No. 14-133

IN THE
Supreme Court of the United States

SARAJANE BLUM, *et al.*,
Petitioners,

v.

ERIC HOLDER, ATTORNEY GENERAL
Respondent,

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

BRIEF OF AMICI CURIAE EDYTHE D. LONDON ET AL., IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI CURIAE[1]

Amici are scientists and medical researchers, who have been subjected to increasing criminal violence

[1] Pursuant to Rule 37.3(a), written consents from the parties to the filing of the brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person other than the amici curiae or their counsel made any monetary contribution to the preparation or submission of this brief. All parties have been notified at least ten days prior to the filing of this brief.

and continued harassment from animal rights extremists for more than two decades. They have had their homes and cars firebombed; their research stolen; and their lives and the lives of their family members threatened. The objective of these extremists is to force the amici to abandon their professional activities in medical research. The amici have devoted their professional lives to medical and scientific research, which often requires the use of laboratory animals.

The Animal Enterprise Terrorism Act of 2006 (AETA) provides an important tool for federal law enforcement authorities to prosecute extremists when they target and attack researchers such as the amici when they move beyond lawfully protected speech to unprotected acts of criminal violence. The AETA proscribes only criminal conduct and does not unconstitutionally violate the First Amendment.

If the Petitioners are successful, substantial harm could easily result to medication and treatment development. The amici here seek to express their views as victims of such domestic terrorist acts, and who see such violence as jeopardizing medical research critical to the nation.

A full list of amici is provided as an Appendix to this brief.

SUMMARY OF ARGUMENT

Petitioners are animal rights activists challenging the constitutionality of the Animal Enterprise Terrorism Act (AETA), 18 U.S.C. §43. One Petitioner failed, in a prior attempt, to have the

predecessor act, The Animal Enterprise Protection Act (AEPA) declared unconstitutional on the same grounds by the Third Circuit and the U.S. Supreme Court.[2] They claim that the AETA encroaches on their right to free speech, which they state has been "chilled," although none have ever been arrested or charged under the statute, and there is no evidence that any of them intend to engage the type of criminal conduct proscribed by the statute.

Unfortunately violence and other criminal acts by animal rights activists has increased substantially.[3] Within the past decade, most of the unlawful and violent activity by these activists has been against scientists and medical researchers such as the amici.[4] Groups attacking these scientists include the Animal Liberation Front (ALF), designated as a domestic terrorist organization by the Department of Justice and others while their criminal actions are the type of activity with which the AETA was enacted to manage and deter.

Both the trial court and the First Circuit found Petitioners are not this type of activist and have no intention of engaging in criminal activities proscribed

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[2] *United States v. Fullmer,* 584 F.3d 132 (3d Cir. 2009); *Kjonas v. United States* (No. 10-7187, Cert. Denied, March 7, 2011).

[3] See, Anti-Defamation League*, Ecoterrorism: Extremism in the Animal Rights and Environmentalist Movements,* (March 3, 2012), and P. Michael Conn and James V. Parker, *The Animal Research War* (2008).

[4] See, for example, Larry Gordon, *UCLA Professor Stands Up to Violent Animal Rights Activists,* Los Angeles Times, (April 13, 2009) and Greg Miller, *Animal Extremists Get Personal*, 118 Science 1856 (December 21, 2007).

by the AETA. Accordingly they simply lack Article III standing under a consistent line of cases prior to and after *Clapper*. Further, this Court's most recent decision in *Susan B. Anthony List* does not change the analysis. Notwithstanding their arguments of some imagined "chill" to their lawful activities, Petitioners' fear is chimerical and their paranoia simply does not confer Article III standing.

In reality, none of these Petitioners have even a remote chance of prosecution under the AETA. Since enactment of the AETA in 2006, prosecutions have been limited to only two cases where the government has alleged specific criminal acts by the defendants, not involving protected speech or similar activities.[5]

At present the threat to essential medical research from animal rights activists is both real and increasing. While none of these Petitioners have targeted the amici or their colleagues, and avoided mention of the issue, the problem is real. The AETA was enacted to deal with this problem and provide federal law enforcement with an important tool in this effort. It was not aimed at, nor has it been used against these Petitioners or others engaging in clearly protected activities. Further, the AETA explicitly proscribes prosecution of those engaged in lawful free

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[5] *United States v. Buddenberg, et al.,* CR-09-00263 (ND California, 2010), was dismissed by the trial court and *United States v. Johnson, et al.* 1:14-cr-00390 (ND Illinois, 2014) is currently before the trial court. Defendants in the *Johnson* case have prior state criminal convictions for activities against amicus London in California and state criminal charges in Illinois not involving speech or other protected activities.

speech and similar activities protected under the First Amendment.

Clearly there are potential plaintiffs who would have standing to challenge the constitutionality of the AETA, holding legitimate and reasonable expectation of prosecution, or even a reasonable fear of such prosecution. It is just not true of these Petitioners, who the trial court and the First Circuit have rightfully found lack Article III standing.

ARGUMENT

I. PETITIONERS LACK ARTICLE III STANDING

A. Petitioners Have No Credible Threat of Prosecution Under the AETA

Under well-established law to establish Article III standing, a plaintiff must show, *inter alia*, an "injury in fact," which must be "concrete and particularized" and "actual or imminent, not "conjectural" or "hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).[6] In challenging a law prior to its enforcement the Court has repeatedly held that a plaintiff "satisfies the injury-in-fact requirement

[6] Articulated in *Lujan* is the fundamental principle consistent in all subsequent cases is the requirement for an "injury in fact" and that plaintiffs must suffer a concrete, discernable injury – not just a "conjectural or hypothetical one" to confer standing. At the time some believed that this made it more difficult for potential plaintiffs to challenge government actions, when the Court rejected the view that a statute conferred upon "all persons an abstract, self-contained, non-instrumental 'right'" to challenge a statute.

where he alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014) (SBA) (slip at 1), citing *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298 (1979).

Petitioners here are animal rights activists bringing a challenge to the constitutionality of the AETA which is largely nonsensical and simply not credible.[7] Their unsubstantiated claim is that the AETA encroaches on their free speech rights which they state have been "chilled," although none have been threatened, arrested or charged under the statute, and they disclaim any intention to engage in conduct proscribed by the statute. Indeed, the trial court examined the situation of each petitioner in the most favorable light before concluding that none had Article III standing.[8]

Since *Lujan,* cases addressing the issue of Article III standing have been consistent for over two decades, with the most recent (*Clapper* and *Susan B. Anthony List*) serving to further articulate the

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[7] As noted *supra*, Petitioner Gazzola failed in her prior attempt to have the predecessor act, The Animal Enterprise Protection Act (AEPA) declared unconstitutional on the same grounds by the Third Circuit and the U.S. Supreme Court.

[8] Curiously Petitioners here do not include any animal rights activists who have a credible threat of prosecution under the AETA, such as those threatening and attacking the amici. Certainly their counsel are aware of them, and provided counsel in the *Buddenberg* case in California which until July 2014 was the only AETA prosecution ever filed.

requirements for pre-enforcement challenge in terms of "an intention to engage in a course of conduct arguably affected with a constitutional interest." *SBA* at 2.

In each the Court has considered the possible threat of future enforcement to see if it is substantial and if there is a history of past enforcement against plaintiffs. Past enforcement against the same conduct has been seen as is good evidence that the threat of enforcement is not "chimerical." *Steffel* v. *Thompson*, 415 U.S. 452, 459 (1974). Certainly this is not the case with Petitioners here.[9]

Further, Article III limits the jurisdiction of federal courts to "Cases" and "Controversies." U. S. Const., Art. III, §2. The doctrine of standing gives meaning to these constitutional limits by "identify[ing] those disputes which are appropriately resolved through the judicial process." *Lujan* at 560. More recently the Court has stated that "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper* v. *Amnesty Int'l USA*, 568 U. S. ___, (slip op., at 9) (2013).

Again citing *Lujan,* the Court in *Clapper* found that to establish Article III standing, a plaintiff must show an "injury in fact, a sufficient "causal connection between the injury and the conduct complained of,

[9] Again there is the matter of Petitioner Gazzola previously convicted under the predecessor act, The Animal Enterprise Protection Act (AEPA) for criminal conduct, and not for protected speech, and not under the AETA.

and a likelihood that the injury will be redressed by a favorable decision." *Id.,* citing *Lujan*, at 560–561.

Most recently the Court in *Susan B. Anthony* again restated the injury-in-fact requirement, which helps to ensure that the plaintiff has a "personal stake in the outcome of the controversy." Citing *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975). An injury sufficient to satisfy Article III must be "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.' " *Lujan*, at 560. An allegation of future injury may suffice if the threatened injury is "certainly impending," or there is a "'substantial risk' that the harm will occur." *Clapper,* at ___, n. 5 (slip at 10, 15, n. 5).

"The party invoking federal jurisdiction bears the burden of establishing standing. [E]ach element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, at 561.

Petitioners raise what has been a recurring issue in the cases, in determining when threatened, potential or perceived threat of enforcement creates Article III standing. When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law. *Steffel* at 459 "[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights" *Id.* at 459

Here the Court has permitted pre-enforcement review "under circumstances that render the threatened enforcement sufficiently imminent." Specifically the Court held that a plaintiff satisfies the injury-in-fact requirement where he alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Babbitt* at 298. Petitioners here disclaim any intention to engage in a criminal course of conduct, and were unable to convince the both the trial court and the First Circuit of any credible threat of prosecution under the AETA.[10]

In *Babbit* the Court builds on *Steffel*, holding that a plaintiff could bring a pre-enforcement suit when he "has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Babbitt* at 298. Here the Court found that the law "on its face proscribe[d] dishonest, untruthful, and deceptive

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[10] See *Blum v. Holder,* 930 F.Supp. 2d 326 (D. Mass 2013) and *Blum v. Holder,* 744 F.3d 790 (1st. Cir. 2014). In *Steffel*, for example, police officers threatened to arrest petitioner and his companion for distributing handbills protesting the Vietnam War. Petitioner left to avoid arrest; his companion remained and was arrested and charged with criminal trespass. The Court determined that petitioner had alleged a credible threat of enforcement, having been warned to stop hand billing and threatened with prosecution if he disobeyed. He stated his desire to continue hand billing, an activity he claimed was constitutionally protected, and his companion's prosecution showed that his "concern with arrest" was not "'chimerical.'" *Steffel* at 459.

publicity." *Babbitt* at 302. There is no such similar language in the AETA, and indeed the act proscribes prosecution for protected speech, presumably however untruthful.[11]

In these cases the Court has not required a plaintiff who wishes to challenge the constitutionality of a law to "confess that he will in fact violate that law." *Babbitt*, at 301. Here the Court found the case to be justiciable even though plaintiffs disavowed any intent to "propagate untruths." *Id* at 301.

At the time the First Circuit heard the instant case the most recent in the line of Article III standing cases was *Clapper*, which curiously was never mentioned in Petitioners' brief to either the trial court or the First Circuit, and which as Petitioners note in their petition was raised on oral argument by the First Circuit. Petitioners are correct in their analysis that the Court in an unbroken line of cases beginning with *Epperson v. Arkansas*, 393 U.S. 97 (1968) has consistently held that plaintiffs can have standing to challenge a statute "so long as the statute is not moribund and the plaintiffs fear that their conduct is prohibited" and that "the threat of prosecution objectively reasonable, and capable of sustaining standing." Petitioners' brief at 13.[12]

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[11] In *Babbit* the Court concluded that the plaintiffs' fear of prosecution was not "imaginary or wholly speculative," and that their challenge to the consumer publicity provision "presented an Article III case or controversy." *Babbit* at 302.

[12] Also citing *Doe v. Bolton*, 410 U.S. 179 (1973); *Steffel* at 452; *Babbitt* at 289; *Virginia v. American Booksellers Assn.,* 484 U.S. 383 (1988); and *Susan B. Anthony List*.

Petitioners are also correct in that the Court has not required a showing that "prosecution is clearly impending" but that plaintiffs have always been required to show "objectively reasonable 'fear of prosecution'." *Ibid.* Petitioners here they are simply unable to do so, and their fears are indeed chimerical.

Petitioners here have no common institutional or organizational tie; are geographically diverse; and have no common objective other than to lawfully protest some real or imagined misuse or maltreatment of animals. As the trial court found, all have previously engaged in some form of lawful protest and none have been arrested or threatened with arrest under the AETA or its predecessor act.[13]

By their own admission, none intend to engage in any type of activity proscribed by the AETA. Any fear of prosecution under the AETA, which specifically proscribes protected speech is clearly illusory, imagined, and chimerical at best.

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[13] With the exception of Petitioner Gazzola, nothing in the record indicates that any of the Petitioners has ever been arrested or charged for anything, or even threatened with arrest. In all fairness Petitioner Gazzola was in fact convicted on felony criminal charges under the predecessor AEPA related to animal rights activities, but specifically not protected speech. Having served substantial prison time for this conviction she has understandable concerns about future prosecution – a common concern for many recently released from prison. Along with her fellow petitioners, however, she disclaims any intent to engage in criminal activities proscribed by the AETA. There is no case law to support the concept that fear derived from prior criminal acts is adequate to confer Article III standing.

B. Petitioners Reliance on *Susan B. Anthony List v. Driehaus* is Misplaced

Petitioners note that the First Circuit declined to delay hearing this case until the Court had decided *Susan B. Anthony List v. Driehaus,* and discuss the subsequent Court opinion in that case at considerable length, under the concept that the decision in *SBA* somehow changes the rule established in the other Article III standing cases discussed above. It does now, and their reliance on *SBA* to argue for Petitioners' standing is misplaced.

In *SBA* the petitioners seek a pre-enforcement challenge to an Ohio statute prohibiting "false statements" during the course of a political campaign and whether they have alleged a sufficiently imminent injury for the purposes of Article III.[14]

Unlike Petitioners here, Susan B. Anthony List (SBA) is a "pro-life advocacy organization," which publicly criticized various Members of Congress who voted for the Patient Protection and Affordable Care Act (ACA) and issued a press release announcing its plan to "educat[e] voters that their representative voted for a health care bill that includes taxpayer-

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[14] Ohio Rev. Code Ann. §3517.21(B) (Lexis 2013). That statute makes it a crime for any person to"[m]ake a false statement concerning the voting record of a candidate or public official," §3517.21(B)(9), or to "[p]ost, publish, circulate, distribute, or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not," §3517.21(B)(10).

funded abortion."[15]

In stark contrast to the Petitioners here the Court noted that in *SBA* the petitioners alleged "an intention to engage in a course of conduct arguably affected with a constitutional interest." *SBA* at 49.

Indeed, they pleaded specific statements they intend to make in future election cycles, in violation of the Ohio statute, and alleged an "inten[t] to engage in substantially similar activity in the future." *Id.* At 49–50.[16] Here the Court noted that because the SBA petitioners intended future conduct that concerns political speech, it is certainly "affected with a constitutional interest." *Id.* citing *Babbitt* at 298; [17]

Again there is sharp contrast as Petitioners here have pled exactly the opposite to what was pled by those in the SBA—that they have no intention of conduct that violates the applicable statute, the AETA. Possibly the only commonality in the cases is that they generally involve some aspect of protected

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[15] Driehaus filed a complaint with the Ohio Elections Commission alleging that SBA had violated §§3517.21(B)(9) and (10) by falsely stating that he had voted for "taxpayer-funded abortion."

[16] See also *Humanitarian Law Project* at 15–16, observing that plaintiffs had previously provided support to groups designated as terrorist organizations and alleged that they "would provide similar support [to the same terrorist organizations] again if the statute's allegedly unconstitutional bar were lifted").

[17] See also *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265 (1971). "[T]he constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Id.* at 272.

speech.

Further, the SBA petitioners' intended future conduct is "arguably. . . proscribed by [the] statute" they wish to challenge. *Babbitt,* at 298.[18] Here the Court had no difficulty concluding that the SBA petitioners' intended speech was "arguably proscribed" by the law, with the respondents there incorrectly relying on *Golden* v. *Zwickler*, 394 U.S. 103 (1969). In *Zwickler* the plaintiff had previously distributed anonymous leaflets criticizing a particular Congressman who had since left office. *Id.*, at 104–106, and the Court dismissed the plaintiff's challenge as nonjusticiable because his "sole concern was literature relating to the Congressman and his record," and "it was most unlikely that the Congressman would again be a candidate." *Id.*, at 109. Thus under these circumstances, any threat of future prosecution was "wholly conjectural." *Ibid.* As in *Zwickler,* any threat of future prosecution against these Petitioners is wholly conjectural and their case similarly nonjusticiable.

Finally, the Court in *SBA* considered the threat of future enforcement of the Ohio statute with respect to false statements as being substantial, pointing to a history of past enforcement. "We have observed that past enforcement against the same conduct is good evidence that the threat of enforcement is not

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[18] A commission panel already found probable cause to believe that SBA violated the Ohio statute when it stated that Driehaus had supported "taxpayer-funded abortion"—the same sort of statement the SBA petitioners planned to disseminate in the future.

"chimerical." *SBA* at 51. Citing *Steffel* at 459; and *Clapper* at ___ (slip op., at 12). Here too Petitioners' case is at sharp contrast, as there is simply no history of past enforcement or even threat of enforcement against any of them.[19] Ultimately in *SBA* the petitioners were able to allege a credible threat of enforcement sufficient to demonstrate an injury in fact sufficient for Article III standing.[20] Petitioners here are unable to make any such demonstration as both the trial court and the First Circuit have found.

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[19] Again with respect to Petitioner Gazzola, the past enforcement of the prior statute for criminal activities can scarcely be considered as past enforcement of the AETA for blocking protected speech.

[20] The Court in *SBA* also makes of *Virginia* v. *American Booksellers Assn. Inc.*, 484 U.S. 383, where it held that booksellers could seek pre-enforcement review of a law making it a crime to "'knowingly display for commercial purpose'" material that is "'harmful to juveniles'" as defined by the statute. *Id.,* at 386. Here the booksellers introduced 16 books at trial they believed were covered by the statute and that costly compliance measures would be necessary to avoid prosecution for displaying such books. As in *Babbitt* and *Steffel*, the Court demined that the plaintiffs had "alleged an actual and well-founded fear that the law will be enforced against them." *Id.* at 393. In *Humanitarian Law Project* at 8 the Court considered a pre-enforcement challenge to a law that criminalized "'knowingly provid[ing] material support or resources to a foreign terrorist organization." Plaintiffs claimed that they had provided support to groups designated as terrorist organizations prior to the law's enactment and would provide similar support in the future. The Court held that the claims were justiciable, as the plaintiffs faced a "credible threat" of enforcement and "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Id.,* at 15.

II. THIS COURT SHOULD PROTECT MEDICAL RESEARCH BY ENSURING THAT THE AETA REMAINS AVAILABLE TO FEDERAL LAW ENFORCEMENT

As its title implies the AETA was enacted to deal with the real and growing threats from animal rights activists engaged in criminal acts of terrorism such as those encountered by the amici.[21] None of the Petitioners have engaged in such acts or intend to. None belong to domestic terrorist organizations such as the Animal Liberation Front (ALF) or any similar organization, or even engage in Internet postings that threaten medical researchers such as the amici.

Congress enacted the AETA and its predecessor, the AEPA, in response to real and increasing acts of domestic terrorism often targeting researchers such as the amici. It provides a federal enforcement tool against threats and violent activity where perpetrators are fairly dubbed "terrorists" in part because of their underground nature and loosely-affiliated structure, but primarily because their *modus operandi* instills mass fear in the lives of innocent civilians such as the amici.[22]

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[21] Not surprisingly petitioners avoid any mention of the increasing violence and terrorist acts caused by animal rights activists such as the ALF for which the statute was enacted.

[22] See, P. Michael Conn and James Parker, *Animal Research Wars*, (2008); Larry Gordon, *UCLA Professor Stands Up to Violent Animal Rights Activists,* Los Angeles Times, (April 13, 2009) and Greg Miller, *Animal Extremists Get Personal*, 118 Science 1856 (December 21, 2007). See also See, e.g., 152 Cong. Rec. H8590, H8591-92 (daily ed. Nov. 13, 2006). The AETA

They employ a broad spectrum of tactics to instill fear, ranging from mailing HIV-Infected razor blades to the firebombing of homes and automobiles, in many cases these amici who are medical and scientific researchers engaged studies that by statute require the use of laboratory animals.[23] Amici collectively have weathered a storm of threats and violence for over two decades resulting in millions of dollars in damages.[24]

While drawing the line between protected free speech necessary to a democratic society and

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addresses over 1,000 incidents of violent attacks, threats, intimidation, and other illegal acts. Among the perpetrators are individuals, belonging to organizations such as the Animal Liberation Front ("ALF"), Stop Huntington Animal Cruelty ("SHAC"), Band of Mercy ("BoM"), The Justice Department ("TJD") and others.

[23] Extremists target the amici because they are members of medical and scientific communities engaging in laboratory research utilizing animals as required by law which require testing of new pharmaceuticals, treatments, and medical devices on animals in the preclinical trial phase. Nobel Prize-winning breakthroughs in medicine involved animal testing, including, *inter alia*, the discovery of penicillin, insulin, and the human papilloma virus. See Conn and Parker, *op. cit.* Treatments for cancer, the human immunodeficiency virus (HIV), and most recently Ebola as well as other diseases would not be possible without research utilizing laboratory animals.

[24] See Anti-Defamation League*, Ecoterrorism: Extremism in the Animal Rights and Environmentalist Movements,* (March 3, 2012), Andy Guess*,* Andy, *Going on the Offensive Against Animal 'Liberationists,'* Inside Higher Ed (February 21, 2008), and Edythe D. London, *Op-Ed., Why I Use Laboratory Animals – UCLA Scientist Targeted by Animal Rights Militants Defends her Research on Addiction,* Los Angeles Times (November 1, 2007).

unprotected illegal conduct has always presented a challenge, the First Amendment has never been a shield for terrorism. The Founding Fathers drew this line in such a way as to provide broad protection for individual liberty in order to promote a marketplace of ideas necessary for a democracy.

Contemporary American law is more aligned with the vision of the Framers and yet it rightfully denies protection for violence, destructing real or personal property, advocating imminent unlawful behavior, and imposing true threats. Regardless of the precise location of this line, the First Amendment does not and must not protect terrorism.

The AETA unquestionably targets domestic terrorism by prohibiting unlawful conduct and intimidation, whose wording consists primarily of two provisions, which target both property destruction and intimidation that places individuals in a reasonable fear of death or serious bodily injury.

Whatever "fear" Petitioners have with regard to possible prosecution under the AETA for engaging in lawful conduct is certainly far less rationale and far outweighed by the fear that the amici have felt at the hands of extremists and do feel at the prospect of living without the AETA. The AETA does not "chill" speech in this area, as experience has amply demonstrated.

What Petitioners can and should fear is that when they cross from protected speech to criminal activity, such as violence and the destruction of property, they can legitimately expect prosecution. The First

Amendment simply does not contain an escape clause for such criminal acts perpetrated in the name of animal rights. Activists have a protected right to speak, march, demonstrate and engage in other expressive activities, however obscene and obnoxious. Their self-proclaimed mission does not, however, grant them immunity from criminal acts against those they oppose.

The statutory wording of the AETA and its enforcement are unquestionably aimed at domestic terrorism. It is a prosecutorial tool for fighting acts of terrorism and its wording targets the unprotected categories of criminal property damage and intimidation. The Government has sparingly enforced the AETA by expressly limiting its application to criminal acts.

The AETA contains two operative provisions that respectively proscribe unprotected illegal conduct and threats. The first provision proscribes intentionally damaging or causing the loss of the real or personal property of an animal enterprise or connected persons or entities. 18 USC § 43(a)(2)(A). Such a provision cannot receive First Amendment protection because intentionally damaging the real or personal property of another is, by its very nature, illegal conduct and not speech.

The second proscribes intentionally threatening certain individuals by placing them in "reasonable fear of death" or "serious bodily harm." 18 USC § 43(a)(2)(B). This wording almost identically tracks the wording in *Virginia v. Black*, 538 U.S. 343 (2003), where the Court declined to protect speech

intentionally made to instill "fear of bodily harm or death." At 1548-49. If anything, the statute proscribes conduct that is even less likely to receive protection because it requires the "bodily harm" to be "serious." § 43(a)(2)(B). It also makes room for the reasonableness standard adopted by the Court for unprotected "true threats." *Fulmer*, at 1491. Such fear "reasonably" results from death threats associated with firebombs directed at their recipients.

It is uncontested that the AETA has been enforced sparingly and only involves fact patterns that include unprotected illegal conduct and true threats. As discussed *supra*, the first AETA case, *Buddenberg,* involved alleged criminal conduct on the part of the defendants, and was dismissed for a lack of specificity in the indictment.[25]

The second AETA case, *United States v. Johnson, et al.* (1:14-cr-00390)(ND Illinois) was filed in July 2014 and remains before the trial court. As in *Buddenberg*, the government has alleged specific criminal conduct on the part of defendants. These defendants have a long history of animal rights advocacy and protected activities for which they have never been threatened or arrested under the AETA.[26]

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[25] The FBI investigation leading to the charges were based on unprotected criminal conduct including, forced entry, assault, destruction of property, and death threats. See *FBI, Press Statement: Four Extremists Arrested for Threats and Violence Against UC Researchers* (February 20, 2009) describing the allegations leading to the arrests).

[26] The *Johnson* defendants, Kevin Johnson (aka Kevin Olliff) and Tyler Lang have a seven year history of protests and

Animal rights activists have number of lawful means of advocacy that have proven themselves to be effective and to have a less detrimental impact on the fields of medical and scientific research. For example, Congress has passed and frequently amended the Animal Welfare Protection Act, which sets standards for the treatment of animals intended for research and provides enforcement authority to the Animal and Plant Health Inspection Service.[27] The FDA has also implemented best practices through the Code of Federal Regulations' "Good Laboratory Practice for Nonclinical Laboratory Studies."[28]

Lawful advocacy also promotes personal accountability among researchers and scientists and, unlike terrorism, does not entail a negative effect on the communities addressed. Many researchers and their employing organizations make a good faith effort to minimize the detrimental affect research has on animals by seeking out accreditation from the Association for Assessment and Accreditation of Laboratory Animal Care International and implementing their best practices.[29] Unlawful advocacy, especially in the form of threats and

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demonstrations at the home of amicus Dr. London. Lang and eight others were arrested on state criminal charges at the home of Dr. London in 2010 for violation of a local ordnance against targeted picketing (Los Angeles Municipal Code 56.45(e)). *People v. Ashmore, et al.* (Case No. 0CA01276).

[27] See generally 7 U.S.C. § 2131 et seq. (enacted in 1960 and amended typically to broaden coverage in 1970, 1976, 1985, 1990, 2002, and 2008).

[28] See 21 CFR § 54 et seq.

[29] See generally *National Research Council, Guide for The Care and Use of Laboratory Animals* (8th Ed. 2011).

property destruction proscribed by the AETA, however, has a detrimental effect on research and could easily cause some of our Nation's best minds to leave the field.

Petitioners appear to be aware that lawful remedies are available to them. For example:

- Petitioner Lehr avers that she has successfully lobbied for a municipal code in Montgomery County that forbade the giving away of bunnies and that she distributes educational materials on-line;
- Petitioner Johnson engages in public education by showing film screenings of videos related to animal rights;
- Petitioner Shapiro engages in animal rights activism, including public speaking and campaign work.

Petitioners easily engage in a host of lawful forms of advocacy and expressive activities that do not implicate the AETA because they do not constitute criminal acts. Naturally, then, their case begs a number of questions. Given Petitioner Johnson's involvement in showing film screenings, for example, the Complaint begs the question why Petitioner Shapiro would fear prosecution for the same conduct?

As a whole, Petitioners' case begs the fundamental question as to why they desire to strike down a statue, which, by its plain meaning and applications, penalizes unlawful conduct and threats, when they are not being prosecuted and only intend to engage in lawful advocacy. Perhaps their self-

professed engagements in other forms of "advocacy" already answer this question.

CONCLUSION

The AETA is as its name implies proscribes criminal acts of domestic terrorism and is explicitly not applicable to protected free speech activities. As applied since enactment in 2006 has involved only two cases with allegations of specific criminal acts against medical researchers such as the amici and no protected activity. None of the Petitioners have been threatened, charged or arrested under the AETA and disclaim any intention of engaging in a criminal act which would bring about such prosecution. The imagined "chill" which the AETA brings to their lawful activities is truly chimerical, and consistent with the Court's holdings in some 40 years of cases. It does not provide a basis for Article III standing.

While there are clearly potential plaintiffs whose activities make them vulnerable to prosecution under the AETA and would have pre-enforcement standing, it is simply not these Petitioners.

Accordingly, the judgment of the First Circuit Court of Appeals should be affirmed.

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Respectfully submitted,

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APPENDIX

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