise shall be fined under this title or imprisoned not more than 6 months, or both.

"(2) Major economic damage. Any person who, in the course of a violation of subsection (a), causes economic damage exceeding $ 10,000 to an animal enterprise shall be fined under this title or imprisoned not more than 3 years, or both.

"(3) Serious bodily injury. Any person who, in the course of a violation of subsection (a), causes serious bodily injury to another individual shall be fined under this title or imprisoned not more than 20 years, or both.

"(4) Death. Any person who, in the course of a violation of subsection (a), causes the death of an individual shall be fined under this title and imprisoned for life or for any term of years.

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

"(3) for any other economic damage 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 animals for food or fiber production, agriculture, research, or testing;

"(B) a zoo, aquarium, circus, rodeo, or lawful competitive animal event; or

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

"(2) the term 'physical disruption' does not include any lawful disruption that results from lawful public, governmental, or animal enterprise employee reaction to the disclosure of information about an animal enterprise;

"(3) the term 'economic damage' means the replacement costs of lost or damaged property or records, the costs of repeating an interrupted or invalidated experiment, or the loss of profits; and

"(4) the term 'serious bodily injury' has the meaning given that term in section 1365 of this title.

"(e) Non-preemption. Nothing in this section preempts any State law.".

Short titles:

Act Aug. 26, 1992, P.L. 102-346, §§ 1, 3, 106 Stat. 928, provides: "This Act may be cited as the 'Animal Enterprise Protection Act of 1992'.". For full classification of such Act, consult USCS Tables volumes.

Other provisions:

Study of effect of terrorism on certain animal enterprises. Act Aug. 26, 1992, P.L. 102-346, § 3, 106 Stat. 929, provides:

"(a) Study. The Attorney General and the Secretary of Agriculture shall jointly conduct a study on the extent and effects of domestic and international terrorism on enterprises using animals for food or fiber production, agriculture, research, or testing.

"(b) Submission of study. Not later than 1 year after the date of enactment of this Act, the Attorney General and the Secretary of Agriculture shall submit a report that describes the results of the study conducted under subsection (a) together with any appropriate recommendations and legislation to the Congress.".