

No. 07-3221

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE CIRCUIT OF UTOPIA

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UNITED STATES OF AMERICA,  
Plaintiff-Appellee,

v.

FRANK CLARKSON,  
Defendant-Appellant.

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On Appeal from the Judgment in a Criminal Case No. 07-3221  
in the United States District Court  
for the District of Utopia

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**BRIEF OF DEFENDANT-APPELLANT**

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### **Statement of the Issues**

(1) Whether the Force, Violence, and Threats Involving Animal Enterprises Act, 18 U.S.C § 43 is vague, overbroad and content-viewpoint based, and therefore unconstitutional on its face and as applied.

(2) Whether Defendant's Frank Clarkson acts and expressive activity consisted entirely of speech and association wholly protected by the First Amendment.

(3) Whether the District Court of Utopia ordered an inappropriately severe sentence to Defendant Frank Clarkson that does not fit the behaviors to which they correspond.

### **Statement of the Facts**

Frank Clarkson is the founder and webmaster of Family Farmers United Against Factory Farms [hereinafter "Family Farms"]. (R. at 2.) Family Farms is a national nonprofit organization whose mission focuses on the protection of public health, the environment, rural communities, and animals by opposing to the expansion of factory farms. (R. at 2.) To advance their goals, Family Farms' website posted photographs and video recordings of the serious health hazards and conditions found at the facilities of a leader in the farming industry, Eggceptional Eggs. (R. at 3.) Family Farms' website encourages boycott and letter writing campaigns for which they provided the addresses of the headquarters of Eggceptional Eggs, the names and home addresses of Eggceptional Eggs chief operating officers, and a list of restaurants and grocery stores who use or sell Eggceptional Eggs. (R. at 3.)

Family Farms learned of Eggceptional Eggs planned expansion site in East Carolina and began to campaign against the new facility. (R. at 3.) As part of this campaign, Family Farms placed several billboards that stated "Stop Factory Farms." (R. at 3.) As a result, weekly demonstrations were held for the stated purpose of pressuring Eggceptional Eggs to stop

expanding their operations. (R. at 3.) Restaurants and grocery stores that use and sell Eggceptional Eggs have suffered significant financial impact due to the boycott launched against them. Amongst these, Wildings Family Restaurant has suffered the most damage in lost profits, due to weekly protestors who have turned away patrons. (R. at 4.)

On July 14, 2007 Frank Clarkson was indicted by the Grand Jury for his alleged violations of the Force, Violence, and Threats Involving Animal Enterprise Act, commonly known as the Animal Enterprise Terrorism Act (“AETA”). *18 U.S.C. § 43* (R. at 1.) His charges consist of conspiring, attempting, and intentionally causing damage or loss of any real or personal property used by an animal enterprise, or any real or personal property of a person or entity having a connection to, relationship with, or transactions with an animal enterprise; and of conspiring to intentionally place a person and their immediate families in reasonable fear of death, or serious bodily injury, by engaging in conduct involving threats, harassment and intimidation. (R. at 1) On September 10, 2007 the District Court for the District of Utopia found Frank Clarkson guilty of all charges. He was sentenced to 3 years of imprisonment in a federal institution and to a restitution payment totaling \$537,000. (R. at 9.)

### **Argument**

#### **I. IS 18 U.S.C. § 43, THE FORCE, VIOLENCE AND THREATS INVOLVING ANIMAL ENTERPRISES ACT, COMMONLY KNOWN AS THE AETA, VAGUE OVERLY BROAD AND CONTENT BIASED?**

On November 27, 2006 President George W. Bush signed into law the Animal Enterprise Terrorism Act of 2006, *18 U.S.C § 43 (c)* [hereinafter AETA], an amendment to the Animal Enterprise Protection Act of 1992, *18 U.S.C § 43* (superseded 2006) [hereinafter the AEPA]. Senator James Inhofe introduced the AETA in the Senate and after its unanimous passage it was introduced in the House by Representative Thomas Pietri. Marjorie A. Berger, *2006*

*Legislative Review*, 13 *Animal L.* 299, 301 (2007). Despite strong opposition from over one hundred and fifty social advocacy groups, such as, the National Lawyers Guild and the American Civil Liberties Union, Representative Sensenbrenner moved to suspend the rules and pass the bill. The bill passed through the House by voice vote. *Id.* at 303.

According to Government, the AETA was enacted in response to the growing number of protests against companies conducting animal research. 152 *Cong. Rec.* S9254-01 (2006). Lobbied by animal industry groups, this amendment raises significant controversy regarding first amendment protections because it is vague, overly broad, and it restrains speech based on its content. *Id.* The AETA is a wide reaching statute that has the effect of expanding prohibitions and increasing sanctions.

#### **A. Vagueness**

As established by the U.S. Supreme Court, “a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.” *City of Chicago v. Morales*, 527 U.S. 41, 57 (1999) (citing *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966)). Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law. “No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.” *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). Statutes that restrict or burden the

exercise of the First Amendment rights must be narrowly drawn in order to ensure “breathing space” for the speech that remains protected. *New York Times v. Sullivan*, 376 U.S. 254, 272 (1964). Vague and overbroad laws risk giving officials extraordinary discretion to abridge speech based on their disagreement with its message. *City of Chicago v. Morales*, *supra*, at 80.

The AETA’s language is so vague it fails to meet the notice requirement allowing for the arbitrary and discriminatory enforcement of the law. The AETA penalizes whoever “travels in interstate or foreign commerce, for the purposes of damaging or interfering with the operations of an animal enterprise.” 18 U.S.C. § 43 (a) (1). The law itself does not provide a definition for the term “interferes with,” but according to the dictionary the phrase “interferes with” means “to prevent something from working effectively or from developing successfully.” *Cambridge Advanced Learner’s Dictionary*, Cambridge University Press, 2008 (Available at <http://dictionary.cambridge.org/define>) (January 11, 2008). This is a significant change to the previous existing law, the AEPA, which limited its applicability to one that “intentionally causes a physical disruption to the functioning of an animal enterprise by intentionally stealing, damaging, or causing a loss of, any property (...) thereby causing economic damages exceeding \$10,000” 18 U.S.C § 43 (superseded 2006). The AETA’s language expands tremendously onto all types of activism that “interferes with” an animal enterprise. 18 U.S.C. § 43 (a) (1) For example, two bulldozers in front of a slaughter house may “interfere with” an “animal enterprise,” but so would two people in front of a slaughter house silently standing and holding a noose. Successful attempts to influence consumers not to support controversial business practices have the effect of “interfering with” an animal enterprise. As a result, the language of the AETA does not meet the notice requirement, for it does not narrowly describe

the kind of conduct that is proscribed to either the potential offender or the potential enforcer. It offers courts and law enforcement officials few clues as to the outer boundaries of its scope.

Just as troubling, this law imposes criminal sanctions if the complainant alleges that the he or she felt “reasonable fear of death of, or serious bodily injury ...” *18 U.S.C. § 43 (a) (2) (B)*. It is important to distinguish between “fear” caused by the speech itself, and fear that derives from violent activities incited by the speech or from threats communicated by the speech, such as incitement and extortion. However, the AETA criminalizes speech that any listener finds subjectively fearful, even in the absence of violent or illegal activities, providing no definition for the term “reasonable fear” in the law. Fear “may be the most idiosyncratic and varied of all human responses.” Ethan Carson Eddy, *Privatizing the Patriot Act: The Criminalization of Environmental and Animal Protectionists As Terrorists*, 22 *Pace Env'tl. L. Rev.* 261 at 318 (2005). Notwithstanding, fear constitutes an element of the offense. Furthermore, according to the dictionary the word “reasonable” is defined as “not extreme or excessive.” *Webster’s New Collegiate Dictionary* 955 (G. & C. Merriam Co. 1980). Therefore, law enforcement officials, prosecutors and judges must determine which instances produce “reasonable fear” of death or serious bodily injury in a complainant, without a provided legislative standard for it. Yet again, the AETA provides law enforcement agents few clues as to the outer boundaries of its scope and provides potentially affected speakers no notice as to whether the content of speech will subject them to incarceration.

Having established that the AETA does not provide the reader with sufficient notice of the kind of conduct that could lead to imprisonment for those individuals considering actions that would cause no harm, either physical or economical, the Penalties section of the AETA *18 U.S.C. § 43 (b)* illustrates the evident and impermissible “chilling effect” this law has on

potential speakers. Furthermore, and, even more alarming, the AETA provides the same penalty for “violation of [the law] or an attempt or conspiracy to violate [the law].” *18 U.S.C. § 43 (b) (1)*. Conspiracy is as an agreement of two or more people to commit a crime, or to accomplish a legal end through illegal actions. *18 U.S.C. § 2* Traditionally, a defendant can be guilty of conspiracy even when, for reasons outside of his control, it's impossible to carry out the planned crime. *United States v. Jimenez Recio*, 537 U.S. 270, 277 (2003) Punishment for an attempt to commit a crime should not carry the same punishment as a consummated crime, as a means of deterring individuals from engaging in illegal activities.

The original legislation, AEPA, provided that a person that caused “an economic damage not exceeding \$10,000 could be fined or imprisoned for not more than six months.” *18 U.S.C. § 43* (superseded 2006). A “major economic damage, exceeding of \$10,000 could be fined and imprisoned for not more than three years.” *Id.* Serious bodily injury carried an imprisonment term “of not more than twenty years and the result of death could face a lifetime imprisonment.” *Id.* The AETA greatly increases the sanctions in the AEPA. The penalties in the AETA vary based on the “economic damages” suffered by the protected business. *18 U.S.C. § 43 (b)*. This section of the law responds not to the nature of the predicate activity, but rather to the dollar amount of adverse economic effects. That is to say, that sentencing under the AETA will depend on the “economic damages” cause when “interfering with” an “animal enterprise.”

According to the penalties provided in the AETA, a person that “does not instill in another the reasonable fear of death or serious bodily injury, and the offense results in no economic damage or the economic damaged suffered does not exceed \$10,000” *18 U.S.C. § 43 (b) (1) (A) (B)* is subject to a fine or imprisonment not more than a year, or both. *Id.* However if the

“economic damages exceed \$10,000 but not more than \$100,000 or the offense instills in another reasonable fear of death or serious bodily injury” *Id.* (b) (2) (A) (B), a person is subject to a fine or imprisonment not more than a five years, or both. *Id.* If the “economic damages” exceed more than \$100,000 the offender could be facing a prison sentence of ten years; consequently, if the economic damage is of more than \$1,000,000 a twenty year prison sentence is provided. As it is, the AETA causes any business classified as an “animal enterprise” (e.g., factory farms, fur farms, vivisection labs, rodeos and circuses) to suffer a profit loss could become a crime punishable by a lengthy prison *sentence*— even if the company’s financial decline is caused by peaceful protests, consumer boycotts or media campaigns. No other industrial sector in the history of U.S. democracy has ever been afforded such legal protections against citizens exercising their constitutionally-granted First Amendment rights to free speech.

## **B. Overbreadth**

While vagueness and overbreadth are two separate problems, sometimes a law’s overbreadth can actually lead it to be vague: because the law is so overbroad, no one would really think of enforcing it literally and enforcers will therefore in practice impose some limits that will ultimately prove vague. See *Board of Airport Comm’rs v. Jews for Jesus*, 482 US 569, 574-576 (1987). Overbreadth analysis determines whether the challenged statute substantially concerns protected expression, and whether it is possible to separate its constitutional components from its unconstitutional applications. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). The overbreadth doctrine has been largely applied “where its effect might be salutary,” *Massachusetts v. Oakes*, 491 U.S. 576, 582 (1989) (plurality opinion), such as, for example, where threat of enforcement of a law that “punishes... protected free speech,” “especially” one

that "imposes criminal sanctions, "may" deter or "chill" the speech, and individuals cannot be expected to "undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case adjudication." *Hicks v. US*, 539 U.S. 113 at 118-119 (2003).

The language of the AETA is subject to overbroad interpretations because it "lumps the protected with the unprotected in such a way as to abridge important public interests in full dissemination of public expression on public issues." The AETA's definition of "animal enterprise" includes not just facilities where animals are kept, but any enterprise "commercial or academic that uses or sells animals or animal products for profit, food or fiber production, agriculture, education, research or testing." *18 U.S.C § 43 (d) (1) (A)*. Also, the AETA included the phrase "any person or entity in connection with an animal enterprise," *18 U.S.C § 43 (a) (2) (A)* expanding the protection to virtually any enterprise. The AETA promotes the maximization of profits for all industries that use animals as commodities and the minimization of interference with those enterprises. This implies that it broadly includes restaurants or retail stores, making it clear that drafters intended to target ordinary consumer protests. Moreover, the AETA reaches activity far from business premises, to reach "traveling in interstate or foreign commerce, or uses or causes to be used the mail or any facility of interstate or foreign commerce." *18 U.S.C § 43 (a)* In turn, the term "any facility" allows for an ample interpretation that would include not only the U.S. post office, but also other forms of communication, such as the internet. The AETA broadens its scope further by criminalizing whomever "conspires or attempts to do so" *18 U.S.C. § 43 (a) (2) (C)*. Therefore, two people, living in different states, exchanging e-mails concerning a protest to be held against an animal enterprise could be charged under this title for using "any facility of interstate commerce" and for "conspiring to" "interfere with" an animal enterprise. The extent of what constitutes

conspiracy under this law is unclear, for it permits an overbroad interpretation that would include nearly all who come in contact with an animal activist.

Furthermore, under this law, government must show that a person interfered with an animal enterprise to “intentionally cause damages or cause the loss of any property...” *18 U.S.C. § 43 (a) (2) (A)*. However, there is no definition provided for the word “damages,” except for the penalty section which refers to the “economic damage.” *Id. § 43 (d) (3) (a)*. This definition includes “the replacement of costs of lost or damaged property or records, the cost of repeating an interrupted or invalidated experiment, the loss of profits, or increased costs, *including* losses and increased costs resulting from threats acts, vandalism, property damage, trespass, harassment or intimidation on account of that person’s or entity’s connection to or relationship or transactions with the animal enterprise.” *Id.* (emphasis added). Still, the problem with this definition is that it emphatically states that it *includes* economic damages that result from illegal acts, such as vandalism. This allows for an overbroad interpretation to include acts that may result in economic damages for the animal enterprise but are constitutionally protected, such as campaigning against the purchase of a product as a way of expressing strong disapproval. Potential offenders should only be liable for damages caused by their illegal actions. This language forces the overly broad interpretation that “economic damages” that do not stem from illegal actions are subject to penalization if resulting in the “loss of profits.” *18 U.S.C. § 43 (a) (2) (A)* Following this same argument, the phrase is also problematic, for it implies that a person could be found guilty of terrorism if he or she causes an animal enterprise to loose profits by engaging in wholly nonviolent and constitutionally protected behavior. The AETA not only protects the contractual expectations of the “animal enterprise” but also, the

avored industries own hopes for success, free from the effects of activists' persuasion of potential consumers. Eddy, *supra*, at 278.

Furthermore, the AETA fails under the overbreadth doctrine because it proscribes activity otherwise covered in state or federal criminal laws. Existing penal statues already proscribe harassment, assault, placing another in fear of imminent physical injury, vandalism, arson and criminal trespass. Eddy, *supra*, at 284. The acts that are not covered by the above list of crimes fail for overbreadth as they involve acts of "interference with." Government's regulation of regulated conduct does not constitute a legitimate government interest that allows the suspension of first amendment rights. Federal and states penal laws directly address and punish expression that involves illegal conduct. Thus, this legislation is unnecessary as a means to regulate illegal actions derived from animal rights activists, or any activists for that matter.

### **C. Content-Based Speech**

In the domain of due process, the U.S. Supreme Court insists that statutes that restrict the exercise of "fundamental" rights can survive only if necessary to promote compelling governmental interests. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997); *Reno v. Flores*, 507 U.S. 292, 301-02 (1993). First Amendment doctrine distinguishes between content-based and content-neutral forms of government regulation. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-43 (1994). Content-neutral laws, such as time, place and manner restrictions are subject to intermediate scrutiny. Content-based restrictions are "presumptively invalid," *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992) because restrictions on speech are disfavored simply because "[o]ur political system and cultural life rest upon" the idea that individual citizens can judge for themselves what "ideas and beliefs [are] deserving of expression, consideration, and adherence." *Turner Broadcasting System v. FCC*, *supra*, at 641.

“[G]overnment has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Police Dep't v. Mosley*, 408 U.S. 92 at 95 (1972). Thus, a Court “cannot be influenced ... by the perception that the regulation in question is not a major one because the speech is not very important,” as “all content-based restrictions on speech” warrant exacting scrutiny. *U.S. v. Playboy*, 529 U.S. at 826. The strong presumption against content-based regulation of expression extends to prohibition of “discussion of an entire topic,” *Consol. Edison Co. v. PSC*, 447 U.S. 530, 537 (1980), as government cannot choose “which issues are worth discussing or debating” *Mosley*, 408 U.S. at 96; *Carey v. Brown*, 447 U.S. 455, 462 (1980) and “[l]isteners’ reaction to speech is not a content-neutral basis for regulation.” *Forsyth County v. Nationalist Movement*, 505 U.S. 765, 134 (1992). Contrary to commercial speech, which can be restricted by government if it advances a substantial interest and it is not more extensive than necessary to serve that interest, *Hudson Gas & Elec. Co. v. Public Serv. Comm’n*, 447 U.S. 557 (1980) to justify a content-based regulation government must show “that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.” *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987); *Simon & Schuster, Inc., v. Members of the N.Y. State Crime Victim Board*, 502 U.S. 105, 118 (1991). The burden rests with the government, *US v. Playboy*, 529 U.S. 803, 816 (2000) and rigorous judicial scrutiny, of both, the importance of the objectives pursued and of the means/ends relationship applies. Admittedly, courts have extended First Amendment protection to conduct when that conduct is imbued with a certain degree of expressive quality. Thus, the Supreme Court has struck down government regulations when they overreachingly restrict an individual's ability to communicate through conduct. *See, e.g., Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *US v. Eichman*, 496 U.S. 310 (1990) (flag burning); and *US v. O'Brien*,

391 U.S. 367 (1968) (draft card burning). To that effect, the Supreme Court's decision in *R.A.V.*, the latest in the chronicle of decisions regarding protected expressive conduct, held that cross burning, like flag and draft card burning, is in some circumstances conduct sufficiently imbued with expressive qualities for First Amendment protection. 505 U.S. 377 (1992). Thus, unless the regulated speech is unprotected or government justifies it by advancing a compelling state interest that is narrowly drawn, a content-based restraint is presumptively invalid. *Id.*

However, the AETA does not differentiate between protest acts that physically and willfully "interfere with" access to business and those that "interfere with" business by persuading customers not to support them based on the content of their message. This law does not restrict all speech on the subject, only that which is unfavorable to animal enterprises. For example, animal activists leafleting near (or far from) the property with information regarding the physical ramifications for an animal probed by scientists in the name of research could be charged with "interfering with" an "animal enterprise;" but, a member of the National Rifle Association (NRA) leafleting in the same area regarding that state's restrictions on gun ownership, would not be subject to criminal sanctions. What is otherwise considered simple vandalism rises to level of terrorist activity when the alleged perpetrator is furthering an animal rights cause. Defendant's case illustrates such disparities. Joseph Whittle, Eggceptional Eggs Regional Manager was cited with criminal mischief and order to pay a \$50 fine for defacing Family Farms' billboards. Defendant Frank Clarkson was ordered to pay \$25,000 in restitution to Eggceptional Eggs for defacing their billboards, only after Whittle painted Family Farms'.

The AETA is hardly the "least restrictive means" to further government's interests in stopping terrorism for it does not provide "time, place, or manner" standards and does not "leave open ample alternative channels for communication of the information." *Metromedia*,

*Inc. v. City of San Diego*, 453 U.S. 490, 516 (1981) (plurality opinion) (quoting *Va. State Pharmacy Bd. v. Va. Citizens Consumer Council*, 425 U.S. 748, 771 (1976)). Consequently, this Court should reject States' invitation to expand existing categories of lesser-protected speech to fit the needs of First Amendment protected acts. The right to speak freely should not be dependent on the ability to navigate around an ever-expanding list of exceptions to the general protections of the First Amendment. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, *supra*.128 (1991). Truthful speech that involves non-violent activist tactics is what the First Amendment was designed to protect. If the State can stifle an animal right activist from the persuasive power of his speech, then the State can completely shut down the marketplace of ideas in the entire area of animal rights movement.

Given the AETA proscribes expression in a content-based fashion; it must be subject to strict scrutiny. In order to withstand such scrutiny, the ordinance must be supported by a compelling state interest and the law must be narrowly tailored to achieve that interest. Government asserts its interest in the public safety rationale and its fight against terrorism. But, in truth, the AETA is a continuation of the legislative terrorist rhetoric initiated with the U.S. Patriot Act. According to the FBI, animal rights activists fall within the category of domestic terrorism. Domestic terrorism, as defined by the FBI, consists of "the unlawful use, or threatened use, of force or violence by a group or individual based and operating entirely within the United States or Puerto Rico without foreign direction committed against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof in furtherance of political or social objectives." [http://www.fbi.gov/publications/terrorism/terrorism2002\\_2005.htm](http://www.fbi.gov/publications/terrorism/terrorism2002_2005.htm) (Available December 29, 2007) On the other hand, Congress has defined "terrorism" as the "activity, directed against United States persons, which (A) is

committed by an individual who is not a national or permanent resident alien of the United States; (B) involves violent acts or acts dangerous to human life which would be a criminal violation if committed within the jurisdiction of the United States; and (C) is intended-(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by assassination or kidnapping. *18 U.S.C. 921(a)(22)*.

Extremist groups of the anti-abortion movement which have been responsible for seven murders and hundreds of violent attacks on clinic workers and volunteers have never been labeled as terrorists by Congress. Eddy, *supra*, at 323. Defendant Clarkson or any other animal rights activist, for that matter, have never advocated, let alone taken part in, any crime of violence against any other human being. Animal rights activists pose no threat to human life, and they engage in protests on a wide variety of social issues with one common thread: respect for human and animal rights in all of its manifestations. The AETA labels animal rights activists as terrorists, recklessly applying a term that in a post-September 11 nation implies the most repulsive criminal conduct. The political nature of the AETA cannot be denied in consideration of other criminal acts that do not, according to lawmakers, rise to the highest level of domestic terrorism, such as those of the anti-abortion movement. Clearly, the AETA is not meant to protect the United States from violent acts dangerous to human life, rather it protects wealthy, industrious enterprises from any activity that “interferes with” and results in “economical damages.”

Assuming the Government has demonstrated a compelling state interest, the Act is not narrowly drawn to achieve that interest. The language and meaning of the ordinance is simply not subject to a narrowing construction. On the contrary, it provides for a construction which

effectively makes illegal any activity whether or not it is protected by the First Amendment. The ordinance has no core of constitutionally proscribable conduct since it is not possible to define a precise category of expression protected by the First Amendment which can be clearly stated to fall outside the reach of this ordinance. And, even if the AETA is read to constrain conduct only, “much speech is accompanied by action, and courts have afforded strict first amendment protection to many completely nonverbal acts in recognition of their expressive value.” *Tinker v. Des Moines Independent Community*, 393 U.S. 503, 505 (1969). This law punishes conduct because of the conduct’s detrimental effects on members of protected industrious categories, not for society as a whole. As with the law at issue in *R.A.V.*, *supra*, the AETA criminalizes any expressive conduct based on the reactions that may be caused in other individuals. If the AETA were to survive a strict scrutiny, it will have the effect of elevating private economic interests to the status of constitutional rights.

Finally, the “Rules of Construction” 18 U.S.C 43 (e) offered in the AETA have no effect in protecting First Amendment rights; for it leaves all discretion to law enforcement officials, prosecutors, and judges, to determine when speech has become unprotected as an instance made by “any person or entity in connection with an animal enterprise”, that may cause “interference” or “loss”. The AETA has an impermissible chilling effect on protected speech, and the fact that lawmakers note the legislation does not prohibit conduct “protected from legal prohibition by the First Amendment” *Id.* suggests legislative recognition of its vague and overbroad language. In the long run, the AETA’s “Rules of Construction” do not work because the law itself fails to provide a person of ordinary intelligence adequate notice of what conduct is proscribed. Regardless of Congress’ efforts to construe a section to evidence the

constitutionality of a statute, if the statute itself lacks basic constitutional standards, it cannot be construed as such.

## **II. WHERE THE DEFENDANT'S ACTS PROTECTED UNDER THE FIRST AMENDMENT AND IS SENTENCING INAPPROPRIATE?**

Defendant Frank Clarkson posted on Family Farms' website photographs and video recordings of the serious health hazards and conditions found and documented at the facilities of a leader in the farming industry, Eggceptional Eggs. Defendant provided the addresses of the headquarters of Eggceptional Eggs and the names and home addresses of Eggceptional Eggs chief operating officers for the purpose of letter writing campaigns. Also, he posted a list of restaurants and grocery stores that use or sell Eggceptional Eggs encouraging the boycotting of their product. After learning of the planned expansion site in East Carolina, Family Farms placed billboards that read "Stop Factory Farms". All of Defendant's conduct is fully protected by the First Amendment.

### **A. Defendant's acts are all protected by the First Amendment.**

Despite its negative and absolutist drafting, "Congress shall make no law . . . abridging the freedom of speech..." *US Const. Amend. 1*, the Supreme Court has never read the first amendment to prohibit all governmental regulation of expression. The First Amendment permits restrictions upon the content of speech in a few limited areas, which are of "slight social value" such as defamatory speech, fighting words, incitement to riot or imminent lawless action, obscenity and child pornography. *Bose Corporation v. Consumers Union of United States*, 466 U.S. 485, 504 (1984). All other speech is protected, although there is a hierarchy among the various protected categories. Political speech is the most protected because it has the highest social value, furthering society's interest in free and open debate as the individual's interest in expression. Commercial speech, speech by corporations or individuals in pursuit of

their business interests, is less protected. David Kairys, *The Politics of Law* 197-198 (1998). Lower courts have also acknowledged that the first amendment “protects conduct *qua* expression unless it can be removed from that protection pursuant to some doctrine judicially recognized.” *U.S. v. Dellinger*, 472 F.2d 340 (1972).

The First Amendment permits government to ban a “true threat” because they coerce by unlawful conduct rather than persuade by expression, and thus play no part in the marketplace of ideas. *Virginia v. Black* 538 U.S. 359, 357 (2003). Accordingly, the Supreme Court has defined a true threat as statements that “encompass those statements where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Id.* at 360 (2003). Nevertheless, an alleged threat must be analyzed in light of the entire context and under all circumstances. *See, e.g., Milk Wagon Drivers v. Meadow Moor Dairies, Inc.*, 312 U.S. 287, (1941). In *Watts v. United States*, the Supreme Court held that a “true threat,” unlike a political hyperbole or other protected speech, is not protected under the First Amendment. 394 U.S. 705, 708 (1969). The statements posted in Family Farms website, which included photographs and videos depicting the treatment of chickens at Eggceptional Eggs, the addresses of the headquarters of Eggceptional Eggs, the names and home addresses of some of Eggceptional Eggs’ upper level managers and officers, and a list of restaurants and grocery stores who use or sell Eggceptional Eggs, do not constitute a “true threat” as to lose all first amendment protection. These were all provided for the purpose of legally protected activities such as, boycott and letter-writing campaigns. Nothing in the record reveals a single threatening statement, that would intimidate or cause fear in anyone related with Eggceptional Eggs. And even if the statements were to constitute a true threat, [a]s the Web is not considered a direct form of communications, there may be little

reason to expect targets to actually receive the threat. Cf. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975).

Along with true threats, Government may suppress speech for advocating the use of force or a violation of law only if “such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Despite the fact that the usual method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it, government may not prohibit speech because it increases the chance an unlawful act will be committed “at some indefinite future time.” *Hess v. Indiana*, 414 U.S. 105, 108 (1973). In this case there is no attempt, incitement, solicitation, or conspiracy to commit a crime. Placing a billboard that states “Stop Factory Farms” can hardly be considered as language “directed or inciting or producing an imminent lawless action” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). The Government has shown no more than a remote connection between speech that might encourage potential customers to “interfere with” an animal enterprise that may result in “economic damages or loss of profits.”

Furthermore, in an open democratic society the streets, the parks and other public places are an important facility for public discussions and political process. Harry Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, Sup. Ct. Rev. 1, 11-12 (1965). Forum classification is assigned to a certain location for purposes of evaluating constitutional obligations under the First Amendment. Robert D. Nauman, *The Captive Audience Doctrine and Floating Buffer Zones: An Analysis of Hill v. Colorado*, 30 Cap. U. L. Rev. 769, 774 (2002). The Supreme Court recognizes the existence of three types of fora: the traditional public forum, designated

public forum, and nonpublic forum. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

The Court characterizes the traditional public forum as one that has been immemorially reserved for public use, including citizens' assembly, communication, and discussion. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). A designated public forum, on the other hand, is one that has not traditionally served these purposes, but instead has been opened by the government to the public for assembly and expression. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, *supra*. The government may silence public speech and expression in a designated public forum, but not in a traditional public forum. Nauman, *supra*, at 775. In these two types of public fora, content-based restrictions would be subject to strict scrutiny, while content-neutral restrictions need only meet intermediate scrutiny. *Id.* In a nonpublic forum, on the other hand, speech restrictions are subject to mere rational basis review because nonpublic fora, such as prisons, *Adderley v. Florida*, 385 U.S. 39 (1966) military bases, *Greer v. Spock*, 424 U.S. 828 (1976) and school mail systems, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, *supra*. are closed to public communication.

The Web is a medium that uses a remote information retrieval protocol to communicate. See *Reno*, 929 F. Supp. at 836. The World Wide Web has grown exponentially in the last decade, changing the way Americans communicate with each other, gather essential information, and participate in the democratic process. As of September 2001, the number of people using the Internet had expanded to at least 400 million, including approximately 143 million in the United States alone. See *ALA*, 201 F. Supp. 2d at 416. The Supreme Court recognized the Internet is a "vast democratic forum," with content "as diverse as human thought" and as "the most participatory form of mass speech yet developed," *Reno v. ACLU*,

521 U.S. 844, 868 (1997). The Supreme Court has determined that the internet should be entitled to “the highest protection from governmental intrusion”. *Id* at 863. Family Farms internet postings are analogous to pamphlets, and their distribution of information through the internet should be similarly protected, and thus, when applying the strictest constitutional scrutiny, this Court should find that there is “no basis for qualifying the level of First Amendment scrutiny.” *Reno v. ACLU, supra*.

When balancing privacy rights and first amendment protections, the District Court of Utopia relied on *Frisby v. Schultz*, 487 U.S. 474 (1988), and ruled that the rights of citizens to enjoy the privacy of their homes outweighed Defendant’s First Amendment rights. In *Frisby*, the Supreme Court employed the “captive audience argument” to uphold a statute prohibiting pickets near residences. The Court upheld the anti-picketing statute even though it substantially interfered with demonstrators’ ability to speak in a traditional public forum -the streets- because of the strong privacy interest associated with the home. However, having established that Defendant’s speech or conduct did not constitute a threat, and that an internet website is not considered a direct form of communication for the “listener” might not actually receive the alleged threat, *Frisby* is simply inapplicable to Defendant’s case. An essential element in the government’s protection of privacy interests in *Frisby* was the inability of the residents to avoid the communication at issue. Unlike television or radio broadcasting, the internet poses no captive audience problem, for a person must take affirmative steps to retrieve the information on any given website. *Cf. Sable Communications v FCC*, 492 U.S. 115, 127 (1989). Furthermore, the cases cited by the District Court are clearly distinguishable from Defendant’s case because these cases all dealt with protests and demonstration that occurred on a physical location where speech is more likely to reach a captive audience.

Finally, freedom of association is derived from the fundamental guarantee of speech and assembly advancement assured by the Due Process Clause of the Fourteenth Amendment irrespectively (or immaterially) of the beliefs sought to be advance. *N. A. A. C. P. v. Alabama*, 357 U.S. 449 (1958). It is now beyond dispute, that freedom of association for the purpose of advancing ideas and airing grievances is protected from [governmental] invasion by the Due Process Clause of the Fourteenth Amendment. *Id.* The right to free association extends beyond intimate relationships. *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984). Groups peaceably joined to engage in First Amendment activities also enjoy protection from government interference. To constitute “expressive association,” such interaction must be defined by common political, cultural or economic activism. *Id.*

Defendant is careful to note that if sections (a), (b) and (c ) of the AETA, 18 U.S.C. § 43 were violated by members or sponsors of Family Farms, he cannot be held liable the acts of violence in which others engaged, simply because they all belong to the same association. *NAACP v. Clairbone Hardware Co.*, 357 U.S. 449 (1958). When messages of opposition turn to acts of violence and lawlessness, the Court has required “precision of regulation” before individual members may be held liable by the fact of their belonging. *Id.* Clearly nothing in the record reveals that Clarkson incited or abetted the lawless action of others. The District Court cannot rest its *ratio decidendi* by merely “believing” that Clarkson intended to incite people who visit Family Farm’s website into harassing or intimidating Eggceptional Eggs employees, or to damage restaurants and grocers. Considering the possibility that other animal rights activists harassed or intimidated Eggceptional Eggs employees; conducted protests and demonstrations at Eggceptional Eggs workplaces and employees’ homes; or damaged restaurants and grocers, Clarkson cannot be held liable for inciting illegal behavior. The fact

that weekly demonstrations and protests began after Clarkson posted information regarding Eggceptional Eggs expansion site in Family Farms' website does not, beyond reasonable doubt, prove that lawless or inciteful language was employed. And, even if these statements were considered as so, if government securitization does not further egalitarian goals, it would constitute a conspicuously bad interference with First Amendment freedom.

**B. Defendant's punishment does not fit the behaviors to which they correspond and are inappropriately severe.**

Defendant was sentenced to three years in a federal institution and was ordered to pay restitution totaling \$537,000. An overbroad reading of the AETA statute has severe consequences for the many criminal defendants accused of violating it, as well as for the entire criminal justice system. The AETA punishes "interference with" an animal enterprise with harsh penalties: a statutory maximum of up to twenty years' imprisonment and a fine for restitution that as in the Memorandum Opinion by the Utopia District Court ascended \$537,000, whichever is greater. Congress approved the AETA in 2006, classifying acts of animal rights activism, anti-corporation activism or disobedience as acts of terrorism, and enabling the State to prosecute legitimate protestors as "domestic terrorists" when an animal-related business loses profits and property. Congress intends the Act to supplement the states' law enforcement. However, adequate remedies exist in state law to punish those who employ civil disobedience as a means of challenging the current state of the law. For example, a person who trespasses upon private property is subject to the laws of the several states concerning trespass. Simply put, the AETA is an unnecessary tool for criminal prosecution.

In truth, the theory of terrorism adopted in the AETA by the Congress and approved by the District Court of Utopia is novel. Never in the history of the common law was terrorism understood to comprehend a loss of profit of an animal enterprise. Only most recently, and

never with the blessing of this Court, has “interfering with the operations of an animal enterprise” been understood as a crime applied to social protest in which the protesters do not obtain property from those against whom they were protesting. Accordingly, if the novel view on enterprise terrorism advanced by the AETA were the law of the land at any earlier period of our history, it would have been a major impediment for all movements of social protest that have enhanced the protection of life, liberty, and equality in this nation. In particular the movements to abolish slavery, to end racial discrimination, to include women within the franchise and the full obligations of citizenship, and to end irrational gender discrimination would have suffered severe setbacks. Crimes such as trespass or disturbing the peace are punishable by fines and/or imprisonment, sanctions that many important figures in American history have been willing to bear as advocates for social progress. Defendant urges the Court that a prosecutor or civil plaintiff should not be able to invoke an additional law - one intended to stifle social dissent - simply by arguing creatively that such activities constitute, for example, “interferes with the operations of an animal enterprise; and in connection with such purpose” or “conspires or attempts to do so”. AETA would replace appropriate sanctions for civil boycott or disobedience with disproportionate sanctions designed for reviled and truly dangerous criminal activity of terrorism. If the theory of the State is correct, moreover, federal judges applying the criminal provisions of AETA to boycotts or civil disobedience will have little or no discretion under these new federal sentencing guidelines to take into account the grounding of defendant's behavior in a conscientious conviction that the law in its current state must be disobeyed. There is and there ought to be a lot of room in the law between activity that is unconditionally protected under the First Amendment and activity that is severely punished under a federal statute in which Congress aimed at terrorism acts. History cautions against the

expansion of the AETA to nonviolent protesters who occasionally may employ the tactic of speech or civil disobedience to manifest their protest to the current status of the law. Following the tradition of nonviolent direct action to protest conditions of perceived injustice, animal right activists could decide to engage in nonviolent illegal acts.

In 1994, after various violent attacks on abortion clinics, Congress enacted a federal statute known as the Federal Access to Clinic Entrance Act [FACE], 18 U.S.C. § 248. This statute was enacted because Attorney General Reno and the Attorneys General of several states took the view that no federal law -including the Hobbs Act, 18 U.S.C. § 1951 and RICO, 18 U.S.C. § 1961- afforded any protection to abortion clinics under the circumstances of protests in front of clinics at the time. The court of appeals has stretched RICO far beyond the intent of Congress and has needlessly intervened in the traditional domain of the states to maintain public peace in the context of expression of viewpoints on controversial matters of public concern. The principal changes effected by AETA apply against free speakers and civil disobedience, not criminals. Whereas AEPA had the *mens rea* of a “purpose of causing physical disruption,” the new AETA has expanded the *mens rea* to include any “purpose of damaging or interfering.” FACE defines interference as “to restrict a person's freedom of movement,” while the AETA offers no definition for such term. However, the AETA does manage to define “damages” and does so to include a “loss of profits and does not define “interference”.

The District Court of Utopia, after a bench trial, makes no reference to any of the factors that the Sentencing Reform Act (“SRA”) demands that courts “shall consider” in every case, including the nature and circumstances of the offense and the history and characteristics of the defendant, 18 U.S.C. § 3553(a)(1), the kinds of sentences available, *Id.* (a)(3), or the goal of

avoiding unwarranted sentence disparities for similar offenders and offenses, *Id.(a)(6)*. Defendant's punishment simply does not fit the behaviors to which they correspond and are inappropriately severe. Congress launched its legislative net well beyond the permissible object of prohibiting animal rights activists from interfering with the companies whose corporate practices they seek to change.

### **Conclusion**

For the foregoing reasons, it is respectfully submitted that the District Court of Utopia erred in upholding the convictions against Frank Clarkson. For the reasons stated, defendant Clarkson respectfully requests this Court to reverse his conviction and dismiss the indictment, based on the arguments that the AETA is unconstitutional and on the arguments that the conduct proved in this case was protected by the First Amendment. As demonstrated above, there was insufficient evidence to convict him on any of the counts charged consistent with the rights guaranteed by the First Amendment.

Respectfully submitted,

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