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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE DIVISION

14

15 UNITED STATES OF AMERICA)	CR 09-263 RMW
16 Plaintiff,)	GOVERNMENT OPPOSITION
17 v.)	TO MOTION TO DISMISS
18 JOSEPH BUDDENBERG,)	Date: July 13, 2009
MARYAM KHAJAVI,)	Time: 9:00 a.m.
19 NATHAN POPE, A/K/A NATHAN KNOERL,)	Court: Hon. R. Whyte
ADRIANA STUMPO,)	
20 Defendants.)	
21)	

22 I. INTRODUCTION

23 On May 22, 2009, the defendants filed motions to dismiss the indictment, arguing in
24 substance that 18 U.S.C. § 43 is unconstitutional, overbroad, and vague. The defendants' motion
25 to dismiss the indictment based on the facial unconstitutionality of the statute should be denied
26 because the sections of the statute charged in the indictment are not content-based restrictions on
27 protected First Amendment speech. Section 43 proscribes criminal conduct, not protected
28 speech. This case is not about whether animal rights activists have a First Amendment right to

1 protest animal testing laboratories and its employees. This case is about whether or not they can
2 use criminal means, such as threats, intimidation, harassment, criminal trespass, and property
3 damage against researchers at their homes, to accomplish those objectives. As courts have
4 repeatedly recognized, defendants have no constitutional right to utter threats or to engage in
5 threatening conduct. Accordingly, acts committed in violation of 18 U.S.C. § 43 (a)(1),
6 (a)(2)(B), and (a)(2)(C) (attempt) are not protected by the First Amendment.

7 **II. FACTUAL BACKGROUND**

8 On February 19, 2009, the defendants were charged by complaint with a violation of 18
9 U.S.C. § 43. As set forth in the criminal complaint, the defendants are accused of engaging in a
10 course of conduct involving threats, acts of vandalism, property damage, criminal trespass,
11 harassment, and intimidation against University of California at Berkeley and Santa Cruz bio-
12 medical researchers who conduct laboratory tests on animals.

13 On March 12, 2009, the defendants were charged by indictment with one count of conspiracy,
14 in violation of 18 U.S.C. § 371, and one count of force, violence, and threats involving an animal
15 enterprise, in violation of 18 U.S.C. § 43. The criminal complaint alleges, and the indictment
16 charges, that between October 2007 and July 2008, the defendants engaged in repeated protests,
17 including acts of vandalism, property damage, criminal trespass, harassment, threats, and
18 intimidation at numerous bio-medical researchers' homes in the East Bay and in Santa Cruz for
19 the very explicitly stated purpose of causing the researchers to abandon laboratory testing on
20 animals. For example, the defendants are accused of chanting slogans such as "1, 2, 3, 4, open
21 up the cage door; 5, 6, 7, 8, smash the locks and liberate; 9, 10, 11, 12, vivisectioners go to hell,"
22 and "we will never back down until you stop your killing."

23 Section 43 is defined, in part, as follows:

24 (a) Offense. - Whoever travels in interstate or foreign commerce, or uses or causes to be
25 used the mail or any facility of interstate or foreign commerce -

26 (1) for the purpose of damaging or interfering with the operations of an animal
27 enterprise; and

28 (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;

1 (B) intentionally places a person in reasonable fear of death of, or serious
2 bodily injury to that person, a member of the immediate family (as defined in section 115)
3 of that person, or a spouse or intimate partner of that person by a course of conduct
involving threats, acts of vandalism, property damage, criminal trespass, harassment, or
intimidation; or

4 (C) conspires or attempts to do so;
shall be punished as provided for in subsection (b).

5 (...)

(d) Definitions. -As used in this section -

6 (1) the term “animal enterprise” means -

(A) a commercial or academic enterprise that uses or sells animals or animal
7 products for profit, food or fiber production, agriculture, education, research, or testing;

8 (2) the term “course of conduct” means a pattern of conduct composed of 2 or more acts,
evidencing a continuity of purpose (...)

9 The conspiracy count alleges that the defendants conspired to commit a violation of 18
10 U.S.C. § 43 (a)(1) and (a)(2)(B) - a conspiracy to damage and interfere with an animal enterprise
11 by intentionally engaging in a course of criminal conduct. The second count of the indictment
12 alleges a violation of 18 U.S.C. § 43 (a)(1), (a)(2)(B), and (a)(2)(C) (attempt) - for the purpose of
13 damaging and interfering with the operations of an animal enterprise, the defendants intentionally
14 placed persons in fear and attempted to do so, by engaging in a course of criminal conduct. The
15 defendants are not charged with violating 18 U.S.C. § 43 (a)(2)(A) (intentionally damaging or
16 causing the loss of any real or personal property used by, or relating to an animal enterprise), and
17 they are not charged under the conspiracy liability of subsection (a)(2)(C).

18 **III. ARGUMENT**

19 A. The defendants only have standing to challenge the sections of the statute with which they
20 are charged.

21 Where First Amendment rights are at issue, the defendants have standing to challenge a
22 statute for facial overbreadth and vagueness without alleging an unconstitutional as-applied
23 harm. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). However, the defendants are still
24 required to demonstrate standing in order to properly invoke the Court’s authority under Article
25 III of the Constitution. *Allen v. Wright*, 468 U.S. 737, 750 (1984). Under Article III, the Court
26 only has authority to hear “actual ‘cases’ and ‘controversies’.” *Id.* Therefore, the defendants
27 lack standing to challenge elements of 18 U.S.C. § 43 with which they are not charged because
28 those elements do not present a controversy for the court to resolve. *See Service Employees*

1 *International Union v. Municipality of Mt. Lebanon*, 446 F.3d 419, 424 (3rd Cir. 2006) (“We are
2 not free to hear a party’s facial challenge to a municipal regulation that is wholly inapplicable to
3 the party.”). Indeed, in order for the defendants to obtain the relief they seek, dismissal of the
4 indictment, they must establish that the statute as charged against them is unconstitutional. This
5 pares the defendants’ constitutional arguments down to the following: (1) the statute is an
6 unlawful content-based restriction on protected speech in violation of the First Amendment; (2)
7 the statute is overbroad and vague; and (3) the terms “damaging” and “interfering” in subsection
8 (a)(1) and “economic damages” in subsection (d)(3)(B) are undefined, overbroad, and vague.

9 B. The statute does not violate the First Amendment.

10 The Supreme Court has long recognized that First Amendment rights are not absolute, and
11 that certain conduct involving speech may exceed First Amendment protection. While pure
12 political hyperbole is protected speech, threats are not. *See Watts v. United States*, 394 U. S. 705
13 (1969). The fact that an animal rights activist may engage in some protected speech does not
14 shield him from criminal liability for threatening conduct that exceeds First Amendment
15 protection. *See e.g. United States v. Bellrichard*, 994 F.2d 1318, 1322 (8th Cir. 1993) (“a person
16 may not escape prosecution for uttering threatening language merely by combining the
17 threatening language with issues of public concern.”). The fact that speech is involved in
18 furthering the activist’s goals does not transform the illegal conduct into protected speech. *See*
19 *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) (“[I]t has never been deemed an
20 abridgment of freedom of speech or press to make a course of conduct illegal merely because the
21 conduct was in part initiated, evidenced, or carried out by means of language, either spoken,
22 written, or printed.”).

23 The First Amendment clearly permits statutes barring threats. As the Supreme Court
24 recognized in *Virginia v. Black*, “the First Amendment ... permits a state to ban a ‘true threat.’”
25 538 U.S. 343, 359 (2003) (internal citations omitted). At issue in *Virginia v. Black* was a state
26 law prohibiting cross burnings done with the intent to intimidate. In upholding the law, the Court
27 found that “[t]he protections afforded by the First Amendment, however, are not absolute, and
28 we have long recognized that the government may regulate certain categories of expression

1 consistent with the Constitution.” *Id.* at 358. While recognizing that cross burning is symbolic
2 expression, the Court nevertheless concluded that when done with the intent to intimidate, it falls
3 outside the contours of protected speech. *Id.* at 363. The Court explained that “[i]ntimidation in
4 the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs
5 a threat to a person or group of persons with the intent of placing the victim in fear of bodily
6 harm or death.” *Id.* at 360.

7 Similarly, the Ninth Circuit held in *Planned Parenthood v. American Coalition of Life*
8 *Activists* that the First Amendment did not protect even facially non-threatening speech. 290
9 F.3d 1058 (9th Cir. 2002) (*en banc*). The defendants there were prosecuted under the Freedom
10 of Access to Clinics Entrances Act, a statute enacted in response to the targeting of legitimate
11 businesses by activist groups opposed to their mission. Like the defendants here, the defendants
12 in *Planned Parenthood* were motivated by their political beliefs. In rejecting the defendants’
13 First Amendment challenge, the Ninth Circuit found that the release of personal information
14 identifying physicians and done with intent to intimidate was threatening, even though the
15 information was conveyed in a manner that did not contain overly threatening language. *Id.* at
16 1085. The Court held that “[t]hreats are outside the First Amendment to ‘protect[] individuals
17 from the fear of violence, from the disruption that fear engenders, and from the possibility that
18 the threatened violence will occur.’” *Id.* at 1076 (quoting *R.A.V. v. City of St. Paul, Minn.*, 505
19 U.S. 377, 388 (1992)). Accordingly, the Court found that the continued release of information
20 identifying abortion providers after three physicians previously identified in posters had been
21 murdered was threatening speech unprotected by the First Amendment. *Id.* at 1079-1086. *See*
22 *also United States v. Viefhaus*, 168 F.3d 392, 396 (10th Cir.1999) (recorded answering machine
23 message announcing that 15 bombs would detonate in major cities not protected speech).
24 Accordingly, the First Amendment does not shield the threatening acts of animal rights activists,
25 including the flyers they create and distribute identifying the researchers by photograph, name,
26 work and home addresses, work and home telephone numbers; the activists’ vandalism, criminal
27 trespass, harassment, and intimidation of the researchers and their families, from prosecution
28 under 18 U.S.C. § 43 (a)(1), (a)(2)(B), and (a)(2)(C) (attempt).

1 Since the statute does not limit protected speech, the strict scrutiny test does not apply. *See*
2 *Melugin v. Hames*, 38 F. 3d 1478, 1483-1484 (9th Cir. 1994) (strict scrutiny test applies to
3 protected speech, lesser standard applies to unprotected speech). Section 43 (a)(2)(B)
4 criminalizes acts, including threatening speech, that are part of a course of conduct involving at
5 least two criminal acts of intimidation, threats, harassment, vandalism, property damage, or
6 trespass intended to place the victim in fear of death or serious bodily injury. *See* 18 U.S.C. § 43
7 (a)(2)(B) and (d)(2). Its purpose is clearly legitimate - to protect animal enterprises from
8 threatening criminal conduct. If an activist engaged in lawful, non-threatening conduct in
9 furtherance of his political opinion, he could not be prosecuted under 18 U.S.C. § 43 (a)(1) and
10 (2)(B) based on his words alone. In fact, a single animal rights protest, or a series of protests,
11 that was not coupled with at least two of the enumerated criminal acts and that was not done for
12 the purpose of scaring a person to death would not violate the statute. As such, the statute
13 criminalizes true threats, much like the statutes at issue in *Virginia v. Black*, *Planned*
14 *Parenthood*, and *Viefhaus* discussed above.

15 C. The statute is neither overbroad nor void for vagueness.

16 1. The statute is not overbroad.

17 In evaluating a facial challenge to the overbreadth of a statute, “a court’s first task is to
18 determine whether the enactment reaches a substantial amount of constitutionally protected
19 conduct.” *Hoffman Estates v. Flipside*, 455 U.S. 489, 494 (1982). Invalidating a statute on this
20 ground is “strong medicine,” and is done “with hesitation and then ‘only as a last resort.’” *New*
21 *York v. Ferber*, 458 U.S. 747, 769 (1982) (internal citation omitted). As a result, “the
22 overbreadth doctrine is not casually employed.” *Los Angeles Police Department v. United*
23 *Reporting Publishing Corp.*, 528 U.S. 32, 39 (1999). *See United States v. Coronado*, 461 F.
24 Supp. 2d 1209, 1212-1213 (S.D. Cal. 2006). Under the overbreadth doctrine, a court must not
25 declare a statute unconstitutional unless it “reaches a substantial amount of constitutionally
26 protected conduct.” *Hoffman Estates*, 455 U.S. at 494. Furthermore, “where conduct and not
27 merely speech is implicated the overbreadth of a statute must be judged in relation to its
28 legitimate sweep.” *Id.* at 1213. *See Hill v. Colorado*, 530 U.S. 703, 732 (2000). The defendants

1 bear the burden of proof in demonstrating substantial overbreadth. *New York State Club Assn.,*
2 *Inc. v. City of New York*, 487 U.S. 1, 14 (1988).

3 Applying the *Hoffman Estates* test, it is clear that the defendants' overbreadth challenge to
4 the statute fails at the first step of the analysis. Section 43 does not criminalize "a substantial
5 amount of constitutionally protected conduct." *Hoffman Estates*, 455 U.S. at 494. Section 43
6 (a)(1) and (2)(B) criminalize a course of conduct intended to place a person in reasonable fear of
7 death or serious bodily injury for the purpose of damaging or interfering with an animal
8 enterprise. As set forth above, the Supreme Court has repeatedly recognized that "true threats"
9 are not protected speech. *See United States v. Cassel*, 408 F.3d 622, 627 (9th Cir. 2005).
10 Accordingly, the statute does not prohibit any constitutionally protected activity. Therefore,
11 defendants' facial overbreadth challenge must fail.

12 2. The statute is not vague.

13 "A statute can be impermissibly vague for either of two independent reasons. First, if it fails
14 to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it
15 prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement."
16 *Hill v. Colorado*, 530 U.S. at 732. "A law that does not reach constitutionally protected conduct
17 and therefore satisfies the overbreadth test may nevertheless be challenged in its face as unduly
18 vague, in violation of due process. To succeed, however, the complainant must demonstrate that
19 the law is impermissibly vague in all of its application." *Hoffman Estates* at 497. Moreover,
20 "every reasonable construction must be resorted to, in order to save a statute from
21 unconstitutionality." *Gonzalez v. Carhart*, 550 U.S. 124, 153 (2007) (internal quotation
22 omitted).

23 Since the statute does not apply to protected speech, the defendants must prove that Section
24 43 (a)(1), (2)(B), and (2)(C) are vague in all of their applications. *See Cal. Teachers Ass'n v.*
25 *State Bd. Of Educ.*, 271 F.3d 1141, 1149 n. 7 (9th Cir. 2001). "[A]ssuming the enactment
26 implicates no constitutionally protected conduct, [the court] should uphold the challenge only if
27 the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some
28 conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the

1 conduct of others.” *Hoffman Estates*, 455 U.S. at 494-495 (footnote omitted). Accordingly, the
2 defendants must prove that the statute was vague as applied to them.

3 Since the defendants have limited the scope of their argument to a facial challenge of the
4 statute, they have not established how the statute was vague as applied to them. Nor could they.
5 The defendants, while frequently hiding their identity behind bandanas, were very vocal about
6 their intended purpose - as set forth in the complaint, the defendants chanted “1, 2, 3, 4, open up
7 the cage door; 5, 6, 7, 8, smash the locks and liberate; 9, 10, 11, 12, vivisectors go to hell,” “what
8 goes down comes around burn UC Berkeley to the ground,” and “we will never back down until
9 you stop your killing.” The defendants are also accused of creating a flyer titled “Murderers and
10 torturers alive & well in Santa Cruz July 2008 edition” that read “animal abusers everywhere
11 beware we know where you live we know where you work we will never back down until you
12 end your abuse.” It is clear from their statements alone that the defendants acted for the purpose
13 of causing the researchers to stop using animals for testing, thereby at a minimum intending to
14 interfere with the activities of their laboratories. Again, the defendants here are charged not
15 because of their opinions, but because of their repeated intentional criminal acts of harassing,
16 intimidating, and threatening bio-medical researchers, coupled with acts of criminal trespass,
17 vandalism, and property damage at their homes. While the defendants could have protested
18 without terrorizing and attempting to terrorize the researchers, they chose not to. They cannot
19 now claim that the law is unclear because they got caught.

20 3. The terms “damage” and “interfere” are not vague.

21 The defendants’ arguments that the term “damage” in subsection (a)(1) is vague because it is
22 not defined in the statute is equally unavailing. The defendants do not prove, nor do they even
23 suggest, any confusion in what that word means. Addressing one of the defendants’ examples,
24 protesters who successfully caused a business to break a contract with another could not be
25 prosecuted under 18 U.S.C. § 43 (a)(1) and (2)(B). *See* Stumpo Brief at 8. While the term
26 “economic damage” is defined in subsection (e)(3), that does not render the term “damage” in
27 (a)(1) vague. In the absence of a statutory definition, courts will normally construe a word based
28 on its ordinary, common meaning. *See Smith v. United States*, 508 U.S. 223, 228 (1993); *see*

1 also *United States v. Iverson*, 162 F.3d 1015, 1022 (9th Cir. 1998) (“When a statute does not
2 define a term, we generally interpret that term by employing the ordinary, contemporary and
3 common meaning of the words that Congress used.”). Damage is defined as to cause “loss or
4 harm resulting from injury to person, property, or reputation.” Merriam-Webster Online
5 Dictionary at www.Merriam-Webster.com/dictionary/damage. This definition is consistent with
6 the common sense understanding of the word. See *Iverson*, 162 F. 3d at 1022.

7 Similarly, there is nothing vague with the term “interfering.” In *United States v. Bucher*, the
8 Ninth Circuit upheld a criminal conviction based on the defendant’s interference with a park
9 ranger engaged in his official duties. 375 F.3d 929 (9th Cir. 2004). Specifically, the Court found
10 that “[t]he term ‘interfere’ is unambiguous and is defined as ‘to oppose, intervene, hinder, or
11 prevent.’” *Id.* at 932 (internal citations omitted). See also, *United States v. Willfong*, 274 F. 3d
12 1297, 1301 (9th Cir. 2001) (“‘Interfere’ has such a clear, specific and well-known meaning as not
13 to require more than’ the use of the word itself in a criminal statute.” quoting *United States v.*
14 *Gwyther*, 431 F. 2d 1142, 1144 n. 2 (9th Cir. 1970)). The defendants’ reliance on *Dorman v.*
15 *Satti* is misplaced. 862 F. 2d 432 (2nd Cir. 1988). The *Dorman* Court found that the terms
16 “interfere,” “harass,” and “acts in preparation” in the Hunter Harassment Act could mean
17 anything because of the “imprecise and indefinite” nature of the statute. *Id.* at 436. Unlike the
18 Hunter Harassment Act, Section 43 limits its application to acts committed for the purpose of
19 damaging or interfering with the operations of an animal enterprise that intentionally place a
20 person in reasonable fear of bodily injury. The only logical meaning the term “interfering” can
21 have in that sentence is the first definition cited by the defendants - “to interpose in a way that
22 hinders or impedes: come into collusion or be in opposition.” Stumpo Brief at 13 quoting
23 Merriam-Webster Online Dictionary. See *Bucher*, 375 F. 3d at 932 (“[o]ne who interferes with a
24 government employee who is engaged in an official duty has necessarily compromised the
25 performance of those duties.”).

26 Nor do the defendants’ hypothetical applications of the statute lead to a different result. A
27 sidewalk picket in front of a fur store for the purpose of interfering with the store’s business
28 which does not also involve at least two criminal acts and is intended to place a person in

1 reasonable fear of death or serious bodily injury could not be prosecuted under 18 U.S.C. § 43
2 (a)(1) and (2)(B). *See* Stumpo Brief at 13. A letter to a company threatening to boycott their
3 product would also not fall under the scope of 18 U.S.C. § 43 (a)(1) and (2)(B). *Id.* The
4 defendants’ alleged acts are in stark contrast to their examples - multiple protests at researchers’
5 homes at which the defendants wearing bandanas covering their face, chant and scream that they
6 will not stop their protests until the researchers stop using laboratory animals, while making
7 explicit and subtle references to arsons, are hardly equivalent to a boycott or peaceful picket.
8 There is no risk that lawful expressions of political opinion that interfere or damage an animal
9 enterprise, without a threat or attempted threat of death or serious bodily injury, would subject an
10 animal rights activist to prosecution under 18 U.S.C. § 43 (a)(1), (2)(B), and (2)(C) (attempt).
11 Indeed, “[t]he ‘requirement of intent to intimidate serves to insulate the statute from
12 unconstitutional application to protected speech.’” *Planned Parenthood*, 290 F. 3d at 1076
13 (internal citation omitted).

14 **IV. CONCLUSION**

15 For the reasons set forth above, 18 U.S.C. § 43 (a)(1), (a)(2)(B), and (a)(2)(C) (attempt) is a
16 lawful restriction on animal rights activists’ ongoing threatening criminal conduct committed
17 against animal enterprises, including employees of the animal enterprises and their families.
18 Neither the statute as charged, nor its defining language is overbroad or vague. Accordingly, the
19 defendants’ motions to dismiss the indictment should be denied.

20
21 Dated: June 15, 2009

Respectfully submitted,
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24 /s/
25 _____
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