UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

AMERICAN SLAUGHTERHOUSE ASSOCIATION, Plaintiff, v. UNITED STATES DEPARTMENT OF AGRICULTURE; and TOM VILSACK, in his official capacity as Secretary of Agriculture; Defendants.	Case No. 3:14-cv-55440 MJC (ABC) **MEMORANDUM OPINION**

Plaintiff, the American Slaughterhouse Association ("ASA"), a national trade association of slaughterhouses, brought an action for declaratory judgment and injunctive relief contending that the Meat Eaters' Right to Know Act ("MERK Act") is unconstitutional. ASA's Complaint alleges that the MERK Act, which requires slaughterhouses to install video cameras on their premises and stream the footage live on their companies' websites, violates the First Amendment (because it compels speech) and the Fourth Amendment (because it authorizes unreasonable government searches).

This matter is now before this Court on the motion of the United States Department of Agriculture and Secretary Vilsack ("the government") to dismiss ASA's Complaint under Federal Rule of Civil Procedure 12(b)(6).

II. Factual Background

In March 2012, in the wake of a slew of undercover investigations at slaughterhouses by animal rights organizations that revealed horrific animal abuse, Congress passed the Meat Eaters' Right to Know Act (introduced as House Bill 108 by Rep. Panop T. Kahn, D-Calif.), which

requires all federally inspected slaughterhouses to install and maintain cameras throughout their facilities in all places where there are animals present, including carcasses. MERK Act § 3. The MERK Act further requires that the footage recorded by the cameras be live-streamed on the website of the company that owns the slaughterhouse, if it has one. MERK Act § 4. Facilities that do not maintain a website must provide the video to the United States Department of Agriculture, which shall make the video available to the public under the Freedom of Information Act (5 U.S.C. § 552). MERK Act § 4. The MERK Act includes a phase-in provision, giving slaughterhouses three years to set up the technology necessary to comply with the law. The statute goes into effect on March 2, 2015. MERK Act § 6.

In passing the MERK Act, Congress found "that the abuse of livestock animals on farms and in slaughterhouses violates the public interest in the humane treatment and slaughter of animals raised for meat and poultry." MERK Act § 1(a). Looking to undercover investigations conducted by animal rights organizations, Congress concluded that "egregious mistreatment of animals raised to produce" animal products was sufficiently prevalent to justify stricter oversight and more surveillance. *Id*. In introducing the legislation, Rep. Kahn noted that slaughterhouses "have little incentive to train workers to treat animals humanely, because until recently, consumers were completely in the dark."

Congress also found "that information about the treatment of these animals is of vital importance to the American consumer. Consumers are curious about where their food comes from and favor laws and policies that create transparency in the food industry." MERK Act § 1(b). Rep. Kahn observed that the MERK Act would "give consumers the information they need to vote with their wallets."

In March 2014, one year before the statute was due to go into effect, ASA filed the present Complaint, alleging that the MERK Act violates the United States Constitution. Currently before the Court is the government's motion to dismiss the complaint under F.R.C.P. 12(b)(6) for failure to state a claim.

III. Analysis

A. Standard

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*.

On a motion to dismiss, the court has "jurisdiction to consider . . . legal argument[s] that the plaintiffs have not stated cognizable constitutional violations, accepting the facts alleged in the complaint as true. . . . But [it] does not at this stage in the litigation have jurisdiction to decide whether any constitutional violations actually occurred or to resolve any factual disputes necessary to make that determination." *Maldonado v. Fontanes*, 568 F.3d 263, 268 (1st Cir. 2009).

Dismissal under Rule 12(b)(6) may be appropriate where, as here, "[t]he facts are not in dispute; the legal conclusions from the facts are." *San Gerónimo Caribe Project, Inc. v. Acevedo-Vilá*, 687 F.3d 465, 471(1st Cir. 2012) (en banc). "Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law," even if the plaintiff's legal theory is "a close but ultimately unavailing one." *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989).

B. First Amendment

ASA's first cause of action alleges that the MERK Act violates the First Amendment, which forbids Congress from making any law "abridging the freedom of speech." U.S. Const. amend. I. The Supreme Court has long held that the First Amendment protects "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The Supreme Court has also made clear that the First Amendment protects commercial speech, such as that of ASA and its members, although that protection is "somewhat less extensive than that afforded 'noncommercial speech.'" *Zauderer v. Office of Disciplinary Counsel*, 471 U.S.

626, 637 (1985). ASA argues that the MERK Act violates slaughterhouses' right to refrain from speaking by requiring them to videotape their operations and put them on display to the public on their websites.

1. Does The MERK Act Regulate Speech?

The threshold question is whether the MERK Act regulates speech at all. The government contends that the MERK Act cannot offend the First Amendment because it does not force slaughterhouses to say anything. It simply requires slaughterhouses to engage in specified *conduct*, namely, that they videotape their premises and stream the footage – unedited – on their websites. In support of its position, the government cites *D'Amario v. Providence Civic Center Authority*, in which the court held that a photographer who was prohibited from photographing a concert was not deprived of his First Amendment rights, because "[t]he activity in which [he sought] to engage, does not partake of the attributes of expression; it is conduct, pure and simple." 639 F. Supp. 1538, 1541(D.R.I. 1986), *aff'd without opinion*, 815 F.2d 692 (1st Cir. 1987). The court concluded that the photographer "wishe[d] to '*do'* something," not *express* something. *Id*. (emphasis added). The government argues that the MERK Act requires slaughterhouses to engage in "conduct, pure and simple."

But the government's position and the court's decision in *D'Amario* no longer seem tenable. Numerous courts, including our circuit, have found that videography is a form of speech entitled to First Amendment protection. In *Glik v. Cunniffe*, for instance, the First Circuit recognized that the First Amendment "encompasses a range of conduct related to the *gathering and dissemination of information*" and therefore protects the right to videotape police officers performing their duties in public. 655 F.3d 78, 82 (1st Cir. 2011) (emphasis added); *see also, ACLU v. Alvarez*, 679 F.3d 583 (7th Cir. 2012) (holding that the First Amendment protects the right to videotape police officers in public); *Iacobucci v. Boulter*, 193 F.3d 14, 25(1st Cir. 1999) (holding that a citizen's filming of public officials was "done in the exercise of his First Amendment rights"); *see generally* Seth F. Kreimer: *Pervasive Image Capture and the First*

Amendment: Memory, Discourse, and the Right to Record, 159 U. Pa. L. Rev. 335 (2011) (noting that "images which are immediately disseminated upon capture (as in live video broadcasting) constitute 'speech.'"). If there exists a First Amendment right to videotape, there must exist the correlative right *not* to videotape.

In light of this overwhelming judicial (not to mention social) trend towards considering videography to be speech, this Court hold that the MERK Act does in fact compel speech, and therefore must be scrutinized under the First Amendment.

2. Does The MERK Act Violate The First Amendment?

Having concluded that the MERK Act does tread into the terrain of the First Amendment, the resulting question is whether the Act nevertheless withstands constitutional scrutiny.

i. Which First Amendment Test Applies?

The Supreme Court has established separate tests for *restraints* on commercial speech on the one hand, and *compelled commercial disclosures* on the other. In *Central Hudson*, the Court held that restrictions on commercial speech must "directly advance" a "substantial" government interest that cannot be served "by a more limited restriction." *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980). In *Zauderer*, however, the Supreme Court recognized that there are "material differences between disclosure requirements and outright prohibitions on speech," and reasoned that disclosure requirements "only require[] [commercial speakers] to provide somewhat more information than they might otherwise be inclined to present." *Zauderer*, 471 U.S. at 650. Because a commercial speaker's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal," the government is held to a lesser standard and need only show that "disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.* at 651.

Notwithstanding this important distinction between compelled disclosures and prohibited speech, ASA nevertheless urges this Court to employ the stricter *Central Hudson* standard, which would require the government to show that the MERK Act directly advances a substantial

governmental interest and is the least restrictive means of achieving that end. *Central Hudson*, 447 U.S. at 564. ASA argues that *Zauderer* applies only in cases in which the proffered government interest is "preventing deception of consumers," 471 U.S. at 651, which the government concedes is not at issue in this case.[1]

Although the First Circuit has yet to clearly extend *Zauderer* to government interests other than consumer deception, the D.C. Circuit, sitting en banc, recently held in *American Meat Institute v. USDA* "that *Zauderer* in fact does reach beyond problems of deception." *Am. Meat Inst. v. United States Dep't of Agric.*, No. 13-5281, 2014 U.S. App. LEXIS 14398, at *3 (D.C. Cir. July 29, 2014) (en banc).

In *AMI*, a meat industry trade group challenged a regulation requiring meat packages to disclose their country of origin, including where the animal was born, raised, and slaughtered. *Id*. at *4. AMI argued that the compelled disclosure violated the First Amendment. *Id*. at *6. A divided en banc court upheld the regulation, holding that the *Zauderer* standard applied, notwithstanding the fact that the country-of-origin labels were not intended to cure consumer deception. *Id*. at *3. The court held that the government's proffered interests in promoting American meat and in protecting the health of consumers were substantial. *Id*. at *21.

Absent contrary guidance from the First Circuit, this Court finds the D.C. Circuit's reasoning persuasive and agrees that *Zauderer* extends to substantial government interests other than curing consumer deception.

ii. Does the MERK Act pass the Zauderer *test?*

As in the *AMI* case, the first step in evaluating the constitutionality of the MERK Act under *Zauderer* is to "assess the adequacy of the interest motivating the [law.]" *Id*. at 8. Here, the legislative findings of the statute focus on preventing animal cruelty and enabling consumers to see how their food was produced.[2] ASA argues that neither of these interests is adequate to justify

[1] Although the MERK Act is intended to increase meat eaters' knowledge of how their food is produced, nothing in the factual findings suggests that it is intended to remedy actual *deception*.

[2] The government argues in its motion to dismiss that meat production implicates food safety

infringing on the free speech rights of its members.[3]

In support of the first argument, that preventing animal cruelty is not substantial, ASA cites the Third Circuit's decision in *United States v. Stevens*, in which the court refused to recognize the prevention of animal cruelty as a compelling interest. 533 F.3d 218, 226 (3d Cir. 2008), *aff'd on other grounds*, 559 U.S. 460 (2010). *Stevens* involved the constitutionality of a federal statute that prohibited the creation, production, or possession of depictions of animal cruelty. *Id*. at 221-22. After reviewing Supreme Court cases involving compelling government interests, the Third Circuit concluded that "[n]othing in these cases suggests that a statute that restricts an individual's free speech rights in favor of protecting an animal is compelling." *Id*. at 227-28.

ASA also argues that the government has no substantial interest in enabling consumers to know how their food was produced. ASA cites *International Dairy Foods Ass'n v. Amestoy*, in which the Second Circuit held that "consumer curiosity alone is not a strong enough state interest to sustain the compulsion of even an accurate, factual statement." 92 F.3d 67, 74 (2d Cir. 1996). *Amestoy* involved the constitutionality of a Vermont statute that required milk producers to disclose whether their products were produced using bovine growth hormones. *Id*. at 69. The Second Circuit concluded that the state had failed to establish any basis for the law other than the idle curiosity of consumers. *Id*. at 74.

The Court disagrees with ASA's arguments on each of these substantial government interests.

As to the government's interest in preventing animal cruelty, this country has a long history of according protections to animals, dating back to the Puritans, and today all fifty states

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concerns, but this potentially substantial government interest was not part of the legislative findings, so this Court will not consider it as a basis for upholding the law.

[3] As the D.C. Circuit acknowledged, "*Zauderer* gives little indication of what types of interest might suffice. In particular, the Supreme Court has not made clear whether *Zauderer* would permit government reliance on interests that do not qualify as substantial . . . ." *AMI*, 2014 U.S. App. LEXIS 14398, at *9. Because this Court concludes that protecting animals and promoting consumer information are substantial government interests, it need not chart new territory by determining whether a lesser interest could justify the disclosure required by the MERK Act.

prohibit cruelty to animals. *Stevens*, 559 U.S. at 469 ("[T]he prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies."); *see also id.* at 496 ("[T]he Government . . . has a compelling interest in preventing the torture" of animals") (Alito, J., dissenting); *Farm Sanctuary, Inc. v. Dep't of Food & Agric.*, 74 Cal. Rptr. 2d 75, 79 (Cal. Ct. App. 1998) ("It has long been the public policy of this country to avoid unnecessary cruelty to animals," because "[t]here is a social norm that strongly proscribes the infliction of any 'unnecessary' pain on animals, and imposes an obligation on all humans to treat nonhumans 'humanely.'" (citations omitted)). For more than fifty years, the federal government has had a policy of ensuring that animals are slaughtered in a way that minimizes their suffering. The Humane Methods of Slaughter Act of 1958 declares that "the use of humane methods in the slaughter of livestock prevents needless suffering," and accordingly made it the "policy of the United States that the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods." 7 U.S.C. § 1901. In light of this historical consensus, this Court has no difficulty concluding that the government's interest here is substantial.

As to the government's interest in empowering consumers to make educated choices about their food purchases, the Court simply disagrees with the out-of-circuit decision in *Amestoy*. The Court notes that there is a growing public interest in how food is produced, as evidenced by the public's growing demand for organic foods, proposed laws requiring the labelling of food that contains genetically modified organisms, and the popularity of books like *The Omnivore's Dilemma*. This country has long required the disclosure of information related to animal products, as evidenced by a host of federal statutes, including the Federal Meat Inspection Act (FMIA), the Poultry Products Inspection Act (PPIA), the Egg Products Inspection Act (EPIA), the Agricultural Marketing Act (AMA), the Federal Food, Drug and Cosmetic Act (FFDCA), and the Fair Packaging and Labeling Act (FPLA). This Court therefore concludes that the government's interest in enabling consumers to know how their food is produced is substantial.

Accordingly, the Court finds that the government has met its burden under the first step of *Zauderer*.

"Having determined that the interest served by the disclosure mandate is adequate, what remains is to assess the relationship between the government's identified means and its chosen ends." *AMI*, 2014 U.S. App. LEXIS 14398, at *14. In this case, ASA urges the Court to subject the MERK Act to rigorous scrutiny to determine whether it is "narrowly tailored" to serve the government's purported interests in preventing animal cruelty and informing consumers about how meat is produced. *Central Hudson*, 447 U.S. at 564. ASA argues that because the Act applies indiscriminately to all slaughterhouses, regardless of whether they have violated humane slaughter laws in the past, it is overbroad and not narrowly tailored to the government's interests. ASA further argues that even as to those slaughterhouses who do treat animals inhumanely, the MERK Act does not "directly advance the state interest involved," *id*., because merely recording or observing animal suffering does nothing to actually remedy it. ASA also argues that the MERK Act is not the least restrictive means of educating consumers about how their meat is produced because the government could simply produce an educational video or require video at a small sampling of slaughterhouses rather than all of them.

But ASA's argument that the statute must be narrowly tailored and must directly advance the government's interest relies entirely on *Central Hudson*, which this Court has already held does not apply to a case such as this one, in which the government is compelling speech rather than restricting it. Accordingly, the government need only show that the MERK Act is "reasonably related" to its purported interests. *Zauderer*, 471 U.S. at 651.

The Court concludes that there is a reasonable relationship between the video requirement and the goals of promoting animal welfare and informing consumers. The MERK Act reasonably advances the government interest in animal welfare by potentially deterring the cruel treatment of animals or empowering consumers to boycott those slaughterhouses that they disapprove of. The MERK Act also reasonably advances the governmental interest in consumer information, because,

as the D.C. Circuit put it, "the means-end fit is self-evidently satisfied when the government acts only through a reasonably crafted mandate to disclose 'purely factual and uncontroversial information' about attributes of the product or service being offered." *AMI*, 2014 U.S. App. LEXIS 14398, at *15 (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)). That is precisely what the MERK Act does. A live, unedited videostream is both "purely factual" and "uncontroversial," because it simply depicts reality and does not force the slaughterhouses to adopt any particular message or viewpoint about the morality, humaneness, or desirability of what is depicted. *Id*. at 17.

Having concluded that the MERK Act is, as a matter of law, reasonably related to the government's substantial interest in animal welfare and consumer information, the Court holds that ASA has failed to state a claim under the First Amendment and GRANTS the government's motion to dismiss that claim.

C. Fourth Amendment

The Complaint also alleges that the MERK Act violates the Fourth Amendment's prohibition on unreasonable searches. U.S. Const. amend. IV. ASA argues that the streaming requirement essentially constitutes a continuous and ongoing search of slaughterhouses with no warrant, probable cause, or even reasonable suspicion that a crime is being committed and without meeting the Supreme Court's test for warrantless administrative searches.

1. Can ASA Pursue A Facial Challenge To The MERK Act Under The Fourth Amendment?

The government contends that ASA's Fourth Amendment challenge is premature. In support of its position it cites the Supreme Court's decision in *Sibron v. New York*, 392 U.S. 40 (1968) and the Sixth Circuit's en banc decision in *Warshak v. United States*, 532 F.3d 521 (6th Cir. 2008) (en banc), both of which refused to entertain facial challenges to statutes under the Fourth Amendment.

In *Sibron*, the Supreme Court considered a facial Fourth Amendment challenge to New York's "stop-and-frisk" law, N. Y. Code Crim. Proc. § 180-a. Although the litigants urged the Court to determine whether the statute was constitutional on its face, the Court "decline[d] . . . to be drawn into what [it] view[ed] as the abstract and unproductive exercise of laying the extraordinarily elastic categories of [the challenged statute] next to the categories of the Fourth Amendment in an effort to determine whether the two are in some sense compatible." *Sibron*, 392 U.S. at 59. The Court concluded that "[t]he constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case." *Id*. Instead of opining on the overall constitutionality of the statute itself, the Court analyzed the specific circumstances of the searches conducted on the defendants. *Id*. at 62.

In *Warshak*, the Sixth Circuit refused to entertain a facial Fourth Amendment challenge to the Stored Communications Act, 18 U.S.C. §§ 2701-2711, holding that the plaintiff's challenge was not ripe for review. *Warshak*, 532 F.3d at 525. The court noted that the Fourth Amendment's requirement that searches be reasonable made sense only in the context of actual, conducted searches, and that it lacked jurisdiction to opine on the constitutionality of hypothetical future searches. *Id*. at 528. As the Sixth Circuit put it, in the Fourth Amendment context, "courts typically look at the 'totality of the circumstances,' reaching case-by-case determinations that turn on the concrete, not the general, and offering incremental, not sweeping pronouncements of law." *Id*. at 528. For that reason, "the Fourth Amendment . . . generally should be applied *after* those circumstances unfold, not *before*." *Id*. (emphasis added).

In response, ASA argues that the Supreme Court itself has entertained at least one facial Fourth Amendment challenge, just one term before *Sibron*. *Berger v. New York*, 388 U.S. 41 (1967). In *Berger*, the Supreme Court held that a New York statute that permitted wiretapping without requiring any of the procedural safeguards of the Fourth Amendment was facially unconstitutional. *Id*. at 55 ("[T]he statute is deficient on its face . . . .").

ASA also points out that there is a circuit split concerning whether courts can entertain facial challenges to statutes under the Fourth Amendment. The Ninth Circuit, sitting en banc in *Patel v. City of Los Angeles*, 738 F.3d 1058 (9th Cir. 2013) (en banc), recently permitted a facial challenge under the Fourth Amendment to Los Angeles Municipal Code section 41.49, which requires hotel operators to maintain certain information about their guests. *Id.* at 1060. The Ninth Circuit found the statute unconstitutional on its face. *Id.* at 1064.

This Court finds that although the Supreme Court has warned against facial Fourth Amendment challenges in most cases, it has not clearly foreclosed them, especially in cases like this one where every application of the statute is potentially unconstitutional. Although the First Circuit has not addressed the issue, the Court finds the Ninth Circuit's decision in *Patel* more persuasive than the Third Circuit's decision in *Warshak*.[4] Although courts generally benefit from facts and context when evaluating the reasonability of a search, this case is different because it entails continuous and ongoing surveillance, regardless of the circumstances.

Moreover, the Court recognizes the difficult position that ASA's members are in absent an ability to mount a facial challenge. Denying a facial challenge before the MERK Act goes into effect would effectively force slaughterhouses to either install expensive surveillance equipment or else face steep fines for failing to do so. *See Patel*, 738 F.3d at 1064 (noting that "[o]nly by refusing the officer's inspection demand and risking a criminal conviction may a hotel operator challenge the reasonableness of the officer's decision to inspect"). In the First Amendment context, courts have refused to force plaintiffs to break a law before they can challenge its constitutionality. *See, e.g.*, *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). The Court sees no reason why that rule should not apply to laws that may violate the Fourth Amendment.

The Court therefore will consider ASA's facial challenge under the Fourth Amendment.

[4] The First Circuit has not directly addressed this issue, but the District Court of Massachusetts seems to have entertained a facial Fourth Amendment challenge in *Scott v. United States*,2013 U.S. Dist. LEXIS 36982 (D. Mass. Mar. 18, 2013).

2. Does The MERK Act Violate The Fourth Amendment?

Although the Fourth Amendment frowns on warrantless searches, it nevertheless permits them in certain cases. Recognizing the inherent tension between a robust regulatory state and the privacy protected by the Fourth Amendment, the Supreme Court has held that administrative searches are reasonable as long as they meet certain requirements. *New York v. Burger*, 482 U.S. 691, 702 (1987). "Because the owner or operator of commercial premises in a 'closely regulated' industry has a reduced expectation of privacy, the warrant and probable-cause requirements, which fulfill the traditional Fourth Amendment standard of reasonableness for a government search, have lessened application in this context." *Id*. (citation removed); *see also United States v. Maldonado*, 356 F.3d 130, 134-35 (1st Cir. 2004) ("Commerce, by its very nature, often results in a heightened governmental interest in regulation. This increased interest necessarily results in a diminution of the privacy interests of those who operate commercial premises. That trend crests when an industry operates under pervasive regulation. In such circumstances, warrantless inspections of commercial sites may be constitutionally permissible.").

In *Burger*, the Supreme Court established a three-part test to determine whether the warrantless search of a closely regulated industry violates the Fourth Amendment: "First, there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made. . . . Second, the warrantless inspections must be 'necessary to further [the] regulatory scheme.' . . . [Third], 'the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant.'" *Burger*, 482 U.S. at 702.

As a threshold matter, ASA argues that no court has found slaughterhouses to be a closely regulated industry for Fourth Amendment purposes. The Court is unpersuaded: given the already extensive requirements under the HMSA and FMIA, as well as their implementing regulations, the Court has no trouble concluding that ASA's members are pervasively regulated companies, such that they have reduced privacy expectations. *See Giragosian v. Bettencourt*, 614 F.3d 25, 29 (1st

Cir. 2010) ("[T]he owner of commercial property in a closely regulated industry has a reduced expectation of privacy in those premises.").

The Court must therefore analyze the MERK Act under the *Burger* test.

The first question is whether there is "a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made." *Burger*, 482 U.S. at 702. As the Court has already discussed in the compelled speech context, the government has met this burden by showing that protecting animals and informing consumers are substantial government interests.

The second question is whether "the warrantless inspections [are] 'necessary to further [the] regulatory scheme.'" *Burger*, 482 U.S. at 702. The government argues persuasively that the MERK Act advances animal welfare by deterring cruelty: if slaughterhouses know they are being watched, they are much less likely to cut corners and treat animals inhumanely. It also promotes the consumer's right to know by providing a window onto the production process. ASA argues that the video requirement is unnecessary because there are already USDA inspectors present at slaughterhouses. Although it is true that there are already federal inspectors at ASA's member facilities, Congress has the power to expand and supplement their reach by adding the videotaping requirement. Accordingly, the Court finds that the MERK Act's ongoing video inspections are "necessary to advance the regulatory agenda." *Maldonado*, 356 F.3d at 135.

The final question is whether "the statute's inspection program, in terms of the certainty and regularity of its application, . . . provid[es] a constitutionally adequate substitute for a warrant.'" *Burger*, 482 U.S. at 703. The *Burger* Court elaborated this prong thusly: "the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." *Id*. ASA contends that the MERK Act fails this prong because it lacks "a properly defined scope," given that it requires ongoing and continuous livestreaming. *Id*., *see also United States v. Biswell*, 406 U.S. 311, 315 (1972) (holding that warrantless searches must be "carefully limited in time, place, and scope").

Although the Court acknowledges the broad sweep of the MERK Act, it holds that the law meets the third requirement of the *Burger* test. As the First Circuit has described this prong, it simply requires that the inspection scheme provide "notice to those regulated and restrictions on the administrator's discretion." *United States v. Gonsalves*, 435 F.3d 64, 67 (1st Cir. 2006); *see also Maldonado*, 356 F.3d at 135 (1st Cir. 2004) ("This last criterion looks to notice as to the scope of the search as well as limitations on the discretion afforded to inspecting officers."). The MERK Act provides slaughterhouses adequate notice, in that they are always aware when the search is ongoing; indeed that is part of the very purpose of the MERK Act – to let slaughterhouses know that consumers and the USDA are watching. The MERK Act also contains sufficient restraints on the discretion of the inspector. The MERK Act requires all slaughterhouses to livestream everything, such that it cannot be employed by inspectors in a discriminatory fashion.

Having concluded that the MERK Act meets the *Burger* test for warrantless administrative searches, the Court holds that ASA has failed to state a claim under the Fourth Amendment and GRANTS the government's motion to dismiss that claim.

IV. Conclusion

For the reasons set forth herein, the Court GRANTS the government's motion to dismiss ASA's Complaint in its entirety for failure to state a claim under either the First Amendment or the Fourth Amendment.

IT IS SO ORDERED this 15th day of August, 2014.

Hon. Myra J. Copeland
United States District Judge