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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

UNITED STATES, Plaintiff, v. ADRIANA STUMPO, Defendant	Case No. CR 09-263 RMW **DEFENDANT'S MOTION TO DISMISS** Date: June 8, 2009 Time: 9.00 a.m. Court: Hon. R. Whyte

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Statutory Authority:

18 U.S.C. section 43

Case Authority:

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on June 8, 2009, at 9.00 a.m., or as soon thereafter as the matter may be heard before the Honorable Judge Ronald Whyte, Defendant, Adriana Stumpo, through counsel, will move this Court for an order dismissing the indictment against her. This motion is made on the grounds that the statute under which she is being prosecuted, 18 U.S.C. section 43 is unconstitutional on its face in that it is impermissibly overbroad and vague.

This motion is based on this notice, the memorandum of points and authorities in support thereof, and any additional argument that may be presented at the hearing on this motion.

Date: May 21, 2009

Respectfully submitted,

/s/
Thomas J. Nolan
Emma Bradford
Attorneys for Defendant, Adriana Stumpo

MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF ARGUMENT

The Animal Enterprise Terrorism Act (AETA), 18 U.S.C. § 43, is unconstitutionally vague and overbroad in violation of the First and Fifth Amendments. The AETA is substantially overbroad because it criminalizes protected speech that causes an animal enterprise to lose profits or goodwill. The AETA is unconstitutionally vague because its repeated and inconsistent use of undefined terms requires individuals of common intelligence to guess at its meaning and scope. Neither the AETA's overbreadth nor its vagueness can be cured by the statute's rules of construction.

II. STATEMENT OF FACTS AND STATUTORY SCHEME

Under the AETA, it is a federal crime to:

> Travel [] in interstate or foreign commerce, or use [] or cause [] 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 damage [] or cause [] 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 place [] 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; or
>
> (C) conspire [] or attempt [] to do so

18 U.S.C. 43(a).

The term "animal enterprise" is defined to include any "commercial or academic enterprise that uses or sells animals or animal products for profit, food or fiber production, agriculture, education, research, or testing; [] a zoo, aquarium, animal shelter, pet store, breeder, furrier, circus, or rodeo, or other lawful competitive animal event; or [] any fair or similar event intended to advance agricultural arts and sciences." 18 U.S.C. § 43(d)(1). This incredibly broad definition goes far beyond a common understanding of the phrase "animal enterprise." The statute does not define "damaging" or "interfering."

Penalties under the AETA depend on the amount of "economic damage" and/or bodily injury that result. Economic damage is broadly defined as "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 "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[.]" 18 U.S.C. § 43(d)(3).

III. ARGUMENT

A. Defendant Has Standing to Bring a Facial Challenge to the AETA on Overbreadth and Vagueness Grounds.

Defendant, Adriana Stumpo, challenges the legitimacy of the AETA on its face, irrespective of whether it may legally be used against her.[1] Facial challenges of this nature have a long pedigree where criminal statutes infringe on freedom of speech and association. *See, e.g.*,

Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926). This exception to the general prohibition on third-party standing allows facial challenges to statutes based on a "judicial prediction or assumption that [a challenged] statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

The Ninth Circuit routinely hears facial challenges on overbreadth and vagueness grounds, *see, e.g.*, *Humanitarian Law Project v. Mukasey*, 509 F.3d 1122 (9th Cir. 2007), including overbreadth and vagueness challenges by criminal defendants to the statutes they are prosecuted under. *See, e.g.*, *United States v. Schales*, 546 F.3d 965, 970-73 (9th Cir. 2008).

There can be no question that the AETA presents the type of wide-ranging chill facial challenges were designed to address. Ever since the AETA's passage in November of 2006, it has had a profound effect on the legitimate and protected activity of animal rights advocates, as uncertainty over the AETA's scope and breadth leaves activists to guess whether some of their activity presents the risk of a federal terrorism charge.

Does the AETA criminalize picketing activity if the picketing is effective enough to close down a fur store? *See* Seth Prince and Spencer Heinz, *Activists Look Beyond Fur Shop's Move*, THE OREGONIAN, November 30, 2006, at B2 (discussing such a debate between an animal enterprise owner and animal rights activists). Have crimes of non-violent civil disobedience, like sitting down in front of the doors of a business, been transformed from the state crime of obstruction to federal terrorism crimes when the civil disobedience is performed by animal rights activists? *See* Doug Erickson, *Protecting Researchers or Chilling Free Speech?; Opponents and Animal Rights Activists Say the Law Goes Too Far, but Advocates Say it Gives Needed Protection*,

[1] Ms. Stumpo does not concede that the AETA is constitutional as applied and reserves the right to bring such a challenge at a later date.

WIS. STATE J., November 26, 2006, at A1 (discussing the ambiguity on that question). Does a raucous demonstration with a giant video screen showing primate experimentation outside an animal researcher's home violate the AETA? *See id.* Are undercover investigators who work with local prosecutors and wear hidden cameras now risking animal enterprise terrorism charges if their investigation focuses on a slaughterhouse? *See* Kim Severson, *Upton Sinclair, Now Playing on YouTube*, N.Y. TIMES, March 12, 2008, at F1 (stating undercover investigators at slaughterhouses risked prosecution under the AETA).

Animal rights activists are unable to clearly answer these questions. As the above-cited articles demonstrate, the media have not fared any better at interpreting the AETA. On its face, the AETA appears to cover much protected conduct. And even if it does not, the imprecision of the AETA renders the text too confusing for the reader to understand. It leaves essential terms undefined, defines other terms in a manner that appears to criminalize protected activity, and leaves intent requirements unclear. Even the structure of the attempt and conspiracy provision leaves the reader wondering where the boundaries of the AETA's proscribed conduct lie.

For these reasons, explored in detail below, the AETA must be struck down as facially invalid.

B. The AETA Violates the First and Fifth Amendments because the Prohibitions against "Damaging an Animal Enterprise," "Damages to… Personal Property," and "Economic Damage" are Vague and Overbroad.

The AETA's prohibition on activity undertaken "for the purpose of damaging … an animal enterprise" by an individual who "intentionally damages or causes the loss of any real or personal property… used by an animal enterprise," is vague and overbroad. 18 U.S.C. § 43(a)(1) & (a)(2)(A). These provisions criminalize losses to intangible property, such as lost profits, that result from protected First Amendment activity. Even if construed not to cover intangible property, the lack of any statutory definition renders these provisions unconstitutionally vague.

The AETA's definition of "economic damage" only contributes to the statute's vagueness and overbreadth.

1. The AETA is Substantially Overbroad because its Prohibitions against "Damaging an Animal Enterprise," "Damages to… Personal Property," and "Economic Damage" Criminally Sanction Protected Activity

A statute is facially unconstitutional on overbreadth grounds where there is a likelihood that the statute's very existence will inhibit free expression by inhibiting the speech of third parties who are not before the Court. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 799 (1984). "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). "[W]hen overly broad statutory language seems to sweep protected First Amendment expression directly into the scope of a regulation affecting speech, or indirectly places an undue burden on such protected activity, free expression can be chilled even in the absence of the statute's specific application to protected speech." *Am. Booksellers v. Webb*, 919 F.2d 1493, 1499 (11th Cir. 1990).

An overbroad statute punishes a "'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'" *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (quoting *Broadrick v. Oklamona*, 413 U.S. 601, 615 (1973)). In an overbreadth analysis, a court must first determine exactly what speech or conduct a statute covers, *United States v. Williams*, 128 S.Ct. 1830, 1838 (2008), and then determine whether the statute "criminalizes a substantial amount of protected expressive activity." *Id.* at 1841.

Legitimate expressive activity often results in damage to intangible property, including loss of future profits, increased security costs, and decreased business goodwill. The *raison d'etre* of protests, pickets, and boycotts is to shed light on a perceived wrong in the hopes of leveraging

potential harm to future profits and loss of business goodwill. These same pickets can (and often do) lead to increased security costs—such as camera installation, a doorman, or new locks—even in the absence of any illegal protest activity.

The AETA criminalizes this activity. The AETA does not define "damages" as used in section (a)(1), nor "damages" or "real or personal property" as used in section (a)(2)(A); nor does the statute limit the scope of the law to actual loss of tangible property. Thus, on its face, the AETA appears to criminalize activity that causes an enterprise to lose intangible property like future profits or business goodwill.

Black's Law Dictionary defines personal property as "[a]ny movable or intangible thing that is subject to ownership and not classified as real property." BLACK'S LAW DICTIONARY 988 (7th ed., abr. 2000). The AETA is not limited to damages to tangible property, but includes intangible property such as loss of future profits, increased security costs, and business goodwill. *Cf.* Cal. Bus. & Prof. Code § 14102 (2008) ("The good will of a business is property and is transferable."). *Gully v. Southwestern Bell Tel. Co.*, 774 F.2d 1287, 1295 n.20 (5th Cir. 1985) (damages to property include lost business profits); *Radiation Sterilizers v. United States*, 867 F.Supp. 1465, 1471-1472 (E.D. Wash. 1994) (property damage includes damage to intangible property, including lost profits and business goodwill).

Defendant is not alone in her concern over the breadth of this provision. Congressman Steve Israel raised concerns in the House of Representatives that the AETA's lack of a definition of personal property could lead to criminalization of protected speech. *152 Cong. Rec. E. 2100* ("This bill criminalizes conduct that 'intentionally damages or causes the loss of any real or personal property,' however, the bill fails to define what 'real or personal property' means. As a result, legitimate advocacy - such as a boycott, protest, or mail campaign - that causes an animal enterprise to merely lose profits could be criminalized."). The ACLU Legislative Office also

expressed a concern over this issue in a letter to the Chairman of the House Judiciary Committee. Letter from Caroline Fredrickson, Director, Washington Legislative Office, ACLU, to James Sensenbrenner, Chairman, House Judiciary Committee (Oct. 30, 2006), available at http://www.aclu.org/images/general/asset_upload_file809_27356.pdf. These concerns were left unaddressed.

The prosecution of several members of the group Stop Huntington Animal Cruelty, or "SHAC," under the precursor to the AETA, the Animal Enterprise Protection Act (AEPA) of 2002, demonstrates the government's incredibly broad understanding of a similar provision. *See United States v. Fullmer*, No. 06-4211 (3rd Cir. argued and submitted Jan. 6, 2009). In language almost identical to the AETA, the AEPA prohibited "physical disruption… [that] intentionally damage[d] or cause[d] the loss of any property" to an animal enterprise. In *Fullmer*, the United States argued that SHAC intended to, and did, physically disrupt and cause the loss of property by, among other actions, flooding Huntington Life Sciences with email, which prompted the company to purchase more sophisticated computer firewall technology. *See* Consolidated Brief for Appellee at 37-38, 102-103, *United States v. Fullmer*, No. 06-4211 (3rd Cir. May 22, 2008). Surely if the government contends such activity constitutes damages under the AEPA, it fits within the meaning of "damages" under the AETA.

The definition of "economic damage" in subsection (d)(3) does not cure the statute's overbreadth. The phrase "economic damage" does not appear in the offense section of the AETA, but only in the penalty section. Thus, under common usage and the rules of statutory interpretation, the "damages" proscribed in section (a) of the statute include but are not limited to "economic damage." *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate

inclusion or exclusion."). In other words, the AETA proscribes "damages" not included within the definition of "economic damages."

Moreover, even the "economic damages" defined by subsection (d)(3) create their own overbreadth problem, as the definition explicitly includes profit loss and cost increases. As explained above, legitimate, protected First Amendment activity often results in both profit loss and increased costs of operating.

Subsection (d)(3)(B) attempts to address this overbreadth by exempting from "economic damages" "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." First, because this provision only clarifies what "economic damage" may be considered in calculating a penalty under the AETA, the exception cannot be interpreted to cure the overbreadth caused by Congress' failure to define "damages" in section (a) of the statute.

Moreover, (d)(3)(B)'s exemption creates independent constitutional problems. Subsection (d)(3)(B) does not exempt protected protest activity, but rather premises exemption on the lawful reaction of third parties. If activists were to organize a picket of a fur store and a third party entered the store and splashed paint on fur coats, the picket would not be exempted because the third party reaction was unlawful. Similarly, if one business were to unlawfully break a contract with another business as a result of activist pressure, subsection (d)(3)(B) would not exempt the activists' activity. The same result would apply if activist pressure led to a government divestment later deemed unlawful. *Cf. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000). Premising liability on the actions of others is prohibited by the First Amendment prohibition on guilt by association. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982); *McCoy v. Stewart*, 282 F.3d 626, 632-33 (9th Cir. 2002).

2. The AETA's Prohibitions against "Damaging an Animal Enterprise," "Damages to… Personal Property," and the Definition of "Economic Damage" are Vague because the Conduct Prohibited is Un-defined and Internally Inconsistent, in Violation of Due Process

Along with being substantially overbroad, the AETA is also void for vagueness. A statute "can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement. *Hill v. Colorado*, 530 U.S. 703, 732 (2000), *citing Chicago v. Morales*¸ 527 U.S. 41, 56-57 (1999). When protected speech is involved, however, the "objectionable quality of vagueness and overbreadth" does not depend on either of these two infirmities, but on "the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *NAACP v. Button*, 371 U.S. 415, 433 (1963) (citations omitted). An unclear statute will "inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (citations omitted). For this reason, "standards of permissible statutory vagueness are strict in the area of free expression" and a court must not presume that an ambiguous line between permitted and prohibited activity "curtails constitutionally protected activity as little as possible." *NAACP*, 371 U.S. at 432.

Animal rights advocacy is at the core of political speech protected by the First Amendment. *See Bagget v. Bullitt*, 377 U.S. 360, 373 n.10 (1964) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means … is a fundamental principle of our constitutional system. A statute which upon its face … is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment."). Moreover, animal rights activists are particularly vulnerable to

attack due to their marginal and unpopular status. As the Supreme Court commented, at a time when the now venerated civil rights movement was in its infancy, "[w]e cannot close our eyes to the fact that the militant Negro civil rights movement has engendered the intense resentment and opposition of the politically dominant white community of Virginia…. In such circumstances, a statute broadly curtailing group activity … may easily become a weapon of oppression, however even-handed its terms appear." *Button*, 371 U.S. at 435-36; *see also Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051 (1991) (possibility of discriminatory enforcement is of special concern when speaker is critical of those who enforce the law). It is in this context that the clarity of the AETA's statutory provisions must be examined.

In an overbreadth and vagueness facial challenge the court must first determine whether the enactment reaches a substantial amount of constitutionally protected conduct. *Village of Hoffman Estates v. Flipside*, 455 US 489, 494 (1982). As explored fully, *infra*, the AETA does. For this reason, defendant may challenge the statute on its face, and need not show that the enactment is impermissibly vague in all of its applications. *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1149 n.7 (9th Cir. 2001). In this context, a statute's "vagueness exceeds constitutional limits if its deterrent effect on legitimate expression is both real and substantial, and if the statute is not readily subject to a narrowing construction by the state courts." *Id.* at 1151 (internal citations and punctuation omitted).

The AETA is unconstitutionally vague due to the repeated and inconsistent use of un-defined terms. Failure to define statutory terms fails vagueness scrutiny because it requires individuals of common intelligence to guess at a statute's meaning. *See, e.g., McGray v. City of Citrus Heights*, No. CIV S-99-1984, 2000 U.S. Dist. LEXIS 13593 (E.D. Ca. Aug. 7, 2000) (ban on "amplified" music void-for-vagueness because ordinance did not indicate how much music must be amplified before the ordinance is applicable); *Springfield v. San Diego Unified Port Dist.*,

950 F. Supp. 1482, 1489 (S.D. Ca. 1996) (ban on "speech-making" and "proselytizing" void-for-vagueness, as speaker had no way to know whether "proselytizing" refers only to religious activity, or speech on other subjects, or when "speech-making" is distinct from interpersonal communication); *see also Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303 (8th Cir. 1997) (failure to define pivotal term renders regulation vague); *Westbrook v. Teton County Sch. Dist. No. 1*, 918 F. Supp. 1475 (D. Wyo. 1985) (same).

Here, the same failure to define "damage," along with the unclear meaning of "economic damages" that renders the statute overbroad, also renders the statute impermissibly vague. As the legislature chose to define one set of terms and not the other, a law-abiding citizen must guess whether "lawful economic disruption," like profit loss caused by a successful political campaign, excepted from consideration in the penalty stage, fits the defined offense.

Moreover, the definition of "economic damage" itself is hopelessly vague. It includes, for example, "[lost profits] and increased costs resulting from threats, acts … [etc.] taken against a person or entity on account of that person's or entity's connection to … an animal enterprise." Does this mean that lost profits and increased costs count as economic damage whether or not the perpetrator intended the result *because of* the entity's connection to an animal enterprise? In other words, are lost profits caused by animal rights protestors identical to lost profits caused by labor activists who have no idea or concern as to whether or not the enterprise in question uses animal products? If so, the entire second part of the provision is surplusage. If not, the statute invites the exploration of subjective intent and self-censorship, explained below. *Sheehan v. Gregoire*, 272 F. Supp. 2d 1135, 1149 (W. D. Wash. 2003). Either way, the lack of clarity renders the statute unconstitutionally vague.

As explained in more detail above, the subsequent exception at subsection (d)(3)(B) is even less clear. The statute instructs that "economic damage" does not include "lawful economic

disruption" resulting from "lawful public, governmental, or business reaction to the disclosure of information about an animal enterprise," but does that include increased costs that result from public, governmental, or business reaction to information disclosure? If, for example, an animal enterprise chooses to hire additional security in the face of a peaceful and lawful picket on a public sidewalk across the street from enterprise headquarters, has economic damage occurred? What about "damage or loss?" The lack of clear answers to any of these questions underlines the AETA's vagueness.

C. The AETA Violates the First and Fifth Amendments Because the Prohibition on "Interfering" with an Animal Enterprise is Overbroad and Vague

Section (a)(1) of the AETA prohibits "interfering" with an animal enterprise. Like the prohibition on "damaging," the restriction on "interfering" with an animal enterprise is undefined and substantially overbroad and vague in its plain meaning.

Statutory language prohibiting acts such as interference and harassment encompass speech as well as conduct. *Houston v. Hill*, 482 U.S. 464-65 (1987). In *Houston*, the Court declared unconstitutionally overbroad an ordinance that made it unlawful to interrupt police officers in the performance of their duties because it "criminalize[d] a substantial amount of constitutionally protected speech, and accord[ed] the police constitutional discretion in enforcement." *Id*. at 466. Similarly, in *Dorman v. Satti*, 862 F.2d 432 (2d Cir. 1988), the Second Circuit declared a statute that prohibited "interfere[ing]" with or "harass[ing]" hunters unconstitutionally overbroad and vague. *Id.* at 436-37.

As "interfering" is left undefined, the AETA gives no clue as to what conduct constitutes "interfering" with an animal enterprise. However, it is logical to presume that it alludes to some conduct distinct from that which "damages" or "causes… loss." *See SEC v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003) ("It is a well-established canon of statutory interpretation that the use of different words or terms within a statute demonstrates that Congress intended to convey a different

meaning for those words.") Merriam-Webster defines "interfere" as: (1) to interpose in a way that hinders or impedes: come into collision or be in opposition; (2) to strike one foot against the opposite foot or ankle in walking or running —used especially of horses; (3) to enter into or take a part in the concerns of others or; (4) to act reciprocally so as to augment, diminish, or otherwise affect one another - used of waves. *Merriam-Webster Online Dictionary*, http://www.merriam-webster.com/dictionary/interfere. Definitions (1) and (3) are each relevant, yet they mean substantially different things. Traveling to "take part in the concerns" or meddle in the affairs of an animal enterprise is exceptionally broad, in that it could include any sort of travel related to lawful advocacy against a given enterprise, such as traveling to speak on a panel. Definition (1) is much narrower, in that it requires creation of an obstacle. Because there are two "competing and equally viable definitions," the term does not place potential violators on adequate notice of the legality of their conduct. *Jane L. v. Bangerter*, 61 F.3d 1493, 1501 (10th Cir. 1995) *rev'd on other grounds*, *Leavitt v. Jane L.*, 518 U.S. 137 (1996).

Examples of protected speech and conduct done with the purpose of interfering with an animal enterprise abound. A sidewalk picket outside a fur store is certainly intended to interfere with that business; the purpose is to persuade the public not to patronize that store and to shame those who do. A letter to a company threatening to boycott their products unless they cease testing on animals is also intended to interfere with that business, either by changing the current mode of operations or causing loss of future business. And, of course, interference defined by "being in opposition" to an animal enterprise includes every type of advocacy.

The Second Circuit struck down similar language for overbreadth and vagueness in *Dorman v. Satti*, 862 F.2d 432, 433 (2d Cir. 1988), which analyzed the Hunter Harassment Act's prohibition on "interfere[nce] with the lawful taking of wildlife by another person." In finding the statute impermissibly vague, the court characterized "interfere" as an imprecise term that can

"mean anything." *Id.* at 436. Indeed, prohibitions on "interfering" have been repeatedly struck down by federal courts on both overbreadth and vagueness grounds. *See Hirschkop v. Snead*, 594 F.2d 356, 371 (4th Cir. 1979) (Virginia Code of Professional Responsibility prohibition on statement "reasonably likely to interfere with a fair trial" is overbroad and vague because it is "so imprecise that it can be a trap for the unwary… neither the speaker nor the disciplinarian is instructed where to draw the line between what is permissible and what is forbidden."); *Nitzberg v. Parks*, 525 F.2d 378, 383 (4th Cir. 1975) (school directive overbroad and void for vagueness because it gives no guidance as to what amounts to a "substantial disruption or material interference" with school activities); *Young v. City of Roseville*, 78 F. Supp. 2d 970 (D. Minn. 1999) (permit ordinance that asks whether a proposed sign "interfere[s] with the use and enjoyment of adjacent land" void for vagueness).

Courts have upheld statutory use of the term "interfere" only when the term is defined or limited within the statute or regulation in question. *See, e.g., Cameron v. Johnson*, 390 U.S. 611, 616 (1968) (prohibition "on picketing . . . in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any . . . county . . . courthouses" is not vague nor overbroad); *Riley v. Reno*, 860 F. Supp. 693, 704-05 (D. Ariz. 1994) (Freedom of Access to Clinic Entrances Act not void for vagueness nor overbroad as phrase "interfere with" is defined within the statute as "to restrict a person's freedom of movement.") The AETA includes no such limitations or definitions, as the prohibited interference is not limited to a certain site or type of action.

D. The AETA's Intent Requirement is Unconstitutionally Vague because it Invites Discriminatory Enforcement and Requires an Individual to Guess as to Prohibited Conduct

By criminalizing conduct based on purpose, the AETA's prohibition of actions undertaken "for the purpose of damaging or interfering with the operations of an animal enterprise" requires

that a prosecuting attorney, and then a jury discern the "subjective intent" of the individual and thus invites subjective enforcement. *See Foti v. City of Menlo Park,* 146 F.3d 629, 638 (9th Cir. 1998) (ordinance that prohibits parking with the intent to attract public attention to a sign requires consideration of subjective intent and is thus void-for-vagueness); *Sheehan v. Gregoire*, 272 F. Supp. 2d 1135, 1149 (W. D. Wash 2003) (statute that forbids disclosure of law enforcement officers' information with "intent to harm or intimidate" requires consideration of subjective intent and is thus void-for-vagueness).

Like the provisions in *Foti* and *Sheehan*, the AETA's purpose requirement demands self-censorship, requiring "that one police one's own thoughts and subjective intent." *Sheehan*, 272 F. Supp. 2d at 1149. In this way, it "impermissibly sacrifices the public interest in the free exchange of speech and ideas." *Id.* Such vague language in the context of a statue that "is obviously adopted to target the political activities of specific persons" renders "discriminatory enforcement a real possibility." *Id.*

At the same time that the statute's purpose requirement renders it vulnerable to discriminatory enforcement, the meaning of that requirement is profoundly unclear. Specifically, it is impossible to discern whether the offense requires a perpetrator motivated by the fact that an animal enterprise has some connection to animals.

Certainly, the definition of "animal enterprise" found in subsection (d)(1) is broad enough to include not just animal testing facilities frequently targeted by animal rights activists, but any food or retail outlet, university, or school, along with all corporations that provide cafeterias for their workers. Wal-Mart, The Gap, Nike, and Columbia University, for example, all sell animal products, and thus all fall within the definition. *See* 18 U.S.C. § 43 (d)(1)(A). The statute provides no answer to the question of whether workers' rights activists who picket Wal-Mart, or organize a boycott of The Gap or Nike and thus cause security expenditures or lost profits engage

in activity punishable by the statute. Such individuals may intend to cause loss of profit to an animal enterprise, but their actions are most likely not motivated by the fact that the enterprise uses animal products. A person of common intelligence cannot discern if the type of political message at issue is determinative of the statute's application (e.g., workers' rights versus animal rights).

In contrast, the Freedom of Access to Clinic Entrances Act, with which the AETA shares some statutory language and structure, limits its application to action taken against a person *because* that person provides reproductive health services. 18 U.S.C. § 248(a)(1). FACE's motive requirement targets a specific crime, while avoiding federalizing "a slew of random crimes that might occur in the vicinity of an abortion clinic." *United States v. Dinwiddie*, 76 F.3d 913, 923 (8th Cir. 1996).

The lack of clarity posed by the AETA's failure to include a motive provision is not based on the "mere fact that close cases can be envisioned," *Williams*, 128 S.Ct. at 1846, or "uncertainty at a statute's margins," *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1151 (9th Cir. 2001) but rather on the "indeterminacy" as to precisely what conduct and intent is required. *Williams*, 128 S.Ct. at 1846. There is a huge amount of protest activity aimed at "animal enterprises" that may or may not be proscribed by the law, depending on whether violation of the AETA requires intent to harm an animal enterprise *because it is an animal enterprise*. This impermissible vagueness means that an individual must guess at what advocacy is proscribed, and thus must self-censor, to limit his or her action to that which is "unquestionably safe." *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279 (D. Utah 1998). For this reason, political activists of all persuasions may be chilled from speech or action regarding any corporation or university definable as an "animal enterprise."

Moreover, the broadness of this definition, especially in contrast to the deceptively specific implication of the phrase "animal enterprise," is problematic in itself. Broad proscriptions may pass constitutional muster when the statutory scheme is specific enough to limit the potential liability. *United States v. Cassel*, 408 F.3d 622, 635 (9th Cir. 2005). For example, in *Cassel* the Ninth Circuit declined to void a statute prohibiting "intimidation" because the limited context of the statute—prohibiting intimidation that occurs in connection to the sale of public land—gave fair notice to those who might violate the statute. *Id.*, *citing United States v. Tabacca*, 924 F.2d 906 (9th Cir. 1991) (prohibition on "intimidating" not unconstitutionally vague because the statute included modifying language requiring that the proscribed acts occur while on board an aircraft, and must interfere with the performance by an attendant of his or her duties.) *See also Grayned v. City of Rockford*, 408 U.S. 104, 113 (1972) (upholding anti-picketing ordinance specifically targeted to avoid disruption of normal school activities); *Cmty. Television of Utah v. Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985) *aff'd*, 800 F.2d 989 (10th Cir. 1986) (Utah Decency Act void for vagueness because it lacks limitation on scope). Given the breadth of the statute's description of an animal enterprise, however, the AETA's proscriptions lack any bounded context, and thus fail to provide fair notice to potential violators.

E. The AETA Unconstitutionally Provides Criminal Liability for Conspiring or Attempting to Interfere with or Damage an Animal Enterprise

Finally, subsection (a)(2)(C) of the AETA is unconstitutionally vague and overbroad because it criminalizes conspiring or attempting to travel or use of the mail for the purpose of damaging or interfering with the operations of an animal enterprise. The breadth of this provision cannot be overstated. Unlike subsections (a)(2)(A) & (a)(2)(B), which require an additional course of conduct resulting in damage to property or threat of injury, subsection (a)(2)(C) does not require any further course of conduct.

The full offense under (a)(2)(C) reads: "Whoever [uses interstate commerce] for the purpose of damaging or interfering with the operation of an animal enterprise; and conspires or attempts to do so; shall be punished…." The textual, plain meaning of "to do so" refers back to interfering with an animal enterprise under subsection (a)(1).

The AETA's structure is clear: subsection (a)(2)(C) does not prohibit a conspiracy or attempt to damage property under subsection (a)(2)(A), nor threats of injury under subsection (a)(2)(B). Subsection (a)(2)(C)'s inclusion on a list of three offenses, joined together by "or," plainly permits (a)(2)(C)'s application in the absence of either (a)(2)(A) or (a)(2)(B). Just as threats under (a)(2)(B) do not require any damages to property under (a)(2)(A), (a)(2)(C) similarly stands alone as a basis for criminal liability under subsection (a)(2).

The structure of other federal criminal statutes further supports this reading. The AETA appears unique in this structure; other provisions of 18 U.S.C. that use attempt and/or conspiracy language either include attempt/conspiracy language in each subsection it applies to,[2] include a separate attempt/conspiracy subsection explicitly identifying other subsections it incorporates,[3] or have attempt/conspiracy language separate and apart from the list of subsections of offenses separated by "or," clearly indicating that the conspiracy/attempt language applies to all subsections in the list.[4] Each of the above three methods are clear in their text and structure as to

[2] *See, e.g.*, 18 U.S.C. § 33; 18 U.S.C. § 81; 18 U.S.C. § 175; 18 U.S.C. § 247; 18 U.S.C. § 248; 18 U.S.C. § 609; 18 U.S.C. § 793; 18 U.S.C. § 794; 18 U.S.C. § 832; 18 U.S.C. § 836; 18 U.S.C. § 924; 18 U.S.C. § 930; 18 U.S.C. § 1203; 18 U.S.C. § 1204; 18 U.S.C. § 1262; 18 U.S.C. § 1362; 18 U.S.C. § 1363; 18 U.S.C. § 1365; 18 U.S.C. § 1368; 18 U.S.C. § 1470; 18 U.S.C. § 1505; 18 U.S.C. § 1512; 18 U.S.C. § 1513; 18 U.S.C. § 1791; 18 U.S.C. § 1951; 18 U.S.C. § 1959; 18 U.S.C. § 2071; 18 U.S.C. § 2118; 18 U.S.C. § 2119; 18 U.S.C. § 2153; 18 U.S.C. § 2154; 18 U.S.C. § 2155; 18 U.S.C. § 2241; 18 U.S.C. § 2251; 18 U.S.C. § 2260; 18 U.S.C. § 2275; 18 U.S.C. § 2332; 18 U.S.C. § 2385; 18 U.S.C. § 2388; 18 U.S.C. § 2421; 18 U.S.C. § 2422; 18 U.S.C. § 2423; 18 U.S.C. § 2425; 18 U.S.C. § 2339(a); 18 U.S.C. § 2339A; 18 U.S.C. § 2339B.

[3] *See, e.g.*, 18 U.S.C. § 18; 18 U.S.C. § 32; 18 U.S.C § 38; 18 U.S.C. § 351; 18 U.S.C. § 831; 18 U.S.C. § 1201; 18 U.S.C. § 1751; 18 U.S.C. § 1831; 18 U.S.C. § 1832; 18 U.S.C. § 2280; 18 U.S.C. § 2281; 18 U.S.C. § 2291; 18 U.S.C. § 2332B; 18 U.S.C. § 2332F; 18 U.S.C. § 2339C.

[4] *See, e.g.*, 18 U.S.C. § 37; 18 U.S.C. § 1091; 18 U.S.C. § 1466A; 18 U.S.C. § 1512; 18 U.S.C. § 1513; 18 U.S.C. § 2241; 18 U.S.C. § 2242.

how attempt or conspiracy operate vis a vis other sections of the statute. The AETA, alone in its flawed structure, is not.

The fact that attempt or conspiracy to interfere with or damage an animal enterprise, without more, is prohibited, is further supported by section (b), the AETA's penalties section. First, section (b) explicitly provides penalties for attempt and conspiracy that are equal to substantive violation of subsections (a)(2)(A) and (a)(2)(B). A fundamental rule of statutory construction requires that every part of a statute be presumed to have some effect, and not be treated as meaningless unless absolutely necessary. *Raven Coal Corp. v. Absher*, 149 S.E. 541 (Va. 1929); *see also Amato v. W. Union Int'l, Inc.*, 773 F.2d 1402, 1408 (2nd Cir. 1985). If subsection (a)(2)(C) only referred back to subsections (a)(2)(A) & (B), the inclusion of penalties for attempt and conspiracy in section (b) would be superfluous, and vice versa.

Second, subsection (b)(1)(A) provides the penalty for the textual offense under (a)(2)(C)—in other words, it provides a penalty for a violation in which there is neither damage nor the threat of (or actual) injury. Subsection (b)(1)(A) provides for up to a year of imprisonment for conspiring or attempting to interfere with the operation of an animal enterprise, with nothing more.

By prohibiting an attempt or conspiracy to travel for the purpose of damaging or interfering with the operation of an animal enterprise, subsection (a)(2)(C) criminalizes a huge amount of protected speech and conduct.

F. The AETA's Rules of Construction Do Not Save its Vagueness and Overbreadth Deficiencies

The AETA's confusing reach is only heightened by the "rules of construction," which state that the statute shall not be construed "to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment." 18 U.S.C. § 43(e). If meaningful, the "rule" renders the (d)(3)(B) narrow

exception for lawful economic disruption including certain "lawful boycott[s]" exception redundant, as the rule purports to protect all lawful boycotts from punishment, whether or not they result from public, governmental, or business reaction of any specific type. *Cf. Bridger Coal Co. v. Office of Workers' Comp. Programs*, 927 F. 2d 1150, 1153 (10th Cir. 1991) (a court's interpretation of a statute should not render any clauses superfluous).

The provision can be seen as mere surplusage, as *all statutes* are already subject to the rule that they should be construed wherever possible to avoid constitutional problems. *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2000). As the Fifth Circuit said of similar language in another federal statute: "such a provision cannot substantively operate to save an otherwise invalid statute, since it is a mere restatement of well-settled constitutional restrictions on the construction of statutory enactments." *CISPES (Comm. in Solidarity with the People of El Sal.) v. FBI*, 770 F.2d 468, 474 (5th Cir. 1985).

Nor does the boilerplate provision add any clarity that would permit ordinary people to know what is permitted and what is prohibited. The ordinary person cannot be charged with understanding all the nuances of First Amendment doctrine, and without that understanding, a statute that merely says it should not be construed to abridge First Amendment rights does not give adequate notice of what is prohibited and what is protected. In *Rubin v. City of Santa Monica*, 823 F. Supp. 709, 712 (C.D. Ca. 1993), for example, the district court relied on an ordinance's exemption of "First Amendment Activities" from regulation in making its vagueness determination. That regulation, similar to the AETA, did not define "First Amendment Activities," nor could it. *Id* at 712 n.6 (citing Supreme Court precedent suggesting "the peril in drafting an ordinance which uses the term 'First Amendment Activities' as if the meaning of such a term were self-evident or easily discernable" and that "such provisions are inherently vague and unenforceable, and hence unconstitutional."); *see also NAACP*, 371 U.S. at 438 (When there is

"internal tension between proscription and protection in the statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights. Broad prophylactic rules in the area of free expression are suspect."). Indeed, the inclusion of a savings clause exempting first amendment activity from regulation "in attempting to cure overbreadth … in turn renders the ordinance unconstitutionally vague." *Nat'l People's Action v. City of Blue Island*, 594 F. Supp. 72, 80 (N.D. Ill. 1984). As the exemption alludes to "a vast and diverse body of law as guidance …[s]uch a general exemption does not sufficiently inform" individuals as to the reach of the regulation. *Id.* at 79.

IV. CONCLUSION

For the foregoing reasons, this court should declare the AETA unconstitutionally vague and overbroad. Consequently, the indictment against Ms. Stumpo should be dismissed.

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Respectfully submitted,

/s/
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