No. 13-1490

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

SARAHJANE BLUM; RYAN SHAPIRO; LANA LEHR
LAUREN GAZZOLA; IVER ROBERT JOHNSON, III,

Plaintiffs-Appellants,

v.

ERIC H. HOLDER, JR., Attorney General of the United States,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR APPELLEE

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STATEMENT OF JURISDICTION

Plaintiffs invoked the District Court's jurisdiction under 28 U.S.C. § 1331. The district court entered judgment granting Defendant's motion to dismiss on March 18, 2013. Plaintiffs filed a timely notice of appeal on April 17, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the District Court correctly held that Plaintiffs lack standing to challenge the constitutionality of the Animal Enterprise Terrorism Act ("AETA"), 18 U.S.C. § 43, because they do not allege an intent to engage in any activity prohibited by the Act and cannot demonstrate a credible threat of prosecution.

2. Whether, even if Plaintiffs could establish standing, their claims should be dismissed because they did not state a claim that the Animal Enterprise Terrorism Act is substantially overbroad, impermissibly vague, or an unconstitutionally content- or viewpoint-based restriction on speech.

STATEMENT OF THE CASE

This is a pre-enforcement facial and as-applied challenge to the Animal Enterprise Terrorism Act ("AETA" or "the Act"), brought by five

individuals who are self-described animal rights activists. The AETA is a criminal statute that prohibits intentionally damaging or causing the loss of real or personal property of an animal enterprise or intentionally placing a person in reasonable fear of death or serious bodily injury.

Notwithstanding an express provision of the statute stating that it may not be construed to prohibit any expressive conduct (including peaceful picketing or demonstration), plaintiffs allege that the statute in fact prohibits activities such as letter writing, public speaking, documentary filmmaking, and peaceful protests. They contend that the AETA has chilled their speech because it is overly broad and impermissibly vague. They also argue that the AETA discriminates on the basis of content and viewpoint. The district court granted the government's motion to dismiss, holding that plaintiffs lack standing because the actions in which plaintiffs intend to engage do not fall within the purview of the statute. This appeal followed.

STATEMENT OF FACTS

A. Statutory Background: The Animal Enterprise Terrorism Act.

In 2006, Congress enacted the Animal Enterprise Terrorism Act, 18 U.S.C. § 43, in response to "an increase in the number and the severity of criminal acts and intimidation against those engaged in animal enterprises." *See* 152 Cong. Rec. H8591 (daily ed. Nov. 13, 2006) (Statement of Rep. Sensenbrenner. The Act was designed to close "serious gaps and loopholes…with respect to protecting employees and associates of animal enterprises . . . ." *Id.* (statement of Rep. Scott).

The Act, codified under the title "[f]orce, violence, and threats involving animal enterprises," contains 5 subsections. Subsection (a) of the Act defines the "offense":

> (a) Offense. Whoever travels in interstate or foreign commerce, or uses or causes to be used the mail or any facility of interstate commerce—
> (1) for the purpose of damaging or interfering with the operations of an animal enterprise; and
> (2) in connection with such a purpose—
>
> > (A) intentionally damages or causes the loss of any real or personal property (including animals or records) used by an

> animal enterprise, or any real or personal property of a person or entity having a connection to, relationship with, or transactions with an animal enterprise;
>
> (B) intentionally places a person in reasonable fear of the death of, or serious bodily injury to that person, a member of the immediate family…of that person, or a spouse or intimate partner of that person by a course of conduct involving threats, acts of vandalism, property damage, criminal trespass, harassment, or intimidation, or
>
> (C) conspires or attempts to do so;
>
> shall be punished under subsection (b)

18 U.S.C. § 43(a).

Subsection (b), entitled "Penalties," sets forth fines and imprisonment depending upon the nature and extent of any bodily injury and the amount of "economic damage" caused. *See id*. § 43(b). The graduated penalty structure accounts for two types of harm to victims: "economic damage" and either a reasonable fear of bodily injury or death or an actual "serious" or "substantial" bodily injury to oneself or a related individual. *See* 18 U.S.C. § 43(b)(3)(A)—(B), (4)(A). For instance, an "offense [that] results in economic damage exceeding $10,000 but not exceeding $100,000" is eligible for a penalty of "not more than 5 years," while an "offense [that] results in

economic damage exceeding $100,000" is eligible for a penalty of "not more than 10 years…." 18 U.S.C. § 43(b)(2)—(3).

The AETA, in subsection (c), also provides for "an order of restitution" in the event of a violation. Such an order may include compensation for: (1) "the reasonable cost of repeating any experimentation that was interrupted or invalidated as a result of the offense"; (2) "the loss of food production or farm income reasonably attributable to the offense"; and (3) "any other economic damage, including losses or costs caused by economic disruption, resulting from the offense." 18 U.S.C. § 43(c)(1)—(3).

The Act defines "economic damage" as "the replacement costs of lost or damaged property or records…the loss of profits, or increased costs, including losses and increased costs resulting from threats, acts of vandalism, property damage, trespass, harassment, or intimidation" inflicted due to a connection to an animal enterprise. 18 U.S.C. § 43(d)(3). However, economic damage "does not include any lawful economic disruption (including a lawful boycott) that results from lawful public,

governmental, or business reaction to the disclosure of information about an animal enterprise…." 18 U.S.C. § 43(d)(3)(B).

Finally, the Act contains "rules of construction." As relevant here, the act provides that "[n]othing in this section shall be construed: (1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment"; or "(2) to create new remedies for interference with activities protected by the free speech or free exercise clauses of the First Amendment to the Constitution, regardless of the point of view expressed . . . ." 18 U.S.C. § 43(e)(1), (2).

B. Plaintiffs' Challenge to the Act.

Plaintiffs are self-described activists with long histories of involvement in a range of animal rights issues. They brought this pre-enforcement action against the Attorney General of the United States in December 2011, alleging that the AETA is unconstitutional on its face and as applied to the plaintiffs. Appendix (App) 20. Specifically, plaintiffs allege that the Act is overbroad and discriminates on the basis of content

and viewpoint in violation of the First Amendment, and that it is impermissibly vague in violation of the Fifth Amendment. Plaintiffs seek both a declaration that the Act is unconstitutional on its face and as applied, and a permanent injunction enjoining the United States from enforcing the Act. App 64.

Plaintiffs do not allege that they have been prosecuted or threatened with prosecution under the Act, nor do they allege that they intend to damage or cause the loss of any tangible real or personal property or to place anyone in reasonable fear of bodily injury. Rather, plaintiffs allege that they intend to "engage in lawful animal rights activism, like attending public protests, or investigating and publicizing conditions and mistreatment of animals on factory farms" (App. 22). On the basis of a theory that the Act prohibits these lawful activities if they would diminish the profits of an animal enterprise, plaintiffs assert that they are "chilled from [engaging in] lawful and socially useful advocacy based on their reasonable fear that such activities will subject them to prosecution" under the AETA. *Id*.

1. Plaintiff Sarahjane Blum, for instance, states that she would like to "advise and work with the collective to raise public awareness of foie gras, toward the goal of banning its production in Minnesota." App. 43. Although Blum pleaded guilty in 2004 to trespass in connection with releasing ducks from a farm, App. 42, and states that she has "knowingly and openly violated the law many times through acts of non-violent civil disobedience" (App. 42), she does not allege an intention to continue that conduct.

Rather, Blum intends to raise awareness by entering a fois gras farm through its public tours, documenting aspects visible from public property, and otherwise obtaining permission to enter and document farm conditions. *Id*. Blum would like to publicize the results of these activities online and at events around the country, and would also like to put public pressure on local restaurants to stop serving foie gras through letter writing and protest campaigns. *Id*. However, Blum claims she has refrained from engaging in these activities because she is concerned about the risk of prosecution under the AETA. App. 43-44. She also alleges that she declined

an invitation to speak at an animal rights conference in Seattle for similar reasons, and has avoided showing a documentary film depicting her activities because she believes she could be prosecuted for causing fois gras farms to lose profits. App. 44-45.

2. Plaintiff Ryan Shapiro alleges that he would like to advocate for animal rights through the lawful creation of documentary films, but that he cannot do so due to his fear of prosecution. App. 49-51.[1] He states that "under the law, taking documentary footage of farms, slaughterhouses, or research facilities and disseminating the resulting film through the mail," "traveling cross-country to show any films that result from such investigations," or "organizing protests outside a department store that sells fur coats" could violate the AETA by causing "property loss." App. 50. However, Shapiro continues to distribute leaflets, speak publicly, and engage in public campaigning. App. 49.

[1] Shapiro, like Blum, pleaded guilty to misdemeanor trespass in connection with releasing ducks from a farm in 2004. App. 48. He does not allege that he intends to continue this activity.

3. Plaintiff Robert Iver Johnson III does not allege that he intends to take any action that arguably violates the statute. Instead, he contends that because others have been chilled by the Act, "his attempts to learn about local animal rights campaigns [after moving to New York City] have been largely fruitless," and protests he has attended have not been as "sustained and carefully planned" as he had hoped. App. 61-62; *see* Plaintiffs' Opposition to Motion to Dismiss, at 11 ("AETA has not directly chilled [Johnson] from engaging in animal rights advocacy, but rather has impeded his work due to the far-reaching chill it has cast on others in his community.").

4. Plaintiff Lana Lehr, the founder of an organization called RabbitWise, participates in letter writing campaigns, petitions, and conferences as an attendee. App. 54-55. She states that she would like to keep attending fur protests because "she believes in the importance of demonstrating and educating the public through lawful, peaceful protests," but alleges she is chilled from doing so because she fears prosecution under the AETA. App. 54. Similarly, she claims she has ceased

to pass out literature at events attended by rabbit breeders because "this activity also feels too risky to her." App. 54-55. Lehr would also like to participate in "lawful public protests" but claims she "continues to be chilled from doing so." App. 55.

5. Plaintiff Lauren Gazzola has participated in both lawful protest and non-violent acts of civil disobedience, and has been arrested several times. App. 56-57. In 2006, she was one of seven individuals arrested and convicted under the AETA's predecessor statute, the Animal Enterprise Protection Act, for making true threats and planning and executing illegal activities on behalf of the animal rights group Stop Huntingdon Animal Cruelty ("SHAC"). She was sentenced to 52 months in prison and is currently on probation. App. 55-56.

Gazzola states that she would "once again like to organize animal rights campaigns," but "only within the bounds of the First Amendment." App. 57. She "understands that theoretical advocacy of illegal action, along with expressions of support for those who violate the law," is protected by the First Amendment, and that "it is lawful to protest in front of an

individual's home, consistent with municipal and state ordinances limiting such activity, as long as one does not make threatening statements." *Id*. She alleges that she is chilled from engaging in this activity because she fears prosecution under the AETA. *Id*. For instance, when speaking at a law school about her previous criminal activities and her prison sentence, Gazzola stated "I'd do it again. It was all worth it." App. 58. She states that she wished to add "So go do it," but did not do so for fear that making such a statement would provide evidence against her in a prosecution for conspiracy to violate AETA. App. 58-59.

C. The Government's Motion to Dismiss And The District Court's Decision.

The government filed a motion to dismiss for lack of subject matter jurisdiction, lack of ripeness, and failure to state a claim, on the ground that Plaintiffs could not show the AETA violated the First or the Fifth Amendments. The district court granted the motion, holding that plaintiffs "failed to establish an objectively reasonable chill on their First Amendment rights" and therefore could not show the "injury in fact" necessary to support Article III standing. Pl. Addendum, at 18.

Specifically, the district court held that plaintiffs "have not alleged an intention to engage in any activity prohibited by the AETA." Pl. Add. 16. The court noted that the conduct in which plaintiffs seek to engage – "documenting factory conditions with permission, organizing lawful public protests and letter-writing campaigns, speaking at public events, and disseminating literature and other educational materials" – is "far different" from the type of conduct prohibited by the Act. The court concluded that "none of Plaintiffs' proposed activities fall within the statutory purview of intentionally damaging or causing loss of real or personal property or intentionally placing a person in reasonable fear of death or serious injury." *Id*. The court also observed that "Plaintiffs have not directed this court to any case charging as an AETA violation the type of conduct in which they seek to engage." *Id*.

The district court also rejected Plaintiffs' contention that the Act extends to lawful protests that result in a loss of profits to an animal enterprise, on the theory that the prohibition against intentionally causing damage to "personal property" includes any activity that reduces profits.

Id. The court held that it "must read the term 'personal property' in light of the words around it, specifically 'animals or records' and 'real property.' In this context, personal property cannot reasonably be read to include an intangible such as lost profits." *Id*. at 16-17. The court also noted that the statute separately defines "economic damage" and "loss of profits," and concluded that "the court cannot reasonably read these two distinct terms—'personal property' and 'economic damage'—to have the same meaning." *Id*. at 17.

The district court did not doubt "Plaintiffs deeply held commitment to animal welfare or the sincerity of their personal fear of prosecution under the AETA." Pl. Add. 14). However, the court concluded that "Plaintiffs have not alleged an intention to engage in any activity that could reasonably be construed to fall within the statute." *Id*. at 14 (internal quotations omitted).

SUMMARY OF ARGUMENT

The Animal Enterprise Terrorism Act prohibits intentionally damaging an animal enterprise, causing loss of real or personal property to

an animal enterprise, or placing a person connected with an animal enterprise in reasonable fear of death or serious bodily harm. Plaintiffs insist that their tortured reading of the AETA – untethered to the statute's text, purpose, context and rules of construction – is reasonable and provides them with standing for this pre-enforcement challenge to its constitutionality. They further contend that the statute, as they insist upon construing it, violates the First Amendment. However, as we demonstrate below, plaintiffs lack standing to pursue this pre-enforcement challenge to AETA's constitutional validity because they lack an objectively reasonable fear of prosecution for engaging in protected First Amendment speech activity. In addition, the statute, as properly construed, poses no threat to protected First Amendment activity and easily withstands constitutional scrutiny. Accordingly, the district court's judgment should be affirmed.

1. The district court correctly dismissed plaintiffs' case for lack of standing. To establish standing to maintain a pre-enforcement challenge to a criminal statute, plaintiffs must allege that they intend to engage in conduct that violates the statute and sufficient facts to establish that there is

a credible threat that they will be prosecuted. Plaintiffs can establish neither.

None of the plaintiffs alleges an intent to engage in any activity that is proscribed by the Act. Subsection (a)(2)(A) prohibits conduct that "intentionally damages or causes the loss of real or personal property" of an animal enterprise. The activities in which plaintiffs wish to engage – peaceful protests, investigating and publicizing mistreatment, and the distribution of information – plainly fall outside the scope of this provision. Plaintiffs' contention that Congress intended to prohibit even peaceful protest, documenting farm conditions, or disseminating information if that conduct results in lost profits (which plaintiffs interpret as "personal property") is without merit. Indeed, if there were any doubt regarding the statute's reach, it is dispelled by the rules of construction, which make clear that expressive conduct, including peaceful protests, are not prohibited by the Act.

The contention that plaintiff Lauren Gazzola has standing to challenge subsection (a)(2)(B) is without merit. That provision prohibits

intentionally placing others in fear of serious bodily injury or death – something that none of the plaintiffs alleges that he or she intends to do. And plaintiffs' claim to standing on subsection (a)(2)(C), which merely prohibits conspiring to take actions otherwise prohibited by the statute, rests upon an unreasonable interpretation that the statute prohibits conspiring to interfere with an animal enterprise, without requiring the loss of property or a threat of harm.

The district court thus correctly held that plaintiffs failed to allege any specific injury caused by the AETA, and that they could not show that they were reasonably chilled from engaging in expressive activity due to a credible threat of enforcement.

2. Because plaintiffs lack standing, this Court need not consider the merits of their challenge. In any event, plaintiffs' constitutional challenges are without merit. Plaintiffs' claim that AETA is overbroad rests upon an unreasonable interpretation of the statute as prohibiting any action that causes an animal enterprise to lose profits – an interpretation that runs counter to the statute's plain text and its legislative history. And even if

plaintiffs' interpretation were plausible, the court would be obligated to interpret the statute in a way that does not violate the First Amendment, since the language of the statute (particularly in light of its rules of construction) is readily susceptible to a narrower interpretation.

Plaintiffs' claim that that the statute is vague relies on isolating specific terms, with universally accepted applications of criminal law, from the context in which they appear in the statute. Finally, plaintiffs' contention that the Act discriminates on the basis of content and viewpoint is specious; the Act plainly prohibits specific conduct and unprotected speech, and applies regardless of the content of the message or the viewpoint of the individual.

STANDARD OF REVIEW

The District Court's decision dismissing this case for lack of standing is subject to *de novo* review. *See National Organization for Marriage v. McKee*, 649 F.3d 34, 46 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 1635 (2012).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFFS LACK STANDING TO MAINTAIN A PRE-ENFORCEMENT CHALLENGE TO THE AETA.

To establish standing, at an "irreducible constitutional minimum," a plaintiff must establish : (1) an injury in fact that is concrete and particularized and actual or imminent, (2) a causal connection between the injury suffered and the conduct complained of, such that (3) the injury will likely be redressed through a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see Mangual v. Rotger-Sabat*, 317 F.3d 45, 56 (1st Cir. 2003). The injury must be "distinct and palpable," (*Warth v. Seldin*, 422 U.S. 490, 501 (1975)) rather than "abstract," "conjectural," or "hypothetical." *Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983). Moreover, the Supreme Court has cautioned that "our standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (internal quotations omitted).

Where standing depends upon allegations of future harm, the Supreme Court has "repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient." *Clapper*, 133 S. Ct. at 1147 (emphasis in original) (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990)). Plaintiffs must allege "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the] statute, and [that] there exists a credible threat of prosecution thereunder." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (citation omitted). Alternatively, plaintiffs can show that they are chilled from exercising their right to free expression because they have foregone speech to avoid enforcement. *New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996). Importantly, both types of injury depend on "the existence of a credible threat that the challenged law will be enforced." *Id*. at 14; *see Mangual*, 317 F.3d at 57.

Thus, "persons having no fears of . . . prosecution except those that are imaginary or speculative, are not to be accepted as appropriate

plaintiffs." *Babbitt*, 442 U.S. at 298 (quoting *Younger* v. *Harris*, 401 U.S. 37, 42 (1971)). "A party's subjective fear that she may be prosecuted for engaging in expressive activity will not be held to constitute an injury for standing purposes unless that fear is objectively reasonable." *New Hampshire Right to Life*, 99 F.3d at 14; s*ee Laird v. Tatum*, 408 U.S. 1, 12 (1972). And where a party's intended activities do not fall within the statutory prohibition, the fear of a wrongful prosecution is too speculative to support standing. *White v. United States*, 601 F.3d 545, 553 (6th Cir. 2010); *see Laird*, 408 U.S. at 13-14.

In the case at bar, plaintiffs cannot meet the threshold requirement for standing. As discussed below, plaintiffs have not alleged that they intend to engage in a course of conduct proscribed by the statute. For that reason, there is no credible threat of prosecution and no objectively reasonable chill on expressive activity.

A. Plaintiffs Have Not Alleged An Intent To Engage In Any Conduct Prohibited By Section 43(a)(2)(A).

1. Section 43(a)(2)(A) of the AETA prohibits traveling in interstate commerce or using the mail for the purpose of damaging an animal

enterprise if one also "intentionally damages or causes the loss of any real or personal property (including animals or records) used by an animal enterprise, or any real or personal property of a person or entity having a connection to, relationship with, or transactions with an animal enterprise." 18 U.S.C. § 43(a)(2)(A). Plaintiffs have no reasonable fear of prosecution under this provision because they have not alleged an intent to take any action prohibited by it.

By plaintiffs' description, they intend to "engage in lawful animal rights activism, like attending public protests, or investigating and publicizing conditions and mistreatment of animals on factory farms." App. 22. None of the plaintiffs, however, professes the desire or the intent to intentionally damage or cause the loss of property. Plaintiff Blum hopes to lawfully enter a foie gras farm and document her experience, to speak peacefully, and to distribute her documentary film. App. 45-46. Plaintiff Shapiro cites a desire to make and distribute documentary films. App 50-51. Plaintiff Johnson merely desires to meet with fellow activists to participate in peaceful protests. App. 62-63. Plaintiff Lehr wishes to bring

literature concerned with animal welfare to public events. App. 54-55. And plaintiff Gazzola wishes to engage in lawful protests (stopping short of making threatening statements) and to engage in "theoretical advocacy of illegal action" (stopping short of aiding such action or inciting imminent lawless action). App. 57-59. Not one of these proposed activities falls within the scope of the Act, as not one of them involves intentionally damaging real or personal property.

Moreover, as the district court observed, if there were any doubt as to the reach of the statute to cover peaceful picketing and dissemination of information, it is dispelled by the AETA's Rules of Construction. Subsection (e) of the statute states that "nothing in this section shall be construed – (1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution; [or] (2) to create new remedies for interference with activities protected by the free speech or free exercises clauses of the First Amendment to the Constitution, regardless of the point of view expressed . . . ." 18 U.S.C § 43(e). And

Congress further provided, in defining "economic damage" for purposes of the Act's penalty provisions, that such damage "does not include any lawful economic disruption (including a lawful boycott) that results from lawful public, governmental, or business reaction to the disclosure of information about an animal enterprise." *Id*. § 43(d)(3)(B).

Because the statute simply does not prohibit the actions plaintiffs intend to take, the district court properly determined that plaintiffs do not have an objectively reasonable fear of prosecution.

2. In support of their assertion of standing, plaintiffs posit a broad interpretation of "personal property" that is contrary to the text of the statute, especially when it is read in light of its context and congressional intent. According to plaintiffs, the language prohibiting actions that cause the loss of "real or personal property" includes not only damage or loss to tangible property, but also actions that cause an animal enterprise to lose profits. Plaintiffs therefore posit that the statute prohibits any action that causes an animal enterprise to lose profits or suffer a loss of business

goodwill, including peaceful demonstration, letter-writing campaigns, or the dissemination of information.

The district court properly rejected plaintiffs' implausible reading of the statute. To begin, the "rules of construction" make clear that any fear of prosecution from peaceful demonstrations or expressive activity that cause lost profits is unfounded. The statute clearly provides that it does not "prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration)." 18 U.S.C. § 43(e)(1).

Even without reference to the "rules of construction," a straightforward, logical reading of the statute demonstrates that an individual cannot be convicted merely for causing an animal enterprise to lose profits. As the district court recognized, the phrase "intentionally damages or causes the loss of any real or personal property" must be construed in conjunction with the words around it. *See Deal v. United States*, 508 U.S. 129, 132 (1993). The statute identifies "animals or records" as examples of the type of "personal property" at issue, thus signifying that "damages or causes the loss of" was intended to cover damage or harm to

tangible property – not harm to or loss of intangible, not-yet-realized profits or business goodwill. 18 U.S.C. § 43(a)(2)(A). In addition, the real or personal property in question must be "*used by* an animal enterprise," *id.* (emphasis added), again indicating that the statute is directed at those who intentionally cause damage to or loss of tangible property, not merely a decrease in profits.

Plaintiffs argue that the district court erred in using the parenthetical "including animals or records" to limit the otherwise expansive definition of "personal property." Pl. Br. 20-22. But the district court did no such thing. Rather than holding that reference to "animals or records" *limited* the definition of personal property, the court merely cited the parenthetical as examples of the types of records covered by the statute. *See* JA 16-17. Indeed, plaintiffs' insistence that the parenthetical merely provides examples of some of the types of property covered – or even *expands* the definition of "personal property" – demonstrates the folly of their argument. Both of the examples include tangible items, and thus undermine plaintiffs' interpretation of the statute to cover lost profits. And

if the phrase "personal property" had to be *expanded* to cover animals and records, it is wholly unreasonable to interpret the phrase as including intangibles such as lost profits.[2]

3. The district court noted that the statute defined "economic damage" to include "loss of profits," and observed that it could not read the term "personal property" to have the same meaning as "economic damage." Pl. Add. 17. Plaintiffs criticize the district court's reasoning as improperly conflating two separate sections of the statute (the offense and the damages provisions). At the same time, however, plaintiffs insist that the inclusion of lost profits in the damages provision shows that lost profits must be included in the offense itself, and therefore that causing economic damage alone violates section 43(a)(2)(A). Pl. Br. 24-25.

Plaintiffs' argument is mistaken. First, the district court did not improperly conflate the two separate provisions. Indeed, just as plaintiffs

[2] Plaintiffs cite a series of cases for the proposition that lost profits are "routinely characterized" as the loss of "property" (Pl. Br. 23). However, those cases involved contract or tort claims, and have no bearing on the proper interpretation of the AETA.

insist (Pl. Br. 25), the district court used the definition of "economic damage" to *inform* the interpretation of "personal property." "[W]hen Congress uses certain words in one part of a statute, but omits them in another, an inquiring court should presume that this differential draftsmanship was deliberate." *United States v. Ahlers*, 305 F.3d 54, 59-60 (1st Cir. 2002).

As the penalty section of the statute shows, Congress knew how to criminalize causing "economic damages," and it knew how to include lost profits in that definition. The omission of the term "economic damages" from the offense section of the Act must be read as a deliberate decision to exclude economic damages from the elements of the offense. Parsing the words of the statute in context, the district court correctly concluded that "real or personal property (including animals or records) used by an animal enterprise" cannot reasonably be read as incorporating the definition of "economic damages" in the penalty provision of the statute.

Second, plaintiffs are incorrect in their contention that the inclusion of lost profits in the penalty section indicates that causing lost profits is

part of the offense. The definition of the offense appears in a separate subsection of the Act, and uses wholly different terms. Plaintiffs nonetheless argue that it "defies logic" to interpret "personal property" as covering only tangible items because "Congress could not have intended for the penalty under the AETA to be based on the amount of intangible loss caused by a defendant's act if such intangible loss could not give rise to a substantive offense in the first place." Pl. Br. 25. Not surprisingly, plaintiffs offer no support for this assertion. In fact, Congress has frequently imposed penalties and restitution based upon the amount of loss caused by the defendant, independent of the substantive elements of the crime itself. *See, e.g.*, 18 U.S.C. § 3663A(b)(2) (mandating restitution for losses to the victim for offenses involving bodily injury); *United States v. Gonzalez-Alvarez*, 277 F.3d 73 (1st Cir. 2002) (calculation of loss under sentencing guidelines for distribution of adulterated milk, when underlying offense did not require loss).

The definition of "economic damage" shows not only that Congress paid particular attention to lost profits and chose to place them outside the

scope of the offense section, but also that Congress took care to ensure that economic damage would not include losses caused as a result of protected speech. The definition expressly excludes "any lawful economic disruption (including a lawful boycott) that results from lawful public, governmental, or business reaction to the disclosure of information about an animal enterprise . . . ." 18 U.S.C. § 43(d)(3)(B). This provision wholly undermines plaintiffs' theory that lawful expressive activity that causes lost profits violates the Act.[3]

4. As noted above, if there were any doubt as to the meaning of the statute and the intent of Congress, the rules of construction make clear that expressive conduct, including peaceful picketing and other peaceful demonstration, is not prohibited by the Act. *See* 18 U.S.C. § 43(e)(1). Plaintiffs' attempts to disregard this provision are unpersuasive.

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[3] Plaintiffs contend that, because this provision excludes only the "disclosure of information," it therefore applies only to "some First Amendment protected conduct" (Pl. Br. 29). But plaintiffs overlook the broad Rules of Construction, which apply to the entire statute (and not just the penalty provision) and make clear that expressive activity and peaceful protest are not prohibited by the statute.

Plaintiffs' contend (Pl. Br. 31) that the rules of construction cannot "save an otherwise unlawful statute," but can only "validate a construction" supported by the statutory language. But that is precisely what the rules of construction do here; they validate the common sense interpretation of the statute to prohibit unlawful acts that damage tangible property.

The rules of construction are a textual expression of Congress' intent in drafting the statute. *See CISPES v. FBI*, 770 F.2d 468, 474 (5th Cir. 1985) (holding that a nearly identical provision "is a valuable indication of Congress' concern for the preservation of First Amendment rights *in the specific context of the statute in question*") (emphasis added). Congress passed the AETA to provide prosecutors with another tool to combat "violent acts" such as "arson, pouring acid on cars, mailing razor blades, and defacing victims' homes." 152 Cong. Rec. H8590, H8591 (daily ed. Nov. 12, 2006) (Statement of Rep. Sensenbrenner). Yet, at the same time, Congress sought to protect the "rights of those engaged in first amendment freedoms of expression regarding [animal] enterprises." *Id*. (Statement of Rep. Scott)

To accomplish this, Congress added a "manager's amendment" (now the rules of construction) to "clarif[y] that nothing in this bill shall be construed to prohibit any expressive conduct protected by the first amendment, nor shall it criminalize nonviolent activities designed to change public policy or private conduct." *Id*. (Rep. Sensenbrenner); *see also id*. (Rep. Scott) ('to reassure anyone concerned with the intent of this legislation, we have added in the bill assurances that it is not intended as a restraint on freedoms of expression such as lawful boycotting, picketing or otherwise engaging in lawful advocacy for animals").

This case therefore stands in stark contrast to the cases cited by plaintiffs, which address statutes that directly regulate or prohibit speech, and which involve savings clauses that say nothing more than that the statute does not restrict First Amendment activity. *See, e.g., Boos v. Barry*, 485 U.S. 312, 325-26 (1988); *Rubin v. City of Santa Monica*, 823 F. Supp. 709, 712 (C.D. Cal. 1993). The AETA's rules of construction not only make clear that First Amendment activity is not covered, but provide specific examples ("peaceful picketing and other peaceful demonstration") to drive

the point home. 18 U.S.C. § 43(e)(1). Indeed, the clause is identical to the savings clause in the Freedom of Access to Clinic Entrances Act, which has been cited as relevant to determining the reach of that statute. *See American Life League v. Reno*, 47 F.3d 642, 649 (4th Cir. 1996) ("the Act's statement of purpose and rules of construction indicate that the Act was not passed to outlaw conduct because it expresses an idea.")

Plaintiffs argue that the rules of construction "do[] not cover much of the advocacy in which Plaintiffs wish to engage, like the dissemination of information harmful to a factory farm" because such activity is not "expressive conduct" (Pl. Br. 33). The contention that the "dissemination of information" is not "expressive conduct" is puzzling – and contrary to established precedent. *See, e.g., Sorrel v. IMS Health Inc.*, 131 S. Ct. 2653, 2667 (2011) ("the creation and dissemination of information are speech within the meaning of the First Amendment."); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (holding that the First Amendment "encompasses a range of conduct related to the gathering and dissemination of information.").

The mere dissemination of information on an animal enterprise, without more, falls outside the scope of the AETA.

5. Plaintiffs' attempt to support their interpretation by citing to prior prosecutions and investigations fares no better. All of the past prosecutions under the AETA and its predecessor statute cited in plaintiffs' complaint and brief involved allegations of conduct that goes far beyond the peaceful activities in which plaintiffs intend to engage. Those prosecutions involved trespass, property damage, and true threats placing individuals in reasonable fear of bodily harm. *See* App. 35-38; *United States v. Fullmer*, 584 F.3d 132 (3d Cir. 2009).

Plaintiffs' contention that the prosecution in *Fullmer* "applied the law to causing intangible loss in the form of increased expense and profits" (Pl. Br. 27-28) is incorrect. In fact, the court of appeals opinion in that case (which involved AETA's predecessor statute) makes clear that the conduct that resulted in conviction included threats, intimidation, and property damage. *Fullmer*, 584 F.3d at 139-50, 155-58. And plaintiffs are wrong when they suggest that the government's brief in *Fullmer* argued that the

definition of "economic damages" to include lost profits governs the definition of property loss in the offense section of the statute. Rather, the government merely pointed out that the two terms must be construed together, since the penalty provision stated that any person who, "in the course of a violation of subsection (a), causes economic damage," would be subject to certain penalties. Consol. Br. For Appellee, *United States v. Fullmer*, No. 06-4211, 2008 U.S. 3d Cir. Briefs LEXIS 1334, at *124-*125). Nothing in the government's brief in *Fullmer* purports to define "real or personal property" in a subsequent statute to include lost profits.

Amicus the Association of the Bar of the City of New York contends (Am. Br. 18-20) that *United States v. Buddenberg*, 2010 WL 2735547 (N.D. Cal. July 12, 2010), demonstrates that the individuals have been prosecuted under the AETA for non-violent speech or expressive activity. But the indictment in *Buddenberg* alleged that the defendants had engaged in "threats, trespassing, harassment, and intimidation" – acts that go beyond peaceful protest and that are not protected by the First Amendment. *Id*. at *1. The fact that the indictment in that case was dismissed for lack of

specificity shows only that the government did not provide a sufficient factual basis for the allegations, and not that the government believes that the AETA has been interpreted to encompass protected speech or non-violent protests. Moreover, as we have discussed, to the extent plaintiffs fear wrongful prosecution, that fear "is inadequate to generate a case or controversy the federal courts can hear." *Glenn v. Holder*, 690 F.3d 417, 422 (6th Cir. 2012); *see id*. at 423 ("Plaintiffs cite no authority for the proposition that the possibility of an erroneous conviction makes a criminal statute unconstitutional. Obviously, it does not. Plaintiffs lack standing."); *Laird*, 408 U.S. at 13-14.

Finally, plaintiffs' contention that the FBI "implicitly endorsed" their interpretation of the statute during a previous investigation (Pl. Br. 12, 26) is incorrect. Plaintiffs describe the redacted investigation report (App. 67-68) as "describing illegal entry onto farm, videotaping animals, and taking animals, *each* as violations of AETA" (Pl. Br. 12). But the report does not support that interpretation. Rather, it describes two individuals, both of whom illegally entered a farm, and one of whom took animals from the

farm. App. 67-68. There is nothing to support petitioner's tortured reading of the heavily redacted report that the FBI believed that the act of videotaping alone violates the statute.

6. Because the statute plainly does not prohibit the conduct in which plaintiffs wish to engage, plaintiffs' contention that the district court applied an incorrect standard is largely beside the point. We note, however, that plaintiffs' contention is based upon the assumption that they have posited an "objectively reasonable, albeit disputed, interpretation of the statute" (Pl. Br. 10). As the district court correctly held, however, "[a]lthough Plaintiffs personally fear prosecution under the AETA, they have failed to establish an objectively reasonable chill on their First Amendment rights." Pl. Add. 18. There is nothing novel or incorrect about this holding. As numerous courts have recognized, even a plaintiff raising First Amendment claims must show that his or her conduct is covered by the challenged statute to maintain standing. *See, e.g. Hedges v. Obama*, __ F.3d __, 2013 WL 3717774, *11-*21 (2d Cir. 2013) (holding that plaintiffs who feared detention under the National Defense Authorization Act for

their advocacy and journalistic activities did not have standing because their conduct is not covered by the statute); *Glenn*, 690 F.3d at 421-23 (plaintiffs lack standing to challenge federal hate crimes statute because their intended activity is not prohibited by the statute). The district court did not "fail[] to consider" whether plaintiffs raised a credible threat of injury (Pl. Br. 9); it fully considered the issue and determined that plaintiffs had no reasonable fear of prosecution.

B. Plaintiffs Do Not Allege That They Intend To Engage In Conduct Prohibited By Section 43(a)(2)(B).

Section 43(a)(2)(B) imposes penalties against a person who, for the purpose of interfering with the operations of an animal enterprise, "intentionally places a person in reasonable fear of the death of, or serious bodily injury of that person" or a family member, spouse or intimate partner of that person, "by a course of conduct involving threats, acts of vandalism, property damage, criminal trespass, harassment, or intimidation." 18 U.S.C. § 43(a)(2)(B). None of the plaintiffs here has alleged that he or she wishes to engage in any of the acts that give rise to liability under this provision. Indeed, each of the plaintiffs expressly

disavows any intent to do so, stating that he or she intends only to engage in peaceful protest and picketing. *See* App. 22, 45-46, 50-51, 54-55, 62-63.

Plaintiffs nevertheless contend (Pl. Br. 14-15) that Lauren Gazzola has standing to challenge section 43(a)(2)(B). However, Gazzola nowhere states that she intends to take any action that would place any person in reasonable fear of bodily injury, nor does she state she would like to engage in threats, harassment, intimidation, vandalism, property damage, or criminal trespass. She merely wishes to "organize animal rights campaigns," express "support for those who violate the law," and engage in lawful protests in front of an individual's home. App. 57.

While Gazzola alleges she has refrained from telling others to violate the law due to the statute, she makes clear that her intended conduct would stop short of incitement to immediate lawless activity, and states that she understands that this type of general advocacy is protected by the First Amendment. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) ("The 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.'") (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447, (1969)). But general support for illegal action itself does not place a person in reasonable fear of bodily harm. And even if there were any ambiguity regarding the statute's application to Gazzola's activity, the Act's rules of construction make clear that speech protected by the First Amendment is beyond the Act's reach.

Plaintiffs' attempt to base Gazzola's standing on her prior prosecution under the AETA's predecessor statute (Pl. Br. 15-16) is unavailing. Despite plaintiffs' attempt to characterize her conduct in that case as involving "expressions of support for illegal activity with home protests," in fact her conduct went far beyond the bounds of protected speech, and did not involve merely expressing support for "illegal actions undertaken by others." In affirming her conviction, the court of appeals found that the evidence demonstrated that Gazzola and her co-defendants "coordinated and controlled SHAC's activities, both legal and illegal," engaged in "[d]irect action," "intimidation and harassment," and

"participated in illegal protests, in addition to orchestrating the illegal acts of others." *Fullmer*, 584 F.3d at 155-56. It is therefore not surprising that what plaintiffs' attempt to describe as a "political chant" at one protest (in which Gazzola yelled "what goes around comes around" and was answered by other protestors who stated "burn his house to the ground") was reasonably understood as a threat. *See id*. at 157.[4]

The prior prosecution of Gazzola therefore provides no basis for a reasonable fear that mere expressions of support for the acts of others and peaceful protests at an individual's house will result in prosecution under the AETA.

C. Plaintiffs Lack Standing to Challenge Section 43(a)(2)(C).

Plaintiffs' claim that they have standing to challenge section 43(a)(2)(C) likewise is without merit. Section 43(a)(2)(C) merely adds a conspiracy provision to the two provisions that precede it. That is, section

[4] Plaintiffs also overlook the fact that the Gazzola was videotaped at the same protest shouting into a bullhorn, recounting various acts of vandalism against the target of the protest and saying that the police "can't protect you." *Fullmer*, 584 F.3d at 146.

43(a) imposes penalties against any person who intentionally damages property or threatens serious bodily injury for the purpose of interfering with an animal enterprise to the offense provision, or who "conspires and attempts to do so."

Plaintiffs' claim is based entirely upon the notion that subsection (a)(2)(C) "does not appear to relate back to 43(a)(2)(A) or 43 (a)(2)(B)" (Pl. Br. 16). Plaintiffs therefore posit that the conspiracy provision "appear[s] to stand alone as a basis for criminal liability" (Pl. Br. 48), criminalizing "conspiracy to interfere alone, even without resulting property damage or threat" (Pl. Br. 16).

Plaintiffs' strained interpretation is inconsistent with any reasonable reading of the statute in light of its context and purpose. Congress has often uses the phrase "conspires or attempts to do so" or a nearly identical statement after listing the substantive elements of the crime. *See, e.g.*, 18 U.S.C. §§ 1368, 1389, 1752, 2332b, 2260. Plaintiffs nonetheless attribute the placement of this language in its own subsection as an indication that it does not modify the specific acts prohibited in the statute. That argument,

as one court has noted, is "premised upon a technical, nonsensical reading of the AETA." *U.S. v. Buddenberg*, 2009 WL 3485937 at *12 (N.D. Cal. Oct. 28, 2009).

D. Plaintiffs' Claims Are Not Ripe for Review.

For the same reason plaintiffs' lack standing, their claim is not ripe for judicial review. The ripeness inquiry requires an evaluation of "the fitness of the issue presented and the hardship that withholding immediate judicial consideration will work." *Rhode Island Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 33 (1st Cir. 1999) (quoting *Abbott Labs v. Gardner*, 387 U.S. 136, 148 (1967)). The question of hardship "typically turns on whether the challenged action creates a direct and immediate dilemma for the parties." *Ernst & Young v. Depositors Economic Protection Corp.*, 45 F.3d 530, 535 (1st Cir. 1995).

As with standing, to render a pre-enforcement challenge ripe for review, plaintiffs must show "concrete plans to engage immediately (or nearly so) in an arguably proscribed activity." *Rhode Island Ass'n of Realtors, Inc.*, 199 F.3d at 31. As discussed above, plaintiffs have not alleged an

intention to engage in any activity proscribed by the statute. Accordingly, their claims do not satisfy the requirements of ripeness.

II. PLAINTIFFS' CONSTITUTIONAL CLAIMS ARE WITHOUT MERIT.

Because plaintiffs lack standing, this Court should not reach the merits of their constitutional claims. We note, however, that even a cursory review of plaintiffs' constitutional claims demonstrates that they are without merit.

a. The AETA is not Constitutionally Overbroad.

Overbreadth doctrine is an extreme measure that should not be employed lightly. *See United States v. Williams*, 553 U.S. 285, 293 (2008). Invalidation on overbreadth grounds requires a finding that the law "reaches a substantial amount of constitutionally protected conduct." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982).

Plaintiffs' overbreadth argument is based entirely upon their incorrect interpretation of the AETA as prohibiting peaceful picketing and information dissemination that causes an animal enterprise to lose profits.

See Pl. Br. 37-39. As discussed above, that interpretation is contrary to the language, context, and intent of the statute. Congress made clear that the statute does not prohibit lawful First Amendment activities such as peaceful picketing, lawful demonstrations, and the dissemination of information. Plaintiffs' argument that the statute is overbroad thus is without merit.

Plaintiffs cannot show that the statute reaches a "substantial amount" of protected speech. The Act does not prohibit any protected speech; it prohibits causing property damage and putting individuals in fear of bodily harm. The statute's "plainly legitimate sweep" defeats a claim of overbreadth. *See Hill v. Colorado*, 530 U.S. 703, 732 (2000); *Virginia v. Hicks*, 539 U.S. 113 (2003).

To the extent the statute covers any speech or expressive conduct, it is limited to speech or conduct of a threatening, inciteful or violent nature. But those activities are not protected by the First Amendment, and thus cannot give rise to an overbreadth claim. *See Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) ("physical assault is not by any stretch of the imagination

expressive conduct protected by the First Amendment"); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992) ("[T]hreats of violence are outside the First Amendment").

Moreover, if there were any doubt about the reach of the statute, the Court would be required to construe it to avoid a constitutional violation. "It has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be 'readily susceptible' to a narrowing construction that would make it constitutional, it will be upheld." *Virginia v. American Bookseller's Assn., Inc.*, 484 U.S. 383, 397 (1988); *see Frisby v. Schultz*, 487 U.S. 474, 482-83 (1988). The statute here is "readily susceptible" to a construction in which peaceful picketing, lawful protests, and the dissemination of information are not prohibited by the statute. Indeed, that is the stated intent of Congress as reflected in the rules of construction.

B. The AETA is not Impermissibly Vague.

Plaintiffs' vagueness challenge also is without merit. To succeed on such a challenge, plaintiffs must show that the Act "fail[s] to provide a person of ordinary intelligence fair notice of what is prohibited, or is so

standardless that it authorizes or encourages seriously discriminatory enforcement." *Williams*, 553 U.S. at 304; *see McCullen v. Coakley*, 571 F.3d 167, 183 (1st Cir. 2009). In addition, because the Act survives an overbreadth challenge, plaintiff must show that the Act "is impermissibly vague in all of its applications." *Village of Hoffman*, 455 U.S. at 494-95.

It is not enough that a statute "requires some interpretation." *URI Student Senate v. Town of Narragansett*, 631 F.3d 1, 13-14 (1st Cir. 2011) (internal quotation marks omitted). Nor is it enough to merely identify hypothetical situations that might be close to the line. "Close cases can be imagined under virtually any statute. The problem that poses is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." *Williams*, 553 U.S. at 306.

Thus, the courts must consider "whether a statute is vague as applied to the particular facts at issue." *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2719 (2010) (quoting *Hoffman Estates*, 455 U.S. at 495). "[S]peculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the

vast majority of its intended applications." *Hill*, 530 U.S. at 733 (internal quotation omitted).

Plaintiffs cannot meet this standard because the AETA is not vague as to their desired conduct. As discussed above, actions such as lawfully entering a foie gras farm and creating film documentaries, publicizing the results of an investigation, distributing literature at public events, and peaceful protest activities are not proscribed by the AETA. The Act does not concern protected speech; it proscribes only conduct intended to interfere with an animal enterprise by damaging property or making threats against affiliated individuals.

Plaintiffs' vagueness claim consists of nothing more than an attempt to pull out a few individual words or phrases from the statute and – devoid of context – to find some ambiguity in those words or phrases. However, none of the terms plaintiffs challenge makes it impossible to know what is prohibited.

Plaintiffs' contention that the term "interfere" is impermissibly vague rests upon the incorrect assumption that the term "forms an element of

criminal liability" (Pl. Br. 42). In fact, interference with an animal enterprise is not the action that is prohibited, but is merely the *mens rea* element of the crime. That is, an individual must in connection with "the *purpose* of damaging or interfering with the operations of an animal enterprise," act in connection with that purpose to cause the loss or property or to place a person in fear of death or injury. 18 U.S.C. §§ 43(a). The cases cited by plaintiffs, which involve statutes in which interference itself was the crime, are therefore inapposite. Moreover, numerous courts have found the term "interfering" to be sufficiently clear. *See Buddenberg*, 2009 WL 3485937 at *6 (AETA); *see also Cameron v. Johnson*, 390 U.S. 611, 616 (1968) (statute prohibiting "obstruct[ing] and "interfer[ing]" with ingress or egress to and from a courthouse "clearly and precisely delineates its reach in words of common understanding"); *Unites States v. Bird*, 124 F.3d 667, 683-84 (5th Cir. 1997) (statute prohibiting "injur[ing], intimidat[ing] or interfer[ing]" with a person seeking reproductive health services was not impermissibly vague).

Plaintiffs' vagueness challenge to the phrase "animal enterprise" is puzzling, as that term is clearly defined in the statute. 18 U.S.C. § 43(d)(1). Their complaint that the definition covers a potentially large number of establishments (including the courthouse cafeteria, Pl. Br. 44) does not make the statute any less clear.[5] In fact, none of the plaintiffs has alleged a fear of prosecution from the supposed inability to determine the reach of the term "animal enterprise"; they all profess a desire to take actions (peaceful or otherwise) against entities (such as farms and research facilities) that fall squarely within any common understanding of the term.

Plaintiffs' challenge to the term "course of conduct" fares no better. The statute prohibits intentionally placing a person in fear of death or serious bodily injury by a "course of conduct involving threats, acts of harassment, acts of vandalism, property damage, criminal trespass, harassment, or intimidation." 18 U.S.C. § 43(a)(2)(B). "Course of conduct"

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[5] To the extent plaintiffs suggest that it would be unreasonable for the statute to include restaurants or cafeterias, they overlook the fact that a restaurant could be targeted for serving meat or fois gras or for doing business with farms that are believed to mistreat animals.

is defined as "a pattern of conduct composed of 2 or more acts, evidencing a continuity of purpose." *Id*. § 43(d)(2). The identical definition in the interstate stalking statute has been upheld against a vagueness attack. *See United States v. Shrader*, 675 F.3d 300, 311-12 (4th Cir. 2012), *cert. denied,* 133 S. Ct. 757 (2012).

There is nothing vague about this provision. The Act makes clear that a "course of conduct" must involve "threats, acts of vandalism, property damage, criminal trespass, harassment, or intimidation," with the intended effect of "placing a person in reasonable fear of" death or serious bodily injury. 18 U.S.C. § 43(a)(2)(B). Accordingly, the "2 or more acts" that can make up a "course of conduct" under subsection (B) are the "acts" identified in subsection (B) itself: threats or "acts" of vandalism, property damage, criminal trespass, harassment, or intimidation. And the continuity of "purpose" refers to the purpose identified in the AETA: "the purpose of damaging or interfering with the operations of an animal enterprise." *Id.* § 43(a)(1). And while plaintiffs complain that there is no temporal limitation

on the acts that contribute to a course of conduct, they offer no explanation as to why this makes the statute vague.

Plaintiffs' remaining vagueness challenges are based upon their incorrect interpretation of the statute. As we have discussed (pp. 21-26, *supra*), the statutory language makes clear that the statute proscribes action that damages or causes the loss of tangible property or that uses threats, vandalism, harassment, or intimidation that places a person in reasonable fear of bodily injury, and does not cover peaceful picketing, demonstration, or the dissemination of information. Plaintiffs' contentions that phrases such as "damage," "cause the loss," and "economic damage," are impermissibly vague are based upon their incorrect premise that the statute may prohibit peaceful conduct that causes loss of profits.

And plaintiffs' contention that the "conspiracy" provision of the statute is vague is based upon their reading of that term as unrelated to the other two elements of the offense. As we have discussed (pp. 41-42, *supra*), that interpretation is wrong. Moreover, "conspiracy has been so often

defined by the courts that it has a well-understood meaning . . . ." *Ballard Oil Terminal Corp. v. Mexican Petroleum Corp.*, 28 F.2d 91, 97 (1st Cir. 1928).

The plain text and structure of the AETA give a person of ordinary intelligence fair notice of what behavior is proscribed by the Act. Plaintiffs cannot point to any plausible reading of the Act that would render it vague in all of its applications, as it is plainly legitimate in its sweep.

C. The AETA is Viewpoint and Content Neutral.

Plaintiffs' contention that the AETA is not content or viewpoint neutral is plainly without merit. The statute prohibits particular conduct (intentionally damaging or causing the loss of property) or using threats and intimidation to place someone in reasonable fear of bodily injury, regardless of the content of any speech used or the viewpoint of the individual. None of the statute's provisions turn on content or viewpoint, and the statute itself makes clear that it does not create any new remedies for interference with activities protected by the First Amendment, "regardless of the viewpoint expressed." 18 U.S.C. § 43(e)(2). The Act was passed not to suppress a particular viewpoint, but in response to an

increase in "extreme tactics" taken against animal enterprises, including harassment and intimidation. 152 Cong. Rec. H8591 (daily ed. November 13, 2006) (statement of Rep. Scott).

Each of the theories underlying plaintiffs' challenge is foreclosed by uniform precedent of this and other courts. Plaintiffs posit, for instance, that the Act was passed in response to the actions of a particular group of people with a particular viewpoint. But that is of no moment. This Court and the Supreme Court have rejected the contention that an act lacks content neutrality merely because it was passed in response to the acts of a group of people who happen to share a particular viewpoint. *See, e.g.*, *McCullen*, 571 F.3d at 177; *McGuire v. Reilly*, 260 F.3d 36, 45 (1st Cir. 2001); *Madsen v. Women's Health Center*, 512 U.S. 753, 762-64 (1994).

Nor does the fact that the Act may be enforced against animal rights activists more than other groups make the statute impermissibly viewpoint or content-based. "[A] disparate impact on particular kinds of speech is insufficient, without more, to ground an inference that the disparity results from a content-based preference." *McCullen*, 571 F.3d at 177.

The Act applies to *anyone* – regardless of that person's viewpoint – who damages or causes the loss of real or personal property, or engages in harassment or intimidation that places a person in reasonable fear of bodily harm, for the purpose of interfering with an animal enterprise. It does not take sides in the animal rights debate. Thus, an individual who throws a brick through the window of a farm with the purpose of damaging that farm's operation can be prosecuted regardless of whether the brick was thrown because of a labor disagreement, a personal quarrel with the farm owner, or no other purpose than to cause a disruption.

The numerous decisions rejecting First Amendment challenges to the Freedom of Access to Clinic Entrances Act ("FACE"), along with this Court's decisions rejecting challenges to similar state statutes, foreclose plaintiffs' argument here. Every circuit court to consider FACE's constitutionality held that the text of the statute makes it clear that FACE "seeks to govern all people who obstruct the provision of reproductive health services. And it does so regardless of whether the obstruction is or is not motivated by opposition to abortion." *United States v. Weslin*, 156 F.3d

292, 296 (2d Cir. 1998). And this Court has repeatedly upheld state statutes creating buffer zones around health clinics that perform abortions, holding that these statutes are content and viewpoint neutral, notwithstanding claims that the statutes burdened pro-life speech more than pro-choice speech. *See, e.g. McGuire*, 260 F.3d at 43; *McCullen*, 571 F.3d at 177.

Plaintiffs attempt to distinguish these cases on the ground that, because only animal enterprises and their employees and associates are protected by the AETA, the statute "cannot even *theoretically* punish equally loss or threats that emanate from both sides of the debate" (Pl. Br. 57). Not only does that argument ignore the fact that FACE and the state statutes at issue in *McGuire* and *McCullen* were limited to health care clinics that provide reproductive health services, but plaintiffs are mistaken in asserting that only one side of the debate can run afoul of the AETA. As the statute makes clear, the reason a person intends to interfere with an animal enterprise is irrelevant. Not only can a personal dispute result in a violation, but an individual who damages a restaurant because he or she disagrees with the restaurant decision to discontinue serving fois gras

could be covered by the statute. It is the act of interfering with the organization that is proscribed.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,[6]

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AUGUST 2013

[6] The Department of Justice gratefully acknowledges the assistance of Andrea Matthews, a law student at Harvard Law School, in the preparation of this brief.

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Palatino Linotype, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains **10,059 words**, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2013, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system, and served the following counsel via the appellate CM/ECF system:

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