**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**

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| SARAHJANE BLUM, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>ERIC HOLDER, in his official capacity as Attorney General of the United States of America,<br><br>Defendant. | Civil Action No. 1:11-cv-12229-JLT<br><br>Leave to File Excess Pages Granted on 4/5/12<br><br>Oral Argument Set for May 14, 2012 (By Order of the Court on 3/7/12) |

**MEMORANDUM IN OPPOSITION TO DEFEDANT'S MOTION TO DISMISS PURSUANT TO RULES 12(b)(1) AND 12(b)(6)**

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## INTRODUCTION

Plaintiffs are five animal rights activists committed to changing public opinion and corporate policies regarding animal mistreatment and cruelty. They bring a pre-enforcement challenge to the Animal Enterprise Terrorism Act ("AETA"), 18 U.S.C. § 43 (2006), because it has chilled their ability to engage in this socially useful and lawful enterprise through protected speech and expressive conduct. While the Government characterizes AETA as targeting conduct only, the statute's language and legislative history tell a different story.

The Animal Enterprise Protection Act ("AEPA"), 18 U.S.C. § 43 (1992), the predecessor to AETA, was passed in reaction not only to acts of violence and property damage, but also to "disruptive expressions of extremism on behalf of animal rights." Complaint ("Compl.") ¶ 27 (Docket # 1) (*citing* DEP'T JUST., REPORT TO CONGRESS ON THE EXTENT AND EFFECTS OF DOMESTIC AND INTERNATIONAL TERRORISM ON ANIMAL ENTERPRISES 1 (1993); *see also* Compl. ¶ 28. Like AEPA, AETA was designed as a response not just to specific crimes but also to the evolving ethos of an entire movement, and the potential economic impact of that movement. AETA by its terms also applies to expressive activity, chilling lawful and non-violent advocacy of animal rights activists like Plaintiffs. As explained in Part I, in the past each Plaintiff has engaged in speech and expressive conduct now criminalized as "terrorism" by AETA. The complaint provides concrete examples of how they would continue their advocacy, absent the chill cast by the credible threat of their prosecution under AETA. Accordingly, they each have standing to bring this challenge.

Plaintiffs advance three distinct constitutional claims. *See* Part II, *infra.* First, AETA is substantially overbroad in violation of the First Amendment, as it threatens to punish *all* who

have the purpose and effect of causing an animal enterprise to lose profits, whether by expressive conduct and speech, or through violence and property damage. Second, AETA's undefined terms render it unconstitutionally vague, in violation of due process. Finally, while arguably neutral on its face, AETA discriminates on the basis of content and viewpoint, singling out for special protection businesses and individuals who occupy only one side of a contentious political debate, and punishing expressive conduct and speech that has the purpose and effect of undermining the profitability of such enterprises. Because AETA is not narrowly tailored to protect a compelling governmental interest, it violates the First Amendment and must be struck down.

## ARGUMENT

### I. Plaintiffs' Complaint May Not Be Dismissed on Standing or Ripeness Grounds

Plaintiffs have standing to challenge AETA because it has chilled their constitutionally protected speech. Nothing more is needed under Article III. *See Diamond v. Charles,* 476 U.S. 54, 64 (1986) (conflict between "officials empowered to enforce a law and private parties subject to prosecution under that law is a classic 'case' or 'controversy'"); *see also Babbit v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1970) (party need not violate the statute and suffer the penalty in order to generate a conflict worthy of standing in federal court).

The parties agree on the applicable standard: when a criminal law is alleged to infringe on First Amendment interests, either of two separate injuries suffices to confer standing in the absence of an actual prosecution. *Mangual v. Rotger-Sabat*, 317 F.3d 45, 56-57 (1st Cir. 2003); *see also* Mem. Supp. Def.'s Mot. Dismiss ("Def. Mem.") at 6. The first is when "the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute." *Babbit*, 442 U.S. at 298. The second type of injury, unique to the First Amendment context, is the chill that causes a plaintiff to refrain "from exercising her

right to free expression … to avoid enforcement consequences …. In such situations the vice of the statute is its pull toward self-censorship." *N.H. Right to Life PAC v. Gardner,* 99 F.3d 8, 13 (1st Cir. 1996) (internal quotation marks omitted). In either category, a subjective fear of prosecution is not enough; the plaintiff must allege the existence of a "credible threat that the challenged law will be enforced." *Id.* at 14. Where such a threat exists, individuals must choose "either to engage in the expressive activity, thus courting prosecution, or to succumb to the threat, thus forgoing free expression. Either injury is justiciable." *Id.*

Plaintiffs allege that they are chilled from engaging in concrete forms of advocacy and speech punishable under AETA. Compl. ¶¶ 85-98, 107-15, 126-33, 142-48, 160-61. These allegations are sufficient to meet the "forgiving" credible threat inquiry. *N.H. Right to Life PAC,* 99 F.3d at 14*; see also Mangual*, 317 F.3d. at 57 (describing credible threat evidentiary bar as "extremely low"). Indeed, when a plaintiff faces a choice between violating a statute or self-censorship "a pre-enforcement facial challenge to a statute's constitutionality is entirely appropriate unless the State can convincingly demonstrate that the statute is moribund or that it simply will not be enforced." *N.H. Right to Life PAC,* 99 F.3d at 15.

Defendant's primary argument against a credible threat of enforcement focuses on AETA's rule of construction. *See* 18 U.S.C. § 43(e)(1) (AETA shall not be construed "to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment"). Plaintiffs cannot reasonably fear prosecution for their protected advocacy, argues the Government, because the statute says that First Amendment protected activity will not be punished. Def. Mem. at 8.

But given Plaintiffs' reasonable belief that their desired advocacy—whether characterized as "expressive conduct" or pure speech—falls within the more specific offense

provisions of AETA (*see* Part II.A, *infra*), the rule of construction has little impact. First, it is redundant: of course Congress cannot legislate to violate the First Amendment; the First Amendment establishes this, a statute need not repeat it. *See, e.g., CISPES v. FBI,* 770 F.2d 468, 474 (5th Cir. 1985). A generic savings clause cannot obviate the need for a determination of whether the statute chills protected expression—otherwise Congress could do away with all pre-enforcement facial challenges by including Section 43(e)(1)'s language in any statute that bears on expression.

Second, Section 43(e)(1) fails to clarify what is protected under the First Amendment and what is not. *See Rubin v. City of Santa Monica*, 823 F. Supp. 709, 712 (C.D. Cal. 1993) (discounting a broad "First Amendment Activities" exception because it did not and could not "define this concept"). A putative criminal defendant need not run the risk that his conduct will be considered outside of the bounds of the First Amendment's protections in order to challenge the constitutionality of the statute. The purpose of permitting a pre-enforcement facial challenge is to avoid this dilemma. *See Nat'l People's Action v. City of Blue Island*, 594 F. Supp. 72, 78 (N.D. Ill. 1984) (stating that a would-be activist must be knowledgeable of "all law applicable to her or his activities" to know whether a broad exemption or a more specific provision applies).[1]

Put simply, when a statute by its specific terms prohibits First Amendment protected activity, but also broadly claims that it does no such thing, it is reasonable to fear enforcement under the more specific provisions. *See, e.g., NAACP v. Button*, 371 U.S. 415, 438 (1963) (when there is "internal tension between proscription and protection in the statute, we cannot assume

[1] A general savings clause stands in direct contrast to a First Amendment exception that imports a precise standard from a well defined area of the law; for example, courts frequently read statutes criminalizing threats to require a "true threat" whether or not those words appear, and state libel statutes are understood to incorporate the principles of *New York Times v. Sullivan,* 376 U.S. 254 (1964). *Nat'l People's Action*, 594 F. Supp. at 79.

that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights"); *Fisher v. King*, 232 F.3d 391, 395 (4th Cir. 2000) (a savings clause for constitutionally protected rights is meaningless where it contradicts other provisions of the statute). As Professor Laurence Tribe has noted, otherwise the following law would be permissible: "[I]t shall be a crime to say anything in public unless the speech is protected by the first and fourteenth amendment." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-26, at 716 (1st ed. 1978). For these reasons, a First Amendment exception cannot save an otherwise unlawful statute. *See, e.g., CISPES,* 770 F.2d at 474; *United States v. Brock*, 863 F. Supp. 851, 856, 859 n.13 (E.D. Wisc. 1994), *aff'd sub nomine, United States v. Soderna,* 82 F.3d 1370 (7th Cir. 1996); *Am. Life League v. United States,* 855 F. Supp. 137, 143 (E.D. Va. 1994) (savings clause may be helpful in rejecting plaintiffs' attempt to inject ambiguity into the otherwise plain meaning of a statute, but "Congress could not make a fatally flawed law constitutional merely by including a savings clause"), *aff'd*, 47 F.3d 642 (4th Cir. 1995).

Moreover, Section 43(e)(1) creates its own interpretive difficulties. It does not by its terms even cover speech such as the dissemination of information. *See e.g.,* Compl. ¶¶ 94, 111. This speech, well within the core of First Amendment protections, can run afoul of AETA in numerous ways, yet would not necessarily be protected by Section 43(e)(1) because it is not "expressive conduct" nor is it "peaceful picketing" or "other peaceful demonstration." Nor does the provision purport to define "peaceful" expressive conduct—some picketing or demonstration is anything but peaceful but still protected by the First Amendment. Thus, in *Virginia v. Black*, 538 U.S. 343, 365-66 (2003) (plurality opinion), the Supreme Court struck down a state law that "blurs the line" between two different kinds of expressive cross-burning, one that may be criminalized and one that may not, but neither of which could be called peaceful.

Of course, leaving aside the rule of construction, Plaintiffs' fears of prosecution under AETA are credible only if the more specific provisions of the statute can fairly be read to cover their advocacy in the first place. Here, the Government also argues that Plaintiffs have no objective reason to fear enforcement, because their chill arises from their fears of causing animal enterprises to lose profit or increase expenditures—damages the Government asserts are not covered by AETA's prohibition on "damage[ing] or caus[ing] the loss of any real or personal property." Def. Mem. at 3 (citing 18 U.S.C. § 43(a)(2)(A)). Plaintiffs address this argument in detail in Part II.A, *infra*. As a threshold matter, however, even if the statute could or should be narrowly construed to prohibit prosecutions based on profit loss, that would not help the Government's standing argument unless Plaintiffs' reading of the plain language of the statute were *unreasonable*. *See, e.g., Rhode Island Med. Soc'y v. Whitehouse*, 66 F. Supp. 2d 288, 304 (D.R.I. 1999) (doctors have standing for pre-enforcement challenge where their conventional abortion procedures might or might not fall under the "murk[y]" language of Rhode Island's partial birth abortion ban, despite the attorney general's promise that the law would not be so applied).

When a court is deciding a First Amendment challenge on its merits, it may chose to accept a binding and narrow construction that "settle[s] the issue" of the statute's constitutionality, "but that would not affect the objectively reasonable belief that plaintiffs had when they filed suit that they could have run afoul of the Act." *Id.* at 302; *see also Wersel v. Sexton*, 613 F.3d 821, 831 (8th Cir. 2010) (pre-enforcement challenge appropriate where plaintiff chilled by potential, though disputed, applicability of unclear statutory language); *Caribbean Int'l News Corp. v. Agostini*, 12 F. Supp. 2d 206, 213 (D.P.R. 1998) (finding credible threat of prosecution where it was "conceivable" that unless newspaper continued to self-censor, its

stories *might* fall within the challenged provision, despite fact that the statute had never before been enforced against a newspaper). After all, to date, no court has adopted the narrow reading suggested by the Government.[2]

Each Plaintiff has adequately demonstrated an individualized and concrete need for this Court's intervention, as each has clearly stated a specific and concrete chill due to a credible threat of prosecution under AETA.

Sarahjane Blum: Ms. Blum is a devoted activist who has significantly curtailed her activism based on her reasonable fear of prosecution under Section 43(a)(2)(A), the damage/loss provision of AETA. *See generally* Compl. ¶¶ 67-98. Ms. Blum has stopped showing her documentary film about foie gras production, ceased naming targeted foie gras farms, censored her speech about the foie gras industry, and refrained from lawful investigation of a specific foie gras farm in her area. *Id.* at ¶¶ 91, 93-96. Each of these decisions was undertaken based on her reasonable fear that her advocacy would convince others to stop purchasing foie gras, causing loss of property to foie gras farms, and thus violating 18 U.S.C. § 43(a)(2)(A). Ms. Blum desires to engage more fully in a specific community campaign against foie gras production, but continues to censor herself due to her reasonable understanding of the plain language of AETA. *Id.* at ¶¶ 86-90, 96. These allegations are sufficient to confer standing for a pre-enforcement challenge. *Cf. Mangual*, 317 F.3d at 58 (finding allegations that reporter would curtail investigative and journalistic activities due to possibility of prosecution adequate to establish standing); *Caribbean Int'l News Corp.*, 12 F. Supp. 2d at 212. The Government's primary argument that Ms. Blum lacks standing is based on AETA's First Amendment exception

[2] As detailed at Part II.A, *infra,* the Government's application of AEPA, AETA's predecessor, was anything but narrow. For this and other reasons, Defendant's present interpretive stance is less than comforting.

(Section 43(e)(1)), and the Government's narrow interpretation of the damage/loss provision. Def. Mem. at 10. But Ms. Blum's reading of the statute is correct, as is her inability to rely on Defendant's proposed rules of construction. *See* Part II.A, *infra*. [3]

Ryan Shapiro: Mr. Shapiro is another longtime advocate who now studies the treatment of animal rights activists as national security threats in a doctoral program at MIT. *See generally* Compl. ¶¶ 99-115. Mr. Shapiro believes that undercover investigation and documentation of conditions on factory farms are the most effective tactics available to animal rights activists, yet he is refraining from engaging in this work, even though it can be done lawfully—without trespass or theft—due to his reasonable fear of AETA charges. *Id.* at ¶¶ 106, 109, 111-12, 114. These allegations are sufficiently concrete to establish Mr. Shapiro's standing.[4] *Cf. Nat'l Org. for Marriage v. McKee,* 649 F.3d 34, 48-49 (1st Cir. 2011) (noting the "burden of proving that one's speech was chilled is a modest one" and finding chill adequately alleged where organization's executive director testified that the organization would refrain from expending resources to become involved in campaigns in Maine due to challenged law).

[3] The Government also argues that even if Section 43(a)(2)(A) allows for liability based on lost profits, the limitations set forth in Section 43(d)(3)(B), defining "economic damage" to exclude lawful third party reaction, should then apply to ease Ms. Blum's mind. *See* Def. Mem. at 10. This makes no sense, first because Congress chose to use the phrase "economic damage" only in the penalty section, and not the offense section of the statute. Moreover, Ms. Blum reasonably fears prosecution for another activist's illegal act against the foie gras industry, where that act was directly inspired by Ms. Blum's compelling advocacy about foie gras. *See* Compl. ¶¶ 88, 92, 94, 97. Nor does the "economic damage" definition protect Ms. Blum from being held liable for a foie gras farm's decision to hire extra security in light of her advocacy efforts. *See* Part II.A, *infra*.

[4] The Government complains that Mr. Shapiro has failed to "give shape to the difference between the type of work he is allegedly chilled from doing and that which he is allegedly currently doing (leafleting, public speaking campaign work)." Def. Mem. at 11. But this is nothing more than an attack on the credibility of Mr. Shapiro's chill allegations, which is not appropriately made on a motion to dismiss. The Government will have the opportunity to question Mr. Shapiro as to the logical differentiation between these types of advocacy during discovery.

While these allegations alone establish standing, Mr. Shapiro (along with Plaintiff Blum) is also chilled by an FBI memo describing undercover investigation on a farm as a violation of AETA. Compl. Ex. A. Contrary to Defendant's analysis (Def. Mem. at 10), the memo endorses an AETA prosecution not just for "subject 2"—alleged in the memo to have taken an animal from the farm—but also for "subject 1" whose only acts on the farm involved illegal entry and videotaping, neither of which would presumably result in damage to tangible property. Compl. Ex. A. And despite Defendant's repeated assurances that AETA covers only criminal conduct, there is simply nothing in its text to distinguish illegal entry from legal entry, where entry is for the purpose of gathering undercover footage that will impact the profitability of a farm. Tellingly, Mr. Shapiro himself is named in this FBI memo about potential AETA charges as one who "disrupts … business" and "causes economic loss." *Id.*

Lana Lehr: Ms. Lehr is a longtime advocate for rabbits, who for years combined written and legislative advocacy with public protests in front of fur stores. Compl. ¶¶ 117, 120, 121, 124. Now, she has ceased organizing and attending fur protests out of fear that such protests might have their intended effect of causing a fur store to lose profit. *Id.* at ¶¶ 126-28, 130; *cf. McGuire v. Reilly,* 386 F.3d 45, 51-52, 59 (1st Cir. 2005) (plaintiff Zarella's allegations that she was chilled in continuing past pro-life sidewalk counseling, though she was never threatened with arrest, establish standing for pre-enforcement challenge). Defendant argues that Ms. Lehr's advocacy does not involve conduct intended to "*physically* damage a business." Def. Mem. at 11 (emphasis added). It is true that Ms. Lehr intends no such result, but AETA does not require one. *See* Part II.A, *infra*.

Lauren Gazzola: Ms. Gazzola was previously convicted and incarcerated under AEPA, AETA's precursor, and thus is especially wary of AETA charges. Compl. ¶¶ 139-41. Ms.

Gazzola's chill allegations are clear: in the past she engaged in a successful campaign that combined expressions of support for illegal activity with lawful home protests. She understands that, separately, each of these tactics is protected by the First Amendment, but believes, based on her past experience, that in combination they are criminalized by AETA. *Id.* at ¶¶ 141-143. Her past prosecution, along with her current desire to engage in similar campaigns, establishes standing. *See Rock for Life-UMBC v. Hrabowski*, 411 Fed. Appx. 541, 548 (4th Cir. 2010) ("To demonstrate a credible threat that a … policy is likely to be enforced in the future, a history of threatened or actual enforcement of the policy against the plaintiff or other similarly-situated parties will often suffice.") (collecting cases).

Ms. Gazzola's experiences also demonstrate that AETA's First Amendment exception is ineffective. When two different courts examined Ms. Gazzola's prior speech, one found it protected by the First Amendment, and the other did not. Compl. ¶ 141 (recounting contradictory holdings by the Third Circuit and the Massachusetts Superior Court ); *see also id. at* ¶ 57 (citing Third Circuit's holding that although much of the political speech on the SHAC website was otherwise protected by the First Amendment, in context it violated the AEPA because it furthered the effort to convince businesses to divest from an animal enterprise). [5]

Finally, the Government concedes that Ms. Gazzola's recent self-censorship on the Internet states a concrete allegation of chill, Def. Mem. at 12, Compl. ¶¶ 146-47, but argues that the omitted phrase "so go do it" does not violate AETA because Ms. Gazzola's purpose was to

[5] Contrary to the assertions made by *Amici*, Ms. Gazzola was *not* convicted for "participating in a Seattle bombing." *See Br. of Amici Curiae, Dr. Edythe D. London, et al.*, at 8 (Docket # 20-1). As the Third Circuit made clear, Ms. Gazzola's only connection to smoke bombs detonated at a Seattle office was to speak in support of the tactic, after the fact, during a call-in radio show. *United States v. Fullmer*, 584 F.3d 132, 148-49 (3d Cir. 2009). Similarly, the Government is incorrect to suggest that Ms. Gazzola's prosecution did not result, at least in part, from First Amendment protected activity. *See* Def. Mem. at 21; *Fullmer*, 584 F.3d at 156.

describe an experience, not to cause damage to Huntingdon Life Sciences ("HLS"). Def. Mem. at 12. This argument misunderstands Ms. Gazzola's claim; addition of the omitted phrase would have been for the very purpose of urging the readers of Ms. Gazzola's blog to carry on the work she began—to try to put HLS out of business. This is exactly the type of call to action for which Ms. Gazzola was prosecuted in the past. Compl. ¶¶ 55-58.

Iver Robert Johnson III: Mr. Johnson's allegations are different from the other Plaintiffs' in that AETA has not directly chilled him from engaging in animal rights advocacy, but rather has impeded his work due to the far-reaching chill it has cast on others in his community. *Id*. at ¶¶ 160-61. The First Circuit has recognized the validity of this type of chill in analyzing standing. *See Mangual*, 317 F.3d at 58 (including in chill analysis allegations that reporter's sources might silence themselves due to reporter's possible prosecution).

Finally, Defendant's ripeness argument merits little response. "[W]hen free speech is at issue, concerns over chilling effect call for a relaxation of ripeness requirements." *Sullivan v. City of Augusta*, 511 F.3d 16, 31 (1st Cir. 2007). Thus while a plaintiff must still meet the ripeness requirements of fitness and hardship, in a pre-enforcement challenge a "conclusion that a reasonable threat of prosecution exists, for purposes of standing, effectively dispenses with any ripeness problems." *Rhode Island Ass'n of Realtors v. Whitehouse*, 199 F.3d 26, 33 (1st Cir. 1999) (*quoting Adult Video Ass'n v. Barr*, 960 F.2d 781, 786 (9th Cir. 1992)). Under this theory, one "need not either describe a plan to break the law or wait for a prosecution under it. The purpose of the alternative ground for standing in such cases is so that plaintiffs need not break the law in order to challenge it." *Mangual,* 317 F.3d at 60. Plaintiffs here challenge AETA on its face and as applied because they wish to engage in specific expression. *See, e.g.,* Compl. ¶¶ 85-

98, 107-15, 126-33, 142-48, 160-61. If they may not raise their challenge here, they will continue to censor themselves, thereby forgoing important First Amendment rights.

## II. Plaintiffs Adequately State Claims for Violations of the First Amendment

Defendant's motion to dismiss may be granted only if Plaintiffs have failed to state a "plausible" cause of action. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Defendant does not argue that any of Plaintiffs' allegations are "conclusory" and to be disregarded. Therefore, the only question for this Court is whether Plaintiffs' factual allegations establish an entitlement to relief that is more than "conceivable," even if it is not probable. *See Id.* at 683; *Bell Atlantic v. Twombly*, 550 U.S. 544, 556 (2007). The complaint easily meets this standard.

### A. AETA Is Substantially Overbroad

Overbreadth doctrine protects individuals who "may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *Gooding v. Wilson*, 405 U.S. 518, 521 (1972). "[W]here conduct and not merely speech is involved," overbreadth must be substantial to result in invalidity. *Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973). A plaintiff may succeed by establishing a "realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court," *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984), a "substantial *risk* that application of the provision will lead to the suppression of speech," *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) (emphasis added), *or* that the "arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach," *New York v. Ferber*, 458 U.S. 747, 773 (1982).

Thus, there are at least two ways in which a statute can be substantially overbroad. First, as suggested by *Taxpayers for Vincent*, a court may focus on both the risk and the potential

extent of the interference with First Amendment rights. 466 U.S. at 801. Second, as *Ferber* suggests, a court may focus on the number of instances in which the statute as applied will violate the First Amendment as compared to the amount of times it will regulate unprotected conduct. 458 U.S. at 773; *see also United States v. Williams* 553 U.S. 285, 303 (2008) (rejecting overbreadth challenge when statute is constitutional in the "vast majority of its applications"); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 256 (2002) (finding law overbroad where it "covers materials beyond the categories" of child pornography and obscenity). Criminal statutes will be examined particularly carefully. *City of Houston v. Hill*, 482 U.S. 451, 459 (1987).

The first step in overbreadth analysis is to interpret the challenged statute. *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010). With a federal statute like AETA, no principles of federalism counsel deference to a separate sovereign's interpretive authority. *Id.* This Court also need not defer to the Executive's own construction of AETA. *Id.* at 1591 ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."); *McCullen v. Coakley*, 759 F. Supp. 2d 133, 139-140 (D. Mass. 2010) (Tauro, J.) (government may not rehabilitate an unconstitutional law by reliance on a particular official's interpretation). A court may adopt a limiting construction to avoid difficult constitutional questions, but only if a statute is "readily susceptible" to it. *Reno v. ACLU,* 521 U.S. 844, 884 (1997) (internal quotation marks omitted). Otherwise Congress would have no incentive to narrowly craft legislation. *Stevens*, 130 S. Ct. at 1592; *Osborne v. Ohio,* 495 U.S. 103,121 (1990). In this case, AETA is not readily susceptible to an alternative interpretation, and AETA's provisions criminalize a broad range of protected speech.

**1. By Its Terms, AETA Criminalizes Plaintiffs' Proposed Speech**

AETA subjects to criminal sanction anyone who (1) crosses state or national boundaries or uses interstate commerce (2) with the "purpose of damaging or interfering with the operations of an animal enterprise" and (3) "in connection with such purpose . . . intentionally damages or causes the loss of any real or personal property (including animals or records) used by an animal enterprise." 18 U.S.C. § 43(a). [6] "Animal enterprise" is defined broadly, as essentially any entity that uses animals or animal products in any way. 18 U.S.C. § 43(d)(1). Critically, the statute fails to define "damaging," "interfering," "damages," "causes the loss," or "personal property."

Penalties under AETA depend on the amount of "economic damage" and/or bodily injury that result from the substantive violation. 18 U.S.C. § 43(b). Economic damage is broadly defined, as, *inter alia*, "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).

The overbreadth of the statute is simply illustrated. As detailed above, Plaintiffs want to publicize the horrific treatment of animals at certain businesses and organize community campaigns in opposition to such treatment. This conduct easily falls within AETA's prohibition. First, it involves interstate communication. Second, Plaintiffs have the intent of "damaging or interfering" with the corporations' operations—the purpose of their advocacy is to cause businesses to suffer economically and be forced either to change their practices or to cease doing

[6] Plaintiffs do not challenge Section 43(a)(2)(B) of the statute as overly broad.

business entirely because of public outrage. If the targeted businesses suffer losses including lost profits, Plaintiffs will thereby have "intentionally damage[ed] or cause[d] the loss of . . . personal property . . . used by an animal enterprise." 18 U.S.C. § 43(a)(2)(A). Further, AETA holds Plaintiffs accountable for the illegal actions of third parties, even if Plaintiffs do not intend to encourage unlawful conduct. *See* 18 U.S.C. §§ 43(b), (d)(3) (hinging AETA penalties on resulting economic damage, including illegal third party reaction to disclosure of information about an animal enterprise).

It is not hard to imagine such a scenario. Animal enterprises may spend more money on security as a result of public demonstrations. Disgusted consumers may stop purchasing goods manufactured by animal enterprises. Some members of the public may be so enraged by what they learn from Plaintiffs' campaigns that they respond by targeting a company for harassing and threatening conduct, some of it illegal.

The interstate nature of AETA's offense provisions are uncontested. Therefore, we start with the first requirement—namely, that an AETA defendant have the purpose of "damaging or interfering" with the corporation's operation. Black's Law Dictionary defines "damage" to mean "[l]oss or injury to person or property." BLACK'S LAW DICTIONARY 445 (9th ed. 2009); *see also* MERRIAM-WEBSTER COLLEGIATE DICTIONARY 314 (11th ed. 2003) (defining "damage" as "loss or harm resulting from injury to person, property, *or reputation*.") (emphasis added). Thus, it is hard to accept the Government's proposition that speech directed at exposing animal cruelty at a particular animal enterprise does not fit within the definition of "damaging." Def. Mem. at 12. Clearly Plaintiffs intend to inflict a "loss . . . to property" (or, on the more expansive definition, loss to "reputation").

The Government's position fares no better with respect to "interfering." Black's defines "interference" as "[t]he act of meddling in another's affairs" or "[a]n obstruction or hindrance." BLACK'S LAW DICTIONARY at 888. By their speech, Plaintiffs intend to be an obstruction and hindrance to the operation of at least some animal enterprises. Moreover, Congress must have been aware of the many statutes that prohibit intentionally or purposefully "interfering" with certain activities, some of which clearly apply to expressive activity. *See* 5 U.S.C. § 1502(a)(1) (prohibiting "interfering" with the result of an election); 18 U.S.C. § 1367 (prohibiting "interfer[ing]" with "operation" of satellite);[7] *cf.* 18 U.S.C. § 2388(a) (criminalizing those who "willfully obstruct[] the recruiting or enlistment service of the United States").[8] Indeed, longstanding precedent recognizes both that speech has the power to interfere with or damage a business' operations, and that the Government lacks power to regulate speech solely on that basis. *See Waters v. Churchill*, 511 U.S. 661, 674 (1994) (recognizing that speech by public employees and private citizens can disrupt government operations, but government does not have power to restrict the latter); *Thornhill v. Alabama*, 310 U.S. 88, 104-05 (1940) (recognizing that protected expression may harm business interests, but finding that "the danger of injury to an industrial concern is neither so serious nor so imminent" as to justify speech restriction); *United Bhd. of Carpenters & Joiners of Am. Local 586 v. NLRB*, 540 F.3d 957, 966 (9th Cir. 2008) (holding unconstitutional rule designed to restrict speech, but not conduct, that "would interfere with normal business operations").

[7] Section 1367 has been interpreted to apply to the unauthorized transmission of religious messages. *See United States v. Haynie*, No. 91-5000, 1991 U.S. App. LEXIS 18505, *1, 7 (4th Cir. Aug. 14, 1991).

[8] Section 2388(a) was routinely applied to speech during World War I. *See*, *e.g.*, *Debs v. United States*, 249 U.S. 211 (1919).

The Government fails to offer its own definition for "interfering" or "damaging," or to cite any relevant precedent. Def. Mem. at 17. Rather, it relies on *United States v. Buddenberg*, No. 09-cr-263, 2009 U.S. LEXIS 100477 (N.D. Cal. 2009), the only prior constitutional challenge to AETA. But in that case, the court held that defendants had standing to challenge only the threats and conspiracy portions of the statute, as they were only facing prosecution under 18 U.S.C. § 43(a)(2)(B) and (2)(C). The court did not opine on the potential overbreadth of Section 43(a)(2)(A), but did note the potential breadth of Section 43(a)(1). *See id.* at *23 ("Defendants are correct that a wide variety of expressive and non-expressive conduct might plausibly be undertaken with the purpose of interfering with an animal enterprise .") For this reason, *Buddenberg* is of no help to the Government.

Once we have established that Plaintiffs mean to intentionally interfere with or damage the operations of an animal enterprise within the meaning of Section 43(a)(1), it is not difficult to conclude that they also intend to damage or cause the loss of any real or personal property within the meaning of Section 43(a)(2)(A). As numerous cases establish, a business's lost profits are easily characterized as damage or loss to property. *Martco Ltd. P'ship v. Wellons, Inc.*, 588 F.3d 864, 879 (5th Cir. 2009) (lost profits properly considered "property damage" for purpose of insurance claim that defined property damage as physical injury to tangible property, including all resulting loss of use of that property); *Gully v. Sw. Bell Tel. Co.*, 774 F.2d 1287, 1295 n.20 (5th Cir. 1985) (damages to property include lost business profits); *Radiation Sterilizers, Inc. v. United States*, 867 F. Supp. 1465, 1471-72 (E.D. Wash. 1994) (property damage includes damage to intangible property, including lost profits and business goodwill); *Geurin Contractors, Inc. v. Bituminous Cas. Corp.*, 636 S.W.2d 638, 641 (Ark. 1982) (finding that lost profits resulting from road closure satisfied policy definition of "loss of use" of tangible property); *see*

*also St. Paul Fire & Marine Ins. Co. v. Northern Grain Co.*, 365 F.2d 361, 366 (8th Cir. 1966) (finding that diminution in the value of a wheat crop amounted to property damage within the scope of liability policy); *Labberton v. General Cas. Co. of Am.*, 332 P.2d 250, 255 (Wash. 1958) ("property is a term of the very widest significance" and "when used without qualification may reasonably be construed to include … intangibles"); *cf. In re C.R. Stone Concrete Contractors, Inc.*, 462 B.R. 6, 23 (Bankr. D. Mass. 2011) ("personal property" within meaning of estate law includes intangible assets like good will).

The history of AETA confirms Plaintiffs' interpretation. AETA is the successor statute to the Animal Enterprise Protection Act of 1992 (AEPA). 18 U.S.C. § 43 (1992). When AEPA was passed, it applied to actions (1) with the same interstate/international commerce character as AETA, (2) "for the purpose of causing physical disruption to the functioning of an animal enterprise," and (3) intentionally causing "physical disruption" to the functioning of an animal enterprise by "intentionally stealing, damaging, or causing the loss of, any property" and thereby causing "economic damages" above $10,000. *Id.* at § 43(a) (1992). The inclusion of the word "physical" before "disruption" limited AEPA's impact on protected expression.

In 2002, the AEPA was amended to delete the reference to economic damages in the third element described above, making the extent of damage relevant solely to penalty, not to threshold criminal liability. 18 U.S.C. § 43(b) (2002). The "physical disruption" language was retained. *Id.* Finally, in 2006, the statute was renamed and amended to its current form, eliminating "physical disruption" and requiring only that one purposely damage or interfere and intentionally cause damage or loss to an animal enterprise. 18 U.S.C. § 43 (2006). From 1992's AEPA to the present AETA, the scope of criminal liability has thus continually widened. If, as the Government contends, Sections 43(a)(1) and (a)(2)(A) were not meant to encompass speech

or expression, it was passing strange for Congress to amend the statute to eliminate the requirement of "physical" disruption.

Moreover, the exception to the definition of "economic damages" found in Section 43(d)(3) confirms that Congress anticipated that "disclosure of information" about an animal enterprise could trigger liability under AETA. If the liability provision were not meant to encompass expression that included the dissemination of information, there would be no need to exclude from the definition of "economic damages" the harm caused by such speech.

Even the Government's prior interpretation of the narrower AEPA buttresses Plaintiffs' argument that AETA covers this kind of protected activity. In a prior prosecution under AEPA, the Government argued that AEPA prohibited such actions as placing repeated phone calls to an animal enterprise with the goal of causing employees "to waste their time," Consol. Br. for Appellee, *United States v. Fullmer*, No. 06-4211, 2006 U.S. 3d Cir. Briefs LEXIS 1334, at *27 (3d Cir. June 17, 2008) and coordinated email "attacks" that required the purchase of "new hardware, new fire walls, and additional." *Id.* at *46. Indeed, key to the Government's rebuttal of one of the points raised by the defendants on appeal was that there was a logical and inextricable link between the term "economic damages" as used in the penalty provision and the element of causing damage or loss of property in the liability provision. *Id.* at *125 ("The penalty provisions for 'economic damage' and 'major economic damage' that are described in subsection (b) are themselves expressly linked to the damage or loss of property specified in subsection (a).").

The Government strains to avoid this interpretation of AETA by arguing, *contra* its position in *Fullmer*, that there is a disconnect between "economic damage" and that which

"damages or causes the loss of any real or personal property." Def. Mem. at 18-19.[9] Indeed, Defendant argues that the term "economic damage" found in the penalty provision of AETA is somehow *broader* than the "damage[]" or "loss" referred to in the Act's liability provision. *Id.* Most specifically, the Government maintains that Plaintiffs' fears of prosecution are unfounded because the harm to "personal property" referred to in Section 43(a)(2)(A) refers only to *tangible* property and not something like lost profits, even as Section 43(d)(3) includes lost profits within the meaning of "economic damages." *Id.* at 18.

Nothing in the statute supports the Government's interpretation. First, the Government points to the statutory *examples* of animals or records for the proposition that "personal property" means *only* tangible property. *Id.* But the statute explicitly refers to "*any* real or personal property," a breadth of coverage not mitigated by the provision of two examples. 18 U.S.C. § 43(a)(2)(A). This distinguishes it from other contexts in which the Government's argument might hold sway. In the insurance context, for instance, most coverage is limited to damage to "tangible" property, and lost profits are thought of as intangible property. *See*, *e.g.*, *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Ready Pac Foods, Inc.*, 782 F. Supp. 2d 1047, 1056 (C.D. Cal. 2011); Calum Anderson, *Insurance Coverage for Employment–Related Litigation: Connecticut Law,* 18 W. NEW ENG. L. REV. 199, 237–38 (1996). AETA has no such limiting definition of "property." *Compare U.S. Fidelity and Guaranty Co. v. Barron Indus., Inc.,* 809 F. Supp. 335, 360 (M.D. Pa. 1992) (excluding goodwill and lost profits from coverage because term "property damage" was qualified by the word "tangible").

[9] Here, the Government's reliance on *United States v. Buddenberg* is again unavailing. Def. Mem. at 19. The *Buddenberg* court found the definition of "economic damage" irrelevant to the potential overbreadth of Section (a)(2)(B), while noting that such an argument was potentially applicable to Section (a)(2)(A). 2009 U.S. Dist. LEXIS 100477, at *18.

Second, the Government points out that AETA requires that real or personal property be "used" by an animal enterprise, Def. Mem. at 18, implying that money in the form of profits is not put to use by animal enterprises. Of course, this is not the case. The plain language of the statute thus supports a reading of "damage or cause the loss of any real or personal property" that *includes,* but is not limited to, causing economic damage supportive of increased penalties.[10]

**2. None of the "Saving" Provisions of AETA Support the Government**

The statutory provisions that the Government claims undermine this interpretation do nothing of the sort. First, the First Amendment exception is meaningless, as described in Part I, *supra*. *See* 18 U.S.C. § 43(e)(1).[11] Next, the Government maintains that because the definition of economic damages excludes "any lawful economic disruption (including a lawful boycott) that results from lawful public, governmental, or business reaction to the disclosure of information about an animal enterprise*," id.* at § 43(d)(3)(B), Congress did not intend to expose individuals like Plaintiffs to liability. On the Government's theory, because such damages cannot be used to calculate the penalty, conduct that causes lost profits through such disruption also cannot trigger liability.

[10] Even *Amici* in support of dismissal seem to agree with this commonsense reading of the statute. *See Br. of Amici Curiae Nat'l Ass'n For Biomedical Research, et al,* ("NABR Br.") at 11 (Docket # 17-1) (arguing that AETA's prohibition on activity that causes an animal enterprise to lose profits or increase security costs is constitutional due to the First Amendment exception), and at 15 (noting that "loss" is not vague, as Plaintiffs are able to interpret it themselves to include loss of profits and increased security costs).

[11] That certain legislators were reassured by the rule of construction that AETA would protect First Amendment rights (*see* Def. Mem. at 20 n.7) is irrelevant, especially as other legislators expressed the opposite interpretation. *See, e.g.,* 152 CONG. REC. E2100 (daily ed. Nov. 13, 2006) ("The 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.")(comments of Rep Israel).

The Government's argument is insufficient for three reasons. First, the exception does not alter the definition of damage or loss as those terms are used in the statute's liability provisions. It affects only the penalty that a defendant may face *after* criminal liability has been determined. This placement is significant. It suggests that if the only damage caused by Plaintiffs' conduct is the result of "lawful" actions by third parties, no *economic damage* results, thereby limiting Plaintiffs' potential prison sentence to one year. *Id.* at § 43(b)(1)(A). In other words, a activist like Ms. Blum, who would intend to cause harm to an animal enterprise by encouraging consumers to stop purchasing foie gras, may cause "damage or loss," without causing any economic damage within the meaning of the Act. Indeed, as argued above, the exception itself contemplates that liability could be based on speech like Ms. Blum's; otherwise it would not be necessary to exclude harms caused by the disclosure of information.

Second, by its terms the exception only applies to some First Amendment protected conduct—lawful economic disruption that results from the disclosure of information. The First Amendment protects much more than the dissemination of information— it protects advocacy, opinion, and many other kinds of expression that are not informational. Finally, the exception applies only to the *lawful* actions of third parties that result from "disclosure of information" about an animal enterprise. But unlawful third party conduct could "result[]" from such disclosure and cause significant damage, even if the speaker had no intention of causing this result. Premising liability on the actions of others is prohibited by the First Amendment. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982); *McCoy v. Stewart*, 282 F.3d 626, 632-33 (9th Cir. 2002).

Given this straightforward interpretation of AETA, it is overbroad. It "inhibit[s] free speech and …[is] unsupported by a sufficiently compelling state interest …[nor] tailored

narrowly to such an interest." *Auburn Police Union v. Carpenter*, 8 F.3d 886, 896 (1st Cir. 1993); *see also Am. Booksellers Found. for Free Expression v. Coakley*, No. 10-11165, 2010 U.S. Dist. LEXIS 114750, at *12 (D. Mass. Oct. 26, 2010). As illustrated above, there is a "realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court," *Taxpayers for Vincent*, 466 U.S. at 801, as well as a "substantial *risk* that application of [AETA] will lead to the suppression of speech," *Finley*, 524 U.S. at 580 (emphasis added). Nor can it be said that the speech restricted by AETA is essentially criminal conduct. *United States v. Johnson*, 952 F.2d 565, 577-79 (1st Cir. 1991) (rejecting overbreadth challenge to 18 U.S.C. § 957).

**B. AETA Is Void for Vagueness**

Along with being substantially overbroad, AETA is also void for vagueness. An unclear statute like AETA 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 and punctuation 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 will minimally impact protected expression. *NAACP v. Button*, 371 U.S. 415, 432 (1963). Although "some degree of inexactitude is acceptable in statutory language," to comply with the requirements of due process, a law must define an offense so that an ordinary reader can understand what is prohibited, and it must do so in a way "that does not encourage arbitrary and discriminatory enforcement." *See URI Student Senate v. Town of Narragansett*, 631 F.3d 1, 13-14 (1st Cir. 2011) (internal quotation marks omitted); *see also Skilling v. United States,* 130 S. Ct. 2896, 2927–28 (2010); *McCullen v. Coakley*, 571 F.3d 167, 182–83 (1st Cir. 2009).

In a facial vagueness challenge, the court must first determine whether the enactment reaches a substantial amount of constitutionally protected conduct. *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 494 (1982). As explored fully in Part II.A, above, AETA does. For this reason, Plaintiffs may challenge the statute on its face and need not show that the law is impermissibly vague in all of its applications. *See City of Houston v. Hill*, 482 U.S. 451, 459 (1987); *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983); *cf. Whiting v. Town of Westerly*, 743 F. Supp. 97, 100 (D.R.I. 1990) ("[I]f the law implicates no constitutionally protected conduct, the challenge should be upheld only if the law is impermissibly vague in all of its applications."), *aff'd*, 942 F.2d 18 (1st Cir. 1991). In this context, a statute is unconstitutionally vague if its "deterrent effect on legitimate expression is ... both real and substantial, and if the statute is [not] readily subject to a narrowing construction." *Young v. Am. Mini Theatres, Inc.,* 427 U.S. 50, 60 (1976) (internal quotation marks omitted).

The Government argues that the Court need not consider the impact of the law on other parties, because the statute is not vague as applied to Plaintiffs. Def. Mem. at 22. Along with ignoring the correct legal standard, described above, this is incorrect as a factual matter. As illustrated in Part I, each of Plaintiffs' complaints of vagueness is exemplified by his or her own desired conduct. Plaintiff Blum, for example, is hindered in her ability to effectively advocate against the foie gras industry, based on her uncertainty as to whether or not her conduct could be punished as "interfering" and "causing the loss" of "personal property" belonging to an "animal enterprise." *See, e.g.,* Compl. ¶¶ 91, 93. Similarly, Plaintiff Gazzola fears engaging in a campaign that combines advocacy for civil disobedience with targeted residential protests, due to the uncertainty surrounding AETA's "course of conduct" definition, described below. Compl. ¶¶ 142-43.

AETA's vagueness stems first from the statute's failure to define "interfering," one of the key words used to establish the first element for liability under the Act. *Compare* 18 U.S.C. § 43(a)(1); *with* the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248(e)(2) (defining "interfere with" as "to restrict a person's freedom of movement.") When a statute fails to define a term that forms an element of criminal liability, there is a greater risk that individuals will not understand the breadth of the law and will be subject to the whim of law enforcement's discretion. *See Kolender*, 461 U.S. at 358-60 (finding statute vague for failure to define "credible" or "reliable"); *Massachusetts Fair Share, Inc. v. Town of Rockland*, 610 F. Supp. 682, 690 (D. Mass. 1985) (finding statute vague for failure to define "sunset" and "daylight hours" in ordinance prohibiting door-to-door canvassing).

By forgoing a statutory definition of "interfering," AETA leaves ordinary readers in the dark about its precise meaning. However, it is logical to assume that it alludes to some conduct distinct from "damage[ing] or caus[ing] … loss." 18 U.S.C. § 43(a)(2)(A); *see Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.") (internal quotation marks and citation omitted); *Arevalo v. Ashcroft*, 344 F.3d 1, 7 (1st Cir. 2003). Black's Law Dictionary defines "interference" as "[t]he act of meddling in another's affairs" or "[a]n obstruction or hindrance." BLACK'S LAW DICTIONARY 888 (9th ed. 2009). Both definitions are relevant, yet they mean substantially different things. Traveling to "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 convince a shareholder to vote for a particular resolution. The second definition 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*, *sub nom. Leavitt v. Jane L.*, 518 U.S. 137 (1996); *see also Reno v. ACLU*, 521 U.S. 844, 871 (1997) (lack of definition "provoke[s] uncertainty among speakers").

The Second Circuit struck down similar language on vagueness grounds 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. *See Hirschkop v. Snead*, 594 F.2d 356, 371 (4th Cir. 1979) ("reasonably likely to interfere with a fair trial" is vague); *Nitzberg v. Parks*, 525 F.2d 378, 383 (4th Cir. 1975) ("substantial disruption ... or material interference" with school activities is vague); *Young v. City of Roseville*, 78 F. Supp. 2d 970, 975 (D. Minn. 1999) ("interfere[s] with the use and enjoyment of adjacent land" is vague).

Courts have upheld the use of the term "interfere" when it 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); *Riely v. Reno*, 860 F. Supp. 693, 705 (D. Ariz. 1994) (FACE not void for vagueness as "interfere with" is defined within the statute). The cases cited by *Amici* fall into this category. *United States v. Bird*, No. 95-20792, 1997 U.S. App. LEXIS 33988 (5th Cir. Sep. 24, 1997), for example, also involved a vagueness challenge to FACE. *See* NABR Br. at 15. *Amici*'s citation to *United States v. Gwyther*, 431 F.2d 1142, 1143 (9th Cir. 1970) is equally unavailing, as that case involved the

much more bounded crime of hindering or interfering with the administration of the Military Selective Service Act.

Similarly, while the *Buddenberg* court rejected the defendants' arguments that AETA's failure to define "interfering" rendered the statute vague, it did so only after considering the term as bounded by Section 43(a)(1)(B)'s requirement of interfering with an animal enterprise by a threatening course of conduct. 2009 U.S. Dist. LEXIS 100477 at *20-23. Indeed, the court noted that "[d]efendants are correct that a wide variety of expressive and non-expressive conduct might plausibly be undertaken with the purpose of interfering with an animal enterprise—a public protest, for example … but that conduct is not prohibited under § 43(a)(2)(B)." *Id.* at *23.

Second, AETA's definition of "animal enterprise" is so expansive as to give ordinary citizens no notice of when they risk criminal liability. *See* 18 U.S.C. § 43(d)(1)(A) (defining "animal enterprise" as, *inter alia*, "a commercial or academic enterprise that uses or sells animals or animal products for profit, food or fiber production, agriculture, education, research, or testing"). It is hard to imagine any commercial or academic enterprise that does not fall within this definition, and even more difficult to imagine how any reasonable person would be able to distinguish between enterprises covered by the definition and those that are not. Further, AETA criminalizes intentionally damaging or causing loss not only to all animal enterprises but also to "any real or personal property of a person or entity having a connection to, relationship with, or transactions with an animal enterprise." *Id.* at § 43(a)(2)(A). This magnifies the potential reach of the statute without providing any meaningful guidance to a person of ordinary intelligence.

Broad proscriptions such as AETA's may pass constitutional muster when the statutory scheme is specific enough to limit potential liability. For example, in *United States v. Cassel,* 408 F.3d 622, 635 (9th Cir. 2005), 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. *See also Grayned*, 408 U.S. at 113 (upholding anti-picketing ordinance specifically targeted to avoid disruption of normal school activities). Given the breadth of the statute's description of an animal enterprise, AETA's proscriptions have nearly unlimited potential application, and thus fail to provide fair notice to potential violators.

Third, even if the Court determines that the failure to define "damage" and "cause the loss," along with the unclear meaning of "economic damages," do not make AETA unconstitutionally overbroad, they nonetheless evidence AETA's vagueness. 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 advocacy campaign, excepted from consideration in the penalty stage, fits the defined offense. Additionally, the definition of "economic damage" taken in conjunction with the exception set forth in Section 43(d)(3)(B) is itself hopelessly vague. 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." It is unclear whether the phrase includes 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, a reasonable person will not know whether economic damage has occurred. As a general matter, then, a reasonable person will have no idea how seriously she will be punished for violations of AETA.

Defendant's reliance on AETA's intent requirement does not mitigate this vagueness. *See* Def. Mem. at 24. The relevant question is whether or not AETA punishes advocacy that has the *intent* and effect of causing a business to loss profits. If it does, it is surely a "trap for those who act in good faith" by assuming that conduct protected by the First Amendment could not possibly also violate AETA. *Id.*

Fourth, the phrase "course of conduct," appearing in Section 43(a)(2)(B), is also unconstitutionally vague. Most problematically, the term is defined only as "a pattern of conduct composed of 2 or more acts, evidencing a continuity of purpose." 18 U.S.C. § 43(d)(2). Notably omitted is any set time frame, meaning that an actionable course of conduct could include disparate acts across years or even decades.[12] It is unclear whether such acts must both fall within the statute of limitations, (*see Toussie v. United States*, 397 U.S. 112, 115, 120 (1970)) (describing "continuing offenses" that toll the statute of limitations period), *superseded by statute*, 50 U.S.C. § 462(d)), and whether they must be undertaken by the same individual or may be part of a pattern of group activity. *See Undergraduate Student Ass'n v. Peltason*, 367 F. Supp. 1055, 1057 (N.D. Ill. 1973) (asking, of a disorderly course of conduct statute, "[w]hat if, in an orderly demonstration, a few create a 'disorderly disturbance'? Are the rest in violation?") The requirement of "continuity of purpose" adds to AETA's uncertainty, as an animal rights activist's larger political purpose would presumably tie together otherwise attenuated acts of protest. Thus, a protest at a researcher's home, followed by years of inactivity, could potentially resurface as a basis for AETA liability if 5, 10, or 20 years later, a member of the same group that organized the initial protest again targets the same individual.

[12] The RICO statute, by contrast, provides that a "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of the Act and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity. 18 U.S.C. § 1961(5).

Conversely, it is not clear if attendance at one protest, involving, for example, multiple chants, or multiple actors, could comprise a "course of conduct." *Compare* MICH. COMP. LAWS § 750.411h(1)(a)(2012) ("Course of conduct" defined as "pattern of conduct composed of a series of 2 or more *separate noncontinuous acts* evidencing a continuity of purpose") (emphasis added) *with United States v. Carmichael*, 326 F. Supp. 2d 1267, 1278 (M.D. Ala. 2004) (noting that "website's continuous presence on the internet could arguably be equivalent to 'a series of acts over a period of time'").

Neither the Government nor *Amici* marshal any precedent to contradict this point. The defendant in *United States v. Shrader*, No. 09-0270, 2010 U.S. Dist. LEXIS 44656 (S.D. W.Va. Apr. 7, 2010) (*see* NABR Br. at 16), for example, does not appear to have advanced Plaintiffs' temporally based theory of vagueness, and thus the case is irrelevant to this Court's inquiry. Further, while Government and *Amici* place heavy reliance on AETA's intent requirement to alleviate the vagueness endemic to AETA's threats prong, (*see* Def. Mem. at 23-24; NABR Br. at 17), such reliance is problematic in the context of statutes that punish threats, as the circuits are currently split on the extent to which the true threats standard requires *subjective intent to threaten* by the speaker, or merely intentional utterance of a statement which a reasonable person would interpret as threatening. *Compare United States v. Nishnianidze*, 342 F.3d 6, 16 (1st Cir. 2003) *with United States v. Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005). As shown by the *Fullmer* and the *Buddenberg* prosecutions, discerning an "intentional" threat from heated political rhetoric is decidedly more difficult in the context of public demonstrations (likely to be the focus of AETA prosecutions) than it is in one-on-one communication. Compl. ¶¶ 60, 141.

Fifth, and finally, Section 43(a)(2)(C) of AETA is unconstitutionally vague because it appears to criminalize conspiring or attempting to use interstate commerce for the purpose of

damaging or interfering with the operations of an animal enterprise, without tying such an attempt or conspiracy to intentional damage or threat of injury. While a judge or lawyer might interpret this provision to implicitly refer back to Sections 43(a)(2)(A) and (B), (*see, e.g., Buddenberg*, 2009 U.S. Dist. LEXIS 100477 at *35), a lay person would likely take at face value AETA's apparent allowance of liability without reference to these Sections.

The full offenses specified at Section 43(a)(2)(C) reads: "Whoever [uses interstate commerce] for the purpose of damaging or interfering with the operations of an animal enterprise; and conspires or attempts to do so; shall be punished." The textual, plain meaning of "to do so" refers back to interfering with an animal enterprise under Section 43(a)(1). AETA's structure appears clear: Section 43(a)(2)(C) does not prohibit a conspiracy or attempt to damage property under Section 43(a)(2)(A), nor threats of injury under Section 43(a)(2)(B). Rather, Section 43(a)(2)(C)'s inclusion on a list of three offenses, joined together by "or," plainly permits Section 43(a)(2)(C)'s application in the absence of the conduct described in either (a)(2)(A) or (a)(2)(B). Just as threats under Section 43(a)(2)(B) do not require any damage to property under Section 43(a)(2)(A), so does Section 43(a)(2)(C) stand alone as a basis for criminal liability under Section 43(a)(2).

The structure of other federal criminal statutes further demonstrates this ambiguity. AETA appears unique in that other federal criminal statutes that incorporate attempt and/or conspiracy language either include such language in each subsection it applies to,[13] include a

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

separate attempt/conspiracy subsection explicitly identifying other subsections it incorporates,[14] or have attempt/conspiracy language separate and apart from the list of subsections of offenses separated by "or," thus indicating that the conspiracy/attempt language applies to all subsections in the list.[15] Each of the above three methods is clear in its text and structure as to how attempt or conspiracy operates vis-à-vis other sections of the statute. AETA, alone in its flawed structure, is not.

For each of these reasons, AETA must be struck down as void for vagueness.

**C. AETA Impermissibly Discriminates Based on Content and Viewpoint**

AETA discriminates on the basis of content by targeting core political speech that relates to the operation of animal enterprises. Even worse, the Act discriminates on the basis of viewpoint by privileging speech that is supportive of animal enterprises and criminalizing certain speech that is opposed to these enterprises. And even if AETA were limited to regulating otherwise unprotected speech like "true threats," it would still engage in unconstitutional content and viewpoint discrimination. *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Virginia v. Black*, 538 U.S. 343 (2003). The Government's arguments in favor of dismissal are based on an unduly narrow reading of the statute, an unfounded analogy to other circuits' resolution of content/viewpoint discrimination claims raised by FACE, and a misinterpretation of *R.A.V.* and *Black*. *See generally* Def. Mem. at 27-29.

Content-based regulation is impermissible because it allows the Government to "effectively drive certain ideas or viewpoints from the marketplace." *R.A.V.* 505 U.S. at 387, 391 (finding regulation to be impermissibly content-based because it proscribed speech based on

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

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

subject matter). Viewpoint-based restrictions are an even more dangerous form of content-based discrimination, because they represent the Government picking sides in a disputed issue. *See Rosenberger v. Rector & Visitors of the Univ. of Va.,* 515 U.S. 819, 829 (1995). The First Amendment is offended by both kinds of regulations because directly or indirectly, they suggest that "the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994) (internal quotation marks omitted). While this showing may be based upon explicit or implicit legislative intent, a content-based purpose is not necessary. *Id.* at 642. "Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content." *Id*. at 642-43. Such laws must be distinguished from those which impose limitations on the "time, place, and manner of protected expression" and are subject to less rigorous scrutiny. *McGuire v. Reilly*, 260 F.3d 36, 43 (1st Cir. 2001).

AETA discriminates based on content and viewpoint because it singles out for punishment speech and expression that have the purpose and effect of diminishing the profitability of animal enterprises, while ignoring otherwise identical speech and conduct that aid such an enterprise. AETA does not regulate the timing or location of speech and expressive conduct. *Cf. McCullen v. Coakley,* 573 F. Supp. 2d 382, 403 (D. Mass. 2008)(restriction on speech near a health care facility "does not directly regulate speech … [but] merely [] the places *where* communications may occur") (internal quotation omitted, emphasis in original), *aff'd,* 571 F.3d 167 (1st Cir. 2009). Nor can AETA be characterized as a *manner* restriction, as the act focuses on the effect of certain speech. *See AIDS Action Comm. v. MBTA*, 42 F.3d 1, 8 (1st Cir. 1994) ("[I]n order to be considered a valid manner restriction, a regulation cannot be aimed at the communicative impact of expressive conduct"). Far from regulating place or manner, AETA

outlaws altogether speech that, by nature of its communicative effect (and sometimes its viewpoint), takes one side of a controversial public issue.

While the two liability prongs of AETA work differently, they are each impermissibly discriminatory. The Supreme Court's decision in *Boos v. Barry*, 485 U.S. 312 (1988), is instructive as to Section 43(a)(2)(A). In *Boos*, the Court struck down a Washington, D.C. provision prohibiting the display of any sign within 500 feet of a foreign embassy, if the sign tended to bring a foreign government into "public odium" or "disrepute." *Id.* at 315. The Government defended the provision as concerned not with the content or viewpoint of potential protestors' speech, but rather with the secondary effects of such protest—"namely, our international law obligation to shield diplomats from speech that offends their dignity." *Id.* at 321. This argument relied heavily on the Supreme Court's previous holding in *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), upholding as content-neutral a restriction on speech by theaters specializing in adult films, because of the secondary effects of such theaters on the surrounding communities. *Boos,* 485 U.S. at 320. The Supreme Court distinguished *Boos* from *Renton*, explaining the "emotive impact of speech on its audience is not a 'secondary effect.'" *Id.* at 321 (plurality opinion); *see also id*. at 334 (Brennan, J., concurring in part and concurring in judgment). Even the *Renton* ordinance would be content-based if it were justified by the city's interest in preventing psychological damage caused by viewing adult movies. *Id.* at 321.

Unlike the restriction in *Renton*, but like the one in *Boos*, AETA's prohibitions against damaging or causing loss to an animal enterprise depend on the direct impact of an advocate's speech on his or her audience. AETA prohibits speech because of its intended impact—if the speech has the purpose and effect of causing a business to lose profits, it is criminalized. For example, if pro-foie gras and anti-foie gras advocates organized simultaneous and competing

protests at a food convention, the latter could be prosecuted under AETA if their speech discouraged potential investors; the former, whose speech would presumably have the effect of aiding and encouraging investment and profit, could not. This distinction impermissibly allows the Government to interfere "with the marketplace of ideas and opinions." *United States v. Soderna*, 82 F.3d 1370, 1375 (7th Cir. 1996).

The Government characterizes AETA as punishing only "criminal conduct" and "violence," without regard to any particular message. Def. Mem. at 27. But this is too narrow a reading. *See* Part II.A, *supra*. And as the Supreme Court explained in *Texas v. Johnson*, 491 U.S. 397, 406 (1989), a "law *directed at* the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires." Thus, in *United States v. Eichman*, 496 U.S. 310, 315 (1990), the Government sought to defend a flag-burning statute as distinguishable from the one struck down in *Johnson* because it proscribed only *conduct* that damages a flag, regardless of the actor's motive or intended message. Despite its facial neutrality, the act suffered "the same fundamental flaw: it suppresses expression out of concern for its likely communicative impact." *Id.* at 317. That AETA may succeed in punishing some who commit criminal or violent acts cannot excuse this fundamental flaw. *See, e.g., Ackerley Commc'ns v. City of Cambridge*, 88 F.3d 33, 39 (1st Cir. 1996) (finding ordinance that disadvantaged off-site commercial speech content-based despite its success in banning the "worst aesthetic offenders").

As for Section 43(a)(2)(B), even if this section of AETA prohibits only otherwise unprotected speech, such as "true threats," its content- and viewpoint-based discrimination is impermissible. The Supreme Court reviewed similar criminal statutes in *R.A.V.* and *Black*, in both cases rejecting the same argument relied upon by the Government here. In *R.A.V.*, the

ordinance at issue criminalized "fighting words" that the speaker "knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." 505 U.S. at 380-81. The Court made clear that even though "fighting words" are generally unprotected by the First Amendment, the Government may not choose to criminalize a subset of unprotected speech using content- or viewpoint-based discrimination. *Id.* at 391-94. As the Supreme Court elaborated in *Black*, the Government may only make content-based distinctions within a category of speech that is generally unprotected when the distinction is drawn for the same reasons that the category of speech is unprotected as a general matter. 538 U.S. at 361-63. Thus, in *Black*, burning a cross with the intent to intimidate could be criminalized because the category of "true threats" is unprotected precisely because of its intimidating nature, and burning a cross is simply one especially pernicious mode of intimidating speech. *Id.* at 363.

AETA is more like *R.A.V.* than *Black*, in that it criminalizes a subset of true threats made to interfere or damage an animal enterprise, for none of the purposes held to be permissible in *Black*. Illustrated simply, an animal rights protestor who threatens a fur store owner may be prosecuted under the act; the same threat, issued in an equally intimidating manner, but made by the owner to the protestor, may not be prosecuted. Unlike the statute in *Black*, such content discrimination cannot be explained by the reason threats may be prescribed in the first place. It may be, as *Amici* suggest, that some animal researchers have experienced serious intimidation and harm as a result of threats by animal activists not before this court, but the same could certainly be said for African Americans subjected to fighting words meant to arouse racial tension, given the long, divisive, and violence-ridden history of racism in this country. *See R.A.V.,* 505 U.S. at 393-94. Because AETA does not single out a *mode* of threats that are extra-

threatening, *see Black*, 538 U.S. at 363, but rather proscribes threats distinguishable only in that they are aimed at a specific industry, the Act discriminates based on content, and must be subjected to strict scrutiny.

In arguing that AETA does not discriminate based on content and viewpoint, the Government places heavy reliance on other circuits' rejection of content/viewpoint challenges to FACE. *See* Def. Mem. at 28. This reliance is misplaced. First, Defendant's citations to FACE challenges are relevant only to the Court's analysis of AETA's threats prong, 18 U.S.C. § 43(a)(2)(B); these cases say nothing of relevance to Section 43(a)(2)(A), as FACE has no analogous provision. Unlike AETA, FACE criminalizes three specific types of activity: use of "force," "threats of force," or "physical obstruction" to injure, intimidate, or interfere with one who is obtaining or providing reproductive health services. 18 U.S.C. § 248(a)(1). To "interfere" is defined narrowly (unlike in AETA), as restricting a person's freedom of movement. *Id.* at § 248(e)(2). Unlike the broad array of actions that may "damage[] or cause . . . . loss," 18 U.S.C. § 43(a)(2)(A), the use of physical obstruction or force will rarely (if ever) implicate the First Amendment. *See United States v. Dinwiddie*, 76 F.3d 913, 921-22 (8th Cir. 1996); *United States v. Soderna*, 82 F.3d 1370, 1375-76 (7th Cir. 1996).

That said, the FACE challenges are of some relevance to AETA's threats prong, as several courts have considered whether FACE's prohibition on using a "threat of force" to intimidate a person involved in obtaining or providing reproductive health services discriminates based on content or viewpoint. In support of this argument, FACE plaintiffs have attempted to show that, despite its neutral patina, FACE was actually adopted based on hostility toward pro-life protestors' message. *See, e.g., Am. Life League v. Reno*, 47 F.3d 642, 649 (4th Cir. 1995); *Soderna*, 82 F.3d at 1374. The courts have disagreed, finding that the act protects equally access

to *all* reproductive health services, whether they provide abortion or pregnancy counseling, and punishes equally those who engage in the prohibited conduct (like physically blocking a clinic entrance) regardless of viewpoint. *See, e.g., Am. Life League,* 47 F.3d at 649. While the courts have acknowledged that the law is primarily used against pro-life activists, a statute is not "rendered non-neutral simply because one ideologically defined group is more likely to engage in the proscribed conduct." *Id.* at 651.

AETA Plaintiffs' content and viewpoint discrimination claims are distinct. Plaintiffs do not complain merely because animal rights activists will be disproportionately prosecuted under the act. Unlike FACE, AETA cannot even *theoretically* punish equally loss or threats that emanate from both sides of the debate; it is only animal enterprises and their employees – the likely targets of animal rights activists – that are singled out for protection under the law.[16] FACE's threats prohibition, in contrast, may be applied against pro- and anti-abortion advocates alike. *See, e.g., United States v. Weslin*, 156 F.3d 292, 296-97 (2d Cir. 1998) (citing *United States v. Mathison*, CR-95-085-FVS (E.D. Wa. 1995) (FACE prosecution for threats against workers at pro-life facility)).

Defendant's analogy would have more force if FACE prohibited interfering with or intimidating a woman *seeking an abortion*, as the Government has no legitimate interest in promoting abortion (as opposed to promoting access to reproductive care facilities in general, or protecting those who choose to access such services), just as it has no legitimate interest in promoting or protecting the profit margins of foie gras farms. *See National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 738 (1st Cir. 1995) ("[E]ven when a municipality passes an

[16] It is true that AETA does not *only* punish threats by animal rights activists – it could also be used against labor activists or others who target animal enterprises for diverse reasons, but this breadth of application does not eliminate the distinction AETA draws between two distinct sides in a controversial political debate.

ordinance aimed solely at the secondary effects of protected speech (rather than at speech *per se*), the ordinance may nevertheless be deemed content-based if the municipality differentiates between speakers for *reasons unrelated to the legitimate interests that prompted the regulation.*") (emphasis in original).

As a content-based restriction on speech and expressive conduct, AETA can only stand if it is "narrowly tailored to promote a compelling Government interest." *United States v. Playboy Entm't Group*, *Inc.,* 529 U.S. 803, 813 (2000). If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative. Here, the Government *already* successfully punishes threats without discriminating based on content or viewpoint. *See, e.g.,* 18 U.S.C. § 2261A (prohibiting interstate stalking). And conduct which causes *physical* damage to an animal enterprise could be prohibited by the Federal government where it has an impact on interstate commerce, just as it is already punished by the States. *See, e.g.,* MASS. GEN. LAWS ch. 266, § 104 (2011) (injury to building); MASS. GEN. LAWS ch. 266, § 104B (2011) (removal or injury to research animals). Such legislation would accomplish all the expressed goals of AETA, without burdening speech that *lawfully* impacts animal enterprises. *See R.A.V.* 505 U.S. at 395-96 (noting that an ordinance "not limited to the favored topics … would have precisely the same beneficial effect. In fact the only interest distinctively served by the content limitation is that of displaying the city council's special hostility toward the particular biases thus singled out").

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendant's motion to dismiss in its entirety.

Dated: April 6, 2012

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on this day I caused a true copy of the above document to be served upon the attorney of record for all parties via ECF.

Date: April 6, 2012 */s/Rachel Meeropol*
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