IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

United States of America	)	
	)	No. 14 CR 390
v.	)	
	)	Hon. Amy J. St. Eve
Kevin Johnson, Tyler Lang	)	

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS INDICTMENT

The Government has opposed Defendants' Motion to Dismiss their indictment (Dkt. No. 63, hereafter "MTD"). *See* Government's Response to Defendants' Motion to Dismiss (Dkt. No. 88, hereafter "Gov't Resp.") In further support of that motion Defendants offer the following reply brief, and respectfully request oral argument.[1]

Defendants make three constitutional challenges to the Animal Enterprise Terrorism Act ("AETA"), 18 U.S.C. § 43 (2014). First, Defendants argue that the AETA is substantially overbroad because it sweeps within its reach a significant amount of protected speech and conduct. The Government responds that the statute should be interpreted to apply only to *conduct* that causes *tangible* loss. This interpretation is unsupported. Second, Defendants argue the statute is unconstitutionally vague, because it allows for unfettered prosecutorial discretion. The Government misunderstands the law of vagueness, and would defend against this claim based on Defendants' failure to identify specific, vague, statutory terms. But a statute that is so broad as to allow for arbitrary and discriminatory enforcement is void for vagueness regardless of any given term. Third, Defendants show the AETA violates substantive due process, both facially and as-applied to Defendants' alleged conduct, as it punishes a nonviolent property

[1] A Table of Contents and Table of Authorities are attached hereto as Exhibits A and B.

crime as an act of terrorism. The Government argues in response that the Act's title has no impact, and it is rational to label nonviolent crimes by animal rights activists "terrorism." The former defies logic and precedent; the latter cannot be squared with the Government's admission that the "Animal Enterprise Terrorism Act" has nothing to do with terrorism.

I. The AETA is Unconstitutionally Overbroad

As Defendants explained in their opening brief, overbreadth analysis begins with the proper interpretation of a statute. *See* MTD at 8, *citing United States v. Stevens*, 559 U.S. 460, 474 (2010). The proper interpretation of a statute, in turn, begins with the plain meaning of its terms. *See* MTD at 9, *citing Meghrig v. KFC Western*, 516 U.S. 479, 485-86 (1996).

The AETA makes it a crime to "intentionally damage[] or cause[] 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). The Government appears to concede that the *plain meaning* of "any real or personal property" includes *intangible* property, as it does not argue otherwise, nor distinguish Defendants' many citations on this issue. *Compare,* MTD at 9-12 with Gov't Resp. at 6-10.[2]

To overcome the statute's plain meaning the Government makes three contextual arguments: first, that the parenthetical examples which follow the phrase "any . . . personal property" and inclusion of the word "used" rule out the provision's application to intangible personal property; second, that the penalty provision's reliance on certain "economic damages" means Congress intended to exclude causing economic damage as a source of liability; and third,

[2] The Government does drop a terse footnote stating that "[t]he offense does not criminalize loss to intangible property as incorrectly stated in defendants' motion." But it provides no support or citation, even to the statute itself, *see* Gov't Resp. at 3 n. 2, and thus it is impossible to know if the Government is claiming to interpret the statute's plain language or something else.

that the statute's rules of construction prevent its application to protected speech or conduct which causes property loss. None of these arguments overcome the plain meaning of the statute.

First, the Government interprets the phrase "any . . . personal property" to mean *tangible* personal property because the examples in the parenthetical that follow – "(including animals or records)" are themselves tangible. But it is a basic tenet of statutory interpretation that a parenthetical beginning with "including" is meant to "expand, not restrict." *Am. Sur. Co. of N.Y. v. Marotta*, 287 U.S. 513, 517 (1933) ("In definitive provisions of statutes and other writings, 'include' is frequently, if not generally, used as a word of extension or enlargement rather than as one of limitation or enumeration.") (citations omitted); *see also P.C. Pfeiffer Co., v. Ford*, 444 U.S. 69, 77 n.7 (1979); *Westfarm Assoc's v. Wash. Suburban Sanitary Comm'n*, 66 F.3d 669, 679 (4th Cir. 1995) (parenthetical beginning with "including" was meant to "emphasize [a] point") (internal quotation marks and alterations omitted). To the extent that "including" ever does more than illustrate or emphasize, it typically expands the meaning of the terms it modifies "beyond the ordinary and commonly accepted meaning of those words." *Pinellas Ice & Cold Storage, Co., v. Comm'r*, 287 U.S. 462, 469-70 (1933).

Congress understands the conventions of statutory interpretation, and thus uses vastly different language in parentheticals when it wishes to limit the effect of potentially far-reaching language. For example, the Immigration and Nationality Act ("INA") defines an aggravated felony as "a crime of violence (as defined in section 16 of title 18, *but not including a purely political offense*) for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(F) (2014) (emphasis added). Similarly, INA § 1101(a)(43)(J), defines an aggravated felony as "an offense described in [18 U.S.C. § 1962] (relating to racketeer influenced corrupt organizations), or an offense described in [18 U.S.C. § 1084] (*if* it is a second or subsequent

offense)." 8 U.S.C. § 1101(a)(43)(J) (2014) (emphasis added). This type of clearly restrictive language is necessary where Congress intends a parenthetical to limit or refine a given provision.

Congress's use of the modifier "any" further supports Defendants' broad reading of the statute. *See Harrison v. PPG Indus.,* 446 U.S. 578, 589 (1980) (concluding "that the phrase, 'any other final action,' in the absence of legislative history to the contrary, must be construed to mean exactly what it says, namely, *any other* final action") (emphasis in original); *see also Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 221 (2008) ("Congress could not have chosen a more all-encompassing phrase than 'any other law enforcement officer'"). And to the extent that the Government's interpretation of the parenthetical constitutes a backwards type of *ejusdem generis*,[3] reliance on that principle is inappropriate when Congress has used expansive language such as "any real or personal property." *See Harrison*, 446 U.S. at 588-89 (finding that principle of *ejusdem generis* is inapplicable to statute that uses word "any" because that word admits of no ambiguity); *accord United States v. Turkette*, 452 U.S. 576, 581 (1981).

The Government adds that the AETA prohibits damaging or causing the loss of any real or personal property "*used by* an animal enterprise." Gov't Resp. at 8. But it cannot be denied that animal enterprises also "use" intangible property, like money. Moreover, the Government's interpretation ignores the rest of the sentence. The provision addresses one who "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) (emphasis added). Neither the parenthetical nor the term "used" appears after the

[3] The canon of *ejusdem generis* "limits general terms [that] follow specific ones to matters similar to those specified." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2171 (2012) (citation omitted). It would turn this tenet on its head to limit the reach of expansive terms when they are *followed by* more specific ones.

second reference to "real or personal property." If these terms limited the definition of the preceding clause, "personal property" would mean something different in the two clauses: illogically, the AETA would protect only tangible property belonging to an animal enterprise, but all property belonging to a person or entity related to an animal enterprise.

The Government's second argument rests on the interaction of the penalty and liability provisions. The Government finds it "significant" that Congress used the term "*economic* damage" in the AETA's penalty provision, but omitted "the modifier 'economic'" in the offense provision. Gov't Resp. at 8. The Government would thus infer that causing "economic" damage cannot give rise to liability. This argument fails at the outset because the structure and language of the two provisions are completely different. Section (a)(2)(A) assigns liability to one who "intentionally damages or causes the loss of any real or personal property. . . ". Under Section (b), the penalty for an AETA violation will turn on the amount of "economic damage" that results. The Government's argument might be persuasive if (a)(2)(A) were instead drafted to punish one who "intentionally causes damage to any real or personal property," but Congress's use of "damage" as a *verb* in the liability provision and its inclusion of the phrase "causes the loss"—which makes textual sense when interpreted to include "caus[ing] the loss" of money—forecloses any apples-to-apples comparison. There is simply no reason to assume that Congress intended its use in Section (b) of the noun phrase "economic damage" to mean anything about the breadth of the *totally different* verb phrase "damages or causes the loss" in Section (a).

Given this, the Government's argument about the definition of "economic damage" is rather beside the point: under Section (b) and (d)(3), certain lost profits and increased costs qualify as "economic damage," others do not – but this says nothing about whether a substantive violation has occurred. Indeed, the interaction of the liability and penalty provision actually

support Defendants' reading of the statute, because (b)(1)(A) describes an AETA *violation* (distinct from an attempt or conspiracy) that "does not instill in another the reasonable fear of serious bodily injury" *and* results in "no economic damage." How could one damage or cause the loss of property but *not* cause any economic damage if damaging or causing the loss of property were not broader than "economic damage" as defined?

The Government's third argument relies on the AETA's rule of construction, which prohibits application of the statute to "any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment." 18 U.S.C. § 43(e)(1). Here the Government argues that "to the extent the statute covers speech or expressive conduct" it should simply be read *not to.* Gov't Resp. at 10.

Defendants explained at length in their initial brief why a general (and confusing) First Amendment exception cannot save an otherwise overbroad statute. *See* MTD at 14-17. The Government's arguments in response all presume a statute that is *otherwise lawful* on its face. *See* Gov't Resp. at 13 (analogizing to *CISPES v. FBI*, 770 F.2d 468 (5th Cir. 1985)). But while a savings clause may operate, as it did in *CISPES*, to validate one of several competing constructions, it cannot change the plain meaning of a statute's substantive provisions. The Government's citation to cases challenging the Freedom of Access to Clinic Entrances Act ("FACE") are similarly unavailing, as FACE, unlike the AETA, proscribes only "force" "threats of force" and "physical obstruction." *See United States v. Bird*, 124 F.3d 667, 683 (5th Cir. 1997); 18 U.S.C. § 248 (a).

If, as Defendants have argued above, the plain meaning of 18 U.S.C. § 43 (a)(2)(A) allows for a prosecution based on speech or protected conduct that causes the loss of intangible property, and the statute's structure and context do not defeat this plain meaning, the savings

clause in turn cannot change that provision's plain meaning. *CISPES,* 770 F.2d at 474 ("Of course, such a provision cannot substantively operate to save an otherwise invalid statute . . .").

Finally, the Government argues that the AETA does not reach "a substantial amount of constitutionally protected activity because the statute itself is not aimed at speech at all" but rather is aimed at "*conduct* that has the purpose of damaging or interfering with a business . . . ". Gov't Resp. at 6 (emphasis in original), *see also, id.* at 6, n.4 ("The prong of the statute at issue here *almost exclusively* applies to conduct") (emphasis added). But the Government's only citation is to the statute itself, which does not include the word "conduct." *Id.* As explained in Defendants' opening brief, the AETA fails to include an *actus reus*, and thus applies to speech *or* conduct undertaken for a specific purpose and causing a certain effect. 18 U.S.C. § 43(a).

The Government insists that words like "interfering" and "damaging" require conduct, but speech too has the power to interfere with or damage a business's operations. *See Waters v. Churchill*, 511 U.S. 661, 674 (1994) (recognizing that speech can disrupt government operations); *Thornhill v. Alabama*, 310 U.S. 88, 104-05 (1940) (recognizing that protected expression may harm business interests); *United Bhd. of Carpenters & Joiners of Am. Local 848 v. NLRB*, 540 F.3d 957, 966 (9th Cir. 2008) (holding unconstitutional a rule designed to restrict speech, but not conduct, that "would interfere with normal business operations").

The Government all but concedes that the plain language of AETA Section (a)(2)(A) allows for prosecution based on causing the loss of intangible property; neither the surrounding terms and provisions, nor the First Amendment exception alters this clear meaning. Given that the AETA prohibits *anything* that causes an animal enterprise to lose profit or expend money, it sweeps within its reach a substantial amount of protected speech and conduct and must be struck down as overbroad. *See* MTD at 12-14.

II. The AETA Is Void for Vagueness

The AETA is also unconstitutionally vague, because it "impermissibly delegates to law enforcement the authority to arrest and prosecute on an 'ad hoc and subjective basis.'" MTD at 17 (quoting *Bell v. Keating*, 697 F.3d 445, 462 (7th Cir. 2012)). The Government disagrees that a law's susceptibility to discriminatory or arbitrary enforcement renders it vague, arguing that Defendants' "fail[ure] to identify even a single word from the statute that they regard as vague" makes it "not really . . . a vagueness argument at all." Gov't Resp. at 14. This is incorrect.

"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." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (emphasis added); *see also United States v. Lim*, 444 F.3d 910, 915 (7th Cir. 2006); *Skilling v. United States*, 561 U.S. 358, 402-403 (2010); *Hegwood v. City of Eau Claire*, 676 F.3d 600, 603 (7th Cir. 2012) (statute is unconstitutionally vague "'if it fails to define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and it fails to establish standards to permit enforcement in a nonarbitrary, nondiscriminatory manner'" (quoting *Fuller ex rel. Fuller v. Decatur Public School Bd. of Educ. Sch. Dist. 61*, 251 F.3d 662, 666 (7th Cir. 2001)).

As explained in Defendants' opening brief, the AETA lacks standards for enforcement because it federalizes almost every theft, libel, vandalism, and other property crime against almost every business in the country, whether the defendant targets the business because of its connection to animals or not. MTD at 18. This incredible latitude is underlined by the statute's lack of an *actus reus*—subsection (a)(1) criminalizes any act taken for a broadly defined purpose ("damaging or interfering with the operations of an animal enterprise") that results in a broadly

defined effect ("intentionally damag[ing] or caus[ing] the loss of any real or personal property" associated with an animal enterprise). 18 U.S.C. § 43(a)(2)(A). The act is left undefined; it can be anything. *See United States v. L. Cohen Grocery*, 255 U.S. 81, 89 (1921) ("the section forbids no specific or definite act. . . . It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against."). The AETA's boundaries are impossible to delineate.

The Government's attempt to fault Defendants for not focusing on individual terms indicates their misunderstanding of the vagueness doctrine. Gov't Resp. at 14, 17. As the Supreme Court has explicitly found, while "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited . . . *the more important aspect of vagueness doctrine* 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974) (emphasis added)). "Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Id.* at 358 (citing *Smith*, 415 U.S. at 575). That was the case in *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972), where the concern was not that any individual term was indefinable, but that the statute provided unbridled discretion.

Along these same lines, the Supreme Court recently ordered briefing on the question of "[w]hether the residual clause in the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B)(ii), is unconstitutionally vague." Order, *Johnson v. United States*, Case No. 13-7120 (Jan. 9, 2015). The Court did not request briefing because the residual clause—defining a

violent felony as one that "involves conduct that presents a serious potential risk of physical injury to another"—has vague terms, but because it "could embrace virtually any offense." *James v. United States*, 550 U.S. 192, 223 (2007) (Scalia, J., dissenting); *see also Sykes v. United States*, 131 S. Ct. 2267, 2287 (2011) (Scalia, J., dissenting) (ACCA's residual clause can apply "enhancement to virtually all predicate offenses . . . [unconstitutionally] permit[ting], indeed invit[ing], arbitrary enforcement").

The Government's attempts to distinguish *Papachristou* and *City of Houston v. Hill*, 482 U.S. 451 (1987) are unconvincing. The statute in *Papachristou* was struck down not because it used archaic terminology, but because it failed to give fair notice of exactly what conduct it forbid, encouraging arbitrary enforcement and placing unfettered discretion in the hands of the police. 405 U.S. at 162. The statute in *Hill* was struck down for the same reason—the *breadth* of the prohibition on "oppos[ing]" and "interrupt[ing]" a police officer meant that the statute "is admittedly violated scores of times daily . . . yet only some individuals—those chosen by the police in their unguided discretion—are arrested." 482 U.S. at 466-67.

The Government does not disagree that the AETA applies to most interstate property crime. Instead, it objects that Defendants discount the importance of the "use of a facility of interstate commerce" component. Gov't Resp. at 17. But all this component requires is that the defendant use one of the banal facilities of interstate commerce that pervade modern life—the internet, a telephone, an automobile—even if that use is entirely intrastate. *See*, e.g., 18 U.S.C. § 1958(b)(2) (defining "facility of interstate . . . commerce" to include "means of transportation

and communication"); *United States v. Richeson*, 338 F.3d 653, 661 (7th Cir. 2003) (even intrastate use of a facility of interstate commerce satisfies commerce clause requirements).[4]

The Government's attempt to limit the vagueness doctrine to statutes that implicate speech rights also fails. Gov't Resp. at 16. The prohibition against vagueness arises out of the Fifth Amendment's Due Process clause, not the First Amendment speech clause. "Unduly vague laws violate due process whether or not speech is regulated." Erwin Chemerinsky, Constitutional Law: Principles and Policies, § 11.2.2 (Vagueness) (Aspen Law & Business 4th ed. 2011). *Papachristou*, to give just one example, did not involve implications on speech. 405 U.S. at 162.

Finally, the Government relies on documents relevant to the 2008 AETA prosecution of Richard Sills in an attempt to dispute Defendants' argument that the AETA is not only *susceptible* to discriminatory enforcement, but has actually been used in a discriminatory manner. Gov't Resp. at 18 and Ex. C. But the Government's assertion (unsupported by their exhibit) that Sills "originally claimed to have acted on behalf of an animal rights organization . . . [but] in fact was a university employee and had no known ties to the animal rights community" (Gov't Resp. at 18), says nothing as to Sills' motivation or individual status as an activist. Indeed, the sentencing memo attached at Exhibit C indicates that Sills' "bomb threats and hoax IED . . . had as a goal to raise awareness for animals." Gov't Resp. at Ex. C, p. 8.

Thus, even if the Government were right that Sills claimed to be an activist but was not, it was still an animal-rights related prosecution. The AETA is not used when, for instance, four men break into an animal enterprise and bludgeon 900 caged animals to death. MTD at 19. But

[4] *See also, e.g.*, *United States v. Nowak*, 370 Fed. App'x 39, 44-45 (11th Cir. 2010) (intrastate calls made within an interstate telephone system may be regulated by Congress because the telephone system is a facility of interstate commerce); *United States v. Means*, 297 Fed. App'x 755, 759 (10th Cir. 2008); *United States v. Nader*, 542 F.3d 713, 722 (9th Cir. 2008); *United States v. Perez*, 414 F.3d 302, 304-05 (2d Cir. 2005).

when animal rights activists are alleged to have made threats or released animals from cages, the FBI, Joint Terrorism Task Forces, and federal prosecutors zealously enforce the AETA. More than "authoriz[ing] and even encourag[ing] arbitrary and discriminatory enforcement," *Morales*, 527 U.S. at 56—this is arbitrary and discriminatory enforcement in practice.

III. The AETA Violates Substantive Due Process

Finally, the AETA also violates substantive due process (both facially and as-applied to Defendants) because it punishes as an act of terrorism nonviolent property crimes. The Government defends against this claim by arguing, first, that Defendants have no liberty interest at stake because the act's title means nothing and has no repercussions, and, second, that it is rational to punish nonviolent property crimes by animal rights activists as acts of terrorism because some animal rights activists commit violent crimes. Both arguments fail.

First, the Government's claim that a conviction for animal enterprise *terrorism* has no impact distinct from, say, a conviction for "destruction of animal enterprise property" is easily overcome. Even if the Government "will not refer to defendants as terrorists at trial or any other context," (*see* Gov't Resp. at 19), this will not change the reality that, if convicted, Defendants' conviction will be for "animal enterprise terrorism." Defendants may have to disclose the nature of their conviction to potential employers, academic institutions, friends and acquaintances, and the press will surely report it as such whether or not Defendants themselves chose to draw attention to the label.[5]

[5] *See, e.g.,* Dallas Weekly, "*Activist Who Refused Grand Jury Testimony Now Charged with Conspiracy,*" Nov. 19, 2009, http://www.dallasweekly.com/your_news/community/image_ce3651f5-e1c9-5e4d-bb18-b72707507c3f.html (reporting Scott Demuth charged with "an act of 'animal enterprise terrorism'" related to university vandalism); Eric S. Peterson, *"FBI Keeps Activists' Items,"* Salt Lake City Weekly, Oct. 6, 2011, http://www.cityweekly.net/utah/fbi-keeps-activists-items/Content?oid=2158219 (referencing Demuth's "animal enterprise terrorism" conspiracy conviction); Jesse Fruhwirth, "*Animal Rights*

Indeed, the Government's self-serving promise in this regard parts from its prior practice. An FBI press release about the first AETA indictment repeatedly credited the arrests to the Joint Terrorism Task Force, made several references to the "Animal Enterprise Terrorism Act," and included a special agent's quote that "it is inexcusable and cowardly for these people to resort to *terrorizing* the families of those with whom they don't agree." FBI San Francisco, *"Four Extremists Arrested for Threats and Violence Against UC Researchers,"* Feb. 20, 2009, http://www.fbi.gov/sanfrancisco/press-releases/2009/sf022009.htm. Similarly, the *United States v. Sills* sentencing memo attached to the Government's Response makes repeated references to that AETA defendant's "terroriz[ing]" of the UCSD campus. Gov't Resp. at Ex. C, p. 6.

Besides social stigma, being convicted of a terrorism-related offense has serious implications for prison conditions. *See* MTD at 21. The Government counters with unsworn testimony from a "senior analyst with the Counterterrorism Unit [CTU] of the Bureau of Prisons" that a terrorism conviction won't "*on its own*" affect prison designation because "every aspect of the prisoner's background" will be considered. Gov't Resp. at 20. But according to the *sworn* testimony of his boss, the chief of the CTU, a terrorism "related" conviction renders an offender eligible for Communication Management Unit placement.[6] *See Dec'l of Leslie Smith,* filed in *Aref v. Holder*, No. 10-cv-0539 (D.D.C. 2010) at 2, attached as Exhibit C, hereto.

The AETA's title matters. Thus Defendants have a liberty interest, albeit a non-fundamental one, in avoiding such a misleading and prejudicial label. Non-fundamental liberties

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Activist Pays the Price of Grand Jury Resistance," Salt Lake City Weekly, Oct. 20, 2010, http://www.cityweekly.net/utah/animal-rights-activist-pays-the-price-of-grand-jury-resistance/Content?oid=2149990 (reporting on William James Viehl and Alex Jason Hall's indictment for "animal enterprise terrorism").

[6] Other than the Federal Administrative Maximum Prison (ADX), Communication Management Units "are the most restrictive facilities in the federal system." *Rezaq v. Nalley*, 677 F.3d 1001, 1009 (10th Cir. 2012).

retain protection against arbitrary infringements. *See Swank v. Smart*, 898 F.2d 1247, 1251-52 (7th Cir. 1990) (rational basis review for non-fundamental right of off-duty police officer to offer a motorcycle ride to a young woman). This is because substantive due process "protect[s] a broad sphere of 'harmless liberties' (as well as fundamental rights) . . . ranging from idle chit-chat . . . to wearing a mustache." *Wroblewski v. Washburn*, 965 F.2d 452, 457 (7th Cir. 1992) (internal citations omitted). *See also Hayden v. Greensburg Cmty. Sch. Corp*, 743 F.3d 569, 575-76 (7th Cir. 2014) (rational basis review for non-fundamental right to wear one's hair as one wants), *Greater Chi. Combine & Ctr. v. City of Chicago*, 431 F.3d 1065, 1071-72 (7th Cir. 2005) (rational basis review for non-fundamental right to raise homing pigeons), *Doe v. City of Lafayette*, 377 F.3d 757, 768-773 (7th Cir. 2004) (rational basis review for non-fundamental right to enter public parks to wander and loiter innocently).

The Government argues that it is rational to "criminaliz[e] acts committed against animal enterprises as acts of terror" because of the "increase in number and severity of criminal acts and intimidation against those engaged in animal enterprises" and because some "examples" of such acts "would rightly be defined as acts of terror." Gov't Resp. at 22, 23 (citing 152 Cong. Rec. H8591 (daily ed. Nov. 13, 2006) (Statement of Rep. Sensenbrenner). But labeling a broad swath of criminal activity as terrorism must at least require that *most* of the crimes arguably fit the definition. *Cf, People v. Knox*, 903 N.E.2d 1149, 1154 (N.Y. 2009) (holding New York's sex offender registration act survives rational basis review despite its requirement that all kidnappers register as sex offenders, because the requirement could rationally have been based on the legislature's conclusion that "in the large majority of cases where people kidnap or unlawfully imprison other people's children, the children either are sexually assaulted or are in danger of

sexual assault.").[7] Here, the Government does not (and cannot) claim that even a simple majority of criminal acts against animal enterprises could accurately be described as acts of terror. And the Government's own exhibit indicates that the FBI urged passage of the AETA *not* because of an increase in violent or dangerous acts by animal rights extremists, as "it is a relatively simple matter to prosecute extremists who are identified as responsible for committing arson or utilizing explosive devices, using existing federal statutes" but rather because "it is often difficult, if not impossible to address a campaign of *low-level* (but nevertheless organized and multi-national) criminal activity . . . in federal court." Gov't Resp. Ex. D, p. 4 (emphasis added).

Indeed, the Government's first argument is fatal to their second: they volunteer that the AETA's "text contains no reference to the word 'terrorism'[,] . . . the government need not prove that the defendants acted as terrorists in order to sustain a conviction[,] . . . the government will not refer to defendants as terrorists at trial or in any other context" and the FBI is not permitted to designate those convicted of Animal Enterprise Terrorism as domestic terrorists for intelligence purposes. Gov't Resp. at 19, 21. In other words, it is the Government's position (and Defendants agree) that the AETA actually has *nothing to do* with terrorism. So how can it possibly be rational to call the offense terrorism?

Conclusion

For the foregoing reasons, and those stated in Defendants' Motion to Dismiss, the Court must dismiss the indictment against Defendants Johnson and Lang on the ground that the AETA is unconstitutional on its face and cannot be applied to Defendants' alleged conduct consistent with due process of law.

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

Date: January 16, 2015

Respectfully submitted,

s/*Rachel Meeropol*

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CERTIFICATE OF SERVICE

Rachel Meeropol, attorney for Defendant Kevin Johnson, hereby certifies that **Kevin Johnson and Tyler Lang's Reply in Support of their Motion to Dismiss Indictment** was served on all parties on January 16, 2015, in accordance with Fed.R.Crim.P. 49, Fed.R.Civ.P. 5, LR 5.5, and the General Order on Electronic Case Filing (ECF) pursuant to the district court's system as to ECF filers.

s/ Rachel Meeropol

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EXHIBIT A

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EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Yassin Muhiddin Aref, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 10-0539 (RMU)
	)	
Eric Holder, et al.,	)	
	)	
Defendants.	)	

DECLARATION OF LESLIE SMITH

I, Leslie Smith, do hereby declare as follows:

1. I am currently the Chief of the Counter Terrorism Unit ("CTU") for the Federal Bureau of Prisons ("BOP"), Washington, D.C. I have held this position since October 2006. During my tenure with the BOP, I have held positions of increasing responsibility. I started my career as a Correctional Officer. I was then promoted to Senior Officer Specialist and then Lieutenant. I have also been a Special Investigative Agent at the Administrative Maximum Penitentiary ("ADX") in Florence, Colorado, and an Intelligence Officer for Counter Terrorism assigned to the National Joint Terrorism Task Force ("NJTTF"). I have been employed with the BOP since December 3, 1989.
2. As the Chief of the CTU, I supervise CTU staff responsible for reviewing information relating to the recommendation of placement, or "designation," of inmates to one of two Communications Management Units ("CMU"). My responsibilities include analyzing domestic and international terrorist-related intelligence and information, producing and disseminating intelligence products, and developing and providing relevant counter terrorism training.

3. The statements in this declaration are based upon my personal knowledge and experience gained in the course of my employment with the BOP and in the course of my official duties as Chief of the CTU.

4. The CMU is a self-contained general population housing unit where inmates reside, eat, and participate in all educational, recreational, religious, unit management, and work programming within the unit itself. The purpose of the CMU is to house inmates who, due to their current offense of conviction, offense conduct, or other verified information, require increased monitoring of communication between the inmates and persons in the community in order to protect the safety, security, and orderly operation of Bureau facilities and to protect the public. Inmates may be designated to the CMU if they meet one or more of the following criteria:

    (i) The inmate's current offense(s) of conviction, or offense conduct, included association, communication, or involvement, related to international or domestic terrorism;

    (ii) The inmate's current offense(s) of conviction, offense conduct, or activity while incarcerated, indicates a propensity to encourage, coordinate, facilitate, or otherwise act in furtherance of, illegal activity through communication with persons in the community;

    (iii) The inmate has attempted, or indicates a propensity, to contact victims of the inmate's current offense(s) of conviction;

    (iv) The inmate committed prohibited activity related to misuse/abuse of approved communication methods while incarcerated; or

(v) There is any other evidence of a potential threat to the safe, secure, and orderly operation of prison facilities, or protection of the public, as a result of the inmate's communication with persons in the community.

5. Initial consideration of inmates for CMU designation begins when the BOP becomes aware of information relevant to the criteria set forth in Paragraph 4. In order to determine whether CMU designation may be appropriate in the case of an individual inmate, the CTU may review the following types of information:

(a) Pre-sentence Investigation Reports (PSR), which contain information about an inmate's conviction and other information relevant to an inmate's sentencing;

(b) Judgments in a Criminal Case (J&C);

(c) Statements of Reasons (SOR);

(d) Discipline Hearing Officer reports relevant to the referral, such as any communication-related misconduct;

(e) Memoranda, correspondence and other information from courts, United States Attorneys' Offices, law enforcement officials and government agencies relating to the referral, including law enforcement sensitive or classified information; and

(g) any other information or intelligence relevant to the referral.

6. In cases where the CTU decides to recommend in favor of transferring an inmate to a CMU, the CTU prepares a designation memorandum ("CTU Designation Memorandum") for the review of the North Central Regional Director, who is the BOP official responsible for deciding whether CMU placement is appropriate based on the criteria set forth in Paragraph 4. See BOP CMU 5023-5025 (attached as sealed exhibit to Declaration of Alexis Agathocleous (ECF No. 65-3)). The CTU Designation

Memorandum provides relevant information about the inmate and includes the rationale for the CTU's recommendation. For inmates who are currently in a CMU, BOP conducts periodic program reviews of the inmates to determine whether they should remain in the CMU.[1] As part of this periodic review process, the CTU may also provide Designation Memoranda to the North Central Regional Director, recommending in favor of or against the continued designation of the inmate to the CMU.

7. After the CTU Designation Memorandum is completed, it is forwarded to the North Central Regional Office ("NCRO"), where it is reviewed by the Regional Director and his staff. Initially, the Correctional Programs Administrator, or his designee, at the NCRO generates a summary form ("NCRO Referral Form") based on the information provided in the CTU Designation Memorandum. See e.g., BOP CMU 5005-5006 and BOP CMU 5026-2059 (attached as sealed exhibit to Declaration of Alexis Agathocleous (ECF No. 65-3)). The NCRO Referral Form is then reviewed by the following personnel on the Regional Director's staff: the Psychology Services Administrator,[2] the Correctional Programs Administrator,[3] the Correctional Services Administrator,[4] the

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[1] As of May 16, 2012, 162 BOP inmates had been designated to a CMU. Of these inmates, 75 had been released from the CMU. See infra ¶ 11.

[2] The Psychology Services Administrator was not always part of the routing process. Sometime between August and October 2008, Psychology became part of the process.

[3] Correctional Programs is responsible for planning, documenting, monitoring, and providing delivery of services to inmates. Correctional Programs develops activities and programs designed to appropriately classify inmates, eliminate inmate idleness, and develop the skills necessary to facilitate the successful reintegration of inmates into their communities upon release. Programs include psychology and religious services, drug abuse treatment, programs for special needs offenders and females, and case management.

[4] Correctional Services ensures adherence to policy by providing training and technical guidance

Executive Assistant to the Regional Director, and the Deputy Regional Director. Each of these individuals includes his or her recommendation in favor of or against designating the inmate to a CMU and the reasons supporting the recommendation.

8. The next step in the process is for the NCRO Referral Form to be sent to the Regional Director. After reviewing the NCRO Referral Form, which by this point includes the written comments and recommendations of the Regional Director's staff as well as the information and recommendation provided by the CTU, the Regional Director decides whether CMU designation is warranted based on the criteria set forth in Paragraph 4. The Regional Director's decision in favor of or against a CMU designation and the reasons supporting the decision are then included in the NCRO Referral Form.

9. If an inmate is transferred to a CMU, the inmate is provided with a Notice to Inmate of Transfer to a Communications Management Unit (BP-A0944) ("Notice of Transfer").[5] The Notice of Transfer, which is completed by the CTU, informs the inmate of his designation to the CMU, explains the purposes of the CMU, includes the specific reasons for the inmate's designation, and informs the inmate of his or her right to challenge the designation through the Administrative Remedy process. See Ex. E to Compl. (ECF No. 5-2).

10. I understand that Plaintiffs have filed a Motion to Compel, which appears to seek the production of NCRO Referral Forms and Notices of Transfer (collectively, "CMU Referral Documents") for all former and current CMU inmates. Below, I explain that the

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to staff and also provides oversight for security programs.

[5] To the extent Plaintiffs are seeking documents regarding non-party CMU inmates in addition to the NCRO Referral Forms and Notices of Transfer, Defendants reserve the right to offer a supplemental declaration addressing any harms and burdens of disclosing such documents.

CMU Referral Documents of former and current CMU inmates contain sensitive information the disclosure of which threatens, among other things, the safety of inmates and BOP staff, the security of BOP's institutions, ongoing law enforcement investigations, and BOP's ability to receive information and candid input from other governmental agencies regarding the appropriateness of a CMU designation. I further explain that it is not possible to adequately guard against the release of identifying information in these documents by merely, as Plaintiffs propose, redacting the names and register numbers of inmates. This is because the CMU Referral Documents contain information that is highly specific to individual inmates, permitting someone with basic knowledge about the inmate to likely identify the inmate based on non-redacted portions of the documents that might be released. Finally, I explain that if the BOP were ordered to provide the CMU Referral Documents for all former and current CMU inmates, BOP would need to conduct a time-consuming review of the documents in order to redact any privileged information. This will require extensive consultations with numerous other government agencies that have provided sensitive law enforcement information to BOP. Based on BOP's experience in this case reviewing and consulting with FBI regarding the CMU Referral Documents for Aref, Jayyousi and McGowan, this process would likely take months to complete.

11. There are 162 former or current BOP inmates who are currently or have been housed in a CMU. The CMU Referral Documents for these inmates contain sensitive information that will require a lengthy privilege review. Specifically, the CMU Referral Documents contain the following types of information described below.

12. The NCRO Referral Forms and the Notices of Transfer for current and former CMU inmates contain information about the inmates' convictions that may place them in jeopardy. For example, the CMU Referral Documents include information that certain inmates have been convicted of sex offenses, including crimes against children. Unless all identifying information in these documents is redacted, the recipient of the NCRO Referral Forms and Notices of Transfer could potentially identify the inmate whose convictions are detailed in these documents. This could create a dangerous security situation in prison because of the possibility that other inmates might seek to harass, extort, or physical assault the inmate whose information was disclosed.

13. The NCRO Referral Forms and Notices of Transfer for current and former CMU inmates routinely contain information derived from PSRs, which contain information about the inmates' financial resources, community affiliations, and other personal information about inmates. The PSR-derived information in the NCRO Referral Forms and Notices of Transfer for the current and former CMU inmates includes, among other things, detailed statements about the inmates' offense conduct and reveals that certain inmates are gang members. In the past, BOP has documented situations where inmates have been pressured to provide their PSRs to other inmates. Inmates who refuse to provide PSRs may be threatened, assaulted, and/or may seek protective custody. Conversely, inmates who agree to provide PSRs that reveal information about the inmate that is unpopular or offensive to other inmates — for example, that the inmate is a sex offender — may be threatened, harassed or assaulted by other inmates. The purpose of Program Statement 1351.05, Release of Information, at 15, which prohibits inmates from "obtaining or possessing photocopies of their PSRs, SORs, or other equivalent non-U.S. Code

sentencing documents (e.g., D.C., state, foreign, military, etc.)" is to prevent this situation from occurring. Therefore, given the sensitive nature of the PSR-derived information in the NCRO Referral Forms and Notices of Transfer, it would be necessary to redact this information.

14. The NCRO Referral Forms for current and former CMU inmates contain information about law enforcement investigations. Release of information about ongoing investigations could result in substantial harm to these investigations, while release of information about closed investigations could, among other consequences, reveal investigative methods and means and potentially compromise the use of these means and methods in further cases.

15. Even if BOP redacted information about law enforcement investigations, producing the NCRO Referral Forms for all former and current CMU inmates might allow the recipient of the documents to infer which inmates were the subjects of, or connected to, law enforcement investigations based on which documents contained redactions and which did not.

16. The NCRO Referral Forms for current and former CMU inmates contain sensitive information received from other government agencies, including law enforcement agencies. This includes information, for example, about an inmate's connection to law enforcement investigations. The release of information provided by other governmental entities could adversely impact BOP's ability to obtain such information in the future — with the predictable result that it will become harder for BOP to make informed designation determinations. If BOP cannot adequately protect another agency's

information from disclosure to third parties, these agencies will become reluctant to fully and timely share information relevant to designation determinations.

17. An order requiring BOP to produce the CMU Referral Documents for all current and former CMU inmates will require a careful and lengthy privilege review given the sensitive nature of the information contained in these documents. As explained above, because these documents include information that, among other concerns, may put the lives of inmates at risk, compromise the security of BOP institutions, and interfere with law enforcement investigations, it is extremely important that such sensitive information not be inadvertently disclosed. In addition, as made clear above, it will also be necessary to engage in extensive consultations with numerous other government agencies that have provided sensitive law enforcement information as well as information protected by the deliberative process privilege to BOP. As one example, if a document contains information about a law enforcement investigation conducted by another agency, BOP would likely need to consult with the agency to determine whether the information can be released without causing harm to important law enforcement interests. In this case, the consultations between BOP and FBI regarding the information in the CMU Referral Documents for Aref, Jayyousi and McGowan took well over a month. Therefore, if BOP were required to produce the CMU Referral Documents for the 162 former and current CMU inmates, it would take far longer to complete the necessary consultations since multiple government agencies who have provided information to BOP would need to be contacted. For all these reasons, completing the privileged review for the CMU Referral Documents would likely take many months, and put a severe strain on BOP resources. Furthermore, given the fact that much of the information in the CMU Referral

Documents is highly sensitive and privileged, Plaintiffs would end up receiving, at best, extensively redacted documents.

18. When an inmate is released from BOP custody, the inmate's Central File is placed in the National Archives. As a result, to obtain signed copies of the inmate's Notice of Transfer to CMU, which is maintained in the inmate's Central File, it will be necessary to request the inmate's Central File from the National Archives. To obtain signed copies of Notices of Transfer for current BOP inmates, it will be necessary to retrieve the inmate's Central File from the institution where the inmate is currently housed. As of May 16, 2012, former CMU inmates were housed in approximately nine different institutions.

19. I understand that Plaintiffs have stated that they do not intend to seek the release of Central Inmate Monitoring ("CIM") information. By way of background, there are inmates who, due to inmate safety and institutional security concerns, are separated from other inmates. For instance, BOP will avoid placing two inmates together where one of the inmates served as a government informant against the other inmate. BOP keeps track of an inmate's so-called "separatees" —the individuals the inmate is to be separated from — using the CIM system. While inmates are notified of their classification as a CIM's case and may submit objections to their classification, as well as appeal their classification through the Administrative Remedy Process, they are not provided the details of their CIM assignment, including the identity of their separatees.[6] Among other concerns, providing this information might lead to reprisals and attacks against the separatees.

[6] An inmate's status as a CIM's case is not a basis for CMU designation.

20. I have specifically reviewed BOP's redactions of information in BOP CMU 3791-92, BOP CMU 5019 and BOP CMU 5026 and confirm that the information redacted is entirely CIMs-related information.

In accordance with 28 U.S.C. § 1746, I hereby declare under penalty of perjury the foregoing is true and correct.

Executed this 22 day of June 2012.

Leslie Smith
Chief, Counter Terrorism Unit