Case No. 3:14-cv-55440

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In the United States Court of Appeals for the First Circuit

American Slaughterhouse Association,
Appellant,

v.

United States Department Of Agriculture; and Tom Vilsack, in his official capacity as Secretary of Agriculture;
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
CASE NO. 3:14-CV-55440 MJC (ABC)
THE HONORABLE MYRA J. COPELAND, PRESIDING

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BRIEF FOR APPELLANTS

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NATIONAL ANIMAL LAW MOOT COURT COMPETITION

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STATEMENT OF ISSUES

I. Did the district court commit reversible error by granting the government's motion to dismiss ASA's claim that the Meat Eaters' Right to Know Act ("MERK Act") violates the First Amendment by forcing the entire slaughterhouse industry to install video cameras in every location at which live animals or carcasses are handled and stream the footage live on their websites to satisfy consumer curiosity and identify any potential abuse of food animals?

II. Did the district court commit reversible error by granting the government's motion to dismiss ASA's facial challenge to the MERK Act's "streaming requirement" as authorizing unlimited, warrantless searches of constitutionally protected areas in violation of the Fourth Amendment?

STATEMENT OF THE CASE

Appellants, the American Slaughterhouse Association ("ASA"), a national trade association of slaughterhouses, filed an action in March 2014 in the United States District Court for the District of Massachusetts arguing that the Meat Eaters' Right to Know Act ("MERK Act") violated the First Amendment and Fourth Amendment of the United States Constitution by compelling speech and authorizing unreasonable government searches. The Complaint sought declaratory and injunctive relief before the statute went into effect in March 2015.

The United States Department of Agriculture and Secretary Vilsack (the "government"), filed a motion to dismiss ASA's complaint under Federal Rule of Civil Procedure 12(b)(6). On August 15, 2014, the trial court granted the government's motion to dismiss ASA's complaint, and this action follows.

STATEMENT OF FACTS

In March 2012, Congress passed the MERK Act (introduced as House Bill 108 by Rep. Panop T. Kahn, D-Calif.), which mandates that all federally inspected slaughterhouses install and maintain high-definition video cameras throughout their facilities in every single place animals are present, including carcasses. MERK Act § 3. The MERK Act further demands that the slaughterhouses make "freely accessible and continuously available" all recorded footage to any visitor of their companies' websites, if they have them, or in the alternative, submit that footage to the government to release to the public. *Id.* § 4. Failure to do so results in a fine of $1,000 per day, or portion thereof, that the video is not produced or streamed online. *Id.* § 5. The statute goes into effect on March 2, 2015. Id. § 6.

In passing the MERK Act, Congress saw itself as responding to under-enforcement of the law pertaining the "humane treatment and slaughter of animals raised for meat and poultry." *Id.* § 1(a). Citing undercover videos recorded by animal activist organizations, which revealed abuse in several farms and slaughterhouses, Congress declared that this behavior was "sufficiently prevalent" to justify around-the-clock surveillance of the entire industry to reduce animal mistreatment. *Am. Slaughterhouse Ass'n v. Vilsack*, No. 3:14-cv-55440 MJC (ABC) (D. Mass.) (hereinafter, Mem. Op.) at 2; H.R. REP. NO. 112-666, at 4 (2012) (Conf. Rep.). In support of this new policy, Congress also remarked that consumers are "curious about where their food comes from," MERK Act § 1(b), as evidenced by "calls, emails, and letters" from constituents. *Id.* The MERK, it says, would "give consumers the information they need to vote with their wallets." 112 Cong. Rec. H.R.108 (daily ed. Jan. 25, 2012) (statement of Rep. Kahn). The

government concedes that "preventing the deception of consumers" plays no part in the rationale behind the MERK Act. Mem. Op. at 6.

SUMMARY OF ARGUMENT

This Court should reverse the trial court's granting of the government's motion to dismiss because the MERK Act violates the First Amendment. The Act is subject to heightened scrutiny under *Central Hudson* because it does not articulate an anti-deception rationale as required for less-rigorous review under *Zauderer*. The government's interests in satisfying consumers' curiosity regarding their food and addressing potential abuse of food animals is not "substantial," and therefore cannot justify compelled speech. Nor does the Act actually advance the government's interests; forcing every slaughterhouse to publish endless surveillance of its operations will have no meaningful effect on animal welfare or consumer curiosity, and the Act's enormous scope far surpasses its stated purposes. The Act also fails under *Zauderer* because its mandates do not bear a reasonable relationship with the government's interests and unconstitutionally chill protected commercial speech.

This Court must also reverse the trial court's granting of the government's motion to dismiss ASA's Fourth Amendment challenge to Section 4 of the MERK Act. Though the trial court correctly held that ASA can bring a facial challenge because the language of the statute provides sufficient basis for constitutional analysis, the court incorrectly conducted the analysis itself. Section 4 essentially authorizes continuous, limitless, and warrantless searches of constitutionally protected commercial premises by requiring that slaughter plants live stream video footage of all areas where animals or carcasses are located on their premises. Under the Fourth Amendment, such searches are *per se*

unreasonable, unless they fall within the administrative inspection exception to the warrant requirement. The government is unable to carry its burden of meeting the *Burger* standard for the administrative inspection exception because it cannot demonstrate a substantial interest advanced by the MERK Act, because Section 4 of the MERK Act is not necessary to achieve the government's interests, and because no provision in the MERK Act provides the limiting function of a warrant.

ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING ASA'S CLAIM BECAUSE THE MEAT EATERS' RIGHT TO KNOW ACT COMPELS SPEECH IN VIOLATION OF THE FIRST AMENDMENT.

The Constitution forbids Congress from making any law "abridging the freedom of speech," U.S. Const. amend. I., and it is a "basic First Amendment principle that freedom of speech prohibits the government from telling people what they must say." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (explaining that the First Amendment protects "both the right to speak freely and the right to refrain from speaking at all").

Moreover, the Supreme Court and this Circuit have consistently recognized that videography comprises a form of speech entitled to First Amendment protection. *See United States v. Stevens*, 559 U.S. 460, 468 (2010) (finding that a statute restricting video depictions of animal cruelty was "presumptively invalid" under the First Amendment); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (holding that "[b]asic First Amendment principles, along with case law from this and other circuits," state "unambiguously" that the right to videotape police officers carrying out their duties is protected free speech); *Iacobucci v. Boulter*, 193 F.3d 14, 25 (1st Cir. 1999) (holding that a citizen's video

recording of public officials was performed "in the exercise of his First Amendment rights").

In light of this constitutional foundation, this Court should reverse the lower court's order dismissing ASA's action for relief because the MERK Act is unconstitutional. First, the lower court erred in evaluating the MERK Act through an insufficiently protective standard. The MERK Act is subject to heightened scrutiny under *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, because it does not articulate an anti-deception rationale for regulating speech. *See* 447 U.S. 557, 565 (1980). Second, the MERK Act's mandates unconstitutionally compel speech in violation of the test put forth in *Central Hudson*. Third, should this Court elect to steer the circuit into new territory by extending the standard put forth in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio* beyond its stated anti-deception context, the court below still committed reversible error in finding that the MERK Act did not overstep the Constitution's protections of free speech. *See* 471 U.S. 626, 651 (1985). When considering First Amendment claims, this Court engages in *de novo review* of the district court's conclusions of law and mixed questions of law and fact. *Hurley v. Irish–Am. Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557, 567 (1995); *Naser Jewelers, Inc. v. City Of Concord, N.H.*, 513 F.3d 27, 32 (1st Cir. 2008).

A. The MERK Act is Subject to Heightened Scrutiny Under Central Hudson Because It Does Not Articulate an Anti-Deception Rationale.

The First Amendment itself "reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs." *United States v. Stevens*, 559 U.S. 460, 470 (2010). By applying *Zauderer*'s less demanding inquiry to evaluate the constitutionality of the MERK Act instead of *Central Hudson*'s heightened

scrutiny, the court below deserted that balance and committed reversible error. With regard to compelled commercial disclosures of lawful non-misleading speech, *Central Hudson* requires rigorous review of government action, in contrast with *Zauderer*'s less thorough standard, which applies only to compelled factual disclosures directed at misleading commercial speech. *See Cent. Hudson*, 447 U.S. at 565; *Zauderer*, 471 U.S. at 651; *see also* Anderson Chang, *The Family Smoking Prevention and Tobacco Control Act, Graphic Warning Labels, and the Future of Compelled Commercial Speech*, 11 First Amend. L. Rev. 441, 454, 552 (2013) (distinguishing the *Central Hudson* class of regulation encompassing commercial speech that is both lawful and not misleading or deceptive from the *Zauderer* "misleading information doctrine" "aimed at correcting or mitigating false, misleading, or deceptive commercial speech").

In *Zauderer*, an Ohio regulation requiring attorneys to fully disclose the cost of their services to avoid misleading the public withstood First Amendment scrutiny because an advertiser's First Amendment rights were adequately protected "as long as disclosure requirements [were] reasonably related to the *State's interest in preventing deception of consumers*." *Id.* at 631, 651 (emphasis added). The Court continued to develop this new sub-species of First Amendment cases in *Milavetz, Gallop & Milavetz, P.A. v. United States*, where it applied *Zauderer*'s purpose of addressing "misleading commercial speech" to uphold the bankruptcy code's mandate that "debt-relief" companies disclose in their advertisements that services might include filing for bankruptcy. 559 U.S. 229, 249 (2010).

The court specifically contrasted these facts with the situation in *In re R.M.J.,* where state ethical rules prohibited attorneys from advertising their practice areas in

terms other than those prescribed by the State Supreme Court. *Id.* at 250 (citing 455 U.S. 191, 197-98 (1982)). In *R.M.J.*, because the restricted statements were not inherently misleading, the Court applied *Central Hudson*'s intermediate scrutiny to invalidate the restrictions as insufficiently tailored to any substantial state interest. *Id.* at 205-06.

As the court below correctly pointed out, the First Circuit has *never* extended *Zauderer*'s narrow scope to government interests beyond preventing consumer deception. Mem. Op. at 6. Nevertheless, without offering a modicum of reasoning behind the advisability of this election, the court below chose to espouse the out-of-circuit decision in *Am. Meat Inst. v. United States Dep't of Agric.*, in order to extend the *Zauderer* test outside of the realm of consumer deception. *See* No. 13-5281, 2014 U.S. App. LEXIS 14398, at *3 (D.C. Cir. July 29, 2014); Mem. Op. at 6.

The government concedes in this case that "preventing the deception of consumers" plays no part in the rationale behind the MERK Act. *See* Mem. Op. at 6. Indeed, the statute's legislative findings focus solely on preventing animal cruelty and enabling consumers to see how their food was produced. H.R. Rep. No. 112-666, at 4 (2012) (Conf. Rep.); 112 Cong. Rec. H.R.108 (daily ed. Jan. 25, 2012) (statement of Rep. Kahn). As a result, the court below erred in applying the *Zauderer* test in assessing the MERK Act's constitutionality instead of *Central Hudson*'s more rigorous standard.

B. The MERK Act Fails Under Central Hudson.

The First Amendment's guarantee of free speech extends beyond those "categories of speech that survive an ad hoc balancing of relative social costs and benefits." *Stevens*, 559 U.S. at 470. Under *Central Hudson*'s mandate, the government may only limit truthful commercial speech that does not promote unlawful activity or

mislead the public if the regulation (1) serves a "substantial government interest"; (2) directly advances the government's asserted interest; and, (3) extends no further than necessary to serve that interest. 447 U.S. at 566; *El Dia, Inc. v. P.R. Dep't of Consumer Affairs,* 413 F.3d 110, 113 (1st Cir. 2005). The government has failed to meet its burden under *Central Hudson*: the MERK Act's stated goals of reducing animal abuse and satisfying consumer curiosity fall short of comprising "substantial" government interests, the Act does not directly advance those interests, and the Act's attempts to satisfy those interests are fatally overly-broad.

(1) The Government's Interest in Regulating ASA's Speech Fails to Rise to the Level of a "Substantial Government Interest."

The government's stated interests in satisfying consumers' curiosity "about where their food comes from" and addressing potential abuse of food animals is neither adequately substantial, nor sufficiently supported to justify compelled speech. *See* MERK Act § 1(b), § 1(a). To satisfy the second *Central Hudson* prong, the government must prove that its asserted interest interests are "substantial." 447 U.S. at 566; *F.T.C. v. Direct Mktg. Concepts, Inc.*, 569 F. Supp. 2d 285, 306 (D. Mass. 2008) *aff'd,* 624 F.3d 1 (1st Cir. 2010); *see also Consol. Cigar Corp. v. Reilly*, 218 F.3d 30, 44 (1st Cir. 2000) *aff'd in part, rev'd in part sub nom. Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (holding that despite the "paternalistic" nature of certain state regulations restricting tobacco sale, promotion, and labeling, the regulations constitutionally addressed "perhaps the single most significant threat to public health in the United States"). "Involuntary affirmation can be commanded only on even more immediate and urgent grounds than silence," *West Virginia State Bd. of Ed. v. Barnette,* 319 U.S. 624, 633 (1943), and the "prospect of crime . . . by itself does not justify laws suppressing protected speech."

United States v. Stevens, 533 F.3d 218, 229-30 (3d Cir. 2008) *aff'd*, 559 U.S. 460 (2010) (citing *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 245 (2004)).

In *Stevens*, the defendant brought a First Amendment challenge against a federal statute outlawing depictions of animal cruelty. 533 F.3d at 221. To resolve this issue, the court looked to the Supreme Court's holding in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* where a city's interest in animal welfare proved insufficient to justify ordinances outlawing animal sacrifices in face of the Free Exercise Clause. *Id.* at 226 (citing 508 U.S. 520, 546-47 (1993)). The Supreme Court's choice not to expand the "extremely limited number of unprotected speech categories in a generation," left the lower court with the "only conclusion": that it should not create a new category, especially given the Supreme Court's hesitance to do so on the same topic. *Id.* at 226-27. Thus, despite recognizing that preventing cruelty to animals appeals to our sensibilities, the court refused to "elevate it to the status of a *compelling* interest" sufficient to trump free speech rights. *Id.* at 226. In addition, because the statute addressed video depictions and did not regulate the underlying act of animal cruelty, "no persuasive argument" remained that the statute served a compelling government interest. *Id.* at 228.

Equally instructive in this realm is *Int'l Dairy Foods Ass'n v. Amestoy*, where Vermont's interest in satisfying consumer curiosity alone did not warrant compulsion of an accurate, factual statement at the point of sale regarding the use of growth hormones in producing milk. 92 F.3d 67, 74, 71 (2d Cir. 1996). In so holding, the court remarked that were consumer interests alone sufficient, there would be "no end to the information that states could require manufacturers to disclose about their production methods." *Id.*

Finally, in *Am. Meat Inst. v. United States Dep't of Agric.* ("AMI"), a meat

association challenged a federal regulation requiring that meat packages disclose where the animal was born, raised, and slaughtered. No. 13-5281, 2014 U.S. App. LEXIS 14398, at *4 (D.C. Cir. July 29, 2014). There, the "context and long history of country-of-origin disclosures" to enable consumers to choose American-made products, the demonstrated consumer interest in extending the labeling to food products, and the individual health concerns and market impacts that could arise in the event of a food-borne illness outbreak combined to make the government's interest substantial. *Id.* at *13.

Unlike the labeling requirement upheld in *AMI*, which offered a respondes to consumer concerns about health and the domestic economy, here, the government attempts to justify its mandates by referencing consumers' desire to prevent animal mistreatment and consumer "curiosity," the very interests disposed of in *Amestoy* and *Stevens*. Furthermore, far from the "historical pedigree" of the country-of-origin labels in *AMI*, endless compelled video surveillance of an industry's entire production chain remains unheard of in our country. If "[h]istory can be telling," then the government is flagrantly overstepping its boundaries. *See* 2014 U.S. App. LEXIS 14398, at *13.

Furthermore, one need only imagine the evils that could ensue if marginal interests were deemed "substantial" in order to recognize the grave danger that would accompany affirming the decision below. If the possibility of addressing animal abuse and satisfying consumer curiosity were sufficient to warrant nonstop surveillance, surely the government could turn next to those industries implicating human welfare. As noted in *Amestoy*, there would be "no end to the information that states could require manufacturers to disclose about their production methods." Affirming the decision below could pave the way for the government to compel speech from *every* industry in which it

had a substantial interest, including banks, retirement homes, and hospitals; the "paternalistic" government measures mentioned in *Reilly* could eventually stifle all business and privacy. That sort of tyranny has no place in America, and this Court should honor the Supreme Court's choice to maintain the "extremely limited number of unprotected speech categories in a generation." *Stevens*, 533 F.3d at 227.

(2) The MERK Act Will Not Adequately Advance the Government's Stated Interests.

The MERK Act does not adequately advance the government's stated interests because forcing every slaughterhouse to publish endless surveillance of its entire operations will have no consequential effect on animal cruelty or provide consumers with meaningful insight on their food. "[T]he [government's] regulation may not be sustained if it provides only ineffective or remote support for the government's purpose" and "the harms it recites must be real and its restrictions must *in fact* alleviate them to a material degree." *Central Hudson,* 447 U.S. at 564, 566; *El Dia,* 413 F.3d at 115 (citing *Edenfield v. Fane,* 507 U.S. 761, 770-71 (1993)); *see also Stevens*, 533 F.3d at 228 ("In order to serve the purported compelling government interest of preventing animal cruelty, the regulation of these depictions must somehow aid in the prevention of cruelty to animals."). *Central Hudson* specifically requires a "reasonable fit" between the regulation and the interest, demanding that the scope fall "in proportion to the interest served." 413 F.3d at 117 (citing *Bd. of Trustees v. Fox*, 492 U.S. 469, 480 (1989)).

In *El Dia*, this Court struck down a Puerto Rican newspaper regulation for unconstitutionally infringing upon commercial speech. 413 F.3d at 111-12. The regulation required all newspapers to post a bond in anticipation of any future fines for noncompliance with rules "protecting consumers from fraudulent or deceptive

advertisement." *Id.* at 12. Notably, the regulation neither imposed restraints on its principal violators, nor improved the government's limited ability to enforce the fines levied against others. *Id.* at 117. Ultimately, by attempting to justify its approach with mere references to "history, consensus, and simple common sense," at the expense of any anecdotes or corroborative evidence of its effectiveness, the government failed to demonstrate that the measure advanced its interests. *Id.* at 116.

In *Consol. Cigar Corp. v. Reilly*, tobacco companies challenged Massachusetts regulations restricting the sale, promotion, and labeling of tobacco products aimed toward reducing the use of such products by minors. 218 F.3d 30, 36 (1st Cir. 2000) *aff'd in part, rev'd in part sub nom. Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). In contrast to the weak "common sense" arguments presented in *El Dia*, Massachusetts cited "myriad sources," including a Surgeon General's report and extensive "product specific-evidence," to support the existence of a causal relationship between tobacco advertising and tobacco use. *Id.* at 48-49. Consequently, the government carried its burden of demonstrating that the dangers posed by underage use of tobacco products posed "real harms" and that the regulations could be reasonably "expected to alleviate those harms to a material degree." *Id.* at 45.

Like the Puerto Rican agency's deficient support for its regulation in *El Dia*, here the government offers no real support for its contention that constant video surveillance will alleviate consumer curiosity or animal cruelty in slaughterhouses. In particular, the government offers no evidence that consumers' distaste for animal mistreatment will inspire them to sift through the countless hours of video footage, let alone alter their habits and "vote with their wallets." Passing reference to "calls, emails, and letters" from

constituents in the MERK Act's legislative history stands contrasts starkly with the "myriad sources" offered in *Reilly* connecting advertising to tobacco use by minors.

The MERK Act also exhibits the same fatalities this Court remarked in *El Dia*, where the government's bonding mechanism did not carry any effects on principal violators or improve critical enforcement mechanisms. By directing its entire focus on industry-wide video streaming, the Act fails to address how it will penalize the select companies who have records of violating the Humane Methods of Slaughter Act. Perhaps even more puzzling is the Act's requirement that the industry post video of poultry slaughter and preparation, given that Congress chose to exclude those animals from the protections of the Humane Methods of Slaughter Act. *See* MERK §2(a) ("Slaughter plant refers to any facility engaged in the slaughter of animals for meat and poultry products"); 7 U.S.C.A. § 1902 (2014) (applying only to "cattle, calves, horses, mules, sheep, swine, and other livestock"). As merely recording or observing animal suffering does nothing to actually remedy it, the government has failed to make the requisite showing that the MERK Act's mandates will *in fact* alleviate any of the harms it references to a material degree. This Court must strike down the Act on First Amendment grounds.

(3) The MERK Act's Scope is Grossly More Extensive than Necessary to Serve the Government's Interests.

By tightening its clutches over *all* slaughterhouses regardless of their proven track records in animal welfare, the MERK Act's enormous scope far surpasses its stated purposes. Even within the context of commercial speech, the First Amendment mandates that speech restrictions be "narrowly drawn;" the government must "not restrict more speech than necessary to achieve its purposes." *See Central Hudson,* 447 U.S. at 565,

(internal quotation marks omitted); *Reilly*, 218 F.3d t 49-50 (1st Cir. 2000); *John Donnelly & Sons v. Campbell*, 639 F.2d 6, 13 (1st Cir. 1980).

In *El Dia*, a Puerto Rican agency's newspaper regulation placed a heavy burden on resident intermediaries, among others, who either needed to post a $25,000 bond or forego significant advertising revenue. 413 F.3d at 117. In effect, the regulation "penalized protected commercial speech preemptively," based on the possibility that the newspapers might publish inappropriate material or the agency could encounter problems enforcing the regulation against nonresident newspapers. *Id.* Because the government's concerns were speculative and the regulation offered no tools to actually remedy the problems it identified, the regulation was unconstitutionally broad. *Id.*

In *Lorillard Tobacco*, the Supreme Court found that the extent of Massachusetts' regulations prohibiting tobacco advertising in a substantial portion of its major metropolitan exceeded the scope of its interest in curbing tobacco use by minors. 533 U.S. 525, 528-29 (2001). The regulations' "uniformly broad geographical sweep," and restriction of oral statements and outdoor advertisements of any size demonstrated a lack of tailoring and indicated that Massachusetts did not "carefully calculat[e] the costs and benefits associated with the burden on speech imposed." *Id.* at 528 (citing *Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 417 (1993)).

Like the overly broad geographical sweep of the tobacco regulations in *Lorillard*, the breadth of the MERK Act's application to the entire meat industry overwhelmingly surpasses the government's concomitant interests. By compelling speech at all times, not solely at the point of sale, the MERK Act extends beyond the unconstitutional milk labels in *Amestoy* and the country of origin labels examined in *AMI*. Moreover, by demanding

that slaughterhouses stream live high definition footage from "every location," including those where only carcasses are handled, the MERK Act's mandates bear no connection to the animal welfare interest the Act asserts. Unlike *AMI*, where concern for human health transcended mere consumer curiosity to permit country of origin labels, the government here offers no hint of human health concern, foreclosing this interest from affecting the balance.

Moreover, mimicking the unconstitutional bonding requirement in *El Dia*, the MERK Act preemptively penalizes protected commercial speech. By extending its mandates to slaughterhouses with pristine animal welfare records, the MERK Act forces compliant companies to forsake their First Amendment rights in anticipation of possible lawlessness from their competitors. The astonishing extent of the government's approach is all the more egregious in light of numerous obvious alternatives, including government production of an educational video or a more focused surveillance requirement targeting the slaughterhouses responsible for cruel activity. Thus, the MERK Act fails to keep the "freedoms of the First Amendment in their preferred position," *Saia v. New York*, 334 U.S. 558, 562 (1948), and fails to meet the final *Central Hudson* element.

C. The MERK Act Also Fails Under Zauderer Rational Basis Review.

Should this Court choose to steer this circuit into unchartered territory and extend the *Zauderer* standard beyond its original anti-deception milieu, it should still find that the Court erred upholding the MERK Act under the First Amendment. Just like *Central Hudson*, *Zauderer* still demands scrutiny of (1) the interest motivating the government's disclosure scheme and (2) the relationship between the government's identified means and its chosen ends, to ensure a "reasonably relation" with the government's interests.

Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 650 (1985); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005); *Am. Meat Inst. v. United States Dep't of Agric.* No. 13-5281, 2014 U.S. App. LEXIS 14398, at *4,*26 (D.C. Cir. July 29, 2014) ("*Zauderer*'s method of evaluating fit differs in wording [from Central Hudson's], though perhaps not significantly in substance….").

(1) The Government's Interest is Insufficient to Justify Compelled Speech.

As discussed extensively in section (B)(1) of this brief, the government's stated interests in addressing animal mistreatment and in satisfying consumer curiosity do not warrant the MERK Act's severe intrusion on industry's constitutional rights. In *AMI*, noting that the Supreme Court had not made clear whether *Zauderer* would permit reliance on non-substantial interests to justify First Amendment infringement, the D.C. Circuit declined to decide whether such an interest could compel speech. *2014 U.S. App. LEXIS 14398, at *9.* Nevertheless, the "historical pedigree" of using the disputed country of origin disclosures in connection with addressing human health concerns and supporting the American economy lifted the interests "well above idle curiosity," to significant. *Id.* at *13.

Far from country-of-origin labels' "historical pedigree," twenty-four hour surveillance of an entire industry in order satisfy "idle curiosity" and a concern for animals is positively unheard of in this country. By choosing to go beyond the D.C. Circuit's tempered response to non-significant government interests and declaring that such interests warrant encroachment of the First Amendment, this Court would be taking it upon itself to blast past the Supreme Court's hesitation in this arena.

Perhaps more importantly, as mentioned previously in the context of *Central Hudson*, a different conclusion regarding the requisite level of government interest would inevitably open Pandora's box of threats to privacy and expression. Once the government articulated a marginal concern for an industry's practices, it could attempt to strip the First Amendment's protections from every facet of American business. A concern for consumer curiosity and food animal protection are not the facts upon which to make that titanic decision, and this Court should hold that the government's sub-standard interests fail to justify compelled speech.

(2) There is No Reasonable Relation Between the MERK Act's Disclosure Regime and the Government's Stated Interests.

The MERK Act's compelled speech regime bears no reasonable relation to the government's interests. Like *Central Hudson*, *Zauderer* requires that the government's approach be "reasonably related" to its professed interests. 2014 U.S. App. LEXIS 14398, at *26-*27; *Zauderer*, 471 U.S. at 651. Moreover, *Zauderer* recognized that "[u]njustified or unduly burdensome disclosure requirements" may offend the First Amendment by "chilling protected commercial speech." 471 U.S. at 651.

In *AMI*, because country of original labels provided consumers with no more than basic information regarding where a food animal was "born, raised, and slaughtered," no parties contested their "uncontroversial" nature. *2014 U.S. App. LEXIS 14398,* at *22. These facts stood in contrast with the overly burdensome measures taken in *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy*, where a required disclaimer on a lawyer's advertisement proved so detailed that it effectively ruled out any benefits associated with noting the lawyer's "specialist" designation. *Id.* at 25 (citing 512 U.S. 136, 146-47 (1994)).

Unlike the country of origin labels in *AMI*, which gave no more than a limited factual description of a product upon sale, the MERK Act insists that the meat industry perpetually air all its laundry, whether clean or dirty, to the entire world. Furthermore, like the unconstitutionally burdensome disclaimers in *Ibanez*, the MERK Act literally spares the industry no detail: to the extent any processing plant employs trade secrets in its meat preparation (including special butchering techniques or flavoring secrets), all of that information would become available to its competitors. For those companies who maintain websites for their products, this mandate would inevitably force many to pull down their websites in an effort to protect proprietary information. This is precisely the chill that *Zauderer* sought to combat. As a result, the MERK Act fails to pass constitutional muster under *Zauderer*.

II. THE TRIAL COURT ERRED WHEN IT GRANTED THE GOVERNMENT'S MOTION TO DISMISS ASA'S FOURTH AMENDMENT CLAIM.

This Court should reverse the lower court's order granting the motion to dismiss ASA's Fourth Amendment challenge to the MERK Act. Though the trial court correctly found that ASA has standing to bring a facial challenge, the court incorrectly held that the warrantless searches authorized by Section 4 of the MERK Act are constitutional under the Fourth Amendment. This Court reviews the district court's Fourth Amendment conclusions of law *de novo*. *See Ornelas v. United States*, 517 U.S. 690, 699 (1996); *United States v. Young*, 105 F.3d 1, 5 (1st Cir. 1997).

The Fourth Amendment forbids unreasonable "searches." U.S. Const. amend. IV. A search occurs when the government uses technology to obtain information that could not otherwise be obtained without physically intruding on a constitutionally protected area. *See United States v. Jones*, 132 S. Ct. 945, 951 (2012); *Kyllo v. United*

States, 533 U.S. 27, 34 (2001). The MERK Act's Section 4 "streaming requirement"—the requirement that slaughter plants live video stream all video recordings produced according to the statutes prior provisions—constitutes a continuous and ongoing search of slaughterhouses. The streaming requirement allows the government to obtain information that could only otherwise be obtained by being physically present on the slaughterhouses' premises. Thus, because the streaming requirement is a "search," it must also be reasonable under the Fourth Amendment to be constitutional.

But the MERK Act's Section 4 video streaming requirement is *unreasonable*. "Warrantless searches are *per se* unreasonable, unless they fall within a well-defined and specifically enumerated exception to the warrant requirement." *United States v. Tiru-Plaza*, 766 F.3d 111, 115 (1st Cir. 2014). Because the streaming requirement allows the government to conduct searches without a warrant, without probable cause, without reasonable suspicion of ongoing criminal activity, and without the safeguards necessary for a permissible administrative inspection, the streaming requirement is unconstitutional under the Fourth Amendment.

A. ASA Has Standing to Pursue a Facial Challenge to the MERK Act on Fourth Amendment Grounds.

The lower court correctly held that ASA can bring a facial challenge to the MERK Act on Fourth Amendment grounds for two reasons. First, ASA has standing because the reasonableness of searches under Section 4 of the MERK Act will not differ based on the specific facts and context of any one case; thus, the issue presented is not overly generalized and is ripe for resolution. Second, ASA has standing because denying a facial challenge will force individual slaughterhouses to pay unduly burdensome costs, either to comply with or to challenge the statute.

(1) Specific Facts and Case-Specific Context Will Not Benefit the Court's Fourth Amendment Analysis of the MERK Act's Search Provision.

This Court should hold that ASA can bring a facial challenge because the language of the MERK Act provides a sufficient basis to reach the merits of the Fourth Amendment question. This Court does not need to have the facts and context of a specific case before it to decide that the Section 4 streaming requirement is unreasonable under the Fourth Amendment. The Supreme Court has held that the language of a statute authorizing warrantless searches can be so broad as to render the statute invalid on its face. *See Berger v. New York*, 388 U.S. 41 (1967). In such cases, the facts of a specific search are unnecessary to conduct Fourth Amendment analysis. In *Berger*, the Supreme Court heard a facial challenge to a New York wiretapping statute. The statute permitted magistrates to issue eavesdropping warrants when there existed "a reasonable ground to believe" eavesdropping would result in evidence; however, the statute did not lay out any particulars for the types of crimes that could be grounds for the warrant, nor did it limit the subjects or scope of permissible searches. *Id.* at 55-56. The Court held that the language of the statute was "too broad in its sweep resulting in a trespassory intrusion into a constitutionally protected area." The Court held the statute, therefore, violated the Fourth Amendment on its face, solely on the basis of its language. *Id*. at 44.

The language of the MERK Act is similarly broad because it allows the government to conduct consistent and continuous searches on the premises of all slaughter plants that fall within the statute's definitions, without warrants, without any level of individualized suspicion of criminal activity, and without time limits on the scope of the searches. Because the terms of the statute mandate that these searches will be

uniform, no one case will present a set of facts that will benefit the Court in conducting Fourth Amendment analysis. As in *Berger*, this Court can determine whether the searches authorized by the MERK Act are reasonable merely by examining the language of the statute.

The government argues that ASA lacks standing because the Fourth Amendment challenge is premature. To support its position, the government cites *Sibron v. New York*, 392 U.S. 40 (1968) for the proposition that facial challenges cannot be brought under the Fourth Amendment. However, *Sibron* does not hold that facial challenges under the Fourth Amendment are foreclosed as a matter of law. Nor does the case offer support for the government's reasoning. The Court in *Sibron* found that the provisions of the New York 'stop-and-frisk' statute at issue were "susceptible of a wide variety of interpretations," 392 U.S. at 60, and that New York courts were free to build upon the language of the statute to create state law, as long as the courts worked within the bounds of the Fourth Amendment, *Id.* at 59 ("New York is … free to develop its own law of search and seizure to meet the needs of local law enforcement, … and in the process it may call the standards it employs by any names it may choose"). The Court's reluctance to rule based solely on the language of the law in *Sibron*, therefore, was a matter of federalist principle. The Court did not want to interpret a new state statute without first giving the state's courts an opportunity to define and interpret it. That posture is entirely inapposite to the issue ASA is asking this Court to answer. Here, the MERK Act is not subject to varied interpretation; its meaning is clear on its face, and no amount of case law interpreting the statute will render Section 4's streaming requirement permissible within the bounds of the Fourth Amendment.

The government's position is further weakened by *Skinner v. Ry. Labor Executives' Ass'n*., where the Supreme Court reached the merits of a Fourth Amendment challenge to a drug-testing regulation brought by a group of labor unions. 489 U.S. 602, 614 (1989). Significantly, *Skinner* was decided twenty years after *Sibron*, and the Court referred explicitly to the unions' Fourth Amendment claim as a "facial challenge." *Id.* at 614. Thus, *Skinner* demonstrates that the Supreme Court continues to find, even after *Sibron*, that certain laws can be challenged on their face under the Fourth Amendment. The MERK Act is such a law.

(2) Denying a Facial Challenge Would Place an Unfair Burden on Businesses to Either Pay the Expensive Implementation Costs of Compliance or the Steep Penalties of Noncompliance.

This Court should hold that ASA can bring a facial challenge to prevent unduly burdening each of ASA's individual members. As the court below reasoned, in the First Amendment context, plaintiffs are not required to break the law in order to assert their constitutional rights. *See, e.g., MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). Such a requirement places an undue burden on injured parties and weakens the Constitution's protections. By analogy to these First Amendment cases, ASA should have standing to assert the Fourth Amendment rights of potential individual plaintiffs. If ASA cannot bring a facial challenge on behalf of its members before the MERK Act goes into effect, slaughterhouses will be forced to choose between two burdensome options before having the opportunity to challenge the statute's provisions: install the video recording equipment and pay all other costs required to implement the statute's provisions, or break the law and pay the fines and penalties for noncompliance. In other words, parties must

"buy" their opportunity to assert a constitutional right either by bearing the full weight of the injury they would seek to redress or by breaking the law. Because this Court cannot force parties into such a position, this Court should hold that ASA has standing to pursue a facial challenge against the MERK Act.

B. The MERK Act Violates the Fourth Amendment Prohibition on Unreasonable Searches.

This Court should hold that the MERK Act violates the Fourth Amendment because it authorizes warrantless searches without meeting the criteria for any of the narrowly defined warrantless search exceptions. The Fourth Amendment does not just protect persons and homes; it also prohibits unreasonable searches of commercial premises. *See See v. City of Seattle,* 387 U.S. 541, 543 (1967). This prohibition provides safeguards even against administrative inspections used to enforce regulatory statutes. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312-13 (1978). Administrative inspections generally require warrants, *Michigan v. Clifford*, 464 U.S. 287, 291 (1984), though there is an exception for closely-regulated businesses. Under the Colonnade-Biswell doctrine, *see Colonnade Corp. v. United States,* 397 U.S. 72 (1970); *United States v. Biswell,* 406 U.S. 311 (1972), "closely regulated" industries have a "reduced expectation of privacy," and "where the privacy interests of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened, a warrantless inspection of commercial premises may well be reasonable within the meaning of the Fourth Amendment." *New York v. Burger*, 482 U.S. 691, 702 (1987).

But Fourth Amendment protections do not disappear in closely regulated industries. Warrantless administrative inspections are permissible only if the government meets three criteria, laid out in *Burger*. Under the *Burger* test, (1) "there must be a

'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made"; (2) "the warrantless inspections must be 'necessary to further [the] regulatory scheme'"; and (3) "the regulatory statute must perform the two basic functions of a warrant." *Id.*

Section 4 of the MERK Act authorizes warrantless searches of slaughterhouses as a means of enforcing the MERK Act and other statutes regulating the commercial activities of slaughterhouses. Thus, Section 4 is a warrantless administrative inspection provision. It is *per se* unconstitutional, unless the government carries its burden of proving the elements of the *Burger* test. Because the government cannot carry any one of these elements, Section 4 of the MERK Act is unconstitutional under the Fourth Amendment.

(1) The MERK Act Does Not Address a Substantial Government Interest.

For the same reasons that the MERK Act fails First Amendment substantial interest analysis, so too does it fail the first prong of the *Burger* test. The government's stated interests in satisfying consumers' curiosity "about where their food comes from" and addressing potential abuse of food animals is not adequately substantial to justify government intrusion on private areas. *See Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996) ("Were consumer interest alone sufficient, there is no end to the information that states could require manufacturers to disclose about their production methods.").

(2) The Video Streaming Requirement is Not Necessary to Meet a Government Interest.

The Section 4 video streaming requirement is not necessary to meet the government's interest. This prong of the *Burger* standard requires the Court to consider whether less intrusive, less burdensome measures could ensure that the goals sought by the government are adequately met. *See, e.g., United States v. Biswell*, 406 U.S. at 316 (ruling out a warrant alternative because the element of surprise necessary to the effectiveness of the statute). In *Biswell*, the Court approved an officer-conducted inspection program that would operate similarly to the inspection program of slaughterhouses already authorized by Congress and the USDA. The USDA currently requires that inspectors be present at slaughterhouses and conduct periodic inspections of the methods employed to treat both live and dead animals. 21 U.S.C.A. § 603 (2014); 69 FR 54625-02 (2004). The live video streaming requirement, on the other hand, is far more burdensome and intrusive than an officer-conducted inspection program, without any level of certainty that the requirement will achieve the government's goals. Notably, the Supreme Court, nor any other court to ASA's knowledge, has approved of a regulatory mechanism as intrusive as the one in the MERK Act. This Court, therefore, cannot find that the video streaming requirement is necessary under the second prong of the *Burger* test.

(3) None of the MERK Act's Provisions Provides the Discretion-Limiting Function of a Warrant.

This Court should find the lower court incorrectly analyzed the MERK Act under the third prong of the *Burger* test. As defined by the Supreme Court, the third criteria of the *Burger* test requires the following: "the regulatory 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." 482 U.S. at 702. In *United States v. Gonsalves*, 435 F.3d 64, 68 (1st Cir. 2006), the court reasoned under the third prong of the *Burger* test that a Rhode Island statute authorizing inspectors to enter "at all reasonable hours" to see whether "any of the provisions of [the statute] are being violated," and to "secure samples or specimens," adequately limited the timing and scope of inspection. Similarly, in *Burger,* 482 U.S. at 711, the Supreme Court found the statute's "during regular and usual business hours" language sufficiently limited the scope of the authorized inspections, and in *Biswell,* 406 U.S. at 312 n. 1, the "at all reasonable times" language in the statute sufficiently limited the scope of the inspections. In contrast, under the MERK Act, there is no similar language limiting the scope of permitted searches. The Section 4 streaming requirement subjects slaughterhouses to constant, unending inspection without any temporal limit. The failure of the MERK Act to serve the limiting function of a warrant is enough to render the statute unconstitutional under the Fourth Amendment.

PRAYER FOR RELIEF

For the above reasons, the trial court's order granting the government's motion to dismiss ASA's Complaint in its entirety for failure to state a claim under either the First Amendment or Fourth Amendment should be REVERSED.

Respectfully submitted,

Team 16,
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