Case No. 3:14-55440

IN THE

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

AMERICAN SLAUGHTERHOUSE ASSOCIATION,
APPELLANT,

V.

UNITED STATES DEPARTMENT OF AGRICULTURE;
AND TOM VILSACK, IN HIS OFFICIAL CAPACITY AS SECRETARY OF AGRICULTURE,
APPELLEES.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
THE HONORABLE MYRA J. COPELAND, DISTRICT JUDGE, PRESIDING

BRIEF FOR APPELLANT

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STATEMENT OF THE ISSUES

I. Whether the Meat Eaters' Right to Know Act, which requires slaughterhouses to continuously disseminate unedited videos of their activities to the public, violates the First Amendment by restricting the industry's right to silence.

II. Whether the Meat Eaters' Right to Know Act, which requires slaughterhouses to install high-definition surveillance cameras that capture ongoing footage from within their facilities, is susceptible to a facial challenge of the Fourth Amendment, and if so, whether it is unreasonable under the Fourth Amendment.

STATEMENT OF THE CASE

In March 2012, Congress passed the Meat Eaters' Right to Know Act ("MERK Act"), which goes into effect on March 2, 2015. MERK Act § 6. In March 2014, the American Slaughterhouse Association ("ASA") brought an action for declaratory judgment and injunctive relief, challenging the MERK Act, specifically, on grounds that it violates the First and Fourth Amendments to the United States Constitution. *Memorandum Opinion*, at p. 2.

The United States Department of Agriculture ("USDA") and Secretary of Agriculture Tom Vilsack (collectively "the government") filed a motion dismissing ASA's Complaint under Federal Rule of Civil Procedure 12(b)(6). *Memorandum Opinion*, at p. 1. The United States District Court for the District of Massachusetts granted the motion on August 15, 2014. *Memorandum Opinion*, at p. 15. ASA now appeals the District Court's decision to this Court.

STATEMENT OF THE FACTS

This case arises from an Act of Congress which imposes an unprecedented mechanism of surveillance upon a vast American food industry and creates the disquieting implication of an emergent Orwellian dystopia for free enterprise in the United States. Pursuant to the MERK Act,

beginning March 2, 2015, all slaughter facilities inspected by the USDA or entitled to a custom exemption ("Slaughterhouses") must produce video recordings capturing every location of their slaughter facilities at which live animals or carcasses are handled or slaughtered. MERK Act §§ 2(a), 3. Video recordings are live footage produced by high-definition video cameras stationed throughout the Slaughterhouses. MERK § 2(b). Slaughterhouses must also record all truck unloading areas, pens, shoots, stun boxes, shackle areas, kill lines, and processing areas. MERK § 3. Under the Act, Slaughterhouses must provide live video streaming of these recordings on their websites or produce the video recordings to the USDA for public dissemination. MERK Act §§ 2(d), 4. The MERK Act imposes fines under two distinct scenarios. First, it will fine a Slaughterhouse not less than $1,000 per day or portion thereof for failing to continuously video record its facilities. MERK Act § 5(a). Second, it will fine a Slaughterhouse not less than $1,000 per day or portion thereof for failing to make the surveillance video publicly available on its website or to the USDA. MERK Act § 5(b).

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). Mr. Panop T. Kahn's, in introducing the MERK Act, said that constituents were "desperate for more information about meat production" and claimed that "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." *Legislative History*, p. 1. As a result, Congress found that "information about [livestock] is of vital importance to the American consumer." MERK Act § 1(b). While addressing how to best enable consumer knowledge of food production, Mr. Oliver, from the Committee of Agriculture, stated that "making more information about meat production available . . . is necessary to

educate consumers." *Legislative History*, p. 4. Although Mr. Kahn suggested more limited ways to inform the constituents of information about meat production, and Mr. Oliver merely stated the need for "more" information, Congress found that:

> [i]t [was] in the essential public interest that consumers of animal products possess the greatest possible information about the treatment of animals in slaughterhouses . . . [and that] [v]ideo surveillance providing continuous footage of activities in these facilities promotes [that] goal.

MERK Act § 1(c).

Mr. Oliver noted that it was the "lack of adequate staff and resources" in enforcing the Humane Methods of Slaughter Act, which resulted in the occasional unnoticed mistreatment of livestock. *Legislative History*, p. 3. These findings, which initially advised for "more" information or more "staff" for HMSA enforcement resulted in the MERK Act which imposes continuous and ongoing video surveillance.

STANDARD OF REVIEW

The court of appeals reviews de novo a dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). *Reppert v. Marvin Lumber and Cedar Co., Inc.*, 359 F.3d 53, 56 (1st Cir. 2004). The court's review is limited to whether liability exists under the facts as alleged in the complaint, and not whether those allegations are true. *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629, 631 (1999). "The facts are considered in the light most favorable to the non-moving party, who receives the benefit of all reasonable inferences." *Reppert*, 359 F.3d at 56.

SUMMARY OF THE ARGUMENT

The District Court erred in granting the government's motion to dismiss because the MERK Act violates the First and Fourth Amendments to the Constitution. The MERK Act violates the First Amendment because it restricts the Slaughterhouses right to silence by

requiring them to stream ongoing, free, and unedited video recordings to the public on the company's website, or produce the same to the USDA for public dissemination. First, the District Court erred in applying the *Zauderer* standard rather than the *Central Hudson* test to the MERK Act because the MERK Act is a commercial restriction, not a compelled disclosure. Second, the government interests of preventing the inhumane treatment of animals and enabling consumers to know how their food is produced are not substantial. Third, the MERK Act does not satisfy the *Central Hudson* test because it does not directly advance the government interest and is more extensive than necessary. Finally, the Act fails under *Zauderer* standard because its regulations are not rationally related to the government interests.

The MERK Act violates the Fourth Amendment on its face because the MERK Act fails to employ the procedural safeguards demanded by the Fourth Amendment. Further, it fails a facial challenge because every application of the MERK Act amounts to an unreasonable warrantless search. Finally, because the meat industry is not closely regulated, the *Burger* test for warrantless administrative schemes does not apply.

ARGUMENT

I. THE MERK ACT VIOLATES THE FIRST AMENDMENT BY RESTRICTING THE SLAUGHTERHOUSES' RIGHT TO SILENCE BECAUSE IT REQUIRES THEM TO STREAM ONGOING UNEDITED VIDEOS TO THE PUBLIC.

This case arises from a Congressional Act that abrogates the long-recognized First Amendment right to not speak. In the context of video recordings, the MERK Act forces a national food industry to "speak" when it wishes to remain silent. While the government puts forth its interests of preventing animal abuse and enabling consumers to know about meat production, it simultaneously controls how private enterprise in the United States conducts its business. Because ASA's right to not videotape is commercial speech, it is shielded from

unjustified government regulation. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980).

"Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The Supreme Court recognizes that the First Amendment's protection of "freedom of speech" includes commercial speech and that the First Amendment protects commercial speech from unjustified government regulation. *Central Hudson*, 447 U.S. at 561. Commercial speech is defined as "expression related solely to the economic interests of the speaker and its audience." *Id.* at 561; *El Dia, Inc. v. Puerto Rico Dept. of Consumer Affairs*, 413 F.3d 110, 115 (2005).

The MERK Act requires ASA to videotape and stream the footage on the Internet or provide it to the USDA. MERK Act § 4. However, the Supreme Court admonished that First Amendment protection includes "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 government, through the MERK Act, requires ASA to speak when ASA would prefer to stay silent. But the Supreme Court rejects the '"highly paternalistic' view that government has complete power to . . . regulate commercial speech." *Central Hudson*, 447 U.S. at 562. The District Court importantly ruled that "[i]f there exists a First Amendment right to videotape, there must exist the correlative right *not* to videotape." *Memorandum Opinion*, at p. 5. ASA therefore has the First Amendment right to *not* videotape, just as it has the First Amendment right to *not* speak. ASA respectfully asks this Court to reverse the District Court's Order dismissing ASA's First Amendment claim.

A. The District Court Erred In Applying The *Zauderer* Standard Because The MERK Act Is A Commercial Restriction That Regulates Lawful Commercial Speech That Is Not Misleading Which Is Scrutinized Under The *Central Hudson* Test.

Commercial speech is awarded less protection than other constitutionally guaranteed expression. *Central Hudson*, 447 U.S. at 563. To determine the particular protection it is

awarded, this Court must look at the nature "of the expression and the governmental interests served by its regulation." *Id.* at 563. Depending on the commercial speech and the identified government interests, this Court will apply the appropriate standard as identified by the Supreme Court in *Zauderer* and *Central Hudson*. *See id.* at 563; *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 651 (1985).

Generally, *Central Hudson* applies to commercial restrictions while *Zauderer* applies to commercial disclosures. The District Court incorrectly categorized the MERK Act to be a commercial disclosure, rather than a commercial restriction. The protected commercial expression violated by the MERK Act is *not* videotaping. The MERK Act requires American slaughterhouses to speak by disseminating video recordings and video streaming to the public. Normally, a "commercial restriction," because of the word "restriction," is associated with a ban on speech. *See Central Hudson*, 447 U.S. at 569 (the commercial restriction was a complete ban on advertisement of the electrical utility companies). However, a restriction can be better defined as a regulation that is controlling.[1] The MERK Act gives Congress the power to "control" Slaughterhouses and limit their freedom of speech. Rather than a ban on speech, this regulation is a ban on silence. Slaughterhouses' right to silence is protected by the First Amendment, which they would portray by not videotaping.

Because the commercial speech of not videotaping is neither misleading nor related to unlawful activity, the government's power is more limited, and the government regulation will be analyzed under the stricter *Central Hudson* standard. *Id.* at 564. The *Central Hudson* standard requires that the government regulation on commercial speech "directly advance[s]" a

[1] The *Merriam-Webster Dictionary* defines a restriction as a law or rule that limits or controls something, or the act of limiting or controlling something.

"substantial" government interest and is "not more extensive than is necessary to serve that interest." *Id.* at 566.

On the other hand, in *Zauderer*, the Court held that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception to consumers." *Zauderer*, 471 U.S. at 651. Therefore, under *Zauderer*, if the commercial speech is misleading or related to unlawful activity, the government may ban forms of communication more likely to deceive the public than to inform it, and may also ban forms of commercial speech related to illegal activity. *Central Hudson*, 447 U.S. at 563.

Until very recently, *Zauderer* was only used for the government interest of preventing deceptive or misleading commercial speech. *Am. Meat Inst. v. United States Dep't of Agric.*, 760 F.3d 18, 21-21 (D.C. Cir. 2014) ("*AMI*"). In *AMI*, the "key question for [the court was] whether the principles articulated in *Zauderer* apply more broadly to factual and uncontroversial disclosures required to serve other government interests." *AMI*, 760 F.3d at 22. Although the Court stated that "*Zauderer* itself [did] not give a clear answer," it dramatically extended *Zauderer* without precedent and gave administrative agencies the power to create commercial speech regulations in the food industry. *Id.* at 22. It applied *Zauderer* "more broadly to factual and uncontroversial disclosures required to serve" the substantial government interest of country-of-origin labeling of food. *Id.* at 21. Because the government interest of country-of-origin labeling was not solely to prevent deception, *AMI* overruled numerous other cases that had constrained the *Zauderer* standard to deception-related interests. *Id.* at 23 (overruling other D.C. Circuit cases, including *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 370-71 (D.C. Cir. 2014); *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 959 n. 18 (D.C. Cir. 2013); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1214 (D.C. Cir. 2012).

In summation, because the commercial speech of not videotaping is not misleading and not related to unlawful activity, and because the MERK Act is a commercial restriction on speech, the MERK Act should be analyzed under *Central Hudson*.

B. The MERK Act Fails Under *Central Hudson* Because The Government Interests Are Not Substantial And The MERK Act Does Not Directly Advance Those Interests And Is More Restrictive Than Necessary.

The MERK Act will fail under the *Central Hudson* test. *Central Hudson* requires that the MERK Act directly serves the declared substantial interests and is not more extensive than necessary to serve those interests. The threshold question is whether the government's interests of preventing animal cruelty and enabling consumers to see how their food is produced are substantial.

1. The government interests of enabling consumers to see how their food is produced and preventing the inhumane treatment of animals are not substantial.

Here, in this case, Congress asserts that the government interests are to enable consumers to have knowledge of how their meat is produced and to prevent the inhumane treatment of livestock. Neither interest is substantial. Indeed, the government cannot rely on "mere speculation or conjecture" to overcome its burden of justifying the MERK Act; "rather [it] . . . must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Int'l Dairy*, 92 F.3d 67, 72 (1996) (quoting *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993)). Interests found to be substantial include energy conservation, public health and safety, and preventing consumer deception. *See, e.g.*, *Int'l Dairy*, 92 F.3d at 74; *Central Hudson*, 447 U.S. at 569 (five Justices finding energy conservation to be substantial); *AMI*, 760 F.3d at 23.

In this case, the first government interest of enabling consumers information is not substantial. In the case of *Int'l Dairy*, the State of Vermont had a nearly identical interest that the Second Circuit found to be insubstantial. "Vermont '[did] not claim that health or safety concerns prompted the passage of the Vermont Labeling Law,' but instead defend[ed] the statute on the basis of 'strong consumer interest and the public's right to know.'" *Int'l Dairy*, 92 F.3d at 73. The Second Circuit found this to be "insufficient to justify compromising protected constitutional rights." *Id.* at 73.

Similar to the MERK Act, the Vermont Act required dairy manufacturers to involuntarily speak when they would rather stay silent. In applying the *Central Hudson* test, the court held that a regulation requiring dairy manufactures to identify products which were or may have been derived from cows that were treated with genetically engineered bovine growth hormones, was unconstitutional because the state's interest was *not* substantial. *Int'l Dairy*, 92 F.3d at 74. Analogous to the dairy manufacturer's argument, Slaughterhouses should not be required to produce the videos unless the information "bears on a reasonable concern for human health or safety or some other sufficiently substantial governmental concern." *Int'l Dairy*, 92 F.3d at 74.

The D.C. Circuit, in its recent *AMI* decision, found country-of-origin labeling to be substantial. The *AMI* Court found that three aspects made the government interest of country-of-origin labeling substantial: (1) the context and long history of country-of-origin disclosures to enable consumers to choose American-made products; (2) the demonstrated consumer interest in extending country-of-origin labeling to food products; and (3) the individual health concerns and market impacts that can arise in the event of a food-borne illness outbreak. *AMI*, 760 F.3d at 23. These same aspects, considered in our case, illustrate why the government interests supporting the MERK Act are not substantial.

Because the *AMI* court found that "[c]ountry-of-origin label mandates indeed have a long history" of promoting American-made goods, this Court must find that there is a long history of disclosing the humane processing of animals, which would similarly promote American meat products. *AMI*, 760 F.3d at 23 (the long history is shown by labeling mandates such as the Tarriff Acts and Fur Products Labeling Act). Here, not only is there no history of using video recordings to convey information to consumers, but also this type of surveillance would not promote American-made products. Instead, the video surveillance chills commerce in the meat industry by incentivizing consumers to buy their meat from other producers. By conveying this much information to consumers, the MERK Act contravenes the very principle of *AMI*, which was to encourage American commerce rather than dissuade people from American-produced meat. The MERK Act encourages consumers to refrain from purchasing meat from slaughterhouses with video surveillance (domestic) and encourages consumers to purchase meat from slaughterhouses without video surveillance (international).[2]

The second aspect that supported the *AMI* court's finding that the government's interest of country-of-origin labeling was substantial was the demonstrated consumer interest in extending country-of-origin labeling to food products. Fortunately, for the government in *AMI*, because of the customary use of country-of-origin labels in most other industries before the Mandatory Country of Origin Labeling Act, extending the country-of-origin label to the food

[2] It should also be noted that, the MERK Act, in requiring a Slaughterhouse to potentially advertise for their competitor, should be analyzed under *Central Hudson* scrutiny. *See Safelite Group, Inc. v. Jepsen*, 764 F.3d 258, 264 (2014) (holding that the challenged requirement, which did not mandate information about one's own company, but instead required it to "choose between silence about the product and services of their affiliate or give a (random) free advertisement for a competitor" should be measured using *Central Hudson*).

industry was, by that point, "common sense."[3] *AMI*, 760 F.3d at 21 (showing the food industry as the last to mandate such labels). Contrary to that common disclosure mandate, there has been no history of displaying the humane treatment of animals in any other industry relating to animals yet.

The humane treatment of animals, while important, has never been the type of information that the government provides consumers with. Animal byproducts and animals themselves are commonly used in the clothing industry, the entertainment industry, and the pharmaceutical industry, yet disclosures about their treatment for those industries have never been subject to government regulation. Therefore, because history lacks displaying such disclosure of humane animal treatment in other industries, and because the food industry was the last industry to adopt the country-of-origin labeling mandate, the meat industry should not be the first to require an adoption of video disclosure of humane animal treatment in Slaughterhouses.

The third aspect considered in *AMI* was the individual health concerns and market impacts that can arise in the event of a food-borne illness outbreak. This factor cannot be taken into account here because, as the District Court noted, the government, did not consider in its legislative findings that food safety concerns were grounds for passing the MERK Act, and therefore, it cannot be a basis for upholding the law. *Memorandum Opinion*, at p. 7, n. 2.

2. The MERK Act does not directly advance the government interests and the government interests could be served by more restrictive means.

Even if the Court finds that either of the government interests are substantial, the MERK Act still fails under the final prongs of the *Central Hudson* test. The MERK Act fails the *Central Hudson* analysis because the MERK Act does not directly advance the government interests, and

[3] Specifically, the court stated that the "Congress that extended country-of-origin mandates to food did so against a historical backdrop that has made the value of this particular product information to consumers a matter of common sense." *Am. Meat Inst.*, 760 F.3d at 24.

the interest can be served by a more limited regulation of commercial speech. "The limitation on expression must be designed carefully to achieve the [government's] goal." *Central Hudson*, 447 U.S. at 564. The government regulation of constant videotaping and disseminating the tapings to the public over the Internet or through the USDA does not effectively support the interest of humane treatment and slaughter of animals raised for meat and poultry.

The MERK Act does not directly advance the prevention of inhumane treatment of animals. The interest is not, for example, better enforcing the Humane Methods of Slaughter Act of 1978, which directly relates to preventing needless suffering of livestock. 7 U.S.C.S. § 1901. The HMSA could have been better enforced by adding more staff and resources, as Mr. Oliver had originally suggested. The MERK Act regulates and requires the depiction of all treatment of animals, dead or alive, in slaughterhouses. It does not federally criminalize the conduct of inhumane animal treatment itself. The regulation must "somehow aid in the prevention of cruelty to animals" in order to serve the government interest of preventing cruelty to animals. *See U.S. v. Stevens*, 533 F.3d 218, 223, 228 (2008) (holding there was not a sufficient link between an Act prohibiting the creation, sale, or possession of depictions of animal cruelty with the intent to place it into commerce and the government interest in preventing cruelty to animals). The MERK Act requirement of video taping or video streaming the inside of slaughterhouses where animals are handled does not encourage the enforcement of stopping animal cruelty, but merely encourages the capturing of possible inhumane animal treatment.

In *Stevens*, the court opined that:

> While animals are sentient creatures worthy of human kindness and human care, one cannot seriously contend that the animals themselves suffer continuing harm by having their images out in the marketplace . . . . [W]hen an animal suffers an act of cruelty that is captured on film (or by some other medium of depiction or communication), the fact that the act of cruelty was captured on film in no way exacerbates or prolongs the harm suffered by that animal.

533 F.3d at 229.

Here, the parallel argument is that while animals suffer if in fact they are not treated humanely before slaughter, the taped depiction of the animal suffering will not reduce the suffering the animal went through. Additionally, requiring the videotaping of carcasses cannot reduce any continuing abuse, because there is no abuse the animal has left to feel. A further presumed goal of the MERK Act, that consumers will subsequently change their future purchases of certain Slaughterhouses' products, is purely speculative. Even if the legislative record suggests the MERK Act could have some impact, the government must show that the MERK Act will *significantly* reduce the alleged inhumane treatment of animals and *significantly* enable consumers to know how their food is produced. *See 44 Liquormart, Inc.v. Rhode Island*, 517 U.S. 484, 505 (1996). The government has not met this burden.

In *44 Liquormart Inc.*, the Supreme Court found that a statutory ban on price advertising for alcoholic beverages would not serve the state interest of promoting temperance because the "[s]tate presented no evidence to suggest that its speech prohibition will *significantly* reduce market-wide consumption." *Id.* The Supreme Court stated that even "the abusive drinker will probably not be deterred by a marginal price increase, and that the true alcoholic may simply reduce his purchases of other necessities." *Liquormart*, 517 U.S. at 506.

Here, the same argument could be made that the routine meat eater already realizes they are eating animals that were specifically raised for the purpose of dying to become food. Here, there is no evidence that providing the videos will significantly reduce inhumane animal treatment or significantly enable consumers because the government presented no evidence that consumers of the meat industry will actually watch the videos (rather than, non-meat eaters, whose purchases will not change from watching the videos and whose food is not produced

there, resulting in those watching not being more informed about their food's production process). Further, the government has not shown that video taping and streaming of slaughterhouse activities will *significantly* reduce the inhumane treatment of animals. Furthermore, the government interest of educating consumers of how their meat is produced is not directly advanced by this statute because the government has produced no evidence that videos available through USDA or on company's websites is the most effective way to enable consumers to see how food is produced. Time is of the essence in this day in age, and consumers barely have time to go to the grocery store, let alone sit and watch continuous videos to determine what products will go on their grocery lists. Informational means such as labels or an e-mail of the public USDA citations are more readily accessible and reasonable for the industry to accomplish and for the consumers to appreciate.

The MERK Act does not limit the regulation to Slaughterhouses that have been accused of treating animals inhumanely but instead "refers to any facility engaged in the slaughter of animals for meat and poultry products." MERK Act § 2(a). The MERK Act is not a more limited regulation requiring slaughterhouses to use labels of some sort. It is not simply requiring the dissemination of USDA citations for violating humane animal treatment laws. Instead, the MERK Act jumps straight to an all-encompassing, continuous surveillance of private industries using video recordings and video streaming of Slaughterhouses for public dissemination on their websites or through the USDA. Merk Act §§ 2–4. The MERK Act does not start with a more limited time constraint, but instead is for "continuous footage." MERK Act § 1(c). Further, it does not limit the scope of damages but has an excessive penalty of a "fine of not less than $1,000 per day for each day or portion thereof" for any missing video recordings or video

streaming, resulting in mere seconds or minutes of missed tapings costing Slaughterhouses thousands of dollars. Merk Act § 5(a)–(b).

The MERK Act hardly limits the areas required to be recorded, and instead includes capturing images of:

> every location of the slaughter plant at which live animals or carcasses are handled or slaughtered, including all truck unloading areas, pens, and chutes, as well as the stun box, shack area, kill line, and processing areas.

MERK Act § 3. The MERK Act does not even limit the video recording or video streaming to only tape live animals within the Slaughterhouses, but includes carcasses, which cannot be said to help prevent animal abuse if the animals are no longer alive. MERK Act § 3. The MERK Act could be more limited in nearly an infinite number of ways.

To conclude, the *Central Hudson* test applies to the MERK Act because it imposes a commercial restriction on the Slaughterhouses' First Amendment right to not videotape. The MERK Act fails under *Central Hudson* because the government interest is not substantial, the regulation does not directly advance the stated government interests, and the interests could be served by a more limited regulation.

C. The MERK Act Fails Under *Zauderer*.

The District Court incorrectly applied *Zauderer* because the MERK Act does not compel disclosure and because it is not regulating misleading commercial speech nor regulating unlawful activity. Further, the government interests are not in line with any government interest that *Zauderer* has been applied to.

Cases following *Zauderer* have allowed the government to require the commercial speaker, usually an advertiser, to add a specific statement to its already disseminated information. In many cases, this tool of dissemination was a label. In no cases, was this tool a

video recording or video stream. In many cases, the required or compelled speech was to add one sentence about a particular issue the government was interested in informing consumers about. *AMI*, 760 F.3d at 21 (requiring disclosure of where the livestock was born, raised, and slaughtered). In no cases was the required or compelled speech to produce footage of a private industry at all hours of every day. As restated by the District Court, *Zauderer* held that a disclosure requirement, adding minute details to an advertisement, is one that "only required [the advertising attorney] to provide somewhat more information than they might otherwise be inclined to present." *Zauderer*, 471 U.S. at 650. Therefore, the use of the rationally related standard is not adequate for an overreaching regulation of this capacity, which requires videotaping at all times, and is therefore extensively more than the industry might otherwise present.

The act of streaming videos of the Slaughterhouses does not help enforce the humane treatment of animals and is not rationally related to that goal because those watching the videos do not have direct authority and power to change the Slaughterhouses' action. The continuous and ongoing information produced through streaming, especially of every slaughterhouse, many of which are in full compliance, is too much for a consumer to digest. Also, the MERK Act is not rationally related to the government interests because if the government wanted to give consumers what they wanted they would make sure it was in the form of dissemination and included the content the consumers want. There was no evidence that incorporating slaughterhouses without violations was what the consumers wanted, or incorporating video of times when the slaughterhouses were not open, or recording images of carcasses would meet the consumers' needs. Further, streaming is costly and time-consuming for the viewer. For a public with limited time and busy lives, an ongoing video stream is not rationally related to the plain

interest of consumers wanting more information about food they eat. Finally, the fact that the act of video recording and the subsequent sharing of that recording could arguably be reasonably related to any interest that can be recorded could *not* have been the purpose of the *Zauderer* standard.

If a reasonable relation is all that is required between the government requiring something to be recorded and that which the government has even the slightest interest in seeing recorded and disseminated, there is no limit to what the government can require be recorded and disseminated next. Will it be the government interest in protecting children from abuse in schools, which could be reasonably related to requiring videotaping and streaming all classrooms at all times to prevent such abuse? How about protecting children from abuse in churches? Would the requirement of twenty-four hour videotaping of all workplaces subsequently cure discrimination in workplaces because it would deter consumers from using such businesses. Or would this type of constant government surveillance directly conflict with the freedom to *be*, and not *be watched.* ASA contends that it would. The MERK Act fails under both *Central Hudson* and *Zauderer* standards, and therefore violates Slaughterhouses' First Amendment right not to speak.

II. THE MERK ACT IS SUSCEPTIBLE TO A FACIAL CHALLENGE ON FOURTH AMENDMENT GROUNDS AND IT VIOLATES THE FOURTH AMENDMENT BECAUSE IT LACKS ANY PROCEDURAL SAFEGUARDS AND IMPOSES AN UNREASONABLE INTRUSION UPON PRIVATE COMMERCIAL PROPERTY.

The Fourth Amendment protects the people's right to be secure in their "persons, houses, papers, and effects" against unreasonable searches by the government. U.S. Const. amend. IV. A "search" occurs under the Fourth Amendment when the government "physically occupie[s] private property for the purpose of obtaining information." *U.S. v. Jones*, — U.S. —, 132 S.Ct.

945, 949 (2012) (finding "no doubt . . . a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted.").[4]

Here, the MERK Act does not merely authorize physical intrusion upon Slaughterhouses' private property; it outright requires they install "high-definition video cameras stationed at fixed locations throughout [their facilities,] capturing live images inside the slaughter plant" to "promote [its] goal" of providing consumers "information about the treatment of animals in slaughterhouses." MERK Act §§ 1(c), 2 (b). For purposes of the entire Fourth Amendment discussion to follow, the MERK Act puts forth "future surveillance [that] is certainly impending" which "physically occupies" Slaughterhouses' "private property for the purpose of obtaining information" about the treatment of animals. *See Clapper v. Amnesty Int'l USA*, — U.S. —, 133 S.Ct. 1138, 1150 (2013) (noting the standing requirement for Fourth Amendment challenges to statutes authorizing surveillance); *see Jones*, 132 S.Ct. at 949. Therefore, Slaughterhouses' property-based interest sufficiently trigger Fourth Amendment protection for ASA.

Because there is a "search," the Fourth Amendment is evoked and this Court may strike the MERK Act, on its face, as violative of the Fourth Amendment under any of three theories; each standing for the principle that Congress cannot enact legislation that trenches upon the people's right to be secure in their "persons, houses, papers, and effects" against unreasonable searches by the government. U.S. Const. amend. IV. The first theory is that a statute is facially unconstitutional if it fails to employ the procedural safeguards demanded by the Fourth

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[4] In *Jones*, — U.S. —, 132 S. Ct. at 949, the Supreme Courts rediscovered its traditional "property-based" approach to the question of whether a Fourth Amendment "search" occurred. It recognized the "privacy-based" approach introduced by Justice Harlan's concurrence in *Katz v. U.S.*, 389 U.S. 347, 35, which asks whether the government conduct breached an individual's "reasonable expectation of privacy." But, the Court made clear in *Jones* that a Fourth Amendment "search" is not limited to a privacy-based analysis under *Katz*. *See Jones*, — U.S. —, 132 S. Ct. at 949; *see also*, *Patel v. City of Los Angeles*, 738 F.3d 1058, 1070, (9th Cir. 2013) (en banc) (J. Clifton, dissenting) ("*Jones* made clear that the application of the Fourth Amendment was not limited to circumstances involving a reasonable expectation of privacy.").

Amendment. *See Berger v. New York*, 388 U.S. 41, 54 (1967). The second theory is that a facial Fourth Amendment challenge succeeds if no set of circumstances exists under which the statute can be valid. *See U.S. v. Salerno*, 481 U.S. 739, 745 (1987). The third theory is that the statute authorizes an unreasonable administrative inspection scheme of an industry that is not closely regulated. *See New York v. Burger*, 482 U.S. 691 (1987). In this case, the MERK Act facially violates the Fourth Amendment under all three theories, but this Court must strike the statute as unconstitutional upon finding even just one of the theories persuasive.

A. The MERK Act Violates The Fourth Amendment On Its Face Because It Fails To Employ The Procedural Safeguards That The Fourth Amendment Demands.

The first theory supporting ASA's facial challenge to the MERK Act under the Fourth Amendment emerges from the Supreme Court distinguishing between statutes that undermine the Amendment's procedural safeguards and statutes that merely authorize police conduct that is a substantively reasonable warrantless search.

In *Berger v. New York*, 388 U.S. 41, 54, 56-58 (1967), the Supreme Court found a New York statute authorizing the state to obtain a surveillance warrant without probable cause violated the Fourth Amendment on its face because it failed to "safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." It allowed the facial Fourth Amendment challenge because the statute's "broad sweep" was "immediately observable." *Id.* at 54. The Court set a constitutional benchmark for statutes by finding the Fourth Amendment "prescribe[s] a constitutional standard that must be met before official invasion is permissible." *Id.* at 64. It concluded that "[a]s it is written" the statute's "language permits a trespassory invasion of the home or office, by general warrant, contrary to the command of the Fourth Amendment." *Id.*

The next Term, in *Sibron v. New York*, the Court refused to entertain a facial Fourth Amendment challenge to a statute authorizing police to "stop and frisk" any person for weapons upon reasonable suspicion because the statute was "susceptible [to] a wide variety of interpretations." *Sibron*, 392 U.S. 40, 43-44, 60 (1968); *c.f. Burger*, 388 U.S. at 64 (specifically concluding the statute's "language permits a trespassory invasion of the home or office . . . contrary to the command of the Fourth Amendment."). It considered the "constitutional point with respect to [the "stop and frisk" statute] is not so much the language employed as the conduct it authorizes." *Sibron*, 329 U.S. at 60 (citation and internal quotation marks omitted). In this sense, the Court expertly distinguished the "stop and frisk" statute in *Sibron* from the statute it struck as facially unconstitutional in *Berger*. It opined the challenged statute in *Berger* "failed to embody the *safeguards* demanded by the Fourth [Amendment,]" whereas in *Sibron*, the challenged statute dealt with "the *substantive* validity of certain types of [warrantless] searches." *Sibron*, 392 U.S. 59-60. The Supreme Court's distinction between statutes that, as read, undermine the safeguards demanded by the Fourth Amendment (*Berger*), and the substantive validity of statutes that authorize police to engage in certain conduct (*Sibron*), informs why ASA's facial Fourth Amendment challenge is ripe in this case.

Here, ASA's facial challenge to the MERK Act is similar to the challenged statute in *Berger*, because, like in *Berger*, 388 U.S. at 64, the MERK Act's "language permits a trespassory invasion" of slaughterhouses' privacy by requiring "continuously running" video surveillance "produced by high-definition video cameras stationed at fixed locations throughout" a slaughterhouse. MERK Act § 2 (c), (d). The MERK Act's language completely fails to "safeguard the privacy and security" of slaughterhouses "against arbitrary [government] invasions" because it unambiguously requires ongoing and continuous surveillance without any

need for a warrant or probable cause. MERK Act § 2, 3; *see Berger*, 388 U.S. at 59; *see also*, *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 325 (1978) (holding that a statute is unconstitutional "insofar as it purports to authorize inspections without a warrant or its equivalent. . . .").

Meanwhile, this case is distinct from the challenged statute in *Sibron*, because unlike *Sibron*, where the statute concerned the "substantive validity" of authorizing police to "stop and frisk" persons upon reasonable suspicion, here, the MERK Act, does not authorize certain government conduct, but rather, its language requires that Slaughterhouses produce ongoing and continuous video surveillance. Where the substantive nature of the "stop and frisk" statute in *Sibron* was "susceptible to a wide variety of interpretations," here, even before the MERK Act goes into effect, its language cannot be interpreted beyond that it would force slaughterhouses to either install high-definition video equipment at their facilities and provide continuous and ongoing surveillance, or face steep fines for failing to do so. MERK Act §§ (3)-(5).

But perhaps the most compelling reason for this Court to accept ASA's facial challenge to strike the MERK Act lies in Justice Douglas's concurrence in *Berger*, where he expressly condemned statutory authorization of electronic surveillance. See *Berger*, 388 U.S. at 64 (J. Douglas, concurring). With near clairvoyance to this case, Justice Douglas warned:

> If a statute were to authorize placing a policeman in every home or office where it was shown that there was probable cause to believe that evidence of a crime would be obtained, there is little doubt that it would be struck down as a bald invasion of privacy, far worse than the general warrants prohibited by the Fourth Amendment. I can see no difference between such a statute and one authorizing electronic surveillance, which, in effect, places an invisible policeman in the home.

Id.

Justice Douglas perfectly sums up why *Berger*'s "procedural safeguards" theory applies to the MERK Act in this case. With no extrapolation, imagination, or interpretation, a facial

reading of the Act "places" a policeman, all of Congress, the President, and every member of the general public directly inside Slaughterhouses across the Country. MERK Act § 4 (a)–(c). The "bald invasion of privacy" that Justice Douglas admonished against is precisely what the MERK Act enroots—"surveillance providing continuous footage of activities" from within the private workplace. MERK Act § 1 (c); *Berger*, 388 U.S. at 64.

Simply, the MERK Act is incompatible with the Fourth Amendment. Because the unambiguous and uninterruptible language of the MERK Act eschews the Fourth Amendment's procedural safeguards by requiring warrantless, suspicionless, and endless surveillance of Slaughterhouses, it can be struck under the Fourth Amendment, as it is written. Based upon this first theory alone, this Court may reverse the District Court's Order dismissing ASA's Fourth Amendment claim, and yet the two facial challenge theories to follow provide further grounds for reversal.

B. The MERK Act Violates The Fourth Amendment On Its Face Because Every Application Of The Statute's Continuous Surveillance Requirement Is A Significant Intrusion Upon Slaughterhouses That Substantially Outweighs Any Promotion Of The Government's Interests.

The second theory under which ASA can pursue a facial challenge is that every application of the MERK Act implements an unreasonable search of Slaughterhouses. *See U.S. v. Salerno*, 481 U.S. 739, 745 (1987) (holding that a facial challenge succeeds if the challenger can establish that no set of circumstances exists under which the Act would be valid.); *see also, Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (explaining that a facial challenge succeeds if "the law is unconstitutional in all of its applications."); *see also, Patel v. City of Los Angeles*, 735 F.3d at 1070 (9th Cir. 2013) (en banc) (J. Clifton, dissenting) (explaining "[t]hat the [law] might operate unconstitutionally under some circumstances is not enough to render it invalid against a facial [Fourth Amendment] challenge."). Applying the

Fourth Amendment to the *Salerno* standard for facial challenges, the search provided under the MERK Act is unreasonable in all circumstances because it requires endless video surveillance of activities on private commercial property.

Although the traditional application of the Fourth Amendment generally requires that police secure a warrant supported by probable cause, ASA understands that the MERK Act was not intended to authorize searches to discover evidence of criminal activity. But, ASA recognizes that courts find exception to the warrant requirement when a statute authorizes an administrative inspection scheme. *See Donovan v. Dewey*, 452 U.S. 594, 598, (1981) (finding that "legislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment."); *see also*, *New York v. Burger*, 482 U.S. 691 (1987) (establishing the "closely regulated business doctrine" discussed anon).

However, warrantless searches do not escape "the ultimate measure of the constitutionality of a" search—reasonableness. *Maryland v. King*, — U.S. —, 133 S. Ct. 1958, 1969 (2013). "Even if a warrant is not required, a search is not beyond Fourth Amendment scrutiny; for it must be *reasonable in its scope and manner of execution.*" *King*, 133 S. Ct. at 1970 (emphasis added). Thus, the Fourth Amendment's prohibition against unreasonable searches also applies to administrative inspections of private commercial property. *Donovan v. Dewey*, 452 U.S. 594, 598 (1981) (citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); *See v. City of Seattle*, 387 U.S. 541 (1967)). To determine whether a search is unreasonable, the court must balance the search's intrusion on protected Fourth Amendment interests against the degree to which it promotes a legitimate government interest. *See Riley v. California*, — U.S. —, 134 S. Ct. 2473, 2484 (2014); *see also*, *Skinner v. Ry. Labor Execs. Ass'n,* 489 U.S. 602, 619 (1989) (explaining that reasonableness depends on the circumstances surrounding a search and the

nature of the search itself). In this case, the MERK Act's requirement that Slaughterhouses provide continuous surveillance severely intrudes on Slaughterhouses' property and privacy interests and only marginally promotes the government's interests in mitigating the abuse of livestock animals and appeasing consumers' curiosity about where their food comes from. MERK Act § 1 (a)-(c).

1. The MERK Act's surveillance requirement does not promote the government's interests in preventing animal abuse and providing consumers information about their food.

The government presupposes the MERK Act's surveillance requirement will promotes its goals of preventing animal abuse and providing consumers information about their food. MERK Act § 1 (a)-(c). Yet, the Act's legislative history provides nothing to support that video surveillance promotes its interests beyond being a "window into the treatment of animals" and "the manner in which meat is produced." *Legislative History*, p. 4. In fact, the Committee on Agriculture's Report on the MERK Act articulates what would promote Congress's goals; it states that "[m]aking more *information* about meat products available to consumers is necessary to educate consumers and to ensure the human treatment of livestock animals." *Legislative History*, p. 4 (emphasis added). ASA does not dispute that point, but it contends that video streaming and prior recorded videos do not provide an effective means to the government's end.

Ironically, the Committee's Report solves its own problem by identifying that consumers are concerned that "labels fail to convey any meaningful information." *Legislative History*, p. 4. ASA agrees with the consumers. Video surveillance is wholly disjointed from concerned consumers' meat buying experience. On the other hand, labeling with regard to a slaughter facility's history of compliance with The Humane Methods of Slaughter Act, which requires the human treatment of livestock in Slaughterhouses, will better inform consumers about whether a

particular parcel of meat came from a slaughterhouse with a history of humane animal treatment. *See* 7 U.S.C. § 1901 (2013).

The Act's legislative history indicates that consumers "have no way of knowing–on labels, from the USDA, or on company websites—which slaughterhouses play by the rules, and which abuse animals." Yet, the MERK Act does not solve this problem because no consumer could possibly watch enough surveillance footage from the incalculable number published slaughterhouse videos to identify sufficient information. Instead, labeling can more effectively provide consumers information while incentivizing competition between slaughter facilities to remain compliant. The MERK Act's surveillance requirement renders none of these benefits to further the government's interests.

2. The MERK Act severely intrudes upon property and privacy interests by requiring Slaughterhouses to install high-definition surveillance cameras throughout their facilities to provide ongoing and continuous video of daily activities.

Like the occupant of a residence, the business owner has a constitutional right to go about her business free from unreasonable government entries into her private commercial property. *See See*, 387 U.S. at 543 (1967); *but see*, *Burger*, 482 U.S. at 700 (finding that privacy expectations in commercial premises are less than similar expectations in an individual's home). Although entry into public commercial areas, like a motel lobby or a restaurant, is scarcely the sort of government action that the Fourth Amendment forbids, (*Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 413 (1984) (hereinafter *Lone Steer*)), courts have recognized that inspections of non-public areas on commercial premises are too intrusive absent a warrant (*see e.g.*, *Patel v. City of Los Angeles*, 738 F.3d at 1063, citing *Lone Steer,* 464 U.S. at 414). But, in any event the search must be "reasonable in its scope and manner of execution." *King*, 133 S. Ct. at 1970. Here, the MERK Act's surveillance requirement far exceeds all bounds of reasonableness.

First, the MERK Act imposes surveillance that far exceeds reasonableness in light of the government's interests. The Act's legislative history indicates that USDA inspectors do not "have eyes on the backs of their heads" to better check for HMSA compliance. Congress's response, then, was to require continuous video surveillance of every area of Slaughterhouses that have live or dead animals. MERK Act §§ 2(b), 3. The continuousness requirement is tantamount to endless video surveillance that is so improperly defined in scope that it is impermeable to Fourth Amendment reasonableness. *See U.S. v. Biswell*, 406 U.S. 311, 315 (1972). Further, the place to be searched is beyond the scope of protecting animals and providing information to consumers, because the Act requires surveillance of "all truck unloading areas, pens, and chutes, as well as the stun box, shackle area, kill line, and processing areas." These areas however, are not certain to have animals in them *continuously*, as the Act requires. The scope of time and place is in no way tethered to the purpose of the Act, or the ends it seeks to achieve. Therefore, the Act imposes government intrusion upon Slaughterhouses outweighs the arbitrary relationship between video surveillance and the government's interests.

In summation, the ongoing and continuous nature the MERK Act's video surveillance requirement is a significant invasion of Slaughterhouses' property-based and privacy-based interests. As the Supreme Court has held and the Ninth Circuit recently observed, "[o]ne of the main rights attaching to property is the right to exclude others, and one who owns . . . property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." *Rakas v. Illinois*, 439 U.S. 128, 144 n. 12 (1978), cited by *Patel*, 738 F.3d at 1061. It is without question that the MERK Act treads upon Slaughterhouses' right to exclude not only the government, but the general public as well. The Act woefully departs from all notions of "reasonableness" under the Fourth Amendment, and should accordingly be struck as it is written.

C. The MERK Act Violates The Fourth Amendment On Its Face Because It Imposes An Unreasonable Administrative Inspection Scheme Of An Industry That Is Not Closely Regulated.

Although in some cases, where a legislative inspection scheme may outweigh the need for a warrant or probable cause (*see Dewey*, 452, U.S. at 601), the Supreme Court made further exception to the Amendment's reasonableness requirement when a regulatory scheme imposes inspections upon a "pervasively" or "closely" regulated industry (*see New York v. Burger*, 482, U.S. 691, 702 (1987). Under *Burger*, a warrantless inspection scheme is reasonable where the industry is closely regulated and three further elements are satisfied: (1) there must be a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made; (2) the warrantless inspection must be necessary to further the regulatory scheme; and (3) the statute itself must provide a "constitutionally adequate substitute for a warrant both in terms of certainty and regularity. 482, U.S. at 703. Here, the MERK Act cannot satisfy the *Burger* exception for administrative inspections because the meat and poultry industries are not closely regulated, and the other three criteria under *Burger* are not satisfied.

1. The meat and poultry industry is not "closely regulated."

Under *Burger*, an industry is "closely regulated" if the "regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." 482 U.S. at 705 n. 16 (quoting *Dewey*, 452 U.S. at 600). In this sense, *Burger* instructs that business owners have reduced privacy expectations. 482 U.S. at 702. Yet, the number of regulations over an industry is not itself dispositive. *Id.* at 705.

Here, ASA recognizes that the meat and poultry industry is already under the government's microscope. While the Act subjects slaughter facilities that are operating under a grant of inspection by the United States Department of Agriculture, it also purports to cover

facilities that enjoy a "custom exemption to such inspection." MERK Act § 2(a). Because these facilities enjoy this inspection exemption, their owners cannot "be aware that [their] property will be subject to period inspections" because they are already exempt from federal inspections. *Burger*, 482 U.S. at 705 n. 16. Thus, if *Burger* were applied to this industry, the MERK Act would circumvent the already existing inspection exemptions that many facilities rely on.

In fact, any industry that is granted inspection exemptions cannot be deemed "closely regulated. For instance, other industries which have been scrutinized to the point of "close" and "pervasive" regulation include firearms sales and alcoholic beverage distribution and sales. Indeed, the government would be hard-pressed to justify exempting firearm retailers from its close watch. But the mere fact that some slaughter facilities are subject to, but free from federal inspection boldly undermines the possibility of the meat and poultry industry being "pervasively regulated." Thus, the threshold question under the *Burger* analysis must fail.

2. The trial court incorrectly found that the MERK Act's surveillance requirement furthers a substantial government interest, that ongoing warrantless searches of slaughterhouses is necessary to further the government's interests, and that the Act provides a constitutionally adequate substitute for a warrant.

Even if this Court finds that the slaughter industry is "closely regulated" under *Burger*, the administrative inspection exception still fails because the remaining three criteria are not met. In fact, those criteria need not be re-analyzed here because they have already been discussed at length throughout this brief.

In the First Amendment context, ASA has already shown this Court why the government's interest of preventing animal abuse and providing consumers information about their food are not substantial and are not furthered by ongoing and continuous surveillance. Next, ASA has discussed at length here that video surveillance is not necessary to further the

government's interests because the less invasive and more pragmatic alternative of labeling specific parcels of meat regarding HMSA compliance remains available to the government. Thus, the HMSA compliance labeling option makes endless video surveillance only a sufficient, but not necessary means to the government's ends.

Finally, ASA has discussed in depth under its "reasonableness" analysis above that the manner and scope of the MERK Act surveillance far exceeds what is "notice" for business owners. The fact that the surveillance never ends is not, as the District Court suggests, the same thing as placing ASA on ongoing notice. Instead, the continuousness of the government surveillance under the MERK Act is a scare tactic meant to instill fear into to workdays of countless individuals who are a proud, industrious, and vital part of the American economy.

For these reasons, This Court should find erroneous the District Court's ruling that ASA failed to state a claim under the Fourth Amendment.

PRAYER FOR RELIEF

ASA respectfully requests that this Court reverse the Order granting the government's Motion to Dismiss ASA's Complaint because the District Court incorrectly concluded that ASA failed to state a claim under the First and Fourth Amendments to the Constitution.

Respectfully submitted,

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