No.

In the Supreme Court of the United States

SARAHJANE BLUM, ET AL., PETITIONERS
v.
ERIC H. HOLDER, ATTORNEY GENERAL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In light of this Court's subsequent decision in *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (Jun. 16, 2014), did the First Circuit err in relying on *Clapper v. Amnesty Int'l USA*, 568 U.S. ___, 133 S. Ct. 1138 (2013) to hold that plaintiffs in a pre-enforcement challenge to a criminal statute must show that their prosecution under the statute is "certainly impending," counter to the standard applied in this Court and by every other Court of Appeals?

PARTIES TO THE PROCEEDINGS

The following five individuals were plaintiffs in the district court and appellants in the court of appeals, and are petitioners in this Court: Sarahjane Blum, Ryan Shapiro, Lana Lehr, Lauren Gazzola, and Iver Robert Johnson, III.

The sole defendant in the district court and appellee in the court of appeals, and respondent in this Court is Eric H. Holder, Attorney General of the United States.

All parties are individuals.

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The Animal Enterprise Terrorism Act (AETA),
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The opinion of the court of appeals (App. 1a-26a) is reported at 744 F.3d 790 (1st Cir. Mar. 7, 2014). The court of appeals' order denying rehearing and rehearing *en banc* (App. 27a-28a) is unreported and available on PACER (Order, Doc. No. 116684366, Case No. 13-1490 (1st Cir. May 6, 2014)). The opinion of the district court (App. 29a-49a) granting defendant's motion to dismiss is reported at 930 F. Supp. 2d 326 (D. Mass 2013).

JURISDICTION

The decision of the court of appeals was entered on March 7, 2014 and its denial of rehearing and rehearing *en banc* was entered on May 6, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a pre-enforcement challenge to the Animal Enterprise Terrorism Act ("AETA"), 18 U.S.C. § 43(a)(1)(A), (B), and (C), which provides in relevant part as follows:

> (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 [18 U.S.C. § 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) [with fines and/or imprisonment ranging from one year to life, depending on the extent of consequent injury (or lack thereof)].

Petitioners allege that the statute violates their rights under the First and Fifth Amendments.

In holding that Petitioners lacked standing to challenge these statutory provisions, the First Circuit relied heavily on the AETA's savings clause, which states (in relevant part) as follows:

> (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;

The full text of 18 U.S.C. § 43 is reprinted in the Appendix (App. 50a-55a).

STATEMENT OF THE CASE

Petitioners Sarahjane Blum, Ryan Shapiro, Lana Lehr, Lauren Gazzola and Iver Robert Johnson III are animal rights activists with long histories of lawful speech, organizing, and protest against corporate animal abuse. Each has chosen to refrain from engaging in speech and conduct protected by the First Amendment because they fear prosecution under the Animal Enterprise Terrorism Act. Specifically, they fear the AETA will allow their prosecution (1) for intentionally causing an animal enterprise to lose profits, (2) for voicing general support of illegal action by others that does not rise to the level of incitement under the *Brandenburg* standard, or (3) for conspiring or attempting to cause "damage or interference" to an animal enterprise, even without intent to damage tangible property or cause fear of injury. The chilling effect the statute has had on their politi-

cal advocacy led them to bring this pre-enforcement challenge to the AETA.

A panel of the First Circuit affirmed the district court's dismissal of Plaintiffs' pre-enforcement challenge for lack of standing, holding *sua sponte* that this Court's recent decision in *Clapper v. Amnesty Int'l USA*, 568 U.S. ___, 133 S. Ct. 1138 (2013), intended to "adopt[] a more stringent injury standard for standing than this court has previously employed in pre-enforcement challenges on First Amendment grounds." *Blum v. Holder*, 744 F.3d 790, 798 (1st Cir. 2014) (App. 15a). Plaintiffs in *Clapper* had claimed that their efforts to avoid surveillance potentially permitted by a statute caused them injury, but this Court rejected their claims to standing on the grounds that "the harm [they] seek to avoid is not certainly impending." 133 S. Ct. at 1151. Whereas previously the First Circuit found standing where plaintiffs had an "'objectively reasonable' fear of prosecution," *Blum*, App. 15a (citing five First Circuit precedents decided from 1996 to 2011), the panel held that a heightened threshold should now apply in light of *Clapper*'s "certainly impending" standard. App. 17a-18a.

In doing so, the panel misapplied *Clapper* to the criminal pre-enforcement context, and radically remade the law of standing in pre-enforcement cases in a manner that conflicts with existing precedent in this Court and in every other relevant circuit (including in at least five cases decided after *Clapper*). *Clapper* did not involve a challenge to a criminal statute and therefore did not implicate the standard for establishing standing in a pre-enforcement challenge. The program challenged in *Clapper* did not restrict or regulate individual behavior; the plaintiffs there feared that a government program *might* be used to monitor their activities, not to *flatly prohibit* any particular conduct. Thus *Clapper* could not have altered this Court's well-established precedent

finding standing where a chilling effect is caused by a criminal statute that reasonably appears to prohibit plaintiffs' intended actions. The panel decision incorrectly collapses these two distinct standing doctrines.

After the panel decision and the rejection of a petition for rehearing *en banc*, this Court decided *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (Jun. 16, 2014), which involved a pre-enforcement challenge to provisions of the Ohio elections statute prohibiting certain false statements during the course of a political campaign. The Sixth Circuit had applied a heightened threshold for establishing standing in pre-enforcement challenges, "effectively requiring particularized and certain threats of successful prosecution, and absent such certainties, dismissing [pre-enforcement plaintiffs'] chill as 'merely subjective.'"[1] This Court reversed the Sixth Circuit's dismissal for lack of standing, applying the traditional standard established by a half-century of its own precedent rather than scrutinizing plaintiffs' claims to determine if prosecution was "certainly impending" under *Clapper*. That decision alone provides ample justification for this Court to grant this petition for certiorari, vacate the panel opinion, and remand to the First Circuit for further proceedings.

Petitioners and the AETA

Petitioners Sarahjane Blum, Ryan Shapiro, Lana Lehr, Lauren Gazzola and Iver Robert Johnson, III, are animal rights activists who have long been committed to using speech and expressive conduct to change public opinion and corporate policies regarding animal mistreatment and cruelty. They seek to investigate, docu-

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[1] Petition for Certiorari, *Susan B. Anthony List v. Driehaus*, No. 13-193 (U.S. filed Aug. 9, 2013) at 9.

ment and publicize the horrific treatment of animals at certain businesses and to organize community campaigns in opposition to such treatment. Through this constitutionally-protected advocacy, they hope to persuade their fellow citizens that certain agricultural and scientific business practices are immoral, and discourage them from patronizing such businesses. Petitioners have the intent of "damaging or interfering" with these corporations' operations—the express 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.

Each of the Petitioners has chosen to refrain from engaging in conduct protected by the First Amendment because he or she fears prosecution under the AETA. The AETA criminally penalizes one who, for the purpose of damaging or interfering with the operations of an animal enterprise,[2] "intentionally damages or causes the loss of any real or personal property" belonging to such enterprise, 18 U.S.C. § 43(a)(2)(A), "intentionally places a person in reasonable fear of … death … or serious bodily injury," *id.*(B), or "conspires or attempts to do so," *id.*(C). App. 50a-51a.

Petitioners' allege a desire to engage in expressive activity that could cause a loss of profits to an animal enterprise, but no physical destruction of property. Businesses may spend more money on security as a result of public demonstrations against their treatment of animals, and disgusted consumers may stop purchasing goods manufactured by these enterprises. Because the AETA subsection (a)(2)(A) broadly criminalizes "intentionally…caus[ing] the loss of any…personal property,"

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[2] "Animal enterprise" is defined broadly, as essentially any entity that uses animals or animal products in any way. *See* 18 U.S.C. § 43(d)(1) (App. 53a).

App. 50a, Petitioners fear that any of their intended investigations, organizing, and public campaigning might result in their prosecution under this provision for intentionally causing an animal enterprise to lose profits, notwithstanding that such activity is clearly protected by the First Amendment.

Subsection (a)(2)(A) thus chills animal rights activists' lawful and non-violent advocacy based on the potential economic impact of that advocacy. Petitioners' reading finds support in the legislative history: 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." DEP'T OF JUSTICE, REPORT TO CONGRESS ON THE EXTENT AND EFFECTS OF DOMESTIC AND INTERNATIONAL TERRORISM ON ANIMAL ENTERPRISES 1 (1993). The AETA amended away the language in the AEPA requiring that a violator have both the purpose and effect of "caus[ing] a *physical* disruption" to an animal enterprise. Pub. L. 102-346 (Aug. 26, 1992), § 2 (formerly codified at 18 U.S.C. § 43(a)(1) and (2) (1992)); *see also id.* (noting in "definitions" section that "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" (formerly codified at 18 U.S.C. § 43(d)(2) (1992) (emphasis added))). Petitioners' reading of this provision finds further textual support from other subsections of the AETA that provide for enhanced penalties based on economic damage to the animal enterprise, including from illegal third party reactions to disclosure of information about an animal enterprise. *See* 18 U.S.C. § 43(b) & (d)(3) (App. 51a-52a, 53a-54a).

Moreover, subsection (a)(2)(B) of AETA allows the government to prosecute expressions of general support of illegal action by others even where such speech does not rise to the level of incitement under *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Section (a)(2)(B) 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." App. 50a-51a. Petitioner Gazzola[3] challenged this provision of AETA as unconstitutionally vague, and content- and viewpoint-based. 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 subsection (a)(2)(B) as "intentionally plac[ing] a person in reasonable fear of … death … or serious bodily injury ... through a course of conduct." *See, e.g.*, *United States v. Fullmer*, 584 F.3d 132, 157 (3d Cir. 2009).

Finally, subsection (a)(2)(C) criminalizes conspiring or attempting to cause "damage or interference" to an animal enterprise, even without intent to damage tangible property or cause fear of injury. App. 51a. 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." App. 50a-51a. The provision does not appear to relate back to 43(a)(2)(A) or (a)(2)(B), and thus can be

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[3] Her fear was based in part on her prosecution under AETA's predecessor statute, the Animal Enterprise Protection Act, for involvement in a campaign that combined expressions of support for illegal activity with home protests. *See United States v. Fullmer*, 584 F.3d 132, 157 (3d Cir. 2009).

interpreted to criminalize "conspiracy to interfere" alone, even without resulting property damage or a threat. All Petitioners' 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. Even if it did relate back to subsections (a)(2)(A) and (a)(2)(B), subsection (a)(2)(C) would be problematic for the same reasons as those subsections are.

* * *

Petitioners advanced three distinct constitutional claims below. First, they claimed 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. The AETA could criminalize a vast quantity of lawful protest and advocacy undertaken to impact the profitability of organizations that abuse animals for profit, science, or entertainment. Second, Petitioners claimed AETA's numerous open-ended terms render it unconstitutionally vague. The government offered no limiting definitions in the proceedings below of any of the statute's core terms, and "damage," "interfere," "causes the loss," and "personal property" are all left completely undefined in the statute. Finally, Petitioners claimed AETA unlawfully discriminates against political speech on the basis of content and viewpoint. The statute singles out for special protection businesses and individuals who occupy only one side of a contentious political debate, and punishes expressive conduct and speech that have the purpose and effect of undermining the profitability of their enterprises.

Procedural history

Petitioners filed this action in the District of Massachusetts on December 15, 2011, asserting jurisdiction under 28 U.S.C. § 1331 and § 2201. 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. On March 18, 2013, the District Court granted the motion to dismiss, by interpreting AETA narrowly to punish only harm to *tangible* property. *Blum v. Holder*, 930 F. Supp. 2d 326, 335-37 (D. Mass 2013) (App. 45a-48a). Although the district court stated that Plaintiffs lacked standing to bring a pre-enforcement challenge, App. 45a, it did so by effectively reaching the merits and interpreting the scope of the statute narrowly to avoid proscribing Plaintiffs' intended conduct (relying in part on the absence of past AETA prosecutions of "the type of conduct in which they seek to engage," App. 47a). Plaintiffs appealed, arguing *inter alia* that 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.

A panel of the First Circuit affirmed the District Court's dismissal of Plaintiffs' pre-enforcement challenge for lack of standing, holding *sua sponte*[4] that this Court's recent decision in *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013), suggested "a more stringent injury standard for standing than this court has previously employed in pre-enforcement challenges on First Amendment grounds." *Blum v. Holder*, 744 F.3d 790, 798

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[4] The panel made this radical change in the law of the Circuit without the benefit of briefing from the parties. When the panel opinion states that "Plaintiffs argue that *Clapper* has no bearing," App. 17a, it refers to argument from the podium, since defendant made no argument that *Clapper* altered existing standards for pre-enforcement challenges in his brief, and that argument therefore remained unaddressed by any of the parties' papers.

(1st Cir. 2014) (App. 15a). Whereas previously the First Circuit had found standing where plaintiffs had an "'objectively reasonable' fear of prosecution," *id.*, the panel demanded more in the wake of *Clapper*'s "certainly impending" standard. Rejecting "plaintiffs' arguments that *Clapper* has no application" in the context of pre-enforcement challenges, App. 18a, the panel concluded that Petitioners had failed to meet the *Clapper* standard, primarily because the government's "rejection of plaintiffs' interpretation" of the statutory text as reaching the speech and conduct they wished to engage in, App. 15a, left it unlikely that they would actually be prosecuted if they engaged in their intended activities, App. 25a.

The panel briefly addressed whether the three challenged subsections of the AETA in fact reached Petitioners' intended speech and conduct, App. 19a-25a, but did not decide whether the actual *text* of the prohibitions covered those actions (as the district court had done). Instead, in each instance it held that the presence of a savings clause drawing the line at First Amendment-protected activity was sufficient to find that the statute does not cover constitutionally protected conduct. *See* App. 19a-21a (declining to decide whether plaintiffs' interpretation of the phrase "personal property" in subsection (a)(2)(A) to include lost profits was reasonable, and instead holding that the savings clause "preclude[s] an interpretation according to which protected speech activity resulting in lost profits gives rise to liability"); App. 22a (finding no standing to challenge subsection (a)(2)(B), the provision claimed to criminalize "general support for illegal action by others," because of the savings clause's "specific exemption from liability of" conduct protected by the First Amendment"); App. 24a ("the rules of construction protecting expressive activity would preclude plaintiffs' broad interpretation" of the conspiracy/attempt subsection, (a)(2)(C)).

The panel explicitly relied on this savings clause in its application of *Clapper*, holding that the fact that the "Government disavow[ed the statute's application to Petitioners] is even more potent when the challenged statute contains, as here, explicit rules of construction … which in themselves would prohibit prosecution of First Amendment activities." App. 16a. Rather than deciding whether the text of the statute could actually reach First Amendment activities, the panel decided the generic savings clause, together with the government's litigation position on the proper interpretation of the statute, meant actual prosecution was not "certainly impending" or otherwise sufficiently likely under *Clapper*. *See* App. 25a ("plaintiffs' fear of prosecution under AETA is based on speculation that the Government will enforce the Act pursuant to interpretations it … now explicitly rejects.").

Petitioners filed a petition for panel rehearing and for rehearing before the First Circuit sitting *en banc*. That petition was rejected on May 6, 2014 (App. 27a-28a), with only four judges of the Circuit able to participate in its consideration.[5]

Subsequent to the First Circuit's rejection of the petition for rehearing *en banc*,[6] this Court decided *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (Jun. 16, 2014), reversing the Sixth Circuit and finding that plain-

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[5] There were only five judges in active service on the First Circuit as of May 6th, with a nominee to one vacancy (David Barron) still pending before the Senate at that time. One of the five active judges (Judge Torruella) recused himself from consideration of the *en banc* petition.

[6] The fact that certiorari had already been granted in *Susan B. Anthony List* was noted prominently in the petition for rehearing in this case, Doc. No. 116677921 (filed Apr. 21, 2014), at 10-11, and Petitioners requested that the First Circuit "at minimum hold open this petition" for rehearing until after this Court heard argument and decided *Susan B. Anthony List*, *id*. at 15, but the Court of Appeals declined to do so.

tiffs had established injury-in-fact in their pre-enforcement challenge to provisions of the Ohio elections statute prohibiting certain false statements during the course of a political campaign. The petition for certiorari in *Susan B. Anthony List* had noted that the Sixth Circuit was a lone outlier among the circuits in demanding that "a party whose speech is arguably proscribed [must] prove that authorities would *certainly* and *successfully* prosecute him" in order to maintain standing for a pre-enforcement challenge in the First Amendment context. Pet. for Certiorari, No. 13-193 (filed Aug. 9, 2013), at i (first Question Presented). After this Court's reversal of the Sixth Circuit, the First Circuit is now the sole outlier demanding more than an objectively reasonable fear of prosecution before a plaintiff may bring a pre-enforcement challenge to a criminal statute.

REASONS FOR GRANTING THE PETITION

I. This Court's threshold for pre-enforcement standing was unaffected by *Clapper*

Under a long, unbroken line of cases decided by this Court—*Epperson v. Arkansas*, 393 U.S. 97 (1968), *Doe v. Bolton*, 410 U.S. 179 (1973), *Steffel v. Thompson*, 415 U.S. 452 (1974), *Babbitt v. UFW Nat'l Union*, 442 U.S. 289 (1979), *Virginia v. American Booksellers Assn.*, 484 U.S. 383 (1988), and now *Susan B. Anthony List*—the relevant threat in a pre-enforcement challenge to a criminal or regulatory statute is the risk that one's intended conduct would violate it. So long as the statute is not moribund and the plaintiffs reasonably fear that their conduct is prohibited, this Court has found the threat of prosecution objectively reasonable, and capable of sustaining standing. Plaintiffs in such cases have never been required to show that a prosecution is clearly impending.

See Epperson, 393 U.S. at 101-02 (pre-enforcement challenge to a law that had not been used in 40 years); *Doe*, 410 U.S. at 188 (doctors had standing to bring pre-enforcement challenge to criminal abortion statute even though none had been prosecuted nor threatened with prosecution). Until the decision below, the First Circuit (consistent with the many decisions of this Court cited above) had always required only that plaintiffs have an "'objectively reasonable' fear of prosecution" to establish injury in chilling-effect "First Amendment pre-enforcement actions." *Blum*, App. 15a (citing six First Circuit cases).

Clapper does not change this inquiry. Unlike those cases, *Clapper* did not involve a criminal statute or other law that expressly regulated behavior. Instead, it involved a facial challenge to the FISA Amendments Act of 2008 (FAA), which modified the Foreign Intelligence Surveillance Act to permit judicial approval not just for individualized targeting but rather for whole programs of surveillance (so long as those programs did not intentionally target U.S. persons). *Clapper*, 133 S. Ct. at 1143-45. The plaintiffs in *Clapper* based their claim to standing on two distinct theories: First, that it was "likel[y]" that their communications would be intercepted by FAA surveillance in the future, *id.* at 1143, and second, "that the risk of surveillance under [the FAA] is so substantial that they have been forced to take costly and burdensome measures to protect the confidentiality of their international communications"—a chilling effect "that is fairly traceable to [the FAA]." *Id.* at 1146.

This Court rejected both theories on the grounds that "the harm [the plaintiffs] seek to avoid is not certainly impending." *Id.* at 1151. The Second Circuit had cited *Babbitt* and *American Booksellers* in holding that plaintiffs' fears were based on an "objectively reasonable likelihood" of "contingent future … government action"

taking place. *Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 134-35 (2d. Cir. 2011). But in order for the *Clapper* plaintiffs to be subject to surveillance, an Article III judge on the Foreign Intelligence Surveillance Court (FISC) would have to approve of surveillance under the FAA that targeted only foreigners, complied with the Fourth Amendment, and implemented minimization safeguards (all of which the statute expressly requires), while nonetheless ensnaring the communications of the plaintiffs (all of whom were U.S. persons or organizations rather than foreigners). Moreover, because the primary claim in the *Clapper* complaint was a Fourth Amendment cause of action, plaintiffs' standing depended on the contingency that a FISC judge would decide to approve and authorize surveillance that violated the Fourth Amendment, in the face of the explicit requirement of the statute that the FISC review for Fourth Amendment compliance. 133 S. Ct. at 1148-50. On the facts before it, this Court held that the likelihood that the plaintiffs' communications would be subject to FAA surveillance was far too remote, ultimately resting on an exceedingly unlikely "speculative chain of" contingencies that fell well short of posing a "threat of certainly impending interception." *Id.* at 1150, 1152.

That different standards should govern pre-enforcement challenges to criminal statutes and chilling-effect challenges to non-criminal statutes that might authorize contingent government action (such as *Clapper*) should not be surprising. When Congress passes a surveillance statute, surveillance may or may not be directed at a particular individual as the ultimate result. In contrast, when Congress passes a criminal statute, everyone is obligated to obey it. For this reason, the chilling effect created by a criminal statute has always been regarded as less speculative for purposes of standing than the chilling effect created by fear of contingent govern-

ment action (such as surveillance programs) that may or may not actually end up directed at specific individuals, or other programs that do "not regulate, constrain, or compel any action on their part." *Clapper*, 133 S. Ct. at 1153.

Nothing in *Clapper* suggests that federal courts should deny standing in every chilling-effect case where the feared future injury is not "literally certain"—whether or not created by a criminal statute. *Id.* at 1150 n.5. Nor does anything in *Clapper* suggest that actual prosecution must be shown to be "certainly impending" before a pre-enforcement challenge to a criminal statute may be brought. If that were the case, it would mean that *Clapper* silently overruled the 45 years of this Court's precedents cited above that permit plaintiffs to bring a pre-enforcement challenge to a criminal statute even where there is no imminent threat of prosecution.

Yet that is precisely what the First Circuit panel held:

> Plaintiffs argue that *Clapper* has no bearing on injury and standing with respect to this First Amendment pre-enforcement challenge because this challenge is to a criminal statute, and *Clapper* did not involve a criminal statute. *Clapper*, however, draws no such distinction.

Blum, App. 17a. In collapsing these two doctrines, the First Circuit wrongly assumed[7] that *Clapper* overturned an unbroken line of this Court's decisions that, following the standard articulated in *Babbitt* and *American*

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[7] Other than *Clapper* itself, the only authority the panel cited for this leap was the fact that the latest supplement to the Hart & Wechsler *Federal Courts* "treatise did not suggest that the *Clapper* standard was inapplicable to challenges to criminal statutes." App. 14a, n.9.

Booksellers, require only a showing of "reasonable fear" or "credible threat of prosecution."

That assumption was belied by this Court's decision last term in *Susan B. Anthony List*. In finding that the petitioners in that case had sufficiently alleged an injury-in-fact to support a claim to standing, this Court reiterated without qualification the entire line of decisions that the First Circuit found had been displaced by *Clapper*:

> One recurring issue in our cases is determining when the threatened enforcement of a law creates an Article III injury. When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law. … Instead, we have permitted pre-enforcement review under circumstances that render the threatened enforcement sufficiently imminent. Specifically, we have held that a plaintiff satisfies the injury-in-fact requirement where he alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder."

134 S. Ct. 2342 (quoting *Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1989), and citing *Steffel v. Thompson*, 415 U.S. 452, 459 (1979)); *id.* at 2343 (describing *Virginia v. American Booksellers*). The *Susan B. Anthony List* Court asked whether the risk of enforcement of the challenged law against the intended-but-chilled speech was "sufficiently imminent," 134 S. Ct. at 2343,

not whether it was "certainly impending," *Clapper*, 133 S. Ct. at 1147.[8]

This Court had no difficulty reversing the Sixth Circuit's determination that, in the words of the first question granted, "a party whose speech is arguably proscribed [must] prove that authorities would certainly and successfully prosecute him."[9] "First, petitioners have alleged 'an intention to engage in a course of conduct arguably affected with a constitutional interest'"—namely, their desire to engage in similar speech in future election cycles. *Susan B. Anthony List*, 134 S. Ct. at 2343 (quoting *Babbitt*). "Next, petitioners' intended future conduct is 'arguably … proscribed by [the] statute' they wish to challenge"—notwithstanding the fact that petitioners claimed they only intended to make true statements in their political speech. *Id.* at 2344 (quoting *Babbitt*). Finally, this Court found that the "threat of future enforcement of the false statement statute is substantial." The peculiar enforcement regime created by the Ohio false statement statute made this factor plain. *See id.* at 2345-46 (statute allowed the Ohio Election Commission, in actions commenced by private parties, to make stigmatizing "probable cause" findings, and such administrative commission proceedings have "not [been] a rare occurrence" historically). But this Court held that the "additional threat of criminal prosecution" meant the

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[8] This Court's opinion in *Susan B. Anthony List* mentions *Clapper* in reciting generic standing requirements (134 S. Ct. at 2341, 2345) but does not cite it as establishing a standard for pre-enforcement challenges—even though the granted Question Presented in *Susan B. Anthony List* referred explicitly to the question of what the pre-enforcement standard should be.

[9] Question Presented, *Susan B. Anthony List v. Driehaus*, No. 13-193, *available at* http://www.supremecourt.gov/qp/13-00193qp.pdf.

Court need not rely on the additional risks posed by the administrative enforcement scheme. *Id.* at 2346.

All of those factors—a First Amendment interest, a statute arguably applicable to the Petitioners' intended speech and conduct, and the threat of criminal enforcement—are present here, but the First Circuit nonetheless rejected Petitioners' claims to standing by applying the heightened standard it held was mandated by *Clapper*. Had *Susan B. Anthony List* been decided on the First Circuit's standard, the petitioners there would not have been able to prove that the injury they feared was "certainly impending" within the meaning of *Clapper*. The election cycle during which the Ohio Election Commission had found "probable cause" to hold a hearing on whether Susan B. Anthony List had violated the Ohio false statement statute was already over; the aggrieved candidate who had previously complained to the Commission about the veracity of Susan B. Anthony List's intended ads lost his election, withdrew his complaint, and "remains in Africa on a multi-year assignment with the Peace Corps" and might never run for Congress again; and "SBA List does not say that it plans to lie or recklessly disregard the veracity of its speech" in the future, despite the fact that the statute required a "knowing" or "reckless[ly]" false statement. *Susan B. Anthony List v. Driehaus*, 525 Fed. Appx. 415, 419-22 (6th Cir. 2013). Yet this Court unanimously found the absence of a specific threat of enforcement[10] irrelevant: "As long as petitioners continue to engage in comparable electoral speech [to the statements about taxpayer-

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[10] "[P]etitioners' [intended future] speech focuses on the broader issue of support for the ACA, not on the voting record of a single candidate. … Because petitioners' alleged future speech is not directed exclusively at [former Congressman] Driehaus, it does not matter whether he 'may run for office again.'" 134 S. Ct. at 2344 (quoting brief).

funded abortion under the ACA that led to the probable cause finding in the last election cycle], that speech will remain *arguably* proscribed by Ohio's false statement statute," notwithstanding that SBA List and the Ohio Electoral Commission may likely again disagree about whether the speech is false (and therefore about whether the speech is *actually* proscribed). 134 S. Ct. at 2344. The outcome in *Susan B. Anthony List* is proof that this Court's pre-enforcement standard remains unchanged in the wake of *Clapper*.

II. The panel's other errors are inextricably bound together with its application of the *Clapper* standard

The First Circuit panel, in applying its novel post-*Clapper* standard, determined that actual prosecution of Petitioners was not "certainly impending." It did so by erroneously relying on two factors: the presence of a generic First Amendment savings clause in the AETA, and the fact that the government disagreed with Petitioners' view of the reach of the statutory text's prohibitions. *See* App. 15a-16a. But it is well-established that the presence of a savings clause cannot save a criminal statute that on its terms is vague and overbroad under the First Amendment,[11] because lay persons are not pre-

[11] *See, e.g.*, *Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316, 333 (4th Cir. 2001) (savings clause could not save regulatory statutes from a constitutional challenge because it was "repugnant to the straightforward, limiting language of the respective statutory provisions" (citing *Looney v. Com.*, 133 S.E. 753, 755 (Va. 1926)); *Fisher v. King*, 232 F.3d 391, 395 (4th Cir. 2000) (savings clause is disregarded as void when it is inconsistent with the body of the statute, citing *Sutherland on Statutory Construction* treatise); *CISPES (Committee in Solidarity with the People of El Salvador) v. FBI*, 770 F.2d 468, 474 (5th Cir. 1985) (First Amendment savings clause "cannot substantively operate to save an otherwise invalid

sumed to be able to understand what the First Amendment does and does not protect to the degree of certainty required to provide adequate notice in the criminal context.[12] Despite this, the First Circuit panel stated that it placed special weight on the savings clause because it added credibility to the government's disavowal that the statute reached as far as Petitioners have claimed, expressly citing to *Clapper*.[13] *See* App. 16a.

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statute"); *State v. Machholz*, 574 N.W.2d 415, 421 n.4 (Minn. 1998) (same); *Long v. State*, 931 S.W.2d 285, 295 (Tex. Crim. App. 1996) (same). *Cf. Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (Court considered First Amendment savings clause similar to AETA's in material support statute as evidence of Congress' intent not to violate the First Amendment, *id.* at 36, but actually analyzed statute's substantive provisions and definitions to determine whether the statute violated the Constitution, *id.* at 18-25).

[12] *See, e.g.*, *Long v. State*, 931 S.W.2d 285, 295 (Tex. Crim. App. 1996) (an affirmative defense approach to protecting First Amendment rights "would relegate the First Amendment issue to a 'case-by-case adjudication,' creating [a] vagueness problem" because it "would require people of ordinary intelligence—and law enforcement officials—to be First Amendment scholars"); *id.* ("Because First Amendment doctrines are often intricate and/or amorphous, people should not be charged with notice of First Amendment jurisprudence, and a First Amendment defense cannot by itself provide adequate guidelines for law enforcement"); *State v. Moyle*, 705 P.2d 740, 748 n.12 (Or. 1985) (en banc) (an overbroad statute "cannot be saved simply by adding or implying a limitation" for constitutionally privileged conduct. This "trades overbreadth for vagueness" and "abandons scrutiny of the statute altogether for case-by-case adjudication"); *Id.* ("an attempt to charge people with notice of First Amendment caselaw would undoubtedly serve to chill free expression").

[13] The panel specifically cited to *Clapper*'s invocation of "rules of construction [in the FISA Amendments Act] meant to protect Fourth Amendment rights in assessing the lack of an impending injury." App. 16a. Of course, in *Clapper* that provision would have been considered *ex ante* by a FISC judge in approving or disapproving of any application for surveillance powers made under the FISA Amendments Act, reducing the odds that the *Clapper* plaintiffs

The panel never resolved the disagreement between Petitioners and the government about the reach of the AETA's text, instead finding that the government's position on that issue (reinforced by the savings clause) meant prosecution could not be "certainly impending" or otherwise sufficiently likely under *Clapper*'s heightened standard. *See* App. 15a ("no enforcement has been threatened as to plaintiffs' proposed activities [as described in the complaint.]… The Government has affirmatively represented [in the course of this litigation] that it does not intend to prosecute such conduct because it does not think it is prohibited by the [AETA]."); App. 18a (because government "argues that 'the statute simply does not prohibit the actions plaintiffs intend to take,' … they can have no legitimate fear of prosecution"); App. 25a (Petitioners' fears constitute "speculation that the Government will enforce the Act pursuant to interpretations it … now rejects").

Again, that is an approach at odds with this Court and the vast majority of federal courts, which have been consistently unwilling to deny standing even where a prosecutor expressly states that on her interpretation of a statute the plaintiffs cannot be prosecuted, because even the Attorney General "does not bind the ... courts[,] ... law enforcement," subsequent attorneys general, or even her own future actions. *American Booksellers*, 484 U.S. at 395; *see also Kucharek v. Hanaway*, 902 F.2d 513, 519 (7th Cir. 1990) (interpretation of statute offered by Attorney General is not binding because he may "change his mind [or] may be replaced in office"); *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 383 (2d Cir.

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would be injured by overbroad surveillance that *violated the Fourth Amendment* (their central claim). In the context of a criminal statute, persons situated similarly to Petitioners would have to act first and then take their chances that the First Amendment might protect them.

2000) ("there is nothing that prevents the State from changing its mind. It is not forever bound, by estoppel or otherwise, to the view of the law that it asserts in this litigation."); *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1192-93 (10th Cir. 2000) (representations "that under the State's construction of [the statute], organizations like [the plaintiffs] will not be prosecuted.... are insufficient to overcome the chilling effect of the statute's plain language."); *Vittitow v. City of Upper Arlington*, 43 F.3d 1100, 1106 (6th Cir. 1995) ("it is not clear that counsel can bind either the legislative body of the City or its police department."); *Chamber of Commerce v. Fed. Election Comm'n*, 69 F.3d 600, 603 (D.C. Cir. 1995) ("[n]othing ... prevents the Commission from enforcing its rule at any time with, perhaps, another change of mind of one of the Commissioners.").

The panel's reliance on these two factors other courts have consistently disregarded—the presence of a generic savings clause and prosecutorial disavowal—is unique because its central inquiry is unique: asking whether *actual prosecution* is likely. That inquiry, in turn, flows from its central error of assuming that *Clapper* marked a sea-change in the threshold of proof required to establish pre-enforcement standing.

III. The panel decision stands at odds with the law in every other circuit

In applying a heightened standing threshold in light of *Clapper*, the First Circuit panel also created a conflict with every other Court of Appeals that has considered the question of standing in the context of pre-

enforcement challenges,[14] including at least five that have considered the issue after *Clapper*. *See Hedges v. Obama*, 724 F.3d 170, 196-200 (2d Cir. 2013) (discussing differing standards under *Clapper* and *Babbitt* but ultimately citing *Babbitt* and stating that standing is met when "there is a 'credible threat of prosecution'"); *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682 (2d Cir. 2013) (post-*Clapper* decision finding that standing was satisfied where plaintiff faced a "credible threat' that the law would be enforced against it); *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000) (standing satisfied where plaintiff "may legitimately fear that it will face enforcement of the statute" under a "reasonable enough" interpretation of statute); *Constitution Party v. Aichele*, 2014 U.S. App. LEXIS 12926, at *40-*44 and *44 n. 21 (3d Cir. July 9, 2014) (discussing *Clapper* and *Susan B. Anthony* and stating that "[i]t is enough [for standing] that there is a reasonable evidentiary basis to conclude" that plaintiffs' activity will be limited by the statute); *Cooksey v. Futrell*, 721 F.3d 226,

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[14] The list of citations given in the text includes every circuit other than the First and the Federal Circuit, which lacks jurisdiction over criminal appeals. *See* 28 U.S.C. § 1295.

Prior to the decision below, the First Circuit had consistently set a low barrier: "As to whether a First Amendment plaintiff faces a credible threat of prosecution, the evidentiary bar that must be met is extremely low. 'Courts will assume a credible threat of prosecution in the absence of compelling contrary evidence.'" *Mangual v. Rotger-Sabat*, 317 F.3d 45 (1st Cir. 2003) (quoting *New Hampshire Right to Life PAC v. Gardner*, 99 F.3d 8, 15 (1st Cir. 1996)). As the panel noted, App. 15a, "[b]efore the decision in *Clapper*, this circuit applied an 'objectively reasonable' fear of prosecution injury standard in First Amendment pre-enforcement actions, at least as to state statutes. *See Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 48 (1st Cir. 2011); *Ramirez v. Ramos*, 438 F.3d 92, 99 (1st Cir. 2006); *Mangual*, 317 F.3d at 57; *R.I. Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 31 (1st Cir. 1999); *N.H. Right to Life*, 99 F.3d at 14."

235-38 (4th Cir. 2013) (post-*Clapper* decision citing *Babbitt* and finding that there was a "credible threat of prosecution" because statute "facially restricts" plaintiff's activity); *NRA of Am., Inc. v. McCraw*, 719 F.3d 338 (5th Cir. 2013) (post-*Clapper* case applying *Babbitt*'s "credible threat of prosecution" standard to a evaluate a pre-enforcement challenge to a criminal statute); *McGlone v. Bell*, 681 F.3d 718 (6th Cir. 2012) (citing standard in *Babbitt* and noting that "[p]laintiffs may have standing even if they have never been prosecuted or threatened with prosecution");[15] *Goldhamer v. Nagode*, 621 F.3d 581, 586 (7th Cir. 2010) ("[W]hen an ambiguous statute arguably prohibits certain protected speech, a reasonable fear of prosecution can provide standing for a First Amendment challenge"); *281 Care Comm. v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011) (finding credible threat of prosecution" where defendants could not show official policy of non-enforcement or that statute had a "long history of disuse"); *Valle Del Sol Inc. v. Whiting*, 732 F.3d 1006, 1015-17 (9th Cir. 2014) (post-*Clapper* case applying standard articulated in *Babbitt*, declining to follow defendants' reading of statute, and finding that plaintiff faced a credible threat of prosecution under a "reasonable reading" of statute); *Citizens for Responsible Gov't State Pol. Action Comm. v. Davidson*, 236 F.3d 1174, 1192 (10th Cir. 2000) (applying standard articulat-

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[15] The petition for certiorari in *Susan B. Anthony List* (at 19-20) argued that the Sixth Circuit had also decided a pair of earlier cases demanding a heightened threshold for standing. In *Morrison v. Bd. Of Educ.*, 521 F.3d 602, 609 (6th Cir. 2008), a divided panel of the court dismissed a claim for nominal damages by holding that "some specific action on the part of the defendant" was required to validate the subjective chill of the plaintiff, but was absent on the facts of the case; arguably that represents a heightened threshold. The other case seems distinguishable: in *Fieger v. Mich. Supreme Court*, 553 F.3d 955, 965 (6th Cir. 2009) the purported chilling-effect plaintiff "d[id] not allege any intended speech or conduct at all."

ed in *Babbitt* to find standing and rejecting defendants' construction of the statute because defendants' representations "are insufficient to overcome the chilling effect of the statute's plain language."); *Graham v. Butterworth*, 5 F.3d 496, 499 (11th Cir. 1993) (finding a "credible threat of prosecution" for purposes of standing where plaintiffs "intended to engage in arguably protected conduct, which the statute seemed to proscribe," despite fact "state attorney declined to prosecute" believing plaintiff "lacked the criminal intent" required under statute); *Act Now to Stop War v. Dist. of Columbia*, 589 F.3d 433, 435 (D.C. Cir. 2009) (where statute burdened expressive freedom, standing is satisfied when plaintiff makes a "credible statement of intent to engage in violative conduct" and there is a "conventional background expectation that the government will enforce the law" (quoting *Seegars v. Ashcroft*, 396 F.3d 1248, 1253 (D.C. Cir. 2005))).

The proper approach when the reach of a criminal statute is disputed is to ask whether plaintiffs have set forth an interpretation of the statutory text that is "reasonable enough that [they] may legitimately fear ... enforcement ... by the [government] brandishing the [interpretation] proffered by" plaintiffs, *Hedges*, 724 F.3d at 198 (quoting *Vermont Right to Life*, 221 F.3d at 383). If so, their actions are "arguably proscribed" and they face a "credible threat of prosecution" sufficient to underlie standing, regardless of whether current prosecutors agree with their reading of the statute's scope. *Susan B. Anthony List*, 134 S. Ct. at 2344, 2342 (quoting *Babbitt*, 442 U.S. at 298). Plaintiffs here may not have the best or most correct reading of the statute, but that is an issue for the merits, not for the standing inquiry, which only demands that their interpretation be "objectively reasonable"—as the law in the First Circuit had demanded prior to the panel opinion here. Had the panel reached

the merits, it could have decided whether the government's interpretation of the AETA's text, as applied to the Petitioners' intended actions, was in fact accurate, or whether in fact the statute reached speech and conduct protected by the First Amendment, and all parties would have had a greater ability to conform their behavior to the law going forward.

IV. Summary disposition of this petition is appropriate

The panel opinion and the petition for rehearing *en banc* were decided while *Susan B. Anthony List* was still pending before this Court.[16] Under the circumstances, the most efficient resolution of the issues presented by this petition would be for this Court to grant the writ of certiorari, vacate the panel opinion, and remand to the Court of Appeals for further proceedings.[17]

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[16] The rehearing petition was filed the day before argument in *Susan B. Anthony List*, and Petitioners requested that the Court of Appeals hold the petition until after this Court heard argument and decided *Susan B. Anthony List*, but the First Circuit declined to do so. *See* Statement, *supra* p. 12 n.6.

[17] *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam) ("Where intervening developments ... reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration ... a GVR order is ... potentially appropriate."); *Henry v. Rock Hill*, 376 U.S. 776, 776 (1964) (per curiam) (historically "our practice ... where[] not certain that the case was free from all obstacles to reversal on an intervening precedent" has been to GVR lower court opinion); 28 U.S.C. § 2106; Sup. Ct. R. 16.1.

There is no independent ground for sustaining the decision below. The panel opinion purports to briefly analyze the AETA provisions to determine whether they actually prohibit Petitioners' intended activities, App. 18a-25a, but it simply reprises the analysis it applied in rejecting standing under *Clapper*: the AETA provisions pose no threat to Petitioners because the government disavows the

statute's reach to their intended activities, App. 18a, and the First Amendment savings clause in any event eliminates any risks posed by a literal reading of the statutory text, App. 20a-24a, therefore actual prosecution cannot be sufficiently likely to ground standing. For the reasons already set forth in Part II, supra pp. 20-23, that does not constitute a proper resolution of the meaning of the AETA's text; rather, it is an excuse for not conducting such a review.

As in *Wellons v. Hall*, 558 U.S. 220, 222 (2010), that the panel "gave this question, at most, perfunctory consideration" is no obstacle to summary disposition of this petition via a GVR order. In *Wellons*, the Eleventh Circuit had found a capital habeas petitioner's request for discovery in habeas procedurally barred, but stated in the alternative that on the merits it would have rejected the discovery request on the merits in any event. This Court nonetheless granted certiorari, vacated, and remanded the case: "Having found a procedural bar [preventing it from reaching the merits] … the Eleventh Circuit had no need to address whether petitioner was otherwise entitled to an evidentiary hearing and gave this question, at most, perfunctory consideration that may well have turned on the District Court's finding of a procedural bar." *Id.*

Here, the panel concluded standing was lacking based on the fact that prosecutors disavowed the Petitioner's reading of the statute, which the panel found credible because of the savings clause; it then concluded the AETA does not mean what Petitioners fear it does for the same reasons. *See supra* at pp. 21-23. Because the panel's reasoning on the "procedural bar" (posed by *Clapper*) precisely parallels its cursory and legally-flawed survey of the meaning of the AETA's text, exactly as in *Wellons*, there is no way to be sure that the conclusion below would not have been altered by consideration of the intervening authority of this Court's decision in *Susan B. Anthony List*. *Cf. Wellons*, 558 U.S. at 224 ("even assuming that the Eleventh Circuit intended to address [the merits as an alternative ground for its judgment], we cannot be sure that its reasoning [on the merits] really was independent of [its] error" on the procedural bar).

CONCLUSION

For the reasons set forth above, Petitioners respectfully request this Court grant the petition for certiorari, vacate the panel opinion, and remand to the First Circuit for further proceedings in light of this Court's decision in *Susan B. Anthony List v. Driehaus*.

Respectfully submitted,

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August 4, 2014

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 13-1490

SARAHJANE BLUM; RYAN SHAPIRO; LANA LEHR; LAUREN GAZZOLA; IVER ROBERT JOHNSON, III,
Plaintiffs, Appellants,
v.
ERIC H. HOLDER, JR., Attorney General,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Joseph L. Tauro, *U.S. District Judge*]

Before
Lynch, *Chief Judge*,
Thompson and Kayatta, *Circuit Judges*.

Rachel Meeropol, with whom *Alexis Agathocleous*, *Center for Constitutional Rights*, *Alexander A. Rein*ert, *David Milton*, and *Howard Friedman* were on brief, for appellants.

Matthew M. Collette, Attorney, Appellate Staff, Civil Division, with whom *Stuart F. Delery*, Assistant Attor-

ney General, *Carmen M. Ortiz*, United States Attorney, and *Michael Jay Singer*, Attorney, Appellate Staff, Civil Division, were on brief, for appellee.

Odette J. Wilkens, *Christine L. Mott*, Chair, Committee on Animal Law, *Brian J. Kreiswirth*, Chair, Committee on Civil Rights, and *Kevin L. Barron* on brief for T*he Association of the Bar of the City of New York*, amicus curiae in support of appellants.

Matthew R. Segal, *Sarah R. Wunsch*, *David J. Nathanson*, and *Wood & Nathanson, LLP* on brief for *American Civil Liberties Union of Massachusetts*, *American Civil Liberties Union*, and *National Lawyers Guild*, amici curiae in support of appellants.

March 7, 2014

[744 F.3d at *792] **LYNCH, *Chief Judge*.** Sarahjane Blum and four others are committed and experienced animal right activists. Although they have never been prosecuted or threatened with prosecution under the Animal Enterprise Terrorism Act ("AETA" or "Act"), 18 U.S.C. § 43, which criminalizes "force, violence, and threats involving animal enterprises," they sued to obtain declaratory and injunctive relief that the statute is unconstitutional under the First Amendment.

The district court dismissed their complaint under Rule 12(b)(1), finding that these plaintiffs lacked standing because they have suffered no injury in fact as required by Article III. *Blum v. Holder*, 930 F. Supp. 2d 326, 337 (D. Mass. 2013). The court held that plaintiffs "failed to allege an objectively reasonable chill" on their First Amendment rights and, hence, "failed to establish an injury-in-fact." *Id.* at 335. We affirm.

I.

In their complaint, plaintiffs allege three constitutional defects in AETA. First, plaintiffs allege that, both on their face and as-applied, subsections (a)(2)(A) and (d) of AETA are substantially overbroad in violation of the First Amendment. Plaintiffs maintain that subsection (a)(2)(A) must be read to prohibit all speech activity with the purpose and effect of causing an animal enterprise to lose profits and that subsection (d)(3) must be read to impose higher penalties on the basis of such loss.[1]

Second, plaintiffs allege that, both on its face and as-applied, AETA discriminates on the basis of content and viewpoint, again in violation of the First Amendment. Plaintiffs argue that the Act, which conditions liability on acting with "the purpose of damaging or interfering with the operations of an animal enterprise,"[2] 18 U.S.C. § 43(a), discriminates on the basis of content by targeting core political speech that impacts the operation of animal enterprises and on the basis of viewpoint by privileging speech that is supportive of animal enterprises

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[1] In their complaint, plaintiffs allege also that AETA subsection (a)(2)(C) is overbroad. On appeal, plaintiffs claim only that subsection (a)(2)(C) is void for vagueness.

[2] AETA defines "animal enterprise" as follows:

> (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 in-tended to advance agricultural arts and sciences[.]

18 U.S.C. § 43(d)(1).

and criminalizing certain speech that is opposed to such enterprises.

Third, plaintiffs allege that, both on its face and as-applied, AETA is void for vagueness. Plaintiffs com-plain that various of the Act's key terms are so imprecise as to prevent a reasonable person from understanding what the statute prohibits, encouraging arbitrary or discriminatory enforcement.

None of the plaintiffs express any desire or intent to damage or cause loss of tangible property or harm to persons. Plaintiffs do allege both that they have an objectively reasonable fear of future prosecution and that they have presently refrained from engaging in certain activities [*793] protected by the First Amendment for fear AETA may be read to cover their activities and so subject them to future prosecution. Both that fear of future harm and that present self-restraint, they say, have already caused them to suffer injury in fact. They do not plead that they have received any information that law enforcement officials have any intention of prosecuting them under AETA. Indeed, the Government has disavowed, before both this court and the district court,[3] any intention to prosecute plaintiffs for what they say they wish to do, characterizing plaintiffs' various AETA interpretations as unreasonable. Plaintiffs do not claim they have engaged in or wish to engage in activities plainly falling within the core of the statute, which is concerned with intentional destruction of property and

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[3] In the memorandum in support of its motion to dismiss before the district court, the Government stated flatly, "Plaintiffs have no concrete, actual intent to engage in specific activity at a specific time in the near future that will possibly subject them to the AETA." At oral argument before this court, the Government insisted "there is no intent to prosecute" plaintiffs for their stated intended conduct, which the Government characterized as "essentially peaceful protest."

making true threats of death or serious bodily injury. We describe what they do claim.

Plaintiff Sarahjane Blum alleges that she would like to, but has been deterred from acting to, lawfully investigate conditions at the Au Bon Canard foie gras farm in Minnesota, to create a documentary film, and to publicize the results of her investigation. She would also like to organize letter-writing and protest campaigns to raise public awareness and pressure local restaurants to stop serving foie gras.

Plaintiff Ryan Shapiro alleges that he would like to lawfully document and film animal rights abuses but is deterred from doing so. Shapiro continues to engage in leafleting, public speaking, and campaign work, but fears that these methods of advocacy are less effective than investigating underlying industry conduct.

Plaintiff Lana Lehr alleges that, but for AETA, she would attend lawful, peaceful anti-fur protests, bring rabbits with her to restaurants that serve rabbit meat, and distribute literature at events attended by rabbit breeders. Lehr alleges that, at present, she limits her animal rights advocacy to letter-writing campaigns, petitions, and conferences.

Plaintiff Iver Robert Johnson, III, alleges that he has been unable to engage in effective animal rights advocacy because *others* are chilled from engaging in protests out of fear of prosecution under AETA. Johnson does not allege that he has refrained from lawful speech activity on the basis of such fear.

Finally, plaintiff Lauren Gazzola alleges that she is chilled from making statements short of incitement in support of illegal conduct. Gazzola was convicted in 2004 under AETA's predecessor statute, the Animal Enterprise Protection Act ("AEPA"), for making true threats against individuals and for planning and executing illegal activities as a member of the United States branch of

Stop Huntingdon Animal Cruelty. Her convictions were upheld on appeal. *See United States v. Fullmer*, 584 F.3d 132, 157 (3d Cir. 2009).

II.

A. *Statutory Framework*

In 1992, Congress enacted AEPA, which criminalized the use of interstate or foreign commerce for intentional physical disruption of the operations of an animal enterprise. In 2002, Congress amended [*794] AEPA, increasing the available penalties. In 2006, in response to "an increase in the number and the severity of criminal acts and intimidation against those engaged in animal enterprises," 152 Cong. Rec. H8590-01 (daily ed. Nov. 13, 2006) (statement of Rep. Sensenbrenner), Congress amended AEPA again, renaming it AETA.

In contrast to AEPA, AETA does not specifically limit its scope to *physical* disruption. AETA also criminalizes placing a person in fear of injury or death regardless of economic damage.[4] 18 U.S.C. § 43(a)(2)(B). AETA makes clear that threats of vandalism, harassment, and intimidation against third parties that are related to or associated with animal enterprises are themselves substantive violations of the Act. *Id.* Finally, AETA makes available increased penalties. *Id.* § 43(b).

AETA is codified under the title "Force, violence, and threats involving animal enterprises." *Id.* § 43. The Act consists of five subsections, four of which are relevant here. Subsection (a) of the Act defines "Offense":

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[4] Before enactment of AETA, federal officials utilized, inter alia, the interstate stalking statute, 18 U.S.C. § 2261A, to police such conduct. *See Fullmer*, 584 F.3d at 138.

> (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) of that per-son, or a spouse or intimate partner of that person by a course of conduct involving threats, acts of vandal-ism, property damage, criminal trespass, harassment, or intimidation; or
> > >
> > > (C) conspires or attempts to do so; shall be punished as provided for in subsection (b).

Id. § 43(a).

Subsection (b) sets out the penalties. Of significance here, AETA indexes available penalties to whether and in some instances to what extent the offending conduct results in "economic damage," "bodily injury," "death," or a "reasonable fear of serious bodily injury or death." *Id.* § 43(b).

Subsection (d) in turn defines various key terms.[5] Most important here, subsection (d) defines "economic damage" as used in the penalties subsection as follows:

> (3) the term "economic damage" --
>
> > (A) means the replacement costs of lost or dam-aged property or records, the costs of repeating an interrupted or invalidated experiment, the loss of profits, or increased costs, including losses and in-creased 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
> >
> > [*795] (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).

Last, subsection (e) of the Act articulates two relevant rules of construction:

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[5] Subsection (c) of the Act establishes a scheme for restitution. 18 U.S.C. § 43(c).

> (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; [or]
> >
> > (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[.]

Id. § 43(e).[6]

B. *Procedural History*

Plaintiffs filed this action in the Massachusetts District Court on December 15, 2011. On March 9, 2012, the Government filed a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction, arguing lack of standing, and under Rule 12(b)(6) for failure to state a claim. The district court on March 18, 2013 granted the Government's motion under Rule 12(b)(1). *Blum*, 930 F. Supp. 2d at 335. The court held that plain-tiffs "failed to allege an objectively reasonable chill" on their

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[6] Subsection (3) also articulates a third rule of construction according to which AETA shall not be construed "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." 18 U.S.C. § 43(e)(3).

First Amendment rights and, hence, "failed to establish an injury-in-fact" as required by Article III. *Id.*

III.

This court reviews de novo a district court's grant of a motion to dismiss for lack of standing. *McInnis-Misenor v. Me. Med. Ctr.*, 319 F.3d 63, 67 (1st Cir. 2003). For purposes of review, we accept as true all material allegations in the complaint and construe them in plaintiffs' favor. *Mangual v. Rotger-Sabat*, 317 F.3d 45, 56 (1st Cir. 2003). However, "this tenet does not apply to 'statements in the complaint that merely offer legal conclusions couched as facts or are threadbare or conclusory,'" *Air Sunshine, Inc. v. Carl*, 663 F.3d 27, 33 (1st Cir. 2011) (quoting *Soto-Torres v. Fraticelli*, 654 F.3d 153, 158 (1st Cir. 2011)), or to allegations so "speculative that they fail to cross 'the line between the conclusory and the factual,'" *id.* (quoting *Penalbert-Rosa v. Fortuno-Burset*, 631 F.3d 592, 595 (1st Cir. 2011)).

A. *The Law of Standing for First Amendment Pre-Enforcement Suits*

"'The party invoking federal jurisdiction bears the burden of establishing' standing." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1148 (2013) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

Article III restricts a federal court's jurisdiction to certain "Cases" and "Controversies." U.S. Const. art. III. "'One element of the case-or-controversy requirement' is that plaintiffs 'must establish that they have standing to sue.'" *Clapper*, 133 S. Ct. at 1146 (quoting *Raines v. Byrd*, 521 U.S. 811, 818, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997)). This requirement [*796] "is founded in concern about the proper—and properly limited—role

of the courts in a democratic society." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492-93 (2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

To show standing, plaintiffs must "'allege[] such a personal stake in the outcome of the controversy' as to warrant [their] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on [their] behalf." *Warth*, 422 U.S. at 498-99 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). As *Clapper v. Amnesty Int'l USA*, 133 S. Ct. at 1147, notes, in all cases, to establish Article III standing:

> [Plaintiffs must show] an injury [that is] "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, []130 S. Ct. 2743, 2752[] (2010). "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending." [*Lujan*, 504 U.S. at] 565 n.2 (internal quotation marks omitted). Thus, we have repeatedly reiterated that "threatened injury must be certainly impending to constitute injury in fact," and that "[a]llegations of possible future injury" are not sufficient. *Whitmore* [*v. Arkansas*], 495 U.S. [149], 158 [(1990)] (emphasis added; internal quotation marks omitted)[.]

Id. (sixth alteration in original) (citation omitted).[7]

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[7] To be clear, before *Clapper*, the Supreme Court had imposed a "certainly impending" standard in the context of a First Amend-

This court has said that, in challenges to a state statute under the First Amendment:

> [T]wo types of injuries may confer Article III standing without necessitating that the challenger actually undergo a criminal prosecution. The first is when "the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the] statute, and there exists a credible threat of prosecution." [*Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)].... The second type of injury is when a plaintiff "is chilled from exercising her right to free expression or forgoes expression in order to avoid enforcement consequences." *N.H. Right to Life* [*Political Action Comm. v. Gardner*], 99 F.3d [8,] 13 [(1st Cir. 1996)][.]

Mangual, 317 F.3d at 56-57 (second alteration in original).

The Supreme Court has long held that as to both sorts of claims of harm, "[a] plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt*, 442 U.S. at 298. "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972).

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ment pre-enforcement challenge to a criminal statute. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).

[*797] Most recently, *Clapper* emphasized that "[o]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." 133 S. Ct. at 1147 (alteration in original) (quoting *Raines*, 521 U.S. at 819-20). We apply that standard here.

In *Clapper*, the Supreme Court addressed the Article III standing requirement for First Amendment and Fourth Amendment challenges to a federal statute. There, the Court addressed a pre-enforcement challenge under the First Amendment by journalists, attorneys, and others to the new Foreign Intelligence Surveillance Act.[8] *Id.* at 1146. That Act authorized the Government to seek permission from the Foreign Intelligence Surveillance Court to electronically survey the communications of non-U.S. persons located abroad, without demonstrating probable cause that the target of the surveillance is a foreign power or agent thereof and without specifying the nature and location of each of the facilities or places at which the surveillance will take place. *See id.* at 1156. The plaintiffs' complaint was not of a threat of enforcement of a criminal statute against them which would lead to a chilling of First Amendment activity, but rather of a more direct chilling of speech and invasion of their First Amendment rights when the Government exercised this new authority. Unlike this case, *Clapper* also raised threats to the plaintiffs' personal privacy interests.

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[8] "Pre-enforcement" is a term used in at least two contexts. In one, as in *Clapper*, the suit is brought immediately upon enactment of the statute, before there has been an opportunity to enforce. In the other, as here, the law has been on the books for some years, and there have been charges brought under it in other cases, but the plaintiffs have not been prosecuted under it and say they fear prosecution.

The *Clapper* trial court had held the plaintiffs lacked standing; the Second Circuit disagreed; and the Supreme Court reversed. *Id.* at 1146. The Supreme Court first held that the Second Circuit had erred as a matter of law in holding that the plaintiffs could establish the needed injury for standing merely by showing an "objectively reasonable likelihood that the plaintiffs' communications are being or will be monitored under the [Act]." *Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 134 (2d Cir. 2011). The Court held that the Second Circuit's "objectively reasonable likelihood" standard was inconsistent with "the well-established requirement that threatened injury must be 'certainly impending.'" *Clapper*, 133 S. Ct. at 1147 (quoting *Whitmore*, 495 U.S. at 158). It is not enough, the Court held, to allege a subjective fear of injurious government action, even if that subjective fear is "not fanciful, irrational, or clearly unreasonable."[9] *Id.* at 1151 (quoting *Amnesty Int'l USA v. Clapper*, 667 F.3d 163, 180 (2d Cir. 2011) (Raggi, J., dissenting from denial of rehearing en banc)).

Clapper also rejected plaintiffs' contention that "present costs and burdens that are based on a fear of surveillance" amounted to a cognizable injury. *Id.* It reasoned that plaintiffs "cannot manufacture standing merely by inflicting harm on [*798] themselves based on their fears of hypothetical future harm that is not certainly impending." *Id.*

In rejecting the Second Circuit's "objectively reasonable likelihood" standard, the Supreme Court may

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[9] As one treatise has noted, *Clapper* "signaled a renewed caution about finding injury in fact based on probabilistic injury and the reasonable concerns that flow from it." Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer, & David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 9 (6th ed. Supp. 2013). The treatise did not suggest the *Clapper* injury standard was inapplicable to challenges to criminal statutes.

have adopted a more stringent injury standard for standing than this court has previously employed in pre-enforcement challenges on First Amendment grounds to state statutes.

Before the decision in *Clapper*, this circuit applied an "objectively reasonable" fear of prosecution injury standard in First Amendment pre-enforcement actions, at least as to state statutes.[10] *See Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 48 (1st Cir. 2011); *Ramirez v. Ramos*, 438 F.3d 92, 99 (1st Cir. 2006); *Mangual*, 317 F.3d at 57; *R.I. Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 31 (1st Cir. 1999); *N.H. Right to Life*, 99 F.3d at 14.

In assessing the risk of prosecution as to particular facts, weight must be given to the lack of a history of enforcement of the challenged statute to like facts, that no enforcement has been threatened as to plaintiffs' proposed activities. Particular weight must be given to the Government disavowal of any intention to prosecute on the basis of the Government's own interpretation of the statute and its rejection of plaintiffs' interpretation as unreasonable. The Government has affirmatively represented that it does not intend to prosecute such conduct because it does not think it is prohibited by the statute.[11] *See Holder v. Humanitarian Law Project* ("*HLP*"), 130 S. Ct. 2705, 2717 (2010) (holding that plaintiffs face a credible threat of prosecution where there is a history of

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[10] In *Ramirez v. Ramos*, 438 F.3d 92, 98 (1st Cir. 2006), we said that to constitute a cognizable injury, both fear of prosecution and chilling "require[] a credible threat -- as opposed to a hypothetical possibility -- that the challenged statute will be enforced to the plaintiff's detriment if she exercises her First Amendment rights."

[11] We think that *Clapper* does not call into question the assumption that the state will enforce its own non-moribund criminal laws, absent evidence to the contrary. *See N.H. Right to Life*, 99 F.3d at 15. That is not the issue here, where the Government itself says the statute does not apply.

prosecution under the challenged law and "[t]he Government has not argued … that plaintiffs will not be prosecuted if they do what they say they wish to do" (emphasis added)); *Babbitt*, 442 U.S. at 302 ("Moreover, the State has not disavowed any intention of invoking the criminal penalty provision against [entities] that [violate the statute]." (emphasis added)); *N.H. Right to Life*, 99 F.3d at 17 ("Indeed, the defendants have not only refused to disavow [the statute] but their defense of it indicates that they will some day enforce it."); *see also Mangual*, 317 F.3d at 58 (actual threat of prosecution).

This Government disavowal is even more potent when the challenged statute contains, as here, explicit rules of construction protecting First Amendment rights, which in themselves would inhibit prosecution of First Amendment activities. In *Clapper*, the Court credited the specific rules of construction contained in the statute meant to protect Fourth Amendment rights in assessing the lack of an impending injury. 133 S. Ct. at 1145 n.3.

In *Clapper*'s analysis of injury, it considered that the fear of monitoring of communication rested on what the Court called a highly speculative set of assumptions. This included an assumption that the Government [*799] would use the new surveillance statute rather than other available means to achieve the same ends.[12] *Id.* Here, as well, plaintiffs' fear of prosecution and purported corresponding reluctance to engage in expressive activity rest on speculation. In fact, prosecution under AETA has been rare and has addressed actions taken that are different from those plaintiffs propose to undertake.[13] For

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[12] For this reason, the Supreme Court held that, in addition to being "too speculative," *Clapper*, 133 S. Ct. at 1143, plaintiffs' alleged in-jury was not "fairly traceable" to the challenged law, *id.* at 1149. We do not reach the fairly traceable ground.

[13] In addition to *United States v. Buddenberg* ("*Buddenberg II*"),

its part, the Government has disavowed any intention to prosecute plaintiffs for their stated intended conduct because, in its view, that conduct is not covered by AETA.

Plaintiffs argue that *Clapper* has no bearing on injury and standing with respect to this First Amendment pre-enforcement challenge because this challenge is to a criminal statute, and Clapper did not involve a criminal statute. Clapper, however, draws no such distinction and is expressly concerned with Article III injury requirements. Plaintiffs' position is inconsistent with footnote 5 of *Clapper*, in which the Supreme Court held that plaintiffs' claimed injury was too speculative even under the potentially more lenient "substantial risk" of harm standard the Court has applied in some cases. *Id.* at 1150 n.5 (quoting *Monsanto Co.*, 130 S. Ct. at 2754-55).

Clapper acknowledged that the Court's "cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about." 133 S. Ct. at 1150 n.5. Involving a challenge to a decision of "the political branches in the fields of intelligence gathering and foreign affairs," *id.* at 1147, *Clapper* left open the question whether the previously-applied "substantial risk" standard is materially different from the "clearing impending" requirement. *Id.* As one example, the Court cited *Babbitt*, which involved a First Amendment, pre-enforcement challenge to a criminal statute. *Id. Babbitt*, unlike this case, involved a realistic threat of enforcement where the state had not disavowed any intention to prosecute. 442 U.S. at 302; *see also HLP*, 130 S. Ct. at 2717; *Virginia v. Am. Book Sellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988).

No. CR-09-00263 RMW, 2010 U.S. Dist. LEXIS 78201, 2010 WL 2735547 (N.D. Cal. July 12, 2010), discussed later, plaintiffs cite in their complaint two AETA prosecutions, both for the unlawful release of farm animals and related vandalism.

We reject plaintiffs' arguments that *Clapper* has no application here.[14] As *Clapper* helps make clear, plaintiffs' alleged injuries are "too speculative for Article III purposes" and no prosecution is even close to impending. 133 S. Ct. at 1147 (quoting *Lujan*, 504 U.S. at 565 n.2). [*800]

B. *Plaintiffs' Proffered Statutory Interpretation Does Not Make Out the Needed Injury*

In addition, we find that plaintiffs have not established the needed degree of injury to establish standing based on their proffered interpretations of the provisions of the statute. This is so even under the potentially more lenient "substantial risk" standard or even the "objectively reasonable" standard. *See Ramirez*, 438 F.3d at 98-99 (holding that plaintiff's fear was not "objectively reasonable" when she "never stated an intention to engage in any activity that could reasonably be construed to fall within the confines of the [challenged law]"). The United States argues that "the statute simply does not prohibit the actions plaintiffs intend to take," so they can have no legitimate fear of prosecution.

Plaintiffs argue the district court erred 1) in holding that their expansive interpretation of subsection (a)(2)(A), the destruction of property subsection, was un-

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[14] To the extent plaintiffs may intend to engage in clearly proscribed conduct, they lack standing to assert a vagueness claim. *See HLP*, 130 S. Ct. at 2718-19 ("We consider whether a statute is vague as applied to the particular facts at issue, for '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'" (alteration in original) (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982))); *Whiting v. Town of Westerly*, 942 F.2d 18, 22 (1st Cir. 1991) (no standing where plaintiff's proposed conduct is clearly proscribed); *Eicher v. United States*, 774 F.2d 27, 29 (1st Cir. 1985) (same).

reasonable and, hence, that their fear of prosecution under that subsection was unreasonable as well; 2) in failing to recognize plaintiff Lauren Gazzola's standing to challenge subsection (a)(2)(B) on the basis of her would-be intention to advocate but not incite illegal conduct; and 3) in failing to credit their claim that sub-section (a)(2)(C), the conspiracy subsection, could reasonably be interpreted as criminalizing any attempt to interfere with the operations of an animal enterprise. We address each argument in turn.

1. *Subsection (a)(2)(A)*

Plaintiffs argue that subsection (a)(2)(A) of the Act is substantially overbroad because it must be interpreted as criminalizing any expressive activity that intentionally results in the loss of profits to an animal enterprise, even in the absence of damage to or loss of property used, and will be so prosecuted. The United States disavows that reading.

Subsection (a)(2)(A) prohibits the use of interstate or foreign commerce for the purpose of damaging or interfering with the operations of an animal enterprise where, in connection with that purpose, one:

> [I]ntentionally 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 trans-actions with an animal enterprise.

18 U.S.C. § 43(a)(2)(A). Plaintiffs argue that a) "personal property" includes lost profits, and therefore b) the Act makes unlawful all speech, including peaceful demon-

strations, with the purpose and effect of causing an animal enterprise to lose profits.[15]

The United States replies, relying on the plain text, rules of construction, and legislative intent shown in legislative history, that because subsection (a)(2)(A) prohibits only intentional destruction of personal property "used by an animal enterprise," *id.* § 43(a)(2)(A) (emphasis added), the use of "personal property" cannot reasonably lead to prosecutions based merely on expressive activity causing lost profits.

The Government says Congress intended expressive conduct to be protected against prosecution by AETA's rules of construction. Further, if more is needed [*801] as to congressional intent, AETA's legislative history shows the Act was passed to combat "violent acts" such as "arson, pouring acid on cars, mailing razor blades, and defacing victims' homes." 152 Cong. Rec. H8590-01 (daily ed. Nov. 12, 2006) (statement of Rep. Sensenbrenner); *see also id.* (statement of Rep. Scott) ("While we must protect those engaged in animal enterprises, we must also protect the right of those engaged in [F]irst [A]mendment freedoms of expression regarding such enterprises. It goes without saying that [F]irst [A]mendment freedoms of expression cannot be defeated by statute. However, to reassure anyone concerned with the intent of this legislation, we have added in the bill assurances that it is not intended as a restraint on freedoms of expression such as lawful boycotting, picketing or otherwise engaging in lawful advocacy for animals."); 152 Cong. Rec. S9254-01 (daily ed. Sept. 8, 2006) (statement of Sen. Feinstein) ("[T]his legislation confronts

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[15] The district court held that "personal property" as used in subsection (a)(2)(A) must be read to encompass only "[]tangible" things, reasoning that subsection (a)(2)(A) provides as illustrations of "personal property" two "[]tangible[s]," namely "animals" and "records." *Blum*, 930 F. Supp. 2d at 336-37.

these terrorist threats in [a] manner that gives due protections under the First Amendment. I fully recognize that peaceful picketing and public demonstrations against animal testing should be recognized as part of our valuable and sacred right to free expression.").

This court need not decide in the abstract whether "personal property . . . used by an animal enterprise" could ever be reasonably interpreted to include intangibles such as profits.[16] We are satisfied that AETA includes safeguards in the form of its expression-protecting rules of construction, which preclude an interpretation according to which protected speech activity resulting in lost profits gives rise to liability under subsection (a)(2)(A).

Plaintiffs insist that AETA's rules of construction cannot save an otherwise unlawful statute and so are irrelevant. Our focus is on the congressional intent stated in the statute as to what conduct is covered. Congress has made it clear that prosecutions under the statute should not be brought against "any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution." 18 U.S.C. § 43(e)(1). We have no reason to think prosecutors will ignore these plain expressions of limiting intent.

2. *Subsection (a)(2)(B)*

Plaintiffs argue next that plaintiff Lauren Gazzola has a reasonable fear of prosecution under AETA subsection (a)(2)(B), which prohibits "intentionally plac[ing] a person in reasonable fear of ... death ... or serious bodily injury ... by a course of conduct involving threats, acts

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[16] We note that under *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), any fact that increases a maximum available criminal sentence must be found by a jury beyond a reasonable doubt.

of vandalism, property damage, criminal trespass, harassment, or intimidation." *Id.* § 43(a)(2)(B). Gazzola alleges a desire to voice general support for illegal action by others and to participate in lawful pro-tests. Gazzola alleges further that she is chilled from en-gaging in such general advocacy for fear that it might fall under subsection (a)(2)(B).

Gazzola alleges no intention to engage in "vandalism, property damage, criminal trespass, harassment, or intimidation." Nor does she allege an intention to act in a way that would give rise to a "reasonable fear of ... death ... or serious bodily injury." Indeed, Gazzola specifically disavows any intention to engage in advocacy that rises to the level of incitement. *See Ashcroft v. Free Speech Coal.*, 535 U.S. [*802] 234, 253 (2002) ("The government may suppress speech for advocating the use of force or a violation of law only if 'such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'" (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam))).[17]

Taking her disavowal in combination with AETA's specific exemption from liability of "any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment," 18 U.S.C. § 43(e)(1), Gazzola's fear of prosecution for the lawful activities she describes under subsection (a)(2)(B) is unreasonable.

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[17] Plaintiffs complain that, in the wake of *Virginia v. Black*, 538 U.S. 343 (2003), it is unclear whether "true threats" require subjective intent. *See United States v. Clemens*, 738 F.3d 1, 2-3 (1st Cir. 2013) (noting circuit split on issue, finding no reason to depart from this circuit's objective test). However, as this court has explained, "[i]t is rare that a jury would find that a reasonable speaker would have intended a threat under the particular facts of a case but that a competent defendant did not." *Id.* at 12. The argument does not advance Gazzola's cause.

That Gazzola previously engaged in and was convicted under AEPA for plainly illegal conduct does not help her claim that she would be prosecuted for legal expressive activities. Gazzola's previous actions went well beyond expressing general support for illegal action by others. The Third Circuit found that Gazzola and her co-defendants "coordinated and controlled SHAC's [illegal] activities," engaged in "[d]irect action" and "intimidation and harassment," and "participated in illegal protests, in addition to orchestrating the illegal acts of others." *Fullmer*, 584 F.3d at 155-56.

3. *Facial Attack on Subsection (a)(2)(C)*

Last, plaintiffs argue that the structure of the conspiracy subsection of the Act could reasonably be interpreted to criminalize any conspiracy (or attempt) to damage or interfere with the operations of an animal enterprise, even when there is no intent to or accomplishing of any damage or destruction of property or causing fear of serious bodily injury or death. Under AETA, liability exists where an individual uses interstate or foreign commerce "for the purpose of damaging or interfering with the operations of an animal enterprise," 18 U.S.C. § 43(a)(1), and, in connection with such purpose, intentionally damages or destroys property, *id.* § 43(a)(2)(A), intentionally places a person in fear of serious bodily injury or death, *id.* § 43(a)(2)(B), or "conspires or attempts to do so," *id.* § 43(a)(2)(C).

The dispute here is to what "so" in subsection (a)(2)(C) refers. The Government maintains that the "so" can only be read to refer to the activities described in subsections (a)(2)(A)-(B), that is, intentionally harming property or placing a person in reasonable fear of serious bodily injury or death. *See id.* § 43(a)(2)(A) (conditioning liability on "intentionally damag[ing] or caus[ing]

the loss of any real or personal property," etc.); *id.* § 43(a)(2)(B) (conditioning liability on "intentionally plac[ing] a person in reasonable fear of ... death ... or serious bodily injury," etc.).

Plaintiffs, by contrast, argue that "so" might refer to the activity described in subsection (a)(1), that is, using interstate or foreign commerce "for the purpose of damaging or interfering with the operations of an animal enterprise." *Id.* § 43(a)(1). Plaintiffs' interpretation depends on the somewhat awkward syntax of the provision. While Congress might have [*803] written more clearly, plaintiffs' reading is not what Congress intended. That interpretation cannot be squared with the clear expressions of legislative intent in both the plain text of the Act and the legislative history. Plaintiffs' interpretation is inconsistent with AETA's title as codified, "Force, violence, and threats involving animal enterprises." 18 U.S.C. § 43 (emphasis added); *see* also Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 47 (2008) (relying in part on subchapter's title to reject respondent's interpretation of that subchapter). Plaintiffs' interpretation would also render subsection (a)(2)(C) redundant since every time subsection (a)(1) is satisfied so too would be the "attempt" branch of subsection (a)(2)(C). Avoidance of redundancy is a basic principle of statutory interpretation. *O'Connell v. Shalala*, 79 F.3d 170, 179 (1st Cir. 1996).

Further, the rules of construction protecting expressive activity would preclude plaintiffs' broad interpretation. In addition, plaintiffs' interpretation contradicts the legislative history, already recited, and which also shows that AETA targets "heinous acts" such as "firebomb[ing]." 152 Cong. Rec. S9254-01 (daily ed. Sept. 8, 2006) (statement of Sen. Feinstein). One other court as well has rejected this interpretation. *See United States v. Buddenberg* ("*Buddenberg I*"), No. CR-09-00263 RMW,

2009 U.S. Dist. LEXIS 100477, 2009 WL 3485937, at *12 (N.D. Cal. Oct. 28, 2009).[18]

IV.

In sum, "[plaintiffs] in the present case present no concrete evidence to substantiate their fears, but instead rest on mere conjecture about possible governmental actions." *Clapper*, 133 S. Ct. at 1154. In particular, plaintiffs' fear of prosecution under AETA is based on speculation that the Government will enforce the Act pursuant to interpretations it has never adopted and now explicitly rejects.[19] Such unsubstantiated and speculative fear is not a basis for standing under Article III.[20]

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[18] Further, at oral argument, the Government insisted that "no prosecutor is going to bring a case saying you've conspired to have a purpose."

[19] The Association of the Bar of the City of New York, acting as amicus in support of plaintiffs, cites *Buddenberg II* as an example of unreasonable prosecution under AETA. In that case, the United States filed a criminal complaint under AETA and under 18 U.S.C. § 371 for conspiracy to violate AETA, alleging that defendants participated in a series of threatening demonstrations at the homes of a number of UC Berkeley and UC Santa Cruz biomedical researchers whose work involved the use of animals. *Buddenberg II*, 2010 U.S. Dist. LEXIS 78201, 2010 WL 2735547, at *1. The district court dismissed the indictment without prejudice on the ground that the indictment failed to allege the facts of the crimes charged with sufficient specificity. 2010 U.S. Dist. LEXIS 78201, [WL] at *10. From the fact that an indictment lacked specificity, it does not follow that the interpretation of AETA underlying the indictment was as plaintiffs argue or that it was unreasonably expansive. The availability and use of a bill of particulars by defendants and the dismissal of the case further undercut any need to give pre-enforcement standing.

[20] Individual plaintiff Iver Robert Johnson, III, did not allege that he has even a "subjective 'chill,'" *Laird*, 408 U.S. at 13, and so he has failed to establish a cognizable injury. In addition, his claims fail to meet causation and redressability requirements. *See Blum*, 930 F. Supp. 2d at 337 n.91.

If plaintiffs do choose to engage in conduct which causes them to be prosecuted under AETA, they are free to raise whatever defenses they have in that context.

We affirm the dismissal of this action for lack of standing. So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 13-1490

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

Plaintiffs, Appellants,

v.

ERIC H. HOLDER, JR., Attorney General,

Defendant, Appellee.

Before
Lynch, *Chief Judge*,
Torruella[*], Howard,
Thompson and Kayatta,
Circuit Judges.

ORDER OF COURT
Entered: May 6, 2014

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered

[*] Judge Torruella is recused and did not participate in the consideration of this matter.

that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

/s/ Margaret Carter, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

v.

ERIC HOLDER, in his official capacity as Attorney General of the United States of America, Defendant.

Civil Action No. 11-12229-JLT

For Sarahjane Blum, Ryan Shapiro, Lana Lehr, Lauren Gazzola, Iver Robert Johnson, III, Plaintiffs: Alexander A. Reinert, LEAD ATTORNEY, PRO HAC VICE, c/o Benjamin N. Cardozo School of Law, New York, NY; David Milton, LEAD ATTORNEY, Law Offices of Howard Friedman, Boston, MA; Alexis Agathocleous, Rachel Meeropol, PRO HAC VICE, Center for Constitutional Rights, New York, NY; Howard Friedman, Law Offices of Howard Friedman, P.C., Boston, MA.

For Eric Holder, Jr., in his official capacity as Attorney General of the United States of America, Defendant: Bryan R. Diederich, LEAD ATTORNEY, United States Department of Justice, Civill Division, Federal Programs Branch, Washington, DC; George B. Henderson, III, LEAD ATTORNEY, United States Attorney's Office, John Joseph Moakley Federal Courthouse, Boston, MA; Mark J. Grady, LEAD ATTORNEY, United States Attorney's Office, Worcester, MA.

For Baystate Medical Center, Inc., Movant: Vanessa L. Smith, Bulkley, Richardson and Gelinas, LLP, Springfield, MA.

For National Association for Biomedical Research, Association of American Medical Colleges, Association of American Universities, Association of American Veterinary Medical Colleges, Association of Public and Landgrant Universities, Federation of American Socie-ties for Experimental Biology, Massachusetts Biotech-nology Council, Massachusetts Society for Medical Re-search, The General Hospital Corporation, doing busi-ness as Massachusetts General Hospital, The Brigham & Women's Hospital, Inc., The McLean Hospital Corpora-tion, Amicus: Mark C. Fleming, LEAD ATTORNEY, Wilmer Hale LLP, Boston, MA; Seth P. Waxman, PRO HAC VICE, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC.

For Dr. Edythe D. London, Dr. J. David Jentsch, Dr. Peter Whybrow, Dr. Goran Lacan, Dr. Lynn Fairbanks, Dr. John Schlag, Dr. Madeleine Schlag-Rey, Dr. Dario Ringach, Dr. Linda Porrino, Dr. Nancy A. Ator, Dr. P. Michael Conn, Dr. Michele A. Basso, Dr. Stephen J. Bergman, Dr. Marilyn E. Carroll, Dr. Bertha Madras, Dr. Jonathon C. Horton, Dr. Paul Finkelman, Amicus: Abraham R. Wagner, PRO HAC VICE, Law Offices of Abraham Wagner, Los Angeles, CA; Brian D. Tobin, David D. Tobin PC, Wellesley, MA.

For American Civil Liberties Union of Massachusetts, Amicus: David J. Nathanson, Wood & Nathanson, LLP, Boston, MA.

[930 F. Supp. 2d at *328]

MEMORANDUM

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] 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 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 advanc-

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1 18 U.S.C. § 43 (2006).

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.

ing 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 Defense League ("NYC ADL").[6] She participated in lawful public demonstrations, engaged in non-violent [*329] 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,

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4 Compl. ¶ 14 [#1].
5 Compl. ¶ 68.
6 Compl. ¶ 69.
7 Compl. ¶¶ 69-70.
8 Compl. ¶ 75.

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] 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 AE-

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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).

14 Compl. ¶ 82.

TA.[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 [*330] Blum has refrained from undertaking any of these ac-tions for fear of prosecution under the AETA.

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 investiga-

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15 Compl. ¶ 83.
16 Compl. ¶ 84.
17 Compl. ¶ 86.
18 Compl. ¶ 87.
19 Compl. ¶ 91.

tion 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, 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

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20 Compl. ¶ 88.
21 Compl. ¶ 94.
22 Compl. ¶ 15.
23 Compl. ¶ 100.
24 Compl. ¶ 101.
25 Compl. ¶ 102.
26 Compl. ¶ 104.

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 [*331] 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 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 AE-

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27 Compl. ¶ 105.
28 Compl. ¶ 102.
29 Compl. ¶ 106.
30 Compl. ¶¶ 107-08.
31 Compl. ¶ 110.
32 Compl. ¶ 111.

TA.[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 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]

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[33] Compl. ¶ 111.
[34] Compl. ¶ 115.
[35] Compl. ¶ 116.
[36] Compl. ¶ 117.
[37] Compl. ¶ 120.
[38] Compl. ¶ 121.

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 [*332] 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 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

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

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 com-ply with municipal and state ordinances.[49] But the AETA, and her previous arrest, have chilled her from en-gaging 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

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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.

said that, "I'd do 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 [*333] 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 ar-

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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.

rested many times for disorderly conduct and similar offenses.[57]

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 en-gaging 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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[57] Compl. ¶ 157.

[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 re-viewing courts must accept as true all material allegations of the complaint, and must construe the com-

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 [*334] any concrete plan to engage in pro-scribed 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 're-dressed 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

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plaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501-02, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (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 re-view motions to dismiss under Fed. R. Civ. P. 12(b)(6)").

[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)).

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 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

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[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.

[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.

from exercising [their] right to free expression or forgoe[] expression in order to avoid enforcement consequences.'"[72]

[*335] 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 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]

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.

[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, 185 L. Ed. 2d 264 (2013); *Laird v. Tatum*, 408 U.S. 1, 13-14, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (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

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
> >
> > (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

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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.

> of the immediate family (as defined in section 115) of that per-son, or a spouse or intimate partner of that person by a course of conduct involving threats, acts of vandalism, property dam-age, criminal [*336] 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

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[82] 18 U.S.C. § 43(a) (2006).

> by this action, or to preempt State or local laws that may provide such penalties or remedies.[83]

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

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83 18 U.S.C. § 43(e) (2006).

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 U.S. Dist. LEXIS 2264, 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.").

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 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 [*337] 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]

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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.

III.[*sic*] 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 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

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[92] Because the court concludes that Plaintiffs lack standing, it need not reach Defendant Holder's ripeness argument or the merits of the case.

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

APPENDIX D

ANIMAL ENTERPRISE TERRORISM ACT

(Pub. L. 109–374 (Nov. 27, 2006); 18 U.S.C. § 43)

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

§ 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 U.S.C. § 115]) of that person, or a spouse or intimate partner of that person by a course of conduct involving threats, acts of vandalism, property damage,

criminal trespass, harassment, or intimidation; or

(C) conspires or attempts to do so;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) the term "animal enterprise" means—

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

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

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

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

(3) the term "economic damage"—

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

(B) does not include any lawful economic disruption (including a lawful boycott) that results from lawful public, governmental, or business

reaction to the disclosure of information about an animal enterprise;

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

(A) injury posing a substantial risk of death;

(B) extreme physical pain;

(C) protracted and obvious disfigurement; or

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

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

(A) deep cuts and serious burns or abrasions;

(B) short-term or nonobvious disfigurement;

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

(D) significant physical pain;

(E) illness;

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

(G) any other significant injury to the body.

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

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

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

(3) to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this 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.)