No. 13-1490

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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

v.

ERIC HOLDER, in his official capacity as
Attorney General of the United States,
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
Case No. 11-cv-12229
The Honorable Joseph L. Tauro

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF PLAINTIFFS-APPELLANTS

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July 29, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL AND STATUTORY PROVISIONS

OTHER AUTHORITIES

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amicus curiae* certifies that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

CONSENT OF THE PARTIES

All parties have consented to the filing of this *amicus curiae* brief by the Association of the Bar of the City of New York.

STATEMENT PURSUANT TO FED. R. APP. P. 29(c)(5)

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Association of the Bar of the City of New York (the "Association") was founded in 1870 and has been dedicated ever since to maintaining the highest ethical standards of the profession, promoting reform of the law and providing service to the profession and the public. With over 24,000 members, the Association is among the nation's oldest and largest bar associations.

The Association has long been committed to protecting, preserving and promoting civil liberties and civil rights. Through its standing committees, including the Committee on Civil Rights and the Committee on Animal Law, the Association is interested in educating the Bar and the public about legal issues pertaining to the right of free speech and the importance of protecting speech without regard to viewpoint or ideology and without imposing an unconstitutional burden by chilling speech. The Association is also interested in educating the Bar and the public about legal issues pertaining to the right to due process, including that a law provide specific notice of what is illegal and to protect against arbitrary enforcement.

Members of the Association may also choose to exercise the First Amendment right to free speech in their own right, and therefore have a vested interest in protecting that right. As the Association endeavors to promote social justice and democratic values, it has an interest in halting the unjust results that

inevitably flow from the application of what we argue is an unconstitutional law—the Animal Enterprise Terrorism Act, 18 U.S.C. § 43 (2006).

INTRODUCTION

This case was filed by Plaintiffs-Appellants who are five animal activists challenging the constitutionality of 18 U.S.C. §43[1] on the grounds that the statute encroaches on their free speech rights which they state have been chilled. *See Blum v. Holder*, No. 11-12229-JLT, 2013 U.S. Dist. LEXIS 36979 (D. Mass. Mar. 18, 2013). We agree. This is no ordinary statute. Its very title—the Animal Enterprise Terrorism Act ("AETA")—portends to prosecute "terrorists" and mete out harsh penalties. However, the statute misapplies the terrorism label to protected speech activity, such as leafleting, protests and boycotts. This alone chills even protected speech.

The District Court dismissed the case, stating that the plaintiffs lacked standing because they did not show an injury-in-fact. *Id.* at *21. After reviewing the plain language of the statute and the case law, we conclude that this Court should grant plaintiffs standing and rule that the statute is unconstitutional.

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[1] ''(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 … 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;
''(C) conspires or attempts to do so; shall be punished as provided for in subsection (b)."

BACKGROUND

18 U.S.C. § 43 was enacted ostensibly "[t]o provide the Department of Justice the necessary authority to apprehend, prosecute, and convict individuals committing animal enterprise terror." The statute makes it a federal crime to use "a facility of" interstate commerce "for the purpose of damaging or interfering with the operations of an animal enterprise" by "intentionally damag[ing] or caus[ing] the loss of any real or personal property" connected to an animal enterprise; by "intentionally plac[ing] a person in reasonable fear" of death or serious bodily injury by "threats, acts of vandalism, property damage, criminal trespass, harassment, or intimidation;" or by "conspir[ing] or attempt[ing] to do so." 18 U.S.C. § 43(a)(1-2).

The statute was originally enacted in 1992 as the Animal Enterprise Protection Act..[2] It was later amended in 2002 with more severe penalties.[3] It was amended again in 2006 which greatly broadened the number of covered enterprises and greatly increased prison penalties for loss of personal property such as intangibles and lost profit.[4] It also makes otherwise lawful protestors liable for the illegal acts of unknown actors *after the fact*.

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[2] Animal Enterprise Protection Act of 1992, Pub. L. No. 102-346, § 2(a), 106 Stat. 928.
[3] Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, Title III, Subtitle C, § 336, 116 Stat. 681.
[4] Animal Enterprise Terrorism Act, Pub. L. No. 109-374, § 2(a), 120 Stat. 2652 (codified as amended at 18 U.S.C. § 43 (2006)).

The statute has been criticized by different government agencies. The Congressional Research Service ("CRS"), an independent federal agency, recently commented that 18 U.S.C. § 43 was "specific legislation" directed at "supporters of animal rights."[5] CRS also asked "*why a specific terrorism statute [18 U.S.C. §43] covers ideologically motivated attacks against businesses that involve animals,* while there are no other domestic terrorism statutes as narrow in their purview covering a particular type of target and crime" (emphasis added; footnote omitted).[6] The Justice Department's Inspector General concluded in a 2003 audit of the FBI that focusing counter-terrorism resources on social protestors and animal activists was misplaced.[7] The statute even at its infancy had been identified as an example of over-federalization in a 1998 American Bar Association (ABA) report published by a task force headed by former U.S. Attorney General Edwin Meese.[8]

[5] Congressional Research Service, the Domestic Terrorist Threat: Background and Issues for Congress, CRS Report No. 42536, at i, issued to Congress on May 15, 2012, reissued in January 2013, available at http://www.fas.org/sgp/crs/terror/R42536.pdf (last visited July 23, 2013) [hereinafter "CRS Report"].
[6] CRS Report at 61.
[7] U.S. Department of Justice, Office of the Inspector General, Audit Division, "The Federal Bureau of Investigation's Efforts to Improve the Sharing of Intelligence and Other Information," at 94, Audit Report 04-10, December 2003, available at http://www.justice.gov/oig/reports/FBI/a0410/final.pdf (last visited July 24, 2013).
[8] American Bar Association, Report on the Federalization of Criminal Law (Washington, D.C.: ABA, 1998) at 21, 86 and 130.

SUMMARY OF THE ARGUMENT[9]

18 U.S.C. § 43 denies due process of law under the Fifth Amendment of the U.S. Constitution. Due process requires that a criminal statute provide specific notice of what is illegal, and not forbid conduct in terms so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application," *Connally v. Gen. Constr. Co.,* 269 U.S. 385, 391 (1926); otherwise, the law may have a chilling effect on speech, *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). 18 U.S.C. § 43 fails to provide constitutionally mandated notice of what is illegal, makes individuals susceptible to arbitrary enforcement, and therefore chills speech.

These due process violations are manifested within the statute and in its application. First, by employing a "reasonableness" standard, what constitutes a "true threat" under the statute is subject to inconsistent intent standards and interpretations among the circuit courts. As a result, speech that is protected in one jurisdiction may not be protected in another jurisdiction. This fails to provide

[9] We are not addressing standing in our argument because it is already being addressed by Plaintiffs-Appellants. *See Appellants' Opening* Brief at 6-16, *Blum v. Holder* No. 11-12229-JLT, 2013 U.S. Dist. LEXIS 36979 (D. Mass. Mar. 18, 2013), *appeal docketed*, No. 13-1490 (1st Cir. 2013). However, we are noting that Plaintiffs-Appellants have demonstrated injury-in-fact for Article III standing by suffering previous arrests for animal rights advocacy and their inability to continue their advocacy efforts due to the threat of further prosecution. *See Blum,* No. 11-12229-JLT; App. Br. at 8. The Plaintiffs' inability to continue in their protected advocacy efforts is the direct result of the passage of 18 U.S.C. § 43, as it does not provide adequate notice regarding what speech is permissible.

adequate notice of what is illegal. Therefore, the threat of prosecution and conviction for speech is very real.[10]

Second, the statute, by its plain language, does not necessarily isolate prosecution to the perpetrator, but allows liability to be extended to otherwise lawful protesters, retroactively. It allows for the conversion of an otherwise lawful protest to an illegal one *ex ante* solely based on an unknown actor's commission of an illegal act *after the fact.* This amounts to guilt by association otherwise prohibited under the First Amendment. This also fails to provide adequate notice of what is illegal.

Third, the government's interpretation of when to apply "economic damages" as a sentencing enhancement would violate the Supreme Court holding in *United States v. Booker*, 543 U.S. 220, 230 (2005), which requires that all aggravating elements for sentencing enhancements be determined under the same standard as for an offense—"beyond a reasonable doubt." Any assertion by the government that any elements for sentencing enhancements may be irrelevant for

[10] One such example deals with a demonstration in which Plaintiff-Appellant Gazzola, in a 10-second chant stated, "[w]hat goes around comes around," to which the group responded, "burn his house to the ground." *Commonwealth v. Gazzola*, No. 02-11098, 2004 Mass. Super. LEXIS 28, at *15–16 (Mass. Sup. Ct. 2004). The individuals were otherwise peacefully assembled and police stood unconcerned. *Id.* The speech was found by a Massachusetts state court to be political hyperbole, *Id.*, while the Third Circuit found it to be a true threat, *United States v. Fullmer,* 584 F.3d 132, 157 (3d Cir. 2009). *Gazzola* at *14-16 (protecting speech "in spite of—not because of—[its] message," also noting "there was no indication that any defendant had the present ability or intent to carry out the threat . . . Gazzola cautioned the group to stay off the sidewalk to comply with a civil injunction, suggesting an intent to conform to the law.")

finding a substantive offense violation contravenes *Booker*. That infringes on the due process right against arbitrary enforcement.

Fourth, this statute is not about criminal prosecution, since existing laws already cover the enumerated offenses, but about branding. Anyone wrongfully accused under 18 U.S.C. § 43 risks being disgraced, without remedies for loss of reputation, lost wages or attorneys' fees. Appending the terrorism label to the law chills speech.

ARGUMENT

I. 18 U.S.C. § 43 DENIES THE FIFTH AMENDMENT RIGHT OF DUE PROCESS AND CHILLS SPEECH

The Supreme Court has identified three means by which a statute may run afoul of the right of due process and therefore be "void for vagueness:" (1) the statute fails to give notice of what conduct is lawful and unlawful; (2) the statute allows for arbitrary or discriminatory enforcement by government officials; or (3) the statute has chilling effects on First Amendment protected activity. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

Due process also requires that a criminal statute not forbid conduct in terms so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application," *Connally v. Gen. Constr. Co.,* 269 U.S. 385, 391 (1926). 18 U.S.C. § 43 invites conflicting judicial interpretations of what constitutes speech as a "true threat" not protected under the First Amendment by injecting an objective "reasonable" standard. Under that standard, what may be protected speech in one jurisdiction may be a "true threat" in another; therefore, § 43 fails to provide the ordinary individual with constitutionally mandated notice of what is illegal.

A. The "Reasonable Fear" Standard in 18 U.S.C. § 43 Invites Conflicting Judicial Interpretations of What Constitutes a "True Threat" and Therefore Fails to Give the Ordinary Individual Constitutionally Mandated Notice of What is Illegal

The primary purpose of the "reasonable fear" inquiry is to ascertain whether the speech or conduct constitutes a "true threat" not protected under the First Amendment. The relevant provision under § 43 prohibits "intentionally plac[ing] 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."[11] However, because there exists no uniform judicial standard for discerning what constitutes a "true threat," the statute's invocation of an objective "reasonableness" standard (i.e., "reasonable fear") fails to illuminate the full reach of its scope.

1. The Intent Standards

By incorporating an objective (i.e., reasonableness) standard, § 43 fails to provide specific notice of the distinction between permissible and impermissible speech. Although § 43 modifies the objective standard by including the word

[11] ''(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—
… ''(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 … 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; …" §43(a)(2)(B).

"intentionally," the statute does not require specific intent. "When pure speech is punished, the speaker's intent should matter."[12]

The circuits' intent standards can be understood under three main categories: (1) subjective (or specific) intent where the speaker intends his statement to convey a threat;[13] (2) objective reasonable speaker standard where "a reasonable speaker would understand that his statement would be interpreted as a threat;"[14] and (3) objective reasonable listener standard where "a reasonable [listener] would interpret the statement as a threat."[15]

Both objective standards require the satisfaction of a general intent element—that the speaker knowingly and voluntarily uttered the statement without "mistake, duress, or coercion."[16] Whether the speaker intended to threaten is irrelevant.[17]

Both objective standards also facilitate criminalizing crudely worded statements made negligently by placing the weight of criminal liability on third party interpretations. The Supreme Court rejected such a negligence standard because it "impose[s] an unduly stringent standard" in "a [criminal] statute that

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[12] Paul T. Crane, "True Threats" and the Issue of Intent, 92 Va. L.Rev. 1225, 1276 (2006) [hereinafter CRANE].
[13] *See, e.g., United States v. Cassel*, 408 F.3d 622, 635-36 (9th Cir. 2005) (vacating the defendant's conviction because the jury instructions did not include the subjective intent standard).
[14] *See, e.g., United States v. Parr*, 545 F.3d 491, 499 (7th Cir 2008) (defining the test).
[15] *Id*.
[16] *See, e.g.*, *Roy v. United States*, 416 F.2d 874, 877-78 (1969); *see also* CRANE at 1243, 1248.
[17] *See, e.g., United States v. White*, 670 F.3d 498, 510 (4th Cir. 2012).

regulates pure speech." *Rogers v. United States,* 422 U.S. 35, 47- 48 (1975) (reversing conviction of defendant who stated while intoxicated that he was going to go to Washington to "kill [President Nixon] in order to save the United States" and remanding clarifying the specific intent standard).

The specific intent test provides a defense of diminished capacity or mental defect; the objective test does not.[18]

2. Differing Intent Standards After *Virginia v. Black*

It is axiomatic that while the First Amendment protects speech that may be offensive or even repugnant, *e.g., Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011), it does not protect speech that crosses the line to true threats, *Virginia v. Black*, 538 U.S. 343, 359 (2003). "True threats" are "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," although "[t]he speaker need not actually intend to carry out the threat…." *Black* at 359-60 (internal citations omitted).

In *Black*, the statute at issue had made cross burning prima facie evidence of intimidation. The Court struck down that provision because the statute had failed

[18] *Compare, e.g., United States v. Twine,* 853 F.2d 676, 681 (9th Cir. 1988) (using specific intent test to rule that mental defect evidence should be used to determine the mental capacity to transmit a threat) and *United States v. Myers*, 104 F.3d 76, 79–81 (5th Cir. 1997) (using the objective test to reject the defense of post-traumatic stress, because despite defendant not having taken his medication, the threats were made knowingly because he had voluntarily chosen to discontinue his medication.).

to "distinguish between a cross burning done with the purpose of creating anger or resentment [protected] and a cross burning done with the purpose of threatening or intimidating a victim [unprotected]," *Id.* at 366. The Court's reliance on the speaker's intent appears central to its analysis since even a "reasonable" listener would not be able to distinguish between the two.

The *Black* decision, however, has created more controversy than clarity as to which intent standard to use,[19] and indeed, circuits have used *Black* to justify opposing standards.[20] It has also lead to conflicting interpretations even within circuits, particularly within the Ninth Circuit.[21] A most striking example of this

[19] *See, e.g., United States v. Jeffries*, 692 F.3d 473, 479-482 (6th Cir. 2012) (arguing for a subjective standard, while acknowledging that circuit precedent dictated the use of an objective standard); *Parr*, 545 F.3d at 499-500 (questioning the viability of an objective standard and noting conflicts among the circuits); *Fogel v. Collins,* 531 F.3d 824, 831 (9th Cir. 2008) (commenting that the conflict on whether to use an objective or subjective standard remains unresolved); *see also*, CRANE at 1261–68 (2006).

[20] *See, e.g.*, *Parr*, 545 F.3d at 498 (citing *Black* to justify an objective "reasonable person" test); *United States v. Magleby,* 420 F.3d 1136, 1139 (10th Cir. 2005) (citing *Black* to justify a "specific intent" test); *United States v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005) (citing *Black* to justify a "specific intent" test).

[21] *See, e.g.*, *United States v. Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011) (using both specific intent and reasonable listener standard to reverse conviction under 18 U.S.C. § 879(a)(3) prohibiting threats against a presidential candidate, explaining that, "the subjective test set forth in Black must be read into all threat statutes that criminalize pure speech"); *United States v. Lincoln*, 403 F.3d 703, 706 (9th Cir. 2005) (using reasonable speaker test to find that an inmate attempting to send a crudely worded letter voicing opposition to the President was not a true threat under 18 U.S.C. § 871); *Cassel*, 408 F.3d at 631 (remanding, specifying subjective intent in determining whether defendant used intimidation in a land sale under 18 U.S.C. § 1860); specifying "that the communication itself be intentional … [and] that the speaker intend for his language to threaten the victim,"); *United States v. Romo*, 413 F.3d 1044, 1051 (9th Cir. 2005) (reverting to objective intent of a reasonable speaker to affirm conviction to threaten the President under 18 U.S.C. § 871(a)); *Twine*, 853 F.2d at 680 (using specific intent to construe that "knowingly" contained in 18 U.S.C. § 875(c) would be read into § 876 and affirming conviction); *Roy v. United States,* 416 F.2d 874, 877 (9th Cir. 1969) (using a reasonable speaker

issue arose in the Sixth Circuit, where Judge Sutton authored the majority opinion using the objective standard in conformance with circuit precedent, but also wrote an extraordinary *dubitante* opinion stating, instead, his view that the essence of a "true threat" also includes a subjective component. *United States v. Jeffries*, 692 F.3d 473, 483-486 (6th Cir. 2012) ("… subjective intent is part and parcel of the meaning of a communicated 'threat' to injure another.").

It is, therefore, manifest that the Circuit Courts of Appeals have divergent views on which standards to use, along with variations, to wit: (1) the subjective intent standard: Ninth Circuit,[22] Tenth Circuit[23] and District of Columbia Circuit;[24] (2) objective reasonable speaker standard: First Circuit;[25] and (3) the objective reasonable listener standard: Second Circuit,[26] Third Circuit,[27] Fourth Circuit,[28]

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standard to affirm conviction under 18 U.S.C. § 871 for a telephoned threat against the President).

[22] *E.g.*, *Bagdasarian*, 652 F.3d; *Cassel*, 408 F.3d; *Twine*, 853 F.2d.

[23] *Magleby*, 420 F.3d at 1139 (using specific intent to affirm conviction of burning a cross with intent to threaten under 42 U.S.C. § 3631).

[24] *In re Grand Jury Subpoena No. 11116275*, 846 F. Supp. 2d 1, 6 (D.D.C. 2012) (noting that true threat inquiries may require focusing on speaker's intent).

[25] Using the context of previous events in *United States v. Walker*, 665 F.3d 212, 226 (1st Cir. 2011) (affirming defendant's conviction because he should have foreseen that, in context, the communication would be perceived as a threat); *see also United States v. Fulmer*, 108 F.3d 1486, 1491, 1497 (1st Cir. 1997) (rejecting the "reasonable listener" standard finding it "untenable that . . . a defendant may be convicted for making an ambiguous statement that the recipient may find threatening because of events not within the knowledge of the defendant").

[26] Using the listener's familiarity with the speech's context and the effect upon the listener, *United States v. Davila*, 461 F.3d 298, 304-305 (2d Cir. 2006), and imminence of the threat, *United States v. Kelner,* 534 F.2d 1020, 1027 (2d Cir. 1976). Both *Davila* and *Kelner* affirmed convictions under 18 U.S.C. § 876(c).

[27] Coupling this standard with listener's subjective knowledge in *United States v. Fullmer*, 584 F.3d 132, 157 (3rd Cir. 2009) (affirming conviction of six animal rights activists under the immediate predecessor statute to 18 U.S.C. § 43, suggesting that the decision turned partly on the

Fifth Circuit,[29] Sixth Circuit,[30] Seventh Circuit[31] and Eighth Circuit.[32] Because the merits of § 43 as a threat statute have not yet been fully litigated, the cases draw upon other threat statutes to highlight the varying standards used in each Circuit that would likely apply to § 43.[33]

If even Circuits disagree so markedly as to what constitutes a "true threat," the conclusion that reasonable people may similarly differ inescapably follows. Therefore, a speaker is unable to discern his standard of liability. For example, if he is communicating between circuits that use differing intent standards, it is unclear which jurisdiction would control. The issue is amplified if he is

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listeners' awareness, or subjective knowledge, of past acts undertaken by individuals unrelated to the speakers).

[28] *United States v. White,* 670 F.3d 498 (4th Cir. 2012) (affirming conviction for statements as true threats because they were not political hyperbole under an objective test).

[29] Using "knowingly" as a threshold issue in *Porter v. Ascension Sch.. Dist.,* 393 F.3d 608, 616-17 (5th Cir. 2004) (ruling that an older brother who had drawn a sketch depicting an attack on the school did not knowingly communicate the sketch to the school when it accidentally was brought to school by his younger brother).

[30] *United States v. Jeffries*, 692 F.3d 473, 478 (6th Cir. 2012) (affirming conviction under 18 U.S.C. § 875(c) for threatening a judge presiding over custody battle in a song which defendant posted on social media and to the press).

[31] Adopting a hybrid standard that fuses the reasonable listener standard with the speaker's subjective intent in *United States v. Parr,* 545 F.3d 491, 500-01, n. 2 (7th Cir. 2008).

[32] Applying a five-part objective test that considers (1) the reaction of the listener and other third parties, (2) whether the threat was conditional, (3) whether the threat was communicated directly to its victim, (4) whether the speaker had made similar statements to the victim in the past, and (5) whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence. *United States v. Mabie*, 663 F.3d 322, 331-32 (8th Cir. 2011) (citing *United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996) and applying the test to 18 U.S.C. § 875(c) and § 876(c)).

[33] Many of the threat cases cited deal with 18 U.S.C. § 875 (mailing threatening communications), § 876(c) (making threats through interstate communications) and § 871 (threats against the President and his successors).

communicating on the Internet or on social media. Speech that is protected in one jurisdiction may not be protected in another jurisdiction. Therefore, 18 U.S.C. § 43 makes the threat of prosecution for speech very real.

B. 18 U.S.C. § 43 Impermissibly Converts an Otherwise Legal Act to an Illegal One *Ex Ante*

Section 43 does not isolate prosecution to the perpetrator but allows those otherwise engaging in lawful activity to be liable for illegal actions by unknown actors *after the fact*. "The normal method of deterring unlawful conduct is to punish the person engaging in it," not one who merely advocates. *Bartnicki v. Vopper,* 532 U.S. 514, 529 (2001). Since § 43 ascribes liability for unforeseen or unknowable circumstances, individuals do not have advance notice of what they may be liable for—a due process violation.

The statute premises liability on any unlawful public reaction to a boycott or economic disruption, (§ (d)(3)(B)), and under a "course of conduct" (§ (a)(2)(B)). For example, a group holds a lawful protest, and several weeks later, there is vandalism at the protest site (e.g. graffiti). The statute does not isolate the vandal for prosecution, but bootstraps those who participated in the protest to the vandal, as well. It does so retroactively by making them liable for any public "reaction" that even lacks temporal proximity to the vandal's act, (§ (d)(3)(B)), and also under "continuity of purpose" (§ (d)(2)). Both advance guilt by association. Neither requires conspiracy.

"Lawful reaction" is noted as an exemption in the definition for "economic damage:"

> "which … 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." § 43(d)(3)(B).

That means that whether an activity is lawful is based on what others do *after the fact* at some indefinite time in the future, without any temporal proximity or imminence. For instance, a business which prematurely terminates a contract with an animal enterprise for financial services several months after a protest of the enterprise could be labeled a "reaction." Any random act with no relation to the ideology of the protest could also be a "reaction," causing further mischief.

"Course of conduct" is defined as "two or more acts evidencing a continuity of purpose." § 43(d)(2). It is used in the offense section which specifies placing 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." § 43(a)(2)(B). For example, a protest against a circus may occur without incident, yet several weeks later an unknown party vandalizes the property. Under this language, the first act would be the protest and the second act would be the vandalism, particularly if both are opposed to the same enterprise. "A continuity of purpose" does not require that it be an illegal purpose or that the

same person do both acts. No temporal proximity is required and can extend to an indefinite time in the future.

Converting an otherwise legal act to an illegal one *ex ante* solely based on an unknown actor's commission of an illegal act *after the fact* amounts to guilt by association, which has been rejected by the Supreme Court. "The First Amendment … restricts the ability of the State to impose liability on an individual solely because of his association with another." *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 918-19 (1982).

The government erroneously asserts that the same individual must have engaged in a "course of conduct." *Dep't of Justice Mot. Dismiss* at 25*, Blum v. Holder,* No. 11-12229-JLT, 2013 U.S. Dist. LEXIS 36979 (D. Mass. Mar. 18, 2013) ("One must have an intention to place a specific person in fear, and that intention must be exhibited by and carried out through more than a single instance of 'threats, acts of vandalism, property damage, criminal trespass, harassment, or intimidation'. 18 U.S.C. § 43(a)(2)(B).). The language does not limit acts to the same person. Liability could also apply to those who organized or attended the protest, even though their activity before the vandalism was actually lawful. Rather than isolating the perpetrator, the statute links unrelated parties based on their "continuity of purpose."

Further adding to an individual's liability is that of the loss of "personal property" as included in the offenses (§ (a)(2)(A)), which can relate back to loss of profit or goodwill as the outcome of any lawful boycott or protest. *See, e.g.*, *Radiation Sterilizers, Inc. v. United States,* 867 F. Supp. 1465, 1471–72 (E.D. Wash. 1994) (intangible property damage includes lost business profits and goodwill); *Gully v. Sw. Bell Tel. Co.,* 774 F.2d 1287, 1294 n.20 (5th Cir. 1985) (property damage includes lost business profits); and *Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 194 (1936) ("[G]ood will is property ...").

II. THE LABEL OF "TERRORISM" APPENDED TO THE PUBLIC LAW TITLE OF 18 U.S.C. § 43 LENDS A GOVERNMENTAL IMPRIMATUR AND CHILLS SPEECH

Section 43 is different from other threat statutes in that it appends a terrorism label to the law, lending a governmental imprimatur of terrorism from the time of indictment through conviction and beyond.[34] Contrast this to the USA Patriot Act, which is also a terrorism threat statute but is addressing real issues of what is typically associated with terrorism, e.g., mass destruction and assassinations.[35] In

[34] For example, 18 U.S.C. § 875 and § 876 prosecute threats to kidnap, extort, or physically injure any individual or government official, including the U.S. President; notably, they are not terrorism statutes.

[35] The term "domestic terrorism" means activities that—
(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
(B) appear to be intended—
(i) to intimidate or coerce a civilian population;
(ii) to influence the policy of a government by intimidation or coercion; or
(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

post-9/11 America, just being accused of terrorism creates a real fear of being automatically branded a terrorist—a fear enough to chill speech. This statute is not about criminal prosecution, since existing laws already cover the enumerated offenses, but about branding.

The "terrorism" label in its title—The Animal Enterprise Terrorism Act—only serves as a distraction from the statute's unconstitutionality. Appending the label may have been intended to buttress the statute from opponents who were concerned about its encroachment on protected First Amendment activity. However, simply designating speech as "terrorism" does not permit its suppression. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 508 (1969).

One of the first prosecutions under § 43, *United States v. Buddenberg*, illustrates the statute's wide application to otherwise traditionally protected forms of political speech.[36] Criminal statutes "must be scrutinized with particular care; those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." *Houston v. Hill*, 482 U.S. 451, 459 (1987) (internal citations omitted).

(C) occur primarily within the territorial jurisdiction of the United States.
Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 802(a), 115 Stat. 272, 376 (codified as amended at 18 U.S.C. § 2331 (2006)).

[36] CR-09-00263 RMW, 2010 WL 2735547, at *9 (N.D. Cal. July 12, 2010).

The *Buddenberg* defendants were indicted under § 43(a)(2)(B), relating to the "reasonable fear" provision.[37] Four individuals (including a law student) staged several demonstrations at the residences of University of California animal vivisectors, chanted animal "liberation" slogans, chalked anti-animal testing messages on the public sidewalks, used an Internet terminal at a local shop to gather information about the vivisectors, and made fliers with animal rights slogans to distribute at a local cafe. Criminal Complaint at 6, *Buddenberg*, CR-09-00263 RMW, 2009 WL 3485937 (No. 09-70175). The criminal complaint referred to individuals who were the subject of the demonstrations as stating that they were "fearful" for their health and personal safety. *Id*. at 9.

The government indicted the defendants in March 2009. Indictment at 2-3, *United States v. Buddenberg*, 2010 WL 2735547 (N.D. Cal July 12, 2010) (Case 5:09-cr 00263-RMW). Despite the government's assurance in the instant case that "the advocate's non-violent speech or expressive activity would be exempted by Section (e)," Dep't of Justice Mot. Dismiss at 26, *Blum*, No. 11-12229-JLT, prosecutors in *Buddenberg* had a different view.

The precise scenario that the government now vows would never be prosecuted already has been prosecuted. "To the extent the statute covers speech or expressive conduct, it is speech or conduct of a threatening, inciteful, or violent

[37] *Id.* at *1.

nature …" Dep't of Justice Mot. Dismiss at 20, *Blum*, No. 11-12229-JLT. Clearly not so in this case. A statute should not be upheld "merely because the Government promises to use it responsibly."[38]

The *Buddenberg* District Court pointed out that the government failed to state in the indictment any facts linking any defendant to any illegal act, and "failed to address the potential for a conviction based upon facts not found by the grand jury … a concern of constitutional dimension." CR-09-00263 RMW, 2010 WL 2735547 at *10 (citing to the Fifth Amendment guarantee of due process). Although this is an unreported case, it underscores the government's capacity to engage in arbitrary enforcement of the statute—yet another due process violation.

The Court dismissed the case for factual insufficiency, but not before defendants were under indictment for sixteen months.[39] During that time, they were facing up to ten years in prison if convicted, one defendant was held under house arrest for part of that time, they were silenced and their indictment under a terrorism law became public record.

The government makes much of the savings clauses, that § 43(e) will not be used against free speech activity. Dep't of Justice Mot. Dismiss at 4, 8, 10-12, 17-

[38] *United States v. Stevens*, 130 S. Ct. 1577, 1581 (striking down 18 U.S.C. § 48 explaining that "[d]espite the Government's assurance that it will apply §48 to reach only "extreme" cruelty, this Court will not uphold an unconstitutional statute merely because the Government promises to use it responsibly.")

[39] Order Dismissing Indictment Without Prejudice and Denying as Moot Other Pending Motions, *United States v. Buddenberg*, No. CR-09-00263 RMW (N.D. Cal. July 12, 2010), 2010 WL 2735547.

18, 22-23, 25-27, *Blum*, No. 11-12229 JLT. If there were any question whether the savings clauses in § 43(e) are ineffective in providing any immunity against wrongful indictment, the *Buddenberg* case should remove all doubt. This simply chills speech. Anyone wrongfully arrested under § 43 risks being disgraced and branded as a terrorist in the court of public opinion, and glaringly absent from § 43 are remedies for the wrongfully accused's loss of reputation, lost wages and attorneys' fees.

The *Buddenberg* dismissal is no guarantee that anyone who decides to speak out would also not meet the same fate of a similar intrusion on their personal liberty. In fact, any attorney who would desire to protest animal cruelty may choose to self-censor, and with good reason. Even an erroneous indictment would have a deleterious effect on her ability to practice law, and a conviction based even on a listener's manufactured threat would probably make her lose her law license. The chilling effect would be so daunting that individuals may understandably prefer to self-censor, thereby undermining the entire purpose of having a First Amendment right of free speech.

III. The Government's Interpretation of When to Apply "Economic Damages" Would Violate the Supreme Court Ruling in *United States v. Booker*

In addressing the fact that "economic damages" are not included in the offense elements, the government erroneously asserts that "economic damages can

only be taken into account in determining what penalty to impose once a violation of Section (a)(2)(A) or (a)(2)(B) has been found." Dep't of Justice Mot. Dismiss at 19, *Blum*, No. 11-12229-JLT. However, the determination that there were economic damages is integral to the charge that must be proven beyond a reasonable doubt at trial in order to obtain a conviction. In addition, the government appears to argue that §43(b) is irrelevant to a substantive violation under §43(a). That is precisely what the Supreme Court in *United States v. Booker,* 543 U.S. 220 (2005), declared unconstitutional.[40] The government, therefore, appears to state an intention to enforce an unconstitutional standard. That infringes on the due process right against arbitrary enforcement.

The Court's ruling in *Booker* is clear. Any facts that would increase a defendant's sentence must meet the same constitutional threshold as the element of an offense, i.e., it must be determined by a jury beyond a reasonable doubt. *Id.*

> If a state makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the state labels it [either as an "element" or "sentencing enhancement"]--must be found by a jury beyond a reasonable doubt. *Id*. at 233

This is grounded in the Sixth Amendment right to a jury trial to "protect[ ] every criminal defendant 'against conviction except upon proof beyond a reasonable

[40] The only penalty that may not implicate the *Booker* ruling is the penalty for misdemeanors since it is not a sentencing enhancement under § 43(b)(1). Since federal legislation is not needed for a misdemeanor, § 43 seems unnecessary.

doubt of every fact necessary to constitute the crime with which he is charged.'" *Booker*, 543 U.S. at 230.

In *Booker*, a drug dealer was given an enhanced sentence of an additional eight years based on the judge's additional findings of fact at the sentencing hearing that he possessed more grams of cocaine than was found by the jury. *Id.* at 227. The Court struck down the judge's sentence because it violated the Sixth Amendment right to have all elements found by a jury beyond a reasonable doubt, rather than by the judge by a preponderance of the evidence. *Id.* at 238-39. It also struck down the federal sentencing guidelines as mandatory and made them advisory. *Id.* at 245-46. Except for a prior conviction, the judge could not exceed the maximum sentence correlating to the jury's findings of fact. *Id.* at 231.

This case was decided in 2005, the year before AETA's passage in 2006. The relevance of this ruling for 18 U.S.C. § 43 is also that its statutory construction adds to the confusion. "Economic damages" is not listed in offenses but is listed in the penalties section with sentencing enhancements depending on the extent of "economic damages." Therefore, rather than being listed as offense elements, the aggravating elements are comingled with the penalties. By partitioning the offense elements (§ 43(a)) from the aggravating elements under penalties (§ 43(b)), the statute appears to maintain the very distinction between offense elements and aggravated sentencing elements that the Supreme Court struck down in *Booker*.

CONCLUSION

In light of the foregoing, the Association respectfully asks that the decision of the District Court be reversed and that this Court exercise plenary review and rule on the merits of this important matter.

Dated: Boston, Massachusetts
July 29, 2013

Respectfully Submitted,

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Dated: July 29, 2013

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2013 I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record will be served by the CM/ECF system.

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