Civ. App. No. 3:14-cv-55440 MJC (ABC)
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

AMERICAN SLAUGHTERHOUSE ASSOCIATION, Appellant,	)	
v.	)	Civ. App. No. 3:14-cv-55440 MJC (ABC)
UNITED STATES DEPARTMENT OF AGRICULTURE; And TOM VILSACK, in his official capacity as Secretary of Agriculture; Appellee.	)	

APPELLANT'S OPENING BRIEF

Appeal from the judgment of the
United States District Court for the District of Massachusetts
The Honorable Myra J. Copeland

Before The Honorable Ferguson J. Warren
United States Circuit Judge

Team # 14
American Slaughterhouse Association
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Filed January 23, 2015

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Issues Presented

I. Does the Meat Eaters Right to Know Act ("the MERK Act") violate the First Amendment?

II. Can the American Slaughterhouse Association ("the ASA") pursue a facial challenge to the MERK Act on Fourth Amendment grounds? If so, does the MERK Act, which requires constant unlimited surveillance of slaughterhouses, violate the Fourth Amendment's administrative warrant exception?

Statement of the Case

This matter comes before the First Circuit Court of Appeals on the Appellant's appeal from a grant of a motion to dismiss for failure to state a claim entered in the United States District Court for the District of Massachusetts, Case No. 3:14-cv-55440 MJC (ABC), Myra J. Copeland, District Judge, Presiding. *American Slaughterhouse Association v. USDA and Tom Vilsack*, No. 14-cv-55440 MJC (ABC), slip op. at 15 (D. Mass. Aug. 15, 2014). The ASA appeals the District Court's grant of the United States Department of Agriculture ("the USDA") and Secretary Vilsack's motion to dismiss. The ASA argues that the MERK Act violates both the First Amendment and Fourth Amendment. The lower court applied the incorrect test in the First Amendment context and also misapplied the test for a valid administrative search warrant exception. In sum, the ASA requests that this court overturn the dismissal below and enter declaratory judgment in favor of appellants.

Statement of the Facts

In March 2012, Congress passed the Meat Eaters' Right to Know Act ("MERK Act"), after various undercover investigations of slaughterhouses revealed animal abuse. The MERK Act requires *all* federally inspected slaughterhouses to install and maintain video recording cameras throughout the facility in areas where animals or carcasses are handled. MERK Act § 3.

The MERK Act also requires that recordings be live-streamed on a company website. MERK Act § 4. If a facility does not maintain a website it must provide recording to the USDA, who must make the recordings available to the public under the Freedom of Information Act ("the FOIA") 5 U.S.C. § 552. MERK Act § 4. Slaughterhouses are given three years to set up the technology necessary to comply with the law, which goes into effect on March 2, 2015. MERK Act § 6. The First Circuit Court of Appeals for the United States District Court for the District of Massachusetts approved a motion to dismiss on behalf of the USDA, which the ASA now challenges. *See American Slaughterhouse Association*, No. 14-cv-55440 MJC (ABC), slip op. at 15 (granting Appellee's motion to dismiss below).

Summary of the Argument

The mandated internet broadcasts required by the MERK Act are an unconstitutional compulsion of speech. As commercial speech or non-commercial speech, the MERK Act overburdens animal processing facilities in an ineffective attempt to inform the populace and prevent animal abuse. Due to the overly controlling nature of the Act and its ineffective nature, the MERK Act fails intermediate scrutiny and is unconstitutional.

A facial challenge against the MERK Act is valid because the act cannot be applied constitutionally to any set of circumstances given it's broad scope, it's similar application across the entire industry, and the lack of proper limits on inspecting officer discretion. The MERK Act violates the Fourth Amendment because, though slaughterhouses are a closely regulated industry subject to the administrative search warrant exception, the MERK Act fails to satisfy the Supreme Court's three-pronged *Burger* test. In short, the *Burger* test requires that the law at issue properly limit the discretion of an inspecting officer. The MERK Act fails to limit inspector discretion because it requires indiscriminate constant surveillance broadcast to the global public,

or made available to the entire U.S. public through the FOIA, functionally doing away with inspector discretion regarding how to conduct inspections and what elements of an inspection to focus on (e.g. disease v. animal mistreatment).

Argument

I. The Standard of Review on Appeal From a Motion to Dismiss is *De Novo*

The standard of review on appeal from a motion to dismiss is *de novo*. *Santaliz-Rios v. Metro. Life Ins. Co.*, 693 F.3d 57, 59 (1st Cir. 2012). To survive a motion to dismiss requires that "a complaint contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Conclusory statements of law are not to be accepted as true. *Id.* In short, a court must examine the complaint, discern legal conclusions from facts, treat the facts as true, and then decide whether the given facts and pleadings are sufficient to state a claim for relief that also places the defendant on notice of the suit being brought such that defendants are able to respond. *Id.* What is required is a "short and plain statement of the claim showing the pleader is entitled to relief." Fed. R. Civ. P. Rule 8. The ASA satisfies the requirements of Federal Rule of Civil Procedure 12(b)(6) because, the complaint puts defendants on notice of our claims, and alleges that the facts of the act (constant surveillance broadcast online or given to the USDA) create a valid claim for declaratory relief against an unconstitutionally broad law. Certainly the constitutional issue is a matter of legal debate, but the facts are simply that the act will require constant surveillance for all entities in a given industry, an unprecedented Orwellian step in administrative oversight.

II. The MERK Act Violates the First Amendment Right to Free Speech

The mandated internet broadcasts mandated by the MERK Act are an unconstitutional compulsion of speech. As commercial speech or non-commercial speech, the MERK Act overburdens animal processing facilities in an ineffective attempt to inform the populace and prevent animal abuse. Due to the overly controlling nature of the Act and its ineffective nature, the MERK Act fails intermediate scrutiny and is unconstitutional.

In order to establish the unconstitutional nature of the MERK Act, the ASA argues that the mandated internet broadcasts are in fact protected speech. From there, the ASA applies intermediate scrutiny under *O'Brien* and in the alternative, *Central Hudson* to show that the MERK Act oversteps constitutional bounds. The lower levels of scrutiny applied in *Zauderer* and *Glickman* do not apply to this case and do not grant the government more leeway in their intrusion upon the rights of animal processing facilities.

a) The Mandated Internet Broadcast is Speech and Subject to Intermediate Scrutiny

1) Compelled Speech is Held to the Same Scrutiny as Prohibitions on Speech

Whether the speech is compelled or voluntary, the First Amendment still protects it. See *Wooley v. Maynard* 430 U.S. 1428. The level of protection for voluntary speech and against compelled speech is the same. "The Supreme Court spoke to this in *Riley v. National Federation of the Blind* and declaring that though there is a practical difference between the two, but constitutionally, "...the difference is without constitutional significance, for the first Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." (emphasis in original) 487 U.S. 781, 796-797. The Court in Zauderer went as far to say that compelling speech can be just as violative of the First Amendment as restricting

it. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio* 471 U.S. 626, 650. Due to the equal levels of protection, further explanations regarding the protection and application of non-compelled speech rights also apply to compelled speech.

2) The Mandated Capture and Broadcast of Footage is Compelled Speech

The capturing of video footage is speech under First Circuit law and is protected by the First Amendment. The First Circuit has already held that the gathering of information, including video capture, falls under the First Amendment. *Glik v. Cunniffe* 655 F.3d 78, 82 (2011). Citing *First National Bank of Boston v. Bellotti* 435 U.S. 765 (1978), the First Circuit reasoned that the ability to gather information is essential to self-expression and the First Amendment limits the government from controlling that. *Id.* Since the First Amendment protects against prohibitions of speech and compulsions to speak, it must also protect compelled video capture if it protects prohibitions of video capture.

The broadcast of the already protected video footage also falls under First Amendment protection. Speech can come in a variety of imprecise forms, all of which are given protection. The Supreme Court has treated "communication," as a whole, as something that qualifies as speech. *Spence v. State of Washington* 418 U.S. 405 (1974). Though the *Spence* court used a "particularized message" as a point of emphasis for determining if a student's flag was communication, subsequent rulings have broadened that. *Id* at 411. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* the court dismissed an argument that a coherent message was necessary for it to qualify as protected speech. 515 U.S. 557, 570 (1995). There, the court reasoned that many forms of speech which were undoubtedly protected lacked any distinguishable message. *Id.* The court included examples from music, art, and literature, but the principle is a strong foundation for communication in general.

The internet is a tool inherently intended for communication and speech. The broadcast of a live stream is a common form speech used online and is also protected speech. Live streams can be used for entertainment, communication, or nearly any other form of speech. The live streams required by The MERK Act are no different and qualify as protected speech. Though an animal processing facility may not be definitively expressing a message or wishing to convey anything in particular, under *Hurley,* a coherent message is not required. As information being carried from the facilities to an individual potentially watching the stream, there essentially is a wordless and meaningless message conveyed of "this is what we are doing." If the simple recordings in *Glik* constitute speech while only consisting of a recording, then the video recording of the facilities should be no different.

At the District Court level, the government cited *D'Amario v. Providence Civic Center Authority* 639 F. Supp 1538 (D. Rhode Island 1986), a Rhode Island District court case, as precedent for deeming recording as conduct and not speech. However, the District Court below correctly disregarded that case as "untenable" given other precedent. In *D'Amario*, a prohibition of photography at concerts was upheld because the court treated it as conduct and not speech. Under the *Glik* ruling, this reasoning clearly does not hold water. The court in *Glik* did say qualify their opinion with "To be sure, the right to film is not without limitations. It may be subject to reasonable time, place, and manner restrictions." 655 F.3d 78 at 84. Looking at *D'Amario* differently, limitations on speech/recording could keep the photographer out of the concerts while still considering the act as speech. As a private location, it is not ridiculous that the rights of others (including speech/recording) may be limited to protect the rights of the owners (no different than keeping cameras out of one's own home). With this shift in reasoning,

we can throw out the bathwater of the old *D'Amario* holding while keeping the baby of the rights that it does protect.

3) Without a Proposed Transaction, the Broadcast is Not Commercial Speech

Though the video broadcast constitutes protected speech and is created by a commercial entity, it is not commercial speech and should be afforded intermediate First Amendment protection. Under *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* commercial speech "does no more than propose a commercial transaction." 425 U.S. 748, 762 (1976). This distinction is reiterated in *Edenfield v. Fane* where the Court stated that commercial speech is "linked inextricably with the commercial arrangement it proposes." 507 U.S. 761, 767 (1993).

The proposed commercial transaction in the video is nowhere to be found. The MERK Act acknowledges that some facilities do not possess their own websites to broadcast on but The Act requires that these facilities record themselves nonetheless. It can hardly be argued that these recordings are meant to propose a commercial transaction if the public cannot even see some of them.

Even if The Court is unsure about the commercial nature of the speech and feels that is may be mixed or lie in some middle ground, it should still be given full First Amendment protection. The Supreme Court, in *Riley v. National Federation of the Blind,* ruled that when commercial speech is intertwined with fully protected speech, they cannot be parsed and must be considered together. 487 U.S. 781 at 796. Thus to give full protection to speech that demands it, the mixed speech as a whole is given full protection. *Id.*

4) The MERK Act Fails Intermediate Scrutiny

Under such protection, in order to be upheld, the statute must be made for an important interest and be tailored narrowly to fulfill that interest. *U.S. v. O'Brien* 391 U.S. 367, 377 (1968). Though stopping animal cruelty is an important and noble interest and required surveillance on commercial property is one way of preventing illicit acts, the live broadcast is an entirely different matter. The MERK Act states that the public has a growing curiosity for meat production and that an informed public is important. Not only is mere curiosity not a strong reason for infringing upon the most basic of rights but requiring something as broad and invasive as 24 hour monitoring in all facilities is perhaps the least narrowly tailored remedy as possible. The Second Circuit spoke on curiosity as a driving interest and rejected the notion. *International Dairy Foods v Amestoy* 92 F.3d 67, 74 (1996). There, dairy producers were required to label their products if their cows were given a hormone that had zero measurable effect on the end product. *Id.* Though the government stressed that people wanted to know about the hormones, the Second Circuit stated that no precedent existed for such an idea and speech could not be compelled for such a weak reason. *Id.* Even if there was a real and genuine curiosity, the court determined that the protection of rights was more important. *Id* at 73. If curiosity were a strong enough reason, there would be no real limit on what constituted a strong enough interest.

The Court in *Riley* (dealing with compelled speech for charity disclosures) stated that even though there was a legitimate interest, the compelled speech was too broad. In that case, professional donation solicitors were required to disclose a wealth of information regarding how donated funds would be spent. 487 U.S. 781. Solicitors had to do this for every person they spoke to in hope of a donation. The broad nature of the contested disclosure requirements and the potential for less invasive alternatives caused the court to invalidate the rule. *Id* at 795. In their

reasoning, The Court stated that many less invasive methods for disclosure existed. Compared to the "prophylactic, imprecise, and unduly burdensome rule" the state created, The Supreme Court suggested that the state could publish financial information regarding charity donations, or simply enforce antifraud laws more vigorously. 487 U.S. 781 at 800. With these alternatives, the public could still get the information they wanted and they were still protected from donation solicitors taking their money under false pretenses.

Similar better alternatives exist in the present case as well. Instead of broadcasting the interior of facilities to educate the populace, demonstrative clips, violation reports, and industry statistics and written explanations could be used. If anything, these methods would be more effective than simple video feeds. As complicated as processes in these facilities are, the likelihood of the layman being able to fully comprehend what they see is unlikely. One does not watch a car run and learn about the internal combustion engine. If anything, without proper guidance and explanation, it is likely that these video feeds would make the process look worse than it actually is. As the Court in *Riley* mentioned, more vigorous legal enforcement would solve the same problem without infringing speech. The legislative history of MERK cites over-tasked food safety inspectors and weak penalties for the short comings of animal rights enforcement. HON. PANOP T. KAHN, INTRODUCING THE MEAT EATERS RIGHT TO KNOW ACT, H.R. Rep. No. 112-666, ¶3 (2012). Instead of simply fixing what is broken, Congress decided instead to take the easy route and install Big Brother-esque monitoring on the entire industry. Instead of putting cameras in facilities nationwide, the EPA uses steep penalties, regular inspections, and legal warrantless searches to enforce their regulations. These have proven effective, helped bring about compliance, and protected the environment. Similar actions for animal processing facilities can be just as effective and avoid The MERK Act's invasive nature.

Though the ASA does not ask The Court to make policy decisions, it cannot be denied that the MERK Act is an incredibly invasive statute which imposes heavy burdens upon facilities. At the same time, better, less invasive alternatives exist that do not march over basic rights.

b) The *Zauderer* Test Does Not Apply to the Present Case

1) The *Zauderer* Test is Only Applied to Consumer Deception Cases

If The Court decides that the compelled video feeds are in fact commercial speech, it should not apply the *Zauderer* test. Though some courts have stated that *Zauderer* is better suited for commercial compulsion cases, there are several Supreme Court and lower courts cases that state that test is for consumer deception cases. Even the text of *Zauderer* itself focuses on consumer deception as the warrant for its lower standards.

In terms of application, *Zauderer* is the other side of the *Central Hudson* coin. The first part of the *Central Hudson* test states that in order for commercial speech to receive First Amendment protection, "it at least must concern lawful activity and not be misleading." *Central Hudson Gas & Elec. Corp. v. Public Service Comm. of New York* 447 U.S. 557, 566 (1980). If commercial speech does have the potential to be unlawful or misleading, then *Zauderer* applies. This rationale comes through strongly in *Zauderer*'s concluding paragraph on compelled speech

> We recognize that unjustified or unduly burdensome disclosure requirements might offend the first amendment… But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in **preventing deception of consumers.**

471 U.S. 626 at 651 (emphasis added). The general and non-specific language used to address advertisers and disclosure requirements demonstrates that this statement is meant for more than just the case at hand. The prevention of consumer deception is at the heart of this reasoning and central to the Court's balancing of commercial rights. Nothing limits this language solely to this

case. Instead, it is meant to be the key to the test and precedent the case creates. Without the separation of consumer deception cases, the first caveat of *Central Hudson* loses its meaning and the application of the cases becomes indistinguishable.

The Supreme Court in *United Foods v. U.S.* specifically distinguished *Zauderer* on the grounds that there was no concern for misleading consumers, and declined to use its test. 533 U.S. 405, 416-417 (2001). On the other side of the line, The Supreme Court determined that *Zauderer* was the proper test in *Milavetz v. U.S.* (a case regarding questionable advertisements for attorneys) because of the potential for the misleading of consumers and the challenged statutes intent to prevent it. *Milavetz, Gallop & Milavetz v. U.S.* 559 U.S. 229, 249 (2010). As in *Milavetz, Zauderer,* is used for cases where a commercial entity is already representing itself to the public with certain services and facts that may mislead the public, and further disclosures are required to prevent harm to the public. The ruling in *United Foods* also invalidated arguments that *Zauderer* is the proper test for compelled speech cases. The Court determined that the marketing assessments constituted compelled speech but still refused to apply *Zauderer* to the facts. 533 U.S. 405.

In the present case, there is no potential for such harm or misleading of the public. Animal processing facilities are not presenting half truths or misleading facts to the public and that has not been alleged by the government. Instead the government sites mere curiosity and education of the public as its goals. At an incredibly basic level, it could be argued that the video footage prevents facilities from misleading the public into believing the facilities do not break the law when they actually do. Using this reasoning is untenable however, in that it would make every advertisement or mere public presence of a company a statement that could be misleading. The mushroom growers in *United Foods* could potentially have been misleading the public if

they did not actually sell mushrooms or perhaps sold different varieties but the Supreme Court did not even acknowledge this as potential reasoning.

The government has cited *American Meat Institute v. U.S. Dept. of Agriculture* (*AMI*) as precedent for the idea that *Zauderer* goes beyond consumer deception but this case is wrongly decided and not binding upon this court. The D.C. Circuit in *AMI* quoted several passages of *Zauderer* out of context, disregarded subsequent Supreme Court precedent, and may have even violated its own rules on authority. 760 F.3d 18 (2nd Cir. 2014). In their odd and unfounded decision, the D.C. Circuit explicitly overruled *three* cases that distinctly disagreed with their decision. *Id* at 22-23. Each of those cases had been decided in the previous two years and some were panel decisions. Judge Henderson in dissent, notes that controlling precedent in that circuit prohibited the overruling of one panel decision by another panel but the court did exactly that. *Id at* 35.

Judge Brown in dissent points out that the majority cherry picked specific phrases out of context to reach their conclusion. First he mentions the majority relied upon the phrase "material differences" when discussing compelled speech and speech prohibitions. *Id* at 39. This phrase is meant for the practical differences between the two but the majority views it as a major downplay of protection against compelled speech. *Id.* The majority also cited the use of the term "minimal" in regards to a company's interest in not disclosing information for its disregard of speech protection. *Id.* The majority uses these terms to downplay commercial speech rights and hold that there is next to no protection against factual disclosures. Out of context, those citations seem persuasive, but Judge Brown points out that the majority uses them in complete contrast to the stronger language in *Zauderer* which states that compelled speech "may be as violative of the First Amendment as [prohibited] speech." *Id citing 471 U.S. 626 at 650.*

Under the *AMI* ruling, nearly any compelled factual disclosure could be ordered and upheld by a court, short of a valuable trade secret despite clear precedent protecting this speech. The majority also cites to *National Electric Manufacturers v. Sorrell* 272 F.3d 104 (2nd Cir. 2001), and *Pharm. Care Mgmt Ass. v. Rowe* 429 F.3d 294 (2nd Cir. 2005), for precedent to support its misguided decision. However, both these Second Circuit cases involve consumer safety and deception interests (mercury dangers and artificially expensive pharmaceuticals respectively). Neither one of them says anything about expanding *Zauderer*. The First Circuit should not follow the flawed reasoning of *AMI* and should disregard its non-binding precedent.

2) The Level of Disclosure Discussed in *Zauderer* and the Cases that Follow it are Clearly Distinguishable

Zauderer and cases that apply its test all deal with a factual disclosure for the sake of clarification. Cases like *Sorrel, Pharm. Care Mgmt,* and *New York State Restaurant Ass'n v. New York City Board of Health* 556 F.3d 114 (2009) each applied *Zauderer* to a mandate for a single fact or disclaimer. *Zauderer* and its consumer deception concerns are meant for dealing with compelled disclosures that are narrow in scope and protect the consumer from harm. *Sorrel* protected consumers from mercury, *Pharm Care Mgmt* protected them from pharmaceutical price gouging, and *NY Restaurant* protected them from deceivingly unhealthily foods. Each time, the court applying the test requested that a certain piece of information be attached to the product or advertisement. These facts were clear, uniform, and prevented the consumer from using a product or service that could harm them. In contrast, the internet broadcast the MERK Act mandates gives no clear fact, does not protect the consumer, and is infinitely broader in scope.

Zauderer might apply in the present case if animal processing facilities were required to add an allergy statement, health risk disclosure, or spoil date to their product. However, the

MERK Act requires a video feed that does not give the viewer a fact that may protect them from harm. The broadcast is not a clarification of risks or important caveat, instead, it is a narrative that the viewer is left to interpret for themselves. Due to this massive difference in scope and nature, it does not make sense to apply *Zauderer* to the present case.

c) Correctly Applying the *Central Hudson* Test Invalidates The MERK Act

Central Hudson states

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. 557 at 566. As argued above, the internet broadcast is speech protected by the First Amendment, and is not misleading or unlawful. ASA challenges the substantiality of the government interests and the methods used in their pursuit. Beyond the curiosity of the people, the MERK Act also cites failing animal cruelty enforcement as the basis for these invasive mandates. MERK Act §1. The methods employed do not directly advance the enforcement interest and are far beyond what is necessary to inform the public.

As with the *International Dairy Foods*, the interests behind the internet broadcast are largely based on curiosity since there is no effect on the end product. The term "curious" even appears in §1(b) of the Act. Curiosity by its nature does not involve necessary or important information. The Second Circuit was correct in rejecting curiosity in *International Dairy Foods* and prevented the intrusion of rights based on a whim.

Even if the education of the people was such a dire need in this situation, the broadcast of video footage is an ineffective means of informing people. As previously stated, the intricacies of

animal processing and important details within it cannot be conveyed through a simple video feed. If the government wants to educate the populace on the processes, then a mandate for detailed diagrams or clear explanations in writing would be far more effective. Like in *Riley,* publication of records by the government could also effectively inform the people. The internet broadcast also completely fails as a means to aid enforcement. Unless the government intends to rely upon the people to watch over these broadcasts and report potential violations (likely with little knowledge of what legally constitutes animal cruelty) then these broadcasts will not aid enforcement at all. Allowing access to video footage for government agents upon request or inspection would certainly be effective but giving them to the public is superfluous and invasive.

MERK's mandates are far more extensive than necessary, and therefore fail *Central Hudson* once again. No one could argue that requiring a write up or illustration of facility processes would be more invasive than the current mandate. Constant 24 hour surveillance is perhaps as invasive and intrusive as any government could be. Warning lights must go off when an act intended to inform people and protect animals begins to resemble something out of George Orwell's *1984*. These broadcasts invade the lives the employees and force companies to constantly narrate the lives of their facilities to the world. When enhanced enforcement could be achieved with archived footage or frequent inspections, there is no reason to require this speech.

d) The MERK Act Does Not Complete a Preexisting Regulatory Scheme

Congress intended for the MERK Act to make enforcement of decades old laws easier, but that does not mean that it is a small a step as the laws in the *Glickman* case were. In *Glickman*, fruit growers were compelled to pay assessment fees in order to pay for industry wide advertising. *Glickman v. Wileman Bros. & Elliot* 521 U.S. 457 (1997). Before the assessments in *Glickman* were imposed upon fruit growers, there were already extensive requirements

controlling nearly every aspect of the industry. *U.S. v. United Foods* 533 U.S. 405, 412 (2001). The marketing and sale of the fruit in *Glickman* was already so tightly controlled and unified, that an anti-trust exemption had to be passed for the industry. *Id* at 406. The assessments used for advertising were but one more small addition to the industry consuming controls already in place and were necessary to keep operate the collectivized marketing. In contrast, the assessments in *United Foods* and in the present case are prominent and independent requirements instead of the single puzzle piece addition of the assessments in *Glickman.* The mushroom industry in *United Foods* was surely not without typical food industry controls but was far more independent than the fruit industry in *Glickman*. The news assessments for advertising were unprecedented for growers and did not fit in neatly to the existing regulatory scheme. The Supreme Court felt that this difference distinguished the two cases enough that the assessments in *United Foods* were held unconstitutional but *Glickman* did not need to be overruled. *Id* at 416.

Like in *United Foods*, the meat processing facilities retain relative independence and still have control over their own speech. No other ancillary regulations are mentioned the MERK Act's language or in the Congressional minutes. The additional requirements imposed by the MERK Act go far beyond anything currently in place. Though the legislative history behind the act state that it is intended to strengthen the government's ability to enforce pre existing animal cruelty laws, exerting control over industry speech is far removed from that and is not just another piece perfectly fitted into the regulatory puzzle. The assessments upheld in *Glickman* came as a necessary link in the chain controlling fruit growers. The industry there already operated as one single bound up entity and could hardly operate with free will. Requiring that growers contribute to marketing they could not operate on their own due to government controls was hardly an incursion into growers' rights considering the preexisting government occupation.

Instead of just relating to previous government controls, the assessments were necessary and without them, the forcefully unified fruit growers would not have had an effective way of collecting funds for their unified marketing. Even if there is an occasional shortcoming in government animal treatment requirements in some facilities, the mandates of the MERK Act can hardly be called well fitted or necessary for the industry to operate as the assessments in *Glickman* were. Therefore, the MERK Act's infringement of First Amendment rights is unconstitutional. As explained below, the MERK Act is also invalid under the Fourth Amendment.

III. The American Slaughterhouse Association Can Pursue a Facial Challenge to the MERK Act on Fourth Amendment Grounds Because The MERK Act is Unconstitutional in All Situations to Which it Could be Applied

a) The MERK ACT

In order to determine whether the MERK Act is facially unconstitutional the act must first be described. The purpose of the act is to support the public interest by giving "consumers of animal products…the greatest possible information about the treatment of animals in slaughterhouses." MERK Act § 1(c). Congress is also expressly interested in promoting transparency in the food industry in relation to the "egregious mistreatment of animals raised to produce," meat products. MERK Act § 1(a)-(b). The purpose of act, according to the Honorable Panop T. Kahn, the California Representative who introduced the bill, is to: "address the abuse of animals in our nation's slaughterhouses." HON. PANOP T. KAHN, INTRODUCING THE MEAT EATERS RIGHT TO KNOW ACT, H.R. Rep. No. 112-666, at 1 (2012). The act is also intended to provide the USDA with "stronger tools to prevent animal abuse," because "Inspectors don't have eyes on the backs of their heads, and can't check for ineffective stunning or overdriving of

animals while they're also looking out for *salmonella*." *Id.* Video surveillance is intended to aid with humane slaughter oversight.

The MERK ACT expressly requires slaughterhouses to:

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

MERK Act § 3. In other words, all slaughterhouses, regardless of whether there has been any history of past violations or animal abuse, must record every second of everyday in every location of a plant where animals or carcasses are handled or slaughtered. Slaughter plants must provide a live video stream of all recordings produced pursuant to § 3 of the MERK Act on their company website. MERK Act § 4 (a)-(b). Finally, for plants that do not maintain a website, video recordings must be made "available to the United States Department of Agriculture, which shall make such recordings available to the public under the Freedom of Information Act, 5 U.S.C. § 552." *Id*. subdv. (c). Monetary penalties in the amount of "not less than $1,000 per day for each day or portion thereof" in which a facility is non-compliant are also included in the Act. MERK Act § 5.

b) The ASA Can Pursue a Facial Challenge to The MERK Act Under The Fourth Amendment Because The MERK Act Cannot be Applied Constitutionally in Any Circumstance

1) Case By Case Analyses are Favored, but The Act Will be Applied Similarly and be Unconstitutional in All Circumstances

The Supreme Court has expressed a preference for analyzing constitutional challenges to statutes on a case-by-case basis. For example, in *Siborn*, a New York statute authorizing "stop & frisk" searches was upheld in part because the court refused to undertake a facial challenge to the law given "the abstract and unproductive exercise" of comparing the stop and frisk law "to the categories of the Fourth Amendment in an effort to determine whether the two are in some sense

compatible." *Siborn v. New York*, 392 U.S. 40, 59 (1968). The court went on to explain that: "The constitutional validity of a warrantless search is pre-eminently the sort of question which *can only be decided in the concrete factual context of the individual case*." *Id.* (emphasis added). Therefore, the court engaged in a fact based analysis of both searches at issue to deem one valid and one invalid because of the specific inferences drawn by the officers conducting the searches. *Id.* at 62.

Although the Supreme Court favors case-by-case or as applied challenges to the constitutionality of statutes, facial challenges are still viable where "the challenger [can] establish that no set of circumstances exists under which the Act would be valid," which is the case with the MERK Act. *United States v. Salerno*, 481 U.S. 739, 745 (1987).

First, the MERK Act applies in a broad and general manner such that the facts of each application will take the same two possible forms (i.e. constant surveillance streamed online or recordings submitted to the USDA to be released to the public via FOIA). Second, *all* slaughterhouses' are subject to the law regardless of whether there is a history of violations or non-compliance, thus any as applied challenge will arise under similar circumstances. In other words, a violation may occur and the USDA may seek penalties triggering a constitutional challenge by the offending party, or a party will challenge the act upon its implementation by refusing to comply and thereby being issued a fine. Finally, as explained below, it is the constant surveillance without inspector discretion that causes the MERK Act to violate the Fourth Amendment. Such surveillance is required in all instances thereby doing away with inspector discretion in all instances. In short, the MERK Act will apply similarly in all situations such that there is no need to examine a given set of facts, and the constitutional flaw of the MERK Act is present in any situation to which it is applied. Therefore, a facial challenge is warranted.

Additionally, the MERK Act is comparable to New York's permissive eavesdrop statute at issue in *Berger*, which was held facially invalid. *Berger v. State of N.Y.*, 388 U.S. 41, 43 (1967). In *Berger* the Supreme Court held that the statute's language was "too broad in its sweep resulting in a trespassory intrusion into a constitutionally protected area and is, therefore, violative of the Fourth…" Amendment. *Id.* The law at issue authorized the issuance of an "ex parte order for eavesdropping" based on "oath or affirmation" of a district attorney, attorney general, judge, or police officer of a certain rank. *Id.* at 54. The oath need only state a "*reasonable ground* to believe that evidence of a crime may be thus obtained," and must describe the person or persons to be searched with "particularity." *Id.* (emphasis added). Additionally, the order must "specify the duration of the eavesdrop—not exceeding two months." *Id.* The court in *Berger* found the NY eavesdropping statute facially unconstitutional because it permitted issuance of a warrant without probable cause and without sufficient particularity for a period of time the court deemed too lengthy. *Id.* at 55.

The eavesdropping law in *Berger* was held unconstitutional though it is far more limited in time and scope than what the overbroad language of the MERK Act allows. Though the *Berger* case addressed a criminal statute, the administrative search authorized by the MERK Act is comparable insofar as it permits a broad scope search solely on the (perhaps) "reasonable ground" that because some in the industry violate the law, all should be subject to constant surveillance. As in the NY eavesdropping law, under the MERK Act, "as to what is to be taken, nothing is left to the discretion of the officer," because all images and sounds are taken at all times. *Id.* at 58. Likewise, the MERK Act should be deemed facially unconstitutional.

Finally, though slaughterhouses may have a lower expectation of privacy as a closely regulated industry, they are still subject to constitutional protection. *See New York v. Burger*, 482

U.S. 691, 699 (1987) (explaining that commercial properties still benefit from constitutional protections regarding privacy). Moreover, "the *Burger* criteria are applied generally to a statutory scheme, not to a given set of facts arising under that scheme." *U.S. v. Maldonado*, 356 F.3d 130, 135 (1st Cir. 2004). Thus, where, as in this matter, the administrative exception applies, a facial challenge is appropriate because the object analyzed in the administrative exception context is the statute itself and not necessarily the facts underlying the challenge.

2) A Party is Not Required to Violate the Law in Order to Challenge its Constitutionality

A facial challenge is also valid and necessary because "where threatened *government* action is concerned," a plaintiff is not required "to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced." *Medimmune, Inc. V. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007). Additionally, "federal declaratory relief is not precluded when…a federal plaintiff demonstrates a genuine threat of enforcement of a disputed criminal statute," whether the challenge is facial or as applied. *Steffel v Thompson*, 415 U.S. 452, 475 (1974). The ASA may facially challenge the MERK Act because the ASA is not required to violate the Act in order to challenge it. Additionally, though not a criminal statute, like in *Steffel* the threat of enforcement is real given the MERK Act's significant monetary penalties such that declaratory relief prior to implementation and enforcement of the act should be afforded.

Not to mention, under the MERK Act conduct must be changed, slaughterhouses must be video recorded at great cost, a factor courts consider when deciding to take on a facial challenge. For example, when deciding to analyze and uphold the EPCA, the court in *Warshak* relied on the fact that the "relevant provisions of the ACT do not require Warshak to do anything. They do no 'force [Warshak] to modify [his] behavior in order to avoid future adverse consequences."

Warshak v. U.S., 532 F.3d 521, 531 (6th Cir. 2008). As the lower court noted, compliance with the MERK Act will be a costly endeavor that should not be required in order to challenge the law. *American Slaughterhouse Association*, No. 14-cv-55440 MJC (ABC), slip op. at 12.

In short, the like court below, this court should find a facial challenge to be valid because the MERK Act cannot be applied constitutionally to any set of circumstances.

IV. The MERK Act Violates the Fourth Amendment because it Does Not Provide a Valid Warrant for an Administrative Search and the Act is Insufficient to Satisfy the Closely Regulated Industry Warrant Exception

The fourth amendment states that it is the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and that such right: "shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to searched, and the persons or things to be seized." U.S. Const. IV Amend. The Supreme Court has established that:

> No search required to be made under a warrant is valid if the procedure for the issuance of the warrant is inadequate to ensure the sort of neutral contemplation by a magistrate of the grounds for the search and it proposed scope, which lies at the heart of the Fourth Amendment.

Siborn v. New York, 392 U.S. 40, 59 (1968). The MERK Act does not provide for issuance of a warrant from a neutral magistrate based on probable cause. Yet, slaughterhouses are a closely regulated industry and are therefore subject to the administrative search warrant exception. Therefore, no warrant is necessary for an administrative search of a slaughterhouse, though the statute authorizing such searches must satisfy a three-pronged test, which, for the reasons explained below, the MERK Act fails to do. *See New York v. Burger*, 482 U.S. 691 (1987) (discussing closely regulated industries and establishing test for administrative search warrant exception).

Though there is an applicable administrative warrant exception, the Supreme Court "has long recognized that the Fourth Amendment's prohibition on unreasonable searches and seizures is applicable to commercial premises, as well as to private homes." *Id.* at 699 Thus, there is a "reasonable expectation of privacy in commercial property," and for administrative inspections. *Id; see also Donovan v. Dewey*, 452 U.S. 594, 598 (1981) (discussing administrative search warrant exception). Yet, the reasonable "expectation is particularly attenuated in commercial property employed in 'closely regulated' industries." *Burger*, 482 U.S. at 700.

The basic purpose of the Amendment, "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Mun. Court of City & Cnty. of San Francisco*, 387 U.S. 523, 528 (1967) (stating "the Fourth Amendment protects the interest of the owner of property in being free from *unreasonable* intrusions onto his property by agents of the government."). Application of a law to an entire industry without justification is the kind of arbitrary invasion the Fourth Amendment is meant to protect against. An inspection of commercial property "may be unreasonable if [it is] not authorized by law or [is] unnecessary for the furtherance of federal interests." *Colonnade Catering Corp. v. United States,* 397 U.S. 72, 77 (1970). Though the MERK Act authorizes the constant surveillance of slaughterhouses, the government interest of animal and food safety could be served by hiring more inspecting officers. In short, though a warrant may not be constitutionally required for certain administrative searches, the regulatory scheme should be "sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." *Dewey*, 452 U.S. at 600. However, in the case of the MERK Act, inspections are not periodic, but constant, a situation

that to counsel's knowledge does not exist in any other regulatory context.[1] Above all, the MERK Act fails the *Burger* three-pronged test because it fails to properly limit inspector discretion.

a) ASA Slaughterhouses are a "Closely Regulated" Industry Subject to a Lower Expectation of Privacy

To determine if an industry is "closely regulated," a court will look to: 1) "the pervasiveness and regularity of the federal regulation," 2) the effect of such regulation upon an owner's expectation of privacy, and 3) "the duration of a particular regulatory scheme," will also be an "important factor" to determine whether warrantless inspections are permissible. *Burger*, 482 U.S. at 701. In *Burger* the court held that a junkyard business that involved automobile dismantling was a pervasively regulated industry because the regulations surrounding vehicle dismantling are extensive, other states have similar regulatory schemes, and the history of vehicle dismantling regulations go back to the 1950s in NY and even further for related industries. *Id.* at 704-707. Other examples of closely regulated industries are: commercial trucking, firearms manufacturing and dealing, and the medical professions. *See Maldonado*, 356 F.3d at 135 (reasoning that commercial trucking is a closely regulated industry because it is subject to extensive federal and state regulation, has been regulated for a great number of years, and drivers are made aware of what is required under the law); *see also U.S. v. Biswell*, 406 U.S. 311, 317 (1972) (reasoning that firearms manufacturing and dealing is a pervasively regulated industry because of an extensive history of regulation and proper notice being given to those

[1] In the alternative, because the MERK Act provides no rules for how the video recordings are to be used by inspectors, the search is subject the Fourth Amendment and therefore a proper warrant based on probable cause issued by a neutral arbiter is required. *See Colonnade Corp.*, 397 U.S., at 77 ("Where Congress has authorized inspection but made no rules governing the procedures that inspectors must follow, the Fourth Amendment and its various restrictive rules apply."); *see also Siborn,* 392 U.S. at 59 (discussing warrant requirement of Fourth Amendment).

regulated); and *U.S. v. Gonsalvez*, 435 F.3d 64, 67 (1st Cir. 2006) (reasoning that the medical profession is a closely regulated industry because of a long history of regulation, and the numerous regulations applicable to the industry).

The ASA concedes that, as the lower court found, slaughterhouses are a closely regulated industry subject to the administrative search warrant exception because: 1) slaughterhouses are regulated by federal and state laws, 2) such laws notify operators of possible searches thereby lowering the expectation of privacy, and 3) the regulation of animal slaughter has existed since at least 1958. *See* Humane Methods of Livestock Slaughter Act, U.S.C.A. § 1902 (discussing humane methods of livestock slaughter & requiring that inspectors be on site for facility operation to occur; act first passed in 1958), Federal Meat Inspection Act, 21 U.S.C.A. § 603 (requiring inspection of animals prior to slaughter and use of humane methods for slaughter; act first passed in 1958); Cal. Food & Agric. Code § 19501 (establishing state regulations for human methods of slaughter); and Animal Health Protection Act, 7 U.S.C. § 8301 (regulating transportation of animals as related to disease control; passed in 2002); and *American Slaughterhouse Association*, No. 14-cv-55440 MJC (ABC), slip op. at 13-14 (lower court opinion holding slaughterhouses are a closely regulated industry).

b) However, The MERK Act Does Not Satisfy the *Burger* Test for a Valid Administrative Search Warrant Exception because The Act Does Not Provide a Constitutionally Adequate Substitute for a Warrant

If an industry is closely regulated, a warrantless inspection will only be reasonable so long as the following criteria are met: First, "there must be a 'substantial government interest that informs the regulatory scheme pursuant to which the inspection is made." *Burger*, 484 U.S. at 702. Second, "the warrantless inspections must be necessary to further the regulatory scheme." *Id.* Finally, "the statute's inspection program, in terms of the certainty and regularity of its

application, [must] provid[e] a constitutionally adequate substitute for a warrant." *Id.* at 703. To satisfy the third prong, the statute "must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and *has a properly defined scope, and it must limit the discretion of the inspecting officers*." *Id.* (emphasis added). Thus, the statute must be "sufficiently comprehensive and defined" such that the owner of the property "cannot help but be aware that his property will be subject to *periodic inspection undertaken for specific purposes*." *Id.* (emphasis added). A statute effectively limits the discretion of inspectors where it is "carefully limited in time, place, and scope." *Id.* The MERK Act fails to satisfy the third prong because: 1) its scope, though defined, is overbroad insofar as it applies to an entire industry on the basis of violations perpetrated by only some; 2) involves constant surveillance and broadcasting or reporting, such that there is no longer a need for periodic inspections or a limit on times during which inspections may occur (admittedly the places to be video recorded are defined and limited); and finally 3) inspection officer discretion is not properly cabined, in fact it is essentially done away with as officers can now watch a live stream of all activity while it occurs or after it occurs such that they must no longer decide whether to engage in food inspection, disease inspection, or animal mistreatment inspection during any surprise site visit.

The warrant exception was satisfied in *Burger* because: 1) the State has a substantial interest in regulating vehicle-dismantling and the auto-junkyard industry because of an increase in theft associated to the industry; 2) the regulations reasonably serve the state interest in eradicating theft by targeting the market for stolen automobiles (i.e. junkyards that sell cars for parts); and 3) the statute provides a constitutionally adequate substitute for a warrant. *Id.* at 708-711. The third prong satisfactorily limits the discretion of inspecting officers because it informs

the operator of the business that inspections will be made on a regular basis, the scope of the inspection is also established, and the statute puts the operator on notice of how to comply. The statute also notifies the operator about who can inspect the facility. Additionally, the "time, place, and scope" of the inspection is limited such that inspecting officer discretion is restrained, because inspections can only occur during business hours, can only be made at vehicle dismantling and related industry sites, and the scope is narrow (e.g. inspectors can only examine records, and vehicles or parts subject to the record keeping requirements that are on the premises). *Id.* Other instances in which the administrative search warrant exception was valid included appropriate statutory limits on inspector discretion by defining when, where, or what inspectors may review during a warrantless search. *See Maldonado*, 356 F.3d. at 135-36 (Explaining that Maine's regulation of commercial trucking satisfied the *Burger* test because: 1) the government has a legitimate interest in regulation interstate trucking for safety and economic reasons; 2) warrantless inspections further the regulatory scheme and government interest "because the industry is so mobile, surprise is an important component of an efficacious inspection regime;" and 3) the regulations give notice to truckers of what is required of them, that inspections will be made on a regular basis, and officer discretion is sufficiently limited to those matters delineated in the law.); *see also Biswell*, 406 U.S. at 311 & 317 (holding that the Gun Control Act of 1968 is constitutional under the Fourth Amendment because the act is limited such that inspector abuse is unlikely because the act only authorizes searches during business hours and limits inspections to "any records or documents required to be kept…and any firearms of ammunition kept or stored."); and *Gonsalvez*, 435 F.3d at 68 (holding that Rhode Island's Food, Drugs, and Cosmetics Act is constitutional regarding warrantless searches because the statute was properly limited in scope: 1) entry onto premises can only occur "at all

reasonable hours," and 2) the search can only be used to determine whether any provisions of the law are being violated and to "secure samples or specimens," thereby properly limiting inspection officer discretion.).

On the other hand the MERK Act does not pass the three-pronged *Burger* test. There certainly is a valid government interest in regulating slaughterhouses for reasons of preventing the spread of disease and the mistreatment of animals. Likewise, warrantless inspections further the government's interest—surprise warrantless inspections could do well to catch violators. However, constant surveillance broadcast live on the internet or made available to the public via FOIA goes far beyond a surprise inspection and goes beyond what is necessary to further the government's interest. Most fatally, the MERK Act does not provide a constitutionally adequate substitute for a warrant.

First, though the MERK Act's scope is defined, it is overbroad insofar as it applies to an entire industry on the basis of violations perpetrated by only some. There is simply no reasonable inference that because some slaughterhouses violate the law, all do, and therefore all should be subject to constant invasive surveillance. Second, the act requires constant surveillance of all slaughterhouses, there is no longer the norm of "periodic inspections undertaken for specific purposes" as in *Burger* or the other cases described above. *Burger*, 484 U.S. at 703. Additionally there is no time limit on the inspection required like those upheld in past cases. *Compare* MERK Act § 3 (requiring constant surveillance), with *Burger* 482 U.S. at 711 ("during regular and usual business hours"); *Biswell,* 406 U.S. at 312 ("at all reasonable times"); *Gonsalvez,* 435 F.3d at 68 ("at all reasonable hours"). Finally, the act explicitly broadens an inspector's discretion; where an inspector formally had to decide between focusing on disease or abuse during any given portion of a site visit, now the discretionary decision is made, a site visit need only focus on

disease when surveillance is provided. *See* HON. PANOP T. KAHN, INTRODUCING THE MEAT EATERS RIGHT TO KNOW ACT, H.R. Rep. No. 112-666, at 1 & 3 (2012) (stating that inspectors "are often absent or engaged in food safety inspection duties, and thus fail to notice or prevent the abuse of animals."). The MERK Act effectively makes the entire public an inspecting officer and essentially does away with inspecting officer discretion. The MERK Act does not clarify how inspectors will use the video recordings. Such an indiscriminate and constant search is simply not valid under the administrative search exception, and is unconstitutional under the Fourth Amendment.

Conclusion

MERK threatens to set a concerning precedent for government power to control speech and invade the lives of the people. It compels a level of speech not seen before in American case precedent and forces facilities to expose themselves to the world without consideration for their rights. In *Glik*, the First Circuit protected the rights of the people to videotape police officers and in doing so expressed a strong sentiment about limiting government power. The court said that such freedoms were "one of the principal characteristics by which we distinguish a free nation from a police state." 655 F.3d 78, 84 *citing City of Houston v. Hill 482 U.S. 451 (1987).* The ASA simply asks that the First Circuit continue this strong stance and prevent the abusive authority of MERK from infringing those essential rights. Additionally, given the broad scope of constant industry wide surveillance, the MERK Act simply fails to properly limit inspecting officer discretion in violation of the Fourth Amendment. For these reasons, the ASA asks that this court overturn the dismissal below and hold that the MERK Act, as currently drafted, is facially invalid because it violates both the First and Fourth Amendment's of the United States Constitution.

DATED this 23rd day of January 2015

Respectfully Submitted,

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