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

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

AMERICAN SLAUGHTERHOUSE ASSOCIATION,

Plaintiff-Appellant,

v.

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

Respondents-Appellees.

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

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BRIEF FOR RESPONDENTS-APPELLEES

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STATEMENT OF THE ISSUES

1) Does the Meat Eaters' Right to Know Act ("the MERK Act") violate the First Amendment?
2) Can ASA pursue a facial challenge to the MERK Act on Fourth Amendment grounds? If so, does the MERK Act violate the Fourth Amendment?

See Briefing Order at 1 (filed October 31st, 2014).

STATEMENT OF THE CASE

The Plaintiff-Appellant, American Slaughterhouse Association ("ASA") brought a facial challenge alleging that the Meat Eaters Right to Know Act ("MERK") is unconstitutional under the First and Fourth Amendments of the United States Constitution. The ASA was seeking declaratory judgment and injunctive relief on behalf of the slaughterhouse organizations that make up its members. The ASA argues that the MERK Act, as promulgated by the United States Department of Agriculture, violates the First Amendment because it compels speech by requiring slaughter plants to record their premises at all times and live stream that video on their website. Secondly, the ASA argues that the MERK Act, is facially unconstitutional under Fourth Amendment and is ripe for justicial review because it amounts to an unreasonable government search. The ASA brings their challenges pre-enforcement and did not allege a specific harm in the lower court.

The lower court granted a FRCP 12(b)(6) motion to dismiss in favor of Respondent-Appellees, the United States Department of Agriculture and Tom Vilsack, in his official capacity as Secretary of Agriculture ("USDA"). The lower court held that while the recording and streaming was compelled speech, it was related to a substantial governmental interest of

protecting the animals from inhumane treatment and informing consumers about the slaughter plants which produce their food. As to the second issue, the lower court held that because slaughtering is a closely regulated industry and the MERK Act met all three elements under the Berger test, a warrantless search is reasonable with respect to administrative searches of these slaughter plant businesses under the Fourth Amendment.

Before this court is the ASA's appeal of the United States District Court grant of dismissal in favor of USDA. The USDA agrees with the lower court that the MERK Act does not violate the First Amendment nor the Fourth Amendment. However, USDA also argues that the issues are not ripe for review and that the ASA lacks organizational standing.

STATEMENT OF FACTS

In 1958 the United States made a commitment to protect the welfare of animals by passing the Humane Methods of Slaughter Act, 7 U.S.C. § 1901 -1907 (amended in 1978). While the Act required humane treatment of animals in slaughterhouses, it has not sufficiently deterred slaughterhouse and meat producers from violating animal cruelty statutes. Because violations of the Humane Methods of Slaughter Act result in meager fines, Congress has determined that slaughterhouses have little incentive to train workers to treat animals humanely because consumers are in the dark and inspectors are overtasked. *See generally* "Introducing the Meat Eaters' Right to Know Act" (Hon. Panop T. Kahn of California in the House of Representatives) (Jan. 12, 2012).[1]

Recently, undercover recording of slaughterhouses has outraged consumers concerned

[1] *See also* "USDA Reports: Slaughter Plants Routinely Violate Regulations, Lax Enforcement", Katie Vann (June 5, 2013) (stating that report from USDA Office of the Inspector General shows that in 4 years there were over 44,000 violations cited by inspectors in 616 slaughterhouses resulting in only 28 suspensions).

about the cruel acts performed on animals.[2] Congress believed that in order to remedy this, slaughter plants needed greater oversight to deter the inhumane practices and to inform consumers. Congress reports that inspectors are already overwhelmed and overtasked. Congress believes that video recording and video streaming (for meat slaughter plants there is a civil fine) will remedy the situation. Video streaming under the MERK Act will be done on the Slaughter plants website and if they have none, it must be submitted to the USDA. The USDA at that point will make the video recordings available under the Freedom of Information Act, which generally grants the public access to government records. There is no evidence that these videos will be used to prosecute any employees of crimes or even investigate violations of the law. Congress intends that the additional oversight of consumers and the power of their purse will create a larger incentive for slaughter plants to treat animals humanely. The MERK Act allowed the slaughter plants three years to purchase the necessary surveillance equipment to be compliant with the Act.

SUMMARY OF THE ARGUMENT

As to the first issue, considering Congressional goals to prevent animal cruelty and inform consumers, requiring video recording and posting is a type of compelled speech that is reasonably related to a governmental interest. The U.S. District Court correctly granted USDA's motion to dismiss on this issue.

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[2] *See* "USDA suspends slaughterhouse after video", Tracie Cone, USA TODAY (August 22, 2012) (in one example of undercover video being obtained from a slaughterhouse using inhumane slaughter technics such as suffocation, repeat shooting and killing sick animals for consumption; days later the USDA suspended the slaughterhouse after finding more evidence of wrongdoing; discussing 2008 case at the Hallmark Slaughter Plant which led to the largest ever recall of beef and the conviction to two people who treated cows cruelly).

As to the second issue, the issues before the Court are not ripe for review, the ASA lacks standing and the ASA cannot prove that the MERK Act is facially unconstitutional since it can be applied in constitutionally valid way. Thus, the Court must dismiss this appeal. However, even if the issue is ripe and the ASA has standing, the facial challenge still fails because reasonable administrative searches of a closely regulated industry do not require a warrant to comport with the Fourth Amendment. The MERK Act satisfies all three elements of the *Berger* test for determining whether an administrative search is reasonable. The U.S. District Court properly granted USDA's motion to dismiss on this issue.

ARGUMENT

I. The standard of review is *de novo.*

"This court applies a *de novo* standard of review to a district court's allowance of a motion to dismiss." *Stinson v. Simplex Grinnell, LP,* 152 Fed.Appx. 8, 11(1st Cir.2005) (quoting *Martin v. Applied Cellular Tech., Inc.,* 284 F.3d 1, 5 (1st Cir.2002) (citations omitted)). In reviewing the district court's dismissal of a claim, the court may affirm on any independently sufficient ground. *See Medina–Munoz v. R.J. Reynolds Tobacco Co.,* 896 F.2d 5, 7 (1st Cir.1990).

II. Because the *Zauderer* standard applies to problems beyond deception and because the MERK Act only compels the disclosure of factual information thus adding knowledge to the market place, the District Court was correct in finding that Appellant failed to state a claim under the First Amendment.

In the spirit of the deference the First Amendment gives to access of information, a lenient standard of review is appropriate when the government seeks to introduce more information into the market as opposed to attempts to limit information. *See, e.g., Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010); *In re R.M.J.*, 455 U.S. 191,

201 (1982); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 375 (1977) ("[T]he preferred remedy is more disclosure, rather than less."). Indeed, the Supreme Court advances this fundamental policy objective of the First Amendment in emphasizing the existence of "material differences between disclosure requirements and outright prohibitions on speech." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650 (1985). More specifically, since commercial speech protections are justified by the value of information to consumers, *Zauderer* recognized that commercial speakers have a "minimal" interest in not providing it, triggering only rational basis review under the First Amendment as opposed to intermediate or strict scrutiny which is typical of cases in which the government seeks to restrict speech. *Id.* at 651. Put another way, the very basis for the Supreme Court's extension of limited constitutional protection to commercial speech is the *listener's* interest in the free flow of information. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (justifying protection of commercial speech because "the free flow of commercial information" is needed so that private economic decisions "be intelligent and well informed") (emphasis added). As a result, the resounding interest in discovery of truth that is entrenched at the very core of the First Amendment cannot support the invalidation of a law that proposes to do exactly that: increase the flow of information about the goods and/or services that consumers purchase.

A. The MERK Act only mandates disclosure of factual commercial speech, which merely requires the government to satisfy rational basis review and therefore the District Court appropriately applied the reasonably relates test in *Zauderer.*

The *Zauderer* standard applies to all cases involving compelled commercial disclosure of factual speech, regardless of the government's intent. ASA misinterprets the Supreme Court's reasoning in relying on *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447

U.S. 557, L. Ed. 2d 431, 100 S. Ct. 2343 (1980) and arguing that the *Zauderer* standard applies only to cases where the government interest is preventing deception. Rather, case law on the issue strongly suggests the District Court correctly pointed to the D.C. Circuit's recent decision in support of reading *Zauderer* to "reach beyond problems of deception." *American Meat Institute v. United States Department of Agriculture.*, No. 13-5281, 2014 U.S. App. LEXIS 14398, at *3 (D.C. Cir. July 29, 2014) (en banc). Moreover, such reasoning is not new to the court as the D.C. Circuit was similarly persuaded by the Second Circuit's determination, thirteen years prior, that "*Zauderer*, not *Central Hudson*…describes the relationship between means and ends demanded by the First Amendment in compelled commercial disclosure cases." *National Electric Manufacturer's Association v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001). Thus it is clear, and has been for some time, that the *Central Hudson* test is limited only to regulations that "*restrict* commercial speech." *Id.* at 115 (emphasis added); *see, e.g.*, *New York State Restaurant Association v. New York City Board of Health*, 556 F.3d 114, 133 (2d Cir. 2009); *Pharmaceutical Care Management Association v. Rowe*, 429 F.3d 294, 310 (1st Cir. 2005). In other words, case law regarding the "reasonably relates" test, as elucidated in *Zauderer*, favors equating it with, not just speech that misleads but, the broader scope of "increasing consumer awareness." *Sorrell*, at 115.

For example, in *AMI*, the court was presented with circumstances that parallel those currently under review and found that *Zauderer* was the proper level of scrutiny despite the fact that the government did not intend to cure consumer deception. *AMI*, at *3. In *AMI*, a meat industry trade group raised a First Amendment claim challenging a mandate that compelled meat packages to disclose their country of origin, including where the animal was born, raised, and

slaughtered. *Id*. at *4. Even though, as in this case, the government's intent was not to remedy deception the court nonetheless found that, "by acting only through a reasonably crafted disclosure mandate, the government meets its burden of showing that the mandate advances its interest in making…purely factual and uncontroversial information accessible to the recipients." *Id.* at *26. Similarly, in *Sorrell*, the court found a Vermont statute that mandated disclosure of mercury levels in a variety of products was consistent with First Amendment protection(s) of commercial speech. *Id*. at 115. The court acknowledged that, while the language of the Vermont statute was clearly intended to reduce the amount of mercury released into the environment, *Zauderer* was the appropriate choice as such a goal was "inextricably intertwined with the goal of increasing consumer awareness of mercury in a variety of products." *Id*. To be sure, the court explicitly noted that the issue presented in *Sorrell* was not related to the prevention of "consumer confusion or deception." *Id.* However, because of the "policies underlying the First Amendment…and…the distinction between compelled and restricted commercial speech" the case was still "governed by the reasonable-relationship rule in *Zauderer*." *Id*. Evidently, while sometimes relevant to the application of *Zauderer's* "reasonably relates" standard, whether the law intends to prevent the deception of consumers has no bearing on whether to apply this standard.

Thus, synthesizing these cases reveals the essential basis to *Zauderer* review: the regulation must constitute a compelled disclosure (rather than prohibition or restriction) of factual information (rather than opinions). For example, in *Environmental Defense Center, Inc. v. EPA*, 344 F.3d 832 (9th Cir. 2003), the Ninth Circuit upheld the *compelled disclosure* of the effects of improper waste disposal because the disclosure was "consistent with the regulatory

goals of . . . the Clean Water Act." *Id*. at 849. In so doing, the court noted that the disclosure was "non-ideological" because the information was based on *fact rather than opinion*. *Id*. (emphasis added). Specifically, the court reasoned that the required disclosure was factually based because, in fact, the challenged provisions "need not dictate any specific speech at all." *Id*. Similarly, the MERK Act's requirement of live-video surveillance does not dictate any specific speech to Appellant. In other words, where the MERK Act plainly does not prohibit or restrict speech, it is self-evident that the Act compels disclosure. Additionally, through the use of continuous, unadulterated footage, the Act fulfills the second requirement of a disclosure-based reading of *Zauderer*, as ASA is compelled to disclose only factual information; i.e. the transparent, live-feed depiction of how meat is handled and slaughtered before it reaches the consumer.

Moreover, contrary to the findings of the District Court, the First Circuit has indeed clearly extended the *Zauderer* standard to interests other than consumer deception. *See, e.g., Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 n.8 (1st Cir. 2005) (per curiam) ("[Plaintiff] states that the holding in *Zauderer* is 'limited to potentially deceptive advertising directed at consumers.'…[W]e have found no cases limiting *Zauderer* in such a way."). Therefore, the District Court correctly followed the guidance of other courts, including the First Circuit, to employ the *Zauderer* standard to the case at hand and, for the aforementioned reasons, this Court is obligated to affirm that decision.

B. Because the government has substantial interest in preventing animal cruelty and enabling the increase of flow of information into the market, and because the means employed by the government are reasonably tied to those interests, the MERK Act satisfies the *Zauderer* test and is therefore constitutional under the First Amendment.

Indeed the first part of the test as prescribed in *Zauderer* has already been established upon the determination that *Zauderer* guides the level of scrutiny applicable to the MERK Act, i.e. (1) the regulation must constitute a compelled disclosure factual information. The remainder of the test requires the (2) assessment of the adequacy of the interest(s) in motivating the law and whether (3) the means employed by the government are reasonably related to its purported interests. *Zauderer*, 471 U.S. at 651 (noting commercial speakers' rights are adequately protected as long as…disclosure requirements are reasonably related to the state's interest).

The government has substantial interest preventing animal cruelty and introducing more information into the market. Moreover, when these interests are coupled together, they are especially worthy of lenient scrutiny so as to promote the democratic values that the First Amendment aims to protect. Appellant seeks support for the argument that the government does not have a substantial interest in preventing animal cruelty over free speech rights. *United States v. Stevens*, 533 F.3d 218, 227-28 (3d Cir. 2008). However, *Stevens* does not bear weight on the case at hand because it dealt with the problem of state action that restricted speech. Here we are dealing with government action that compels speech. As elucidated above, the "material differences" between disclosure requirements and outright prohibitions concerning free speech necessitates different judicial approaches. *Zauderer* at 650.

Moreover, Appellant's misguided use of *Stevens* is also evident in looking to the prevailing history of protections that have long been afforded to animals. More specifically, the Humane Methods of Slaughter Act of 1958 has made clear it is the policy of the United States to ensure that the slaughtering and handling of animals "shall be carried out only by humane methods." 7 U.S.C. § 1901. Additionally, along with promoting needless suffering, Congress

found that humane methods of slaughter also results in safer working conditions, improvement of products and economies in operations, and other benefits…which tend to expedite orderly flow of livestock…in interstate and foreign commerce. *Id*. Hence, as it stems not only from compassion for the animals themselves but serves to promote a safer, more beneficial industry the government's interest in preventing the inhumane treatment and slaughter of animals is clearly more than adequate to pass muster under *Zauderer*.

ASA also contends that the government also has no substantial interest in enabling consumers to know how their food was produced. In so doing, ASA cites to *International Dairy Foods Association v. Amestoy*, in arguing that "consumer curiosity alone is not a strong enough state interest to sustain the compulsion of even an accurate, factual statement." 92 F.3d 67, 74 (2d Cir. 1996). There, the Second Circuit reasoned that a Vermont statute that required milk producers to disclose whether their products contained bovine growth hormones was unconstitutional under the First Amendment because the government did not argue an interest other than consumer gratification. *Id*. Yet, reliance on *Amestoy* is in conflict with more recent precedent that, as stated above, clarified that "*Zauderer*, not *Central Hudson*" is the proper backdrop for compelled commercial disclosure cases brought under the First Amendment. *See Sorrell*, 272 F.3d at 115. The court in *Sorrell* went on to elaborate on *Amestoy's* status as an anomaly within the context of compelled commercial speech by describing it as "expressly limited to cases in which a state disclosure requirement is supported by no interest other than the gratification of 'consumer curiosity.'" *Id*. & n.6. Taking that into consideration, it seems *Amestoy* remains thusly limited in light of the fact that other panel decisions which limited *Zauderer* were recently overruled by the en banc D.C. Circuit in *American Meat Institute*, *see* 760 F.3d at 22.

Furthermore, *Amestoy* is inconsistent with the weight of authority from other circuits. *See Am. Meat. Inst.*, 760 F.3d at 48 (noting that demonstrated consumer interest is a legitimate government interest in requiring disclosure of country-of-origin labeling for food products); *International Dairy Foods Association v. Boggs*, 622 F.3d 628, 640-42 (6th Cir. 2010) (applying *Zauderer* to uphold labeling law regarding bovine growth hormone, recognizing general confusion among Ohio consumers regarding what was in the milk they purchase); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (opinion of Boudin, C.J., and Dyk, J.) ("[T]here are literally thousands of similar [disclosure] regulations on the books…The idea that these thousands of routine regulations require an extensive First Amendment analysis is mistaken."). Consequently, *Amestoy's* continuing validity is uncertain and it would be in error to apply *Amestoy* in the instant case because the gravamen of the consumer's interest in this case reaches far beyond that of mere curiosity. In *AMI*, the consumer expressed a legitimate interest to know the country of origin of their food. Here, as in *AMI*, consumers indeed have a genuine interest to know where their food comes from; and whether it was a slaughterhouse that adhered to the law and practiced humane treatment. The District Court was right to disagree with *Amestoy*.

Finally, keeping in mind the ancillary benefits of humane methods of slaughter (as enumerated by Congress), it should be noted that the interests in promoting better welfare for animals and empowering consumers to make educated choices about their food purchases are intertwined such that compelling the disclosure of live-stream footage of the handling and slaughter of animals is reasonable. Firstly, it is well within the authority of the United States Department of Agriculture to appoint inspectors to examine and inspect the method" by which

animals are slaughtered and handled "for the purpose of preventing…inhumane slaughtering." 21 U.S.C. § 603(b). Secondly, there are some very humbling statistics that must be considered in order to fully understand the challenge the USDA faces in actually conducting such inspections effectively. Of the currently amenable species regulated by the USDA (such as cattle, hogs, sheep, and lamb) approximately 147 million were slaughtered in the United States in the year 2013 alone. The Humane Society of the United States, Section on Farm Animal Statistics: Slaughter Totals, by Species (1950 - 2014) (Jan. 22, 2015 8:45 p.m.) http://www.humanesociety.org/news/resources/research/stats_slaughter_totals.html.

What is more, the MERK Act proposes to extend federal inspection to poultry, a species which is currently not listed under the Humane Methods of Slaughter Act. *See* 21 U.S.C. § 601(j). In so doing, the number of animals to be subjected to inspection would rise to approximately 9 billion per year (or approximately 25 million per day). *See* The Humane Society of the United States, Section on Farm Animal Statistics: Slaughter Totals, by Species (1950 - 2014). Evidently, the sheer volume of animals thrust under the regulatory scheme of the MERK Act would require more eyes than would be economically plausible for the Secretary of Agriculture to appoint as inspectors. Hence the intertwining of interest(s) in preventing inhumane treatment of animals and empowering the consumer with more access to information. The unfathomable number of animals slaughtered in the United States makes it nearly impossible for the USDA to inspect and thus ensure that every animal is handled and slaughtered humanely. Thus, with the help of continuous live-feed footage of slaughter plants made publicly accessible, the government will, with the cooperation of concerned consumers, more efficiently be able to ensure that slaughterhouses maintain humane (and therein safer) practices. In turn, consumers are

given access to information that will allow them to make well-informed private decisions with respect to where they choose to buy their meat. Therefore, the means employed by the MERK Act are reasonably related to its ends.

In sum, precedent strongly supports the application of *Zauderer* to problems beyond deception as is presented at the case at hand. Therein, because the MERK Act only compels the disclosure of factual information and its means reasonably relate to the substantial interests of preventing inhumane treatment of animals and enabling consumer awareness, the District Court was correct in finding that Appellant failed to state a claim under the First Amendment.

III. ASA cannot pursue a facial challenge to the MERK Act under the Fourth Amendment because the issue is not ripe, the ASA lacks standing and ASA has not proved that the Act is facially unconstitutional.

A. Because ASA challenges the law pre-enforcement, the issue is not ripe because it is not yet fit for judicial review nor have they adequately plead hardship.

Requests for a declaratory judgment may not be granted unless they arise within a controversy that is "ripe" for judicial resolution. *See Abbott Labs. v. Gardner,* 387 U.S. 136, 148–49, 87 S.Ct. 1507 (1967) *abrogated on other grounds, Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980 (1977*)*; *Verizon New England, Inc. v. Int'l Broth. of Elec. Workers, Local No. 2322*, 651 F.3d 176, 188 (1st Cir. 2011) ("Ripeness is an Article III jurisdictional requirement."); *Ernst & Young v. Depositors Econ. Prot. Corp.*, 45 F.3d 530, 534 (1st Cir. 1995) (stating that courts lack subject matter jurisdiction to consider unripe claims).

When "determining whether a law is facially invalid," as when determining whether a case is ripe, "we must be careful not to ... speculate about 'hypothetical' or 'imaginary' cases" or to "premature[ly] interpret ... statutes on the basis of factually barebones records." *Wash. State*

Grange v. Wash. State Republican Party, 552 U.S. 442, 128 S.Ct. 1184, 1190–91 (2008) (internal quotation marks omitted). As-applied challenges, the "basic building blocks of constitutional adjudication", remain the preferred route. *Gonzales v. Carhart,* 550 U.S. 124, 127 S.Ct. 1610, 1639 (2007) (internal quotations omitted). Facial challenges are disfavored among Supreme Court jurisprudence. *See also Crawford v. Marion County Election Board,* 553 U.S. 181, 128 S.Ct. 1610, 1621-23 (2008) (the Court explained that plaintiffs mounting facial challenges "bear a heavy burden of persuasion," then rejected a facial challenge to Indiana's voter-identification requirements); *Wash. State Grange,* 128 S. Ct. at 1191 (2008) (holding that the speculation that Washington's primary system would confuse voters was not enough reasoning that facial challenges are disfavored due to increased risk of premature adjudication).

A determination of ripeness requires an assessment of two factors: the fitness of the issues for judicial decision and the hardship to the parties if court consideration is withheld. *Abbott Labs.*, 387 U.S. at 149 (1967). *See also Verizon New England, Inc.,* 651 F.3d at 188 (1st Cir.2011) (interpreting *Abbott Labs* and *Ernst & Young* as requiring hardship and fitness for review) (quoting *Ernst & Young,* 45 F.3d at 535 (1st Cir.1995)). "The critical question concerning fitness for review is whether the claim involves uncertain and contingent events that may not occur as anticipated or may not occur at all." *McLnnis-Misenor v. Maine Med. Ctr.*, 319 F.3d 63, 70 (1st Cir. 2003). There must be no circumstances in which the provision may be constitutionally applied. *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095 (1987).

As for the question of hardship, courts must consider "whether the challenged action creates a 'direct and immediate' dilemma for the parties." *Verizon New England, Inc.* 651 F.3d at 188 (1st Cir.2011) (quoting *W.R. Grace & Co. v. United States Envtl. Prot. Agency*, 959 F.2d 360,

364 (1st Cir. 1992)). "This inquiry encompasses the question of whether plaintiff is suffering any present injury from a future contemplated event." *McLnnis-Misenor*, 319 F.3d at 70. The First Circuit has affirmed that these inquiries are highly fact-dependent. *Verizon New England, Inc.* 651 F.3d at 188 (1st Cir.2011) (quoting *Doe v. Bush,* 323 F.3d 133, 138 (1st Cir.2003)).

Generally facial challenges to government regulations are not ripe. *See Texas v. United States,* 523 U.S. 296, 300, 118 S.Ct. 1257 (1998) (holding that issue was not ripe because the hardship of a "threat to federalism" was not enough; the operation of the statute could not be determined based on contingent events that may or may not occur but required particular facts); *Lujan v. National Wildlife Federation,* 497 U.S. 871, 899, 110 S.Ct. 3177 (1990) (holding that the claim was not ripe because the federal agency regulations had not been applied to the plaintiff's situation and ripeness requires concrete action in applying the regulation to the claimant in a way that harms him); *Sibron v. New York*, 392 U.S. 40, 57, 88 S.Ct. 1889 (1968) (in refusing to decide the facial challenge of an ordinance the Court stated, "[t]he constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case"); *Toilet Goods Ass'n, Inc. v. Gardner,* 387 U.S. 158, 163, 87 S.Ct. 1520 (1967) (holding the issue was not ripe because there was no way of knowing what e-mail accounts or types of e-mail accounts the government might investigate in the future even though they accessed e-mail accounts in the past); *Warshawk v. United States*, 532 F.3d 521(6th Cir.2008) (holding that the Fourth Amendment facial challenge was not ripe since the Court could not discern whether the government would ever actually access the plaintiff's emails in the future as authorized by the law at issue).

Like the cases of *Texas*, *Lujan*, *Sibron, Toilet Goods,* and *Warshawk,* ASA's challenge is

not fit for judicial review and does not allege a hardship for purposes of surviving a motion to dismiss. Under the fitness review, ASA has not shown a specific set of circumstances under which the statue would harm the organizations it represents. There is no allegation that the government will review the recordings – or which recordings - for criminal sanctions or otherwise. The harm it could suffer is contingent on the video being inspected and reported to the inspector, investigated and charged. This is not any different that the harm suffered from the undercover agents who record inhumane acts and disseminate the footage to the public.

Nor are the civil sanctions for non-compliance enough to amount to a hardship. They have not alleged a direct and immediate dilemma. They merely allege that a general requirement to record video and live-stream the video (or make it available to the USDA, subject to the Freedom of Information Act disclosures to the public) or pay civil fines may result in some harm. The fine is not high. In fact, when Congress introduced the Meat Eaters' Right to Know Act (House Bill 108 by Rep. Panop T. Kahn, D- Calif.), they found that, "Slaughterhouses consider the Humane Slaughter law penalties merely the 'cost of doing business."

The ASA's challenge is unlike *Patel,* where the court applied the "Fourth Amendment" principles governing administrative record inspections, rather than those that apply when the government searches for evidence of a crime or conducts administrative searches of non-public areas of a business". *Patel*, 739 F.3d at 1063-64 (9th Cir.2013) Here, the ASA challenges an administrative search of a non-public area of business. Thus, ASA cannot pursue a facial challenge under the Fourth Amendment because the issue is not ripe.

B. The ASA cannot prove associational standing to pursue a facial challenge to the MERK Act because Fourth Amendment requires a plaintiff-specific analysis.

Even if neither side nor the lower court raises the issue of standing, the Court is required to address it. *See FW/PBS, Inc v city of Dallas*, 493 US 215, 110 S.Ct. 215 (1990). Standing and ripeness inquiries overlap. *See Warth v. Seldin* 422 U.S. 490, 499 n. 10, 95 S.Ct. 2197 (1975) ("The standing question thus bears close affinity to questions of ripeness—whether the harm asserted has matured sufficiently to warrant judicial intervention."). Standing means that federal courts may adjudicate only actual cases and controversies. *See* U.S. Const. art. III, § 2 (extending judicial power to cases and controversies); Declaratory Judgment Act, 28 U.S.C. § 2201(a) (referring to an "actual" controversy); *Daimler-Chrysler Corp. v. Cuno,* 547 U.S. 322, 340-41, 126 S.Ct. 1854 (2006) (the case or controversy requirement is crucial in maintaining the Constitutional balance of power).

Petitioners must "allege ... facts essential to show jurisdiction", otherwise they have no standing. *McNutt v. General Motors Acceptance Corp of India,* 298 U.S., 178, 189, 56 S.Ct. 780, 785. Plaintiffs must show (1) that they have suffered an injury in fact, (2) that the injury is fairly traceable to defendant's allegedly unlawful actions, and (3) that likely, and not merely speculative, that the injury will be redressed by a favorable decision. *Animal Welfare Institute v. Martin*, 623 F.3d 1971 (1st Cir. 2010) (quoting *Lujan*, 504 U.S. at 560- 61).

An association may bring an action in a representational capacity when (1) at least one of its members would have standing to sue as an individual, (2) the interests it seeks to protect are germane to the organization's purpose," and (3) neither the claim asserted nor the relief requested requires the participation in the lawsuit of each of the individual members. *Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333, 343, 97 S.Ct, 2434, 2441 (1977). *See also Dubois v. U.S. Dep't of Agric.,* 102 F.3d 1273, 1281 & n. 11 (1st Cir.1996).

In some cases, where an individual was required to show actual injury, the association did not have standing under the third prong of the representational capacity factors. *See Summers v. Earth Island Institute,* 555 U.S. 488, 129 S.Ct. 1142 (2009) (holding that the plaintiffs did not have Article III standing to facially challenge agency regulations that had not been applied to any specific projects on the regulated lands, because the plaintiffs had not suffered concrete and particularized injury and thus, the association lacked standing); *Pennell v. City of San Jose*, 485 U.S. 1, 108 S.Ct. 849, 855(1988) (holding that because it was speculative whether any of the associations members would be injured in fact by the Ordinance's tenant hardship provisions, the appellee lacked standing).

Because the Court is obligated to address standing, the Court must consider whether any one of the individual slaughterhouses that ASA represents would have standing. Under the three prong analysis of *Summers* and *Pennell*, the ASA fails to have standing. Similar to the determination of a concrete harm under ripeness, the individual slaughterhouses cannot prove that they will suffer a concrete, likely injury. Alternatively, the ASA cannot allege a general injury under the Fourth Amendment, which is a fact-specific analysis.

C. The ASA cannot prove that the MERK Act is facially unconstitutional because Fourth Amendment facial challenges made pre-enforcement are highly disfavored.

A "plaintiff can only succeed in a facial challenge by establishing that no set of circumstances exists under which the Act would be valid, '*i.e.*, that the law is unconstitutional in all of its applications.' *Wash. State Grange,* 552 U.S. at 449 (2008) (quoting *United States v. Salerno,* 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)). To determine whether a law is facially invalid the Court "must be careful not to go beyond the statute's facial

requirements and speculate about 'hypothetical' or 'imaginary' cases. *See United States v. Raines,* 362 U.S. 17, 22, 80 S. Ct. 519 (1960). The Court must keep in mind that " '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.' " *Ayotte v. Planned Parenthood of Northern New Eng.,* 546 U.S. 320, 329, 126 S. Ct. 961 (2006) (quoting *Regan v. Time, Inc.,* 468 U.S. 641, 652, 104 S. Ct. 3262 (1984) (plurality opinion)).

In the Fourth Amendment context, facial challenges are not successful due to the nature of the Fourth Amendment, which requires a specific factual context in order to determine whether a "search" occurred under Supreme Court precedent. *See e.g., U.S. v. Warie,* 728 F.3d 1, 17-18 (1st Cir. 2013) (dissent maintained the view that the majority could not rule on this facial challenge without more facts)*; Free Speech Coalition, Inc. v. United States,* 677 F.3d 519, 543 (3d Cir. 2012); *United States v. Rundle,* 402 F.2d 701, 704 (3d Cir. 1968); *United States ex rel. McArthur v. Rundle,* 402 F.2d 701, 704–05 (3d Cir.1968) (stating that in the case of warrantless searches, courts are required to consider the concrete factual context); *United States v. Baker,* 78 F.3d 135, 138 (4th Cir. 1996); *United States v. Holloway,* 962 F.2d 451, 454 (5th Cir. 1992); *Warshawk v. United States*, 532 F.3d 521(6th Cir.2008) (holding that the Fourth Amendment facial challenge was not ripe since the Court could not discern whether the government would ever actually access the plaintiff's emails in the future as authorized by the law at issue); *Patel v City of Los Angeles,* 738 F.3d 1058 (9th Cir.2013) (en banc) (allowing a facial attack on a law requiring hotel operators to allow police to inspect guest records as it was a physical intrusion in the hotel and invasion in privacy interests in the business records). The law is clear that the ASA's pre-enforcement suit is premature.

In this case, ASA has not proved that every enactment of the Act is unconstitutional. In

fact, the MERK Act does not subject the poultry plants to a fine for not streaming the video. MERK § 5 (proscribing that slaughter plants must video record but only meat companies have to stream the video or provide it to the USDA). Nor does the ASA contemplate the slaughterhouses within its association that are not federally regulated (local slaughterhouses) and thus not subject to the law. Finally, because the nature of the analysis under the Fourth Amendment generally requires a fact-specific concrete analysis, *after* the harm has been done, the Fourth Amendment facial challenges are generally unsuccessful. Like the plaintiffs in *Warie, Free Speech, Warshawk and Rundle*, the ASA will have to prove a specific concrete context to the search. Since ASA has no way of asserting a specific factual context *pre-enforcement*, the facial challenge will fail.

The ASA cannot bring a facial challenge to the MERK Act because the case is not ripe, the organization lacks standing and because ASA cannot prove that the MERK is facially unconstitutional.

IV. Assuming the ASA can bring a facial challenge to the MERK Act, it falls within the exception to the prohibition on warrantless searches because slaughter plants are a closely regulated industry.

A. The slaughter plants are a closely regulated industry subject to a lower expectation of privacy.

Taking all facts plead by the Plaintiff as true assumes that through the MERK Act the government will engage in an unreasonable warrantless search. The Fourth Amendment's constitutional prohibition against warrantless searches applies to civil, as well as criminal, governmental intrusions. *See Camara v. Municipal Court of City and County of San Fran.,* 387 U.S. 523, 528–29, 87 S.Ct. 1727 (1967) (holding that warrantless inspection of private dwelling by municipal administrator without owner consent is generally unreasonable absent limited

circumstances); *See v. City of Seattle,* 387 *U.S.* 541, 545–46, 87 *S.Ct.* 1737, 1740–41 (1967) (holding that administrative entry, in absence of consent, to non-public portions of commercial establishment may be enforced only through framework of warrant procedure).

The United States Supreme Court has held that expectation of privacy of the owner of commercial property is less than that of someone in their private home. *See U.S. v. Biswell,* 406 U.S. 311, 92 S. Ct. 1593 (1972). Administrative searches of commercial property as authorized by legislative schemes do not necessarily require a warrant in order to be reasonable under the Fourth Amendment. *See Id.* (sustained warrantless searches of firearms dealers under the Gun Control Act of 1968, reasoning that the regulatory inspections "further[ed] urgent federal interest"); *Colonnade Catering Corp. v. U. S.,* 397 U.S. 72, 90 S. Ct. 774 (1970). The burden of proving an exception to the warrant requirement of the Fourth Amendment on the ground that the search was an administrative search of commercial property rests with the party asserting the exception. *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 98 S. Ct. 1816 (1978).

When a closely regulated industry has an interest in privacy that is less than the governmental interest in regulating the regulatory scheme, a warrantless inspection can be made without violating the Fourth Amendment. *New York v. Burger*, 482 U.S. 691, 699- 700, 107 S. Ct. 2636 (1987) (An owner or operator of a business may have an expectation of privacy in commercial property that society is prepared to consider reasonable but certain industries have such a history of government oversight that no reasonable expectation of privacy could exist). Factors to consider when determining whether a particular industry is closely regulated include: duration of the regulation's existence, pervasiveness of the regulatory scheme, and regularity of the regulation's application. *See Donovan v. Dewey*, 452 U.S. 594, 101 S. Ct. 2534 (1981)

(holding that federal mine inspectors may conduct warrantless inspections); *See United States v. Biswell*, 406 U.S. 311, 316 (1972) (it is the pervasiveness and regularity of the federal regulation that ultimately determines whether a warrant is necessary to render an inspection program reasonable under the Fourth Amendment).

Examples of closely regulated industries subject to the administrative warrantless searches include those related to the care and transport of animals. *See Knaust v. Diguesaldo*, No. 13-11374, 2014 WL 5462491 (5th Cir.2014) (holding that the Animal Welfare Act, 7 U.S.C. § 2131 *et seq.,* is a comprehensive regulatory scheme governing the interstate transportation, sale, and handling of certain animals and the purpose of this Act is to insure the humane treatment of those animals); *Hodgins v. U.S. Dept. of Agriculture*, 238 F.3d 421 (6th Cir. 2000) (research animal business qualified as one that was closely regulated); *Lesser v. Espy*, 34 F.3d 1301 (7th Cir. 1994) (holding that selling rabbits to be used in laboratory research conducted by the administrator of the Animal and Plant Health Inspection Service (APHIS) pursuant to the Act fit within the exception to the warrant requirement of the Fourth Amendment, for closely regulated industries, despite the short duration of regulation of the business of selling research animals); *U.S. v. Argent Chemical Laboratories, Inc.,* 93 F.3d 572 (9th Cir. 1996) (the exception to the search warrant requirement for closely regulated industries permitted federal agents to seize veterinary drugs from the manufacturer although such a seizure occurred several months after the governmental agents last inspected the manufacturer's premises).

The ASA is a member of a closely regulated industry because like the cases above, there are many acts regulating the sale, transport, care and humane slaughter of animals. *See e.g.,* Animal Welfare Act 7 U.S.C. § 2131 *et seq;* Federal Packing and Stockyards Act, 1921, § 401, 7

U.S.C.A. § 221 (regulating livestock); Federal Food, Drug, and Cosmetic Act, § 704(a)(1), 21 U.S.C.A. § 374(a)(1) (regulating veterinary drugs); Federal Meat Inspection Act; The Agricultural Marketing Act; the Fair Packing and Labeling Act; Humane Methods of Slaughter Act, 7 U.S.C. § 1901. Ultimately, the amount of agency oversight for handing animals is closely regulated and it follows that slaughtering animals for food would also be heavily regulated. Thus, the slaughter plants fall within the warrantless entry exception to the Fourth Amendment's unreasonable search prohibitions.

B. The MERK Act satisfies all elements of the *Berger* test.

Thus, once a business is determined to be part of a closely regulated industry, then the Court must decide whether the alleged warrantless search was reasonable. *See Burger,* 482 U.S. at 702 (1987). This is because the Fourth Amendment prohibits unreasonable searches even during administrative inspections of private commercial property. *See Marshall v. Barlow's, Inc.,* 436 U.S. 307 (1958) (in those industries, "when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation"); *Donovan v. Dewey*, 452 U.S. at 594 (1981). The Supreme Court of the United States articulated a three-part test to determine whether a warrantless inspection of a commercial property is reasonable: whether a substantial governmental interest informs the regulatory scheme, the warrantless inspection is necessary to further the regulatory scheme, and the inspection provides a constitutionally adequate substitute for a warrant. *Burger*, 482 U.S. at 702- 03.

In many cases, cases involving animals have been seen as reasonable searches without a warrant pursuant to the closely regulated industry exception. *See e.g., U.S. v. Maldonado,* 356 F. 3d 130 (1st Cir. 2004) (warrantless inspection of a commercial trucks is permissible under the

administrative search exception to the Fourth Amendment; government's legitimate interests in regulating interstate trucking to ensure traveler safety, hold costs in check, and restrict what commodities could be transported were furthered by regulatory scheme governing interstate trucking, inspection of trucks was necessary to further regulatory scheme, and regulatory scheme provided notice and safeguards to truckers with respect to inspections); *Harkey v. deWetter*, 443 F.2d 828 (5th Cir. 1971) (city ordinance regulating the occupants of residences who maintained horses, calves, and other animals and providing that the director could make, or cause to be made, inspections of any places where animals or birds were kept was reasonable and not unconstitutional on its face); *Hodgins*, 238 F.3d at 421 (6th Cir. 2000) (the substantial governmental interest served by the Act was to prevent the abuse of research animals and to protect against interstate schemes to steal pets for sale to research facilities, the purposes served by the Act were such as to present a need for surprise inspections, and the owners of animal dealerships licensed under the Act were certainly put on notice that their premises would be subject to inspection at least once each year and that there might be follow–up inspections if violations were found; repeat searches not unconstitutional); *Michigan Wolfdog Ass'n, Inc. v. St. Clair County*, 122 F. Supp. 2d 794 (E.D. Mich. 2000) (since the animal industry had a long tradition of close governmental supervision, Michigan had a substantial interest in regulating wolf–dog crosses along with other potentially dangerous animals for the protection of the general population, and the Act's inspection program would provide a constitutionally adequate substitute for a warrant by advising a wolf–dog owner that the search was being made and by limiting the discretion of the inspecting officers to search only a facility, which did not include a private home, and only during reasonable hours); *Lesser v. Espy,* 34 F.3d at 1301 (7th Cir. 1994)

(Governmental regulation of rabbitries that breed and sell rabbits for use in research was arguably pervasive, the effect of the short duration of regulation did not outweigh the effect of the degree of regulation, the warrant requirement for the most routine inspection would interfere with the Department of Agriculture's ability to function and unnecessarily increase the cost of the Secretary of Agriculture's operations without a significant increase in privacy, and the Act's inspection program provided a constitutionally adequate substitute for a warrant, concluded the court.); *Western States Cattle Co., Inc. v. Edwards*, 895 F.2d 438 (8th Cir. 1990), concluded that the warrantless administrative search of the livestock dealers' business under the Act was valid where the regulation authorizing the searches required notice to the owner in the form of a request, permitted inspections only during normal business hours, and limited inspections to specified records and facilities); *Benigni v. Maas,* 12 F.3d 1102 (8th Cir. 1993) (decided that AWA warrantless administrative searches were reasonable because AWA addressed a substantial governmental interest, since Congress recognized the need for federal legislation because the abuse of animals occurred nationwide and state laws were ineffective in preventing the abuse; each applicant for a license or a renewal of a license under the AWA had to acknowledge the receipt of a copy of the regulations and agree to comply with them, and it was inconceivable that a licensed dealer would have any doubt about being subject to routine and regular compliance inspections); *Stanko v. State of Mont.,* 39 F.3d 1188 (9th Cir. 1994) (holding that the Montana Livestock Marketing Act allowing inspectors to conduct livestock inspections both to verify ownership and to check for disease, did not violate the Fourth Amendment, since the marketing of livestock was a pervasively regulated industry, there was a substantial governmental interest in inspecting livestock to deter theft and detect disease and those objectives required warrantless

inspections, and there was no allegation that the inspections were made at unreasonable times or were unreasonable in scope); *U.S. v. Argent Chemical Laboratories, Inc.*, 93 F.3d 572 (9th Cir. 1996), (the pervasiveness and regularity of the current regulatory scheme of veterinary drugs were sufficient to make it closely regulated and the government had a substantial interest in ensuring the safety and effectiveness of animal drugs, warrantless searches and seizures were necessary to further the regulatory scheme that ensured the integrity of veterinary drugs, and the Food, Drug, and Cosmetic Act, § 704(a)(1), 21 U.S.C.A. § 374(a)(1), provided a constitutionally adequate substitute for a warrant).

Here, the government interest in preventing animal cruelty and informing consumers about slaughter plants that otherwise go virtually unregulated, is substantial. The inspectors cannot adequately prevent cruelty and inform consumers without the video recording and video streaming. As to the third prong, because the MERK Act itself provides notice and nearly three years for the plants to become compliant, the ASA member businesses have adequate notice. Because the video recording would be constant and limited to areas where the carcasses and/or animal bodies are, the MERK is sufficiently limited in scope. Thus, the USDA does not require a warrant to "search" ASA premises and the MERK video streaming is not an unreasonable search that would violate the Fourth Amendment.

Because the slaughter plants operate in a closely regulated industry, the three part Berger test applies and here, any video recording or streaming would be a reasonable search that does not require a warrant under the Fourth Amendment.

CONCLUSION

The United States District Court for the District of Massachusetts properly granted

Respondents-Appellees motion to dismiss for failure to state a claim under FRCP 12(b)(6) because the MERK Act does not violate the First Amendment and does not violate the Fourth Amendment. Alternatively, this Court may dismiss the claim due to Appellants failure to properly assert standing and ripeness on the Fourth Amendment claim. This Court should affirm the United States District Court's holdings.

Respectfully submitted,

Team No. 17

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