**No. 15-0000**

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**UNITED STATES COURT OF APPEALS**
**FOR THE FIRST CIRCUIT**

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AMERICAN SLAUGHTERHOUSE ASSOCIATION

*Plaintiff - Appellant,*

v.

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

*Defendants - Appellees.*

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

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# BRIEF OF APPELLEES

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TEAM 21
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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Statutes and Constitutional Provisions**



**Other Authorities**

## JURISDICTIONAL STATEMENT

This Court has jurisdiction over the District Court's dismissal of ASA's complaint under 28 U.S.C. § 1291.

## STATEMENT OF ISSUE

### Issue 1

Whether the Meat Eaters' Right to Know Act violates the First Amendment by requiring video surveillance in slaughterhouses to deter animal abuse and enlighten consumers about meat production.

### Issue 2

Whether the Meat Eaters' Right to Know Act authorizes "unreasonable" inspections of slaughterhouses in light of the government's interests in informing consumers and enforcing long-standing statutory prohibitions against the infliction of needless suffering.

## STATEMENT OF THE CASE

Congress passed the Meat Eaters' Right to Know Act ("MERK Act" or "Act") in March 2012. In March 2014, one year before the statute was due to go into effect, the American Slaughterhouse Association (ASA) filed suit in the United States District Court for the District of Massachusetts. ASA alleged that the MERK Act violates the First and Fourth Amendments of the United States Constitution. In response, the government filed a motion to dismiss ASA's complaint for failure to state a claim. Fed. R. Civ. P. 12(b)(6).

The District Court granted the government's motion to dismiss. *American Slaughterhouse Ass'n v. U.S Dep't of Agriculture*, No. 3:14-cv-55440 MJC (ABC), slip op. at 15 (D. Mass. Aug. 15, 2014). First, the court found that the MERK Act compels truthful disclosures, and rejected ASA's claim that the Act restricts commercial speech. *Id.* at 6. Noting that "a commercial speaker's 'constitutionally protected interest in not providing any particular factual

information in his advertising is minimal,'" the court applied the test that the U.S. Supreme Court announced in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985). *Id.* at 5 (citations omitted). Under the *Zauderer* test, the "government . . . need only show that 'disclosure requirements are reasonably related to the [government's] interest.'" *Id*. at 5 (quoting *Zauderer*, 471 U.S. at 651). The District Court found that the government has a "substantial" interest in animal welfare and informing consumers. *Id.* at 8. In addition, the court found "a reasonable relationship between the [Act's] video requirement and the goals of promoting animal welfare and informing consumers." *Id.* at 9.

Second, the District Court held that the MERK Act does not violate the Fourth Amendment because it authorizes reasonable administrative inspections. Specifically, the court found that Act passed the three-part test that the U.S. Supreme Court developed in *New York v. Burger*, 482 U.S. 691, 702 (1987). *Id.* at 13. First, the Act advances two "substantial" government interests—informing consumers and preventing animal cruelty. *Id.* at 14. Second, the Act is "necessary to advance the regulatory agenda," because less intrusive regulation has failed. *Id.* Finally, the Act "provides 'notice to those regulated and restrictions on the administrator's discretion.'" *Id*. at 15 (quoting *United States v. Gonsalves*, 435 F.3d 64, 67 (1st Cir. 2006)).

Based on these findings, the District Court dismissed ASA's complaint. *American Slaughterhouse Ass'n*, No. 3:14-cv-55440 MJC (ABC), slip op. at 15 (D. Mass. Aug. 15, 2014). ASA appealed the District Court's decision on the basis of both its First and Fourth Amendment claims.

## STATEMENT OF THE FACTS

ASA brings this case for two reasons. First, ASA aims to prevent effective enforcement of federal animal welfare laws. Second, they intend to hide uncomfortable truths about meat

production from consumers and the voting the public. For more than a century, deplorable conditions in the meatpacking industry have sparked public outrage and prompted legislative action. Federal regulation of slaughterhouses began in 1906, after Upton Sinclair's novel *The Jungle* revealed that unsafe, unsanitary, and inhumane conditions defined the industry. *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965, 967 (2012). In 1958, Congress specifically addressed cruelty to animals with the Humane Methods of Slaughter Act ("HMSA"). 7 U.S.C. § 1901–07. HMSA, which remains in effect today, requires slaughterhouses to prevent unnecessary suffering by rendering all livestock "insensible to pain" before slaughter. *Id.* § 1902. To enforce HMSA, Congress authorized regular, unannounced inspections of slaughterhouses by the U.S. Department of Agriculture ("USDA"). *Harris*, 132 S. Ct. at 968.

USDA inspections, however, failed to stop unnecessary cruelty. On the contrary, recent undercover investigations have shown that "horrific animal abuse" remains the norm in today's slaughterhouses. In 2001, the *Washington Post* published a series of articles revealing that federal regulation had utterly failed to reform slaughterhouse practices. Joby Warrick, *They Die Piece by Piece': In Overtaxed Plants, Humane Treatment of Cattle is Often a Battle Lost*, Washington Post, Apr. 9, 2001, at A1. These front-page articles reported that, rather than being rendered "insensible to pain," as HMSA requires, hundreds, perhaps thousands of animals remain fully conscious while they are skinned and dismembered on high-speed, mechanized "disassembly lines." *Id.* The articles received national attention, and Senator Robert Byrd entered these horrific accounts of animal cruelty into the Congressional record nearly verbatim. 147 Cong. Rec. S7311 (daily ed. July 9, 2001) (statement of Sen. Byrd).

More recently, undercover videos captured workers in a Vermont facility beating and electrocuting veal calves. John Curran, *2 Vt. slaughterhouse workers charged with cruelty*,

Boston.com (June 4, 2010) http://www.boston.com/business/articles/2010/06/04/2_vt_slaughterhouse_workers_charged_with_cruelty/. In one video, a worker "is seen shocking a downed calf 11 times until it gets up. He then shocks it five more times before kicking it, pouring water on its head—to enhance the electrical current—and shocking it seven more times." *Id.* Animal activists uncovered similar behavior in California slaughterhouses, where they videotaped "workers at a California slaughterhouse delivering repeated electric shocks to cows too sick or weak to stand on their own; drivers using forklifts to roll the 'downer' cows on the ground in efforts to get them to stand up for inspection; and even a veterinary version of waterboarding in which high-intensity water sprays are shot up animals' noses." Rick Weiss, *Video Reveals Violations of Laws, Abuse of Cows at Slaughterhouse,* The Washington Post (Jan. 30, 2008) *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/01/29/AR2008012903054.html.

In response to public outrage at these and other atrocities, Congress enacted the MERK Act, which requires federally regulated slaughterhouses to install video surveillance cameras in all areas where animals or carcasses are present. MERK Act § 3. The MERK Act also requires slaughterhouses to live-stream footage from the cameras on their websites. *Id.* § 4. Slaughterhouses that do not maintain a website must hand the footage over to USDA, which will provide the footage to the public under the Freedom of Information Act. *Id.* Congress intended the MERK Act to accomplish what traditional regulation could not—ending unnecessary cruelty in American slaughterhouses. H.R Rep. No. 112-666, at 3–4 (2012). In addition, the MERK Act provides consumers with accurate information about the meat they purchase. In other words, the Act enables consumers to "vote with their wallets." *Statement of Rep. Panop T. Kahn before the U.S. House of Representatives Introducing the Meat Eaters' Right to Know Act* (Jan. 25, 2012).

The surveillance and disclosure provisions of the Act function together to accomplish Congress's goals of ending animal abuse in slaughterhouses, protecting public health, and informing consumers. MERK Act § 1.

## SUMMARY OF THE ARGUMENT

The MERK Act is constitutional under both the First and Fourth Amendments. The Act does not violate slaughterhouses' First Amendment rights because it regulates conduct, not expression. The MERK Act requires slaughterhouses to install and maintain of video surveillance cameras. It does not compel content-based commercial speech.

The Act does not require slaughterhouse operators to espouse any state-sanctioned ideas on animal welfare. Nor does it order slaughterhouse operators to convey a particular message to meat consumers. It simply requires video cameras "where animals are kept and slaughtered." The fact that film often serves as a medium of expression in some contexts does not support ASA's claim that requiring video surveillance compels expression. The Supreme Court has held that any form of expression must actually express an idea to be protected. Accordingly, the Court refuses to label all conduct "speech" simply because it claims to express—or refuses to express—an idea.

The First Amendment does not entitle ASA to withhold information from regulators and consumers. The MERK Act is similar to a record-keeping statute; it requires slaughterhouses to provide access to information through conduct alone. Under the Act, slaughterhouses must *do* something—install video surveillance and provide online streaming. Slaughterhouses do not have to *express* anything. Unlike unconstitutional prosecutions of individuals for filming police officers—government action which restricts the free flow of information—the MERK Act provides truthful information to the public and enriches the marketplace of ideas.

Assuming, *arguendo*, that this Court finds that video surveillance has expressive value, the MERK Act authorizes only constitutionally valid disclosures of commercial information. In *Zauderer v. Office of Disciplinary Counsel*, the Supreme Court held that compelled commercial disclosures do not offend the First Amendment so long as the disclosure requirement is reasonably related to an adequate government interest. ASA argues that the Court should apply the heightened scrutiny of *Central Hudson Gas & Electric v. Public Service Commission of New York*, which the Supreme Court reserves for restrictions on commercial speech. ASA claims *Zauderer* only pertains to state attempts to cure consumer deception. While a narrow reading limits *Zauderer* to regulation aimed at consumer deception, this Court has explicitly extended the deferential *Zauderer* standard to other government interests.

Under *Zauderer*, the MERK Act is constitutional because video monitoring of slaughterhouses is reasonably related to the government's substantial interests in deterring animal abuse and informing consumers about the source and production of meat.

First, the government has substantial interests in preventing cruelty in slaughterhouses and providing consumers with accurate information. Anti-cruelty laws date back to the Puritans of the Massachusetts Bay Colony. All 50 states have criminalized animal cruelty, and the federal government has required humane practices in slaughterhouses since 1958. Moreover, the MERK Act represents a reasonable legislative response to recent consumer outrage at ongoing cruelty in the nation's slaughterhouses. Consumer interest in slaughterhouse practices extends beyond mere curiosity. Indeed, national surveys show that animal welfare is a top concern of the meat-eating public.

Second, the MERK Act is necessary to ensure compliance with federal animal welfare laws. Since Congress passed the Humane Methods of Slaughter Act in 1958, slaughterhouses

have blatantly and systematically flouted the law. Gruesome violations of federal law are "business as usual" in today's slaughterhouses, and frequent USDA inspections have done little the change the status quo. The MERK Act acknowledges that more oversight is necessary to change behavior in slaughterhouses and protect livestock. Only by installing surveillance cameras can the government and the public ensure that slaughterhouses do not take bloody shortcuts when USDA inspectors turn their back.

Plaintiffs also argue that the MERK Act, on its face, violates the Fourth Amendment. However, the U.S. Supreme Court has held that facial constitutional challenges cannot succeed unless the plaintiff proves the statute is unconstitutional in all of its applications. ASA's Fourth Amendment claim fails because constitutional applications of the MERK Act exist.

First, some applications of the Act will fall under the "open fields" doctrine, which holds that visual inspections of outdoor areas on industrial properties are not "searches.". Second, slaughterhouses are a closely regulated industry with a long history of government oversight and a minimal expectation of privacy. Consequently, administrative inspections of slaughterhouses do not violate the Fourth Amendment because the government's interests in animal welfare and consumer protection outweigh the privacy interests of slaughterhouse operators. In sum, the MERK Act satisfies the Fourth Amendment in several of its likely applications, and Plaintiffs' facial challenge therefore fails.

Assuming, however, that the Court entertains ASA's facial challenge, the MERK Act survives Fourth Amendment scrutiny. The Act does not authorize unconstitutional invasions of privacy because it authorizes administrative inspections of closely regulated businesses., and the U.S. Supreme Court applies a relaxed constitutional standard to this category of searches.

In order to satisfy the Fourth Amendment's "reasonableness" requirement, administrative inspections must meet three criteria. First, the inspection must advance a "substantial" government interest. Second, the inspection must be necessary to further the government's "regulatory scheme." And, finally, the "regulatory scheme" must give adequate notice and limit the scope of the inspection. The MERK Act satisfies all three criteria.

The MERK Act provides slaughterhouses with notice, limits the scope of inspection, and conforms with federal court precedent on video surveillance. The Act provides notice by requiring slaughterhouses to install cameras themselves and mandating online video streaming. Slaughterhouse operators can therefore know the location of each and every camera, and have instantaneous, real-time access to surveillance footage. The scope of the search is limited to a superficial visual inspection of "areas where animals are present." Finally, the Act authorizes surveillance only to the extent necessary to ensure compliance with federal law. The purpose of the MERK Act is to ensure that slaughterhouses treat livestock humanely, and the Act authorizes cameras only where animals are kept or slaughtered.

## STANDARD OF REVIEW

This Court reviews *de novo* the District Court's dismissal of ASA's complaint for failure to state a claim. *Brait Builders Corp. v. Mass. Div. of Cap. Asset Mgt.*, 644 F.3d 5, 9 (1st Cir. 2011). However, this Court is not "wedded to the lower court's rationale and may affirm an order of dismissal on any basis made apparent by the record." *Id.*

## ARGUMENT

### I. THE MERK ACT IS CONSTITUTIONAL BECAUSE IT REGULATES CONDUCT, NOT EXPRESSION.

The MERK Act does not compel expression. Instead, it provides public access to truthful information—namely the gruesome conditions that animals raised for food must endure. And, it does so through conduct—specifically installation and maintenance of video cameras. In short,

the MERK Act, "does not partake of the attributes of expression; it is conduct, pure and simple." *D'Amario v. Providence Civic Ctr. Auth.*, 639 F. Supp. 1538, 1541 (D.R.I. 1986), *aff'd*, 815 F.2d 692 (1st Cir. 1987).

The Supreme Court held that "whatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears." *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2733 (2011) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)). While the First Amendment protects numerous forms of expressive, "images . . . must communicate some idea in order to be protected." *Montefusco v. Nassau Cnty.*, 39 F. Supp. 2d 231, 241 (E.D.N.Y. 1999) (citing *Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996)). The Supreme Court has rejected "the view that an apparently limitless variety of conduct can be labeled 'speech.'". *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

ASA brings its First Amendment claim to prevent public dissemination of truthful information, but their challenge fails because the MERK Act does not compel expression. Instead, it simply requires video monitoring and online streaming. The lower court's finding that videography is an established medium of expression does not extend so far as to bring all film under First Amendment protection. *See American Slaughterhouse Ass'n*, No. 3:14-cv-55440 MJC (ABC), slip op. at 5 (D. Mass. Aug. 15, 2014). Leading scholars on image capture and the First Amendment concede that video recording does not automatically receive First Amendment protection because it simply gathers information. *See* Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather*

*Information in the Information Age*, 65 Ohio St. L.J. 249, 255 (2004).[1] And, apart from noting that the MERK Act compels video recording, the District Court and ASA cannot articulate any viewpoint or idea that the MERK Act compels from ASA. Indeed, the Act does not require ASA to adopt or disseminate any opinion or ideology. Nor does the Act specify, in any way, the desired content of the required video footage. It simply requires cameras where animals are kept and slaughtered. The MERK Act does not force slaughterhouses to become mouthpieces for government ideals on animal safety and welfare or adopt a position on the ethical dilemmas of factory farming. Instead, it insures consumer awareness, animal welfare, and compliance with existing USDA regulations.

The MERK Act therefore requires slaughterhouses to engage in non-expressive conduct similar to record keeping. And, it does so in order to provide public access to information. This court has affirmed that holding laws that ensure "public access to information" to the same standards as regulation of speech "ignore[s] 200 years of First Amendment jurisprudence." *D'Amario v. Providence Civic Ctr. Auth*., 639 F. Supp. 1538, 1541 (D.R.I. 1986) aff'd, 815 F.2d 692 (1st Cir. 1987) (citations and internal quotations omitted).The *D'Amario* Court held that the First Amendment protects expression of ideas but does not extend rigorous constitutional scrutiny to access to information. *Id.* Moreover, the lower court erred in holding *D'Amario's* distinction between expression and access to information "no longer seems tenable." 639 F. Supp. at 1541. In *D'Amario* a photographer challenged an ordinance preventing photographic equipment in a civic events center. *Id.* at 1540–41. He claimed the ordinance denied him access to photograph as he pleased, stifling his freedom of speech. *Id* But, the court held that the

[1] McDonald notes that "Information gathering frequently consists of predominantly non-expressive conduct that is unable to lay claim to the core First Amendment protection accorded to expression itself," and that " the conduct at issue—using cameras, audio and video recorders, and computers to gather information for dissemination—cannot, in itself, be characterized as 'expressive activity."

ordinance did not run afoul of the First Amendment because the photographer "wishe[d] to 'do' something," not express something. 639 F. Supp. at 1541. Thus, the First Amendment does not reach regulation of non-expressive conduct. A statute that prohibits non-expressive conduct is constitutional. Likewise, a statute that compels non-expressive conduct by highly regulated commercial industries to insure public access to information presents no First Amendment issues. The MERK Act does just that; it requires conduct that provides access to information, which then enriches the "marketplace of ideas." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 592 (1980) (Rehnquist, J., dissenting).

To support ASA's argument that the MERK Act regulates speech instead of conduct, the District Court cites two cases in which citizens were arrested for filming police officers in the course of their duties. *American Slaughterhouse Ass'n*, No. 3:14-cv-55440 MJC (ABC), slip op. at 4–5 (D. Mass. Aug. 15, 2014). However, these cases involved "arrests in retaliation for image capture." Such incidents—which restrict the free flow of information—differ fundamentally from the MERK Act, which ensures public access to important information. In *Glik v. Cunniffe*, a citizen was arrested for filming what he feared to be police abuse of an arrestee in a public park. 655 F.3d 78, 80 (1st Cir. 2011). Similarly, in *Iacobucci v. Boulter*, this Court found police violated the First Amendment when they arrested of a concerned citizen for filming a public town hall meeting. 193 F.3d 14, 25. Although both cases relate to video recording and imply a First Amendment right of access to information, they are easily distinguished from the MERK Act. *Glik* and *Iacobucci* fit in to a narrow category of "[a]rrests in retaliation for image capture"—an obviously unconstitutional encroachment upon an individual's civil liberties. Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Pa. L. Rev. 335, 394 (2011). It exceeds the bounds of logic to compare

these arrests to compelled video surveillance of a heavily regulated industry simply because both involve cameras.

The MERK Act requires slaughterhouses to *do* something—specifically, provide the public with video footage of specified areas. It does not require slaughterhouses to express an idea. While the First Amendment protects free speech, no Constitutional restriction exits on regulation of non-expressive conduct. Consequently slaughterhouses have no right to withhold information when that information can be provided through conduct alone.

## II. THE MERK ACT COMPELS CONSTITUTIONALLY VALID COMMERCIAL DISCLOSURE THROUGH VIDEO SURVEILLANCE IN SLAUGHTERHOUSES.

### A. The MERK Act video monitoring requirement compels commercial disclosure; it does not restrict commercial expression.

The U.S. Supreme Court has distinguished between restraints on commercial speech and compelled commercial disclosure. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). The former receives heightened scrutiny while the latter need only reasonably relate to an adequate government interest. *Id.* Contrary to ASA's claims, the MERK Act compels commercial disclosure. The Act does not restrict slaughterhouses' free expression. Instead, it obliges them to disclose truthful information.

The First Amendment prohibits Congress from making any law "abridging the freedom of speech." U.S. Const. amend. I. However, Court has limited First Amendment protection for commercial speech. Government restrictions on commercial expression cannot be "more extensive than is necessary" to directly advance a substantial government interest. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980). The court reasoned that even when advertising is selective, "the First Amendment presumes that some accurate information is better than no information at all." *Id*. at 562. (citing *Bates v. State Bar of*

*Arizona*, 433 U.S. 350, 374 (1977)). Consumers are able to make more informed decisions in their own self-interest when commercial information flows freely. *Id.* at 562.

However, the heightened scrutiny of *Central Hudson* does not apply to the MERK Act for two reasons. First, the MERK Act does not restrict slaughterhouses' commercial speech in any way. Second—in keeping with *Central Hudson*'s underlying policy to increase consumer awareness and promote the free flow of truthful information—the MERK Act requires disclosure of the plain reality of slaughterhouse conditions to consumers.

While the First Amendment protects against overreaching restrictions on commercial expression "[t]he right of a commercial speaker not to divulge accurate information regarding his services is not such a fundamental right." *Zauderer*, 471 U.S. at 651 n.14 (1985). In *Zauderer*, the Supreme Court concluded that a material difference exists between disclosure requirements and "outright prohibitions on speech." *Id.* at 637. The Court noted that compelled disclosure does not restrict commercial expression. Instead, it requires companies to, "provide somewhat more information than they might otherwise be inclined to present." *Id.* at 650. The state many compel commercial disclosure of "purely factual and uncontroversial information" so long as "disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.* at 651.

ASA claims *Zauderer* applies only where compelled disclosure is meant to cure consumer deception. However, in *Pharmaceutical Care Management Association v. Rowe*, this Court explicitly extended *Zauderer* beyond the consumer deception context. 429 F.3d 294, 310 n.8 (1st Cir. 2005). The *Rowe* Court heard a company's First Amendment challenge to a disclosure requirement intended to promote citizens' access to quality, cost-effective healthcare. The Court ruled found the company's challenge "completely without merit." *Id.* at 310. The *per*

*curiam* opinion stated that "[t]here are literally thousands of similar regulations on the books-such as product labeling laws, environmental spill reporting, accident reports by common carriers. . . [T]he idea that these thousands of routine regulations require an extensive First Amendment analysis is mistaken." *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005); s*ee also Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 20 (D.C. Cir. 2014) (holding "that Zauderer in fact does reach beyond problems of deception"); N*at'l Elec. Mfg. Assoc. v. Sorrell*, 272 F.3d 104, 115 (2nd Cir. 2001) (applying *Zauderer* to any compelled commercial disclosure provided the state interest is more than satisfying idle consumer curiosity). Given this circuit's explicit extension of *Zauderer* to contexts other than consumer deception, the MERK Act falls squarely under *Zauderer*'s deferential review.

**B. The MERK Act's video surveillance requirement is "reasonably related" to the legitimate government interests in humane treatment of animals and informing consumers about the raising and slaughter of meat.**

*Zauderer* applies a two-part test to determine whether a compelled commercial disclosure violates the First Amendment. *Zauderer*, 471 U.S. at 651. First, the court must "assess the adequacy of the interest motivating the [law]." *Id.* Second determine whether the disclosure requirements are "reasonably related" to the State's legitimate interest. *Id.* The test is lenient "[b]ecause the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed." *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 n.14 (1985). And, while the government need not claim a substantial interest to justify compelled commercial disclosure, prevention of animal abuse is a substantial government interest.

With the MERK Act, Congress addressed egregious and widespread animal abuse in slaughterhouses. The Act also and raises consumer awareness about food production in general

and the meat industry in particular. MERK Act § 1.[2] Moreover, history, federal and state law, strengthening social mores, and consumer outcry all indicate that preventing animal torture and abuse is a substantial government interest. *United States v. Stevens*, 559 U.S. 460, 496 (2010).

Laws against cruelty to animals date back to the original Massachusetts Bay Colony. In 1641, the Colony banned "Crueltie [sic] towards any bruite [sic] Creature [sic] which are usuallie [sic] kept for man's use." Animal Welfare Institute, *Animals and Their Legal Rights: A Summary of American Laws From 1641-1990* 1 (1990). In 1821, Maine became the first State to enact an anti-cruelty law, followed closely by New York in 1829, Massachusetts in 1838, and Connecticut in 1838. David J. Wolfson, *Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production*, 2 Animal L. 123, 127 (1996). Today, all 50 States have anti-cruelty laws. *Id.*

At the federal level, slaughterhouse regulation began in 1906 with the Federal Meat Inspection Act ("FMIA"), which authorized an "elaborate" inspection program. *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965, 967 (2012). In 1958, Congress enacted the Humane Methods of Slaughter Act ("HMSA"), which requires slaughterhouses to use only "humane methods" of slaughter and prevent "needless suffering." 7 U.S.C. § 1901. With HMSA, Congress responded to growing public outcry about "atrocities that were routinely committed in slaughterhouses." Elizabeth L. DeCoux, *In the Valley of the Dry Bones: Reuniting the Word "Standing" with Its Meaning in Animal Cases*, 29 Wm. & Mary Envtl. L. & Pol'y Rev. 681, 687 (2005). At the time, public concern about slaughterhouse cruelty was so great that the Chair of the Senate Agriculture

[2] The district court declined to consider public health and food safety as an adequate state interest as they were not included in the legislative findings. *American Slaughterhouse Ass'n*, No. 3:14-cv-55440 MJC (ABC), slip op. at 7 (D. Mass. Aug. 15, 2014). However, at the introduction of the Act, Representative Kahn stated that video surveillance "could have prevented an episode like Hallmark-Westland, and could very likely prevent the next meat recall." While preventing animal abuse and informing consumers are substantial government interests, the MERK's video monitoring requirement clearly promotes public health and food safety by detecting disease, "downed" animals, contamination, or unsanitary conditions.

Committee stated that "he never had so much pressure in all his twenty-two years in Congress." *Id.*

Courts agree that the government has a substantial interest in preventing cruelty to animals. The U.S. Supreme Court has noted that "the prohibition of animal cruelty . . . has a long history in American law," *Stevens*, 559 U.S. at 469, and that "the Government . . . has a compelling interest in preventing the torture" of animals." *Id.* at 496 (Alito, J., dissenting); *see also Farm Sanctuary, Inc. v. Dep't of Food & Agric.*, 74 Cal. Rptr. 2d 75, 79 (Cal. Ct. App. 1998) ("It has long been the public policy of this country to avoid unnecessary cruelty to animals," because "[t]here is a social norm that strongly proscribes the infliction of any 'unnecessary' pain on animals, and imposes an obligation on all humans to treat nonhumans 'humanely.'" (citations omitted)).

While the ASA offers *Stevens* to support its position that preventing animal abuse is not a substantial government interest, the statute in *Stevens* was a content-based restriction on protected free speech, not a compelled commercial disclosure. *Stevens*, 559, U.S. at 468. The statute, therefore was subject to a much stricter constitutional test. *Id.* Moreover, the statute in *Stevens* criminalized *depictions* of animal cruelty. *Id.* at 466. While the Supreme Court declined to make depictions of animal cruelty a novel category of unprotected speech, it conceded that animal torture and abuse is illegal and immoral. *Stevens*, 559 U.S. at 469. The Court did not foreclose the possibility that preventing animal abuse may be a compelling government interest more a statute more narrowly tailored to accomplish that end. *Id.* at 469. And, given the history of prohibiting animal cruelty, the nationwide prohibition on animal abuse, and social condemnation of mistreatment of livestock, the government has a substantial interest in preventing animal cruelty.

In addition, the government has a substantial interest in "enabling customers to make informed choices based on characteristics of the products they wished to purchase." *American Meat Inst. v. U.S. Dep't of Agriculture*, 760 F.3d 18, 24 (D.C. Cir. 2014). This interest extends beyond mere consumer "curiosity." *See International Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996) (holding that "consumer curiosity alone is not a strong enough state interest to sustain the compulsion of even an accurate, factual statement"). *American Meat Institute* upheld country-of-origin labeling regulations for beef. 760 F.3d at 27. In its decision, the court stated that such labeling serves a greater interest than "idle curiosity." *Id.* at 24. Specifically, country-of-origin labeling satisfies "demonstrated consumer interest" and addresses "individual health concerns." *Id.*

Likewise, the MERK Act satisfies "consumer interest" in humane treatment of animals. *See* H.R Rep. No. 112-666, at 3–4 (describing "egregious mistreatment of livestock" in slaughterhouses). A 2010 Consumer Reports survey "revealed that animal welfare is a top concern for consumers." *Id.* at 4 Additionally, the survey found that "labels fail to convey any meaningful information" about animal welfare. *Id.* Representative Kahn reports that he "receive[s] thousands of calls, emails, and letters every year from constituents outraged by the horrendous cruelty they see in undercover videos." *Statement of Rep. Panop T. Kahn before the U.S. House of Representatives Introducing the Meat Eaters' Right to Know Act* (Jan. 25, 2012). This is not a case of mere "consumer curiosity." Rather, federal government has a substantial interest in preventing needless cruelty in slaughterhouses.

The MERK Act is necessary to prevent rampant violations of HMSA because traditional regulation has failed. In the 57 years since Congress enacted HMSA, slaughterhouse practices

have changed little. In fact, brutality in slaughterhouses today is so commonplace that operators consider HMSA penalties "merely the 'cost of doing business.'" *Id.*

In 2001 a series of *Washington Post* articles reported that gruesome violations of HMSA occurred frequently as slaughterhouse operators blatantly disregarded the law. Joby Warrick, *They Die Piece by Piece': In Overtaxed Plants, Humane Treatment of Cattle is Often a Battle Lost*, Washington Post, Apr. 9, 2001, A1. The front-page articles described animals proceeding, alive and fully conscious, through stations like "the tail cutter, the belly ripper, and the hide puller." *Id.* Indignation over such barbaric practices reached Congress, where Senator Robert Byrd took the floor to describe the violations reported in the *Post*. 147 Cong. Rec. S7311 (daily ed. July 9, 2001) (statement of Sen. Byrd). Two-and-a-half years later, the U.S. General Accounting Office released a report that confirmed 553 violations of federal law in slaughterhouses over a twenty-eight month period. U.S. Gen. Accounting Office, *Humane Methods of Slaughter Act: The USDA Has Addressed Some Problems But Still Faces Enforcement Challenges* 4 (Jan. 2004). More recently, undercover videos recorded by animal activists revealed "abuse of downed cows" at a slaughterhouse in California and "the torture of veal calves … in Vermont." *Statement of Rep. Panop T. Kahn before the U.S. House of Representatives Introducing the Meat Eaters' Right to Know Act* (Jan. 25, 2012).

The MERK Act responds to these and other highly publicized incidents in slaughterhouses nationwide. The U.S. Department of Agriculture insists that it needs "needs stronger tools to prevent animal abuse in slaughterhouses." *Id.* Overtaxed inspectors cannot effectively monitor for both health problems and inhumane treatment. *Id.* the MERK Act provides regulators with the tools they need to prevent unlawful and unnecessary cruelty. At the same time, the Act "give[s] consumers the information they need to vote with their wallets." *Id.*

The Act imposes no additional penalties for animal abuse. Instead, it relies on the market and the free flow of truthful information to solve a problem that traditional inspection has failed entirely to correct. Noncompliance with HMSA has become the norm in the slaughterhouse business, despite years of government action and consumer outrage. The MERK Act is therefore necessary to bring slaughterhouses into compliance with HMSA and other federal laws.

## III. THE MERK ACT DOES NOT VIOLATE THE FOURTH AMENDMENT BECAUSE IT AUTHORIZES CONSTITUTIONALLY VALID ADMINISTRATIVE SEARCHES.

### A. Plaintiffs cannot challenge the MERK Act on its face because it clearly authorizes reasonable searches in some circumstances.

The Fourth Amendment prohibits only "unreasonable" searches. U.S. Const. amend. IV. ASA cannot prove that all applications of the MERK act result in an "unreasonable" search, therefore ASA cannot bring a facial challenge under the Fourth Amendment.

The U.S. Supreme Court has held that "[t]he constitutional validity of a warrantless search . . . can only be decided in the concrete factual context of [an] individual case." *Sibron v. New York*, 392 U.S. 40, 59 (1968). Moreover, the Court has held—and subsequently reiterated—that a facial challenge under the Fourth Amendment is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (explaining that a facial challenge fails unless "the law is unconstitutional in all of its applications"). Thus, the ASA must demonstrate that every conceivable application of the MERK Act violates the Fourth Amendment.

Plaintiffs in federal court rarely meet this burden, for example recently the Sixth Circuit upheld the Stored Communications Act, 18 U.S.C. §§ 2701–11, against a facial Fourth Amendment challenge. *Warshak v. United States*, 532 F.3d 521 (6th Cir. 2008. The Stored

Communications Act authorizes government agents to search an individual's electronic communications without prior notice. 18 U.S.C. § § 2705(a)(2). Nonetheless, the court in *Warshak* refused to find all possible applications of the statute "unreasonable." *Warshak* 532 F.3d at 523. Citing Supreme Court precedent, the Sixth Circuit chose not to engage in "the abstract and unproductive exercise of laying the extraordinarily elastic categories of [a statute] next to the categories of the Fourth Amendment." *Sibron*, 392 U.S. at 59. Rather, the court held that determining whether a search is "reasonable" under the Fourth Amendment requires a court to examine "the totality of the circumstances." *Warshak*, 532 F.3d at 528. In other words, Fourth Amendment analysis "turn[s] on the concrete, not the general," and the *Warshak* court refused to consider the constitutional validity of the Stored Communications Act based on nothing more than the text of the statute. *Id.* at 523.

Likewise, ASA brings a facial challenge, so it must demonstrate that each and every application of the MERK Act will yield an unreasonable search. ASA has failed to do so because constitutionally valid applications of the MERK act exist.

First, some applications of the MERK Act fall within the "open fields" doctrine, which holds that a search does not occur when government agents observe "outdoor areas or spaces between structures and buildings." *Dow Chem. Co. v. United States*, 476 U.S. 227, 236 (1986). The MERK Act requires slaughterhouses to install cameras in "all areas where animals are present." MERK Act § 3. Many slaughterhouses keep livestock in outdoor pens before slaughter. *See, e.g.*, Ted Conover, *The Way of All Flesh: Undercover in An Industrial Slaughterhouse*, Harper's (May 2013) (describing how cattle are unloaded from trucks into outdoor holding pens before slaughter). Therefore, any observation of these pens—either in person or remotely through online streaming—is not a "search" under the Fourth

Amendment. *Dow*, 476 U.S. at 233. Furthermore, the "open fields" doctrine would apply to outdoor pens at slaughterhouses even if inspectors had to pass over private property to view the pens. *See United States v. Eastland*, 989 F.2d 760 (5th Cir.1993) (holding that trespass by state officials did not trump the open fields doctrine). Federal courts have already tested and upheld warrantless inspections of agricultural facilities and animal pens under the "open fields" doctrine. *United States v. King*, No. CR-08-02-E-BLW, 2008 WL 2746034, at *2 (D. Idaho July 11, 2008); *Dunham v. Kootenai Cnty.*, 690 F. Supp. 2d 1162, 1167 (D. Idaho 2010). Therefore, the MERK Act does not violate the Fourth Amendment by requiring video surveillance of outdoor spaces on slaughterhouse grounds where animals are present. MERK Act § 3.

Second, slaughterhouses are "pervasively regulated business[es]." *See New York v. Burger*, 482 U.S. 691, 701 (1987). In *New York v. Burger*, the Supreme Court held that "closely regulated" businesses with a "a long tradition of close government supervision" have a reduced expectation of privacy. *Id*. The Court has also observed "certain industries have such a history of government oversight," that these industries have "no reasonable expectation of privacy." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978). "[W]hen an entrepreneur embarks upon such a business, he [voluntarily subjects] himself to a full arsenal of governmental regulation." *Id.* Indeed, slaughterhouses "have such a history of government oversight that" they have "no reasonable expectation of privacy." *Id.* at 313.

Federal regulation of slaughterhouses began in 1906, shortly after Upton Sinclair's novel *The Jungle* "sparked an uproar over conditions in the meatpacking industry." *Harris*, 132 S. Ct. at 967. That year, Congress enacted FMIA, which establishes "an elaborate system of inspect[ing]" live animals and carcasses in order "to prevent the shipment of impure, unwholesome, and unfit meat." *Pittsburgh Melting Co. v. Totten*, 248 U.S. 1, 4–5 (1918). In

1978, Congress amended FMIA, 92 Stat. 1069, to require all slaughterhouses to comply with the Humane Methods of Slaughter Act of 1958, (HMSA), 72 Stat. 862, 7 U.S.C. § 1901–07. HMSA, in turn, requires slaughterhouses to render livestock "insensible to pain" before slaughter. *Id.* § 1902.

Under the authority of FMIA and HMSA, the Department of Agriculture's Food Safety and Inspection Service (FSIS) has issued "extensive regulations" that govern slaughterhouse operations. *Harris*, 132 S. Ct. at 968. FSIS "employs about 9,000 inspectors, veterinarians, and investigators." *Id.* In fiscal year 2010, FSIS "examined about 147 million head of livestock and carried out more than 126,000 [inspections]." *Id.* In addition, slaughterhouses are subject to state and federal environmental regulations. *See, e.g., State v. Bonaccurso*, 227 N.J. Super. 159, 167, 545 A.2d 853, 857 (Ch. Div. 1988) (describing the relationship between state and federal environmental regulation of slaughterhouses).

Due to the low expectation of privacy, administrative inspections of commercial properties like slaughterhouses do not require probable cause. The constitutional validity of administrative inspections is governed by a "standard of reasonableness." *Camara v. Municipal Court*, 387 U.S. 523, 537 (1967). Courts determine whether an administrative search is reasonable by balancing "the need to search against the invasion which the search entails." *Id.* Slaughterhouses in particular must submit to frequent unannounced inspections of almost every aspect of their operation. Due to the reduced expectation of privacy and "reasonableness" standard of review, the government's interests in animal welfare and consumer safety often outweigh slaughterhouse owners' privacy interests. Thus, many circumstances exist in which administrative inspections of slaughterhouses—even conducted by video surveillance— satisfy the Fourth Amendment.

Plaintiffs have therefore failed to sustain a facial Fourth Amendment challenge because constitutionally valid applications of the MERK Act exist. First, video surveillance of outdoor holding pens and other "open fields" on slaughterhouse property is not a "search" for Fourth Amendment purposes. *Oliver v. United States*, 466 U.S. 170, 177–78 (1984). Additionally, slaughterhouses, like other "pervasively regulated" businesses, have a minimal expectation of privacy. *See Barlow's*, 436 U.S. at 313. Some applications of the MERK Act certainly exist where the public need to search outweighs slaughterhouse owners' limited privacy interests.

### B. The MERK Act authorizes constitutionally valid administrative inspections of a "pervasively regulated" industry.

Assuming ASA's facial challenge is valid, the MERK Act survives Fourth Amendment scrutiny. As discussed above, slaughterhouses are "pervasively regulated" businesses with a minimal expectation of privacy. In this unique context, the MERK Act is a constitutionally valid means to further the government's substantial interest in the humane treatment of animals.

In *New York v. Burger*, the Supreme Court held that "a warrantless inspection of commercial premises" is reasonable—and therefore constitutional—if it satisfies three criteria. *Burger*, 482 U.S. at 702. First, a "substantial government interest" must support the regulatory scheme that authorizes the inspection. *Id.* Second, warrantless inspections must be "necessary to further the regulatory scheme." *Id.* (quoting *Donovan v. Dewey*, 452 U.S. 594, 602 (1981)). Finally, the government must provide notice that inspections will occur and limit the discretion of inspecting officers. *Id.* at 702. The MERK Act satisfies all three *Burger* criteria.

The First Amendment analysis above shows that both preventing animal abuse and informing consumers—in addition to the Act's obvious public health and food safety implications—are substantial government interests sufficient to compel commercial disclosure and justify warrantless inspections under *Burger*. As discussed in section II.B, video monitoring

and public online streaming are reasonably related to preventing animal abuse and informing disclosure. Given rampant violations and the inability of the USDA to effectively regulate slaughterhouses, such means are necessary to accomplish the regulatory ends of preventing animal abuse and informing consumers.

The MERK Act satisfies the final *Burger* prong because it provides slaughterhouses with adequate notice and limits the scope of inspections. The Act requires slaughterhouse operators themselves to "install and maintain" surveillance cameras. MERK Act § 3. The Act also requires slaughterhouses to live-stream camera footage on their websites. *Id.* § 4. These requirements ensure that slaughterhouses subject to the MERK Act will know the location of each camera and the precise areas under surveillance. In addition, slaughterhouses can instantly access real-time camera footage online.

The MERK Act also limits the scope of inspections and the discretion of the inspecting officers. Specifically, the Act limits surveillance to superficial visual inspections of "places where . . . animals [are] present." *Id.* § 3. And, the Act conforms with federal precedent on video surveillance.

In the criminal context, the police must establish four elements before they receive a warrant to install surveillance cameras in homes or private offices. *United States v. Torres*, 751 F.2d 875, 883–84 (7th Cir. 1984); *United States v. Williams*, 124 F.3d 411, 416 (3d Cir. 1997); *United States v. Falls*, 34 F.3d 674, 680 (8th Cir. 1994); *United States v. Koyomejian*, 970 F.2d 536, 542 (9th Cir. 1992); *United States v. Mesa-Rincon*, 911 F.2d 1433, 1436 (10th Cir.1990); *United States v. Cuevas-Sanchez*, 821 F.2d 248, 252 (5th Cir. 1987); *United States v. Biasucci*, 786 F.2d 504, 510 (2d Cir. 1986). First, the police must show that less intrusive methods have failed. *Torres*, 751 F.2d at 883. Second, they must describe the specific conduct

they intend to observe. *Id.* Third, they must stop video surveillance immediately after they achieve their goals. *Id.* And, finally, they must minimize observation of conduct unrelated to their investigation. *Id.* at 884.

These standards function in the rigorous context of police investigations, but they also provide some guidance in assessing the constitutional validity of the MERK Act under Burger. In essence, the four *Torres* factors require the police to tailor the scope of any video surveillance measures to the goals of their investigation. *Torres*, 751 F.2d 875, 884. Likewise, the final *Burger* factor evaluates statutory limits on inspectors' discretion in light of an "administrative scheme." *Burger*, 482 U.S. at 715–16. Applying the Torres factors to the MERK Act yields the conclusion that the MERK Act satisfies the Fourth Amendment.

First, as the legislative history of the MERK Act shows, less intrusive methods have failed to stop unnecessary cruelty in slaughterhouses. H.R Rep. No. 112-666, at 3–4. Second, the Act describes the specific conduct subject to surveillance: the "handling or slaughter[ ]" of "live animals or carcasses." MERK Act § 3. Third, the Act provides for an indefinite period of video surveillance only because it is necessary to achieve the goals of HMSA and federal slaughterhouse regulations. Slaughterhouses have consistently and blatantly disregarded HMSA since 1958. Without video surveillance, these facilities will likely resume their pattern of callous disregard for both animal welfare and federal law. *See, e.g.*, DeCoux, 29 Wm. & Mary Envtl. L. & Pol'y Rev. at 687 (quoting a former USDA inspector as saying that pre-announced inspections of slaughterhouses would yield a "staged performance comparable to a conducted tour of [Soviet] Russia"). Finally, the MERK Act authorizes only video surveillance germane to its purpose of preventing animal cruelty and protecting public health. It requires cameras in areas where "live animals or carcasses are handled or slaughtered," and nowhere else. MERK Act § 3.

Decades of regulation prove that the government has a "substantial interest" in animal welfare. However, for more than half a century, traditional inspections have failed to stop cruel practices at slaughterhouses. The MERK Act responds to public outrage at the meat industry's recalcitrance by authorizing limited visual inspections of federally regulated slaughterhouses. Video surveillance will ensure that slaughterhouses finally comply with HMSA and federal regulations. Moreover, the MERK Act limits the subject matter and location of inspections in a way that advances the government's goals without needlessly intruding upon the limited privacy interests of slaughterhouses.

## IV. CONCLUSION

The MERK Act does not offend the First Amendment because it regulates slaughterhouse owners' conduct; not their speech. Nonetheless, should the Court find that the Act's video monitoring and online streaming provisions regulate speech, the Act would still be constitutional. The surveillance and online streaming provisions of the Act reasonably relate to the weighty government interests of preventing systematic abuse of livestock and raising consumer awareness.

ASA's Fourth Amendment facial challenge also fails because the MERK Act has constitutional applications. Alternatively, MERK does not violate ASA's right to be free from unreasonable government searches and seizures because it passes the *Burger* test. The Act promotes a substantial state interest. Its unique regulatory measures are necessary to enforce existing animal welfare regulations and inform consumers. The Act gives adequate notice by requiring slaughterhouses to outfit and maintain their own cameras. And, it limits searches to areas where animals are kept and slaughtered. Therefore, USDA requests that this court affirm the district court order finding ASA failed to present a valid First or Fourth Amendment claim, and find the MERK Act constitutional.