July 22, 2009

Hon. John Conyers
Chairman
House Judiciary Committee
2624 Rayburn, House Office Building
U.S. House of Representatives
Washington, D.C. 20515

Hon. Patrick Leahy
Chairman
Senate Judiciary Committee
433 Russell, Senate Office Building
U.S. Senate
Washington, D.C. 20510

Hon. Robert Scott
Chairman
House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security
1201 Longworth, House Office Building
U.S. House of Representatives
Washington, D.C. 20515

Hon. Benjamin Cardin
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Hon. Janet Napolitano
Secretary
U.S. Department of Homeland Security
Washington, D.C. 20528

Hon. Tom Vilsack
Secretary
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, D.C. 20250

Hon. Eric Holder
Attorney General
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

Re: The Animal Enterprise Terrorism Act, 18 U.S.C. § 43

Dear Senator Leahy, Representative Conyers, Representative Scott, Senator Cardin, Secretary Napolitano, Secretary Vilsack, and Attorney General Holder:

On behalf of the Legal Issues Pertaining to Animals Committee and the Civil Rights Committee of the New York City Bar Association, we write to urge the repeal of the Animal Enterprise Terrorism Act ("AETA"), 18 U.S.C. § 43, because the statute's overbreadth and vagueness infringe upon protected First Amendment activity. We also urge the dismissal of the pending indictments under AETA[1] and request that the Attorney General forebear from seeking any further prosecutions under the statute.

[1] Indictment of William Viehl and Alex Hall, *United States v. Viehl*, No. 2:09-cr-00119 (D.C. Utah Mar. 4, 2009), *available at* http://www.usdoj.gov/usao/ut/press/indictments/Viehl%20et%20al%20indictment.pdf; Indictment of Joseph Buddenberg, Maryam Khajavi, Nathan Pope, and Adriana Stumpo, *United States v. Buddenberg*, No. 5:09-

AETA makes it a federal crime to use interstate commerce "for the purpose of damaging or interfering with the operations of an animal enterprise" by "intentionally damag[ing] or caus[ing] the loss of any real or personal property" connected to an animal enterprise; by "intentionally plac[ing] a person in reasonable fear" of death or serious bodily injury by "threats, acts of vandalism, property damage, criminal trespass, harassment, or intimidation;" or by "conspir[ing] or attempt[ing] to do so." 18 U.S.C. § 43(a)(1-2).

AETA raises serious constitutional problems because, in targeting actions that cause only economic harm, AETA reaches protected First Amendment activity including protest and picketing. We have no doubt that a properly-drafted statute could constitutionally prohibit physical property damage or serious threats of death or bodily injury. But AETA's expansive definition of damages threatens to criminalize public speech activities, which often have the coincidental or secondary effect of causing the disfavored business profit or reputation losses. On a plain reading of the statute, demonstrators picketing in front of a local pet store could be prosecuted if the store lost sales or business goodwill as a result. AETA also sets a broad range of possible criminal penalties for its violation, including fines and imprisonment ranging from less than one year to a life term. 18 U.S.C. § 43(b). Given its broad scope, the statute's criminalization of protected speech activities is particularly troubling.

AETA infringes on protected First Amendment actions like pamphleteering, peaceful protest, and demonstrations by animal rights and other groups. The pending indictment in *United States v. Buddenberg*, discussed in detail below, illustrates how AETA's expansive scope enables prosecution of animal rights demonstrators for protesting animal testing and conducting Internet searches. The *Buddenberg* indictment also reveals how misapplying the label of terrorism to a statute may mask its serious infringement of constitutional rights. We urge the repeal of AETA and the dismissal of the pending indictments for the following reasons: (1) the statute is an overly broad content-based speech restriction; (2) the statute's vague language fails to notify individuals of permitted and prohibited conduct, chilling their abilities to speak and protest freely; and (3) the statute's savings clause does not remedy its constitutional defects. We discuss each of these points in detail below.

(1) AETA is an Overly Broad Content-Based Speech Restriction

AETA cannot pass strict scrutiny under the First Amendment because it defines offenses based on the content of the penalized speech and is not narrowly tailored. The pending indictment in *Buddenberg*[2] demonstrates the statute's broad reach, encompassing protected speech activities like demonstrations opposing animal testing and protest-related research on the Internet. Moreover, the *Buddenberg* indictment shows AETA's misapplication of "terrorism" to animal rights protest activity. These defendants were charged with violating AETA for allegedly protesting outside of the homes of animal researchers associated with the University of California. AETA's expansive definition of "animal enterprise" includes not only research institutions and animal processing facilities, but pet stores, zoos, and any business that sells animal products. AETA's inclusion of economic damage within its scope makes the statute unconstitutionally overbroad. By imposing criminal penalties for causing economic loss, AETA reaches protest activity that results in lost profits, use of property, or business opportunities. Therefore, AETA's language is over-inclusive in

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cr-00263 (N.D. Cal. Mar. 12, 2009), *available at* http://www.greenisthenewred.com/blog/wp-content/Images/aeta4_indictment.pdf.

[2] This letter focuses on the indictment in *Buddenberg* because the criminal complaint in that case provides substantial detail regarding the facts of the case. In contrast, no criminal complaint was filed in *United States v. Viehl*, and the underlying facts are not detailed in the indictment. The indictment in *Viehl* merely indicates that the defendants were indicted for "intentionally damag[ing] and caus[ing] the loss of . . . property" of two mink farms in August and October of 2008. Indictment of William Viehl and Alex Hall at 1-2.

its definition of enterprises and criminal actions targeting them. For these reasons, AETA is overly broad in violation of the First Amendment.

AETA is a content-based restriction on speech because it targets speech by animal rights activists. "Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (internal citation, quotation marks, and emphasis omitted). In a statement supporting AETA's passage, the Department of Justice described the statute as enabling prosecution of "animal rights extremists."[3] As a content-based restriction on speech, AETA must serve a compelling state interest and be narrowly tailored to survive a court's strict scrutiny under the First Amendment. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395-96 (1992). Content-based restrictions are presumptively invalid because such discrimination "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." *Id*. at 382, 387 (internal citation omitted). AETA fails strict scrutiny because it is not narrowly tailored and its overly broad language encompasses protected First Amendment speech.

The pending indictment in *Buddenberg* illustrates AETA's wide application to traditionally protected forms of political speech. A statute violates the First Amendment where its overly broad reach is "substantial . . . judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Criminal statutes, like AETA, "must be scrutinized with particular care; those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." *City of Houston v. Hill*, 482 U.S. 451, 459 (1987) (internal citations omitted). The *Buddenberg* defendants were indicted under Section (a)(2)(B) of AETA, which prohibits using interstate commerce "for the purpose of damaging or interfering with the operations of an animal enterprise" by "intentionally plac[ing] a person in reasonable fear" of death or bodily injury. The defendants staged several animal rights demonstrations at the homes of University of California researchers.[4] During these demonstrations, the defendants chanted animal "liberation" slogans and chalked anti-animal testing messages on the public sidewalks. The defendants also used an Internet terminal at a Kinko's shop to gather information about the biomedical researchers, and they made fliers with animal rights slogans to distribute at a local cafe. In the conspiracy count, the indictment lists two of the protests at researchers' homes, along with the defendants' "use[ ] [of] the Internet to find information" on the researchers, as "overt acts" "in furtherance of the conspiracy."[5] In the count charging the defendants with a violation of Section (a)(2)(B), the indictment does not specify any particular acts, but includes the time period covering the protests.[6] The *Buddenberg* indictment shows AETA's overbroad application, covering protected First Amendment speech like political demonstrations and Internet research activity.

The *Buddenberg* indictment also serves as a cautionary example of the danger that "anti-terrorism" statutes pose to free speech, especially when the terrorism label is misapplied. The word "terrorism" appears only in AETA's title, but legislative history reveals that the bill was intended to prohibit allegedly "extremist" protest activity. A Department of Justice statement supporting enactment of AETA refers to "animal rights extremists," their "terror tactics," and their separation from

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[3] *Hearing on H.R. 4239 Before the Subcommittee on Crime, Terrorism, and Homeland Security*, 109th Cong. 3 (2006) (statement of Brett J. McIntosh, Deputy Assistant Att'y Gen.).

[4] The details set out above are taken from the Affidavit of FBI Agent Lisa Shaffer in Support of a Criminal Complaint, *United States v. Buddenberg* (N.D. Cal. Feb. 19, 2009).

[5] *Buddenberg* Indictment at 2.

[6] All of the described protests were non-violent, with the exception of a minor altercation with a researcher in February 2008. However, this incident is not listed in either count of the defendants' indictment.

"mainstream activities that should be part of the public discourse."[7] The preamble to the enrolled bill states that AETA's purpose is "[t]o provide the Department of Justice the necessary authority to apprehend, prosecute, and convict individuals committing animal enterprise terror."[8] Appending the label of terrorism to AETA's title was apparently intended to buttress the statute from opponents who were concerned about its encroachment on protected First Amendment activity. However, designating speech as "terrorism" does not permit its suppression. "[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. . . . Any variation from the majority's opinion may inspire fear." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969). The *Buddenberg* defendants' opposition to animal testing may have represented an unpopular perspective, but it did not constitute a threat of terrorism. AETA's breadth allows prosecution of a variety of protected First Amendment activity, and the "terrorism" label in its title only serves as a distraction from the statute's unconstitutionality.

AETA's definition of "animal enterprise" also violates the First Amendment's requirement that a content-based restriction on speech be narrowly tailored. AETA defines "animal enterprise" so broadly that it encompasses a vast number of firms and organizations, some of which only incidentally implicate animal rights issues. Section (d)(1)(A) states that "animal enterprise" means a "commercial or academic" organization that "uses or sells animals or animal products for profit, food or fiber production, agriculture, education, research, or testing." Including all enterprises that "use[ ] or sell[ ]" animal products gives the statute nearly limitless application. AETA covers businesses as diverse as a "zoo, aquarium, animal shelter, pet store, breeder, furrier, circus, or rodeo, or . . . any fair . . . intended to advance agricultural arts and sciences." 18 U.S.C. § 43(d)(1)(B-C). As applied to these "animal enterprises," Section (a)(1) includes broad language prohibiting "damage" and "interference" with these organizations' operations. AETA's expansive definition of "animal enterprise" violates the First Amendment's requirement that the statute be narrowly tailored.

Section (a)(2)(A) of AETA, which criminalizes acts causing economic damage, also fails strict scrutiny. This section prohibits any act, with the purpose of "damaging or interfering" with an animal enterprise, that "intentionally damages or causes the loss" of property either belonging to an animal enterprise or to a person connected with an animal enterprise. AETA's scope reaches beyond that of its predecessor, the Animal Enterprise Protection Act, which criminalized "physical disruption" of a covered entity.[9] In congressional hearings on AETA, the Department of Justice supported the new statute's expanded coverage of activities on the ground that it would "avoid the narrowness of 'physical disruption' by focusing instead on economic damage and disruption . . . ."[10] However, by criminalizing intentional damage under such a broad definition, AETA sweeps up speech long protected by the First Amendment. Many protest activities have as secondary goals alerting customers to the company's business activities, damaging the company's goodwill in the business community, discouraging sales and decreasing future profits, or causing the company to invest in increased security measures. All of these harms cause a loss to intangible property within the scope of Section (a)(2)(A). Protesting outside a company and picketing at a retail outlet have long been recognized as protected speech under the First Amendment even when the goal is "to advise customers and prospective customers of the relationship existing between the employer and its employees . . . induc[ing] such customers not to patronize the employer." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 909 (1982) (internal citation omitted). Upholding the boycott as protected speech, the *Claiborne* Court noted that the protestors "certainly foresaw— and directly

[7] Statement of Brett J. McIntosh at 2, 4.

[8] S. 3880, 109th Cong. (2006) (enacted).

[9] Statement of Brett J. McIntosh at 4 (stating that AETA would correct for AEPA's insufficient coverage).

[10] *Id*.

intended— that the merchants [subject to the boycott] would sustain economic injury as a result of their campaign." *Id*. at 914. Section (a)(1)(A), on its face, could be used to prosecute individuals for carrying anti-fur signs outside a furrier if the protestors intended to shame potential customers out of making purchases.[11] Such "[b]road prophylactic rules in the area of free expression are suspect." *NAACP v. Button*, 371 U.S. 415, 438 (1963). The Supreme Court has plainly stated that it does not "assume that, in . . . subsequent enforcement [of a potentially problematic statute], ambiguities will be resolved in favor of adequate protection of First Amendment rights. . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Id*. (internal citations omitted). The breadth of AETA's language has the potential to prohibit legitimate First Amendment speech like whistleblowing and picketing based on the targeted business's economic losses from the protest. Sections (a)(1) and (a)(2)(A) lack adequate specification to limit their scope within constitutional boundaries.

(2) AETA's Vague Language Fails to Provide Notice and Chills First Amendment Activity

A statute may violate due process if its language is too vague. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The Supreme Court has identified three means by which a statute may be "void for vagueness": (1) the statute fails to give proper notice of what conduct is permissible and what conduct is prohibited; (2) the statute allows for arbitrary or discriminatory enforcement by government officials; or (3) the statute has chilling effects on First Amendment protected activity. *Id*. at 108-109. AETA fails to notify citizens of the line between permissive and non-permissive conduct, grants too much discretion in enforcement to government officials, and thus chills protected speech.

A law is void on its face if it is so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). In addition, "If the line . . . between the permitted and prohibited [speech] activities . . . is an ambiguous one, [a court] will not presume that the statute curtails constitutionally protected activity as little as possible. For standards of permissible statutory vagueness are strict in the area of free expression." *Button*, 371 U.S. at 432. AETA's breadth and its inclusion of acts that cause only economic damage are confusing and fail to provide sufficient limits on its scope. While the statute defines an offense as one with "the purpose of damaging or interfering with . . . an animal enterprise," it does not state whether this purpose must be *because* the animal enterprise is such an organization. For example, it is unclear whether labor organizers protesting working conditions at a grocery store (which falls within the definition of "animal enterprise" because it sells "animal products") may be committing an offense under AETA even if they are unconcerned with the store as an animal enterprise. While Section (d)(3)(B) includes an exception for certain "lawful economic disruption," this exception does not clarify the scope of the statute and indeed further confuses the reader. Section (d)(3)(B) exempts from the definition of economic damages "lawful economic *disruption* (including a lawful boycott) that results from lawful public, governmental, or business reaction to the disclosure of information about an animal enterprise." 18 U.S.C. § 43(d)(3)(B) (emphasis added). The statute does not explain the intended distinction between the economic *damages* that are prohibited under the statute and the economic *disruption* that is lawful. Despite the importance of differentiating between actions that cause "disruptions" and those that cause "damages," Section (d)(3)(B) offers no clarification except for its parenthetical reference to a "lawful boycott." The vagueness in several key statutory terms leaves an average person confused about

[11] The exemption for "lawful economic disruption" under Section (d)(3)(B) and the savings clause in Section (e)(1) are discussed *infra* in points 2-3.

permissible and prohibited activity under AETA and may lead to discriminatory enforcement by government officials because of the lack of guidance that the statute offers.

AETA's vague terms will also cause individuals to "steer far wider of the unlawful zone [of activity] than if the boundaries of the forbidden area were clearly marked." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (internal citation omitted). AETA's lack of specification of purpose under Section (a) may prevent individuals contemplating protest of an animal enterprise from engaging in those actions for fear of prosecution under AETA, even if their complaints have nothing to do with the company's treatment of or policies regarding animals. Under AETA's expansive definition of "animal enterprise," a wide range of speech activity at research universities, businesses selling animal products, and agricultural firms may be hampered. The wording of Section (d)(3)(B)'s exception may also chill protected speech. Section (d)(3)(B) exempts from penalty "lawful economic disruption . . . that results from lawful public . . . reaction to the disclosure of information about an animal enterprise." Because penalties under the statute are premised in part on the amount of economic damage an offense causes, the Section (d)(3)(B) exception is highly important to individuals charged under the statute. But a person who wishes to protest a visiting circus's immoral treatment of animals may be unable to determine ex ante whether any lost profits resulting from his actions will qualify as an exempted "disruption" or penalized "damages," and may decide to remain silent. AETA's limitation of the exemption to the "reaction" to information about an animal enterprise may also fail to capture some protected speech. Likewise, Section (a)'s overly broad language characterizing an offense may appear to reach so widely that individuals check their own speech rather than risk violating the vague, insufficiently defined terms of the statute. "The objectionable quality of vagueness and overbreadth [is in] . . . the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *Button*, 371 U.S. at 432-33. AETA's vague and broad language threatens to chill protected First Amendment speech in violation of the Constitution.

(3) AETA's Savings Clause Fails to Remedy the Constitutional Defects

Section (e) states, "Nothing in this section shall be construed (1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution." 18 U.S.C. § 43(e)(1). However, the presence of a savings clause alone does not necessarily save a statute from unconstitutionality. The Supreme Court has suggested that such generally worded savings clauses may themselves be impermissibly vague. *See Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 575-76 (1987) (rejecting city's limiting construction of ordinance as vague and "murky," and thus striking down city ordinance that made airport "a virtual 'First Amendment Free Zone'" as "substantially overbroad"). District courts have struck down similar ordinances despite their savings clauses, on the grounds that the clauses were "inherently vague and unenforceable, and hence unconstitutional." *Rubin v. City of Santa Monica*, 823 F. Supp. 709, 712 n.6 (C.D. Cal. 1993);[12] *see also Nat'l People's Action v. City of Blue Island*, 594 F. Supp. 72, 80 (N.D. Ill. 1984) (including a savings clause in attempt to cure overbreadth of statute made it "unconstitutionally vague" since diversity of First Amendment law gave individuals insufficient notice of ordinance's coverage). AETA's savings clause offers an example of protected conduct ("peaceful picketing"), but its parenthetical reference provides insufficient guidance for a person faced with a highly fact specific question of whether a certain activity falls within AETA's scope. *See Nat'l People's Action*, 594 F. Supp. at 79 (*citing* Lawrence Tribe, *American Constitutional Law*, § 12-26 at 716 (1978)) ("To construe a statute by reference to such a fact-

[12] The ordinance struck down in *Rubin* required permits for park use except for meetings "organized for the purpose of conveying a . . . message protected by . . . the First Amendment." *Rubin*, 823 F. Supp. at 712 n.5.

oriented standard is to inject an excessive element of vagueness into the law because the standard itself takes shape only as courts proceed on a retrospective, case-by-case basis . . . .”). Therefore, at best, AETA’s savings clause provides insufficient guidance to a citizen and, at worst, is itself unconstitutionally vague.

We urge the repeal of AETA and the dismissal of the pending indictments because the statute’s broad sweep criminalizes protected First Amendment activity. As discussed above, not only is AETA an overly broad content-based restriction on speech addressing animal rights, its vague language fails to notify individuals of permissive and prohibited behavior, chilling protected forms of protest under the First Amendment. AETA’s saving clause fails to remedy either of these constitutional defects. The *Buddenberg* indictment demonstrates both AETA’s far-ranging application and the danger of misapplying the label of terrorism to a statute that criminalizes protected speech.

The Legal Issues Pertaining to Animals Committee and the Civil Rights Committee of the New York City Bar Association welcome the opportunity to work with you on the vitally important interests discussed in this letter. Please contact us if you have questions about our recommendations or would like more information. You may reach the Legal Issues Pertaining to Animals Committee by contacting Jane Hoffman, Committee Chair, at jehoffman@earthlink.net. You may reach the Civil Rights Committee by contacting Peter Barbur, Committee Chair, at pbarbur@cravath.com.

Thank you very much for your attention and concern.

Respectfully,

The Committee on Legal Issues Pertaining to Animals
The Committee on Civil Rights