CASE NO. 3-14159265359

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.

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

Appeal from the United States District Court for the District of Massachusetts
Case No. 3:14-cv-55440 MJC (ABC)
The Honorable Myra J. Copeland, District Judge, Presiding

Team Number 13

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Does the Meat Eaters' Right to Know Act, which requires the disclosure of unedited video recordings of slaughter plant operations, violate the First Amendment?

II. In light of judicial jurisprudence disfavoring facial constitutional challenges due to their speculative nature, may the American Slaughterhouse Association bring a purely facial Fourth Amendment reasonableness challenge?

III. Under the Fourth Amendment, which prohibits "unreasonable searches and seizures," does the Act authorize unreasonable searches when it requires slaughter plants to produce recordings of conduct regulated by the Humane Methods of Livestock Slaughter Act?

STATEMENT OF THE CASE

This appeal arises from a dismissal entered in the United States District Court for the District of Massachusetts in favor of the Government. Appellant, the American Slaughterhouse Association (the "Association"), brought an action for declaratory judgment and injunctive relief contending that that Meat Eaters' Right to Know Act ("MERK Act") is unconstitutional. In particular, the Association alleged that the required disclosure of slaughter plant operations compelled speech in violation of the First Amendment, and authorized unreasonable government searches in violation of the Fourth Amendment.

The Government moved to dismiss the complaint for failure to state a claim under either the First Amendment or the Fourth Amendment, and the district court granted the government's motion in its entirety.

STATEMENT OF THE FACTS

In 2012, the 112th Congress passed the Meat Eaters' Right to Know Act ("MERK Act") to address the public's need for accurate consumer information and interest in humane animal treatment, and to better facilitate the enforcement of the Humane Methods of Livestock Slaughter Act ("HMLS Act"). *See* Leg. Hist. at 4. The American Slaughterhouse Association (the "Association") brought this facial challenge in March of 2014, one year before the statute's effective date. Dist. Ct. Op. at 2. *See also* MERK Act § 6 ("[T]he effective date of this statute is March 2, 2015."). The Association did not include an as-applied challenge in their suit. *See* Dist. Ct. Op. at 1. As such, the record for this case is limited to published documents, such as the statute and its legislative history.

The focus of the Association's claim is the video recording requirement. Dist. Ct. Op. at 1. The Act requires slaughter plants to "produce video recordings capturing every location of the slaughter plant at which live animals or carcasses are handled or slaughtered." MERK Act § 3. The Act applies only to areas in which animals are routinely handled or slaughtered. *See id.* (for example, truck unloading areas, pens, chutes, and stun boxes). Slaughter plants must either stream their video recordings continuously on the company's website or produce copies to the U.S. Department of Agriculture (USDA). *Id.* § 4. In the latter case, the copies will be publicly available pursuant to the Freedom of Information Act, 5 U.S.C. § 552. MERK Act § 4(c).

The MERK Act does not create a new area of regulation. Its requirements only apply to facilities already operating under a grant of inspection or statutory exemption from the USDA. MERK Act § 2(a). Since 1958, the Humane Methods of Livestock Slaughter Act ("HMLS Act"),

7 U.S.C. §§1901–1906 (2012)), has regulated the industry's handling and slaughter of animals. The HMLS Act, in conjunction with published regulations, specify various requirements for achieving compliance. *See, e.g.*, 7 U.S.C. § 1902 (describing required methods of slaughter); 9 C.F.R. § 313 (describing, for example, maintenance of handling areas, and prohibited conduct for the handling and slaughter of animals). Prior to the MERK Act, the HMLS Act's primary enforcement mechanism was inspections conducted by the Food Safety and Inspection Service ("FSIS") pursuant to the Federal Meat Inspection Act ("FMI Act").

However, the HMLS Act's history has been marked by under-enforcement, allowing "egregious mistreatment of livestock to go unnoticed." Leg. Hist. at 3–4. Two problems have led to this result. First, the expansive scope of the FSIS's inspection duties limits their ability to fully enforce the HMLS Act. *See id.* at 1, 3. In addition to inspecting for the humane treatment of animals, the FSIS must also inspect for food safety. FMI Act, 21 U.S.C. § 603; Leg. Hist. at 3. Inspectors are "often . . . engaged in food safety inspection duties, and thus fail to notice or prevent the abuse of animals." Leg. Hist. at 3. Second, in addition to a broad scope of duty, the FSIS suffers from a "lack of adequate staff and resources." *Id.* Thus, there are occasions when inspectors are simply "absent." *Id.*

Even prior to the introduction of the MERK Act, Congress was well-aware of the HMLS Act's under-enforcement. In 2002, Congress passed a provision that specifically directed the Secretary of Agriculture to "fully enforce" the HMLS Act. Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 10305(a)(2), 116 Stat. 134, 493. Despite this mandate, "USDA oversight has failed to prevent horrific cruelty in slaughterhouses in numerous cases." Leg. Hist. at 4. Several of these cases were only revealed through undercover video taken by animal activists. *Id.* For example, these videos revealed the abuse of downed cows at Hallmark-

Westland Meat Packing in 2008, and the torture of veal calves at the Bushway Packing plant in 2010. *Id.*

These incidents of inhumane slaughter methods have led to growing concern from consumers. Leg. Hist. at 4. In fact, a 2010 Consumer Reports survey revealed that consumers consider animal welfare a "top concern," noting that food labels "fail[ed] to convey any meaningful information" about the subject. *Id.* In reaction to incidents revealed in undercover video, consumers have expressed to lawmakers their frustration with their inability to make the informed purchases required to "vote with their wallets." *Id.* at 1–2. Additionally, consumers "overwhelmingly agree … that animals in slaughterhouses should be treated humanely." *Id*. at 4.

On this backdrop of under-enforcement problems and growing public concern, Congress passed the MERK Act. The Honorable Panop T. Kahn introduced the Act on January 25, 2012. *Id*. at 1. Kahn emphasized the FSIS inspectors' need for "stronger tools," introducing the video recording requirement as providing an "extra set of eyes." *Id.* at 1–2. This characterization is echoed in the House Report recommending passage of the bill, noting that inspectors have "report[ed] that video surveillance would facilitate more robust enforcement of the [HMLS Act]." *Id*. at 4. Congress concluded that the MERK Act provides the two-fold benefit of increasing the slaughter industry's incentive to comply with the HMLS Act, and also provide consumers with important purchasing information. *Id.* at 2, 4.

As explained in the following argument, on these facts the district court's order should be reversed in part, and affirmed in part.

SUMMARY OF THE ARGUMENT

The American Slaughterhouse Association ("Association") entirely failed to state a claim under either the First Amendment or the Fourth Amendment.

Regarding the First Amendment issue, the district correctly held that Meat Eaters' Right to Know Act ("MERK Act") is consistent with First Amendment because, under *Zauderer v. Office of Disciplinary Counsel*, the disclosure of slaughter plant operations is reasonably related to the government's interest in promoting transparency in the food industry and preventing livestock animal mistreatment. As the unedited footage involves the preparation of animals for meat and poultry products, the Act would compel uncontroverted, factual conduct that can be characterized as commercial speech. Further, a broad application of *Zauderer* aligns with the principal justification of the First Amendment protection of commercial speech—the free flow of accurate information. As the disclosures would relate to more than the interest of mere consumer curiosity, the Act is constitutional under a *Zauderer* analysis.

Lastly, even if the Act was reviewed under the intermediate scrutiny established by *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N.Y.*, it would remain valid. The prevention of animal cruelty, as well as the consumer's knowledge of the origin of his or her food, are established as substantial interests that can withstand *Central Hudson* scrutiny. The Act directly serves these interests, as it logically follows that the public accountability these disclosures would create will deter future instances of inhumane animal treatment. However, this compulsion is constrained to purely factual and uncontroversial information, and as such, is in proportion to the government interest served. Therefore, the Act remains constitutional when *Central Hudson* is applied.

With regard to the Fourth Amendment issue, the Association's facial challenge should be dismissed on either one of two grounds. First, facial constitutional challenges are disfavored. This is particularly true for Fourth Amendment challenges. Second, the MERK Act is constitutionally reasonable.

I. The Supreme Court in *Sibron* warned against facial challenges of statutes authorizing warrantless searches. Such facial challenges raise significant policy concerns, particularly when there are no facts surrounding an actual search. First, courts should not speculate about how a government will implement a law. Second, by avoiding facial challenges courts avoid addressing constitutional questions before necessary, thereby incurring the risk of establishing a constitutional rule broader than required by actual facts of a case. Finally, the doctrine against facial challenges affords respect to laws that reflect the will of the people and the government that implements the law under the framework of the Constitution.

Considered in the light of these concerns, the Association's facial Fourth Amendment challenge is highly inappropriate. The Association's challenge requires this court to speculate about how the Government will implement the MERK Act, without the benefit of a developed record. The Association's choose this route in lieu of requesting opinion letters from the U.S. Department of Agriculture, or of awaiting an actual enforcement action by the Government. By taking the Association's bait, the district court has placed the judiciary on the hook for creating a broad constitutional rule that may not have been raised by the actual implementation of the Act.

II. The Fourth Amendment does not protect closely regulated industries from administrative searches pursuant to a valid regulatory scheme. Regulatory schemes are analyzed under the *Burger* test, which asks three questions. First, whether there is a substantial government interest that informs the regulatory scheme. Second, whether the searches are necessary to further the regulatory agenda. And third, whether the scheme has safeguards that create "certainty and regularity" in its application.

The *Burger* analysis applies here because the Association's slaughter plants are a closely regulated industry. The plants are pervasively regulated under the Humane Methods of Livestock

Slaughter Act ("HMLS Act"), which contains extensive provisions that regulate the conduct and operation of slaughter plants. The plants operate under license pursuant to the Federal Meat Inspection Act ("FMI Act"), which uses routine inspections of meat product to ensure compliance with both food safety and HMLS Act regulations.

Under the *Burger* analysis, the MERK Act is constitutionally reasonable. First, the Government's interest is in the protection of consumers through the production of accurate information, and the facilitation of enforcement of the HMLS Act. Second, the video recording requirement of the MERK Act is necessary, as evidenced by the current under-enforcement of the HMLS Act under the inspection methods of the FMI Act. Finally, the MERK Act provides constitutional safeguards by substantially limiting the discretion of inspectors. The scope of the video recordings is solely limited to regulated conduct, and the slaughter plants have the primary discretion over the set up of the cameras.

For these reasons, the Association's facial Fourth Amendment challenge should be dismissed.

ARGUMENT

I. The Act's required disclosure of slaughter plant operations is constitutional under the First Amendment

A. A *de novo* standard of review applies to the Association's allegation of First Amendment violation.

This court applies a *de novo* standard of review to a district court's allowance of a motion to dismiss. *Martin v. Applied Cellular Tech, Inc.*, 284 F.3d 1, 5 (1st Cir. 2002) (*citing TAG/ICIB Servs., Inc. v. Pan Am. Grain Co.*, 215 F.3d 172, 175 (1st Cir. 2000). The court will accept as true "the well-pleaded factual allegations of the complaint, draw all reasonable inferences therefrom in the plaintiff's favor and determine whether the complaint, so read, sets forth facts

sufficient to justify recovery on any cognizable theory." *Martin*, 284 F.3d. at 6. However, dismissal is appropriate when it appears certain that the plaintiff would not be entitled to relief even when the allegations are viewed in the light most favorable to the plaintiff. *In re Colonial Mortgage Bankers Corp.*, 324 F.3d 12, 15 (1st Cir. 2003).

B. The district court properly held that the Act is consistent with the First Amendment under *Zauderer.*

The unedited, streamed footage of slaughter plant operations is permissible under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). As a threshold characterization, the Meat Eaters' Right to Know Act ("MERK Act") regulates commercial speech, as it is related to the economic interests of both the slaughterhouse industry and its consumers. *See Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980). Additionally, the required disclosure of slaughterhouse operations via unedited streaming is the compulsion of pure, uncontroverted fact. The Supreme Court has recognized that such disclosures may be appropriately required to keep consumers informed, and a commercial speaker's "constitutionally protected interest in *not* providing any particular factual information … is minimal." *Zauderer*, 471 U.S. at 651.. Accordingly, the Act must only be *reasonably related* to the government's underlying interest, which here is both the prevention of livestock mistreatment and promotion of transparency within the food industry. *See* MERK Act § 1(a–b). The disclosures will result in not only the public informed as to the operations of the slaughterhouse industry but also the industry taking greater care to avoid animal mistreatment. *See* Leg. Hist. at 4. Therefore, the Act remains constitutional, and the district court's allowance of the motion to dismiss as applied to the First Amendment allegations should be upheld.

1. The Act compels commercial speech.

A noted nonissue for the district court, the disclosure of slaughter plant operations—in particular, the preparing of animals and animal carcasses for meat and poultry products—is the compulsion of commercial speech under the First Amendment. The Supreme Court has acknowledged the difficulty of "drawing bright lines that will clearly cabin commercial speech in a distinct category." *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 419 (1993). However, it has characterized commercial speech as "related solely to the economic interests of the speaker and its audience," and this characterization encompasses more than just speech that proposes a commercial transaction. *Id.* at 422. This court has aligned with this fairly broad characterization, finding that disclosure requirements which indirectly affect economic interests still remain as characterized as commercial speech. *Pharmaceutical Care Management Ass'n v. Rowe*, 429 F.3d 294 (1st Cir. 2005) .

In *Rowe*, the plaintiffs represented a national trade association of pharmacy benefit managers (PBMs), who act as middlemen in the business of providing prescription drugs. *Id.* at 298. These PBMs, given their position as intermediary between drug manufacturers and health care providers, have the opportunity to engage in activities detrimental to its customer base as a result of a lack of transparency in their dealings. *Id*. Accordingly, the Maine Legislature implemented a statute requiring PBMs to adhere to certain duties, including disclosure of conflicts of interest and certain financial arrangements with third parties. *Id*. at 299 (*citing* Me.Rev.Stat.Ann. tit. 22, §§ 2699(2)(A-G)). In determining whether commercial speech was at issue, this court found that these provisions were "on their face less related to 'economic interests,'" but would have an overall effect on industry practices and consumers. *Id*. at 309–310. As a result, these disclosure requirements fell within the scope of commercial speech.

Similar to *Rowe*, the Act's required disclosure of slaughter plant operations, while on its face is less related economic interests, has an overall effect on slaughterhouse industry practices and consumers. Like the intended transparency driving the required disclosure of PBM practices, Congress created the Act to "create transparency in the food industry." MERK Act § 1(c). A top concern of consumers is the origin of the food that they pay for and the processes involved, and the Act's informs and strengthens the economic relationship between the slaughterhouse industry and consumer. This aligns with the general understanding of First Amendment protection of commercial speech, which is "justified principally by the value to consumers of the information such speech provides." *Zauderer*, 471 U.S. at 628.

Likewise, this economic relationship is strengthened by the other guiding interest of the Act, the prevention of livestock animal mistreatment. MERK Act § 1(a). The treatment of animals as they are prepared for slaughter has a direct effect on the public as consumers, as the exposure of inhumane practices would adversely affect the public's interest in doing business with that particular slaughter plant. The Association may argue that the prevention of animal cruelty, due to its traditional characterization as a public interest matter, reflects the Act's regulation of noncommercial speech, and heightened scrutiny should apply. *See Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 796 (1988). In *Riley*, however, the Supreme Court applied heightened scrutiny because it dealt with charitable solicitations, which are "characteristically intertwined with informative and perhaps persuasive speech." *Id.* (*citing* V*illage of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980)).

Further, the Supreme Court has made apparent that public-interest motivations as well as economic motivations can drive regulations, and these laws can still be characterized as

regulating commercial speech. In *Bolger v. Youngs Drug Products Corp.*, a federal statute prohibited the mailing of unsolicited advertisements for contraceptives. 463 U.S. 60, 61 (1983). Some of these advertisements directly promoted products, but there were also informational pamphlets that discussed "the desirability and availability of prophylactics in general." *Id*. at 62. The Court held that these pamphlets were properly characterized as commercial speech, even though they contained "discussions of important public issues." *Id*. at 67–68. Therefore, despite the intent of Congress being both to promote transparency in the food industry *and* prevent the mistreatment of livestock animals, the Act is still regulating within the realm of commercial speech.

2. *The Act compels factual and uncontroversial disclosures.*

The Act requires disclosure of unedited video recordings of slaughter plant operations, MERK Act § 3, and these are properly characterized as purely factual and uncontroversial information. In no way does the Act require the slaughter plants to convey any message other than their own conduct, and any argument the Association would make to the contrary would be meritless—the only real disagreement is in providing it. *See Envt'l Defense Center, Inc. v. E.P.A.*, 344 F.3d 832, 850 (9th Cir. 2003) *cert denied*, 541 U.S. 1085 (2004) (holding that factual disclosure involved "no 'compelled recitation of a message' and no 'affirmation of belief'"). As mentioned above, the Supreme Court has held that any constitutionally protected interest in not providing such "particular factual information … is minimal." *Zauderer*, 471 U.S. at 651 Therefore, the relaxed scrutiny under *Zauderer* should apply, instead of the heightened scrutiny traditionally reserved for compulsion of idealogical speech. *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (heightened scrutiny applied to law requiring school children to

recite the Pledge of Allegiance); *Entertainment Software Ass'n v. Blagovech*, 469 F.3d 641, 651–2 (7th Cir. 2006) (distinguishing between "opinion-based" compelled speech, which requires heightened scrutiny, and "purely factual disclosures").

3. Zauderer's scope extends beyond consumer deception and is applicable to the Act.

In *Zauderer*, the Supreme Court drew a distinction between laws that compelled disclosures and those that restricted speech, regardless of whether those laws were designed to prevent consumer deception. Rejecting a "least restrictive means" analysis traditionally applied to prohibitions of commercial speech, the Supreme Court held that the First Amendment interests implicated by disclosures are substantially weaker. *Zauderer*, 471 U.S. at 651 n.14. Again, this analysis was based on the notion that, regarding commercial speech, the consumer retains a greater First Amendment interest than the compelled commercial speaker. *Id*. at 651.

A mere understanding of the *Central Hudson* analysis supports a broad application of *Zauderer*. When applying *Central Hudson*, a threshold determination is whether the commercial speech at is misleading or related to unlawful activity—if it is not, then the court proceeds with the test. *Central Hudson*, 447 U.S. at 564. The Supreme Court in *Zauderer* explicitly acknowledged the *Central Hudson* test, but only by flatly rejecting its application to disclosures. *Zauderer*, 471 U.S. at 651 n.14. If the Supreme Court wanted to solely address consumer deception, it is unclear why the threshold determination of *Central Hudson* was not just applied. Rather than proceed under the illogical assumption that a narrow test was created that does little more than reiterate an already established doctrine, it is more appropriate to assume *Zauderer* clearly has a more expansive reach.

The Association will likely cherrypick *United States v. United Foods, Inc*., and propose that the Supreme Court has since restricted the application of *Zauderer* to instances involving

consumer deception. *United Foods*, 533 U.S. 405, 416 (2001). However, *United Foods* is inapplicable, as it involved compelled speech of a normative message with which the plaintiffs disagreed—no disclosure of purely factual and uncontroversial information was at issue. *Id*. at 408–9. Looking to more relevant precedent, a number of circuits—including this court—have acknowledged *Zauderer*'s broad application even after *United Foods*. *See Rowe*, 429 F.3d at 310 n. 8 (finding that *Zauderer*'s applicability was not limited to advertising preventing deception); *Nat'l Electrical Manufacturers Ass'n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001) (holding disclosure valid under *Zauderer*, despite consumer deception not being at issue per se); *Am. Meat Inst. v. U.S. Dep't of Agric.* (hereinafter "*AMI*"), 760 F.3d 18, 20 (D.C.Cir. 2014) (holding that *Zauderer* "in fact does reach beyond deception"). As the Second Circuit in *Sorrell* provided the most thorough and direct analysis as to extent of *Zauderer*'s application, it should be given a hard look as to its applicability in this case.

In *Sorrell*, a state law required disclosure of products that contained hazardous waste. 272 F.3d at 115. The Second Circuit acknowledged that the statute was intended to "better inform consumers about the products they purchase," yet *Zauderer* still applied. *Id*. The court found that the state's interest in "protecting human health and the environment" was a legitimate interest, and a broad application of *Zauderer* best aligned with the First Amendment justifications for commercial speech protection:

> Commercial disclosure requirements are treated differently from restrictions on commercial speech because mandated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests. Such disclosure furthers, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the "marketplace of ideas." Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring

disclosure of truthful information promotes that goal.

Id. at 115, 113–114; *see also Zauderer,* 471 U.S. at 651 (finding that the free flow of information is a principal justification of the First Amendment protection of commercial speech). The Second Circuit correctly identified the core First Amendment values that support *Zauderer*'s more encompassing scope, and in order to give effect to these values in this case, the same scope must be applied.

4. *The Act is reasonably related to the government's interest in promoting transparency in the food industry and preventing livestock animal mistreatment.*

Applying *Zauderer*, the Act must only be reasonably related to its backing interest. *See* 471 U.S. at 651. Here, as identified in § 1(b) of the Act, Congress found that the treatment of livestock animals is of vital importance. Further, the mandated disclosures are essential to the public interest, as it will create "transparency in the food industry." *Id* Not only would these required video recordings address the "consumers' calls for more information," but they would also provide "a stronger incentive for slaughter plants to treat animals with care." Leg. Hist. at 4.

While Congress based the Act, in part, off the notion that "[c]onsumers are curious about where their food comes from," the government interest in the Act extends beyond mere consumer curiosity, and *Zauderer* remains applicable. *See Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 74 (1996)(holding that "consumer curiosity alone is not a strong enough state interest to sustain the compulsion of even an accurate, factual statement"). While the consumers' interests are taken into consideration, the Act also represents a continuing effort to quell potential mistreatment of livestock animals, as there is a recognized "public interest in the humane treatment and slaughter of animals raised for meat and poultry." MERK Act § 1(a).

Further, the Act acts as continuing support for the enforcement efforts under the Humane Methods of Livestock Slaughter Act ("HMLS Act"), which according to a 2009 U.S. Department of Agriculture (USDA) audit, has suffered from ineffectiveness—inspectors are often "absent or engaged in food safety duties, and thus fail to notice or prevent the abuse of animals in slaughterhouses." Leg. Hist. at 3. In requiring slaughter plants to install and maintain video cameras in all areas where animals are handled and slaughtered, MERK Act § 3, the government retains its longstanding interest in the HMLS Act by addressing the "lack of adequate staff and resources … which has allowed egregious mistreatment of livestock to occasionally go unnoticed." Leg. Hist. at 3–4.

C. The Act remains consistent with the First Amendment under *Central Hudson*.

Even if more intermediate scrutiny under *Central Hudson* were applied, the Act's required disclosure of slaughter plant operations would remain constitutional. Under *Central Hudson*, if the regulated conduct is not at nature misleading, the law that regulates it may only be viable if it is in support of a substantial government interest, it directly serves that interest, and if it is no more extensive than necessary. 447 U.S. at. 566. As there is no dispute that the conduct is not misleading, the subsequent prongs of *Central Hudson* apply.

1. The Act is in support of a substantial government interest.

As mentioned above in Part II, the Act both promotes transparency in the food industry and prevents mistreatment of livestock animals. To this latter interest, the Act's mandated disclosure also reinforces a longstanding statute, HMLS Act, by filling in an absence of agency resources and staff and acting as a form of digital enforcement—providing "stronger incentive for slaughter plants to treat animals with care." Leg. Hist. at 4.

As the district court correctly noted, the government's interest in preventing animal cruelty alone is substantial enough to meet this prong of *Central Hudson*. *See* Dist. Ct. Op. at 8 (discussing caselaw which exhibits the country's longstanding interest in the prevention of animal cruelty). Similarly, like the D.C. Circuit found in *AMI*, a consumer's interest in knowing the origin of his or her food products moves beyond "idle curiosity" and sufficiently meets *Central Hudson*. *See AMI*, 760 F.3d at 23 (finding country-of-origin labels to be a substantial interest while considering the *Central Hudson* standard).

2. The Act directly serves the government interest.

The Act, in requiring continuous video recordings of slaughter plant operations, directly serves its underlying interests. Under *Edenfield v. Fane*, "a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." 507 U.S. 761, 770–1 (1993) However, the government is not required to show empirical data to meet this second prong, and it can be "justified solely on history, consensus, and 'simple common sense.'" *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (*citing Burson v. Freeman*, 504 U.S. 191, 211 (1992)).

Looking to the Act's legislative history, it is clear that this statute is a direct response to real harms. As a result of the under-enforcement of the HMLS Act, due to lack of adequate staff and resources, "USDA oversight has failed to prevent horrific cruelty in numerous cases … abuse of downed cows at Hallmark-Westland Meat Packing in California in 2008 and the torture of veal calves at the Bushway Packing plant in Vermont in 2010, among other instances." Leg. Hist. at 4. These instances, evidenced by undercover videos, are largely the catalyst for consumer concern regarding the treatment of livestock animals. *Id*. As to alleviating these harms to a

material degree, it follows logically that continuous disclosure of slaughter plant operations would inhibit any future instances like those mentioned. Held publicly accountable, slaughter plants would remain on alert for any instances of animal mistreatment, as such activity could potentially result in loss of consumers.

3. The Act is no more extensive than necessary.

Due to the fact that the slaughter plants are compelled to provide purely factual and uncontroversial information, the Act's required disclosure is no more extensive than necessary and is a reasonable means to serve the government's interest. The Supreme Court has recognized that the government is not required to "employ the least restrictive means conceivable." *Greater New Orleans Broadcasting Ass'n, Inc. v. U.S.*, 527 U.S. 173, 188 (1999) Instead, the means must be reasonable, one that "represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Bd. of Trustees of the State University of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). As the district court correctly noted, this reasonableness is inherent when what is required is the disclosure of purely factual and uncontroversial information about the products or services offered. Dist. Ct. Op. at 10 (*citing AMI*, 760 F.3d at 26). As explained in *AMI*, one could think of *Zauderer* "largely as 'an *application* of *Central Hudson*, where several of *Central Hudson*'s elements have already been established." 760 F.3d at 27. As mentioned above in Part II, B, the conduct the slaughter plants are required to disclose is uncontroverted—they are not forced to adopt a normative message, nor are they restricted to act a certain way during operations. Instead, the conduct necessary to continue operations will remain completely unhindered. As such, the disclosure is no more extensive than necessary to carry out the government's interest in promoting a transparent industry and preventing animal mistreatment.

II. The Association's facial challenge of the Act under the Fourth Amendment as an unreasonable search lacks sufficient factual context and should be dismissed.

The Association brought a facial challenge against the MERK Act, alleging that it violated the Fourth Amendment's prohibition on unreasonable searches. Dist. Ct. Op. at 10. The district court should have dismissed the Association's claim. Facial challenges to statutes on constitutional grounds are generally disfavored. In particular, the Supreme Court has stressed that Fourth Amendment challenges on reasonableness grounds require facts surrounding actual government conduct. Without such facts, reaching the merits threatens to "short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 451 (2008). Appellate review of a motion to dismiss is *de novo*. *Giragosian v. Bettencourt*, 614 F.3d 25, 28 (1st Cir. 2010).

A. Facial challenges on Fourth Amendment reasonableness grounds are inappropriate without actual facts surrounding a search.

Fourth Amendment analysis of a warrantless search requires "the concrete factual context of the individual case." *Sibron v. New York*, 392 U.S. 40, 59 (1968). This doctrine also applies in the context of administrative searches. The validity of an administrative search "can only be resolved . . . on a case-by-case basis under the general Fourth Amendment standard of reasonableness." *See v. City of Seattle*, 387 U.S. 541, 546 (1967). The reasonableness of an administrative search "depend[s] upon the specific enforcement needs and privacy guarantees of each statute." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 321 (1978).

1. The underlying policy of this doctrine cautions strongly against facial challenges.

The doctrine disfavoring facial challenges has three major purposes. *See Wash. State Grange*, 552 U.S.. at 450–51. First, it prevents the risk of "premature interpretation" resulting

from adjudication based on speculative facts. *Id.* at 450. Second, it recognizes the "fundamental principle of judicial restraint." *Id.* at 450. Courts should avoid: (1) "anticipat[ing] a question of constitutional law in advance of the necessity of deciding it;" or (2) "formulat[ing] a rule of constitutional law broader than is required by the precise facts." *Id.*; *see also United States v. Gonsalves*, 435 F.3d 64, 68 (1st Cir. 2006.) (holding in the Fourth Amendment context that "variations in fact patterns and the sensitivity of the subject area [gives] good reason to keep [the court's] focus narrow and . . . let the law develop case by case"). Finally, the doctrine prevents the risk of "short circuit[ing] the democratic process" by allowing implementors to implement the law in a "manner consistent with the Constitution." *Id.* at 451.

2. *In* Sibron*, the Supreme Court established that facial challenges based on Fourth Amendment reasonableness are especially inappropriate.*

A court should not speculate about how a government will implement the law. *Wash. State Grange*, 552 U.S. at 450–51; *see Sibron*, 392 U.S. at 59 (describing adjudication of facial challenges as an "abstract" exercise). In *Sibron*, the Court refused to rule on the facial validity of New York's "stop-and-frisk" statute, despite the fact that the statute authorized warrantless "searches" and "stops." *Id.* at 60–61. However, the terms were subject to multiple interpretations, and were not equivalent to the Fourth Amendment terms of "search" or "seizure." *See id.* at 60. The Court stressed that the relevant question is not the statute's language, but rather "the conduct it authorizes." *Id.* at 62 (citations omitted).

The Court in *Sibron* recognized that, in *Berger*, it had struck down a New York statute as facially invalid under the Fourth Amendment. *Sibron*, 392 U.S. at 59. However, unlike in *Sibron*, the statute in *Berger* proscribed the procedure for issuing a warrant. *Id.* Though the reasonableness of a warrantless search depends on the particular facts of the case, a search pursuant to a warrant issued through inadequate procedure is categorically invalid. *See id.*

Additionally, the Sixth Circuit in *Warshak* noted that the *Berger* Court "did not discuss the distinction between as-applied and facial challenges." *Warshak v. United States*, 532 F.3d 521, 530 (6th Cir. 2008). Therefore, *Berger* is not an exception to the *Sibron* rule, and only applies in the circumstance of proscribing procedures for issuing warrants.

B. This court should apply the rule of *Sibron* and dismiss the Association's facial challenge.

The district court incorrectly allowed a facial challenge based on the notion that "every application . . . is *potentially* unconstitutional" and that the Meat Eaters' Right to Know Act "entails continuous and ongoing surveillance." Dist. Ct. Op. at 12 (emphasis added). As discussed further in Part II, courts do not recognize that video recordings constitute a Fourth Amendment search simply as a result of being continuous. *E.g.*, *United States v. Vankesteren*, 553 F.3d 286, 291 (4th Cir. 2009); *see United States v. McIver*, 186 F.3d 1119, 1125 (9th Cir. 1999) ("We reject the notion that visual observation of the site became unconstitutional merely because law enforcement chose to use a more cost-effective 'mechanical eye' to continue surveillance."). Additionally, the district court correctly recognized that slaughter plants are "pervasively regulated companies, . . . [with] reduced privacy expectations." Dist. Ct. Op. at 13 (citing *Giragosian*, 614 F.3d at 29). Thus, properly applying the rule of *Sibron*, the Association's claim should be dismissed.

Though the Act does require continuous live video, MERK Act § 4, the court must still speculate as to how the Government will implement the Act. First, the Act requires video where animals are handled or slaughtered. § 3. The handling and slaughtering of animals is already subject to inspections pursuant to the Federal Meat Inspection Act ("FMI Act"), 21 U.S.C. § 603,, and the MERK Act's jurisdiction is limited to that of the FMIA. *See* MERK Act § 2(a)

(defining "slaughter plant" as "any facility engaged in the slaughter of animals . . . operating under a grant of inspection by the U.S. Department of Agriculture). Second, though the Act requires video recordings capturing "every location . . . at which live animals or carcasses are handled or slaughtered," MERK Act § 3, it does not define *how much* of these locations must be shown.

Thus, speculation cuts both ways. Slaughter plants could work with the Government to implement the Act in a manner consistent with the Fourth Amendment. For example, the Government could allow the Association to limit the scope of its video stream to a portion of a location. This would balance the Government's goals with the Association's interest in privacy. Additionally, the Government could promulgate variances or exercise prosecutorial discretion for unique circumstances. *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821 (1985). For example, if a slaughter plant's office could not be excluded from a video feed, the Government could allow the plant to reduce the scope of that video feed as necessary.

Because there is still some level of speculation required, "it is far more prudent to await an as-applied challenge." *Warshak*, 532 F.3d at 530. Congress gave slaughter plants three years to set up the necessary video cameras. MERK Act § 6. During this time, the Association could have worked with Government regulators and requested opinion letters regarding the compliance of their systems. These opinion letters would have provided a better basis for this court's decision. Having the Association proceed as such would also allow the Government the opportunity to implement the law in a manner consistent with the Fourth Amendment.

In fact, the Association could achieve its desired result by doing nothing and waiting for an enforcement action. The penalty for strategic noncompliance is simply part of the balance between the public interest and the privacy interests of regulated industry. Further, the benefit of

an actual enforcement action would prevent speculation with respect to the penalty amount that the Government would seek. Thus, having the Association proceed as such would properly await the necessity of deciding a constitutional question while avoiding a ruling on speculative facts.

Because the Association cannot pursue a facial challenge of the Act as a matter of law, its claim should be dismissed for failure to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6); *Giragosian*, 614 F.3d at 27

III. The video recording requirement of the Act is a constitutionally reasonable administrative search.

The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. This protection extends to administrative searches of commercial property, *New York v. Burger*, 482 U.S. 691, 699 (1987), in areas where the property owner has a reasonable expectation of privacy. *Id.* However, closely regulated industries have a reduced expectation of privacy. *Burger*, 482 U.S. at 702. Regulatory schemes authorizing warrantless inspections of closely regulated industries are constitutionally reasonable as long as they satisfy the *Burger* test: (1) there must be a substantial government interest; (2) the inspections must be necessary to "further the regulatory scheme;" and (3) the statute must "have a properly defined scope," and "limit the discretion of the inspecting officers." *Id.* at 703. Appellate review of a motion to dismiss is *de novo*. *Giragosian*, 614 F.3d at 28.

The district court correctly ruled that the requirements of the MERK Act were constitutionally reasonable. First, slaughter plants are a closely regulated industry. The camera recordings reasonably supplement the Government's existing authority to continuously inspect the handling and slaughter of animals pursuant to the Federal Meat Inspection Act ("FMI Act"), 21 U.S.C. §§ 601–695 (2012). Second, the requirements meet the *Burger* test. The Act sets

specific requirements that are narrowly defined in scope which are necessary to insure the humane treatment of animals.

A. Slaughter plants are a closely regulated industry, as they are already regulated under the comprehensive inspection scheme of the Federal Meat Inspection Act.

When individuals enter into a closely regulated industry, they do so with the knowledge that portions of their business may be subject to government inspection. *Cf. United States v. Biswell*, 406 U.S. 311, 316 (1972) (discussing the Gun Control Act). Closely regulated industries are characterized by a regulatory scheme under which business owners are well-aware that their property will be subject to such inspections. *See Donovan v. Dewey*, 452 U.S. 594, 600 (1981).

1. Courts look to pervasiveness to determine if an industry is closely regulated.

The reasonability of the authorized searches depends on the pervasiveness of the regulation. *United States v. Maldonado*, 356 F.3d 130, 134–35 (1st Cir. 2004); *see Donovan*, 452 U.S. at 606 ("[I]t is the pervasiveness and regularity of the federal regulation that ultimately determines whether a warrant is necessary to render an inspection program reasonable . . . ."). Pervasiveness can be analogized from similar regulated conduct or industry. *Donovan*, 452 U.S. at 605–606.

Various factors can support a finding of pervasiveness. *See Burger*, 482 U.S. at 704. For example, in *Burger*, the extensive provisions contained in a New York law regulating the automobile-junkyard industry supported the Court's finding that the industry was pervasively regulated. *Id.* Several requirements of the New York statute supported the Court's finding. *Id.* First, operators of automobile-junkyards could not participate in the industry without obtaining a license. *Id.* Second, operators had to maintain records of acquisitions and dispositions, and make such records available for inspection. *Id.* Finally, noncompliant operators were subject to possible criminal penalties, loss of a license, or civil fines. *Id.*

2. *Slaughter plants are closely regulated because regulation of the plants is already pervasive and extensive under the Federal Meat Inspection Act.*

Slaughter plants are a closely regulated industry under the Federal Meat Inspection Act. 21 U.S.C. §§ 601–695. First, like the automobile-junkyards in *Burger*, the slaughter plants cannot operate without a license. Slaughter plants are regulated under the extensive provisions of the FMI Act and the HMLS Act 7 U.S.C. §§ 1901–1907. The MERK Act only applies to those slaughter plants that "operate under grant of inspection" or "custom exemption" from the U.S. Department of Agriculture. *See* MERK Act § 2(a). As part of these inspections, inspectors "shall refuse" to approve any product that has not yet been inspected. 21 U.S.C. § 621. The Secretary may also suspend or refuse to provide inspections at slaughter plants in violation of the HMLS Act. *Id.* § 603(b). Products that have not been inspected and labeled may not leave the plant. *Id.* § 607(a–b).

Second, like the regulatory program in *Burger*, the FMI and HMLS Acts contain extensive provisions that pervasively regulate industry conduct. Section 603(b) provides for the inspection of these animals for the purpose of preventing the "inhumane slaughtering of livestock." *Id.* § 603(b). These inspections are a continuous and routine part of the slaughter industry. *See id.* Further, regulations promulgated by the Department of Agriculture specify detailed requirements for compliance with the HMLS Act. 7 U.S.C. § 1904; 9 C.F.R. § 313. These requirements include specifications for the condition and maintenance of handling and slaughter areas, and acceptable methods of handling and slaughter. 9 C.F.R. § 313.

Finally, like the enforcement scheme of *Burger*, the MERK Act contains a civil penalty to ensure compliance. The fine for failing to produce video recordings as required by the act incurs a minimum penalty of $1,000 a day. MERK Act § 5.

3. The video recording requirement is not categorically unreasonable.

At least two circuits have held that continuous video recording is not categorically unreasonable under the Fourth Amendment. *Vankesteren*, 553 F.3d at 291 (Fourth Circuit); *McIver*, 186 F.3d at 1125 (Ninth Circuit). Fourth Amendment protection only extends to where there is an objectively reasonable expectation of privacy. *Vankesteren*, 553 F.3d at 291; *see Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring) (discussing an expectation that "society is prepared to recognize is reasonable"). Though, in *United States v. Jones*, 132 S.Ct. 945 (2012), several Supreme Court justices expressed some discomfort with long-term surveillance, they only did so in the context of secret electronic tracking of private individuals. *See id.* at 955, 964 (Sotomayor, J. and Alito, J., concurring) ("[T]he use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.").

In the case of closely regulated industry, visual observation with cameras merely acts as a cost-effective enforcement tool. *Cf. McIver*, 186 F.3d at 1125 (characterizing video cameras as "cost-effective 'mechanical eye[s]'"). Thus, the analysis in this case should focus on the Association's reasonable expectation of privacy in the handling and slaughter of animals in their slaughter plants.

Under this analysis, the Association does not have a reasonable expectation of privacy. First, slaughter plants are already subject to continuous and ongoing inspections pursuant to the FMI Act, 21 U.S.C. § 603. As a condition of their operation, slaughter plants are subject to inspections to ensure that the handling and slaughter of animals complies with the HMLS Act. *Id.* § 603(b). Second, the Food Safety and Inspection Service releases publically available quarterly enforcement reports. *E.g.*, U.S. Department of Agriculture, Food Safety and Inspection Service, Quarterly Enforcement Report: July 1, 2014 through Sept. 30, 2014, *available at*

http://www.fsis.usda.gov/wps/portal/fsis/topics/regulatory-compliance/regulatory-enforcement/quarterly-enforcement-reports/qer-index.. These enforcement reports contain detailed information about the compliance status of specific slaughter plants. *See, e.g.*, *id.*. at 6 (table of administrative actions against specific plants).

For these reasons, the MERK Act's video recording requirement is not categorically unreasonable.

B. <u>The video recording requirement of the Act is constitutionally reasonable because it satisfies the three criteria of the *Burger* test.</u>

The district court correctly applied the *Burger* criteria and held that the MERK Act was constitutionally reasonable. Dist. Ct. Op. at 14–15. Regulatory schemes that authorize administrative searches of closely regulated industry are reasonable if three criteria are met. First, there must be a substantial government interest that "informs the regulatory scheme." *Maldonado*, 356 F.3d at 135 (citing *Burger*, 482 U.S. at 700). Second, the administrative search must be necessary to further the regulatory agenda. *Id.* Finally, the scheme should include safeguards that ensure "certainty and regularity" in application. *Id.* These criteria are applied to the regulatory scheme rather than the facts of a specific search. *Id.* at 136.

1. *The Government has a substantial interest in addressing the public's interest in ensuring the humane treatment of slaughter animals.*

The Government can establish a substantial interest by identifying a "significant social problem" that burdens the public. *Burger*, 482 U.S. at 708. To analyze governments' assertions of interest, courts can look to both the statute and legislative history. *See, e.g.*, *id.* (looking to legislative history); *Donovan*, 452 U.S. at 602, 614, n. 7 (looking to the statute's preamble). For example, the interest addressed by the regulatory scheme in *Burger* was the increasing problem of automobile threat in association with the automobile-junkyard industry. *Burger*, 482 U.S. at

708. This placed "enormous economic and personal" burdens on citizens of various states that supported the government's assertion of interest. *Id.*

The Government has a relatively low burden for establishing this interest. *See, e.g.*, *Maldonado*, 356 F.3d at 135; *Gonsalves*, 435 F.3d at 68. In *Maldonado*, this circuit held that the Government had a significant interest in regulating the interstate trucking industry on the basis that the assertion "[could not] be gainsaid." *Maldonado*, 356 F.3d at 135. Similarly, in *Gonsalves*, this circuit held that the Government's interest in regulating medical practice "obviously satisfied' the *Burger* criterion. *Gonsalves*, 435 F.3d at 68.

In this case, the Act satisfies the first *Burger* criteria because it addresses the public's concern with the slaughter industry's treatment of animals as well as the history of under-enforcement of the Humane Methods of Livestock Slaughter Act ("HMLS Act"). First, both the Act and its legislative history note the recent swell in public concern resulting from undercover videos of slaughterhouses that revealed "egregious mistreatment of animals." MERK Act § 1(a); Leg. Hist. at 4. The Act and legislative history also identify the Government's interest in ensuring that consumers are accurately informed about the slaughter industry's treatment of animals. *See* MERK Act § 1(b–c); Leg. Hist. at 4.

Next, the legislative history identifies an additional interest in "providing a stronger incentive for slaughter plants" to comply with existing law. *See* Leg. Hist. at 3–4. In the house report recommending passage of the bill, Congress noted that the "lack of adequate staff and resources has resulted in under-enforcement of the [HMLS Act]." *Id.* at 3. The report cited two recent incidents of egregious cruelty that were only exposed through undercover video taken by animal activists. *Id.* at 4.

This showing of the Government's interest satisfies the first criterion of *Burger*, and substantially exceeds the burden set by this circuit in *Maldonado* and *Gonsalves*.

2. The video recording requirement is necessary to further the regulatory scheme.

To establish the necessity of an administrative search, the Government must show that the search "reasonably serves" the regulatory agenda. *Burger*, 482 U.S. at 709. For example, in *Burger*, frequent and unannounced inspections were necessary to catch stolen car and parts at the automobile-junkyard. *Id.* at 710. A warrant requirement would have interfered with the deterrence of automobile theft, due to how quickly cars and parts can pass through the junkyard. *Id.* Similarly, in *Maldonado*, it was "self-evident" that the mobility of the trucking industry necessitated warrantless inspections. *Maldonado*, 356 F.3d at 135.

In this case, the video recording requirement of the MERK Act is necessary in light of the history of under-enforcement of existing law. The Humane Methods of Livestock Slaughter Act has existed in its current form since 1978. Leg. Hist. at 3. Though the Federal Meat Inspection Act enforces slaughter plant regulations with continuous inspection of livestock and meat products, *see* 21 U.S.C. §§ 603, 607, 621, the lack of staff and resources prevents inspectors from noticing and effectively preventing the abuse of animals. Leg. Hist. at 3. Congressional concern with the under-enforcement of the HMLS Act is not new—in 2002, Congress expressly directed the Secretary of Agriculture to "fully enforce" the HMLS Act. Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 10305(a)(2), 116 Stat. 134, 493. Despite this directive, inspectors could not prevent the abuse of downed cows at Hallmark-Westland Meat Packing in 2008, or the torture of veal calves at the Bushway Packing plant in 2010. Leg. Hist. at 4. These incidents came to light only as a result of video recording within the plants. *Id.*

For these reasons, the Government can establish the second *Burger* criterion. Current methods of enforcement are evidently inadequate. Congress reasonably concluded that continuous live video recording would further the regulatory agenda. First, the recordings would "facilitate robust enforcement" of the HMLS Act. Leg. Hist. at 4. Second, the recordings would protect consumers by providing them meaningful information about the slaughter plants' treatment of animals. *See id.* (stating that food labels fail to convey such information).

3. The Act is narrowly defined in scope and gives minimal discretion to Government inspectors.

For the final *Burger* criterion, the Government must establish that the regulatory scheme provides "adequate safeguards" to ensure "certainty and regularity" in its application. *Maldonado*, 356 F.3d at 135. Courts look to several factors, particularly whether regulated industry is "[on] notice to the scope of the search" and whether the regulatory scheme limits the discretion of inspecting officers. *Maldonado*, 356 F.3d at 135; *accord Burger*, 482 U.S. at 703.

In *Maldonado*, the trucking regulation satisfied the *Burger* criterion through its "carefully delineated scope," and the "ample notice" it gave to interstate truckers that "inspections [would] be made on a regular basis." *Maldonado*, 356 F.3d at 136. The regulation authorized inspectors to "enter upon, to inspect, and to examine any and all equipment of motor carriers." *Id.* at 132 (quoting 49 C.F.R. § 395.8) (internal quotation marks omitted). Federal regulations contained specific requirements, including drivers' qualifications, inspection, repair and maintenance of trucks, and the safe handling of cargo. *Id.* at 135. These requirements sufficiently limited the discretion of inspectors. *See id.* at 132, 135 ("Only FMCSA agents . . . carry the forms that appertain to commercial trucking violations."). Further, licensing regulations required commercial truck drivers to be familiar with the governing regulations. *Id.* at 136.

Thus, the MERK Act also establishes the final *Burger* criterion. First, the scope of the search is narrowly defined. The purpose of the MERK Act is to enforce the requirements of the HMLS and FMI Acts, while protecting the interest of consumers in making informed choices about the food they eat. MERK Act § 1; Leg. Hist. at 4. This is achieved by requiring slaughter plants to "produce video recordings capturing every location . . . at which live animals or carcasses are handled or slaughtered." § 3. Like the trucking regulation in *Maldonado*, the MERK Act regulates discrete conduct as delineated by HMLS Act regulations. *See* 9 C.F.R. § 313. The Act only requires recordings capturing locations where animals are routinely handled and slaughtered. *See* MERK Act § 3.

Second, Government inspectors have minimal discretion under the MERK Act. The video cameras are set up by the slaughter plants. § 3. Thus, the extent of the inspectors' discretion is limited to determining whether systems are sufficient for compliance. Further, slaughter plants have had three years to work with federal regulators. § 6. The cameras are in the control of slaughter plants and government inspectors have no discretion in what they see in the recordings once initial compliance is achieved.

Because the regulatory scheme ensures that inspections conducted through the video recordings have certainty and regularity, the final *Burger* criterion is established.

CONCLUSION

Because the MERK Act is a constitutionally valid regulation of slaughter plants, the Association's claim should be dismissed for failure to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6).