Case Nos. 3:14-cv-55440 MJC (ABC)

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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AMERICAN SLAUGHTERHOUSE ASSOCIATION,

Appellant,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; and TOM VILSACK, IN HIS OFFICIAL CAPACITY AS SECRETARY OF AGRICULTURE,

Respondent.

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Appeal from the United States District Court
District of Massachusetts
The Hon. Myra J. Copeland

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# RESPONDENT'S BRIEF

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Team Number 18
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United States Department of Agriculture; and Tom Vilsack, in his official capacity as Secretary of Agriculture

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## STATEMENT OF THE ISSUES

In this case, appellant, the American Slaughterhouse Association ("ASA"), brought an action against the respondent, United States Department of Agriculture and Secretary Vilsack's ("the government") in the United States District Court for the District of Massachusetts asking the court for declaratory injunctive relief indicating that Meat Eaters' Right to Know Act ("the MERK Act") violates the First Amendment and Fourth Amendment. On the government's motion to dismiss for failure to state a claim, the District Court granted the motion on August 15, 2014. On October 31, 2104 plaintiffs filed a timely notice of appeal.

The questions presented are as follows:

1. Does 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?

## STATEMENT OF THE CASE

This case arises out of the MERK Act. In March 2012, Congress passed the Meat Eaters' Right to Know Act (introduced as House Bill 108 by Rep. Panop T. Kahn, D-Calif.), which requires all federally inspected slaughterhouses to install and maintain cameras throughout their facilities in all places where there are animals present, including carcasses. MERK Act § 3. The MERK Act further requires that the footage recorded by the cameras be live-streamed on the website of the company that owns the slaughterhouse, if it has one. MERK Act § 4. Facilities that do not maintain a website must provide the video to the United States Department of Agriculture, which shall make the video available to the public under the Freedom of Information Act (5 U.S.C. § 552). MERK Act § 4. The MERK Act includes a phase-in provision, giving slaughterhouses three years to set up the technology necessary to comply with the law. The statute goes into effect on March 2, 2015. MERK Act § 6.

Plaintiff, ASA, a national trade association of slaughterhouses, brought an action for declaratory judgment and injunctive relief contending that the MERK Act, which requires slaughterhouses to install video cameras on their premises and stream the footage live on their companies' websites, violates the First Amendment and the Fourth Amendment, because it compels speech and authorizes unreasonable government searches. In March 2014, one year before the statute was due to go into effect, ASA filed the present Complaint, alleging that the MERK Act violates the United States Constitution. On August 15, 2015, the court granted the government's motion to dismiss ASA's Complaint in its entirety for failure to state a claim under either the First Amendment or the Fourth Amendment pursuant to Federal Rule of Civil Procedure 12(b)(6). On October 31, 2104 plaintiffs filed a timely notice of appeal.

## STATEMENT OF THE FACTS

(i) In March 2012, Congress passed the MERK Act due to undercover investigations by animal right organizations at slaughterhouses revealing horrific animal abuse (introduced as House Bill 108 by Rep. Panop T. Kahn, D-Calif.).

(ii) The Act requires all federally inspected slaughterhouses to install and maintain cameras throughout their facilities in all places where there are animals present, including carcasses. MERK ACT § 3

(iii) The Act further requires that the footage recorded by the cameras be live-streamed on the website of the company that owns the slaughterhouse, if it has one. MERK Act § 4.

(iv) Facilities that do not maintain a website must provide the video to the United States Department of Agriculture, which shall make the video available to the public under the Freedom of Information Act (5 U.S.C. § 552). MERK Act § 4.

(v) The MERK Act includes a phase-in provision, giving slaughterhouses three years to set up the technology necessary to comply with the law. The statute goes into effect on March 2, 2015. MERK Act § 6.

(vi) In passing the MERK Act, Congress found "that the abuse of livestock animals on farms and in slaughterhouses violates the public interest in the humane treatment and slaughter of animals raised for meat and poultry." MERK Act §1 (a).

(vii) Looking to undercover investigations conducted by animal rights organizations, Congress concluded that "egregious mistreatment of animals raised to produce "animal products was sufficiently prevalent to justify stricter oversight and more surveillance.

(viii) In introducing the legislation, Rep. Kahn noted that slaughterhouses "have little incentive to train workers to treat animals humanely, because until recently, consumers were completely in the dark.

(ix) Congress also found "that information about the treatment of these animals is of vital importance to the American consumer. Consumers are curious about where their food comes from and favor laws and policies that create transparency in the food industry." MERK Act § 1 (b). Rep. Kahn observed that the MERK Act would "give consumers the information they need to vote with their wallets"

(x) In March 2014, one year before the statute was to go into effect, ASA filed a complaint alleging the MERK Act violates the United States Constitution.

(xi) On August 15, 2015, granted the government's motion to dismiss ASA's Complaint in its entirety for failure to state a claim under either the First Amendment or the Fourth Amendment pursuant to Federal Rule of Civil Procedure 12(b)(6).

(xii) On October 31, 2104 plaintiffs filed a timely notice of appeal.

## SUMMARY OF THE ARGUMENT

ASA alleges that the MERK Act violates the First Amendment by compelling speech with the requirement to have video surveillance installed in slaughterhouses and streamed live on company websites. The MERK Act was created to inform the public and consumers about the conditions in which animals are subjected to in slaughterhouses. This act is a direct response to the public's interest and curiosity in how animals raised for consumption are produced.

The MERK Act's surveillance program is adequately related to the government's interest in informing the public and consumers as the government has a long history in regulating food and providing adequately disclosure to consumers through labeling. There is also a reasonable relationship between the video requirement and the government's interest in preventing animal cruelty. Even though federal inspectors are present at slaughterhouses, it is impossible for them to observe all aspects on the slaughter practice, thus video surveillance is a means at achieving the government's purpose at preventing animal cruelty. Therefore, the MERK Act does not violate the First Amendment.

ASA alleges that the MERK Act violates the Fourth Amendment's prohibition on unreasonable searches. They argue that the streaming requirement constitutes a continuous and ongoing search of slaughterhouses with no warrant, probable cause, or even reasonable suspicion that a crime is being committed and without meeting the Supreme Court's test for warrantless administrative searches.

ASA's facial challenge to the MERK Act on Fourth Amendment grounds is premature as the MERK Act has not yet gone into effect. It threatens to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner

consistent with the Constitution. Further, it frustrates the intent of the elected representatives of the people. Facial challenges should not be entertained easily. In *Sibron v. New York*, 392 U.S. 40 (1968) the court refused to review a Fourth Amendment facial challenge to a New York law and instead analyzed the specific circumstances of the search conducted on the defendants of the case before the court. In *Warshak v. United States*, 532 F.3d 521 (6th Cir. 2008) (en banc), the court also refused to facially review Fourth Amendment challenge hold that plaintiff's challenge was not ripe for review.

Courts have held the warrantless searches of closely regulated business are constitutional as long as they serve a substantial government interest, further the regulatory scheme and the search limits the discretion of the inspecting officers. *New York v. Burger,* 482 U.S. 691, 702 (1987). In this case, the MERK Act's inspection program serves a substantial government interest in protecting animals and informing consumers. The United States has had a substantial government interest in regulating the process and packing of meat given all of the regulatory agencies that oversee the safety of our food. The inspection program is necessary to further the regulatory scheme by serving as a deterrent to animal cruelty as slaughterhouses will know they are under surveillance and will be less likely to cut corners. The inspection program provides limitations on the discretion afforded to inspecting officers since everything is being recorded, inspectors cannot discriminate in what to record.

In conclusion, the MERK Act does not violate the First or Fourth Amendment. ASA has failed to show that the MERK Act's disclosure requirement is unjustified and unduly burdensome. ASA should also be prevented from facially challenging the MERK Act under the Fourth Amendment as their claim is not yet ripe for review. Further, the MERK Act's inspection

program provides a constitutionally adequate substitute for a warrant by putting slaughterhouses on notice that they are always being watched, there sufficient restraints on the discretion of the inspector as it requires all slaughterhouses to livestream everything, and it furthers the regulatory scheme, which is to promote the humane treatment of animals for slaughter.

## ARGUMENT

### I. THE MERK ACT DOES NOT VIOLATE THE FIRST AMENDMENT

In *Discount Tobacco & City Lottery, Inc. v. United States*, 674 F.3d 509 (2012), the United States Court of Appeals for the Sixth Circuit rejected a facial challenge to the constitutionality of the warning label requirement. In essence, the court indicated that the graphic cigarette warning labels don't violate the U.S. Constitution's free speech guarantee. The Court reasoned that the labels serve as disclaimers to the public regarding the incontestable health consequences of using tobacco, and did not pose any restrictions to plaintiff's speech. The graphic warning labels serve to inform the public and consumers.

Similarly, the MERK Act also serves to inform the public and consumers. ASA may argue that the requirements of videotaping slaughterhouses is completely different than a warning label. However, both serve the same purpose, to inform the public. The graphic warning label is informing the public of health risks, which are well known and documented. The MERK Act does not restrict speech. The video surveillance of slaughterhouses is merely showing the incontestable facts of how the animals raise for consumption are being processed, which up to now has been a complete mystery to most people. The MERK act is a direct response to the public's interest and curiosity in how the meat they consume is produced. Thus, the MERK Act does not violate the First Amendment, because the video surveillance of slaughterhouses works the same as a disclaimer at informing the public and consumers of factual processes of the treatment of animals for slaughter.

## A. RATIONAL BASIS APPROACH APPLIES TO THE MERK ACT

Courts have previous stated that certain compelled commercial speech fall under the rational basis standard of review. A rational basis standard is applied in circumstances where the government mandates a disclosure because the speech could potentially mislead consumers. Although nothing in the factual findings suggests that the MERK Act is intended to remedy actual deception, it nonetheless automatically works as a deterrent to slaughterhouses because slaughterhouse owners will know they are being watched. The surveillance requirement can be beneficial to the slaughterhouse companies because companies will be more knowledgeable about their employees and what is going on in their slaughterhouses.

Under the rational basis standard, a law requiring a disclosure label on an advertisement that is potentially misleading does not violate the First Amendment so long as there is a "rational connection between the warning's purpose and the means used to achieve the purpose." *Disc. Tobacco City & Lottery v. U.S.*, 674 F.3d 509 (2012). The court in *R.J. Reynolds Tobacco Co. v. U.S. Food and Drug Admin.*, 845 F.Supp 2d 266 (2012) stated that even under the rational basis standard, compelled disclosures containing "purely factual and uncontroversial information" meant to mitigate the effects of misleading speech does not violate First Amendment as long as the disclosure is considered justified and is not unduly burdensome.

A rational basis standard of review should apply to the MERK Act. The purpose of the MERK Act is to inform the public and consumers of the ways in which animals in slaughterhouse are being treated and if the legal requirements to treat animals humanely are being violated. In essence the MERK Act is disclosure of how animals are slaughtered. There is a rational connection between the MERK Act and the government's current regulations requiring

the humane treatment of animals. The "undercover videos taken on farms and in slaughterhouses by animal protection organizations, [which] revealed the egregious mistreatment of animals raised to produce these products" was the motivation behind the MERK Act. MERK Act § 1 (a). The video surveillance requirement is there to ensure that slaughterhouses are truly complying with government regulations.

The video surveillance of slaughterhouses would also be purely factual and uncontroversial information, as the recordings will be unedited footage simply showing how animals are treated and slaughtered. The surveillance is duly justified given the recent events of our nation's history concerning millions of pounds of meat recalls due to inhumane and unsafe meat, which is discussed in further detail in Section II(B) below. ASA has failed to show how the video surveillance is unduly burdensome. On the contrary, the video surveillance is actually beneficial to ASA as slaughterhouses will be able to monitor their employees to ensure they are complying with government regulations to avoid fines or criminal penalties. Accordingly, a rational basis standard of review applies to the MERK Act as it is simply a form of disclosure to avoid misleading the public and consumers are to how meat for consumption is produced.

### B. THE MERK ACT MEETS THE ZAUDERER TEST

The Supreme Court has indicated that the First Amendment protection of commercial speech, such as that of ASA and its members, is "somewhat less extensive than that afforded 'noncommercial speech.'" *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985). ASA may argue that nothing in the factual findings suggests that the MERK Act is intended to remedy actual deception. Therefore, ASA will argue *Zauderer* should be limited to cases in which the government points to an interest in correcting deception, and should have no

application in this case. However, in *American Meat Institute v. U.S. Dept. of Agriculture*, 760 F.3d 18 (2014), the court held that "*Zauderer* in fact does reach beyond problems of deception, sufficiently to encompass disclosure mandates."

ASA will urge the court to apply strict scrutiny review to the MERK Act by applying the rule in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), to "directly advance" a "substantial" government interest. When the Supreme Court analyzed *Central Hudson's* "directly advance" requirement, it has commonly required evidence of the effectiveness of the disclosure mandate. But as the Court recognized in *Zauderer*, such a requirement is unnecessary when the government has an adequate interest to inform consumers about a particular product.

The *Zauderer Test* has two parts. First, the we must look at the adequacy of the interest motivating the law. Second, the law must be "reasonable related" to the government's purported interest. *Zauderer*, 471 U.S. at 651. In other words, there must be a reasonable relationship between the video requirement and the goals of promoting animal welfare and informing consumers.

The government has adequate interest in promoting the humane treatment of animals for consumption. For decades the government has regulated food, specifically meat for human consumption, through various regulatory agencies and federal laws, such as the United States Department of Agriculture ("USDA"), the Federal Meat Inspection Act ("FMIA"), the Poultry Products Inspection Act ("PPIA"), and the Humane Methods of Slaughter Act ("HMSA"), to name a few. Specifically the humane treatment of animals has been federally regulated since 1958 when HMSA was enacted declaring that "the use of humane methods in the slaughter of

livestock prevents needless suffering," and accordingly made it the "policy of the United States that the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods." 7 U.S.C. § 1901.

There is a direct connection between the treatment of animals during slaughter and the safety of meat. The government has long had an interest in promoting consumer health as explained above through the various regulatory agencies and federal laws. When animals are kept in inhumane and filthy conditions, this increases the the unsafe production of meat, consequently compromising the health of consumers.

Moreover, consumers are becoming more sophisticated with their selection of what foods they wish to purchase and eat. Consumers are interested to know how their food is produced as evidenced by the public's growing demand for organic foods, proposed laws requiring the labelling of food that contains genetically modified organisms and the growing movement of vegetarianism and veganism as a way to avoid animal products altogether due to the lack of information on how animals for slaughter are treated. Thus, there is clearly and substantial interest in preventing animal cruelty through the MERK Act's surveillance requirement by informing consumers.

In *American Meat Institute*, the court held that the government's proffered interests in promoting American meat and in protecting the health of consumers was substantial. *American Meat Institute v. U.S. Dept. of Agriculture, 760 F.3d 18 (2014).* The MERK Act allows for consumers to have access to information about the way animals are treated. The government's purpose in the MERK Act is to resolve the "egregious mistreatment of animals raised to

produce" animal products which was found by undercover investigations. This statute focuses on preventing animal cruelty and enabling consumers to see how their food is produced.

The surveillance requirement imposed by the MERK Act is also reasonably related to the government's interest in preventing animal cruelty. In spite of the required presence of federal inspectors at slaughterhouses, "egregious mistreatment of animals raised to produce" animal products is sufficiently prevalent. MERK Act § 1 (a). As discussed above, there are federal laws that already regulate meat for human consumption. Laws requiring a disclosure label on an advertisement that is potentially misleading does not violate the First Amendment so long as there is a "rational connection between the warning's purpose and the means used to achieve the purpose." *Disc. Tobacco City & Lottery v. U.S.*, 674 F.3d 509 (2012).

Similarly, there is a connection between the MERK Act's surveillance program, to prevent animal cruelty, and the means used to achieve that purpose by putting slaughterhouses on notice that they are being watched. The information discovered by undercover investigations, which directly lead to the creation of the MERK Act, proves there are unknown aspects to slaughterhouse practices that are not readily available to the public and consumers. The people of this country have clearly and loudly demanded that they be informed of slaughterhouse practices based on the public's urgency at the enactment of the MERK Act. Given that there government already promotes consumer disclosure of food through federal regulations, such as Fair Packaging and Labeling Act ("FPLA"), there is also a reasonable relationship between the government's interest to informing the public of meat production and the MERK Act.

The requirements the MERK Act imposes are reasonably related to the government's purported interest in providing the consumer access to information on the way the animals are

treated in slaughterhouses. ASA may argue that surveillance requirements are not related to this purpose. However, the information discovered by undercover investigations prove there are unknown aspects to slaughterhouses that is not readily available to the public. The fact that ASA is arguing to prevent video surveillance should give rise to suspicion of what it unknown about slaughterhouses. Due to the variety of ways to treat animals in slaughterhouse it is necessary for there to be the requirement of video surveillance. Otherwise, slaughterhouses may claim to treat animals one way and then change the treatment without the consumer having any knowledge. The requirements of the MERK Act directly advances the government's interest to inform consumers.

In sum, the MERK Act does not violate the First Amendment. The requirements of the Act are necessary to provide consumers with access to information on the treatment of animals in slaughterhouses. The public and "consumers are curious about where their food comes from and favor laws and policies that create transparency in the food industry." MERK Act § 1 (b). In applying the *Zauderer* test to the MERK Act, the government has shown adequate government interest in informing consumers by simply expanding upon regulations already in place that require the disclosure of food products. The MERK Act's surveillance program is reasonably related to the government's interest in preventing animal cruelty, as the public as well as inspectors already present at slaughterhouses, cannot be assured of the humane treatment of animals without visual assurance. Therefore, the MERK Act is constitutional and does not violate the First Amendment.

## II. ASA CANNOT PURSUE A FACIAL CHALLENGE TO THE MERK ACT ON FOURTH AMENDMENT GROUNDS

### A. ASA'S FOURTH AMENDMENT CHALLENGE IS PREMATURE

ASA's Fourth Amendment challenge is premature. Facial challenges run contrary to the fundamental principle of judicial restraint that courts should neither "anticipate a question of constitutional law in advance of the necessity of deciding it" nor "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936).

In *Sibron v. New York*, 392 U.S. 40 (1968), the Supreme Court considered a facial Fourth Amendment challenge to New York's "stop-and-frisk" law where the litigants asked the court to determine whether New York's law was constitutional on its face. The court refused, stating "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." *Sibron*, 392 U.S. at 59. The court got around reviewing the constitutionality of the statute itself by instead analyzing the specific circumstances of the search conducted on the defendants of the case at hand. The MERK Act has not yet gone into effect, thus there is no concrete factual context with which to challenge constitutionality.

ASA may claim that a facial challenge to the Fourth Amendment has been reviewed prior to *Sibron* in the case of *Berger v. New York*, 388 U.S. 41 (1967). In *Berger,* the Supreme Court held that a New York statute that permitted wiretapping without requiring any of the procedural safeguards of the Fourth Amendment was facially unconstitutional. However, the *Berger* case would not be a good comparison to the MERK Act. At first glance, wiretapping and video

surveillance seem to be within the same realm of modern forms of search and seizure. But the difference between *Berger* and the MERK Act is that in *Berger*, the petitioner was not put on notice of the wiretapping. By contrast, the MERK Act puts all slaughterhouses on notice because they are aware of the ongoing search. Therefore, *Berger's* decision with respect to the MERK Act is misplaced.

### B. ASA'S FOURTH AMENDMENT CHALLENGE IS NOT RIPE FOR REVIEW

In *Warshak v. United States*, 532 F.3d 521 (6th Cir. 2008) (en banc), the court refused to facially review Fourth Amendment challenge to the Stored Communications Act, 18 U.S.C. §§ 2701-2711. The court held that plaintiff's challenge was not ripe for review. *Warshak*, 532 F.3d at 525. In ascertaining whether a claim is ripe for review the *Warshak* Court stated that two basic questions must be addressed: "(1) is the claim 'fit[ ] …for judicial decision' in the sense that it arises in a concrete factual context and concerns a dispute that is likely to come to pass? and (2) what is 'the hardship to the parties of withholding court consideration'?" *Warshak*, 532 F.3d at 525.

As indicated above, MERK Act has not yet gone into effect, thus there is no concrete factual context with which to challenge constitutionality. Whether a dispute is to come to pass in the future is also purely speculative. "The ripeness doctrine serves to 'avoid[ ] … premature adjudication' of legal questions and to prevent courts from 'entangling themselves in abstract' debates that may turn out differently in different settings." *Warshak*, 532 F.3d at 525. For these reasons, ASA's facial challenge is premature as Fourth Amendment challenges are generally applied *after* circumstances unfold, not *before*.

As to the hardships ASA may face by withholding court consideration, ASA may claim that denying a facial challenge before the MERK act goes into effect would force slaughterhouses to install costly surveillance equipment or else face being fined for failing to do so. *Patel v. City of Los Angeles*, 738 F.3d 1058 (9th Cir. 2013) (en banc), recently permitted a facial challenge under the Fourth Amendment to a Los Angeles ordinance, which requires hotel operators to maintain certain information about their guests. The court found the statute unconstitutional on its face indicating that the only way a hotel operator could challenge the reasonableness of the officer's decision to inspect would be by refusing the officer's inspection demand and risking a criminal conviction.

However, consumer health far outweighs any economical hardships ASA may claim with the installation of surveillance equipment. The inhumane slaughter of animals leads to adulterated meat processing, meaning meat that has been prepared and packed in unsanitary conditions thereby contaminating it with filth poses health risks to consumers. When an animal is not humanely cared for to make sure they are healthy for slaughter, this directly affects the safety of meat. Animals housed and slaughtered in inhumane conditions heightens the risk of disease, as shown in the now bankrupt, Hallmark Meat Packing Company ("Hallmark").

After recalling 143 million pounds of beef in February 2008, the largest recall in U.S. history, Hallmark went bankrupt. Hallmark reached a settlement of $500 million dollars with an animal welfare group and the U.S. government. Hallmark's inhume animal slaughter practices ultimately led to the company's demise. As one can see, consumer health with regard to the humane treatment in the slaughter of animals is something the people of this country take very

seriously. By comparison, ASA having to shell out some money now will only help ensure the humane slaughter and safety of our meat in the future.

Facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We 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 (2006). Given our nation's most recent history with millions of pounds of meat recalls, such as those in Hallmark, the MERK Act is a direct response to public and consumer interest. "Consumers are curious about where their food comes from and favor laws and policies that create transparency in the food industry." MERK Act § 1 (c). The MERK Act embodies the will of the people and a facial challenge with regard to the Fourth Amendment is premature and should not be entertained at this juncture.

## III. THE MERK ACT DOES NOT VIOLATE THE FOURTH AMENDMENT

### A. THE SLAUGHTER OF ANIMALS FOR CONSUMPTION IS A CLOSELY REGULATED INDUSTRY

Generally, warrantless searches of private homes and commercial premises violate the fourth amendment. The exception to this rule exists for administrative searches of closely regulated industries. The Supreme Court has reasoned in *New York v. Burger,* 482 U.S. 691, 702 (1987) that the privacy expectation of commercial property used in closely regulated business is significantly less that the privacy expectation of a homeowner. "Certain industries have such a history of government oversight that no reasonable expectation of privacy could exist for the proprietor over the stock of such an enterprise." *Marshall v. Barlow's, Inc.,* 436 U.S. 307 (1978).

The slaughter of animals for consumption in the United States has been a closely regulated industry dating back to 1862 with the creation of the USDA and the subsequent creation of the FMIA, PPIA, and HMSA.

> "Commerce, by its very nature, often results in a heightened governmental interest in regulation. This increased interest necessarily results in a diminution of the privacy interests of those who operate commercial premises. That trend crests when an industry operates under pervasive regulation. In such circumstances, warrantless inspections of commercial sites may be constitutionally permissible." *United States v. Maldonado*, 356 F 3d 130, 134-135 (1st Cir. 2004).

The *Burger* Court stated that a warrantless inspection is reasonable only if three criteria are met. First, the regulatory scheme must serve a substantial government interest. Second, the warrantless inspection must be necessary to further the regulatory scheme. Finally, the inspection program must provide a constitutionally adequate substitute for a warrant in terms of its certainty and regularity. The third prong "looks to notice as to the scope of the search as well as the limitations on the discretion afforded to inspecting officers." *Maldonado*, 356 F.3d at 135 (1st Cir. 2004). Each element of the *Burger Test* is discussed below.

**B. THE PROTECTION OF ANIMALS AND INFORMING CONSUMERS ARE OF SUBSTANTIAL GOVERNMENT INTEREST**

The United States has a long rooted history in the concern of where our food comes from and therefore, the protection of animals and informing consumers is of substantial government interest. In 1883, Harvey W. Wiley, M.D., was appointed chief chemist at USDA. Wiley devoted his career to raising public awareness of problems with adulterated food. In May 1884, President Chester Arthur signed an act establishing the USDA Bureau of Animal Industry ("BAI"), charged with preventing diseased animals from being used as food. This further demonstrates the government's concern over the regulation of the meat we consume.

The turning point for meat inspection occurred in 1905 when author Upton Sinclair published the novel titled *The Jungle*, taking aim at the poor working conditions in a Chicago meat packing house. However, it was the filthy conditions, described in nauseating detail—and the threat they posed to meat consumers—that caused consumer uproar. In response, the Pure Food and Drug Act and the FMIA became law in 1906, which required federal inspectors to be present in meat-packing houses. The FMIA prohibited the sale of adulterated or misbranded meat and meat products for food, and ensured that meat and meat products were slaughtered and processed under sanitary conditions.

By 1958, after a three-year campaign by animal-advocacy groups, the HMSA was signed into law. It required that the government only purchase livestock that had been slaughtered humanely, but did not directly require it of industry. Twenty years later, the HMSA of 1978 amended the FMIA by requiring that all meat inspected by Food Safety and Inspection Service ("FSIS") for use as human food be produced from livestock slaughtered by humane methods.

The United States Food and Drug Administration ("FDA") Food Safety Modernization Act, signed into law in January 2011, is the biggest reform of the FDA's food regulatory powers since 1938, and its implementation will reorient the FDA to take a preventative rather than a responsive role regarding food safety. The continuous evolution of the regulation of the meat industry to further the humane and safe slaughter of animals for consumption proves the substantial government interest.

### C. WARRANTLESS INSPECTIONS ARE NECESSARY TO FURTHER THE REGULATORY SCHEME

The MERK Act furthers the regulatory scheme by serving as a deterrent to animal cruelty and ensuring the safety in the processing of meat for consumption. The constant surveillance over the slaughterhouse industry will help ensure that animals are treated humanely. This will make it harder for slaughterhouses to cut corners, translating into safer meat production. The largest meat recalls in our nation's history have occurred within the last 8 years, raising red flags that the current regulatory scheme is not working. 143 million pounds of beef from Hallmark Meat Packing Co. was recalled in February 2008, the largest beef recall in U.S. history. 36 million pounds of ground turkey from food producer Cargill was recalled in August 2011. That same month, 21.7 million pounds of ground beef product was recalled from Topps Meat Company LLC, making it the second largest beef recall in our nation's history.

Most recently on January 2014 some 8.7 million pounds of meat from Rancho Feeding Corporation, a Northern California company, were recalled because they came from diseased and unsound animals that weren't properly inspected. According to the USDA. This particular recall was a "Class I Recall," meaning that it was a health hazard situation where there is was reasonable probability that the use of the product would cause serious, adverse health consequences or death.

Although FSIS inspection personnel were present at Rancho Feeding Corporation during normal operations, as required by law, the slaughterhouse still managed to process nearly 9 million pounds of un-inspected beef right under their noses. The creation of the MERK Act could not have come at a much better time. As several millions of pounds of meat have been

recalled in less than 8 years, it is obvious that the current regulatory scheme is not being advanced by the mere presence of inspectors at slaughterhouses. The warrantless inspections are necessary to further the regulatory scheme in light of the millions of pounds of meat recalled at plants where inspectors were present.

### D. THE STATUTES INSPECTION PROGRAM PROVIDES A CONSTITUTIONALLY ADEQUATE SUBSTITUTE FOR A WARRANT

The *Burger* Court, stated "the regulatory statute must perform to 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." *Burger*, 482 U.S. at 703. The MERK Act provides slaughterhouses adequate notice, because they are always aware the search is ongoing. The MERK Act also contains sufficient restraints on the discretion of the inspector as it requires all slaughterhouses to livestream everything. By requiring the slaughterhouses to video tape everything, the inspector's discretion is limited in that it cannot be employed in a discriminatory fashion from one slaughterhouse to the next, or from one area of the slaughterhouse to the next as everything needs to be captured on video.

The First Circuit has described this third prong as simply requiring the inspection scheme to provide "notice to those regulated and restrictions on the administrator's discretion." *United States v. Gonsalves*, 435 F.3d 64, 67 (1st Cir. 2006). The notice requirement has been met as slaughterhouses are aware they are always being watched by the USDA and the consumer. The restrictions and limits on the inspecting officers requirement has also been met as the inspectors

are not allowed to pick and choose what is video taped as the MERK Act requires everything to be videotaped.

In Sum, the MERK Act does not violate the Fourth Amendment as courts have consistently held that closely regulated business are held to a lesser expectation of privacy. The meat industry has been closely regulated for decades, and therefore it too should be held to a lesser expectation of privacy. The MERK Act furthers the regulator scheme by serving as a deterrent to animal cruelty and unsafe slaughter practices, ergo ensuring consumer health. It also provides adequate notice through the awareness of an ongoing search requiring that slaughterhouses video record everything. This places restraints on inspectors in not being able to discriminate on any particular area or areas of the slaughterhouse or even discriminate between slaughterhouses. Thus, the inspection program of the MERK Act provides a constitutionally adequate substitute for a warrant while furthering the regulatory scheme.

## CONCLUSION

For the reasons stated above, the district court's order should be affirmed.

Respectfully Submitted,
Team Number 18

January 23, 2015