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

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

BRIEF FOR APPELLEES

Team 20
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LEWIS AND CLARK LAW SCHOOL
NATIONAL ANIMAL LAW MOOT COURT COMPETITION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court

United States Circuit Courts of Appeals

United States District Courts

Statutes and Legislative History

Rules

STATEMENT OF ISSUES

I. Whether the Meat Eaters' Right to Know Act ("MERK Act") violates the First Amendment.

II. Whether American Slaughterhouse Association ("ASA") can pursue a facial challenge to the MERK Act on Fourth Amendment grounds. If so, whether the MERK Act violates the Fourth Amendment.

STATEMENT OF THE CASE

The American Slaughterhouse Association ("ASA") filed an action for declaratory judgment and injunctive relief in the United States District Court for the District of Massachusetts against the United States Department of Agriculture and Secretary Vilsack ("the government"), alleging that the Meat Eaters' Right to Know Act ("MERK Act") was unconstitutional. The government filed a motion to dismiss ASA's Complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim under the First Amendment or the Fourth Amendment.

The district court granted the government's motion to dismiss ASA's Complaint for failure to state a claim. ASA now appeals that decision in this Court.

STATEMENT OF FACTS

In March 2010, Congress passed the Meat Eaters' Right to Know Act (introduced as House Bill 108 by Rep. Panop T. Kahn, D-California) in response to horrific animal abuse that had been discovered at U.S slaughterhouses. *American Slaughterhouse Association v. United States Dep't of Agric.,* No. 3:14-cv-55440 MJC, at 1 (ABC) (D. Mass. Aug. 15, 2014) (hereinafter, Mem. Op.). These horrendous facts were discovered through undercover investigations by animal rights organizations. *Id.* at 2. The MERK Act has two main requirements: 1) that all federally inspected slaughterhouses install and maintain cameras throughout their facilities in all places where there are animals, including carcasses, present and 2) that the footage recorded by those cameras be live-streamed on the website of the company that owns the slaughterhouse, if it has one. MERK Act § 3, 4. For those companies that do not maintain a website, the video must be provided to the United States Department of Agriculture, who will then make the video

available to the public through the Freedom of Information Act (5 U.S.C. § 552). MERK Act § 4. The MERK Act will go into effect on March 2, 2015. MERK Act § 6. From that date, slaughterhouses will have three years to set up the necessary technology in order to be in compliance with the MERK Act. *Id.*

Congress did not pass the MERK Act on a whim, but rather because of the egregious "…abuse of livestock animals on farms and in slaughterhouses…" discovered by the undercover investigations. MERK Act § 1(a). Congress believed that this abuse violated "the public interest in the humane treatment and slaughter of animals raised for meat and poultry". *Id.* Congress also found "that information about the treatment of these animals is of vital importance to the American consumer." MERK Act § 1(b).

SUMMARY OF ARGUMENT

This Court should affirm the district court's grant of Defendant's motion because Petitioner failed to state a claim under the First Amendment or the Fourth Amendment. The district court's decision was based on the factual findings supported by the record. On the issue of the First Amendment, Petitioner failed to show that the government has no substantial interest in preventing animal cruelty and enabling consumers to know how their food is produced. By applying the *Zauderer* test, the government established that they have a substantial interest and that the requirements of the MERK Act are "reasonably related" to that interest. There is a substantial relation between the government's interest and the video requirement. The MERK Act passes the *Zauderer* test and therefore is constitutional under the First Amendment.

On the issue of the Fourth Amendment, the district court erred in allowing ASA to pursue a facial challenge to the MERK Act under the Fourth Amendment because it is

not ripe for review. ASA's facial challenge is not ripe for review because ASA's claim is not fit for judicial decision, and that ASA will not suffer hardship in withholding court consideration. Furthermore, the district court properly held that the MERK Act does not violate the Fourth Amendment because it satisfies the *Burger* test of administrative warrantless searches. By applying the *Burger* test, the government established that 1) they have a substantial interest in the regulatory scheme, 2) the warrantless inspections are necessary to further the regulatory scheme, and 3) the MERK Act provides a constitutionally adequate substitute for a warrant. Therefore, the MERK Act does not violate the Fourth Amendment.

STANDARD OF REVIEW

This Court reviews the District Court's grant of a motion to dismiss *de novo*. *Cook v. Gates,* 528 F.3d 42, 48 (1st Cir. 2008). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In distinguishing sufficient from insufficient pleadings, which is "a context-specific task," the Court must "draw on its judicial experience and common sense." *Id*.

Dismissal under Fed.R.Civ.Pro.12(b)(6) may be appropriate where, "[t]he facts are not in dispute; the legal conclusions from the facts are." Mem. Op. 3 (citing *San Geronimo Caribe Project, Inc. v. Acevedo-Vilá,* 687 F.3d 465, 471 (1st Cir. 2012) (en banc)). "Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law," even if the plaintiff's legal theory is "a close but ultimately unavailing one." Mem. Op. 3 (citing *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989)).

ARGUMENT

I. The District Court Properly Held That the MERK Act Bears a Substantial Relation to a Sufficiently Important Government Interest and Thus Does Not Violate the First Amendment.

This Court should affirm the district court's granting of Defendant's motion to dismiss for failure to state a claim because the district court correctly found, based on the facts before it, that Defendant failed to state a claim under the First Amendment. The appropriate test for evaluating the constitutionality of a law is the *Zauderer* test. Mem. Op., at 6; *Am. Meat Inst. v. United States Dep't of Agric.,* No. 13-5281, 2014 U.S. App. LEXIS 14398, at *8,14 (D.C. Cir. July 29, 2014) (en banc). Under this two-part analysis, the court must 1) "assess the adequacy of the interest motivating the law" and 2) "assess the relationship between the government's identified means and its chosen end". *AMI*, 2014 U.S. App. LEXIS 14398, at *8,14. In the assessment under the second prong, the government need only show that the means being used are "reasonably related" to the claimed interest. *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 651 (1985).

The district court held that the MERK Act does compel speech and therefore should be scrutinized under the First Amendment. Mem. Op., at 5. The MERK Act passes the first prong of the *Zauderer* test because the government has a substantial interest in allowing individuals to know how their food is produced and preventing animal cruelty. MERK Act § 1(a). This substantial interest was the motivating factor in the passing of the MERK Act and other legislation that addressed the issue of animal cruelty and consumers right to information about their food. Meat Eaters' Right to Know Act of 2012, H.R. Rep. No. 112-666, at 3 (2012).

The MERK Act meets the second prong through the implementation of the live video feed. MERK Act § 1(c). This live video feed allows individuals to see how their food is produced which meets the government's interest in allowing them access to that information. The government's interest is further met but having that live feed available on the slaughterhouse's website. MERK Act § 4(b). Access to this feed allows consumers to make informed decisions concerning their food choices. H.R. Rep. No. 112-666, at 3.

A. The government's requirements for the MERK Act bear a substantial relation to the government's interest in preventing animal cruelty.

The government has a substantial interest in preventing animal cruelty. MERK Act § 1(a). This interest is supported by "this country's long…long history of according protection to animals, dating back to the Puritans…" Mem. Op, at 7 (*citing United States v. Stevens*, 559 U.S. 460, 469 (2010)). Currently, all fifty states have legislation that criminalizes animal abuse. *Id.* Similarly, 7 U.S.C. § 1901 requires that livestock be slaughtered in a humane manner and the Internal Revenues Service allows organizations who work towards preventing cruelty to animals to receive tax-exempt status under 26 U.S.C. § 501(c)(3). *See United States v. Stevens*, 533 F.3d 218, 239 (3d Cir. 2008) (Cowen, J., dissenting). Additionally, Congress enacted the Humane Methods of Slaughter Act ("HMSA") in 1958 and adopted it in its modern form in 1978. HMSA "requires the humane treatment of livestock slaughtered in USDA inspected slaughter plants". H.R. Rep. No. 112-666, at 3 (quoting Humane Methods of Slaughter Act (HMSA) of 1978, 21 U.S.C.S. § 603(b) (2014)). The Supreme Court has held that evidence of national or state consensus can be compelling proof of a substantial government interest. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 118 (1991) (State has a compelling interest as shown by the fact that

"[e]very State has a body of tort law serving exactly this interest."); See also *Roberts v. United States Jaycees*, 468 U.S. 609, 624-25 (1984) (stating that various states laws aimed at preventing public accommodation discrimination were evidence of the state's compelling interest in inhibiting that discrimination). The government's interest is readily evident given not only the expansive history of legislation but also the various laws that address animal cruelty.

B. The government's requirements for the MERK Act bear a substantial relation to the government's interest in enabling customers to see how their food is produced by requiring slaughterhouses to live-stream video feed on their websites.

The government has a sufficiently important interest in requiring that federally regulated slaughterhouses live-stream video feeds on their websites of all areas where animals, including carcasses, are present. MERK Act § 3. There has been a growing interest among the American public in knowing how there food is produced as shown by the popularity of documentaries such as *Food, Inc* and books such as *The Omnivore's Dilemma* and *Fast Food Nation: The Dark Side of the All-American Meal.* Moreover, it is not unprecedented that the government require, by federal statute, that companies disclose information related to their products such as requirements under the Federal Meat Inspection Act (FMIA). *See* Mem. Op., at 8; *AMI*, 2014 U.S. App. LEXIS 14398, at * 21 (stating that Congress requires out of country origin labels on food in order to inform consumers). American consumers have come to expect that they have the ability to inform themselves on how their food is produced given the information that is already required to be disclosed by the aforementioned statutes.

Petitioners argue that it is unjust for the requirement to be applied to all federally inspected slaughterhouses rather than only the ones that previously been found to have

animal abuses. However, the government has a compelling interest in applying the requirement to all slaughterhouses. These video feeds are meant to not only deter animal abuse but also to allow individuals to know how their food is being produced. This allows the consumer to have all the necessary information to determine what foods they want to buy and also, if they disapprove of the actions taken by particular slaughterhouses, to boycott them. The video feed is providing the consumer with "purely factual and uncontroversial information". *AMI*, 2014 U.S. App. LEXIS 14398, at * 15 (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)).

Congress had previously passed HMSA in response to animal abuse at slaughterhouses. *Introducing the Meat Eaters' Right to Know Act*, 112th Cong. 2d Sess., at 1 (2012) (statement of Hon. Panop Kahn). However, safety inspectors were overwhelmed with the enforcement and handed out only weak penalties that were ineffective. *Id.* Additionally the United States Department of Agriculture stated that they need stronger tools in order to prevent animal abuse. *Id.* The video feeds allow the USDA and their safety inspectors to more efficiently do their oversight jobs. The video feeds serve not only an information function but also a safety function as well; a function that had previously been done by safety inspectors in person. Given the two-fold function of the video feed, the government is able to advance its substantial interest in preventing animal abuse and provided consumers with important information concerning the production of their food.

II. The District Court Erred in Allowing ASA To Pursue A Facial Challenge To the MERK Act Under The Fourth Amendment Because It Is Not Ripe For Review.

The district court erred in considering ASA's facial challenge under the Fourth Amendment. The decision whether to allow a facial challenge under the Fourth Amendment requires that the claim be ripe for review. *Warshak v. United States*, 532 F.3d 521, 525 (6th Cir. 2008). ASA's claim is not ripe for review. In determining ripeness, courts must "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Texas v. United States*, 523 U.S. 296 (1998) (quoting *Abbott Lab. v. Gardner*, 387 U.S. 136, 149 (1967)).

A. ASA's claim is not fit for judicial decision.

The MERK Act does not go into effect until March 2, 2015. MERK Act § 6. Waiting and "postponing consideration of the questions presented, until a more concrete controversy arises, also has the advantage of permitting the . . . courts further opportunity to construe the provisions." *Texas*, 523 U.S. at 301. *See Sibron v. New York*, 392 U.S. 40, 59 (1968) (A Fourth Amendment challenge needs to be decided "in the concrete factual context of the individual case."). Furthermore, waiting until there is a factual dispute allows the courts to grapple with legal questions that are later discovered. *Nat'l Park Hospitality Ass'n v. DOI*, 538, U.S. 803, 812 (2003). *See Warshak,* 532 F.3d at 528 ("The Fourth Amendment is designed to account for an unpredictable and limitless range of factual circumstances, and accordingly it generally should be applied after those circumstances unfold, not before.").

Here, the court is not yet aware of any consequences or questions regarding the implementation of the MERK Act, since the Act has not yet been put into effect. Thus,

there is not a concrete factual dispute pursuant to the Act that has occurred. It will be difficult and/or impossible to construe the provisions of the act in light of the Fourth Amendment in the absence of a factual dispute concerning the MERK Act. Thus, petitioners claim that they can facially pursue a Fourth Amendment challenge fails this prong of the *Texas* test.

B. ASA will not suffer hardship in withholding court consideration.

Hardship has been found to exist where "the regulation at issue had a 'direct effect on the day-to-day business'" of an operation. *Texas,* 523 U.S. at 301 (citing *Abbott Lab.,* 387 U.S. at 152 (1967)). Here, there is no effect on ASA's day-to-day business, because the surveillance just oversees what is already being done daily at ASA.

While the petitioners allege that they will have to install expensive equipment to comply with the MERK Act, there is a three-year implementation phase-in period that allows slaughterhouses to comply and install the surveillance cameras. MERK Act § 6. Thus, slaughterhouses will have three years to save and budget money to install the surveillance equipment.

Thus, petitioners claim that they can facially pursue a Fourth Amendment challenge fails this prong of the *Texas* test.

III. The District Court Properly Held That The MERK Act Does Not Violate The Fourth Amendment Because It Satisfies The *Burger* Test.

A. Slaughterhouses are a closely regulated industry.

Under the Fourth Amendment, warrantless searches of closely regulated businesses can be allowed in certain instances. *New York v. Burger*, 482 U.S. 691, 702

(1987). "Because the owner or operator of commercial premises in a 'closely regulated' industry has a reduced expectation of privacy, the warrant and probable-cause requirements, which fulfill the traditional Fourth Amendment standard of reasonableness for a government search, have lessened application in this context." *Id*. (citation removed).

The district court did not err when it found that slaughterhouses are a closely regulated industry under the Fourth Amendment. Petitioners are mistaken in arguing that slaughterhouses are not a closely regulated industry. Rather, under the Humane Methods of Slaughter Act (HMSA), and the Federal Meat Inspection Act (FMIA), members of the ASA are closely regulated companies. Thus, they have a reduced expectation of privacy. *See Giragosian v. Bettencourt*, 614 F.3d 25, 29 (1st Cir. 2010) ("Owner[s] of commercial property in a closely regulated industry ha[ve] a reduced expectation of privacy in those premises.").

B. The MERK Act satisfies the *Burger* test.

Since it has been established that slaughterhouses are considered a closely regulated industry, the Court must examine the MERK Act under the *Burger* test. In *Burger*, the Supreme Court established a three-part test to determine whether the warrantlesfs search of a closely regulated industry violates the Fourth Amendment: "First, there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made. . . .Second, the warrantless inspections must be 'necessary to further [the] regulatory scheme.' . . .[Third], 'the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant'" *Burger*, 482 U.S. at 702.

1. *There is a substantial government interest in the regulatory scheme.*

The district court did not err in finding that there is a substantial government interest in monitoring slaughterhouses under the MERK Act. As discussed in the compelled speech context, protecting animals and informing consumers are substantial government interests. This interest in protecting animals is supported by this country's "long history of according protection to animals, dating back to the Puritans…" Mem. Op, at 7 (citing *United States v. Stevens*, 559 U.S. 460, 469 (2010)). An example of the government's interest in protecting animals is evident in 7 U.S.C. § 1901, which requires that livestock be slaughtered in a humane manner. Furthermore, the Internal Revenues Service allows organizations who work towards preventing cruelty to animals to receive tax-exempt status under 26 U.S.C. § 501(c)(3). *See United States v. Stevens*, 533 F.3d 218, 239 (Cowen, J., dissenting).

Furthermore, the country's interest in informing consumers is substantial. Customers have a right to know where their food is coming from. Under the Federal Meat Inspection Act (FMIA), federal statute requires that meat companies disclose information related to their products.

Thus, since there is a substantial government interest in monitoring slaughterhouses, the MERK Act passes this prong of the *Burger* test.

2. *The warrantless inspections are necessary to further the regulatory scheme.*

The district court did not err in deciding that the MERK Act is necessary to further the regulatory scheme. The regulatory agenda in the MERK Act is to promote humane animal welfare. If slaughterhouses are aware that they are being watched all of the time, they are much more likely to treat the animals humanely. However, if

inspections are infrequent and announced in advance, slaughterhouses will have time before the inspectors arrive to fix any violations of the MERK Act. Furthermore, according to the Supreme Court, "If inspection is to be effective and serve as a credible deterrent, …frequent, inspections are essential." *United States v. Biswell*, 406 U.S. 311, 316 (1972). Since the MERK Act calls for ongoing surveillance, it will serve as a credible deterrent from slaughterhouses committing wrongdoing.

Petitioners are mistaken when they say that the video requirement is unnecessary since there are already USDA inspectors present at slaughterhouses. Congress has the power to expand and supplement their reach buy adding the videotaping requirement. Mem. Op., at 14.

Thus, since warrantless inspections are necessary to further the regulatory scheme, the MERK Act passes this prong of the *Burger* test.

3. The MERK Act provides a constitutionally adequate substitute for a warrant.

The court did not err when it decided that the MERK Act provides a constitutionally adequate substitute for a warrant. In order for this prong to be satisfied, "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." *Burger*, 482 U.S. at 703.

Petitioners argue that the law does not have a properly defined scope. However, the third prong only requires that the inspection provide "notice to those regulated and restrictions on the administrator's discretion." *United States v. Gonsalves*, 435 F.3d 64, 67 (1st Cir. 2006). Furthermore, "the governing statute need not in all circumstances

prescribe exhaustive restrictions limiting the target, time, and place of the inspection." *Tart v. Massachusetts*, 949 F.2d 490, 498 (1st Cir. 1991) (held that a briefly worded authorization to allow an officer of the Massachusetts Department of Fisheries had sufficient limits upon the discretion of the officer). Here, under the MERK Act, slaughterhouses are on notice that the search is constant and ongoing. The entire motive and purpose behind the MERK Act is to inform slaughterhouses that the USDA and consumers are watching what occurs in slaughterhouses all of the time.

Furthermore, the MERK Act is not utilized in a discretionary manner. Since slaughterhouses are required to live stream everything that occurs in a slaughterhouse, it cannot be used in an inequitable fashion by inspectors. Mem. Op., at 15.

Thus, since the MERK Act provides a constitutionally adequate substitute for a warrant, the MERK Act passes this prong of the *Burger* test.

PRAYER FOR RELIEF

For the above reasons, the district court's order granting the Appellees' Motion to Dismiss for Failure to State a Claim should be **UPHELD**.

Respectfully submitted,

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