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

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

AMERICAN SLAUGHTERHOUSE ASSOCIATION,
Appellant-Petitioner,
-v.-
UNITED STATES DEPARTMENT OF AGRICULTURE; TOM VILSACK, Secretary,
Appellee-Respondent,

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR AMERICAN SLAUGHTERHOUSE ASSOCIATION
Appellant-Petitioner

Team 12

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STATEMENT OF THE ISSUES PRESENTED

1. Whether the Meat Eaters' Right to Know Act (MERK Act) violates the First Amendment?
2. Whether the American Slaughter Association is able to pursue a facial challenge to the MERK Act under the Fourth Amendment and if so, whether the MERK Act violates the Fourth Amendment?

STATEMENT OF THE CASE

The American Slaughterhouse Association (hereinafter "ASA") is a national trade association for slaughterhouses. R. at 1. In March 2014, ASA filed a complaint alleging that the soon to be enacted Meat Eaters' Right to Know Act (hereinafter "MERK Act") violated the United States Constitution. R. at 2. ASA brought an action for declaratory judgment and injunctive relief against the United States Department of Agriculture (hereinafter "USDA"), and Secretary Vilsack (collectively referred to as "government"), stating that the MERK Act is unconstitutional on First and Fourth Amendment grounds. R. at 1. ASA states that the MERK Act violates the First Amendment because it compels speech by requiring slaughterhouses to record, and share with the public, video from inside their operations. R. at 4. Further, ASA states that the MERK Act violates the Fourth Amendment because it authorizes unreasonable government searches by requiring slaughterhouses to continuously stream video of their operations without a warrant, probable cause, or even a reasonable suspicion of a crime, and that the MERK ACT does not meet the Supreme Court's test for warrantless administrative searches. R. at 10.

The government filed a motion to dismiss ASA's complaint for failure to state a claim for which relief can be granted under F.R.C.P. 12(b)(6). R. at 2. In August 2014, the United States District Court for the District of Massachusetts granted the government's motion to dismiss for failure to state a claim upon which relief can be granted on both of ASA's First and Fourth Amendment claims. R. at 15. The United States District Court for the District of Massachusetts had original jurisdiction over these claims. 18 U.S.C. § 3231 (2012). The district court concluded that the MERK Act is reasonably related to a substantial government interest in animal welfare and consumer information, which satisfied the criteria for dismissal of the First Amendment claim. R. at 10. The district court also concluded that the MERK Act satisfied the test for warrantless regulatory searches, and therefore dismissed the Fourth Amendment challenge. R. at 15.

In October 2014, ASA filed a timely appeal to the United States Court of Appeals for the First Circuit from the final order of the United States District Court for the District of Massachusetts granting the government's motion to dismiss both ASA claims. Briefing Order 1. The United States Court of Appeals for the First Circuit has jurisdiction over appeals from its district courts' decisions. 28 U.S.C. § 1291.

STATEMENT OF THE FACTS

In January 2012, the Honorable Panop T. Kahn of California introduced in the House of Representatives the MERK Act. MERK Act, H.R. 108, 112th Cong. 1 (2012) (hereinafter "H.R. 108, 112th Cong."). In his statement to the House of Representatives, Rep. Kahn states that the introduction of the MERK Act addresses alleged animal abuse that is happening in the nation's slaughterhouses. *Id*. The MERK Act would be in addition to the Humane Methods of Slaughter

Act (hereinafter "HMSA") that was adopted in 1978. *Id*. at 3. The HMSA requires animals in slaughterhouses that are used for food be treated humanely, including that all animals be rendered unconscious and insensible to pain prior to death. *Id.* at 1. Enforcement of the HMSA is carried out through food safety inspectors that are present in the plants during slaughter operations. *Id*. Violations of the HMSA result in warning notices and one-day production suspensions that are to act as a deterrent to inhumane treatment of animals in slaughterhouses. *Id*. According to a 2009 audit conducted by the USDA Office of the Inspector General, the Food Safety and Inspection Service officers that enforce the HMSA are often absent or distracted by other food safety duties and therefore fail to notice violations. *Id*. at 2. Inadequate staff and resources, as well as USDA oversight, has resulted in a lack of enforcement of the HMSA. *Id*.

Recently, there has been an increase in consumer interest as to the way that animals are used for food, and are treated while on the farm and during their time at slaughterhouses. H.R. 108, 112th Cong. 1. Undercover videos that are released to the public depicting animal cruelty create a consumer need to know more about the meat production system. *Id*. However, as of right now, there is no on package labeling or available information from the USDA that would help consumers know more about their food. *Id.* In addition, there is no requirement that companies post information about their humane records and practices on their websites. *Id*. According to Rep. Kahn the goal of the MERK Act is to provide the USDA and consumers with information that can be used to make educated choices about their meat consumption. *Id*.

After a series of undercover investigations that were carried out by animal rights organizations, Congress passed the MERK Act in March 2012. R. at 2. In enacting the MERK Act, Congress stated that there is a public interest in the humane treatment of animals raised for food and that the abuse of livestock animals violates the public interest. MERK Act § 1(a). In

addition, Congress stated that it is important for consumers to be able to access information about the treatment of animals in order to satisfy their curiosity about where food comes from, thus creating transparency within the food industry. MERK Act § 1(b). Finally, the Congressional statement declares that video surveillance addresses the public interest of consumers to have the greatest possible knowledge about the treatment of animals in slaughterhouses. MERK Act § 1(c). The MERK Act requires that all slaughter plants capture a recording of every location where live animals or carcasses are handled or slaughtered. MERK Act § 3. This sweeping list includes such areas as loading, holding pens, chutes, stun box, shackling, kill line and processing. *Id*. The video recording from these areas must be continuously streamed live on all company websites or provided to the USDA to be made available through Freedom of Information Act (hereinafter "FOIA") requests in the event that the company does not have a website. MERK Act § 4. If slaughterhouses do not comply with the provisions of the MERK Act to capture video, and provide it to the public through one of the means previously described, it will result in significant fines per day of violation. MERK Act § 5. The MERK Act is scheduled to take effect in March 2015. MERK Act § 6.

SUMMARY OF THE ARGUMENT

The MERK Act is unconstitutional for two separate reasons. First, because it violates ASA's right to freedom of, or to refrain from, speech by requiring slaughterhouses to continuously record and either live stream the footage or provide it to the USDA to be made available through a FOIA request. The recordings are in fact compelled commercial speech and are afforded protection under the First Amendment that is not provided by the MERK Act. *See*, *Glik v. Cunniffe*, 655 F.3d. 78 (1st Cir. 2011); *Iacobucci v. Boulter*, 193 F.3d 14 (1st Cir. 1999).

Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976). In addition, the MERK Act does not allow for a trade secret exemption for parts of the video recording as is required under FOIA. *See*, 5 U.S.C. § 552(b)(4) (2012). Finally, the District Court erred in applying the compelled commercial disclosure test from *Zauderer v. Office of Disciplinary Council of Supreme Court of Ohio,* and should have instead applied the correct restraints on commercial speech test from *Central Hudson Gas and Electric Corp v. Public Service Commission of New York*. *See*, *Zauderer*, 471 U.S. 626, 637 (1985); *Cent. Hudson Gas and Elec. Corp.*, 446 U.S. 557 (1980). In applying the *Central Hudson* test, the MERK Act is not directly related to the goals stated by Congress of providing consumer knowledge and protecting animal welfare. 446 U.S. at 564; MERK Act § 1. Furthermore, the MERK Act is not narrowly tailored to meet the goals of humane treatment and consumer knowledge, which could be met by a more limited restriction. *Cent. Hudson Gas and Elec. Corp.*, 446 U.S. at 564. Accordingly, the district court incorrectly granted the government's motion to dismiss ASA's First Amendment challenge against the MERK Act, and as such, the decision of the district court should be reversed.

Second, the MERK Act violates the Fourth Amendment because it allows for around-the-clock surveillance of a privately owned company, and does not meet any well-established exception to the search warrant requirement. *See*, *Arizona v. Gant*, 556 U.S. 332, 338 (2009). Similarly to First Amendment context, courts have allowed facial challenges to statutes under the Fourth Amendment, when the statute can only bring about one salient event in which a plaintiff will be forced to break the law. *See*, *Berger v. New York*, 388 U.S. 41 (1967); *Patel v. City of L.A.*, 738 F.3d 1058, 1061 (9th Cir. 2013), cert. granted, *City of L.A. v. Patel*, 135 S. Ct. 400

(2014). Therefore, this Court should allow ASA's facial challenge to the MERK Act under the Fourth Amendment.

The MERK Act authorizes around-the-clock inspections through the use of live web video streaming surveillance of all slaughterhouses, not only to be viewed by the personal eyes of USDA inspectors, but by all citizens of the United States. *See*, MERK Act § 3. The MERK Act, on its face, requires no limiting discretion on behalf of inspecting officers. The Supreme Court, and this Court, have consistently held that for a statute to meet the administrative search exception to the warrant requirement, the statute, must limit discretion of inspections so as to be a constitutionally adequate search warrant substitute. *See*, *New York v. Burger*, 482 U.S. 691, 702 (1987). Traditional search warrants authorize only one intrusion, not a series of searches or a continuous surveillance, and are anticipatory, something that the MERK Act's authorized searches are not. James X. Dempsey, *Communications Privacy in the Digital Age: Revitalizing the Federal Wiretap Laws to Enhance Privacy*, 8 Alb. L.J. Sci. & Tech. 65 (1997); *Ybarra v. Illinois*, 444 U.S. 85 (1979) (Joint dissent of Rehnquist, C.J., Blackman, J.). Accordingly, the district court incorrectly granted the government's motion to dismiss ASA's facial challenge to the MERK Act under the Fourth Amendment, and as such, the decision of the district court should be reversed.

If this Court finds that the MERK Act is unconstitutional on either ground, it must invalidate the MERK Act on its face.

ARGUMENT

I. THE MERK ACT VIOLATES THE FIRST AMENDMENT'S FREEDOM OF SPEECH PROVISION BY REQUIRING VIDEO RECORDING OF ALL SLAUGHTERHOUSE OPERATIONS, WHICH IS MADE AVAILBLE TO THE PUBLIC THROUGH LIVE STREAMING OR THE USDA.

The enactment of the MERK Act violates the United States Constitution's First Amendment's freedom of speech provision in requiring that slaughterhouses continuously record and make available for public viewing video of company operations. The MERK Act regulates speech by requiring slaughterhouses to produce video of the inside of business operations at all points where live animals or carcasses are present. *See*, MERK Act § 3. The First Amendment allows for not only the protection of individual speech but also commercial speech, and equally includes the right to refrain from speaking. *See*, *Va. State Bd. of Pharmacy*, 425 U.S. 748; *Wooley v. Maynard*, 430 U.S. 705 (1977). The correct test to be applied in this matter is the test for restraints on commercial speech rather than the compelled commercial disclosures test used by the United States District Court for the District of Massachusetts. *See*, *Cent. Hudson Gas and Elec. Corp.*, 446 U.S. 557; *Zauderer*, 471 U.S. 626. Therefore, in applying the restraints on commercial speech test, this Court should hold that the MERK Act is unconstitutional, as it requires slaughterhouses to produce video of business operations thereby violating freedom of speech.

A. Standard of Review.

The United States District Court for the District of Massachusetts held that the ASA failed to state a claim under the First Amendment's freedom of speech provision. R. at 10. The district court granted the government's motion to dismiss for failure to state a claim upon which relief can be granted after finding that the MERK Act was reasonably related to the

government's substantial interest in animal welfare and consumer information. *Id*. Whether the MERK Act violates the First Amendment's freedom of speech provision presents a question of law over which this Court exercises de novo review. *Salve Regina Coll. v. Russell*, 499 U.S. 225 (1991).

B. The MERK Act regulates speech by requiring video recording to be taken within slaughterhouse facilities and then made available to the public.

The MERK Act compels speech by requiring slaughterhouses to record video of inside their business operations, and then provide the recording to the public either through web streaming or the USDA. *See*, MERK Act §§ 3-4. The First Amendment makes clear that "Congress shall make no law. . . abridging the freedom of speech, infringing on the freedom of the press . . . ." U.S. Const. amend. I. It has been previously recognized that although the First Amendment *literally* allows for the protection of speech, the protections extend beyond just the spoken or written word. *See*, *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (emphasis added). To determine whether conduct outside the spoken or written word is encompassed within the protections of the First Amendment there needs to be an "intent to convey a particularized message" and the likelihood that the message would be understood needs to be significant. *Id*. The conduct must include evidence to show possession of a message to be communicated and that there is an audience for the message. *See*, *Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Grp. of Bos.*, 515 U.S. 557, 568 (1995).

Requiring slaughterhouses to videotape inside their operations at every area where live animals or carcasses are present would be for the purpose of conveying a message about the treatment of livestock to consumers. *See*, H.R. 108, 112th Cong. 1. The video would be made continuously available to the public through either streaming on a company website or provided to the USDA, and subject to a FOIA request. MERK Act § 4. There is a strong likelihood that the

public would understand the message as it is information that consumers could see for themselves. Part of the reasoning behind the enactment of the MERK Act is that consumers are curious about livestock treatment and where their food comes from, which according to Rep. Kahn supposedly pushes them to contact their legislators about undercover videos, strongly indicating that there is an audience for the continuous surveillance. *See*, H.R. 108, 112th Cong. 1.

In addition, as this Court has previously held, there is a constitutionally protected right to videotape. *See*, *Glik v. Cunniffe*, 655 F.3d. 78, 82 (1st Cir. 2011) (holding that police officers were not entitled to First Amendment qualified immunity against defendant for videotaping of arrest); *see also*, *Iacobucci v. Boulter*, 193 F.3d 14, 25 (1st Cir. 1999) (finding there is a right under the First Amendment to videotape public officials). The First Amendment extends beyond just the right to freedom of speech, but also includes the "gathering and dissemination of information" in these rights. *Glik,* 655 F.3d. at 82. In an age where technology is advancing at a rapid rate, the line between capturing and dissemination is quickly dissolving. Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Pa. L. Rev. 335, 376 (2011). There is receding debate that immediate dissemination of images does not constitute speech. *Id*. As the district court noted below, if protections exist under the First Amendment for the right to videotape then the equal but opposite right not to videotape must also exist. R. at 5.

1. Encompassed in the First Amendment's right to freedom of speech and expression is the equal and opposite right to refrain from speaking.

Along with the First Amendment's protection of freedom of speech, there is an equal and opposite protection that allows for the ability to abstain from speech. *See*, *Wooley*, 430 U.S. 705 (holding that the state could not require display of state motto on vehicle license plate). The Supreme Court has held that encompassed with the protections of the First Amendment's

freedom of speech provision is not only the right to speak freely but also that right to "refrain from speaking at all." *Id.* at 714. The legal system, which is based on the rights under the Constitution that allow its citizens the opportunity to choose their own religion, political party, and individually important causes or ideologies, must also allow for the equal right to not participate in these concepts. *Id*. There exists a "freedom of mind" concept that is established under the First Amendment that allows for not only the right to speak but also the right *not* to speak. *Id*. (emphasis added).

It has also been established by the Supreme Court that compelled disclosure infringes on the notion of privacy that is held under the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (superseded in part by statute regarding campaign contributions). There does not exist justification for compelled disclosure simply by showing a legitimate governmental interest, as there must also exist a "relevant correlation" or "substantial relation" between the interest and the required disclosure in order to infringe on the protected rights of the First Amendment. *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963).

The enactment of the MERK Act would violate the First Amendment's protection against compelling speech in requiring that slaughterhouses continuously videotape and then make publically available the recordings. *See*, MERK Act §§ 3-4. The MERK Act, by requiring slaughterhouses to videotape and make public recordings from inside the business and of their employees is compelling speech when it would be the choice of the slaughterhouses to refrain from speaking.

C. The continuous recording and public availability of the surveillance video under the MERK Act violates commercial speech and trade secrets protection of the slaughterhouse.

Commercial speech, which would encompass the speech at issue in this case, is a protected form of speech under the First Amendment. *See*, *Va. State Bd. of Pharmacy v*, 425 U.S. 748 (holding that commercial speech was not completely outside First Amendment or Fourteenth Amendment protections). The Supreme Court has previously found that speech is still to be protected under the First Amendment even though it is done for profit, to solicit a contribution of money or for advertising. *Id.* at 761. Even speech that encompasses nothing more than a commercial transaction is entitled to protection under the First Amendment. *Id.* at 762.

A determination under the commercial speech doctrine relies on the "common sense" approach, allowing for the distinction between speech that is of a commercial nature, typically an area that is subject to government regulation, and other areas of speech. *Zauderer,* 471 U.S. at 637 (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978)). Although, it has been stated that protections under the First Amendment for commercial speech are less comprehensive than the protections that are afforded non-commercial speech, protections do still exist and can be enforced. *Id.* at 637; *see also*, *Bolger v. Youngs Drug Prod. Corp*., 463 U.S. 60, 65 (1983); *In re R.M.J.*, 455 U.S. 191, 200 (1982); *Cent. Hudson Gas and Elec. Corp.*, 447 U.S. 557, 562 (1980). Beyond being "false, deceptive, or misleading" or "illegal in nature", commercial speech may only be restrained through means that directly advance a substantial government interest. *Zauderer*, 471 U.S. at 638 (citing *Cent. Hudson Gas and Elec. Corp.*, 447 U.S. at 566). In the *Zauderer* case, even though disclosure requirements that were reasonably related to a government interest in preventing consumer deception did not infringe on an advertiser's First Amendment right, it was stated that disclosure requirements could infringe on commercial

speech under the First Amendment if they are unjustified or unduly burdensome. *Zauderer*, 471 U.S. at 651.

The videotaping that is required under the MERK Act would infringe on ASA's rights to protected commercial speech. Since video would be required in all areas where live animals and carcasses are present, the conduct and actions that are part of the daily business operations of the slaughterhouse would also be captured on video. *See*, MERK Act § 3. This conduct is done in the pursuit of profit for the business and the video would capture actions beyond just the treatment of animals. *See*, R. at 1. The conduct that is carried out in the course of normal business operations is not as a whole false, deceptive, or misleading, as there is currently no claims required to be made by slaughterhouses as to the treatment of animals. H.R 108, 112th Cong. 1. In addition, the conduct at slaughterhouses as a whole is not considered illegal and the HMSA is already in place to ensure the prevention of any illegal activity. *Id*.

1. The MERK Act violates the trade secret exemption to FOIA by allowing video recordings to be made continuously available to the public.

Under section 4 of the proposed MERK Act, slaughterhouses must provide live streaming video recordings on their company websites to be available for consumers to view. MERK Act § 4(a),(b). If a company does not have a website, then the recordings must be provided to the USDA, which will then make it available to consumers upon completion of a FOIA request. § 4(c). Nowhere it the MERK Act does it mention a slaughterhouse's ability to redact part of the recordings. However, under FOIA there are exceptions to the content of information that is required to be made available for public viewing. 5 U.S.C. § 552(b) (2012). A segregation of the information may be provided to a requestor after deletion of exempted information. *Id*. This includes information about a company that is considered "trade secrets and commercial or financial information." 5 U.S.C. § 552(b)(4). Trade secrets have been defined and used by courts

to include "any formula, pattern, device, [or] compilation of information" that is used in the course of business or may provide a competitive advantage. 21 C.F.R. § 20.61(a) (2014); *see also*, *Anderson v. Dep't of Health and Human Serv.*, 907 F.2d. 936, 943 (10th Cir. 1990); *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d. 1280, 1286-87 (D.C. Cir. 1983). Factors to be considered in the application of the trade secrets exemption, are (1) whether the disclosure of information would significantly help agency performance, (2) the harm that would be encountered by the producers and public resulting from disclosure and, (3) whether an alternative to full disclosure could serve public interest effectively without harming the producers. *Pennzoil Co. v. Fed. Power Comm'n*, 534 F.2d 626, 632 (5th Cir. 1976).

The MERK Act's requirement that slaughterhouse continuously record and live stream or provide recordings to the USDA would violate the trade secrets exemption to FOIA because it allows cameras into every aspect of slaughterhouse operations without any censorship. *See*, MERK Act § 3. The MERK Act would provide anyone the opportunity to see the inner workings of every area and piece of equipment within slaughterhouse walls. Although the video would record the treatment of animals, it would also record every other aspect of the business. *Id*. This occurrence will significantly harm slaughterhouse businesses since, in addition to consumers being able to view the information, competitors can as well. There is no indication in the record that the government has explored alternatives, other than continuous video recording, that can satisfy the public interest of knowing where their food comes from without requiring full disclosure of all slaughterhouse operations and machinery.

D. The District Court erred in applying the *Zauderer* test, as the correct test to be applied in this matter is the *Central Hudson* test for restraints on commercial speech.

The district court applied the compelled commercial disclosure test from the *Zauderer* case stating that there are "material differences between disclosure requirements and outright

prohibition on speech." R. at 5; *Zauderer*, 471 U.S. at 650. In addition the *Zauderer* Court determined that the disclosure requirements for commercial speech only required "somewhat more information" than normally presented. R. at 5; *Zauderer*, 471 U.S. at 650. However, the *Zauderer* test only applies when the government interest at issue is designed at "preventing deception of consumers." R. at 6; *Zauderer*, 471 U.S. at 651. In this matter, the government concedes that preventing deception of consumers is not the issue with the enactment of the MERK Act, it is instead designed to provide information to consumers about animal welfare and origin of their food.[1] R. at 6; MERK Act § 1.

Although the district court cites to the D.C. circuit case of *American Meat Institute v. USDA* to show that the *Zauderer* test has been extended beyond use in consumer deception, it should not be extended to this case. R. at 6; 760 F.3d 18 (D.C. Cir. 2014). In *American Meat Institute*, the court found that several factors combined to create a substantial government interest that would pass the *Zauderer* test. *Id*. at 23. These factors included safety regarding food borne illness outbreaks, which lead to health concerns, market impacts, and consumer interest in American products or other county of origin. *Id*. *American Meat Institute* acknowledges that the *Zauderer* test can be applied to cases beyond consumer deception for a "purely factual matter", as in country of origin labeling. *Id*. The Court itself in *Zauderer* states that "warning[s] or disclaimer[s] might be appropriately required . . . ." *Zauderer*, 471 U.S. at 651. However, the MERK Act not only extends beyond the limits of consumer deception as laid out by *Zauderer*, it also extends beyond a purely factual matter. As referenced above, the continuous video recording and live streaming availability required by the MERK Act is well beyond on package labeling claims. MERK Act §§ 3,4. Unlike the on package labeling required in *American Meat*

[1] There is nothing in the factual findings of the case to suggest an intention to remedy any actual deception. R. at 6.

Institute, the continuous live streaming and public availability is not a one-time statement made as a warning or disclosure, but instead a pervasive intrusion. In addition, there is no claim that the MERK Act was enacted to ensure food safety or ensure against food borne illnesses.[2]

The district court should have, instead, applied the restraints for commercial speech test that arose out of *Central Hudson*. R. at 5; *Cent. Hudson Gas and Elec. Corp.*, 447 U.S. at 564. As mentioned previously (pp. 10-11), the Supreme Court has found that commercial speech does not lack all protection under the First Amendment just because it is driven by an economic nature, and is thereby afforded intermediate scrutiny. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). Once a determination is made that the commercial speech does not involve any unlawful activity or is not misleading to the public, the Supreme Court in *Central Hudson* stated that commercial speech restrictions must "directly advance" a "substantial" government interest in a way that cannot be provided "by a more limited restriction." *Cent. Hudson Gas and Elec. Corp*., 447 U.S. at 564 (finding that although the state had a legitimate interest that was directly advanced by Commission's order, the order suppressed speech by a more extensive means than was necessary to meet the interest); *see also*, R. at 5.

The second and third elements under the *Central Hudson* test state that in order to put qualifications on the right of freedom of speech, the government must show a "substantial" interest that is "directly advance[d]" by the qualification set out. *Cent. Hudson Gas and Elec. Corp.*, 447 U.S. at 564. It is conceded that the government's interest in protecting the welfare of animals at slaughterhouses may be considered a compelling interest and therefore could be considered a substantial interest. *See*, *United States v. Stevens*, 559 U.S. 460, 495-96 (2010)

[2] Although the government argued that meat production affects food safety concerns in its motion to dismiss, this concern was not addressed as part of the legislative findings of the MERK Act. R. at 6-7.

(finding that the government's interest in preventing the types of torture to animals depicted in crush videos was a compelling interest but statute was overbroad and invalid under First Amendment).

However, the government's interest in providing consumer knowledge does not constitute a substantial interest for which the MERK Act would pass. *See*, *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996). Consumer concern, even if considerable, is not enough to support a substantial government interest that would condone allowing restrictions on commercial speech under the First Amendment. *Id*. at 73. Similarly to the case here, in *International Dairy Foods Association*, the state asserted a strong consumer interest and the public's right to know as justifications for enacting a law that required dairy farmers to label products from cows that were treated with hormones. *Id*. However, the state made no claims that the law protected consumers against any health or safety concerns. *Id*. In this matter, the claims made in support of the MERK Act state that information about the treatment of animals at slaughterhouses is of "vital importance to the American consumer." MERK Act § 1(b). Further, that consumers are curious about where their food comes from and should possess the greatest possible amount of information. MERK Act § 1 (b)-(c). There is no claim under the MERK Act that live video surveillance from inside the slaughterhouses would provide protection to consumers against health and safety concerns.[3]

Additionally, the government has the burden to show justification for the enactment of the MERK Act. *Int'l Dairy Foods Ass'n*, 92 F.3d. at 72. The burden of justification cannot be fulfilled by means that are mere speculation, but must be demonstrated to be real and will be alleviated to a "material degree" by the restrictions enacted. *Id*. at 73; *see also*, *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). The legislative findings of the MERK Act cite to the video

[3] *See*, R. at 6-7, *supra* note 2 .

surveillance being able to help protect consumers from a meat recall episode due to violations of the HMSA, like Hallmark-Westland.[4] H.R 108, 112th Cong. 1-2. However, this statement is of mere speculation by Representative Kahn. The required video surveillance under the MERK Act would not catch any violations of animal care standards, already in place through the HMSA, which should not currently be caught through inspections. The legislative findings cite a lack of adequate staff and distraction of food safety inspections as reason for failing to notice mistreatment of animals and under enforcement of HMSA. H.R. 108, 112th Cong. 3. This suggests that an adequate staff of USDA inspectors that could visually see, in the moment, animal care violations and put a stop to them would further the government interest in preventing another meat recall without the intrusive nature of continuous video surveillance.

The fourth element needed to satisfy the *Central Hudson* test is that the restriction imposed on commercial speech cannot be equally met by a more limited restriction. *Cent. Hudson Gas and Elec. Corp.*, 447 U.S. at 564. In tailoring the restrictions to meet the interest of the government, the restrictions must be "narrowly drawn" and cannot completely suppress information if there is a more narrow restriction available. *Id*. at 565. As the Supreme Court in *Central Hudson* found, although the state was able to show a legitimate interest, the restriction on speech was more extensive than necessary to meet the government's interest, and therefore violated the electrical utilities company's First Amendment rights. 447 U.S. at 557. In *Central Hudson,* the state banned all commercial advertising by the electrical utility, stating that it was trying to conserve energy and prevent any inequalities in rates. *Id*. The Court determined that the complete suppression of speech was not narrowly tailored to meet the state's interest in energy

[4] The USDA recalled 143 million pounds of beef from Westland Meat and partner Hallmark Packaging for animal care violations. David Brown, *USDA Order Largest Meat Recall in History*, The Washington Post (February 18, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/02/17/AR2008021701530.html.

conservation and unequal rates. In addition, the Supreme Court in *Stevens*, stated that the statute criminalizing the depictions of animal cruelty through "crush videos" was overbroad and was therefore in violation of the First Amendment. 559 U.S. at 460.

Similarly, in this case, the enactment of the MERK Act requiring that all slaughterhouses record and live stream or make publically available video of all aspects of their operations where animals are present is an overbroad generalization to address the government interests stated. *See*, MERK Act §§ 3-4. As in *Central Hudson* and *Stevens*, the complete ban on advertising or criminalization of all depictions of animal cruelty was not narrowly tailored to address government concerns about electrical rates, energy conservation, and animal cruelty. Similarly, the requirement of continuous live streaming of all areas within slaughterhouses, considering the breadth of areas that are included, is not narrowly tailored to protect animal welfare and provide information to consumers. *See*, MERK Act § 3.

II. THE MERK ACT VIOLATES THE FOURTH AMENDMENT ON ITS FACE AS THE ONE AND ONLY SALIENT EVENT THAT CAN BE BROUGHT TO FRUITION BY THE MERK ACT CAN NEVER COMPLY WITH THE FOURTH AMENDMENT OR ANY EXCEPTION TO THE FOURTH AMENDMENT.

This Court should find, similarly as the district court, that ASA's facial challenge to the MERK Act under the Fourth Amendment can be entertained as it will impose undue hardship to all slaughterhouse companies if they cannot challenge the constitutionality of the Act before it takes effect. This Court should further find that neither of the two grounds in which the district court granted the government's motion to dismiss are correct. First, the district court incorrectly concluded that the third prong of the tripartite test for administrative searches under the *Burger* doctrine simply requires statutory notice, and not a search that is "carefully limited in time, place, and scope." *New York v. Burger*, 482 U.S. 691, 703 (1987). Second, the district court concluded that the *Burger* doctrine allows for around-the-clock inspections, and that the use of

video surveillance is the proper means to this end. R at 15. Again, the district court completely disregards that the Supreme Court frowns upon the use of advancing technology to take away the reasonableness requirement of the Fourth Amendment. *See*, *Jones v. United States*, 132 S. Ct. 945, 950 (2012) (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)). Accordingly, neither of the grounds that the district court relies on to dismiss ASA's complaint are correct.

A. Standard Of Review.

This Court reviews a district court's disposition of a motion to dismiss for failure to state a claim de novo. *See, Artuso v. Vertex Pharm., Inc.*, 637 F.3d 1, 5 (1st Cir. 2011). In conducting this review, the Court "accept[s] as true all well-pleaded facts alleged in the complaint and draw[s] all reasonable inferences therefrom in the pleader's favor." *Butler v. Balolia*, 736 F.3d 609, 612 (1st Cir. 2013).

B. The government blindly overstates the significance of the precedent in favor of denying a facial challenge to the MERK Act under the Fourth Amendment by either misinterpreting or misapplying those cases.

The government in this matter argues, "ASA's Fourth Amendment [facial] challenge is premature" and should be dismissed. R. at 10. To support this proposition - a proposition that the district court does not agree with (*see,* R. at 12) - the government relies heavily on the Supreme Court's decision in *Sibron*, and the Sixth Circuit's splintered nine to five decision in *Warshak*. *Sibron v. New York*, 392 U.S. 40 (1968); *Warshak v. United States*, 532 F.3d 521 (6th Cir. 2008) (en banc). The government erroneously asserts that *Sibron* and *Warshak* stand for the remarkable proposition that courts "refuse[] to entertain facial challenges to statutes under the Fourth Amendment," but this is woefully inaccurate. R. at 10. *Sibron* and *Warshak*, as explained in detail below, correctly imply that courts will not entertain facial Fourth Amendment challenges when the statute in question can (1) be unpredictable, and (2) be interpreted in multiple ways,

something that is of no concern in this matter. Moreover, the Supreme Court and one of this Court's sister circuits have already entertained facial challenges to statutes under the Fourth Amendment, and found the challenges meritorious. *See, Berger v. New York*, 388 U.S. 41, 55-57 (finding that New York state's wiretapping statute "is deficient on its face" in part because the statue authorized "a serious or a continuous surveillance."); *see also, Patel v. City of L.A.*, 738 F.3d 1058, 1061 (9th Cir. 2013) (en banc), cert. granted, *City of L.A. v. Patel*, 135 S. Ct. 400 (2014) (finding a statute that only "authorize[es] warrantless, onsite inspections of… records upon the demand of any police officer" facially invalid under the Fourth Amendment).[5]

In *Sibron*, the New York state legislature enacted a statute allowing a police officer, with "reasonable suspicion," to "stop any person," in order to "demand" explanations, and "search such person for a dangerous weapon." 392 U.S. at 43–44. The defendants sought suppression of evidence discovered pursuant to such searches, and asked the Supreme Court to strike down the state statute as facially unconstitutional under the Fourth Amendment. *Id*. at 44. The Court declined to address the facial challenge to the statute in *Sibron* under the Fourth Amendment because federal courts should "confine [] review instead to the reasonableness of the searches and seizures" that have actually taken place. *Id*. at 62. However, the foundation of *Sibron* is built upon the reasoning that when a statute's terms "are susceptible of a wide variety of interpretations," the Court can only determine if the government has violated the Fourth Amendment by analyzing the "concrete factual context" in which the statute was applied. *Id*. at 59 - 60.

[5] The district court correctly recognized that while "[t]he First Circuit has not directly addressed this issue," R. at 12 n. 4, a District Court that this Court oversees has entertained a facial challenge to a statute under the Fourth Amendment without deciding whether the statute was constitutional or not. *See, Scott v. United States*, 2013 U.S. Dist. LEXIS 36982, at *8-10 (D. Mass. Mar. 18, 2013) (finding that a facial Fourth Amendment challenge to a Massachusetts statute is "a difficult facial challenge.").

The similar problem of broad application and multiple statutory interpretations was found in *Warshak*, where the court vacated an earlier panel decision on the grounds that Warshak's request to enjoin the government from obtaining his emails in advance of an attempt by the government to do so was not ripe for review. 532 F.3d at 526-27. The *Warshak* court stated that "[t]he 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. The *Warshak* court, similar to the *Sibron* Court, reasoned that its "case involves not just the risk of guessing about other fact patterns in which a statute might be applied[,] but the risk of guessing how the statute will be applied even to this individual--a fact that makes the facial invalidation of this statute especially inappropriate." *Id*. at 530-31.

In the instant matter, ASA does not bring before this Court a statute that requires guessing, is unpredictable, or is susceptible to a wide variety of interpretations. Instead, ASA brings before this Court a statute that, once brought to fruition, will only bring about one salient event, namely, unconstitutional video surveillance of all slaughterhouses "regardless of the circumstances." R. at 12. Moreover, the statute in this matter is very similar to the statue at issue in *Burger*, as the *Burger* statute also allowed for continuous surveillance. The purpose of the MERK Act, as its Congressional history clearly reveals, is that "by requiring video surveillance inside slaughterhouses… USDA and consumers can use [this Act] to provide a [continuous] check on inhumane treatment" and nothing more. H.R. 108, 112th Cong. 2 (statement of Rep. Kahn). Accordingly, the MERK Act will soon become effective with only one salient event as applied to all slaughterhouses, and for that reason, a facial challenge to the MERK Act under the Fourth Amendment should be permitted by this Court.

1. The District Court's refusal to force plaintiffs to break the law before they can challenge the constitutionality of a statute under the First Amendment similarly shows reason not to force a plaintiff to break the law before they can challenge the constitutionality of the MERK Act under the Fourth Amendment.

The Supreme Court has long held that "it is not necessary that [a plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."). Just like First Amendment interests, Fourth Amendment interests "are fragile interests, and a person who contemplates protected activity might be discouraged by the in terrorem effect of [a] statute." *Bates v. State Bar*, 433 U.S. 350, 380 (1977). When that happens, "[s]ociety as a whole [is] the loser." *Sec'y of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984); *see also, Gun Owners' Action League v. Swift*, 284 F.3d 198, 206 (1st Cir. 2002) (holding that individuals, businesses, and associations affected by a gun control Act in Massachusetts creates "a dilemma… when threatened prosecution puts the party seeking pre-enforcement review 'between a rock and a hard place.'") (quoting *Navegar, Inc. v. United States*, 103 F.3d 994 (D.C. Cir. 1997)).

The district court correctly held that "[i]n the First Amendment context, courts have refused to force plaintiffs to break a law before they can challenge its constitutionality," and "the Court sees no reason why that rule should not apply to laws that may violate the Fourth Amendment."[6] R. at 12. However, facial challenges to statutes under the Fourth Amendment do take a different path than facial challenges to statutes under the First Amendment because the latter challenges are entertained against "overly broad statutes… to prevent the statute from

[6] In support of is decision, the district court cited *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007), and *Steffel v. Thompson*, 415 U.S. 452, 459 (1974).

chilling the First Amendment rights of other parties not before the court." *Joseph H. Munson Co.*, 467 U.S. at 958. But as demonstrated above (pp. 19-21), courts will entertain facial challenges to statutes under the Fourth Amendment *not* when the statute is overly broad, but when the statute is "not susceptible of a wide variety of interpretations." *Sibron*, 392 U.S. at 60; *see also, Berger*, 388 U.S. at 55 (finding a statute "deficient on its face" when the challenger is "indisputably affected by it."); *Patel,* 738 F.3d at 1060; (emphasis added).

The district court recognized that if ASA's facial challenge is denied, ASA would first have to violate the MERK Act "by refusing the officer's inspection demand," and then challenge the reasonableness of the Act. R. at 12 (quoting *Patel*, 738 F.3d at 1064). This means that slaughterhouse companies will have to "quite clearly expose[] [themselves] to the imposition of strong sanctions." *Abbott Labs. v. Gardner*, 387 U.S. 136, 154 (1967) (overruled on other grounds by *Califano v. Sanders*, 430 U.S. 99, 105 (1977)). There can be no question here that slaughterhouse companies are stuck between a rock and a hard place because if these companies refuse to comply with the Act's video provisions by the effective date of March 2, 2015, these companies will have strong sanctions of thousands of dollars in fines per day imposed upon them. MERK Act §§ 3-6. Additionally, no modifications to the MERK Act are expected to occur as the Act gave a three-year grace period before taking effect, and that grace period will expire shortly. *Id*.

The Supreme Court has stated that "Fourth Amendment cases must be decided on the facts of each case, not by extravagant generalizations." *Dow Chem. Co. v. United States*, 476 U.S. 227, 238 n. 5 (1986). However, the district court correctly found that while courts "benefit from facts and context when evaluating the reasonability of a search, this case is different because it entails continuous and ongoing surveillance," thus, all facts are already before the

court and no extravagant generalizations need to be made. R. at 12. For this Court to hold otherwise, and superfluously require more facts, would risk striking at the heart of the Fourth Amendment and insulating unconstitutional statutes that allow for unreasonable searches. Accordingly, this Court should permit ASA's facial challenge to the MERK Act under the Fourth Amendment to be entertained.

C. The inspections that the MERK Act authorizes are unconstitutional and inapplicable under the *Burger* doctrine because there must be more than a simple courtesy of statutory notice to satisfy the doctrine's third prong.

When slaughterhouse companies and their 1.9 million employees[7] operate daily, they maintain a reasonable expectation of privacy within the four walls of a privately owned company under the Fourth Amendment. It is beyond dispute that privately owned companies are protected by the Fourth Amendment's warrant and reasonableness requirement. U.S. Const. amend. IV. *See also, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014) ("[E]xtending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company."); *Okla. Press Pub. Co. v. Walling*, 327 U.S. 186, 205-06 (1946) ("[T]he Fourth Amendment has been held applicable to corporations."). However, the only exception to the warrant requirement that the government urges the MERK Act to fall within is the administrative search doctrine of *New York v. Burger*. 482 U.S. 691 (1987); *see also,* R. at 13-15. For purposes of this appeal, ASA only contests this doctrine as to its third prong of its tripartite test.

Both the government and the district court go to great lengths to paint a picture proclaiming that the First Circuit has described the third prong of the *Burger* doctrine as "simply

[7] *See,* The Poultry Federation, *Poultry Industry Provides 1,337,030 Jobs and 265.6 Billion in Economic Impact To U.S. Economy*, News (Oct. 3, 2012), http://www.thepoultryfederation.com/news/poultry-industry-provides-1337030-jobs-and-265-6-billion-in-economic-impact-to-u-s-economy; American Meat Institute, *The United States Meat Industry At a Glance*, (Mar. 2011), http://www.meatami.com/ht/a/GetDocumentAction/i/89473.

requir[ing]… 'notice.'" R. at 15 (quoting *United States v. Gonsalves*, 435 F.3d 64, 67 (1st Cir. 2004)). This notice, according to the district court, is the only requirement to satisfy the third prong and authorize "continuous and ongoing surveillance" under the MERK Act. R. at 12. This portrait, however, is entirely off the mark, as there is no "specifically established and well-delineated exception[]" to the warrant requirement for such an around-the-clock search of a company, especially not under the *Burger* doctrine. *Arizona v. Gant*, 556 U.S. 332, 338 (2009). The Supreme Court has even struck down a statute on its face for allowing "a series or a continuous surveillance." *Berger v. New York*, 388 U.S. 41, 57 (1967). The district court's holding is clearly inapposite to the *Burger* requirement that the "statute's inspection program… provid[e] a constitutionally adequate substitute for a warrant." 482 U.S. at 703. This means that the discretion of inspecting officers must "be carefully limited in time, place, and scope," so as "to place appropriate restraints upon the discretion of the inspecting officers." *Id.* at 702-03, 711 (quoting *Donovan v. Dewey*, 452 U.S. 594, 605 (1981)). The district court completely disregarded that the administrative search exception to the warrant requirement is limited under the Fourth Amendment.

For example, pertinent to the four industries where the Supreme Court has invoked the administrative search exception, it has been recognized that the statute in question properly limited, on its face, the time, place, and scope of the regulatory inspection. *See e.g., Burger*, 482 U.S. at 711 (finding that the vehicle dismantling industry statute required a vehicle dismantler to permit inspection only "during [his] regular and usual business hours."); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970) (finding that the liquor industry statute minimized intrusive government invasions by not allowing for forcible entry, only regulatory inspection); *United States v. Biswell*, 406 U.S. 311, 316-317 (1972) (finding that the firearm industry statute

"pose[d] only limited threats to the dealer's justifiable expectations of privacy," and that the "regulatory inspections… and the possibilities of abuse and the threat to privacy are not of impressive dimensions."); *Donovan*, 452 U.S. at 604 (finding that the mining industry statute did not "leav[e] the frequency and purpose of inspections to the unchecked discretion of Government officers," but instead "establishes a predictable and guided federal regulatory presence.").

Similarly, this Court has found, when invoking the *Burger* doctrine and its administrative search exception, that notice is not the only requirement under the third prong, as "the regulatory statute must (1) alert owners that their premises are 'subject to periodic inspections undertaken for specific purposes,' and (2) carefully constrain official discretion respecting the time, place and scope of periodic inspections." *Tart v. Massachusetts*, 949 F.2d 490, 498 (1st Cir. 1991) (quoting *Donovan*, U.S. 594 at 600). The district court, however, cites *Gonsalves* for the distorted proposition that this Court "simply requires" the third prong of the *Burger* doctrine to "provide 'notice.'" R. at 15 (quoting *Gonsalves*, 435 F.3d at 64). The district court similarly distorts *Maldonado* by saying that the "'last criterion looks to notice as to the scope of the search as well as limitations on the discretion [of] inspecting officers.'" *Id.* (quoting *United States v. Maldonado*, 356 F.3d 130, 136 (1st Cir. 2004)).

While these are accurate quotations, the district court omits the *Gonsalves* and *Maldonado* majority's full interpretation of *Berger*'s third prong. In *Gonsalves*, the court elaborates further on what "the third condition -- the 'constitutionally adequate substitute for a warrant'" must be. 435 F.3d at 68 (quoting *Burger*, 482 U.S. at 703). The *Gonsalves* court explains that the third prong places "adequately specific limits on the timing and scope of the activity." *Id*. (comparing *Burger*, 482 U.S. at 711 ('during regular and usual business hours'); *Biswell*, 406 U.S. at 312 n. 1 ('at all reasonable times')). Likewise, in *Maldonado*, the court

determined that the interstate commercial trucking was held to the administrative search exception and stated that the "carefully delineated scope of the federal regulations suitably cabins the discretion of the enforcing officer." 356 F.3d at 136.

These holdings make sense because the third prong of *Burger* recognizes that the statute, on its face, must allow for a constitutionally adequate search warrant *substitute* (emphasis added). 482 U.S. at 703. The spirit of a traditional search warrant "authorizes only one intrusion, not a series of searches or a continuous surveillance." James X. Dempsey, *Communications Privacy in the Digital Age: Revitalizing the Federal Wiretap Laws to Enhance Privacy*, 8 Alb. L.J. Sci. & Tech. 65, 69-70 (1997); *see also, Ybarra v. Illinois,* 444 U.S. 85, 102 (1979) ("A search warrant is, by definition, an anticipatory authorization.") (Joint dissent of Rehnquist, C. J., Blackmun, J.). Imagine if the statute in *Maldonado* allowed for continuous searches of commercial trucks delivering products and goods. Not only would this be an absurd piece of legislation because the search of a truck, even the largest truck, would never require a search of the interior to last a month or a year, but nothing would ever be successfully delivered as the truck would be stopped for an unlimited period of time, with no limiting discretion required on behalf of the inspecting officer. Moreover, after a prolonged period of time, the anticipatory effect of executing a search warrant will no longer be anticipated, becoming stagnate, thus, making the substitute for a search warrant unconstitutional.

Equally, the government's and the district court's distortion of both *Gonsalves* and *Maldonado* should not go unnoticed by this Court. The district court "simply" states that "[t]he MERK Act provides slaughterhouses adequate notice, in that they are always aware when the search is ongoing." R. at 15. However, this simplicity strays from the inexplicable true purpose of the MERK Act, that *the search is always ongoing* (emphasis added). Another inexplicable

truth, more accurately than the district court depicts, is that "slaughterhouses know that consumers and the USDA are [*always*] watching. R. at 15 (emphasis added). Therefore, the authorized inspections of the MERK Act go well beyond the constitutionally adequate search warrant substitutes and required restrictions of not only the Supreme Court's previous decisions, including *Burger,* but also against this Court's decisions in *Gonsalves* and *Maldonado*. The MERK Act grants limitless searching discretion to the government and the citizens of the United States, allowing for forced around-the-clock surveillance. Accordingly, the MERK Act, on its face, is contrary to precedent and logic because it does not require what every statute authorizing the administrative search exception has in common: an inspection scheme that is a constitutionally adequate substitute for a search warrant. This Court should not permit the "broad sweep" of the MERK Act that the district court was so eager to permit. R. at 15.

1. Using technology without a warrant to provide continuous footage of daily activates has been found to violate the Fourth Amendment, thus, making the heart of the MERK Act unconstitutional.

The Supreme Court has made clear that when the government engages in prolonged electronic tracking, or when tracking reveals information about a private space that could not otherwise be publicly observed, that tracking violates a reasonable expectation of privacy and therefore constitutes a search within the meaning of the Fourth Amendment. Pertinent to this matter, the government's use of "video surveillance [to] provide[] continuous footage" inside slaughterhouses, and track the daily "activities in[side] these facilities" (MERK Act § 1(c)), requires this Court to confront the "power of technology to shrink the realm of guaranteed privacy." *Kyllo v. United States*, 533 U.S. 27, 34 (2001). In two recent Supreme Court decisions, *United States v. Jones*, 132 S. Ct. 945 (2012), and *Riley v. California*, 134 S. Ct. 2473 (2014), it has been described how tracking daily activities, implicates significant privacy interests.

In *Jones*, the Court unanimously held that the government's warrantless installation of a GPS device to conduct electronic tracking of a vehicle for twenty-eight days "constitutes a 'search.'" 132 S. Ct. at 949. In *Riley*, the Court specifically cited Justice Sotomayor's concurring opinion in *Jones* as a reason to limit police searches of cell phones incident to arrest. *Riley*, 134 S. Ct. at 2490. *Riley* recognized the privacy implications of tracking information, noting that cell phones store data that can "reveal where a person has been," making it possible to "reconstruct someone's specific movements down to the minute, not only around town but also within a particular building." *Id*. (citing *Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring)). These precedents provide independent routes to find that a warrant is required for government access through prolonged electronic tracking. Just as "society's expectation has been that law enforcement agents and others would not… monitor and catalogue every single movement of an individual's car for a very long period," so, too, is it society's expectation that government agents would not electronically track the insides of a privately owned company for such a perpetual period. *Jones*, 132 S. Ct. at 964 (Alito, J. concurring). Moreover, because federal courts must "'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted,'" this Court must ensure that all outcomes in this matter square with the Fourth Amendment's central purpose of reasonableness. *Jones*, 132 S. Ct. at 950 (quoting *Kyllo*, 533 U.S. at 34); *Id*. at 958 (Alito, J., concurring). Given that the "continuous and ongoing" surveillance in the instant matter is similar, and much longer in duration than that frowned upon in both *Jones* and *Riley*, this Court has a particular interest in ensuring that Fourth Amendment privacy safeguards extend to technology attempting to provide continuous footage inside of a privately owned company. R. at 10.

As more Americans have a subjective expectation of privacy to not be electronically tracked around-the-clock, these expectations necessarily become one that "society is prepared to recognize as 'reasonable,'" and thus protected by the Fourth Amendment. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Even Justice O'Connor, the only Supreme Court justice ever to have served as a state legislator[8], noted: "Legislators have, upon occasion, failed to adhere to the requirements of the Fourth Amendment[.] Indeed, as noted, the history of the Amendment suggests that legislative abuse was precisely the evil the Fourth Amendment was intended to eliminate." *Illinois v. Krull*, 480 U.S. 343, 362 (1987) (O'Connor, J., dissenting). This precise evil is what is found within the MERK Act in the matter before this Court. Accordingly, warrantless and continuous tracking by the government, even assuming that the MERK Act allows slaughterhouses to be held to the administrative search exception to the warrant requirement, offends the rights of a privately owned company and the individuals who work for that company to maintain privacy in their day-to-day activities, particularly when they would not reasonably expect such information to be gathered or made available to others.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the lower court granting the government's motion to dismiss ASA's First Amendment challenge and Fourth Amendment challenge to the MERK Act.

[8] Biographies of Current Justices of the Supreme Court, http://www.supremecourt.gov/about/biographies.aspx (last visited January 22, 2015).