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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

UNITED STATES OF AMERICA Plaintiff, v. JOSEPH BUDDENBERG, MARYAM KHAJAVI, NATHAN POPE, A/K/A NATHAN KNOERL, ADRIANA STUMPO, Defendants.	CR 09-263 RMW GOVERNMENT OPPOSITION TO MOTION TO DISMISS Date: July 13, 2009 Time: 9:00 a.m. Court: Hon. R. Whyte

I. INTRODUCTION

On May 22, 2009, the defendants filed motions to dismiss the indictment, arguing in substance that 18 U.S.C. § 43 is unconstitutional, overbroad, and vague. The defendants' motion to dismiss the indictment based on the facial unconstitutionality of the statute should be denied because the sections of the statute charged in the indictment are not content-based restrictions on protected First Amendment speech. Section 43 proscribes criminal conduct, not protected speech. This case is not about whether animal rights activists have a First Amendment right to

protest animal testing laboratories and its employees. This case is about whether or not they can use criminal means, such as threats, intimidation, harassment, criminal trespass, and property damage against researchers at their homes, to accomplish those objectives. As courts have repeatedly recognized, defendants have no constitutional right to utter threats or to engage in threatening conduct. Accordingly, acts committed in violation of 18 U.S.C. § 43 (a)(1), (a)(2)(B), and (a)(2)(C) (attempt) are not protected by the First Amendment.

II. FACTUAL BACKGROUND

On February 19, 2009, the defendants were charged by complaint with a violation of 18 U.S.C. § 43. As set forth in the criminal complaint, the defendants are accused of engaging in a course of conduct involving threats, acts of vandalism, property damage, criminal trespass, harassment, and intimidation against University of California at Berkeley and Santa Cruz bio-medical researchers who conduct laboratory tests on animals.

On March 12, 2009, the defendants were charged by indictment with one count of conspiracy, in violation of 18 U.S.C. § 371, and one count of force, violence, and threats involving an animal enterprise, in violation of 18 U.S.C. § 43. The criminal complaint alleges, and the indictment charges, that between October 2007 and July 2008, the defendants engaged in repeated protests, including acts of vandalism, property damage, criminal trespass, harassment, threats, and intimidation at numerous bio-medical researchers' homes in the East Bay and in Santa Cruz for the very explicitly stated purpose of causing the researchers to abandon laboratory testing on animals. For example, the defendants are accused of chanting slogans such as "1, 2, 3, 4, open up the cage door; 5, 6, 7, 8, smash the locks and liberate; 9, 10, 11, 12, vivisectors go to hell," and "we will never back down until you stop your killing."

Section 43 is defined, in 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 death of, or serious bodily injury to that person, a member of the immediate family (as defined in section 115) of that person, or a spouse or intimate partner of that person by a course of conduct involving threats, acts of vandalism, property damage, criminal trespass, harassment, or intimidation; or
>
> (C) conspires or attempts to do so;
>
> shall be punished as provided for in subsection (b).
>
> (...)
>
> (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;
>
> (2) the term "course of conduct" means a pattern of conduct composed of 2 or more acts, evidencing a continuity of purpose (...)

The conspiracy count alleges that the defendants conspired to commit a violation of 18 U.S.C. § 43 (a)(1) and (a)(2)(B) - a conspiracy to damage and interfere with an animal enterprise by intentionally engaging in a course of criminal conduct. The second count of the indictment alleges a violation of 18 U.S.C. § 43 (a)(1), (a)(2)(B), and (a)(2)(C) (attempt) - for the purpose of damaging and interfering with the operations of an animal enterprise, the defendants intentionally placed persons in fear and attempted to do so, by engaging in a course of criminal conduct. The defendants are not charged with violating 18 U.S.C. § 43 (a)(2)(A) (intentionally damaging or causing the loss of any real or personal property used by, or relating to an animal enterprise), and they are not charged under the conspiracy liability of subsection (a)(2)(C).

III. ARGUMENT

A. The defendants only have standing to challenge the sections of the statute with which they are charged.

Where First Amendment rights are at issue, the defendants have standing to challenge a statute for facial overbreadth and vagueness without alleging an unconstitutional as-applied harm. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). However, the defendants are still required to demonstrate standing in order to properly invoke the Court's authority under Article III of the Constitution. *Allen v. Wright*, 468 U.S. 737, 750 (1984). Under Article III, the Court only has authority to hear "actual 'cases' and 'controversies'." *Id.* Therefore, the defendants lack standing to challenge elements of 18 U.S.C. § 43 with which they are not charged because those elements do not present a controversy for the court to resolve. *See Service Employees*

International Union v. Municipality of Mt. Lebanon, 446 F.3d 419, 424 (3rd Cir. 2006) ("We are not free to hear a party's facial challenge to a municipal regulation that is wholly inapplicable to the party."). Indeed, in order for the defendants to obtain the relief they seek, dismissal of the indictment, they must establish that the statute as charged against them is unconstitutional. This pares the defendants' constitutional arguments down to the following: (1) the statute is an unlawful content-based restriction on protected speech in violation of the First Amendment; (2) the statute is overbroad and vague; and (3) the terms "damaging" and "interfering" in subsection (a)(1) and "economic damages" in subsection (d)(3)(B) are undefined, overbroad, and vague.

B. The statute does not violate the First Amendment.

The Supreme Court has long recognized that First Amendment rights are not absolute, and that certain conduct involving speech may exceed First Amendment protection. While pure political hyperbole is protected speech, threats are not. *See Watts v. United States*, 394 U. S. 705 (1969). The fact that an animal rights activist may engage in some protected speech does not shield him from criminal liability for threatening conduct that exceeds First Amendment protection. *See e.g. United States v. Bellrichard*, 994 F.2d 1318, 1322 (8th Cir. 1993) ("a person may not escape prosecution for uttering threatening language merely by combining the threatening language with issues of public concern."). The fact that speech is involved in furthering the activist's goals does not transform the illegal conduct into protected speech. *See Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) ("[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.").

The First Amendment clearly permits statutes barring threats. As the Supreme Court recognized in *Virginia v. Black*, "the First Amendment ... permits a state to ban a 'true threat.'" 538 U.S. 343, 359 (2003) (internal citations omitted). At issue in *Virginia v. Black* was a state law prohibiting cross burnings done with the intent to intimidate. In upholding the law, the Court found that "[t]he protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression

consistent with the Constitution." *Id.* at 358. While recognizing that cross burning is symbolic expression, the Court nevertheless concluded that when done with the intent to intimidate, it falls outside the contours of protected speech. *Id*. at 363. The Court explained that "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Id*. at 360.

Similarly, the Ninth Circuit held in *Planned Parenthood v. American Coalition of Life Activists* that the First Amendment did not protect even facially non-threatening speech. 290 F.3d 1058 (9th Cir. 2002) (*en banc*). The defendants there were prosecuted under the Freedom of Access to Clinics Entrances Act, a statute enacted in response to the targeting of legitimate businesses by activist groups opposed to their mission. Like the defendants here, the defendants in *Planned Parenthood* were motivated by their political beliefs. In rejecting the defendants' First Amendment challenge, the Ninth Circuit found that the release of personal information identifying physicians and done with intent to intimidate was threatening, even though the information was conveyed in a manner that did not contain overly threatening language. *Id.* at 1085. The Court held that "[t]hreats are outside the First Amendment to 'protect[ ] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.'" *Id*. at 1076 (quoting *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388 (1992)). Accordingly, the Court found that the continued release of information identifying abortion providers after three physicians previously identified in posters had been murdered was threatening speech unprotected by the First Amendment. *Id.* at 1079-1086. *See also United States v. Viefhaus*, 168 F.3d 392, 396 (10th Cir.1999) (recorded answering machine message announcing that 15 bombs would detonate in major cities not protected speech). Accordingly, the First Amendment does not shield the threatening acts of animal rights activists, including the flyers they create and distribute identifying the researchers by photograph, name, work and home addresses, work and home telephone numbers; the activists' vandalism, criminal trespass, harassment, and intimidation of the researchers and their families, from prosecution under 18 U.S.C. § 43 (a)(1), (a)(2)(B), and (a)(2)(C) (attempt).

Since the statute does not limit protected speech, the strict scrutiny test does not apply. *See Melugin v. Hames*, 38 F. 3d 1478, 1483-1484 (9th Cir. 1994) (strict scrutiny test applies to protected speech, lesser standard applies to unprotected speech). Section 43 (a)(2)(B) criminalizes acts, including threatening speech, that are part of a course of conduct involving at least two criminal acts of intimidation, threats, harassment, vandalism, property damage, or trespass intended to place the victim in fear of death or serious bodily injury. *See* 18 U.S.C. § 43 (a)(2)(B) and (d)(2). Its purpose is clearly legitimate - to protect animal enterprises from threatening criminal conduct. If an activist engaged in lawful, non-threatening conduct in furtherance of his political opinion, he could not be prosecuted under 18 U.S.C. § 43 (a)(1) and (2)(B) based on his words alone. In fact, a single animal rights protest, or a series of protests, that was not coupled with at least two of the enumerated criminal acts and that was not done for the purpose of scaring a person to death would not violate the statute. As such, the statute criminalizes true threats, much like the statutes at issue in *Virginia v. Black*, *Planned Parenthood*, and *Viefhaus* discussed above.

C. The statute is neither overbroad nor void for vagueness.

1. The statute is not overbroad.

In evaluating a facial challenge to the overbreadth of a statute, "a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Hoffman Estates v. Flipside*, 455 U.S. 489, 494 (1982). Invalidating a statute on this ground is "strong medicine," and is done "with hesitation and then 'only as a last resort.'" *New York v. Ferber*, 458 U.S. 747, 769 (1982) (internal citation omitted). As a result, "the overbreadth doctrine is not casually employed." *Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32, 39 (1999). *See United States v. Coronado*, 461 F. Supp. 2d 1209, 1212-1213 (S.D. Cal. 2006). Under the overbreadth doctrine, a court must not declare a statute unconstitutional unless it "reaches a substantial amount of constitutionally protected conduct." *Hoffman Estates*, 455 U.S. at 494. Furthermore, "where conduct and not merely speech is implicated the overbreadth of a statute must be judged in relation to its legitimate sweep." *Id.* at 1213. *See Hill v. Colorado*, 530 U.S. 703, 732 (2000). The defendants

bear the burden of proof in demonstrating substantial overbreadth. *New York State Club Assn., Inc. v. City of New York*, 487 U.S. 1, 14 (1988).

Applying the *Hoffman Estates* test, it is clear that the defendants' overbreadth challenge to the statute fails at the first step of the analysis. Section 43 does not criminalize "a substantial amount of constitutionally protected conduct." *Hoffman Estates*, 455 U.S. at 494. Section 43 (a)(1) and (2)(B) criminalize a course of conduct intended to place a person in reasonable fear of death or serious bodily injury for the purpose of damaging or interfering with an animal enterprise. As set forth above, the Supreme Court has repeatedly recognized that "true threats" are not protected speech. *See United States v. Cassel*, 408 F.3d 622, 627 (9th Cir. 2005). Accordingly, the statute does not prohibit any constitutionally protected activity. Therefore, defendants' facial overbreadth challenge must fail.

2. The statute is not vague.

"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. at 732. "A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged in its face as unduly vague, in violation of due process. To succeed, however, the complainant must demonstrate that the law is impermissibly vague in all of its application." *Hoffman Estates* at 497. Moreover, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Gonzalez v. Carhart*, 550 U.S. 124, 153 (2007) (internal quotation omitted).

Since the statute does not apply to protected speech, the defendants must prove that Section 43 (a)(1), (2)(B), and (2)(C) are vague in all of their applications. *See Cal. Teachers Ass'n v. State Bd. Of Educ.*, 271 F.3d 1141, 1149 n. 7 (9th Cir. 2001). "[A]ssuming the enactment implicates no constitutionally protected conduct, [the court] should uphold the challenge only if the enactment is impermissibly vague in all of its applications. 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." *Hoffman Estates*, 455 U.S. at 494-495 (footnote omitted). Accordingly, the defendants must prove that the statute was vague as applied to them.

Since the defendants have limited the scope of their argument to a facial challenge of the statute, they have not established how the statute was vague as applied to them. Nor could they. The defendants, while frequently hiding their identity behind bandanas, were very vocal about their intended purpose - as set forth in the complaint, the defendants chanted "1, 2, 3, 4, open up the cage door; 5, 6, 7, 8, smash the locks and liberate; 9, 10, 11, 12, vivisectors go to hell," "what goes down comes around burn UC Berkeley to the ground," and "we will never back down until you stop your killing." The defendants are also accused of creating a flyer titled "Murderers and torturers alive & well in Santa Cruz July 2008 edition" that read "animal abusers everywhere beware we know where you live we know where you work we will never back down until you end your abuse." It is clear from their statements alone that the defendants acted for the purpose of causing the researchers to stop using animals for testing, thereby at a minimum intending to interfere with the activities of their laboratories. Again, the defendants here are charged not because of their opinions, but because of their repeated intentional criminal acts of harassing, intimidating, and threatening bio-medical researchers, coupled with acts of criminal trespass, vandalism, and property damage at their homes. While the defendants could have protested without terrorizing and attempting to terrorize the researchers, they chose not to. They cannot now claim that the law is unclear because they got caught.

3. The terms "damage" and "interfere" are not vague.

The defendants' arguments that the term "damage" in subsection (a)(1) is vague because it is not defined in the statute is equally unavailing. The defendants do not prove, nor do they even suggest, any confusion in what that word means. Addressing one of the defendants' examples, protesters who successfully caused a business to break a contract with another could not be prosecuted under 18 U.S.C. § 43 (a)(1) and (2)(B). *See* Stumpo Brief at 8. While the term "economic damage" is defined in subsection (e)(3), that does not render the term "damage" in (a)(1) vague. In the absence of a statutory definition, courts will normally construe a word based on its ordinary, common meaning. *See Smith v. United States*, 508 U.S. 223, 228 (1993); *see*

also United States v. Iverson, 162 F.3d 1015, 1022 (9th Cir. 1998) ("When a statute does not define a term, we generally interpret that term by employing the ordinary, contemporary and common meaning of the words that Congress used."). Damage is defined as to cause "loss or harm resulting from injury to person, property, or reputation." Merriam-Webster Online Dictionary at www.Merriam-Webster.com/dictionary/damage. This definition is consistent with the common sense understanding of the word. *See Iverson*, 162 F. 3d at 1022.

Similarly, there is nothing vague with the term "interfering." In *United States v. Bucher*, the Ninth Circuit upheld a criminal conviction based on the defendant's interference with a park ranger engaged in his official duties. 375 F.3d 929 (9th Cir. 2004). Specifically, the Court found that "[t]he term 'interfere' is unambiguous and is defined as 'to oppose, intervene, hinder, or prevent.'" *Id.* at 932 (internal citations omitted). *See also, United States v. Willfong*, 274 F. 3d 1297, 1301 (9th Cir. 2001) ("'Interfere' has such a clear, specific and well-known meaning as not to require more than' the use of the word itself in a criminal statute." quoting *United States v. Gwyther*, 431 F. 2d 1142, 1144 n. 2 (9th Cir. 1970)). The defendants' reliance on *Dorman v. Satti* is misplaced. 862 F. 2d 432 (2nd Cir. 1988). The *Dorman* Court found that the terms "interfere," "harass," and "acts in preparation" in the Hunter Harassment Act could mean anything because of the "imprecise and indefinite" nature of the statute. *Id.* at 436. Unlike the Hunter Harassment Act, Section 43 limits its application to acts committed for the purpose of damaging or interfering with the operations of an animal enterprise that intentionally place a person in reasonable fear of bodily injury. The only logical meaning the term "interfering" can have in that sentence is the first definition cited by the defendants - "to interpose in a way that hinders or impedes: come into collusion or be in opposition." Stumpo Brief at 13 quoting Merriam-Webster Online Dictionary. *See Bucher*, 375 F. 3d at 932 ("[o]ne who interferes with a government employee who is engaged in an official duty has necessarily compromised the performance of those duties.").

Nor do the defendants' hypothetical applications of the statute lead to a different result. A sidewalk picket in front of a fur store for the purpose of interfering with the store's business which does not also involve at least two criminal acts and is intended to place a person in

reasonable fear of death or serious bodily injury could not be prosecuted under 18 U.S.C. § 43 (a)(1) and (2)(B). *See* Stumpo Brief at 13. A letter to a company threatening to boycott their product would also not fall under the scope of 18 U.S.C. § 43 (a)(1) and (2)(B). *Id.* The defendants' alleged acts are in stark contrast to their examples - multiple protests at researchers' homes at which the defendants wearing bandanas covering their face, chant and scream that they will not stop their protests until the researchers stop using laboratory animals, while making explicit and subtle references to arsons, are hardly equivalent to a boycott or peaceful picket. There is no risk that lawful expressions of political opinion that interfere or damage an animal enterprise, without a threat or attempted threat of death or serious bodily injury, would subject an animal rights activist to prosecution under 18 U.S.C. § 43 (a)(1), (2)(B), and (2)(C) (attempt). Indeed, "[t]he 'requirement of intent to intimidate serves to insulate the statute from unconstitutional application to protected speech.'" *Planned Parenthood,* 290 F. 3d at 1076 (internal citation omitted).

IV. CONCLUSION

For the reasons set forth above, 18 U.S.C. § 43 (a)(1), (a)(2)(B), and (a)(2)(C) (attempt) is a lawful restriction on animal rights activists' ongoing threatening criminal conduct committed against animal enterprises, including employees of the animal enterprises and their families. Neither the statute as charged, nor its defining language is overbroad or vague. Accordingly, the defendants' motions to dismiss the indictment should be denied.

Dated: June 15, 2009

Respectfully submitted,

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