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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Plaintiffs are five animal rights activists chilled by the Animal Enterprise Terrorism Act (AETA), 18 U.S.C. § 43 (2013), from educating the public about the mistreatment of animals for food, fashion, and science, for fear their speech will cause such industries monetary loss or harm. Contrary to the impression left by Defendant's brief (hereafter "Appellee Br.") and the District Court's cursory standing decision, Plaintiffs' fears of being prosecuted under the AETA are eminently reasonable.

Throughout Defendant's brief are snippets of Congressional testimony meant to portray the AETA as a neutral and necessary response to mounting violence by animal rights activists. *See e.g.,* Appellee Br. at 3. But there is more to this story. According to a congressionally mandated report, the first version of the AETA was passed not only as a response to violence, but also in response to "disruptive expressions of extremism on behalf of animal rights." DEP'T OF JUSTICE, REPORT TO CONGRESS ON THE EXTENT AND EFFECTS OF DOMESTIC AND INTERNATIONAL TERRORISM ON ANIMAL ENTERPRISES 1 (1993). Indeed, the Report (like the Animal Enterprise Protection Act (AEPA) of 1992 that mandated it) is not limited to review of violent or underground animal rights extremists, but rather scrutinizes the *ideology* underlying the animal rights movement as a whole. *Id.* at 3. Alongside information about sabotage and vandalism, the report discusses "legitimate, above-ground animal rights advocacy groups" that release videotape

of footage taken by underground activists, and "sympathizers willing to support [underground groups] through legal means, such as funding defense-related litigation and arranging for publicity." *Id*. at 7. Tellingly, in cataloging "extremist activities perpetrated" by animal rights activists, the Report refers to "demonstrations, sit-ins, and other protests" as having some, albeit marginal, relevance to the mandate of the Act. *Id*. at 15.

In recognition of the AETA's explicit focus on animal rights activists and the singling out of a specific ideology for criminal sanction, the Congressional Research Service ("CRS"), an independent federal agency, recently commented that the AETA was "specific legislation" directed at "supporters of animal rights." JEROME P. BJELOPERA, CONG. RESEARCH SERV., REPORT NO. 42536, THE DOMESTIC TERRORIST THREAT: BACKGROUND AND ISSUES FOR CONGRESS (January 17, 2013), at i, available at http://www.fas.org/sgp/crs/terror/R42536.pdf (last visited September 8, 2013). CRS asked "why a specific terrorism statute covers ideologically motivated attacks against businesses that involve animals, while there are no other domestic terrorism statutes as narrow in their purview covering a particular type of target and crime." *Id*. at 61.

It is this story of AETA's purpose and use, rather than the narrow and neutral law imagined by Defendant, which must form the backdrop of this Court's analysis. As shown in Plaintiffs' opening brief, and below, Plaintiffs' fear of

prosecution is reasonable, as the AETA broadly prohibits damaging or causing the loss of any real or personal property. 18 U.S.C. § 43(a)(2)(A) (2013). Though Defendant would read the word "tangible" into this prohibition, the statute itself includes no such limitation. And though the statute is broad enough to federalize almost any imaginable interstate property crime undertaken against a business, AETA has been applied *exclusively* to politically motivated crimes by animal rights activists just like Plaintiffs.

ARGUMENT

I. The District Court Erred in Dismissing Plaintiffs' Claims for Lack of Standing

The District Court held that Plaintiffs lack standing to challenge the AETA by *first* construing the law narrowly, in spite of its plain meaning, and *then* comparing the statute's cabined reach to the speech and expressive conduct Plaintiffs have been chilled from undertaking. *See* Addendum at 16-17. As explained at length in Plaintiffs' opening brief, this approach is erroneous, as clear precedent requires a court to determine the existence of standing under a plaintiff's own reasonable interpretation of the relevant statute, even if, on the merits, that interpretation turns out to be incorrect. *See* Appeal Br. at 10-12 (*citing Virginia v. Am. Booksellers Ass'n,* 484 U.S. 383, 392 (1998), *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 661, 664 (5th Cir. 2006), *Vt. Right to Life Comm. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000), *Hoover v. Wagner*, 47 F.3d 845, 847

(7th Cir. 1995), *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) and other cases for the proposition that a plaintiff has standing when she self-censors based on an objectively reasonable, albeit disputed, interpretation of the statute.)

The cases cited by the Government do not contradict this well-settled point. For example, Defendant cites *Hedges v. Obama*, No. 12-3176, 2013 U.S. App. LEXIS 14417 (2d Cir. July 17, 2013), for the proposition that a plaintiff must show that her conduct is covered by the challenged statute to maintain standing, Appellee Br. at 37-8, but that case acknowledges, and does not disturb, the precedent on which Plaintiffs rely. *Hedges* involved disputed interpretations of Section 1021 of the National Defense Authorization Act for Fiscal Year 2012 (NDAA). *Hedges*, 2013 U.S. LEXIS 14417 at *4-5. Citizen and non-citizen plaintiffs feared military detention under the Act. *Id.* at *5-6, *43. The Court found that the American citizen plaintiffs lacked standing because the Act explicitly indicated that it does not apply to American citizens. *Id.* at *56-59. With respect to the non-citizen plaintiffs, the parties disagreed as to whether those plaintiffs' intended acts fell within the statutory prohibition, such that they faced a credible threat of enforcement. *Id.* at *64-65, 75-76. After acknowledging Second Circuit precedent supporting standing when a plaintiff faces prosecution under a reasonable but disputed interpretation of the statute, the Court declined to decide

this issue, instead holding that plaintiffs lacked standing because they had not shown an adequate threat of enforcement given the unique and non-criminal nature of the NDAA. *Id.* at *79-89.

Unlike the NDAA, the AETA is a criminal statute. So long as Plaintiffs' intended actions are prohibited under a reasonable interpretation of that statute, they need only show that the statute is "non-moribund" to establish a credible threat of prosecution. *N.H. Right to Life PAC v. Gardner*, 99 F.3d 8, 15 (1st Cir. 1996).

Defendant also cites *Glenn v. Holder*, 690 F.3d 417 (6th Cir. 2012), for the same proposition, *see* Appellee Br. at 38, but that case is inapposite. In *Glenn*, anti-gay activists challenged the Federal Hate Crimes Act. 690 F.3d at 419. The plaintiffs did not argue that their desired conduct (espousing anti-gay rhetoric) was prohibited under the act, nor could they. *Id.* at 421-22. Instead, they alleged standing based on a fear of wrongful conviction. *Id.* at 422. *Blum* Plaintiffs are not aware of any court that has recognized standing based on such a theory, nor do they advance it in this case.

Defendant's arguments about the AETA's threats and conspiracy/attempt provisions, 18 U.S.C. § 43(a)(2)(B) and (a)(2)(C), are equally unavailing. Plaintiff Gazzola was prosecuted under the AETA's precursor, the AEPA, and 18 U.S.C. § 2261A(2) (2013) (interstate stalking), for chants at home protests which, taken in

the context of internet statements supporting unlawful activity, were held to have placed the protest's target in reasonable fear of serious harm. *See* Appendix 57; *United States v. Fullmer,* 584 F.3d 132, 157 (3d Cir. 2009). She alleges that she would like to engage in a similar campaign again. Appendix 57. Given this allegation, Defendant's argument that Ms. Gazzola "nowhere states that she intends to take any action that would place any person in reasonable fear of bodily injury," Appellee Br. at 39, misses the mark. Even if Ms. Gazzola does not *subjectively* intend to place any person in reasonable fear of bodily injury, she credibly fears having her actions again construed in that light.[1] Also relevant is the indication that the FBI has continued to investigate Ms. Gazzola's animal rights activities long after the completion of her AEPA prosecution. *See* Appendix 57-58, 70. Taken together, these allegations more than satisfy the "forgiving" credible threat of prosecution inquiry. *N.H. Right to Life PAC*, 99 F.3d at 14.

Similarly, all Plaintiffs have standing to challenge Section (a)(2)(C) of the AETA, which prohibits a conspiracy or attempt to travel in interstate commerce for the purpose of damaging or interfering with the operations of an animal enterprise, without requiring property loss or threats. *See* 18 U.S.C. § 43(a) and § 43(a)(2)(C).

[1] The circuits are deeply divided on the question of whether true threats require subjective intent. *Compare, United States* v. *Cassel*, 408 F.3d 622, 632 (9th Cir. 2005) with *United States* v. *White*, 670 F.3d 498, 508 (4th Cir. 2012), *see also*, *Jeffries v. United States*, 692 F.3d 473 (6th Cir. 2012), *petition for cert filed* (Mar. 29, 2013) (No.12-1185).

The District Court failed to even address Plaintiffs' standing under this provision, and while it may seem like common sense to Defendant that the provision could not possibly mean what it says (*see* Appellee Br. at 42), courts are not empowered to rewrite poorly drafted statutes, no matter how nonsensical they may be. *See Crooks* v. *Harrelson*, 282 U.S. 55, 60 (1930) ("Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts.").

Defendant argues that many perfectly lawful statutes also employ the phrase "conspires or attempts to do so." Appellee Br. at 42. This is true, but unlike the AETA, each of the statutes cited by Defendant includes language which (1) allows for conspiracy or attempt liability *within the* subsection setting forth the substantive elements of the offense,[2] or (2) sets forth attempt and conspiracy liability in a separate subsection, *but also* includes a clear reference back to the

[2] *See e.g.,* 18 U.S.C. § 1368(a) (2013) ("Whoever willfully and maliciously harms any police animal, or attempts or conspires to do so, shall be fined under this title and imprisoned not more than 1 year"); 18 U.S.C. § 1389(a) (2013) ("Whoever knowingly assaults or batters a United States serviceman or an immediate family member of a United States serviceman . . . or who attempts or conspires to do so"); 18 U.S.C. § 1752(a)(4) (2013) ("Whoever . . . knowingly engages in any act of physical violence against any person or property in any restricted building or grounds; or attempts or conspires to do so").

elements of the substantive offense.[3] AETA alone provides for attempt or conspiracy liability in a separate subsection that refers back only to the statute's intent requirement, rather than the substantive elements of the offense.

Because each Plaintiff has been chilled from traveling in or using interstate commerce for the purpose of damaging or interfering with the operations of an animal enterprise, *see e.g.,* Appendix 44 (¶91), the requirements of standing are met.

II. Plaintiffs' Claims Are Ripe for Review

Defendant argues that Plaintiffs' claims are not ripe for review because Plaintiffs have not alleged an intention to engage in any activity proscribed by the statute. *See* Appellee Br. at 43-44. As Defendant all but acknowledges, this argument rises and falls with the question of standing. "[W]hen free speech is at issue, concerns over chilling effect call for a relaxation of ripeness requirements." *Sullivan v. City of Augusta*, 511 F.3d 16, 31 (1st Cir. 2007). Thus, while a plaintiff must still meet the ripeness requirements of fitness and hardship, in a pre-enforcement challenge a "conclusion that a reasonable threat of prosecution exists, for purposes of standing, effectively dispenses with any ripeness problem." *Rhode*

[3] *See e.g.,* 18 U.S.C. § 2332b(a)(2) (2013)("Whoever threatens to commit an offense under paragraph (1), or attempts or conspires to do so, shall be punished under subsection (c)); 18 U.S.C. § 2260(c)(1) (2013)("A person who violates subsection (a), or attempts or conspires to do so, shall be subject to the penalties provided in subsection (e)").

Island Ass'n of Realtors v. Whitehouse, 199 F.3d 26, 33 (1st Cir. 1999) (*quoting Adult Video Ass'n v. Barr*, 960 F.2d 781, 786 (9th Cir. 1992)). Under this theory, one "need not either describe a plan to break the law or wait for a prosecution under it. The purpose of the alternative ground for standing in such cases is so that plaintiffs need not break the law in order to challenge it." *Mangual v. Rotger-Sabat*, 317 F.3d 45, 60 (1st Cir. 2003). Plaintiffs here challenge the AETA because they wish to engage in specific expression. *See, e.g.,* Appendix 42-46 (¶¶ 85-98), 48-51(¶¶107-15), 53-55 (¶¶126-33), 57-59 (¶¶142-48), 62 (¶¶160-61). If they may not raise their challenge here, they will continue to censor themselves, thereby forgoing important First Amendment rights.

III. Defendant's Narrow Interpretation of the AETA Is Erroneous

The principal dispute between the parties centers on whether the words "any real or personal property" can reasonably be read to include intangible property such as money or business goodwill. Plaintiffs' opening brief established that plain meaning, precedent, and the framework of the AETA all support the straightforward conclusion that the AETA's broad terms protect both tangible and intangible property. Appeal Br. at 17-30. The Government's attempt to avoid this conclusion by focusing on the structure and surrounding context of the AETA is unpersuasive. Defendant would also rely on the AETA's Rules of Construction,18 U.S.C § 43(e), but as Plaintiffs' opening brief establishes, and Defendant does not

dispute, a broad First Amendment exception cannot operate to redeem an otherwise unconstitutional statute. Appeal Br. at 30-34; Appellee Br. at 31. For all of these reasons, Plaintiffs' interpretation of the AETA–that it criminalizes intentionally damaging or causing the loss of any property belonging to an animal enterprise, whether tangible or intangible–is both reasonable and correct.

The correct interpretation of a statute begins with the plain meaning of its terms. *See*, *e.g.*, *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485-86 (1996) (interpreting "imminent" by beginning with dictionary definition); *Mississippi v. Louisiana*, 506 U.S. 73, 77-78 (1992) (beginning and ending with dictionary definition to resolve plain meaning of "exclusive").

Black's Law Dictionary defines "personal property" to include intangible property:

> In broad and general sense, everything that is the subject of ownership, not coming under denomination of real estate. … Generally, all property other than real estate; as goods, chattels, money, notes, bonds, stocks and choses in action generally, including intangible property…

BLACK'S LAW DICTIONARY 1217 (6th ed. 1990).

Consistent with this expansive definition of personal property, when Congress means to protect only tangible property, it does so clearly. In over 30 different statutes, relating to both criminal and non-criminal areas of regulation, Congress has specifically referred to "tangible personal property" rather than just

personal property.[4] And in defining a crime that threatens the "property of the United States," Congress included "money" as one form of "property," clearly

[4] *See*, *e.g.*, 4 U.S.C. § 107(a) (2013)(relating to taxation of property sold by United States); 7 U.S.C. § 941(c) (2013)(relating to taxation of Rural Telephone Bank); 7 U.S.C. § 3318(d) (2013)(relating to grants by Department of Agriculture); 11 U.S.C. § 541(b)(8) (2013)(relating to property in bankruptcy); 11 U.S.C. § 722 (2013)(relating to bankruptcy redemption); 12 U.S.C. § 1464(c)(2)(C) (2013) (relating to activity of federal savings associations); 12 U.S.C. § 1768 (2013) (taxation of federal credit unions); 12 U.S.C. § 2290(a) (2013)(taxation of Federal Financing Bank); 15 U.S.C. § 78kkk(e) (2013)(taxation of SIPC); 15 U.S.C. § 381(a)(1) (2013)(property subject to income tax); 15 U.S.C. § 2301(1) (2013)(defining consumer product); 15 U.S.C. § 6611(a)(2) (2013)(relating to tort damages in Y2K actions); 18 U.S.C. § 1513(b) (2013)(criminalizing causing damage or threatening damage to "tangible property of another person" for the purpose of preventing testimony of a witness at an "official proceeding"); 19 U.S.C. § 81o(e) (2013)(relating to ad valorem taxation); 22 U.S.C. § 2697(d) (2013)(relating to acceptance of gifts on behalf of the United States); 26 U.S.C. § 48(a)(5)(D) (2013)(relating to energy tax credit); 26 U.S.C. § 48C(c)(2) (2013)(relating to energy project tax credit); 26 U.S.C. § 110(c)(3) (2013)(relating to construction allowances); 26 U.S.C. § 144(a)(12)(C) (2013)(relating to tax exemption for qualified bonds); 26 U.S.C. § 168 (2013)(relating to depreciation of property); 26 U.S.C. § 170(a)(3) (2013)(relating to charitable deductions); 26 U.S.C. § 199(c)(5) (2013)(relating to calculation of income); 26 U.S.C. § 263A(b)(1) (2013)(relating to capitalization of certain expenses); 26 U.S.C. § 274(j)(3) (2013)(relating to employee achievement awards); 26 U.S.C. § 408(m)(2)(F) (2013)(defining "collectible" for tax purposes); 26 U.S.C. § 543(b) (2013)(relating to taxation of personal holding company income); 26 U.S.C. § 1298(d) (2013)(relating to special treatment of leased property); 26 U.S.C. § 1397C(d) (2013)(relating to definition of enterprise zone business); 26 U.S.C. § 2503(g)(2) (2013)(relating to tax treatment of certain gifts); 26 U.S.C. § 2522(e) (2013)(same); 26 U.S.C. § 6323(b) (2013)(relating to property subject to tax liens); 26 U.S.C. § 6334(a)(13) (2013)(relating to property subject to levying); 26 U.S.C.

indicating that in its most general usage, property includes intangibles. *See* 18 U.S.C.A. § 2114(a) (2013), *see also* Brief of Amici Curiae American Civil Liberties Union of Massachusetts, et al ("ACLU Amicus"), at 33, *citing Nemariam v. Fed. Democratic Republic of Ethiopia*, 491 F.3d 470, 478 (D.C. Cir. 2007) (rejecting tangible/intangible distinction in interpreting statutory protection of "property"). It is thus highly likely that Congress' exclusion of the word "tangible" in the AETA was purposeful.

Nowhere in Defendant's brief is there any explanation of what the Government believes is the plain meaning of the AETA's broad reference to "any real or personal property." One is left to wonder if, or how, Defendant believes that the plain meaning of "any…personal property" excludes intangible property.

Nor does Defendant grapple with the many cases Plaintiffs cite in which "property" is interpreted broadly to include both tangible and intangible loss. *See* Appeal Br. at 23-24. Defendant's only rationale for disregarding compelling and uncontroverted precedent is that these cases involve contract or tort claims, and

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§ 6343(a)(2) (2013)(relating to property eligible for expedited levy determination); 29 U.S.C. § 1302(g) (2013)(relating to taxation of Pension Benefit Guaranty Corporation); 31 U.S.C. § 6306 (2013)(relating to authority of agencies to vest title in certain property); 42 U.S.C. § 238(d) (2013)(relating to acceptance of gifts on behalf of United States by Secretary of Health and Human Services); 42 U.S.C. § 4622(a)(2) (2013)(describing losses eligible for payment when agency displaces business or farm operation).

therefore "have no bearing." Appellee Br. at 27 n.2. Defendant does not explain why this distinction makes a difference.

Contrary to Defendant's analysis, the FBI document attached to Plaintiffs' complaint conforms to the AETA's plain meaning, and Plaintiffs' logical interpretation. As Defendant acknowledges (Appellee Br. at 36), the document describes two subjects, one who has illegally entered a farm and videotaped conditions there, and another who has done the same, and *also* taken an animal. Appendix 67-68. The FBI document identifies subject one's actions, which presumably did *not* result in any damage to tangible property, as a potential violation of the AETA. *Id.* [5]

[5] Defendant's contention that the *Fullmer* prosecution did not include liability based on intangible loss, *see* Appellee Br. at 34, is incorrect. In *Fullmer*, the United States argued that the defendants intended to, and did, physically disrupt and cause the loss of property by, among other actions, flooding Huntington Life Sciences with email, which prompted the company to purchase more sophisticated computer firewall technology. *See United States v. Fullmer*, No. 06-4211, 2006 U.S. 3d Cir. Briefs LEXIS 1334, at *27 (3d Cir. June 17, 2008). Indeed, within the page range Defendant cites for the proposition that the offense conduct involved only "threats, intimidation, and property damage" the Court of Appeals stated that "cyberattacks" against Huntingdon caused a computer crash that resulted in $400,000 in lost business, $50,000 in staffing costs to repair the system, and $15,000 in new computer equipment. *United States v. Fullmer*, 584 F.3d 132, 142 (3d Cir. 2009). The *Fullmer* court later discussed these intangible losses with respect to the AEPA's "loss of property" requirement. *Id.* at 159.

Given the gaping holes in Defendant's analysis, it is perhaps unsurprising that Defendant also fails to provide precedent or support for its context-based interpretation of Section 43(a)(2)(A) to exclude intangible property. First, Defendant argues that because the AETA refers to the "use" of real or personal property by an animal enterprise, it must apply only to tangible property. Appellee Br. at 26. Defendant cites no case for this proposition nor does he explain, for instance, why one might assume that a company does not "use" the profits from its enterprise.

Second, Defendant defends the District Court's reliance on the parenthetical "(including animals or records)" to limit the meaning of the term "any real or personal property" by arguing, against all evidence, that this is not what the District Court actually did. Appellee Br. 26-27, *see also* Addendum at 16-17. Defendant can take this position only by pretending that the ordinary meaning of the term "any . . . personal property" excludes intangible property such as lost profits. But as Plaintiffs demonstrated above (and Defendant does not explicitly dispute), the ordinary meaning of that term is not limited to tangible property. Thus, the only fair reading of the District Court's opinion is that it relied on the subject parenthetical to *limit* the meaning of "any . . . personal property" to *tangible* personal property.

The following language from the District Court's opinion makes this clear:

> First, the court must read the term "personal property" in light of the words around it, specifically "animals or records" and "real property." In this context, personal property cannot reasonably be read to include an intangible such as lost profits.

Addendum at 16-17. This excerpt shows several things. First, the District Court critically failed to consider the impact of the modifier "any" that precedes "personal property." *See Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588-89 (1980) (word "any" is a critically expansive modifier); *see also* Appeal Br. at 21. Second, the Court's argument implicitly assumes that the plain meaning of "personal property" on its own includes intangible property. The Court would have had no need to seek recourse to the words surrounding "personal property" had it concluded otherwise. It follows, then, that the District Court relied on the parenthetical "including animals or records" to limit the otherwise broad meaning of the words "personal property." Defendant's contention otherwise, *see* Appellee Br. at 26, is simply incorrect.

Once this conclusion is reached, the extent of the District Court's error is manifest. Take *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588-589 (1980), a case that Plaintiffs cited but Defendant ignores. In that case, respondents relied on the principle of *ejusdem generis* to argue that the words "any other final action" of the EPA should be limited by specific examples *preceding* the more general phrase. 446 U.S. at 588. Petitioners, by contrast, argued that the term "any other final action" should be read literally. 446 U.S. at 587. The Court agreed with

petitioners, arguing that whatever its virtues, the *ejusdem generis* canon of interpretation cannot overcome Congress's intent to speak broadly, as evidenced by its use of the modifier "any." *Id.* at 588-89.

Defendant here, of course, cannot rely on the *ejusdem generis* principle, because the AETA's more general term is the definitive one, and the more specific examples ("animals or records") do not precede the more general term as part of a series. For this reason alone, Defendant's reliance on the parenthetical to limit the broad term "any . . . personal property" is misguided. This is confirmed by the other set of cases that Defendant ignores – those that establish that a parenthetical beginning with the word "including," as in the AETA, cannot operate to limit the breadth of a preceding term. Appeal Br. at 20-21. Illustrative is *American Surety Co. of New York v. Marotta*, 287 U.S. 513 (1933), in which the Court considered how to interpret the word "creditor" when the statute instructed that the term "shall include anyone who owns a demand or claim provable in bankruptcy." *Id.* at 516. The lower court found that the term "creditor" was limited by the "shall include" clause. The Supreme Court rejected that interpretation, noting that Congress typically used the phrase "shall mean," rather than "shall include," when restricting a definition. *Id.* at 517. For this reason, the Court concluded that Congress must have intended to use the term "creditor" consistent with its broad common-law meaning. *Id.* at 518.

Defendant does not even try to defend the District Court's failure to address the second reference in the AETA to intentionally damaging "any real or personal property," which is not followed by the parenthetical "(including animals or records)." *See* Appeal Br. at 22-23. Defendant fails to explain how the parenthetical could be critical to interpreting "personal property" when included in one portion of the statute but irrelevant when omitted from another portion.

Nor do Defendant's arguments regarding the import of the definition of "economic damages" refute Plaintiffs' interpretation of the Act. *See* 18 U.S.C. § 43(b) and (d)(3). First, Defendant's citation to *United States v. Ahlers*, 305 F.3d 54 (1st Cir. 2002) is unpersuasive. In that case, this Court rejected an attempt to link together two statutory provisions that "differ[ed] radically." *Id.* at 58; *see also id.* at 59 ("[Plaintiffs] offer no explanation as to why two provisions with such different architecture and such different goals should be deemed to march in lockstep."). Here, by contrast, the two statutory provisions at issue are clearly meant to work in tandem. Defendant misreads this argument, and insists that section 43(a)(2)(A) "cannot reasonably be read as incorporating the definition of 'economic damages.'" Appellee Br. at 28. Plaintiffs agree, and make no such claim. Rather, Plaintiffs interpret the two provisions together to indicate that a person is exposed to substantive liability by intentionally damaging or causing the loss of any property used by an animal enterprise, without regard to the question of

whether "economic damage" has occurred. 18 USC § 43(a)(2)(A). The person's sentence, however, is only enhanced when she causes a certain amount of economic damage. 18 USC § 43(b). Contrary to the statutory framework in *Ahlers*, here it makes perfect sense to read the statutory provisions in tandem.

The history of the AETA reinforces this interpretation. Defendant is correct that causing economic damage is not an element of the substantive offense in the current AETA. But it was an element of the substantive offense under the AETA's predecessor statute, the AEPA. *See* 18 U.S.C. § 43(a)(2) (1992). Given that the AETA was clearly meant to broaden the AEPA, the shift of "economic damages" from the substantive portion of the AEPA to the penalty portion of the AETA is consistent with congressional intent. Now, under the AETA, defendants can be convicted in more circumstances than they could under the AEPA, but their sentences can be enhanced only when the damage they cause is sufficiently extensive.

Defendant relies heavily on the AETA's definition of "economic damages" to exclude harm caused by "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," 18 U.S.C. § 43(d)(3)(B). But far from *confirming* that the AETA does not prohibit protected speech that causes intangible loss, the exclusion could just as easily be read to support

Plaintiffs' interpretation—that AETA liability attaches to a person who harms an animal enterprise by disclosing information, but the definition of "economic damage" ensures that such person's punishment will not be enhanced by the amount of economic harm caused by her disclosure. Defendant's assumption otherwise—that the exclusion of a particular kind of harm from the calculation of the punishment *must* mean that that harm is not meant to be included in the liability portion—is completely without support. Defendant's citation to 18 U.S.C. § 3663A(b)(2) (2013) does not help, as that provision does not define a particular crime, and does not enhance a criminal sentence based on economic loss caused. Instead, it is specifically directed to determining the amount of restitution that a defendant owes to particular victims, generally tying that restitution to the loss caused, a logical arrangement. Unlike the AETA, with its long history of linking "economic damages" to the substantive elements of the offense, Section 3663A is a straightforward way of providing restitution to victims of criminal offenses. Defendant's citation to *United States v. Gonzalez-Alvarez*, 277 F.3d 73 (1st Cir. 2002), is similarly inapposite. Like Section 3663A(b)(2), *Gonzalez-Alvarez* involves a sentencing guideline, not a statute defining a substantive crime in which the penalty is specifically linked to harm caused to intangible property.

Finally, the AETA's First Amendment exception, Section 43(e), cannot save the statute. First, Plaintiffs agree with Defendant that such an exception may

demonstrate Congress' intent (or stated intent) to protect First Amendment rights. *See* Appellee Br. at 31-32. But whether or not Congress intended to violate the First Amendment when it passed the AETA is irrelevant. Presumably Congress never intends to violate the First Amendment, whether or not it includes a broad statement saying so.

Second, even taken at face value, the Rules of Construction do not provide the broad protection imagined by Defendant. Section 43(e) applies only to "expressive conduct," with no mention of other protected activity such as pure speech or dissemination of information. 18 U.S.C § 43(e). Thus, even if individual members of Congress expressed intent to protect the "rights of those engaged in first amendment freedoms of expression regarding [animal] enterprises," *see* Appellee Br. at 31 (citing statement of Rep. Sensenbrenner), the Rules of Construction do not provide that breadth of protection. 18 U.S.C § 43(e).

Equally troubling, the provision leaves to the potential criminal defendant the responsibility of determining what constitutes "expressive" conduct, a question that has bedeviled Supreme Court Justices, let alone laypersons. *See generally* John Greenman, *On Communication*, 106 MICH. L. REV. 1337, 1339-40 (2008) ("The law nominally protects acts that are 'expressive,' but rarely defines that word"). *Compare United States v. O'Brien*, 391 U.S. 367, 376 (1968) (conduct cannot "be labeled 'speech' whenever the person engaging in the conduct intends thereby to

express an idea"), *with Spence v. Washington*, 418 U.S. 405, 409 (1974) (conduct is protected when it is "sufficiently imbued with elements of communication") *and Virginia v. Black*, 538 U.S. 343, 360-61 (2003) (referring to "symbolic expression" and "symbolic conduct" as protected in some circumstances).

The examples provided in the Rules of Construction – "peaceful picketing or other peaceful demonstration" –further confuse the issue. For instance, some conduct can be considered expressive even if it is not "peaceful." One could certainly argue that urging "revengeance" while others shouted "bury the [racial epithet]" is not peaceful, yet it is protected speech. *Brandenburg v. Ohio*, 395 U.S. 444, 446 n.1 (1969). And when a civil rights leader threatened that he would "break [the] damn neck" of anyone who frequented a "racist store[]," his speech was protected. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 902 (1982). To add to the confusion, some forms of protest, such as non-violent civil disobedience, are not protected by the First Amendment even though they are peaceful.

At base, the AETA's Rules of Construction require potential speakers to be experts in the First Amendment and to determine what counts as expressive conduct and what kind of protest activity will be protected. This inevitably chills speech because reasonable people will steer clear of conduct that might be protected but that also may be close to the First Amendment line. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

Defendant's reliance on a similar provision found in the Freedom of Access to Clinic Entrances (FACE) statute is unavailing. *See* 18 U.S.C. § 248(e)(2) (2013).While the acts' Rules of Construction are similar, the substantive statutes are different; FACE has no provision similar to the broad-ranging Section 43(a)(2)(A), and it specifically applies to "physical obstruction," leaving no question that the statute criminalizes activity unprotected by the First Amendment. *Id.*

IV. Plaintiffs' Three Constitutional Claims Should be Reinstated by this Court

Defendant does not dispute that should this Court reverse the District Court's standing decision, it may then consider whether Plaintiffs have adequately stated claims for relief. We briefly address each claim below.

A. Overbreadth

Plaintiffs and Defendant agree that the overbreadth claim turns on the proper interpretation of the statute. Plaintiffs concede that if the statute is interpreted to apply only to tangible loss, it is not overly broad. Conversely, Defendant has not offered any argument to save the statute from a finding of overbreadth in the event the Court agrees with Plaintiffs' interpretation.

That said, Defendant argues (for the first time on appeal) that if the Court has any doubt as to the AETA's constitutionality, it should apply a narrowing construction prohibiting the AETA's applicability to "peaceful picketing, lawful

protests, and the dissemination of information." *See* Appellee Br. at 46. But courts cannot rewrite statutes at will. As explained at length in Section III, above, it defies the plain meaning of Section 43(a)(2)(A) to construe the prohibition on "damag[ing] or caus[ing] the loss of *any* real or personal property" to mean "damage[ing] or caus[ing] the loss of *only real or tangible property*." *See City of Houston v. Hill*, 482 U.S. 451, 469 n. 18 (1987) (disallowing use of a narrowing construction at odds with the plain meaning of an ordinance); *see also, Erznoznik v. Jacksonville*, 422 U.S. 205, 217 n. 15 (1975).

B. Vagueness

Plaintiffs have already shown at length that the AETA is impermissibly vague. *See* Appeal Br. at 40-49. We do not reiterate those points here, but rather address briefly several arguments raised in Defendant's brief.

First, Defendant provides no support for his novel argument that due process requires statutory clarity only for the elements of an offense, and not also for provisions setting forth the required *mens rea*. *See* Appellee Br. at 48-49 (urging the Court to ignore the weight of precedent holding that "interfere" is unconstitutionally vague, because the term appears only in section 43(a)(1) of the AETA rather than 43(a)(2)). Plaintiffs could locate no precedent limiting the Due Process Clause's guaranty of "fair warning," *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972), in this manner.

Second, with respect to the phrase "animal enterprise," Defendant is correct that the term is defined within the statute, *see* Appellee Br. at 50; it is the breadth of that definition that presents a problem. *See* 18 U.S.C. §43(d)(1). As *Amici* convincingly demonstrate, the AETA could be used to prosecute nearly any property crime imaginable that is committed against a business and has an interstate component. *See* ACLU Amicus at 18-23. This unprecedented sweep allows "unbridled prosecutorial discretion" in charging. *See Papachristou v. City of Jacksonville,* 405 U.S. 156, 165 (1972); *City of Houston v. Hill*, 482 U.S. 451, 465 (1987). Despite its immensely wide applicability, the AETA has been enforced solely against animal rights activists. ACLU Amicus at 22 (citing Memorandum in Support of Defendant's Motion to Dismiss Pursuant to Rules 12(b)(1) and 12(b)(6), Dist. Ct. Dkt. No. 12, at 29).

Third, with respect to Section 43(a)(2)(B)'s reference to a "course of conduct," Defendant appears to concede that the phrase would allow for liability arising from discrete acts separated by decades. *See* Appellee Br. at 51. That the same phrase was upheld in the face of a vagueness challenge to the interstate stalking statute is of little import, as that challenge appears to have been based on a completely distinct legal theory. *See United States v. Shrader*, 675 F.3d 300, 311 (4th Cir. 2012) (rejecting defendant's argument that the statute is unconstitutionally vague because it does not define whether all acts included in the

prohibited "course of conduct" must be done with the specific intent to cause harm required by the statute).

Finally, Defendant ignores Plaintiffs' argument that the definition of "economic damage" in Section 43(d)(3) is itself hopelessly confusing, independent of the larger dispute regarding the meaning of "any real or personal property" in (a)(2)(A). *See* Appeal Br. at 45-46.

C. Content And Viewpoint Discrimination

Both the threats and property loss provisions of the AETA discriminate on the basis of content and viewpoint. In response to this claim, Defendant primarily refutes arguments Plaintiffs do not advance. For example, Defendant mischaracterizes Plaintiffs as complaining "that the Act was passed in response to the actions of a particular group of people with a particular viewpoint." Appellee Br. at 54. While this is certainly true (*see supra,* p. 1-2), Plaintiffs' discrimination claim does not rely on Congress' purpose in passing the AETA, but on the manner in which the AETA singles out speech and expressive conduct that disadvantages animal enterprises. *See* Appeal Br. at 50 (noting that a content-based legislative purpose is not necessary to make out a content/viewpoint discrimination claim); and *id.* at 55 (demonstrating that the AETA discriminates based on content and viewpoint because it singles out for prohibition only those threats directed at specific industries).

Similarly, Defendant argues that a law is not discriminatory merely because it "may be enforced against animal rights activists more than other groups." Appellee Br. at 54. We agree. *See* Appeal Br. at 57 ("Plaintiffs do not complain merely because animal rights activists will be disproportionately prosecuted under the Act.")

In posing hypothetical applications of the AETA, Defendant again ignores Plaintiffs' arguments. Defendant explains, for example, that a person who throws a brick through a farm window can be prosecuted under the AETA regardless of whether the brick was thrown because of a labor disagreement, a personal quarrel with the farmer, or some other disruptive purpose. Appellee Br. at 55. Again, Plaintiffs agree. *See* Appeal Br. at 57 n. 10. What Defendant fails to address, however, are Plaintiffs' examples of the ways in which the AETA singles out for protection animal-related industry—the likely targets of animal rights activists—without providing comparable protection to animal advocacy groups.[6] *See* Appeal Br. at 52 (noting that pro- and anti-foie gras protests at a food convention which result in identical security expenditures could not both be prosecuted under the AETA, as the former would not be undertaken "for the purpose of damaging or interfering with the operations of an animal enterprise") and Appeal Br. at 54-55

[6] Tellingly, the Government offers that it is logical that the AETA should apply to restaurants and cafeterias, as these places "could be targeted for serving meat or foie gras…". Appellee Br. at 50 n. 5.

(noting that an animal rights protestor who threatens a fur store owner may be punished under the AETA, but not a fur store owner who makes the exact same threat to a protestor).

Defendant's reliance on unsuccessful challenges to the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248 (e) (2013), and state laws creating buffer zones around reproductive health clinics, provide no help. *See* Appellee Br. at 55-56, *see also* Appeal Br. at 55-58 (distinguishing FACE and AETA at length). The buffer laws are irrelevant to this case, as they are time, place, and manner restrictions. *See* Appeal Br. at 50-51. And absent from all FACE challenges has been any claim that the statute provides different protection for actors on either side of that debate; pro-life reproductive care providers are protected along with abortion providers under the law. AETA, in contrast, provides no reciprocal protection. It is *only* animal enterprises, not animal defenders, whose rights have been elevated.

Finally, Defendant fails to address the import of both *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) and *Virginia v. Black*, 538 U.S. 343 (2003), which together establish that even for unprotected speech like "true threats," the Government may not draw viewpoint or content-discriminatory lines. *See* Appeal Br. at 54-55. Defendant does not dispute that Section 43(a)(2)(B) regulates true threats directed at animal enterprises. But Defendant makes no argument for why the Government

is permitted to single out some true threats. As such, if this Court finds that Plaintiffs have standing to challenge Section 43(a)(2)(B), Defendant has made no argument for its constitutionality.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Plaintiffs' Appeal Brief, Plaintiffs respectfully request that the Court reverse the lower court, reinstate all of Plaintiffs' claims, and remand for discovery.

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Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because this brief contains 6680 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: September 9, 2013

Certificate of Service

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 at the addresses listed below:

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