Nos. 16-1459 and 16-1694

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KEVIN JOHNSON and TYLER LANG,
Appellants.

Defendants-

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
Case No. 14 CR 390
The Honorable Judge Amy J. St. Eve

JOINT REPLY BRIEF AND APPENDIX TO THE REPLY OF DEFENDANTS-APPELLANTS KEVIN JOHNSON and TYLER LANG

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SUMMARY OF THE ARGUMENT

Appellants Kevin Johnson and Tyler Lang were convicted of conspiracy to commit "animal enterprise terrorism," 18 U.S.C. § 43 (a)(2)(C), for trespassing on a fur farm, releasing approximately 2000 mink from cages, pouring a caustic substance on two farm vehicles, and spray painting the words "liberation is love" on a barn. *See* Johnson Plea Agreement, Dist. ECF No. 124 at ¶6, Lang Plea Agreement, Dist. ECF No. 126 at ¶6. As Appellants argued in their opening brief, their convictions must be reversed because the statute under which they were convicted, the Animal Enterprise Terrorism Act, 18 U.S.C. § 43, is unconstitutionally overbroad, vague, and violates substantive due process, both on its face and as-applied.

Appellants' first argument is that subsections (a)(2)(A) and (a)(2)(C) of the AETA are substantially overbroad because they sweep within their reach a significant amount of protected speech and conduct. As to subsection (a)(2)(A), the Government's primary response is that the provision's prohibition on "damaging or causing the loss of *any* real or personal property" must actually be understood as a prohibition on causing the loss of "only *tangible* property." While "any property" is generally understood to include *intangible* property, the Government relies on the fact that elsewhere in the statute, certain harm to intangible property is described as "economic damage" and these words are not used in the AETA's liability provision. Such aggressive use of context to defeat a provision's plain meaning is unsupported by precedent. And while the AETA does have a "rule of construction"

purporting to protect First Amendment interests, the rule cannot insulate the statute from Constitutional challenge.

Subsection (a)(2)(C) is also substantially overbroad, because it criminalizes mere conspiracy to travel in interstate commerce with the purpose of damaging or interfering with an animal enterprise, and thus outlaws *all* interstate protest and advocacy against businesses that use animal products. In response, the Government asks the Court to ignore the rules of grammar, but it is hard to argue that "or" means anything other than "or."

Second, Appellants argue that the AETA is unconstitutionally vague, because it allows for arbitrary and discriminatory enforcement. The Government insists that a statute's breadth cannot give rise to unconstitutional vagueness, even if that breadth invites a completely unfettered exercise of police and prosecutorial discretion. But precedent demands otherwise.

Third, Appellants show the AETA violates substantive due process, both facially and as-applied to Appellants' criminal conduct, as it labels a nonviolent property crime an act of terrorism. The Government argues in response that the AETA's title has no impact, and it is rational to label nonviolent crimes by animal rights activists "terrorism." The former defies logic and precedent; the latter cannot be squared with the Government's admission that the "Animal Enterprise Terrorism Act" has nothing to do with terrorism.

ARGUMENT

I. The AETA is Substantially Overbroad

As argued in our opening brief, subsection (a)(2)(A) of the Animal Enterprise Terrorism Act is substantially overbroad because it prohibits causing the loss of *any* property used by an animal enterprise, and "property" as commonly defined includes money and intangibles; thus, the provision makes it a federal crime to cause a business to spend money or lose profit. Second, the AETA's conspiracy / attempt provision—(a)(2)(C)—is incredibly overbroad, because it punishes any interstate plan undertaken "for the purpose of damaging or interfering with the operations of an animal enterprise."

A. Subsection (a)(2)(A) is Substantially Overbroad

With respect to the constitutionality of subsection (a)(2)(A), what is most telling about the Government's response is what they omit: having made no argument to the contrary, they concede that the plain meaning of "causing the loss of any real or personal property (including animals or records)" includes causing the loss of money or intangible property like profit or business reputation. *See, e.g.,* Brief of the United States (hereafter "Gov't Br.") at 18. They concede that if Appellants' interpretation of (a)(2)(A) is correct, the rule of construction cannot save the statute, *see* Gov't Br. at 24, and in light of Appellants' argument about the District Court's inconsistent reliance on the word "used" in (a)(2)(A), they all but abandon the point, stating only that the Court's reliance on that reasoning was not "dispositive." *Id.* at 20.

Thus the Government is left with only one real argument: that the District Court was correct to rely on Congress's use of the defined phrase "economic damage" in the AETA's penalty provision to interpret the AETA's prohibition on "causing the loss of any real or personal property (including animals or records)" to actually only prohibit *causing something other than economic damage to any real or personal property (including animals or records)*. *See* Gov't Br. at 19-20. This approach is incorrect.[1]

As explained in Appellants' opening brief, penalties under the AETA depend on the amount of "economic damage" and/or bodily injury that result from a substantive violation. 18 U.S.C. § 43(b). The District Court reasoned that Congress's "specific inclusion of the defined term 'economic damage' in the penalties provision of the statute, but not in the offense conduct, indicates that Congress did not intend to criminalize conduct that solely causes economic loss as damage to property." Appellants' Short Appendix, (hereafter "A") at 9-10. The problem with this argument is that the exceptionally broad phrase "damages or causes the loss of any real or personal property" would normally include causing the loss of intangible property and nothing about the balance of the statute suggests otherwise. *See* Joint Brief of Defendants-Appellants (hereafter "Appeal Br.") at 18-19.

Without citing a single case, the Government disagrees with Appellants' analysis, but their support of the District Court's reasoning relies on a fundamental

[1] Tellingly, elsewhere in their brief the Government repeatedly paraphrases the statute as prohibiting "intentionally damaging the *tangible* property of an animal enterprise." *See, e.g.,* Gov't Br. at 8, 34, 36, 37 (emphasis added). Of course, that is not what Congress wrote.

misunderstanding of the canon of statutory interpretation reiterated in *Bates v. United States*, 522 U.S. 23, 29-30 (1997). *See* Gov't Br. at 19 (citing A-10). *Bates* quoted *Russello v. United States*, 464 U.S. 16, 23 (1983) for the proposition (cited by the District Court) that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." 522 U.S. at 29-30. But as the *Russello* Court went on to explain, the impact of this presumption is that a court should "refrain from concluding . . . that the differing language in the two subsections has the same meaning in each." 464 U.S. at 23. In other words, the *Bates/Russello* canon is a presumption that, when Congress uses two different phrases in the same statute, the two different phrases *do not mean the same thing*. *See, e.g.*, *id.* ("any interest the person has acquired" does not mean the same thing as "any interest in . . . any enterprise which the person has established"); *Bates*, 522 U.S. at 29 (the state of mind required in 20 U.S.C. § 1097(a): "Any person who knowingly and willingly embezzles. . . any funds . . . shall be fined . . ." does not mean the same thing as the state of mind in 1097(d): ""Any person who knowingly and willingly destroys or conceals any record . . . *with intent to defraud the United States* . . . shall be fined. . . ."); *Duncan v. Walker*, 533 U.S. 167, 173-74 (2001) ("state post-conviction or other collateral review" does not mean the same thing as "federal or state collateral post conviction proceedings").

But Appellants' do not argue that "damages or causes the loss of any real or personal property" *means the same thing* as "results in economic damage."

Obviously the two phrases mean different things; interpreting them in line with their plain meaning, in which the former is a broad reference to any kind of damage to tangible or intangible property, and the latter is a narrower reference to a certain type of loss of intangible property, does not run afoul of the presumption that Congress uses different words when it means different things. *Cf, Russello*, 464 U.S. at 25 ("[t]he term 'profits' is specific; the term 'interest' is general. The use of the specific in the one statute cannot fairly be read as imposing a limitation upon the general provision in the other statute.")

The Government ignores Appellants' hypothetical illustration of this principle (*see* Appeal Br. at 19), so a real-life example may illuminate. 18 U.S.C. § 111 prohibits assaults on certain officers. It states:

> (a) In general. Whoever—
>
> > (1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title [18 USCS § 1114] while engaged in or on account of the performance of official duties; or
> >
> > (2) forcibly assaults or intimidates any person who formerly served as a person designated in section 1114 [18 USCS § 1114] on account of the performance of official duties during such person's term of service,
> >
> > shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and where such acts involve physical contact with the victim of that assault or the intent to commit another felony, be fined under this title or imprisoned not more than 8 years, or both.
>
> (b) Enhanced penalty. Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component) or inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both.

As a matter of plain meaning, it is beyond dispute that one might "forcibly assault[ ], resist[ ], oppose[ ]," etc, through the infliction of bodily injury. Yet according to the District Court and the Government's reasoning in the present case, the use of the phrase "inflicts bodily injury" in the enhanced penalty provision, and failure to use the phrase "inflicts bodily injury" in the liability provision, would indicate that Congress intended to exclude assaults carried out by the infliction of bodily injury from giving rise to liability. Of course, this makes no sense.

As explained in our opening brief, Appellants' interpretation of the AETA not only accords with plain meaning of the entire statute, it is also consistent with how the AETA's precursor statute, the Animal Enterprise Protection Act (AEPA), 18 U.S.C. § 43 (2002), was interpreted, and how a different federal court interpreted a similar provision of the Price Anderson Act. *See* Appeal Br. at 14-16.

The Government's response regarding the AEPA is hard to parse. First, they rely on the fact that the AEPA, unlike the AETA, required "physical disruption." Gov't Br. at 21. This is true, but it is irrelevant to Appellants' point, which is that the same language—"damages, or causes the loss of, any property"—is found in both statutes, and was interpreted in *United States v. Fullmer*, 584 F.3d 132, 159 (2009) to prohibit causing an animal enterprise to spend money on increased security. In response, the Government argues that the Third Circuit wasn't actually counting increased security costs as "loss of property," rather the Circuit was referring to damage to tangible property. *See* Gov't Br. at 22 n.4. But this starkly ignores the Government's brief on appeal in that case, describing the "property damage" in

question: "HLS had to purchase new hardware, new fire walls and additional software to combat the attack." *See* Initial Brief, Appellee-Respondent, *United States v. Fullmer*, No. 06-4211, 2008 U.S. 3d Cir. Briefs LEXIS 1334, at 46 (3d Cir. June 17, 2008). The purchase of more sophisticated equipment to guard against cyber-attacks is an increased business cost not indicative of physical damage to tangible property. Moreover, the Government ignores Appellants' other citation to the *Fullmer* decision, *see* Appeal Br. at 15, *citing* 584 F.3d at 159 (describing $400,000 in lost business as "loss of property").

If there were still any ambiguity as to prior interpretation of the AEPA, the Government's argument in *Fullmer*, which directly contradict its argument here, shed considerable light on the issue. On summation in the district court, the *Fullmer* prosecution argued that the "loss of any property" element was met because the *Fullmer* defendants conspired to shut down Huntingdon, and disrupting its business would cause the loss of property. *See, United States v. Fullmer*, No. 06-4211, Joint Appendix at 3466-67, attached hereto in the Appendix to the Reply, at R8-9. And again, in responding to defense motions for judgments of acquittal, the prosecution stated explicitly that "loss of property includes lost profits." *Id.* at R2.[2]

[2] Indeed, having secured a conviction based on a broader interpretation of the statutory provision, the Government's argument to interpret the provision narrowly here gives pause. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position.") *quoting Davis v. Wakelee*, 156 U.S. 680, 689 (1895), *see also Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000) (habeas petition granted due

The Government also attempts to discount the relevance of another federal court's interpretation of similar language in the Price Anderson Act. *See* Gov't Br. at 22. As a preliminary matter, the Government is incorrect that this argument is new on appeal. *See* Defendants' Motion to Dismiss Indictment, Dist. ECF No. 63 at p.12 (citing *Radiation Sterilizers, Inc. v. United States*, 867 F. Supp. 1465, 1470 (E.D. Wash. 1994) for the proposition that "[o]ther courts are in accord that a business's lost profits are easily characterized as damage or loss to property").

The Government's only substantive response is that *Radiation Sterilizers* is "hardly persuasive" because the Price Anderson Act doesn't have a penalty provision which refers to "economic damage." But as demonstrated above, this argument cannot bear the weight the Government and District Court would place upon it.

Finally, the Government turns to the rules of construction. *See* Gov't Br. at 24-26. Here, there is little actual dispute between the parties. The Government concedes that if Appellants' interpretation of (a)(2)(A) is correct, the rule of construction cannot save the statute. *Id.* at 24. In turn, Appellants acknowledge that if the statue were truly open to two competing, reasonable interpretations, the First Amendment exception could serves as a "valuable indication of Congress' concern for the preservation of First Amendment rights." *See CISPES v. FBI*, 770

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to state's use of inconsistent theories to convict defendants in two criminal cases in violation of due process). *But see United States v. Presbitero*, 569 F.3d 691 (7th Cir. 2009) (noting circuit split regarding whether government may take inconsistent positions; case did not present need for the Seventh Circuit to address issue.)

F.2d 468 (5th Cir. 1985) at 472. What the exception cannot do, however, is *itself* make a competing interpretation reasonable. *Id.*

That a *different* statute "with identical rules of construction" was upheld as constitutional is thus wholly irrelevant. *See* Gov't Br. at 16 (citing *United States v. Bird*, 124 F.3d 667, 683 (5th Cir. 1997), *American Life League, Inc. v. Reno*, 47 F.3d 642, 649 (4th Cir. 1995)). The cases relied upon by the Government involve overbreadth challenges to the Freedom of Access to Clinic Entrances (FACE) statute's prohibition on one who "by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person. . . .". *United States v. Bird*, No. 95-20792, 1997 App. LEXIS 33988, *46-48 (5th Cir.1997); *American Life League, Inc.*, 47 F.3d at 648. Given FACE's definition of "physical obstruction," there is no real argument that the statute criminalizes activity protected by the First Amendment. *See* 18 U.S.C. § 248(e)(2). And while FACE does have a separate prohibition on causing property damage, is it nowhere near as broad as the AETA's, and moreover, it was not at issue in the cited cases. *See id.* at § 248(a)(3) (criminalizing one who "intentionally damages or destroys the property of a facility, or attempts to do so…"). Neither case stands for the proposition that a First Amendment exception can validate an alternate reading of the statute which would not otherwise be reasonable.

B. Subsection (a)(2)(C) is Substantially Overbroad

The AETA's attempt and conspiracy subsection, 18 U.S.C. § 43(a)(2)(C), is also substantially overbroad, as it applies to one who "travels in interstate or foreign commerce, or uses or causes to be used the mail or any facility of interstate or foreign commerce (1) for the purpose of damaging or interfering with the operations of an animal enterprise; and (2) in connection with such purpose . . . (C) conspires or attempts to do so." In other words, one violates the AETA simply by conspiring to travel across state lines for the purpose of damaging or interfering with an animal enterprise.

The Government is correct that Appellants did not make this argument below, but that does not mean the Court is limited to plain error review. *See* Gov't Br. at 28. A defendant cannot waive or forfeit a facial challenge to a statute's constitutionality. *See United States v. Bell,* 70 F.3d 495, 497 (7th Cir. 1995) ("if there were no constitutional statute to be charged under, there could not be a 'valid establishment of factual guilt'"); *United States v. Phillips,* 645 F.3d 859, 863 (7th Cir. 2011) (facial attack on statute's constitutionality is jurisdictional). Regardless, the error is plain.

According to the Government, it is logical to read subsection (a)(2)(C) as referring back to (a)(2)(A) or (a)(2)(B) despite the fact that the three subsections are separated by "or." The English language simply does not work this way. Consider the following statement:

> I want the Court to rule correctly. The Court can (a) rule for defendants, (b) rule for the government, or (c) try to do so.

The simplicity of this structure makes Appellants' reading undisputable: when separated by an "or" listed items do not refer to each other, but back to the phrase that modifies them all. This does not nullify the "in connection" requirement; an (a)(2)(C) violation requires a conspiracy or attempt to damage or interfere with the operations of an animal enterprise in connection with a purpose to do the same.

Moreover, under the Government's theory these two provisions mean the same thing:

Whoever travels in interstate commerce, (1) for the purpose of damaging an animal enterprise; and (2) in connection with such a purpose: (a) Damages property, (b) Places someone in fear of bodily injury, **or** (c) Conspires or attempts to do so…	Whoever travels in interstate commerce, (1) for the purpose of damaging an animal enterprise; and (2) in connection with such a purpose: (a) Damages property, (b) Places someone in fear of bodily injury. **or** (c) Conspires or attempts to commit the acts listed in (a) and (b) above…

But when Congress means the latter, it says so explicitly. *See, e.g.*, 18 U.S.C. § 32(a)(8); 18 U.S.C. § 38(a)(3); 18 U.S.C. § 831 (a)(8) & (9).

II. The AETA is Unconstitutionally Vague

Appellants also challenge the AETA as facially void for vagueness, as its unprecedented breadth invites arbitrary enforcement. The Government responds that such a challenge is not possible, and even if it were, the AETA provides law enforcement with sufficient guidelines.

On the first point, the Government insists that a criminal defendant cannot bring a facial vagueness challenge where the First Amendment is not at issue. *See* Gov't Br. at 30-31 (arguing Appellants can only make an as-applied vagueness challenge).[3] But this cannot be squared with *Johnson v. United States,* 135 S. Ct. 2551 (2015), in which the Supreme Court invalidated a statute on its face on vagueness grounds, without regard to the First Amendment. *See also, Hoffman Estates v. Flipside*, 455 U.S. 489, 497 (1982) ("A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague[.]") The Government would distinguish *Johnson* and the other precedent Appellants cite as involving facial *and* as-applied challenges. *See* Gov't Br. at 31, 31 n.6. But Appellants are aware of no rule of standing that would allow a defendant to bring a facial challenge only if he also advances an as-applied challenge.

Here, the Government may be mistakenly relying on doctrine requiring courts to consider a statute's application to the defendant's conduct when reviewing

[3] The Government states that "[f]or their vagueness claim, defendants do not allege the AETA implicates First Amendment concerns." Gov't Br. at 30. This is not exactly correct; rather, Appellants claim that the AETA is unconstitutionally vague *whether or not* the AETA implicates the First Amendment. *See* Appeal Br. at 34.

the merits of a non-First Amendment vagueness challenge. *See. e.g., Hoffman Estates*, 455 U.S. at 497-98; *United States v. Lim*, 444 F.3d 910, 915 (7th Cir. 2006). But even if Appellants' facial challenge to the AETA must include some examination "in light of the facts of the case at hand," *see* Gov't Br. at 31, *quoting Maynard v. Cartwright,* 486 U.S. 356, 361 (1988), the AETA *is* vague as to Appellants; indeed it is vague in every application. *See City of Chicago v. Morales*, 527 U.S. 41, 71 (1999) (Breyer, J., concurring in part and concurring in the judgment) ("The ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in every case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications.")

Turning to the merits, the Government argues that the AETA satisfies due process because it "contains no vague or ambiguous terms that would permit unfettered law enforcement discretion. . . ". Gov't Br. at 33. Yet two pages later, the Government concedes that a statute need not have a vague or unclear term to be found void for vagueness. *Id.* at 35. Regardless of this contradiction, the Government's argument seems to be that a law is not vague so long as law enforcement has sufficient guidance in determining "whether a crime has in fact been committed" even if the crime covers such a wide swath of conduct that law enforcement must exercise unfettered discretion in determining which offenders to arrest and prosecute.

This directly contradicts the precedent cited in Appellants' opening brief. Contrary to the Government's attempt to distinguish *Metro Produce Distributors, Inc. v. City of Minneapolis*, 473 F. Supp. 2d 955 (D. Minn. 2007), the problem with that ordinance's prohibition of "idling" was not that it fails to separate lawful and unlawful conduct; the ordinance is violated any time a driver ceases operating a motor vehicle yet leaves the motor running. What is problematic about the statute is that it applies *so broadly* that law enforcement has unfettered discretion to decide which vehicles to cite, and which to pass over. *Id.* at 961 ("an official could cite one motor vehicle for remaining stationary one minute and pass over another motor vehicle that remained stationary for thirty minutes"). So too with *United States v. Vest*, 448 F. Supp. 2d 1002 (S. D. Ill. 2006), "*all* of the members of the Illinois State Police SWAT team would then technically be in violation of the statute," thus requiring the Government to choose which ones to prosecute. *Id.* at 1014 (emphasis added).[4]

Similarly, and as the Government failed to recognize, while the Ninth Circuit found that a Los Angeles municipal ban on using one's vehicle as living quarters

[4] Appellants' opening brief also cites *JWJ Indus., Inc. v. Oswego County* , No. 5:09-cv-740, 2012 U.S. Dist. LEXIS 164279, *19-20 (N.D.N.Y. Nov. 16, 2012) (finding a local law concerning "Recyclable Materials" unconstitutionally vague because it grants "case-by-case discretion" to the government to define what the law covers, potentially allowing for "arbitrary and discriminatory" enforcement). *See* Appeal Br. at 40. The Government states that the Second Circuit later found that the ordinance provides adequate notice. *See* Gov't Br. at 38 n 7. This is true but misleading. Oswego County did not appeal from the District Court's finding that the ordinance invited arbitrary enforcement. *See JWJ Indus., Inc. v. Oswego County*, 538 F. App'x 11, 12 n. 3 (2d Cir. 2013). Rather, JWJ Industries appealed from the District Court's denial of their distinct vagueness-for-lack-of-adequate-notice claim, the court's rejection of which was affirmed on appeal. *Id.*

failed to provide adequate notice of the prohibited conduct, the court also identified the statute's susceptibility to arbitrary enforcement as an independent ground for vagueness. *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1156-57 (9th Cir. 2014) ("If a statute provides 'no standards governing the exercise of . . . discretion,' it becomes 'a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.'") *quoting Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

The AETA's lack of standards for enforcement can be traced to the fact that it federalizes almost every theft, libel, vandalism, and other property crime against almost every business in the country, whether the defendant targets the business because of its connection to animals or not. This incredible latitude is a function not just of the breadth of the phrase "animal enterprise" but also the statute's lack of an *actus reus*—subsection (a)(1) criminalizes any act taken for a broadly defined purpose ("damaging or interfering with the operations of an animal enterprise") that results in a broadly defined effect ("intentionally damag[ing] or caus[ing] the loss of any real or personal property" associated with an animal enterprise). 18 U.S.C. § 43(a)(2)(A). The act is left undefined; it can be anything. *See United States v. L. Cohen Grocery*, 255 U.S. 81, 89 (1921) ("the section forbids no specific or definite act. . . . It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against."). The AETA's boundaries are impossible to delineate.

That the AETA has a *scienter* requirement (*see* Gov't Br. at 34), does nothing to alleviate this type of vagueness. An intent requirement may be relevant to the first type of vagueness—failure to provide adequate notice—if it prevents a law from acting as a "trap for those who act in good faith." *Gonzales v. Carhart*, 550 U.S. 124, 149-150 (2007), *quoting Colautti v. Franklin*, 439 U.S. 379 (1979). But the AETA's intent requirement is logically irrelevant to the question of whether the statute invites arbitrary or discriminatory enforcement. *See id.* at 150 (discussing *scienter* requirement with respect to the question of whether the statute provides adequate notice, and not with respect to the question of arbitrary enforcement), *see also Hoffman Estates,* 455 U.S. at 499 ("a scienter requirement may mitigate a law's vagueness, *especially with respect to the adequacy of notice to the complainant that his conduct is proscribed*") (emphasis added). None of the cases cited by the Government rely on the existence of an intent requirement to determine whether a statute unlawfully invites arbitrary enforcement.

Finally, as shown in our opening brief, the AETA not only invites discriminatory enforcement, but has actually been used in a discriminatory manner—only animal rights activists have been prosecuted under the law. *See* Appeal Br. at 41. The Government attempts to dispute this point by citing the 2008 prosecution of Richard Sills, whom they assert had no "ties to the animal rights movement." *See* Gov't Br. at 39 (citing R. 88, Ex C). But the very document the Government relies on indicates that Sills' "bomb threats and hoax IED . . . had as a goal to raise awareness for animals." R. 88, Ex. C at p. 8.

Thus, even if the Government is right that Sills had no ties to "the animal rights community," it was still an animal-rights related prosecution. The AETA is not used when, for instance, four men break into an animal enterprise and bludgeon 900 caged animals to death. *See* Jim Guy, *Riverdale Man, Three Teens Arrested in Golf Club Bludgeoning of 900 Foster Farms Chickens*, FRESNO BEE, Oct. 2, 2014, *available at*: http://www.fresnobee.com/2014/10/02/4156464/riverdale-man-three-teens-arrested.html. But when animal rights activists are alleged to have released animals from cages, the FBI, Joint Terrorism Task Forces, and federal prosecutors zealously enforce the AETA. More than "authoriz[ing] and even encourag[ing] arbitrary and discriminatory enforcement," *Morales*, 527 U.S. at 56—this is arbitrary and discriminatory enforcement in practice.

III. The AETA Violates Substantive Due Process

Third, Appellants argue that the AETA violates substantive due process, both facially and as-applied, by labeling non-violent property crimes "terrorism." The parties have no dispute as to the operative standard: Appellants acknowledge that the right to avoid having a misleading label attached to their crime is not fundamental, and thus the Court must determine whether this non-fundamental deprivation "is rationally related to a legitimate government interest." *See* Appeal Br. at 43, Gov't Br. at 41.

Instead, the Government argues that Appellants have no right at all, because the AETA "does not label anyone as anything" and the law's title is "essentially meaningless." Gov't Br. at 41. This is untrue. First, it cannot be disputed that an

AETA conviction renders one *eligible* for placement in a Communication Management Unit (CMU), while conviction for a similar property crime without the word "terrorism" in the title would not. *See* 28 C.F.R. § 540.201. In argument below, the Government acknowledged Appellants were correct that the AETA's title, far from being meaningless, results in a prisoner being reviewed by a counter-terrorism employee for potential placement in a CMU. *See* Transcript of Proceedings, Feb. 19, 2015, (hereafter "Feb. 19 Tran."), Dist. ECF No. 138 at 22, 46. Now the Government argues that such review "has no ultimate bearing on the individual's designation within the Bureau of Prisons," Gov't Br. at 43, but this too is false. Between 2006 and 2014 only 205 federal prisoners were *reviewed* for CMU placement, and 175 of them were so designated. *See Aref v. Lynch*, No. 15-5154, (D.C. Cir.), Brief for Plaintiffs-Appellants, Oct. 28, 2015, ECF No. 1580576 at p. 31.

The Government makes no attempt to specifically refute Appellants' argument that the terrorism label is also stigmatizing. In the District Court, they promised never to refer to Appellants as "terrorists" or make reference to the Act's title, Feb. 19 Tran. at 44-45, but in fact the word "terrorism" has been repeatedly used by the Government to publicly describe other AETA defendants. *See* Appeal Br. at 44-45. Nor does the Government explain how the right not to be called a terrorist by the United States Government is less deserving of protection that the right to offer a motorcycle ride to a young lady, the right to grow a moustache, or other non-fundamental rights recognized by this Court. *See, e.g., Swank v. Smart*, 898 F.2d 1247, 1251-52 (7th Cir. 1990), *Wroblewski v. Washburn*, 965 F.2d 452, 457

(7th Cir. 1992), *Hayden v. Greensburg Cmty. Sch. Corp*, 743 F.3d 569, 575-76 (7th Cir. 2014), *Greater Chi. Combine & Ctr. v. City of Chicago*, 431 F.3d 1065, 1071-72 (7th Cir. 2005), *Doe v. City of Lafayette*, 377 F.3d 757, 768-773 (7th Cir. 2004). The District Court was correct to subject the statute to rational basis review.

According to the Government, even if such review is appropriate, the AETA passes, because its "purpose was rationally related to a legitimate government interest—the prevention of violence, harassment and acts of terror committed by animal rights extremists." Gov't Br. at 41. This is not quite the correct question (indeed, it is basically an assertion that the AETA's purpose is rationally related to its purpose). Rather, the court must examine whether *calling non-violent property damage "terrorism"* is rationally related to the government's legitimate interest in preventing violence and harassment by a small handful of extremists.

Without explicitly acknowledging *this* question, the Government implies the answer is yes. It argues that any stigma which attaches to those convicted under the AETA, even those convicted of non-violent property damage like Appellants, passes rational basis review because non-violent property damage is part of the animal rights "extremist movement," and some other people in that movement engage in acts of violence or harassment that could more rationally be called terrorism. Gov't Br. at 44. This is a remarkable proposition, and would justify calling any individual who commits any crime in the name of animal rights, including peaceful civil disobedience—a sit-in in front of a fur store, for example—a terrorist.

Next, the Government argues that a statute's title need not "appropriately characterize every crime committed under the statute." Gov't Br. at 45. Perhaps not, but Appellants do not challenge a small disconnect at the margins; there is no reason to suppose that *any* of the activity prohibited by (a)(2)(A) of the AETA could ever properly be called "terrorism." *Cf, People v. Knox*, 903 N.E.2d 1149, 1154 (N.Y. 2009) (holding New York's sex offender registration act survives rational basis review despite its requirement that all kidnappers register as sex offenders, because the requirement could rationally have been based on the legislature's conclusion that "in the *large majority* of cases where people kidnap or unlawfully imprison other people's children, the children either are sexually assaulted or are in danger of sexual assault") (emphasis added).[5]

Indeed, the Government's first argument is fatal to their second: they volunteer that the word "terrorism" is not "included anywhere in the text of the AETA itself," "the government need not prove that the defendants acted as 'terrorists' in order to sustain a conviction[,]" and AETA defendants are not automatically subject to any sentence enhancement based on having committed a terrorist act. Gov't Br. at 43. In other words, it is the Government's position (and defendants agree) that the AETA actually has *nothing to do* with terrorism. So how can it possibly be rational to call the offense terrorism?

[5] *But see ACLU of N.M. v. City of Albuquerque*, 137 P.3d 1215, 1226 (N.M. Ct. App. 2006) (finding that mandatory sexual offender registration for non-sexual crimes is not rationally related to any legitimate legislative purpose).

CONCLUSION

For the reasons explained above and set forth in Appellants' opening appeal brief, the AETA must be struck down as facially unconstitutional, and Appellants' convictions reversed.

Date: July 29, 2016

Respectfully submitted,

s/*Rachel Meeropol*

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CERTIFICATE OF COMPLIANCE

I, Rachel Meeropol, an attorney, hereby certify that the attached Joint Reply Brief of Defendants-Appellants Kevin Johnson and Tyler Lang complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because it contains 5,846 words.

s/Rachel Meeropol
Rachel Meeropol

Dated: July 29, 2016

CERTIFICATE OF SERVICE

I, Rachel Meeropol, an attorney, hereby certify that I served the attached Joint Reply Brief and Appendix to the Reply of Defendants-Appellants Kevin Johnson and Tyler Lang to counsel for Plaintiff-Appellee, Ms. Bethany Biesenthal, via ECF on July 29, 2016.

s/Rachel Meeropol
Rachel Meeropol

Dated: July 29, 2016

APPENDIX TO THE REPLY

Docket Nos. 06-4211 (Lead),
06-4296, 06-4339, 06-4436, 06-4437, 06-4438, and 06-4447 (Consolidated)

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

STOP HUNTINGDON ANIMAL CRUELTY USA, Inc. (06-4438), KEVIN KJONAAS (06-4339), LAUREN GAZZOLLA (06-4437), JACOB CONROY (06-4447), JOSHUA HARPER (06-4436), ANDREW STEPANIAN (06-4296), and DARIUS FULLMER (06-4211),

Defendants-Appellants.

On Appeal from Judgments in a Criminal Case
No. 3:04-CR-373 in the United States District Court
for the District of New Jersey (Thompson, J.)

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APPELLANTS' JOINT APPENDIX
Volume VI of VII (pp. 2692-3321)

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When Mr. Dillbone was asked why he participated in the black faxes against Stephens, his quote was, because I saw the information on SHAC's web site. He didn't say because I saw it in other places. He did say he had seen this kind of activity in other places but when asked specifically why he participated against SHAC -- excuse me -- against Stephens, his answer was, I saw the information on the SHAC web site. And so, that type of instruction doesn't require that imminency or immediacy that Mr. Haveson spoke about. That would be illegal conduct irrespective of it. Apologize, your Honor.

THE COURT: When you spoke about instruction, are you referring to the kind of teaching of a case like the Paladin Enterprises case out of the Fourth Circuit?

MR. SOLANO: Correct, your Honor. It's correct, your Honor, exactly. The Rice vs. Paladin opinion. It's speech, no one is doubting that, but that's not the end of the inquiry. The inquiry is what is being said. Is what is being said rhetorical or are these specific instructions? And if the jury looks at these postings, I think they can reasonably infer this is not simply rhetorical. They're direct specific instructions on what to do.

And when I was discussing, just citge the case law, the prior incidents about acting with knowledge identifying targets, that is the Ninth Circuit case Willamette case, which

I forget the cite but --

THE COURT: What's the name?

MR. SOLANO: Planned Parenthood of willamette Valley, I believe. Willamette. I'm mispronouncing that, Willamette Valley, the Planned Parenthood, and that talks about how you may have a web site that advocates rhetorical ideas or abstract ideas but if you continue to identify targets with a knowledge that violence occurs every time you do, then you can reasonably infer you intend that violence to happen.

A couple specific things about Count One. Mr. Haveson made some arguments about the construction of the statute and we've disagreed about that belief. Construction of the statute was something that was resolved before this trial ever began in March of '04 -- '05. There were motions made. We've addressed the construction of the statute. Working within that framework, which is the instructions that your Honor gave the jury in their preliminary instructions, physical disruption and the loss of property includes lost profits, and the testimony both from Mark Bibi and Richard Michaelson was that as a result of the SHAC campaign, they've lost profits, expenses have had to be expended responded to this. Now defense is free to attack the credibility of that, whether or not it was a SHAC campaign, some other anonymous group, but that's certainly something the jury can infer.

Second point on that is the way the conspiracy is

charged is to ultimately shut down Huntingdon Life Sciences. I don't think there will be much disagreement that's one of the goals of the SHAC campaign. Conspiracy may not be successful to be criminal. If you intend to go about shutting it down through illegal means, that's a crime whether or not they ultimately succeed. But certainly the testimony from both Mr. Bibi and Mr. Michaelson was that they already had succeeded to the extent that their damages were or lost profits well exceeded the $10,000 threshold requirement of the statute.

With regard to Mr. Stepanian, to respond to Mr. Throckmorton's arguments, Mr. Stepanian I think believed the phone calls establish his complicity in this conspiracy. First physically present, he is in May 2001 at Elaine Perna's house. Why? Because that's a SHAC target. It's not a coincidence that the three of them are there together.

SHAC had announced the Bank of New York as a target. They had posted Tom Perna's information as his home address as a target. That's why they're they're working together. When Deloitte & Touche is a target, from the phone calls we learn that Andrew Stepanian is what SHAC conveniently terms a, quote, New York activist. He's the one sneaking into the Deloitte & Touche behind Domino's pizzy deliveryman. He's the one going up to the management saying, Listen, you need action, you don't know the trouble you're saving me by talking

to me. We're going to mount a full-fledged campaign. Not some anonymous group, we are. Who does he immediately call to tell? Lauren Gazzola.

Conveniently, it gets posted on the SHAC web site at exhibit 1177 as New York activist, and we seen that in other places, your Honor, where the SHAC web site may say it's someone else when it's somebody that they know. That's one example.

The individuals in the video at E-trade which is in evidence were David Hayden and Nick Hensey. They happened to be the ones that are with Kevin Kjonaas, Lauren Gazzola, Jacob Conroy and Josh Harper in literal. David Hayden also the one that's outside of Martha Lobo's house on Sunday morning in May banging on her door with Kevin Kjonaas yelling at her. Those are co-conspirators. The defendants know who they are. When they are in that E-trade at Quick and Reilly, that video is found in a search of 101 Home Street. It gets posted as government exhibit 1121 that incident it doesn't get posted as David Hayden who we know, Nick Hensey. It gets posted as activists from California. No mention of who they are. So those are just some examples where the jury can infer that when they say they have no idea what's going on out there, they have no idea who is carrying it out, simply doesn't ring true. Based upon those specific examples and there is others like that. Texas, Mrs. Harlos and Mrs. Dillenback are from

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APPELLANTS' JOINT APPENDIX
Volume VII of VII (pp. 3322-3926)

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through the jury box the copies of the Indictment so that you will have them.

MR. McKENNA: Your Honor, I think it also has the verdict sheet.

THE COURT: Yes, it looks as if the verdict sheet is on top.

I did not talk about the verdict sheet during my instructions but I will at the end of my instructions, after the summations. I had told you I think Friday what the verdict sheet would be like, anyway. This way everybody will have a copy of the Indictment as we go along. You may have to share. I'm not sure there is a copy for everybody.

MR. McKENNA: I put 18 up there.

THE COURT: You only need 16.

Excuse me.

You may continue.

MR. SOLANO: Thank you, Your Honor.

Before I move onto the Counts of the Indictment and the elements of the offenses, there's one point I want to correct if I said this, the tape of Mrs. Perna's house, exhibit 4003, the individuals there were Kevin Kjonaas, Laruen Gazzola and Andrew Stepanian. They're the ones at her front door screaming at her through the screen. Darius Fullmer

is off to the side. And I may have mentioned Jacob Conroy, but as you will see from the evidence and and Government is not contending Jacob Conroy was not there on that occasion.

I'll discuss the charges in the order beginning with Count 1.

Count 1 charges a conspiracy to violate the Animal Enterprise Protection Act.

What are the elements?

The first element is that the defendants agreed with one another and with others to use a facility in interstate commerce.

As I have discussed, these defendants agreed do participate in a collective effort. That effort was to shut down Huntingdon Life Sciences. And the tactics or the means to achieve that goal were the illegal tactics that they either participated in through the threats or intimidation, or directed others to do so.

The central parts of that campaign was the internet.

As I have discussed earlier, the internet is a facility in interstate commerce. Their SHAC website was in fact what they used to partake in that campaign.

Part of that campaign also included the telephone, both for communications and for faxes.

You've seen the postings about that telling people such and such a date, that's black fax Monday. Send black faxes to Stephens. Download it here, and here is a number to do it on.

The purpose of that calendar is so that it's a collective effort there to maximize the effect.

It also included the e-mail blockades like Mr. Faruque. You recall the call going out to knock out his e-mails. All of that was done for the collective effort to ultimately shut down Huntingdon Life Sciences.

These defendants, as I have discussed this morning, participated in that effort collectively, willfully, and knowingly. They knew what this was about as I have already discussed. Knowing that, they willfully joined that agreement, they participated with each other and others.

For example, when Lauren Gazzola is talking to Jimmy from Texas, they're participating in that. More than one person. That's the agreement. That's the conspiracy.

Because it's a conspiracy, you've heard

the element of overt acts. I have mentioned several of them. What acts did they do in furtherance of that collective effort? Clearly putting information on that website was part of that collective effort.

I mentioned before as you heard from witness after witness, it wasn't until that went up that things happened to them. It's an overt act in furtherance of that.

Andy Stepanian walking into that Deloitte & Touche branch in New York and saying you have 48 hours before we go on and launch a full-fledged campaign. That's an act that he took in furtherance of that agreement that he had.

The smoke bombs in Seattle, that's an act that a co-conspirator took in furtherance of that.

Josh Harper told you whoever did that, did that in furtherance of the purposes of shutting down Huntingdon Life Sciences.

You may not know the identity of the person, but you don't need to know the identity of the co-conspirator. Only that they participated in it willfully and knowingly.

The Jeffrey Dillbone's of the world who saw the information, who partook in that, those are overt acts being carried out in furtherance of that

conspiracy.

And so for those reasons these defendants were working with each other, and with others to direct and coordinate the activities of SHAC.

That's the first element.

The second element.

That the purpose of the conspiracy was to cause the physical disruption to the functioning of an animal enterprise.

Again, what was the purposes of this agreement? To close down Huntingdon Life Sciences. Put it out of business. Physically disrupt its operations.

Huntingdon Life Sciences is the animal enterprise that they were ultimately shutting down. Did they target other companies? Yes. But that was all done, and you have seen from the evidence in the postings and from their own words, for one reason, to shut down the animal enterprise Huntingdon Life Sciences.

How did they do that?

As I mentioned this morning, through all of those illegal tactics through running a campaign of intimidation, harassment, threats and inciting others to do illegal acts against their targets.

Were there aspects of that campaign that were legal? Yes, there's no denying that. But just because you mix legal acts with illegal conduct doesn't excuse you for the illegal conduct.

Third -- that's the second element.

The third element, that the conspiracy intended to damage or cause a loss of any property used by the animal enterprise in an amount exceeding $10,000.

Closing Huntingdon Life Sciences would have physically disrupted its business and ultimately would have caused the loss of that property.

As you may recall from the testimony of several witnesses from Huntingdon Life Sciences, including Michael Bibi and Richard Michaelson, the costs of that would have well exceeded $10,000.

Brian Cass testified about Huntingdon Life Sciences having approximately 200 employees here in New Jersey. Closing it down would have disrupted that business.

So the cost of that would have exceeded $10,000, and because it's a conspiracy doesn't matter if you are not successful. What matters is what was your intent. But in this case we know that this campaign in fact has already been successful

and caused damages and loss of property to Huntingdon Life Sciences well in excess of $10,000..

Richard Michaelson talked about it. He estimated the cost to exceed millions of dollars, and he broke that down for you. It included damage from that computer attack. That computer attack that the SHAC website in exhibit 1033 coordinated with Huntingdonsucks.com which I have already discussed, later on you see evidence of Huntingdonsucks.com working together with Kevin Kjonaas. That computer attack alone exceeded $10,000. Richard Michaelson said the damage to the computer equipment was about $15,000. That didn't even include the other damage.

He talked about a break-in. Damage to property. Josh Harper when he testified talked about a break-in as well at Huntingdon Life Sciences and told you there was a break-,in and certainly animals were stolen. Initially Sid Rasputin (ph), on cross-examination you may remember he conceded his facility wass broken into and their animals -- their property was taken.

The damages to the HLS also includes lost management hours, employee time having to deal with the SHAC campaign, and the cost of adding security

both to the physical facility in East Millstone and to its employees.

The SHAC campaign and this conspiracy has already resulted in over $10,000 in damages.

For those reasons, ladies and gentlemen, each of those defendants, each of these defendants is guilty, guilty beyond a reasonable doubt as charged in Count 1 of the superseding Indictment.

Counts two through 5.

As the Judge instructed you, Counts 2 through 5 charge SHAC U.S.A., Inc., Kevin Kjonaas, Lauren Gazzola, and Jacob Conroy. It charges them with, Count 2, conspiracy to commit enterstate stalking, and 3, 4, 5, substantive Counts of interstate stalking.

You heard from the witnesses in the substantive Counts. Count 3, Sally Dillenback. She was from Texas and testified. Count 4 was for Marion Harlos. Count 5 was Robert Harper who came here and testified.

While all of these defendants were involved in the SHAC conspiracy, and carrying out that goal, it is clear that they played different roles. At the very top of the conspiracy, at the top of the campaign was Kevin Kjonaas, Lauren Gazzola and Jacob