13-1490

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 HOLDER, in his official capacity
as Attorney General of the United States,
Defendant-Appellee.

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

Brief of Amici Curiae American Civil Liberties Union of Massachusetts, American Civil Liberties Union, and National Lawyers Guild, Supporting Appellants and Reversal

(filed with consent of all parties)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 26.1, each of the *amici curiae* certifies that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

ADDITIONAL AUTHORITIES

INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Massachusetts is the Massachusetts affiliate of the ACLU. Since their founding in 1920, these organizations have frequently appeared before this Court and others, both as direct counsel and as *amici curiae*, including in numerous cases involving the First and Fifth Amendments. See, *e.g.*, *Glik* v. *Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *Barr* v. *Galvin*, 626 F.3d 99 (1st Cir. 2010).

The National Lawyers Guild, Inc. is a non-profit corporation formed in 1937 as the nation's first racially integrated voluntary bar association, with a mandate to advocate for fundamental principles of human and civil rights including the protection of rights guaranteed by the United States Constitution. Since then the Guild has been at the forefront of efforts to develop and ensure respect for the rule of law and basic legal principles.

The Guild has championed the First Amendment right to engage in unpopular speech for over seven decades. The Guild has a long history of defending individuals accused by the government of espousing dangerous ideas, including in hearings conducted by the House Committee on Un-American Activities and other examples of governmental overreaching that are now popularly discredited. See, *e.g.*, *Kinoy* v. *District of Columbia*, 400 F.2d 761 (D.C. Cir. 1968). Since then, it has continued to represent thousands of Americans critical of government policies, from antiwar activists during the Vietnam era to current day anti-globalization, peace, environmental, and animal rights activists.

The *amici* file this brief with the consent of all parties.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

The Animal Enterprise Terrorism Act is a broad criminal statute that has been applied, discriminatorily, only to a narrow group of people. In theory, the AETA reaches almost any property crime

[1] Under Federal Rule of Appellate Procedure 29(c)(5), counsel for the *amici* state that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the *amici*, its members, or its counsel made a monetary contribution for its preparation or submission.

committed against a business that uses or sells animals or animal products, as well as many crimes against people connected with those businesses. In practice, however, the AETA has been enforced *only* against animal rights activists. The AETA's susceptibility to this discriminatory enforcement renders it impermissibly vague, in violation of the Fifth Amendment's due process guarantee.

The district court seemed to acknowledge the AETA's breadth, but it dismissed the plaintiffs' pre-enforcement suit on standing grounds. Regarding the AETA's scope, the district court recognized that the AETA can be read to prohibit routine property and violent crimes against "animal enterprises." Plaintiffs' Appellate Addendum at 16 ("Pl. Add."). Because the AETA defines "animal enterprise" to include businesses that sell animal products—such as food or shoes—its protection extends from zoos to restaurants to convenience and department stores. Yet the government *conceded* below, despite the AETA's breadth, it had been enforced *only* against animal rights activists. See 3/9/12 U.S. Mem. at 29.

Nevertheless, the district court ruled that the plaintiffs—themselves animal rights activists—lack Article III standing to

challenge to the AETA. That ruling is incorrect. The plaintiffs do have standing to bring this pre-enforcement challenge, and the suit should prevail because the AETA is impermissibly vague.

With respect to standing, the district court overlooked that plaintiffs generally face only an "extremely low" bar to establish standing to bring a pre-enforcement challenge to a law implicating First Amendment freedoms. *Mangual* v. *Rotger-Sabat*, 317 F.3d 45, 56-57 (1st Cir. 2003). Although the district court concluded that the plaintiffs' intended activism does not violate the AETA, it reached that conclusion only after adopting a narrowing interpretation of the AETA's scope.

That is a far more stringent standing inquiry than the law permits, and it is particularly unfair in the context of a vagueness challenge. The Supreme Court has held that plaintiffs cannot bring a facial vagueness challenge if their intended conduct would clearly *violate* the relevant statute. *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2719 (2010). It follows that such a valid challenge will have to come from plaintiffs whose intended conduct probably would *not violate* the statute. Thus, if upheld, the district court's approach would stymie legitimate challenges to unconstitutionally vague laws.

The AETA is such a law. Under the void-for-vagueness doctrine, a penal statute violates due process unless it "define[s] the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." *Skilling* v. *United States*, 130 S. Ct. 2896, 2927-28 (2010). The AETA is vague in both respects.

First and foremost, the AETA is susceptible to arbitrary and discriminatory enforcement. As shown below, the AETA could be applied to literally thousands of crimes—such as trespass, vandalism, theft, and assault—against businesses and people. That breadth permits law enforcement officers to pick and choose which conduct and crimes to prosecute under the AETA. And they have indeed chosen: the AETA has been applied only against animal rights activists. Second, and relatedly, the AETA does not enumerate what conduct it prohibits. Rather, it omits an *actus reus* provision and offers, in its stead, a vague "rule of construction" that seems to presume that ordinary Americans are First Amendment scholars.

The AETA's fatal Fifth Amendment flaw threatens expression protected by the First Amendment. Strident and even coercive speech, including speech that harms businesses, is a protected form of expression with a storied history. It has been used, for example, by civil rights protestors, organized labor, and anti-apartheid advocates. With each additional day of discriminatory enforcement, the AETA is an affront to that history. Accordingly, this Court should reverse the decision below and hold that the AETA is void for vagueness.

BACKGROUND

I. The AETA

The Animal Enterprise Terrorism Act of 2006 replaced the Animal Enterprise Protection Act of 1992 (AEPA). The AEPA had made it a crime to "intentionally damage[] or cause[] the loss of" property belonging to an "animal enterprise," if the defendant had "the purpose of causing physical disruption to the functioning of an animal enterprise." 18 U.S.C. § 43(a) (2002). Under the AEPA, "animal enterprises" included any business where animals are on display—such as a zoo or rodeo—and any "commercial or academic enterprise that

uses animals for food or fiber production, agriculture, research, or testing." *Id.*

The AETA reaches substantially more conduct. Whereas the AEPA required a showing that the defendant intentionally damaged or caused the loss of "any property . . . used by the animal enterprise," AETA liability arises from any one of three showings: (1) intentional damage to or loss of "any real or personal property . . . used by an animal enterprise"; (2) intentional damage to or loss of "any real or personal property of a person or entity" associated with an animal enterprise; or (3) intentional placement of someone in fear of death or serious injury through a specified "course of conduct." 18 U.S.C. § 43(a)(2) (2006). Similarly, whereas the AEPA was violated only if the defendant's purpose was to cause "physical disruption," the AETA is violated if the defendant's purpose was to "damag[e] or interfer[e] with the operations of an animal enterprise." *Id.* § 43(a)(1). These changes implicate First Amendment issues because speech and expressive conduct, though unlikely to cause "physical disruption" within the meaning of the AEPA, can arguably "damag[e] or interfer[e]" with a business's operations. See *NAACP* v. *Claiborne Hardware*, 458 U.S. 886

(1982) (explaining that even speech "intended to exercise a coercive impact" is not outside "the reach of the First Amendment").

The AETA does not purport to define a particular category of conduct constituting animal enterprise terrorism. Instead, it defines the relevant "offense" as follows:

> Offense.— Whoever travels in interstate or foreign commerce, or uses or causes to be used the mail or any facility of interstate or foreign commerce—
>
> > (1) for the purpose of damaging or interfering with the operations of an animal enterprise; and
> >
> > (2) in connection with such purpose—
> >
> > > (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 [or an immediate 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; or
> > >
> > > (C) conspires or attempts to do so;
>
> shall be punished as provided for in subsection (b).

18 U.S.C. § 43(a).

The AETA also drastically expanded the definition of an "animal enterprise." Under the AEPA, "animal enterprises" actually used live animals. Under the AETA, however, the term "animal enterprise" includes "a commercial or academic enterprise that uses *or sells* animals *or animal products*" for almost any purpose, including "profit." 18 U.S.C. § 43(d)(1) (2006) (emphasis added).

Seeking to provide a boundary for this newly-expanded law, Congress gave the AETA a First Amendment "rule of construction." Under that rule, the AETA "shall not be construed . . . to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution." 18 U.S.C. § 43(e)(1) (2006).

II. District Court Proceedings

The court below granted the government's motion to dismiss, on standing grounds, the plaintiffs' pre-enforcement challenge to the AETA. As a consequence, the court did not reach the merits of the plaintiffs' constitutional claims. The plaintiffs had claimed that the AETA is overly broad and discriminates on the basis of content and

viewpoint, in violation of the First Amendment, and is impermissibly vague, in violation of the Fifth Amendment.

The district court first acknowledged that "the AETA criminalizes: 1) intentionally damaging or causing the loss of real or personal property; 2) intentionally placing a person in reasonable fear of death or serious bodily injury; and 3) conspiring or attempting to commit either of these two acts." Pl. Add. at 16. The court gave examples of everyday crimes—such as "harassment," "civil disobedience," "true threats," "trespass[,]" and "vandali[sm]"—that violate the AETA. *Id.*

Nevertheless, the court ruled that the plaintiffs lacked standing because they could not establish "an injury-in-fact," such as "'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the] statute,'" or a chilling effect on their speech caused by the AETA. Pl. Add. at 13 (quoting *Mangual*, 317 F.3d at 56-57). The court reasoned that the plaintiffs' intended conduct—peaceful advocacy—was not "prohibited by the AETA." *Id.*

That conclusion, however, hinged on the district court's particular interpretation of the AETA. For example, the court ruled that advocacy

cannot cause the loss of "personal property" under the AETA because that term cannot include "an intangible such as lost profits." *Id.* at 17. The court also ruled that the plaintiffs' advocacy would be protected by the AETA's First Amendment rule of construction. *Id.*

ARGUMENT

The district court's dismissal of this case on standing grounds overlooked two important issues. First, in a pre-enforcement vagueness challenge to a statute implicating First Amendment freedoms, standing is a low hurdle. Second, the AETA is in fact impermissibly vague, in violation of the Fifth Amendment.

I. The district court's standing analysis is incorrect.

The district court dismissed the plaintiffs' lawsuit based on an overly restrictive view of standing. See U.S. Const. art. III, § 2. Under the correct analysis, the plaintiffs have standing to bring this suit.

A. Standing is governed by a permissive standard.

An injury sufficient to confer standing occurs "when a plaintiff is chilled from exercising her right to free expression or forgoes expression in order to avoid enforcement consequences." *N.H. Right to Life Political Action Comm.* v. *Gardner*, 99 F.3d 8, 13 (1st Cir. 1996); see *Meese* v.

Keene, 481 U.S. 465, 473 (1987). The fear of prosecution need only be "objectively reasonable." *R.I. Ass'n of Realtors* v. *Whitehouse*, 199 F.3d 26, 31 (1st Cir. 1999). When a plaintiff raises a pre-enforcement challenge to a statute implicating First Amendment freedoms, this hurdle is "extremely low." *Mangual*, 317 F.3d at 56-57. "A finding of no credible threat of prosecution under a criminal statute requires a long institutional history of disuse, bordering on desuetude." *Id.*

Yet that was not the district court's approach. Instead of "assum[ing] a credible threat of prosecution in the absence of compelling contrary evidence," *R.I. Ass'n of Realtors*, 199 F.3d at 31, the court affirmatively developed a theory under which the plaintiffs would avoid AETA liability. Specifically, the court *first* interpreted the AETA narrowly and *then* ruled, based on that narrow interpretation, that the plaintiffs would not face AETA prosecution. Pl. Add. at 16-17. Particularly since the district court's interpretation of the AETA is not binding on any other court—and cannot insulate the plaintiffs from prosecution—that approach to standing is backward.

B. The district court's approach would shield unconstitutional laws from court challenges.

The district court's approach, if upheld by this Court, would unduly restrict vagueness challenges to statutes threatening First Amendment freedoms. As discussed below, a statute can be void for vagueness either because it is susceptible to arbitrary and discriminatory enforcement, or because its meaning is unclear. The Supreme Court has held that someone "'who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'" *Humanitarian Law Project*, 130 S. Ct. at 2719 (quoting *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)); *National Organization for Marriage, Inc.* v. *McKee*, 669 F.3d 34, 41-42 (1st Cir. 2012). Thus, people who seek to engage in conduct that a law proscribes are not ideal candidates, and perhaps not even plausible candidates, to bring a pre-enforcement challenge asserting that the law is facially vague.

That leaves, as potential plaintiffs to such a suit, people who have *not* clearly violated the law. But the district court's approach, if upheld, would also create standing problems for those plaintiffs. Under that approach, if a district court adopts a construction of a statute that

would protect a particular group of plaintiffs from criminal exposure, then those plaintiffs will lose a motion to dismiss. Presumably only a tiny fraction of plaintiffs—those whose conduct arguably, but only arguably, runs afoul of the district court's interpretation of the statute—would then have standing to bring a facial vagueness challenge.

That is not the "quite forgiving" inquiry that both this Court and the Supreme Court have endorsed. *N.H. Right to Life Political Action Committee*, 99 F.3d at 14 (citing *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979)). Nor is it faithful to this Court's recognition that plaintiffs can have standing even when it is "not likely" that a prosecution against them would succeed. *Mangual*, 317 F.3d 45, 59 (1st Cir. 2003). Instead, the district court's approach amounts to a rule that, to have standing, plaintiffs must thread a doctrinal needle.

The consequences of such a narrow rule would be severe. The Supreme Court has warned that our "delicate and vulnerable" First Amendment freedoms "need breathing space to survive," and that "[t]he threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *NAACP* v. *Button*, 371 U.S. 415, 433

(1963). Yet, if plaintiffs in pre-enforcement challenges are barred at the courthouse doors, unconstitutionally vague statutes will remain on the books, and First Amendment freedoms will be chilled. As explained below, the AETA is one such statute. It is unconstitutionally vague, and it is already being applied in a discriminatory manner.

II. The AETA is unconstitutionally vague.

A criminal statute is void for vagueness unless it "define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U.S. 352, 357-58 (1983) (citations omitted); *Skilling*, 130 S. Ct. at 2927-28. Moreover, "[a] more stringent vagueness test is used" where, as here, "the rights of free speech or association are involved." *Butler* v. *O'Brien*, 663 F.3d 514, 520 (1st Cir. 2011); see *Humanitarian Law Project*, 130 S. Ct. at 2719. Here, under any vagueness test—and certainly under the more stringent test applicable in the First Amendment context—the AETA reflects both kinds of vagueness: it encourages discriminatory enforcement and its boundaries are unclear.

A. The AETA is susceptible to discriminatory enforcement.

The AETA is susceptible to, and has a track record of, arbitrary and discriminatory enforcement. The AETA sweeps up—and punishes as "terrorism"—common conduct like vandalism, property damage, trespass, harassment, or intimidation. As the government has observed, the AETA prohibits this conduct regardless of whether the defendant sought to advance any political message. See 3/9/12 U.S. Mem. at 27-29; 4/27/12 U.S. Reply at 19-23. According to the government, this statutory breadth is a virtue that supposedly renders the AETA content- and viewpoint-neutral. But, in fact, it is a fatal flaw. Precisely because the AETA may apply to so many crimes against businesses, it is impermissibly susceptible to arbitrary and discriminatory enforcement.

1. A statute is void for vagueness if it is susceptible to discriminatory enforcement.

A statute can be impermissibly vague if it exposes the public to oppression. A vague law "delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972). Laws must

therefore provide explicit standards that do not "allow[] policemen, prosecutors, and juries to pursue their personal predilections." *Kolender*, 461 U.S. at 357-58 (citations omitted).

The Supreme Court applied this principle in *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972), and *City of Houston* v. *Hill*, 482 U.S. 451 (1987). In *Papachristou*, the Court struck down a vagrancy ordinance that essentially allowed the police to prosecute as vagrants people whose guilt of more serious crimes they suspected but could not prove. The Court explained that a legislature cannot "'set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.'" 405 U.S. at 165 (quoting *United States* v. *Reese*, 92 U.S. 214, 221 (1876)). In *Hill*, the Court struck down Houston's interrupting-an-officer ordinance, which allowed virtually "unfettered discretion to arrest individuals for words or conduct that annoy or offend [police officers]." 482 U.S. at 465.

Similarly, the Fourth Circuit recently struck down, as unconstitutionally vague, a federal disorderly conduct regulation as applied to a man who engaged in over-the-clothing sexual contact with

an undercover officer on the Blue Ridge Parkway. *United States* v. *Lanning*, --- F.3d ----, 2013 WL 3770694 (4th Cir. July 19, 2013). The crucial regulatory provision—a ban on "obscene" conduct—did not single out homosexual conduct for scrutiny. But given that officers had relied on citizen complaints to instigate a sting operation against gay men, the Fourth Circuit concluded that enforcing the regulation presented "a real threat of anti-gay discrimination." *Id.* at *5.

A statute's susceptibility to discriminatory enforcement is particularly problematic where enforcement threatens First Amendment rights. The Supreme Court has explained that, "[i]f there is an internal tension between proscription and protection in [a] statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights." *Button*, 371 U.S. at 438. This problem has already arisen with the enforcement of the AETA.

2. The AETA is susceptible to arbitrary enforcement because it applies to numerous economic and property crimes.

The AETA is a modern-day vagrancy law. As in *Papachristou*, the law sweeps up a broad range of conduct so that law enforcement will

have maximum discretion to prosecute their true targets: aggressive animal rights activists. And as in *Lanning*, there is ample evidence of discriminatory enforcement.

To begin, the AETA's definition of "animal enterprise"—a business that "uses or sells animals or animal products"—includes nearly every supermarket, convenience store, restaurant, coffee shop, and pharmacy in the United States. 18 U.S.C. § 43 (d)(1)(a). It also includes every retail establishment or Internet merchant that sells leather goods, including shoe stores, department stores, and book stores. The AETA also defines "animal enterprise" to include zoos, pet stores, and fairs. Crimes against *any* of those businesses can violate the AETA.

The AETA's other requirements are easily met by many economic crimes against animal enterprises, and by many acts of violence against animal enterprise employees or associates. A defendant violates the AETA if, for the purpose of damaging or interfering with the operations of an animal enterprise, she intentionally damages or causes loss to an animal enterprise—or any person or entity associated with an animal enterprise—or places in fear someone associated with the animal enterprise. 18 U.S.C. § 43 (a)(2).

Although it might be tempting to suppose that animal rights activists disproportionately engage in such conduct, that is not so. The AETA does *not* require that the defendant target an enterprise *because* of its connection to animals. The government has conceded that the AETA applies "regardless of whether the conduct is accompanied by a message or not, and regardless of what that message might be." 4/27/12 U.S. Reply at 23; see *United States* v. *Buddenberg*, No. CR-09-00263, 2009 WL 3485937, at *8 (N.D. Cal. Oct. 28, 2009) (noting that "a wide variety of expressive and *non-expressive conduct* might plausibly be undertaken with the purpose of interfering with an animal enterprise") (emphasis added). As a result, the AETA is exactly like the statutes invalidated in *Papachristou* and *Hill*: "The ordinance's plain language is admittedly violated scores of times daily . . . yet only some individuals—those chosen by the police in their unguided discretion—are arrested." *Hill*, 482 U.S. at 466-67.

To be sure, animal rights activists sometimes violate the AETA. But, given a nexus with interstate commerce, the AETA also applies to abundant conduct by non-activists. A *neutral* application of the AETA

could fill the federal courts with prosecutions aimed at such conduct, including:

- spray-painting the side of a convenience store;
- shoplifting from a supermarket;
- intentionally failing to pay the bill at a restaurant;
- trespassing or causing a disruption at a department store;
- assaulting a convenience store clerk; and
- libeling an animal enterprise on the Internet, from Amazon (which sells groceries) to Zappos (which sells leather shoes).

The AETA is therefore unlike statutes that, when applied neutrally, have a disparate impact on people holding certain views. For example, the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248, prohibits a narrow class of conduct: "force, threat of force, or [] physical obstruction" of reproductive health services providers and patients. 18 U.S.C. § 248(a). That narrow prohibition is violated only occasionally, and typically by anti-abortion protestors. So the *neutral* application of the FACE Act disparately affects that group. *United States* v. *Weslin*, 156 F.3d 292, 297 (2d Cir. 1998) (upholding the FACE Act and rejecting a "disparate impact" approach to the First Amendment).

Not so with the AETA. In exercising their unguided AETA discretion, prosecutors and law enforcement officers are unmistakably discriminating against animal rights advocates. As the district court noted, animal rights activists have been prosecuted under the AETA for "trespassing," "vandali[sm]," and "harassment" against animal enterprises. Pl. Add. at 16; see *United States* v. *Viehl*, No. 2:09-CR-119, 2010 WL 148398, at *1 (D. Utah Jan. 12, 2010); *United States* v. *Fullmer*, 584 F.3d 132 (3d Cir. 2009). Non-activists, however, have avoided these prosecutions. For example, just like the "mink farm" victimized in *Viehl*, convenience stores like CVS are animal enterprises under the AETA. After all, CVS sells "animal products," including beef jerky. Yet crimes against CVS, when committed by non-activists, are never prosecuted under the AETA.

Instead, "*only self-identified animal rights activists have been prosecuted under the AETA*." 3/9/12 U.S. Mem. at 29 (emphasis added). That is not the neutral application of a law that has a disparate impact. It is the discriminatory application of a law that gives virtually unbridled discretion to police and prosecutors. See *Lanning*, --- F.3d ----, 2013 WL 3770694, at *5 ("The sting operation that resulted in

Defendant's arrest was aimed not generally at sexual activity in the Blue Ridge Parkway; rather, it specifically targeted gay men.").

B. The AETA does not specify what conduct it prohibits.

In addition to being susceptible to discriminatory enforcement, the AETA is unconstitutionally vague because it fails to specify where liability begins and ends. A penal statute violates due process if it requires ordinary people, "at peril of life, liberty or property[,] to speculate as to [its] meaning." *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939). The prohibition against vagueness is particularly important when a criminal statute threatens expression protected by the First Amendment. Indeed, even when "violence or threats of violence . . . occurs in the context of constitutionally protected activity . . . 'precision of regulation is demanded.'" *Claiborne Hardware*, 458 U.S. at 916-17 (quoting *Button*, 371 U.S. at 438). The AETA contradicts that demand in three respects: (1) it does not affirmatively define a prohibited act; (2) it relies on a rule of construction that cannot be interpreted by ordinary people; and (3) it contains vague terms that risk chilling constitutionally protected expression.

1. The AETA lacks an actus reus provision.

The AETA's description of an "offense"—in subsection (a)—fails to define an *actus reus* constituting animal enterprise terrorism. Unlike other "terrorism" provisions, the AETA does not require a predicate "violent act[] or act[] dangerous to human life."[2] And unlike its predecessor, the AEPA, the AETA does not require an intended "physical disruption." 18 U.S.C. § 43(a)(1) (2002).

Instead, animal enterprise terrorism under the AETA means *any* act—or an attempt or conspiracy to do any act—that has a nexus with interstate commerce, is done for a specified but broadly-defined *purpose*, and has one of two broadly-defined *effects*. The requisite purpose is "damaging or interfering with the operations of an animal enterprise." 18 U.S.C. § 43(a)(1). The requisite effects are (1) "intentionally damag[ing] or caus[ing] the loss of any real or personal property" associated with an animal enterprise, or (2) "intentionally plac[ing] a

[2] 18 U.S.C. § 2331(1) & (5) (defining "international terrorism" and "domestic terrorism"); see 22 U.S.C. § 2656f(d)(2) (defining "terrorism" to mean "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents"); 28 C.F.R. § 0.85 (defining terrorism to require "the unlawful use of force and violence").

person in reasonable fear" of her safety. *Id.* § 43(a)(2). But the terroristic act is never defined.[3]

It is therefore impossible to know the AETA's boundaries. Indeed, in the proceedings below, neither the district court nor the government supplied a comprehensive description of acts that violate the AETA, and that is because no such description is possible.

2. The AETA's "rule of construction" worsens its vagueness problem.

Because the AETA's definition of an "offense" could be satisfied by almost any conduct (including expressive conduct), squaring the AETA with the First Amendment hinges on a "Rule[] of Construction." 18 U.S.C. § 43(e). That rule provides that the AETA does not "prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution." *Id.* § 43(e)(1). No matter the effect of that rule on the plaintiffs' *First Amendment* challenge, it confirms the strength of their *vagueness* challenge.

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[3] See *United States* v. *L. Cohen Grocery*, 255 U.S. 81, 89 (1921) ("Observe that 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.").

For starters, the rule of construction makes First Amendment doctrine—rather than words known by "ordinary people"—the touchstone for AETA liability. *Kolender*, 461 U.S. at 357-58. Yet it is hard to find two legal scholars, let alone every single person of "ordinary" intelligence, who agree on the First Amendment's boundaries. Accordingly, as Texas's highest criminal court has observed, a First Amendment rule of construction "creat[es] [a] vagueness problem." *Long* v. *State*, 931 S.W.2d 285, 295 (Tex. Ct. Crim. App. 1996) (en banc).

In *Long*, the court struck down, as unconstitutionally vague, the "stalking" provision of a harassment statute. Although the statute contained a rule purporting to protect "activity in support of constitutionally or statutorily protected rights," Tex. Penal Code § 42.07(e), applying that rule "on a case-by-case basis would require people of ordinary intelligence—and law enforcement officials—to be First Amendment scholars." *Long*, 931 S.W.2d at 295. The court rejected that requirement:

> Because First Amendment doctrines are often intricate and/or amorphous, people should not be charged with notice of First Amendment jurisprudence, and a First Amendment

> defense cannot by itself provide adequate guidelines for law enforcement.

Id.; *cf. State* v. *Machholz*, 574 N.W.2d 415, 420-21 (Minn. 1998) (en banc) (holding that a harassment statute was unconstitutionally overbroad on its face and as applied to someone who disrupted a gay rights celebration, notwithstanding a statutory exception for conduct "authorized, required, or protected by state or federal law or the state or federal constitutions").

Even if it were reasonable to expect ordinary people to learn First Amendment caselaw—it is not—"an attempt to charge people with notice of First Amendment caselaw would undoubtedly serve to chill free expression." *Long*, 931 S.W.2d at 295. For example, if an animal rights activist believes that *she* understands First Amendment caselaw, she still cannot be sure that her understanding will be shared by police officers, prosecutors, and judges. As the Supreme Court has explained, "where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.'" *Grayned*, 408 U.S. at 109 (footnotes omitted). Faced with an uncertain boundary between protected and criminal conduct, people will

simply "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Id.*

The AETA "abuts" First Amendment freedoms because its boundary *is* the First Amendment. That boundary portends a chill of First Amendment expression, particularly because crossing it yields significant criminal sanctions. *Cf. Reno* v. *ACLU*, 521 U.S. 844, 872 (1997) ("The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." (citation and internal quotation marks omitted)).

What is more, the text of the AETA's rule of construction would be vague even to someone who *had* studied the First Amendment. The rule carves out only "expressive conduct" protected by the First Amendment, leaving it unclear whether the rule protects *all* First Amendment rights. Other rules of construction, in contrast, have seemed to offer broader protection.[4] It is also unclear how legal scholars, let alone ordinary people, would interpret the phrase "protected from legal

[4] See *Hutchins* v. *District of Columbia*, 188 F.3d 531, 546 & n.9 (D.C. Cir. 1999) (excluding "religion, freedom of speech, and the right of assembly"); *Schleifer* v. *City of Charlottesville*, 159 F.3d 843, 853 (4th Cir. 1998) (same); *CISPES Comm. in Solidarity with People of El Salvador* v. *F.B.I.*, 770 F.2d 468, 473-74 (5th Cir. 1985) ("rights guaranteed under the First Amendment").

prohibition." That phrase might mean that AETA liability arises from conduct that is not *actually* prohibited in the state or town where it occurred, so long as the conduct is *capable* of prohibition. For example, certain targeted residential pickets and secondary boycotts can be prohibited. See *Frisby* v. *Schultz*, 487 U.S. 474, 483 (1988) (upholding an ordinance that prohibited picketing directly in front of a targeted residence); *NLRB* v. *Retail Store Employees Union Local 1001 (Safeco)*, 447 U.S. 607, 616 (1980) (upholding a prohibition on secondary boycotts in the National Labor Relations Act). Thus, where targeted residential pickets are otherwise lawful, an activist might worry that the AETA prohibits them. See, *e.g.*, *Dean* v. *Byerley*, 354 F.3d 540, 546 (6th Cir. 2004) (noting that "there is no applicable Michigan statute that bans all targeted residential picketing").

3. The AETA contains vague terms.

Beyond having what might be called a vague structure, the AETA also contains vague terms. The government urged the district court to clarify those provisions by adopting limiting constructions "with an eye toward Congress' intent." 3/9/12 U.S. Mem. at 26. But a law's susceptibility to a vagueness challenge does not turn on whether its

terms can be reasonably interpreted by skilled government lawyers. Instead, the test is whether the law can be understood by laypeople. With respect to at least three statutory terms, the AETA is impermissibly vague.

- *"Interfering"*

The AETA applies to conduct intended to "damage[e] or interfer[e]" with an animal enterprise. 18 U.S.C. § 43 (a)(1). For two reasons, it is unclear what Congress meant by "interfering." First, that term is presented in the disjunctive with "damaging," which suggests that interference need not cause any damage. Second, Congress in 2006 deleted the requirement that the defendant intend some "physical disruption," which suggests that the requisite interference need not involve a physical act. In that context, Congress could have intended the term "interfering" to encompass mere exhortation, such as urging someone to end a business relationship with an animal enterprise. *Claiborne*, 458 U.S. at 891, 894 (theory of liability against organizers of boycott was common law malicious interference with business).

- *"Conspires"*

The AETA's conspiracy provision—which prohibits "conspiring" to damage or cause the loss of an animal enterprise's real or personal property—also threatens to stifle protected speech, association, and assembly. 18 U.S.C. § 43 (a)(2)(C). The provision's main problem is that substantially *all* coordinated activism against a business could be regarded as a conspiracy to diminish the business's real or personal property.

A divestment campaign illustrates this problem.[5] In such a campaign, activists do not literally remove animals from the property of an animal enterprise. But their purpose is to reduce the enterprise's purchasing power, which in turn will reduce the number of animals it owns or uses. In that context, could an activist incur AETA liability by posting to the Internet records of an animal enterprise's egregious violations of the Animal Welfare Act? *See* 7 U.S.C. § 2131 *et seq.* What if that same activist worked in tandem with others who engaged in

[5] *Cf. Epton* v. *New York*, 390 U.S. 29, 32 (1968) (Douglas, J., dissenting from denial of certiorari) ("[T]he use of constitutionally protected activities to provide the overt acts for conspiracy convictions might well stifle dissent and cool the fervor of those with whom society does not agree at the moment.").

"'rhetorical' threats of violence" designed to discourage people from patronizing the enterprise? See *Claiborne*, 458 U.S. at 897 & n.20 (noting that the First Amendment protects "'rhetorical' threats of violence by boycott leaders" and "failure to act" against "boycott 'enforcers' [who] caused fear of injury to persons and property").

In this respect, the AETA is similar to the "attempted insurrection" statute struck down in *Herndon* v. *Lowry*, 301 U.S. 242 (1937). That statute proscribed "[a]ny attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State." *Id.* at 246 n.2. Though the statute purported to prohibit instigating unlawful conduct, it "amount[ed] merely to a dragnet which may [have] enmesh[ed] any one who agitate[d] for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some effect in the future conduct of others." *Id.* at 263-64. Likewise, the AETA's conspiracy provision could be construed to prohibit mere exhortation.

- *"Personal Property"*

The AETA's "personal property" clause—which prohibits intentionally damaging or causing the loss of "personal property"—is

another source of vagueness. 18 U.S.C. § 43 (a)(2)(A). The district court ruled that the AETA does not criminalize conduct that could reduce the profitability of an animal enterprise because it construed the term "personal property" to exclude "an intangible such as lost profits." Pl. Add. at 17. But, at the very least, it is debatable whether the term "personal property" can be read to exclude intangible property.

For starters, "'the tangible/intangible characterization of property interests . . . is a distinction without a difference' and 'is not generally recognized in international, federal, or state law.'" *Nemariam* v. *Fed. Democratic Republic of Ethiopia*, 491 F.3d 470, 478 (D.C. Cir. 2007) (quoting *W.* v. *Multibanco Comermex, S.A.*, 807 F.2d 820, 830 (9th Cir. 1987)). Thus, there is little reason to suspect that Congress intended to draw such a distinction in the AETA.

Even if it were possible to draw a meaningful distinction between tangible and intangible property, construing the term "personal property" to exclude intangibles would lead to absurd results. For example, some courts seem to regard electronic information as *intangible*. See, *e.g.*, *Am. Online, Inc.* v. *St. Paul Mercury Ins. Co.*, 347 F.3d 89, 93 (4th Cir. 2003); *State Auto Prop. & Cas. Ins. Co.* v. *Midwest*

Computers & More, 147 F. Supp. 2d 1113, 1115 (W.D. Okla. 2001); see generally 1 Data Sec. & Privacy Law § 8:10 (2013); 9 Couch on Ins. § 126:40. Under that view, if "personal property" under the AETA were interpreted to exclude intangibles, then the AETA would not criminalize intentionally destroying electronic files. That cannot be right. *Kremen* v. *Cohen*, 337 F.3d 1024, 1034 (9th Cir. 2003) (electronic documents must be property, otherwise "[t]orching a company's file room would then be conversion while hacking into its mainframe and deleting its data would not").

CONCLUSION

For these reasons, this Court should reverse the dismissal of the complaint and hold that the AETA is void for vagueness.

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Respectfully submitted,

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I certify that this brief was filed electronically on July 29, 2013. Notice of this filing will be sent by operation of this Court's electronic filing system to all parties.

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