Case No. 3:14-cv-55440 MJC (ABC)

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

AMERICAN SLAUGHTERHOUSE ASSOCIATION,

Plaintiff-Appellant

v.

UNITED STATES DEPARTMENT OF AGRICULTURE;

and TOM VILSACK, in his official capacity as Secretary of Agriculture;

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE DEFENDANTS-APPELLEES

Team No. 10

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

STATEMENT OF JURISDICTION

The present appeal arises in response to final judgment of the United States District Court for the District of Massachusetts, entered on August 15, 2014. The District Court had proper jurisdiction over the matter pursuant to 28 U.S.C. § 1331, which provides that "[t]he district court shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." The United States Court of Appeals for the First Circuit has jurisdiction for this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether the Meat Eaters' Right to Know Act ("the MERK Act") violates the First Amendment.

II. Whether the American Slaughterhouse Association ("the Association") can pursue a facial challenge to the MERK Act on Fourth Amendment grounds and, if so, whether the MERK Act violates the Fourth Amendment.

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

In March 2012, Congress passed the MERK Act, which requires all federally inspected slaughter plants to video record all handling or slaughtering operations performed in areas where animals or carcasses are present. MERK Act § 3. The MERK Act also requires all slaughter plants maintaining a company website to continuously steam the video recordings required by Section 3 to all visitors to the site. MERK Act § 4. The MERK Act requires slaughter plants without company websites to provide the video recordings to the United States Department of Agriculture ("USDA"), which in turn is required to make the video recordings available to the public under the Freedom of Information Act, 5 U.S.C. § 552. MERK Act § 4. Congress provided the act an effective date of March 2, 2015, "[i]n order to give slaughter plants sufficient time to set up the technology necessary to comply with the law." MERK Act § 6.

II. PROCEEDINGS BELOW

In March 2014, Appellants American Slaughterhouse Association ("the Association"), a national trade association of slaughterhouses, filed a claim in the United States District Court for the District of Massachusetts, claiming that MERK violates the First and Fourth Amendments. The Association sought a declaratory judgment and injunctive relief against Appellees USDA and Tom Vilsack, Secretary of Agriculture ("the Government"). The Government brought a motion to dismiss the Association's case for failure to state a claim for which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)").

After hearing arguments on the motion to dismiss, the District Court (Copeland, J.) issued a ruling on August 15, 2014, granting the Government's motion to dismiss the Association's

claims in its entirety for failure to state a claim under either the First Amendment or the Fourth Amendment.

The Association appealed, to the United States Court of Appeals for the First Circuit, the District Court's grant of the Government's motion to dismiss. On October 31, 2014, the Court of Appeals issued a briefing order to both parties, limiting the parties' briefs to specific issues provided by the court.

STATEMENT OF THE FACTS

In 1955, Senator Hubert Humphrey (D-Minn.) introduced the first humane slaughter bill ever presented to Congress. 85 Cong. Rec. S15381 (1958) (statement of Sen. Hubert Humphrey). While the 1955 bill and successive legislative efforts in 1956 and 1957 failed (85 Cong. Rec. S15412-13, 1996), the issue of humane slaughter continued to gain the attention of Congress, prompting subcommittee hearings and a visit by the House subcommittee members to various slaughterhouses. Proposals Relating to Humane Methods of Slaughter of Livestock: Hearings on S. 1213, S. 1497, and H. R. 8308 Before the S. Comm. on Agriculture and Forestry, 85th Cong. 30 (statement of Fred Myers, executive dir., Humane Soc'y of the United States). On August 27, President Dwight D. Eisenhower signed into law the Humane Methods of Slaughter Act (HMSA) of 1958. 85 Cong. Rec. H19717 (1958). Asked if he would sign the bill, President Eisenhower had responded: "If I went by mail, I'd think no one was interested in anything but humane slaughter." United States. Cong. House. *Expressing the sense of Congress that the Humane Methods of Slaughter Act of 1958 should be fully enforced so as to prevent needless suffering of animals*. 107th Cong. 1st sess. H. Con. Res. 175 (2001).

The HMSA regulated the methods of slaughter, but exempted ritual slaughter, such as Kosher or Halal. 7 U.S.C. § 1902 (1958). In 1978, Congress amended the HMSA to charge the USDA with enforcement responsibility over the act, which was then mandatory for all slaughterhouses engaged in interstate commerce. 21 U.S.C. § 603; 21 U.S.C. § 610. This amendment also provided for USDA inspection during all operating hours. 21 U.S.C. § 603. As a result of this amendment, which incorporated the HMSA into the Federal Meat Inspection Act (FMIA), criminal penalties are available for humane slaughter violations. 21 USC § 676. Though there are no reported cases of criminal convictions arising from HMSA violations, the Bureau of

Justice Statistics reports that there were thirty-four defendants in closed HMSA criminal cases from 2000-2012. Bureau of Justice Statistics – Federal Justice Statistics Program, http://www.bjs.gov/fjsrc/tsec.cfm (last visited Jan. 22, 2015). While there is no known record of criminal penalties arising from HMSA, the USDA takes other enforcement actions against facilities in violation of the act, including suspensions and issuance of noncompliance reports and memoranda of interview, which are posted to the USDA website or available through the Freedom of Information Act, 5 U.S.C. § 552. United States Department of Agriculture – Food Safety and Inspection Service – Humane Handling Enforcement Actions, http://www.fsis.usda.gov/wps/portal/fsis/topics/regulatory-compliance/regulatory-enforcement/humane-handling-enforcement-actions (last visited Jan. 22, 2015).

On January 25, 2012, Representative Panop T. Kahn (D-Calif.) introduced the MERK Act "to address the abuse of animals in our nation's slaughterhouses" in response to a perceived weakness in the enforcement of the HMSA. Introducing the Meat Eaters' Right to Know Act, dated January 25, 2012, at 1. Prior to the MERK Act's passage, Representative Kahn received "thousands of calls, emails, and letters every year from constituents outraged by the horrendous cruelty they see in undercover videos, [*sic*] and desperate for more information about meat production. Right now, they have no way of knowing—on labels, from the USDA, or on company websites—which slaughterhouses play by the rules and which abuse animals." *Id.* The USDA also voiced a need for video surveillance to assist its HMSA enforcement duties. *Id.* In response to these needs, and in order to "end the deplorable abuse of animals in our Nation's slaughterhouses and give consumers the information they need to vote with their wallets," Representative Kahn authored the MERK Act. *Id.* at 2.

The MERK Act included a Congressional statement of findings concluding that abuse of animals in slaughterhouses "violates the public interest in the humane treatment and slaughter of animals raised for meat and poultry;" that "information about the treatment of these animals is of vital importance to the American consumer;" and that "[i]t is in the essential public interest that consumers of animal products possess the greatest possible information about the treatment of animals in slaughterhouses [and v]ideo surveillance providing continuous footage of activities in these facilities promotes this goal." MERK Act. § 1. The MERK Act was passed in March 2012. Memorandum Opinion, dated August 15, 2014, at 1–2. The effective date of the act is March 2, 2015. MERK Act. § 6.

STANDARD OF REVIEW

The court reviews a dismissal for failure to state a claim under Rule 12(b)(6) de novo. *Woods v. Wells Fargo Bank, N.A.*, 733 F.3d 349, 353 (1st Cir. 2013). The sole inquiry under Rule 21(b)(6) is whether, construing the well-pleaded facts of the complaint in the light most favorable to the plaintiffs, the complaint states a claim for which relief can be granted. Fed. R. Civ. P. 12(b)(6).

"In resolving a motion to dismiss, a court . . . should begin by identifying and disregarding statements in the complaint that merely offer 'legal conclusion[s] couched as . . . fact[]' or '[t]hreadbare recitals of the elements of a cause of action.'" *Ocasio-Hernandez v. Fortuño-Burset*, 640 F.3d 1, 12 (1st Cir. 2011) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The court should not "accept the complaint's legal conclusions or naked assertion[s] devoid of further factual enhancement." *Soto-Torres v. Fraticelli*, 654 F.3d 153, 156 (1st Cir. 2011) (internal quotations omitted).

"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 *Twombly*, 550 U.S. at 570). Additionally, the court has "jurisdiction to consider the . . . legal argument that the plaintiffs have not stated cognizable constitutional violations." *Maldonado v. Fontanes*, 568 F.3d 263, 268 (1st Cir. 2009). "[O]nly a complaint that states a plausible claim for relieve survives a motion to dismiss." *Iqbal*, 556 U.S. at 679.

SUMMARY OF THE ARGUMENT

The district court erred in ruling that the MERK Act regulates expressive speech. Since only the conduct of slaughter plants' is regulated, and they retain full control over the content of the required video recordings, neither the act of recording, the act of dissemination, nor the content of the video is expressive speech afforded First Amendment Protection. In the alternative, even if the MERK Act is determined to compel speech, it compels speech permissibly under *Zauderer*, which provides the appropriate First Amendment test for analysis of compelled commercial speech that is a purely factual disclosure, as here. As the MERK Act articulates two deeply rooted State interests in the legislative findings of the act, and since these interests are reasonably related to the disclosure requirements, the act passes constitutional muster.

The district court also erred in considering the facial Fourth Amendment challenge to the MERK Act. Since the Fourth Amendment protects against unreasonable searches and seizures, the court evaluates the reasonableness of the search or seizure, which a very fact specific exercise. In the case the court does consider the facial challenge, the MERK Act does not violate the Fourth Amendment. The Association's members are part of a closely regulated industry, which can reasonably be subjected to administrative searches. The MERK Act is reasonable and passes the three criteria set forth in *Burger* through the articulation of a substantial government interest that informs the regulatory scheme necessitating the warrantless inspection and providing for a sufficient substitute in lieu of a warrant.

ARGUMENT

I. THE MERK ACT DOES NOT VIOLATE THE FIRST AMENDMENT BECAUSE IT DOES NOT REGULATE COMPELLED SPEECH OR, IN THE ALTERNATIVE, DOES NOT VIOLATE THE FIRST AMENDMENT BECAUSE IT REGULATES COMPELLED COMMERCIAL DISCLOSURES AS PERMITTED UNDER THE *ZAUDERER* DOCTRINE.

A. The Video Recordings And Slaughter Plant Disclosures Required By The MERK Act Are Not Compelled Speech Because The Statute Does Not Regulate Expressive Speech Or The Content Of The Recordings.

The Association claims that the MERK act violates the First Amendment, which states in part that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The Supreme Court held in 1974 that "freedom of speech" applied both to compelled silence and compelled speech. *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 258 (1974). Yet this constitutional protection does not limit the government's ability to regulate conduct, as "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

The MERK Act requires "video recordings capturing every location of the slaughter plant at which live animals or carcasses are handled." MERK Act. § 3. Additionally, the act requires all slaughter plants that "maintain a company website" to stream these recordings on their website in a manner that is "freely accessible and continuously available to any visitor to the

company website," requiring those slaughter plants without a company website to make available their video recordings to the public via the USDA and "under the Freedom of Information Act, 5 U.S.C. § 552." The Association's assertion that these recordings and disclosures constitute compelled speech in violation of the First Amendment is erroneous because the MERK Act regulates not expressive speech, but conduct.

The Supreme Court cautions that "it is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). The Supreme Court has also consistently rejected the argument that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (cited with approval in *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993)).

The determining factor then is expression, which differentiates protected speech from pure conduct, for if the regulated activity "does not partake of the attributes of expression; it is conduct, pure and simple." *D'Amario v. Providence Civic Ctr. Auth.*, 639 F. Supp. 1538, 1541 (D.R.I. 1986), *aff'd without opinion*, 815 F.2d 692 (1st Cir. 1987), *cert. denied*, 48 U.S. 859 (1987). Here, as in *D'Amario*, the Plaintiff does not "desire to 'express' [it]self by displaying [or withholding] the existing fruits of his photographic endeavors . . . [but] wishes to 'do' something. *Id.* The MERK Act requires only that slaughter plants only "do" the various actions that it entails.

The District Court rejected the argument that the MERK Act merely controls conduct, but it erred in so doing. The District Court rejected the court's decision in *D'Amario*, citing a string

of subsequent cases that require First Amendment protection for videotaping public officers in public places. Memorandum Opinion, dated August 15, 2014, at 4-5. The ruling then concludes that "[i]f there exists a First Amendment right to videotape, there must exist the correlative right *not* to videotape." *Id.* at 5. But this conditional statement goes too far: there is no blanket First Amendment right to videotape; there is a right to videotape *if* certain content requirements are met, namely, that the content is sufficiently expressive. *City of Dallas*, 490 U.S. at 25.

The video recording required by the MERK act is not sufficiently expressive to merit protection under the First Amendment. The illustrative test is provided by *Rumsfeld*, which states that a regulation impermissibly compels speech only when it dictates the content of the speech, thereby restricting the expression. *Rumsfeld*, 547 U.S. at 62. Here, as in *Rumsfeld*, the complaining party retains complete control over the content of the video recordings, and so there is no restriction or compulsion of expression. *Id.* The MERK Act does not attempt in any way to restrict or compel expressive speech, it simply regulates conduct, the content and expression of which is left to the slaughter plant.

Determinations of what acts constitute First Amendment protected speech become increasingly difficult in an increasingly digital age in which much, if not all, is recorded in some way. Extending blanket protection on the basis of the medium on which an activity is recorded, documented, or performed alone runs the risk of extending First Amendment protection over all conduct. Such an extension of protection under the First Amendment to all conduct would cripple the ability of Congress to regulate at all, as all regulations of conduct would be restrictions of speech and so subjected to the strict scrutiny First Amendment tests. Additionally, this extension would upset a long tradition of legal precedent that defines and qualifies the protection offered by the First Amendment.

The District Court opinion sets aside good law, in *D'Amario*, and drops the critical element of expression from its analysis, thus blurring the line between speech and conduct. Memorandum Opinion, dated August 15, 2014 at 4. It also sidesteps the critical *Rumsfeld* test that considers whether or not the content of a message or activity is being controlled or compelled. Despite the fact that the MERK Act requires the recording and streaming of slaughter plant activities, the slaughter plants themselves are not engaged in expressive speech and retain complete control over the content of the videos they are required to produce. As such, the MERK Act is a regulation on the conduct of a regulated industry, which does not violate or even concern the First Amendment.

B. Assuming *Arguendo* That The MERK Act Restricts or Compels Protected Speech, The Statute Does Not Violate The First Amendment Under *Zauderer*.

i. The *Zauderer* Test Controls The First Amendment Analysis Of The MERK Act.

Through the district court erred in ruling that the MERK Act regulated speech, the court ruled correctly in finding that even if the MERK Act were determined to regulate speech, it did so in a manner that did not offend the First Amendment. In conducting a First Amendment analysis, the first step is to determine which test applies. The *Central Hudson* test first determines whether the commercial speech in question is neither misleading nor related to unlawful activity. *Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980). If, as here, the commercial speech is not misleading or unlawful, the government must assert a substantial interest justifying a restriction on the speech, which must not just directly advance the government's substantial interest, but do so in a way that does not extend more than necessary to satisfy the interest. *Id.* Soon after its ruling in *Central Hudson*, the Court clarified in *Zauderer* that if the government compels factual and uncontroversial

information, the disclosure requirement will receive a lower level of scrutiny than available under the *Central Hudson* test. *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 650-51 (1985). This is appropriate because compelled commercial speech is "purely factual and uncontroversial information" and because when the government compels commercial speech, it does not prevent the company from stating anything, but simply requires them to provide more factual information. *Id.*

Zauderer's assertion that First Amendment protection of commercial speech is "somewhat less extensive than that afforded noncommercial speech" (*Id.*, at 637) was reaffirmed by the Supreme Court, years later, when it held again that "'commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values', and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression." *Bd. of Trs. v. Fox*, 492 U.S. 469, 477 (1989) (quoting *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978)). As the MERK Act discloses only whatever actions are taking place at the slaughter plants, it is compelling "purely factual and uncontroversial information" and the proper First Amendment standard is thus provided by *Zauderer*. MERK Act. §§ 3-4.

ii. The MERK Act Passes the Two-Part *Zauderer* Test.

Under *Zauderer*, the First Amendment analysis first determines whether there is a legitimate state interest motivating the regulation. *Zauderer*, 471 U.S. at 651. The legislative findings provided in the MERK Act state that the government interests furthered by the act are to prevent animal cruelty and to enable consumers to make informed purchasing decisions by providing more "transparency in the food industry." MERK Act. §1. The government interest in preventing cruelty to farmed animals at least as far back as the passing of the HMSA in 1958.

Proposals Relating to Humane Methods of Slaughter of Livestock: Hearings on S. 1213, S. 1497, and H. R. 8308 Before the S. Comm. on Agriculture and Forestry, 85th Cong. 30 (statement of Fred Myers, executive dir., Humane Soc'y of the United States). Additionally, the government has a substantial interest in providing transparency in the food industry to consumers of farmed animals; this demand for transparency in the arena of meat production has long been demanded by the public and was cited when President Eisenhower signed the HMSA into law. United States. Cong. House. *Expressing the sense of Congress that the Humane Methods of Slaughter Act of 1958 should be fully enforced so as to prevent needless suffering of animals*. 107th Cong. 1st sess. H. Con. Res. 175 (2001).

These two government interests are so strong that they have warranted continuous inspection of slaughter plants by USDA inspectors since 1978, when the HMSA was incorporated into the FMIA. 21 U.S.C. § 603. While the USDA has levied a massive amount of HMSA enforcement actions against slaughter plants, all of which are made available to the public through the USDA's website or the Freedom of Information Act (5 U.S.C. §552), the state interests were not being sufficiently advanced, resulting in the introduction of the MERK Act. United States Department of Agriculture – Food Safety and Inspection Service – Humane Handling Enforcement Actions, http://www.fsis.usda.gov/wps/portal/fsis/topics/regulatory-compliance/regulatory-enforcement/humane-handling-enforcement-actions (last visited Jan. 22, 2015); Introducing the Meat Eaters' Right to Know Act, dated January 25, 2012, at 1. While it is likely that either of the two government interests stated in the legislative record would be sufficient to satisfy the substantive requirements of the *Zauderer* test on their own, the power of two substantial and historically recognized government interests clarifies the analysis further.

There is a substantial government interest such that the second prong of the *Zauderer* test requires analysis.

Given that there is an adequate state interest, or, as here, multiple state interests, *Zauderer* also requires that the purported state interests are "reasonably related" to its regulation of activity. *Zauderer*, 471 U.S. at 651. The MERK Act makes available to the public a complete and honest picture of slaughterhouse operations. MERK Act. §§ 3-4. Providing such information advances the government interest of preventing animal cruelty because it allows more effective USDA inspection of the slaughter process. Introducing the Meat Eaters' Right to Know Act, dated January 25, 2012, at 2. The video recordings and live-streaming also advances the government interest in providing consumer transparency in the slaughter process by allowing consumers to keep their own "check on inhumane treatment" and thus "make educated choices about their food." *Id.* The regulations provided by the MERK Act are therefore not only related to the government interests which they seek to promote, but they promise to effectively reinforce the HMSA, an act which had the same two government and public interests as its motivation. Proposals Relating to Humane Methods of Slaughter of Livestock: Hearings on S. 1213, S. 1497, and H. R. 8308 Before the S. Comm. on Agriculture and Forestry, 85th Cong. 30 (statement of Fred Myers, executive dir., Humane Soc'y of the United States). On August 27, President Dwight D. Eisenhower signed into law the Humane Methods of Slaughter Act (HMSA) of 1958. 85 Cong. Rec. H19717 (1958).

The district court properly determined that an analysis of potential First Amendment protection against the requirements of the MERK Act was provided by *Zauderer*, and also properly ruled that there the dual government interests motivating the act were substantial and reasonably related to any commercial speech or activity required by slaughter plants. Despite the

fact that the lower court erred in it's determination of whether or not the MERK Act, implicates expressive speech at all, the ruling that the act does not violate the First Amendment is proper and this court should affirm the order of dismissal.

II. THE MERK ACT DOES NOT VIOLATE THE FOURTH AMENDMENT SINCE THE ASSOCIATION'S FACIAL CHALLENGE FAILS TO PROVIDE THE REQUIRED CONCRETE FACTUAL CONTEXT AND THE ACT ESTABLISHES A REASONABLE ADMINISTRATIVE INSPECTION SCHEME IN A CLOSELY REGULATED INDUSTRY.

A. The Association Cannot Make a Facial Challenge to the MERK Act On Fourth Amendment Grounds.

According to the Fourth Amendment, "The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV (emphasis added). "As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'" *Maryland v. King*, 133 S. Ct. 1958, 1969 (2013) (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995)). "What is reasonable, of course, 'depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.'" *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989) (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)). Consequently, the Supreme Court determined 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." *Sibron v. New York*, 392 U.S. 40, 59 (1968) (emphasis added).

In *Sibron*, the Supreme Court declined to consider the facial Fourth Amendment challenge to New York's "stop-and-frisk" law even though both sides of the case considered the facial constitutionality of the statute to be the primary issue. *Id.* The Court refused "to be drawn into what we view as the abstract and unproductive exercise of laying the extraordinarily elastic categories of [a statute] next to the categories of the Fourth Amendment in an effort to determine whether the two are in some sense compatible." *Id.* Instead, the Supreme Court limited the review to an as-applied Fourth Amendment challenge. *Id.*

The Sixth Circuit also refused to consider a facial Fourth Amendment challenge to the Stored Communications Act due to a lack of ripeness in the en banc *Warshak*. *Warshak v. United States*, 532 F.3d 521, 525 (6th Cir. 2008). Instead, an as-applied Fourth Amendment challenge to a particular e-mail search was considered because "the reviewing court looks at the claim in the context of an actual, not a hypothetical, search and in the context of a developed factual record of the reasons for and the nature of the search. A pre-enforcement challenge to future e-mail searches, by contrast, provides no such factual context. The Fourth Amendment is designed to account for an unpredictable and limitless range of factual circumstances, and accordingly it generally should be applied after those circumstances unfold, not before." *Id.* at 528.

Conversely, the Ninth Circuit permitted a facial Fourth Amendment challenge, but this decision could be overruled since the Supreme Court recently granted writ of certiorari. *City of L.A., Cal. v. Patel*, 135 S. Ct. 400 (2014). The 7-4 en banc decision in *Patel v. City of L.A.*, 738 F.3d 1058, 1060 (9th Cir. 2013), examined the facial challenge of Los Angeles Municipal Code § 41.49 and reversed an earlier panel's upholding of constitutionality. While the Ninth Circuit

found the statute facially unconstitutional on Fourth Amendment grounds, the first question presented to the Supreme Court is whether or not "the Ninth Circuit err[ed] in using a facial challenge to strike § 41.49 as a violation of the Fourth Amendment on reasonableness grounds." Brief for Petitioner at i, *City of L.A., Cal. v. Patel*, 135 S. Ct. 400 (2014) (No. 13-1175).

The District Court for the District of Massachusetts found the *Patel* case more persuasive than the *Warshak* case (at least prior to the granting of certiorari) and concluded that the Supreme Court "has not clearly foreclosed" facial Fourth Amendment challenges. Memorandum Opinion, dated August 15, 2014 at 12. Whether or not the Supreme Court "clearly foreclosed" facial Fourth Amendment challenges is debated, but precedent indicates that the Supreme Court never invalidated a statute strictly based on a facial Fourth Amendment challenge with zero factual record and no tangible, specific setting in which the law is implemented. *See* Cong. Research Serv., *The Constitution of the United States of America: Analysis and Interpretation,* S. Doc. No. 112-9, at 2287-536 (Centennial ed., Interim ed. 2014) (listing all statutes that this Court has held unconstitutional through July 1, 2014). Courts generally disfavor facial challenges since "facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008).

Seeing as how the First Amendment specifically addresses "Congress," which "shall make no law," U.S. Const. amend. I, whereas the Fourth Amendment, U.S. Const. amend. IV, addresses the Executive and fact-specific searches and seizures, facial challenges are more appropriate for the First Amendment than the Fourth Amendment. The district court failed to appreciate the textual differences between the First and Fourth Amendments when suggesting the

facial Fourth Amendment challenges should be treated similarly to facial First Amendment challenges.

The district court also mistakenly assumed slaughterhouses would be forced to install expensive surveillance equipment or pay steep fines should the facial Fourth Amendment challenge be denied. Memorandum Opinion, dated August 15, 2014 at 12. An as-applied Fourth Amendment challenge is still available to slaughterhouses and the MERK Act provides three years in which such challenges could be made prior to the Act taking effect. *See* MERK Act § 6. Moreover, the mere existence of a statute does not confer standing for any Fourth Amendment challenge. A showing of an injury that is certainly impending or fairly traceable to the challenged statute is needed. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1150 (2013).

The district court erroneously permitted and considered the Association's facial Fourth Amendment challenge. The USDA respectfully requests that the First Circuit heed Supreme Court precedent warning against facial Fourth Amendment challenges, take into account the actual text of the Fourth Amendment, and refuse to entertain the Association's facial challenge to the MERK Act on Fourth Amendment grounds.

B. Assuming *Arguendo* That The Association Can Make A Facial Fourth Amendment Challenge To The MERK Act, This Challenge Fails On The Merits.

The Fourth Amendment protects "persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Both residential and commercial property is entitled to Fourth Amendment protections. *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541, 543 (1967). "An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home. This expectation is particularly attenuated in commercial property

employed in 'closely regulated' industries. *New York v. Burger*, 482 U.S. 691, 699 (1987) (citations omitted). "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." *Burger*, 482 U.S. at 702.

Not only are privacy interests weakened in closely regulated industries, but the Government has an increased interest in regulating. *Id.* "Because the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions." *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006) (citing *Flippo v. West Virginia*, 528 U.S. 11, 13 (1999) *(per curiam); Katz v. United States*, 389 U.S. 347, 357 (1967)). "While probable cause tends to be required to establish reasonableness for criminal investigations, that standard 'may be unsuited to determining the reasonableness of administrative searches where the Government seeks to prevent the development of hazardous conditions.'" *Ruskai v. Pistole*, No. 12-1392, 2014 WL 7272770, at *6 (1st Cir. Dec. 23, 2014) (citing *Bd. of Educ. v. Earls*, 536 U.S. 822, 828–29 (2002)). Consequently, "warrantless inspections of commercial sites may be constitutionally permissible" and an administrative search exception to the warrant requirement may be appropriate. *United States v. Maldonado*, 356 F.3d 130, 134–35 (2004) (citing *Burger*, 482 U.S. at 702–03).

In *Burger*, the Supreme Court creates a three-part test of ascertaining whether or not an administrative search exception to the Fourth Amendment's warrant requirement is constitutional. *Id.* A warrantless inspection of a closely regulated business is reasonable if: 1) "a 'substantial' government interest that informs the regulatory scheme pursuant to which the exception is made," 2) the warrantless inspection is "necessary to further [the] regulatory

scheme," and 3) "the statute's inspection program, in terms of certainty and regularity of its application, [provides] a constitutionally adequate substitute for a warrant." *Id.* at 702–03.

First and foremost, slaughterhouses meet the threshold matter of constituting a closely regulated industry. Since the Supreme Court in *Burger* concluded that a vehicle dismantling business falls within a closely regulated industry, slaughterhouses must fall within the closely regulated industry. Slaughterhouses are subject to extensive requirements under HMSA and FMIA and already undergo ubiquitous inspection. 21 U.S.C. § 603. Consequently, the Association's members are closely regulated companies with reduced privacy expectations.

Moving onto the three-part *Burger* test, a substantial government interest informs the MERK Act. The Act clearly articulates substantial government interests in animal welfare and consumer's right to know, which together inform the regulatory scheme set forth. MERK Act § 1.

The warrantless inspections are necessary to further the regulatory scheme set forth in the MERK Act. Continuous video surveillance can deter animal cruelty that persists despite regulation by harnessing the Hawthorne effect, or the behavior change resulting from one's knowledge of being watched. Studies show hand washing compliance is approximately threefold higher in hallways within eyesight of an auditor compared with when no auditor was visible. The Association urges that video surveillance is unnecessary because USDA inspectors are already present; however the inspectors are over-burdened as evidenced by continued animal cruelty news stories. The current regulatory scheme fails to educate consumers and address the government's interest in consumer's right to know.

The MERK Act's inspection program, in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant. In *United States v.*

Gonsalves, 435 F.3d 64, 67 (1st Cir. 2006), the First Circuit described this prong of the *Burger* test as requiring "notice to those regulated and restrictions on the administrator's discretion." All slaughterhouses receive adequate notice (three years of advanced notice) of the inspections The Association argues that the MERK Act fails to properly define the scope. *See United States v. Biswell*, 406 U.S. 311, 315 (1972). However the MERK Act does define the scope, just not as narrowly as the Association would like. While the inspection is ongoing and continuous, the video survelliance only occurs where animals are present. In *Ruskai*, this court found that an administrative search need only be a "reasonably effective means" versus the "least intrusive practicable alternative" for furthering the government interest. *Ruskai*, 2014 WL 7272770 ("While we will not require the government to adopt the least intrusive practicable alternative, there must be a fairly close fit between the weight of the government's interest in searching and the intrusiveness of the search-that is, the search must be a 'reasonably effective means' for furthering the important government interest.")

In addition to explaining how the MERK Act meets the *Burger* test for warrantless administrative searches, the Association's tremendous burden of persuasion. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). "Plaintiffs mounting facial challenges 'bear a heavy burden of persuasion,'" *Warshak*, 532 F.3d at 530 (citing *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 200 (2008)), which the Association fails to meet.

CONCLUSION

For all the foregoing reasons, this court should affirm the district court's order dismissing the Association's Complaint in its entirety for failure to state a claim under either the First Amendment or the Fourth Amendment.

Respectfully submitted,

Team No. 10