No. 14-55440

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

AMERICAN SLAUGHTERHOUSE ASSOCIATION,
Appellant,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE
and TOM VILSACK, in his official capacity
as Secretary of Agriculture,
Appellee.

Appeal from the United States District Court
for the District of Massachusetts

BRIEF OF THE APPELLEE

Team #15

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STATEMENT OF THE ISSUES

I. Whether the Meat Eater's Right to Know Act ("MERK Act") is permissible under the First Amendment when the MERK Act regulates slaughter plant conduct by requiring unedited streaming video from slaughter plants or through a mandatory disclosure requirement of speech.

II. Whether the ASA may pursue a facial challenge to the MERK Act on Fourth Amendment grounds and, if so, whether the Fourth Amendment allows warrantless administrative video recordings of slaughter plants.

STATEMENT OF THE CASE

The U.S. District Court for the District of Massachusetts granted the government's motion to dismiss for failure to state a claim on ASA's First Amendment claim and Fourth Amendment claim. *Am. Slaughterhouse Ass'n v. U.S. Dep't of Agric.*, No. 3:14-cv-55440 MJC (ABC) (D. Mass. Aug. 15, 2014) ("Memo. Opinion").

STATEMENT OF THE FACTS

Congress passed the MERK Act in 2012 to address the problem of animal cruelty in slaughter plants. H.R. Rep. No. 122-666, at 1 (2012). The MERK Act was passed largely in response to the ineffectiveness of the Humane Methods of Slaughter Act ("HMSA"), passed many years earlier. *Id.*; 7 U.S.C. § 1901 *et seq.* (1978). Food inspectors tasked with enforcing HMSA have been frequently too busy with food and safety inspections to allocate enough of their focus to advancing the prerogatives of HMSA. H.R. Rep. 122-666, at 3. Moreover, the oversight that these inspectors are capable of providing is limited because they cannot continuously monitor all areas of a slaughter plant where animals are handled. *Id.*

Because of this under-enforcement, HMSA has failed to provide sufficient deterrence to prevent the abuse of animals in slaughter plants. *Id.* at 1. Slaughter plants view the minimal penalties associated with HMSA as "the cost of doing business," declining to spend the resources needed to train employees to treat animals humanely. *Id.* This attitude has led to several incidents of animal abuse in recent years that have peaked consumer interest in the meat production process. *Id.* at 4. For example, undercover videos taken by animal activists in 2008 and 2010 revealed horrific animal abuse at the Hallmark-Westland Meat Packing plant in California and the torture of veal calves at the Bushway Packing plant in Vermont. *Id.* These incidents likely contributed to consumers citing "animal welfare" as a top concern in a 2010 Consumer Reports survey. *Id.*

The MERK Act addresses these concerns by implementing a video recording program where slaughter plants will be held accountable by consumers. *See* MERK Act § 3. Under the MERK Act, slaughter plants must install cameras to record activity in all areas where employees handle live animals. *Id.* Slaughter plants must then make live streaming of these video recordings accessible to the public through their websites. MERK Act § 4. If a slaughter plant does not maintain a website, it must submit video recordings to the U.S. Department of Agriculture to make available to the public. MERK Act § 4(c). Failure to comply with the MERK Act results in a civil penalty in the form of a fine. MERK Act § 5. The MERK Act is set to go into effect in March of 2015, giving slaughter plants ample time to comply with requirements since its passage. MERK Act § 6.

SUMMARY OF THE ARGUMENT

The MERK Act is permissible under the First Amendment because it regulates non-speech conduct or, alternatively, is merely a mandatory disclosure requirement. Regulations that

restrict or require non-speech conduct are not afforded protection under the First Amendment. Conduct that is factual and rather than symbolic or expressive is not speech.

The MERK Act requires unedited video recordings of slaughter plant conditions, akin to video surveillance. The video recording requirement compells conduct because it does not involve expression, journalism, or video editing. Thus, the MERK Act does not regulate speech and this Court should dismiss ASA's First Amendment claim.

However, even if the MERK Act is found to regulate speech, the MERK Act is still permissible under the First Amendment because the MERK Act requires slaughter plants to disclose information. When a regulation does not restrict commercial speech, but rather requires a commercial disclosure of information, the regulation must be rationally related to preventing consumer deception, in a broad sense, or other important government interests. The regulation also cannot be overly burdensome when compared to the interest being achieved.

The MERK Act furthers important governmental and public interests in preventing consumer deception through transparency and preventing animal cruelty. Consumers have an interest in not eating meat that comes from slaughter plants that have poor animal conditions. The MERK Act is not overly burdensome because it only requires one-time installation of video equipment (which slaughter plants may already have in place) and the MERK Act does not chill commercial speech. Because the MERK Act satisfies the test for mandatory disclosure requirements, this Court should affirm the district court's ruling and dismiss ASA's First Amendment claim.

The MERK Act is also permissible under the Fourth Amendment. While ASA's facial challenge to the MERK Act is premature, the video recording requirement of the MERK Act is

nonetheless a reasonable administrative search that forms an exception to the warrant requirement.

Fourth Amendment claims must be analyzed on a case-by-case basis, considering the totality of concrete factual circumstances; courts should not allow facial challenges to hypothetical future searches on Fourth Amendment grounds. Because the MERK Act could have varying effects, despite the regularity of its application, which cannot be predicted before its implementation and consequences of pursuing a challenge as-applied are minimal, this Court should decline to consider a facial challenge to the MERK Act.

Even if this Court allows ASA to pursue a facial challenge to the MERK Act, the video recording requirement allows reasonable administrative searches consistent with Fourth Amendment requirements. The MERK Act regulates commercial premises in an already closely-regulated industry. The high health and safety risks that cause the need for this pervasive regulation reduce slaughter plants' expectation of privacy. Thus, the MERK Act meets the threshold element for the exception to the warrant requirement for administrative surveillance.

The MERK Act satisfies all three additional requirements for the exception to the warrant requirement for administrative searches of commercial premises in closely-regulated industries. First, the video recording requirement of the MERK Act advances the substantial government interest in ensuring the humane treatment of animals and promoting consumers' freedom of choice. Second, the video recording requirement is necessary to further the regulatory scheme of the MERK Act because prior attempts to enforce legislation requiring humane treatment of animals has failed, and the MERK Act addresses the causes of these failures. Finally, the MERK Act provides an adequate substitute for the warrant requirement because the regularity of application gives property owners notice of the scope of searches, and its narrowly-defined scope

limits discretion in its application. Because the MERK Act satisfies all elements for the exception to the warrant requirement for reasonable administrative searches, this Court should dismiss ASA's Fourth Amendment claim.

ARGUMENT

The First Amendment to the U.S. Constitution protects individuals' freedom to speak, or to refrain from speaking. U.S. Const. amend. I. The First Amendment does not control here because MERK Act regulates conduct, not speech. Alternatively, the MERK Act merely requires a mandatory disclosure.

The Fourth Amendment to the U.S. Constitution protects against unreasonable warrantless searches and seizures. U.S. Const. amend. IV. The MERK Act's video surveillance requirement is a reasonable administrative search consistent with the Fourth Amendment, a facial challenge to which is premature.

For these reasons, the district court properly granted the government's Rule 12(b)(6) motion to dismiss ASA's First and Fourth Amendment claims. A procedural Rule 12(b)(6) motion to dismiss for failure to state a claim allows courts to preserve resources for cognizable claims which are facially plausible. *See* Fed. R. Civ. P. 12(b)(6); *Achcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This Court reviews motions to dismiss *de novo*. See, e.g., *Gagliardi v. Sullivan*, 513 F.3d 301, 305 (1st Cir. 2008).

I. THE MERK ACT IS PERMISSIBLE UNDER THE FIRST AMENDMENT BECAUSE THE MERK ACT REGULATES CONDUCT, OR ALTERNATIVELY, IS A MANDATORY DISCLOSURE REQUIREMENT.

The First Amendment protects speech, as well as conduct that contains speech elements, such as symbolic or journalistic speech. U.S. Const. amend. I; *United States v. O'Brien*, 391 U.S. 367, 376 (1968). The First Amendment does not afford protection to mere conduct without speech elements. *Id.* The MERK Act calls for unedited video recording that contains no speech

elements. The request for video information, in this case, does not constitute First Amendment protected speech.

Even if the MERK Act does require speech, the MERK Act is a mandatory disclosure requirement, not a restriction on commercial speech. The MERK Act is reasonably related to preventing consumer deception and preventing animal cruelty. As such, the video recording requirement is not burdensome beyond the public interests fulfilled by the MERK Act.

A. The MERK Act requires conduct from slaughter plants for compliance with proper commercial regulation and does not compel an expressive act equivalent to speech.

The First Amendment protects the "freedom of speech." U.S. Const. amend. I. Though this protection does not extend to all speech, it is clear that a party must "speak" to invoke the circumscribed protection of the First Amendment. *See O'Brien*, 391 U.S. at 376-79.

The U.S. Supreme Court has recognized that only conduct that is highly expressive in nature can invoke First Amendment protection. *See Texas v. Johnson*, 491 U.S. 397, 404 (1989); *O'Brien*, 391 U.S. at 376. In *O'Brien*, the Court stated that burning a ballot card, though conduct, has expressive elements protected under the First Amendment. 391 U.S. at 376. The Court noted that this ruling does not mean that a "limitless variety of conduct can be labeled 'speech,'" but rather that some highly expressive elements of conduct can be considered "symbolic speech." *Id.* Similarly, in *Texas v. Johnson*, the Court recognized that flag burning was conduct on its face, but "constituted expressive conduct, permitting [Johnson] to invoke the First Amendment." 491 U.S. at 404. In a more recent case, the Court ruled that the First Amendment protects video games because video games, like literature, often communicate an idea or a "social message." *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2733 (2011). Therefore, conduct, only when highly expressive, receives First Amendment protection.

In *Glik v. Cunniffe*, this Court broached the "fairly narrow" issue of whether or not a

person could film police officers performing their duties. 655 F.3d 78, 82 (1st Cir. 2011). Holding that videotaping police officers making an arrest did fall within First Amendment protection, this Court also noted "gathering and dissemination of information" is protected as well. *Id.* This Court did not suggest that *all* collection of information was protected under the First Amendment, but rather only that which is *necessary in the expression of speech*, which, when limited, would affectively chill speech. *See id. Gilk* is similar to *O'Brien, Johnson,* and *Brown* because filming that was journalistic, i.e. expressive, in nature was held to receive First Amendment protection. *See id.* at 82–83.

Here, the video recording requirement in the MERK Act compels conduct, not speech, because the video recording required is not expressive in nature. The "unedited" live-streaming video that the MERK Act requires slaughter plant facilities to provide does not express a symbolic message in the way burning a ballot did in *O'Brien,* or flag burning did in *Johnson.* There, the conduct communicated messages that the actors did not support some particular government actions. Here, the video surveillance is factual, accurate, unaltered footage of slaughter plants and does not convey a particular message.

Additionally, the video surveillance is not literary or communicative of a social idea that was apparent in video games in *Brown,* or journalistic in *Glik.* Further, the lower court misread the "gathering and dissemination of information" protection from *Glik.* The gathering and dissemination of information by a *speaker* that is required in order to preserve the speaker's speech rights is also protected under *Glik.* 655 F.3d at 82. This Court in *Glik* did not state that the gathering and dissemination of information is always a First Amendment protected activity, distinguishing *Glik* from the instant case. *Id.* The speaker in *Glik* conveyed a message by turning on a camera at a particular time and filming a particular event—police officers making an arrest.

Here, the MERK Act does not convey a particular message because the video surveillance is continuous and unedited. MERK Act § 2(c).

Because the MERK Act's video surveillance requirement is not expressive in nature, nor journalistic or literary, the MERK Act requires conduct, not speech. Therefore, this Court should not subject the MERK Act to First Amendment scrutiny.

B. Even if this Court finds that the MERK Act regulates speech, it merely creates a mandatory disclosure requirement to thwart consumer deception and protect the humane treatment of animals, which passes First Amendment scrutiny under the *Zauderer* test.

The lower court properly dismissed ASA's First Amendment claim because the MERK act creates a valid mandatory commercial disclosure requirement under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). In order to pass the *Zauderer* test, the government must show that: (*i*) the MERK Act constitutes a mandatory disclosure, not a restriction on speech, (*ii*) the MERK Act is reasonably related to preventing consumer deception through transparency of information and other rational interests, and (*iii*) the MERK Act does not burden slaughter plants more than necessary. *See id.*; *see also Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014).

i. The video recording requirement of the MERK Act is a mandatory disclosure requirement.

Mandatory commercial disclosure requirements that compel speech receive limited First Amendment scrutiny under the *Zauderer* test, requiring vastly less scrutiny than traditional speech restraints and lower scrutiny even than less-protected commercial speech. *Zauderer*, 471 U.S. at 651. Disclosure requirements differ from restrictions on speech in that they do not *prohibit* commercial speech, but instead *require* or *compel* somewhat more speech than a commercial entity would ordinarily be willing to present. *Id.* at 650. *See also Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 (1st Cir. 2005). The *Zauderer* test applies a bare level of

scrutiny because commercial organizations have only minimal interests in withholding information compared to citizens and consumers who may rely on this information in their decision-making. *Id*; *Zauderer*, 471 U.S. at 651. "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." *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113-14 (2d Cir. 2001).

Courts apply the *Zauderer* test in a variety of situations where regulation or legislation mandates disclosures. In *Rowe*, this Court applied the *Zauderer* test to a First Amendment challenge to state legislation requiring pharmacy benefit managers to disclose limited but vital information, such as "conflicts of interest, disgorge profits from self-dealing, and… their financial arrangements with third parties." *Id.* at 299. In *New York Restaurant Ass'n v. New York City Bd. of Health*, the Second Circuit applied the *Zauderer* test to a First Amendment challenge to a city law requiring restaurants to post calorie information. 556 F.3d 114, 132 (2d Cir. 2009).

In contrast, outright *prohibitions* and *restrictions* on commercial speech require intermediate scrutiny. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980); *see also Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 360 (2002) (applying the *Central Hudson* test); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 492 (1996). For example, in *Thompson*, the Supreme Court, applying the *Central Hudson* test, struck down a law that prohibited drug companies from advertising compound drugs. 535 U.S. at 360. Similarly, in *44 Liquormart*, the Supreme Court struck down a Rhode Island law prohibiting the listing of prices in liquor advertising, applying the appropriate *Central Hudson* test. 517 U.S. at 492.

Here, if this Court finds that the MERK Act's video recording requirement is a speech requirement, the *Zauderer* test applies, not *Central Hudson* test because the MERK Act requires the mandatory disclosure of slaughter plant conditions through video recording. The MERK Act does not restrain or prohibit commercial speech (which would invoke the *Central Hudson* test), but requires a disclosure of recorded video in the form of unedited video recording—information that is easily available and discloses only somewhat more than slaughter plants would ordinarily wish to divulge on their own.

Although the circumstances of the disclosure in the instant case differ somewhat from those in other commercial disclosure cases, the instant case is markedly more similar to *Zauderer* commercial disclosure cases than *Central Hudson* speech restriction cases. In *Rowe* and *New York Restaurant Association*, the courts applied the *Zauderer* test, respectively upholding laws requiring the disclosure of vital information to the public. Here, the MERK Act simply makes public slaughter plant conditions—information that the government should theoretically already have access to from USDA inspected slaughter plants. In contrast, the MERK Act is unlike the regulations in *44 Liquormart* and *Thompson*, where the government *restricted* speech. Therefore, this Court should apply the *Zauderer* test when evaluating the MERK Act on First Amendment grounds.

ii. The video recording requirement of the MERK Act reasonably relates to furthering the public's interest in preventing animal cruelty in slaughter plants and increasing consumer awareness through transparency.

To pass the *Zauderer* test, the government must show a commercial disclosure requirement is reasonably related to preventing consumer deception. *Zauderer*, 471 U.S. at 651. Under the *Zauderer* test, the definition of "consumer deception" is broad, extending beyond intentional and purposeful consumer deception. *See id.* Preventing consumer deception under the

Zauderer test includes creating mandatory disclosures in the interest of providing consumers with information they require to make an informed commercial decision. *See, e.g., New York Restaurant Ass'n,* 556 F.3d at 132. While consumer curiosity alone is not normally enough to justify a mandatory disclosure, consumer desire for information to make an informed decision, when combine with other factors, can sufficiently justify a mandatory disclosure. *See Int'l Dairy Foods Ass'n v. Amestoy,* 92 F.3d 67, 74 (2d Cir. 1996); *see also New York Restaurant Ass'n*, 556 F.3d at 134; *Sorrell*, 272 F.3d at 115 n. 6.

In *New York Restaurant Ass'n*, the Second Circuit applied the *Zauderer* test to uphold a New York City law requiring restaurants to disclose calorie information. 556 F.3d at 134–35. The court stated that providing calorie information to customers was reasonably related to the city's interest in battling obesity, in addition to satisfying consumer curiosity. *Id.* There, the lack of accurate, easily accessible calorie information at restaurants constituted consumer deception. *Id.* Similarly, the Second Circuit held that a law requiring light bulb manufacturers to list the mercury content of their light bulbs was a valid mandatory disclosure under the *Zauderer* test. *Sorrell*, 272 F.3d at 115. Although labeling a light bulb does not prevent consumer deception *per se*, the court reasoned, the government's rational interest in reducing the amount of mercury sold in the state and ensuring it is disposed of properly is "inextricably intertwined" with the goal of increasing consumer awareness of the presence of mercury in a variety of products. *Id.* In *American Meat Institute*, the D.C. Circuit, sitting *en banc*, explicitly stated that other government interests, in addition to consumer deception, can be considered under the *Zauderer* test. 760 F.3d at 20. There, American Meat Institute brought a First Amendment challenge to a U.S. Department of Agriculture regulation that required the country-of-origin to be labeled on certain meat products. *Id.* The court held that providing this information allowed consumers "to make

informed choices based on characteristics of the products they wished to purchase." *Id.* at 24. Therefore, other rational state interests can augment consumer curiosity in order to justify a mandatory disclosure under the *Zauderer* test.

Here, the MERK Act's video recording requirement directly advances a vital governmental interest in preventing consumer deception through informational transparency. *See* MERK Act § 1(c). In *American Meat Institute* and *New York Restaurant Ass'n*, disclosing information furthered the state interest in allowing consumers to make informed decisions, whether based on the origin of their meat products or the calories in their food, and passed the *Zauderer* test. Here, the MERK Act allows consumers to choose meat that comes from slaughter plants that have humane conditions for the animal, as well as hygienic conditions for meat preparation. H.R. Rep. 122-666, at 1. In addition, the MERK Act creates an even less noticeable impact on slaughter plant businesses than in *American Meat Institute* and *New York Restaurant Ass'n*, in that the MERK Act does not require any point-of-sale disclosure. In this way, the MERK Act is less obtrusive than *American Meat Institute* and *New York Restaurant Ass'n*. This is not to say the MERK Act will not negatively harm some businesses. Just as in *New York Restaurant Ass'n*, where posting calorie information could possibly damage a restaurant's business, the MERK Act could potentially damage a slaughter plant if the plant has poor conditions and consumers choose to respond through purchasing power. It is ultimately at the consumer's discretion to react to accurate and truthful disclosure of information.

iii. The MERK Act does not overly burden slaughter plants because the video recordings are purely factual and unedited.

Government regulation that constitutes a commercial disclosure requirement have a low burden to meet rational basis review under the *Zauderer* test. *See Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 558 (6th Cir. 2012). "Regulations that compel 'purely factual

and uncontroversial' commercial speech are subject to more lenient review.'" *Sorrell*, 272 F.3d at 113 (quoting *Zauderer*, 471 U.S. at 650). Therefore, a mandatory disclosure is valid and not unduly burdensome, absent a showing that the disclosure overly chills protected commercial speech when the disclosure calls for factual, accurate information. *Zauderer*, 471 U.S. at 651.

Courts have found that labeling on packaging is justified and not overly burdensome. *See, e.g., Sorrell*, 272 F.3d at 113 (holding listing mercury content on light bulb packaging to be permissible); *Am. Meat Inst.*, 760 F.3d at 20. Disclosing a large amount of vital and potentially damaging information by pharmacy benefit managers was found to be justified and not unduly burdensome. *Rowe*, 429 F.3d 294, 310. In *Public Citizen Inc. v. Louisiana Attorney Disciplinary Bd.*, the Fifth Circuit held that a disclosure requirement forcing an attorney advertisement to have long disclosures that would overtake the majority of a short television advertisement as overly burdensome. 632 F.3d 212, 229 (5th Cir. 2011).

Here, the MERK Act requires factual, accurate information in the form of unedited video recording that is justified and not unduly burdensome. Conventional inspections of slaughter plants have proven to be ineffective. H.R. Rep. 122-666, at 1. Inspectors are spread too thin to focus on both enforcing slaughter plant cleanliness and enforcing humane animal conditions. *Id.* The MERK Act is necessary to augment where the Humane Slaughter Act fell short. *Id.* Slaughter plants are minimally burdened by the installation of cameras around their facilities, and many may already have such equipment in place that can be concurrently purposed. Further, slaughter plants were given two years comply with the MERK Act before the act was effective.

The MERK Act is less burdensome than many other permissible mandatory disclosures. The MERK Act does not require point-of-sale disclosure, like *Sorrell* or *American Meat*

Institute. Consumers must make a conscious effort to go to the slaughter plant or government's website to view the streaming view.

Further, the MERK Act does not chills commercial speech. For a mandatory disclosure to be overly burdensome, it must sufficiently chill commercial speech. *Zauderer*, 471 U.S. at 651. Here, unedited streaming video of slaughter plants does not prevent slaughter plants from advertising or otherwise. Therefore, the MERK Act is not only necessary and justified to fill the shortfall of inspections, but does not unduly burden slaughter plants or chill their commercial speech and passes the *Zauderer* test.

Because the MERK Act satisfies all three prongs of the *Zauderer* test for mandatory disclosures, it is permissible under the First Amendment.

II. THE MERK ACT IS PERMISSIBLE UNDER THE FOURTH AMENDMENT BECAUSE A FACIAL CHALLENGE IS PREMATURE AND THE VIDEO RECORDING REQUIREMENT NONETHELESS CONSTITUTES REASONABLE ADMINISTRATIVE SURVEILLANCE OF COMMERCIAL PREMISES IN A CLOSELY-REGULATED INDUSTRY.

The Fourth Amendment to the United States Constitution protects citizens' "persons, houses, papers, and effects" against unreasonable, warrantless searches. U.S. Const. amend. IV. The MERK Act's video surveillance requirement must not be invalidated on its face because Fourth Amendment challenges must be analyzed on a case-by-case basis, considering the concrete factual context of the implementation of a search. *See Sibron v. New York*, 392 U.S. 40, 59 (1968).

While the U.S. Supreme Court has long held that the Fourth Amendment applies to commercial properties, as well as residential homes, surveillance of commercial premises in closely-regulated industries often qualify as reasonable under the Fourth Amendment. *See, e.g.*, *See v. City of Seattle*, 387 U.S. 541, 543, 546 (1967); *New York v. Burger*, 482 U.S. 691, 702

(1987). The MERK Act meets this exception to the warrant requirement for reasonable administrative searches and is thus permissible under the Fourth Amendment.

A. ASA's facial challenge to the MERK Act is premature because Fourth Amendment challenges to warrantless searches require case-by-case basis consideration of concrete factual circumstances.

The U.S. Supreme Court has frequently declined to facially invalidate warrantless searches because of the variety of circumstances which contribute to reasonableness and necessity of searches. *See e.g.*, *Sibron,* 392 U.S. at 59. In *Sibron,* the Court declined to invalidate a "stop-and-frisk" statute "on its face." *Id.* The Court explained that rather than engaging in the "abstract" exercise of analyzing how the text of a statute may apply in the context of the Fourth Amendment, courts should analyze whether a specific search is reasonable under the Fourth Amendment—an analysis that requires "concrete factual context." *Id.* The idea that courts should look at the "totality of circumstances" of specific searches requirement rather than "hypothetical future searches" has been adopted by several circuits. *See, e.g.*, *Warshak v. United States*, 532 F.3d 521, 528 (5th Cir. 2008).

The district court improperly relied on two cases that are distinguishable from this case: *Berger v. New York* and *Patel v. City of Los Angeles*. 388 U.S. 41, 55 (1967); 738 F.3d 1058, 1060 (9th Cir. 2013). In *Berger,* the U.S. Supreme Court invalidated on its face an eavesdropping statute which allowed law enforcement to obtain a warrant for wiretapping with no more than a "reasonable" belief that evidence of a crime would be discovered. 388 U.S. at 55–56. The Court held that this lenient standard was unconstitutional, falling far below the "probable cause" standard of the Fourth Amendment warrant requirement. *Id.* In *Patel,* the Ninth Circuit invalidated on its face a municipal code requiring hotels to maintain hotel guest records and provide these records for inspection upon government request. 738 F.3d at 1060. The court

explained that in every possible application, this statute violated the Fourth Amendment because it did not provide safeguards against abusive and arbitrary inspections, and imposed harsh criminal liability for failing to produce "commercially sensitive" guest information contained in records. *Id.* at 1062, 1064

The MERK Act's video recording requirement does not present the concerns that made the respective courts wary of the statutes in *Patel* and *Berger*. The clearly-defined scope of the MERK Act's video surveillance requirement protects against abusive and arbitrary application like that in *Patel*, as it is sufficiently limited to address the problem of poor animal conditions in slaughter plants. Additionally, the Court's reasoning in *Berger* does not apply here because the statute in *Berger* is sufficiently distinguishable from this case. In *Berger*, the Court's analysis fell not on the reasonableness of searches permitted by the stature, but on the "adequacy of procedural safeguards" required for obtaining a warrant to conduct a search. *Sibron*, 392 U.S. at 59 (citing *Berger*, 388 U.S. at 41). Here, the administrative surveillance of commercial slaughter plants advanced by the MERK Act, like a "stop and frisk" search, forms an exception to the warrant requirement altogether, and complies with the Fourth Amendment based on its "reasonableness." *See, e.g.*, *Burger*, 482 U.S. at 702. Because the constitutionality of the MERK Act depends on the reasonableness of searches rather than sufficient procedures for obtaining a warrant, the reasoning of *Sibron* and *Warshak* controls here.

As in *Sibron* and *Warshak*, challenges to the MERK Act's video recording requirement can present in a variety of ways and must be analyzed on a case-by-case basis. Though the statute requires equal application (*all* slaughter plants must install cameras that record activity in areas where employees handle animals), the effect of this requirement will differ from plant to plant because of disparities in the size, layout, and location of each plant. Because not "every

application of the statute is potentially unconstitutional," a facial challenge to the MERK Act is improper. *See* Memo. Opinion at 12.

Additionally, the consequences of pursuing a challenge to the MERK Act only in specific instances after its implementation are minimal. ASA need not risk criminal liability to challenge the law as-applied, as the MERK Act does not impose criminal liability like the statute in *Patel*. 738 F.3d at 1064. Additionally, the one-time cost of installing cameras (for those plants that do not already use cameras for security purposes) is minimal compared to the importance of thwarting consumer deception and poor slaughter plant conditions. Finally, for slaughter plants that do not wish to bear the costs of maintaining a website, the government offers the alternative of making footage available on its own website. MERK Act § 4(c).

For the foregoing reasons, this Court must decline to consider ASA's premature facial challenge to the MERK Act on Fourth Amendment grounds and grant the government's motion to dismiss for failure to state a claim.

B. Even if this Court finds that ASA may pursue a facial challenge to the MERK Act, the *Burger* exception to the warrant requirement for reasonable administrative searches applies because commercial slaughter plants operate in the closely-regulated food industry.

The Fourth Amendment prohibits warrantless searches only when such searches are "unreasonable." *See Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) n. 5 (quoting U.S. Const. amend. IV). The U.S. Supreme Court noted this in *Burger*, where it recognized that warrantless administrative searches of commercial premises in already closely-regulated industries may be reasonable. 482 U.S. at 702.

Though the Fourth Amendment applies both to private residences and commercial premises, owners of commercial property experience a reduced expectation of privacy when participating in an industry that requires close government regulation to protect public health and

safety. *Id.* at 699–700; *see also City of Seattle*, 387 U.S. at 543, 546. For example, the Court in *Burger* held that the warrantless administrative search of an automobile junkyard was not necessarily unconstitutional because the operation of a junkyard is a closely-regulated business. 482 U.S. at 703–04.

"Closely-regulated" industries are characterized by factors such as licensing requirements, mandated inventory and record-keeping, and the threat of civil and criminal penalties if regulations are not followed. *See, e.g.*, *id.* at 704–06. Whether an industry has a "long history of government supervision" also contributes to whether an administrative search may be reasonable. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978). However, even new industries or branches of long-regulated industries can still pass this test. *Burger*, 482 U.S. at 705–06. For example, at the time *Burger* was decided, "vehicle dismantling" was a very new business, but the Court ruled that junkyards in general had a long history of government regulation. *Id.* at 706. All of these factors contributed to the reasonableness of the warrantless search of the automobile junkyard in *Burger*. *Id.*

Ultimately, the common factor in cases where the administrative search exception applies is the pervasiveness and regularity of government regulations due to risks involved with the industry. *See, e.g.*, *Donovan v. Dewey*, 452 U.S. 594, 606 (1981). In *Burger*, the Court explained that theft as a pressing problem had created the need for thorough regulations. *Id.* at 708. In a case involving the inspection of a liquor supplier, the U.S. Supreme Court cited the pervasiveness of historical and modern alcohol regulations to support the reasonableness of warrantless administrative searches in the industry. *Colonnade Catering Corp.*, 397 U.S. at 76–77. A more recent case illustrating the importance of pervasiveness as a factor in determining whether an industry is "closely-regulated" involved the warrantless search of a gun shop.

Giragosian v. Bettencourt, 614 F.3d 25, 29 (1st Cir. 2010). There, this Court noted that the inherent danger posed by firearms has led to the pervasive regulation of firearm manufacturing and sales in the United States, making administrative searches of commercial premises in this closely-regulated industry reasonable under the Fourth Amendment. *Id.* (citing *United States v. Biswell*, 406 U.S. 311, 316 (1972)).

Here, the MERK Act permits administrative oversight into one of the most highly-regulated commercial industries—the food industry. Commercial slaughter plants operating under a grant of inspection from the U.S. Department of Agriculture have a reduced expectation of privacy for operating in this closely-regulated industry. The high health and safety risks associated with the food industry require compliance with many federal laws, including pervasive U.S. Department of Agriculture regulations consisting of licensing requirements, etc. *See* MERK Act § 2(a). Although Congress passed HMSA relatively recently, the regulation of slaughter plants represents merely a branch of an extensive history of food regulations, which have existed far longer than vehicle or firearm regulations. Because the MERK Act permits surveillance over commercial premises in the closely-regulated food industry, the government satisfies the threshold requirement of the *Burger* exception.

C. The MERK Act is consistent with the Fourth Amendment because it satisfies all three prongs of the *Burger* exception to the warrant requirement for reasonable administrative searches.

Under the *Burger* exception, an administrative search program of commercial premises in a closely-regulated industry is consistent with the Fourth Amendment if it meets three requirements. 482 U.S. at 702–03. For the MERK Act to fall under the *Burger* exception, the government must show that: (*i*) the video recording requirement of the MERK Act is part of a regulatory scheme informed by a "substantial government interest"; (*ii*) the video recording is

"necessary to further the regulatory scheme"; and (*iii*) the certainty and regularity of the regulatory scheme's application provides a constitutionally adequate substitute to the warrant requirement. *Id.* at 702–03 (quoting *Donovan*, 452 U.S. at 600, 602). An administrative search program meets the third prong of the *Burger* exception if it gives notice of the search to the commercial property owners and has a properly-defined scope such that administrators of the search have limited discretion. *Id.*

i. The video recording requirement of the MERK Act is informed by the substantial government interests of preventing animal cruelty in slaughter plants and promoting consumer choice.

The first prong of the *Burger* exception requires that the administrative regulatory scheme serves a "substantial" government interest. 482 U.S. at 702. In *Burger*, the Court held that regulations intended to prevent automobile theft (a source of significant social, economic, and personal burdens on citizens) sought to advance a substantial government interest. *Id.* at 708. Regarding regulations of firearm traffic, both the Supreme Court and this Court have considered protecting consumer and public safety a substantial interest. *See Biswell*, 406 U.S. at 315–16; *Giragosian*, 614 F.3d at 29–30.

Like the aforementioned regulatory schemes, the MERK Act aims to rectify slaughter plant violations that Congress found to be a threat to public interest. MERK Act §1(a). Because of reports of animal cruelty, meat consumers have shown increased interest in recent years in ensuring that the food they eat is ethically sourced. *See* H.R. Rep. No. 112-666, at 4. The video requirement of the MERK Act both assures consumers that animals are treated humanely and deters slaughter plants from engaging in practices that are cruel to animals—both substantial government interests.

ii. The video recording requirement of the MERK Act is necessary to advance the regulatory scheme.

Under the second prong of the *Burger* exception, a warrantless administrative search program must be "necessary" to further the regulatory scheme. 482 U.S. at 702. The Court in *Burger* held that administrative searches of automobile junkyards "reasonably serve[d]" the State's substantial interest of preventing vehicle theft. *Id.* at 709. The Court went as far as to say that the State's *rational belief* that the regulatory scheme would achieve its goal of reducing theft, was enough to satisfy this prong. *Id.* Because many stolen vehicles pass through junkyards, the government reasonably determined that its ability to conduct frequent and even unannounced inspections was necessary to create a credible deterrent, and a warrant requirement would frustrate this purpose. *Id.* at 710.

In a more recent case, this Court applied this prong of the *Burger* exception to a warrantless commercial truck search. *United States v. Maldonado*, 356 F.3d 130, 135–36 (1st Cir. 2004). There, a police officer discovered large amounts of marijuana during the warrantless search of a commercial vehicle in the interstate trucking industry traveling across state lines. *Id.* at 135. Noting that warrantless inspections are often the only way to achieve the substantial government interests of ensuring traveler safety and monitoring interstate commerce, this Court held that it was "self-evident" that frequent, warrantless searches are necessary to the industry's regulatory scheme. *Id.*

Here, the government has much more than an inkling that the MERK Act is needed to discover violations and enforce compliance with HMSA. As articulated by the House of Representatives upon passage of the MERK Act, government audits show that HMSA on its own has failed to deter illegal animal abuse in slaughter plants. H. R. Rep. No. 112-666 at 3. Administrative inspectors simply cannot monitor all areas of every slaughter plant at all times,

and this inability to enforce HMSA has allowed multiple instances of horrific animal cruelty, as exposed by undercover videos taken by animal activists. *Id.* at 4. The inhumane treatment of animals captured by these videos likely shows only a small percentage of the horrific treatment that occurs throughout the United States when consumers and the government lack the resources to closely monitor slaughter plants. Without continuous accountability imposed by the MERK Act, slaughter plants merely need to wait until investigators and administrative enforcement agents are not present to get away with inhumane behavior, like that shown in the undercover videos. The ineffectiveness of HMSA also indicates that a warrant requirement would essentially render the government's efforts to end animal cruelty useless by encouraging slaughter plants to adjust their practices only when an announced, brief inspection is conducted pursuant to a warrant. *Id.* at 1. The MERK Act's video surveillance program, however, provides the necessary deterrence to enforce the government's regulatory scheme and advance its substantial interests in protecting consumer choice and preventing animal cruelty at all times, not just when an inspector is present.

iii. The video recording requirement of the MERK Act sufficiently substitutes the Fourth Amendment warrant requirement in terms of the regularity and certainty of its application.

The warrantless search of a commercial premises in a closely-regulated industry satisfies the third prong of the *Burger* exception if the regularity and certainty of its application adequately substitutes a warrant. 482 U.S. at 703. In this context, regularity of application is determined by two factors: (*i*) the commercial property owner must have notice of the scope of potential searches and (*ii*) a properly-defined "time, place, and scope" must limit search administrators' discretion. *Id.* In *Burger*, the junkyard owner had notice of the government's ability to regularly conduct warrantless searches from an authorizing statute. *Id.* at 711. As

inspections were conducted pursuant to statute, government officials were limited in their discretion to act outside of the scope of the regulatory scheme. *Id.* Additionally, the Court held that the "time, place, and scope" of the surveillance program was properly-defined because it provided clear instruction to officers of the specific hours during which a search could be conducted and the parts of the premises which could be searched. *Id.* As these requirements perform two of the basic functions of a warrant, the Court held that the regulatory scheme adequately substituted the Fourth Amendment warrant requirement. *See id.* at 711–12.

The MERK Act easily satisfies the notice requirement of this prong. As in *Burger*, owners of commercial premises in the industry are informed of regular administrative surveillance by the statute. Regarding the second part of this prong, the "time, place, and scope" of the MERK Act's video surveillance is sufficiently defined to limit discretion. As the district court correctly explains, the limiting "time, place, and scope" requirement does not question whether the scope is proper, but whether the scope is sufficiently narrowly-*defined* in order to limit discretion. Memo. Opinion at 14–15. The regulatory scheme here is reasonably and necessarily thorough to advance the interests explained above, yet its scope is still narrowly defined. The MERK Act specifically defines the slaughter plants where surveillance will occur, what the video surveillance will entail, and the ways in which video will be accessible by the public. *See* MERK Act § 2. Like the statute in *Burger*, the MERK Act creates no ambiguity which could result in unpredictable or unequal application based on the discretion of administering agents, especially because "searches" are not conducted by humans but consist of video recordings. Therefore, the MERK Act is sufficiently regular in its application to provide a constitutionally adequate substitute to the warrant requirement.

Because the MERK Act satisfies all three prongs of the *Burger* exception to the warrant requirement for administrative searches of commercial premises in closely-regulated industries, it is permissible under the Fourth Amendment.

CONCLUSION

For the foregoing reasons, the appellee, the government, respectfully requests that this Court affirm the district court's grant of the government's motion to dismiss ASA's First Amendment and Fourth Amendment claims.

Respectfully submitted,

Team #15