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

IN THE 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.

On Appeal from the District Court for the District of Massachusetts

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BRIEF OF APPELLEES

January 23, 2015

Team #22
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Oral Argument Requested

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ISSUES PRESENTED FOR REVIEW

1. Under the First Amendment of the United States Constitution, should this Court uphold the dismissal of appellant's First Amendment claim, apply rational review, and hold that the Meat Eaters' Right to Know Act is constitutional when it (1) serves the government's interests in preventing cruelty to animals, promoting public health, and informing consumers, and (2) uses mandatory video surveillance of slaughter plants as a means that is reasonably related to those interests?

2. Should this Court be convinced to prematurely evaluate the constitutionality of the Meat Eaters' Right to Know Act in terms of the Fourth Amendment, even though the act has yet to take force and entertaining such an evaluation involves heavy speculation? If this Court decides to review the act's constitutionality, should this Court uphold the lower court's determination that the act does not violate the Fourth Amendment given the act's focus on a closely regulated industry with a diminished expectation of privacy when the searches are necessary to further a regulatory scheme?

STATEMENT OF THE CASE

In March 2014, in the United States District Court for the District of Massachusetts, the American Slaughterhouse Association ("Appellant") filed a complaint against the United States Department of Agriculture and the Secretary of Agriculture, Tom Vilsack ("Appellee" or "the government"), challenging the constitutionality of the Meat Eaters' Right to Know Act ("MERK Act") and seeking declaratory judgment and injunctive relief. Memorandum Opinion, 1-2 (D. Mass. 2014). Appellee filed a motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Id. at 2. Ruling that Appellant did not state a claim under the First Amendment nor the Fourth Amendment, United States District Judge, the Honorable Myra J. Copeland, granted Appellee's motion to dismiss the ASA's complaint in its entirety on August 15, 2014. Id. at 15. Appellant then filed an appeal to this Court on October 31, 2014. United States Circuit Judge, the Honorable Ferguson J. Warren ordered parties to brief whether the MERK Act is constitutional under the First and Fourth Amendments. Briefing Order, 1-2 (1st Cir. 2014).

STATEMENT OF FACTS

This case concerns the rights of consumers to know where their food comes from and the rights of elected officials to legislate the people's will of wanting humane treatment and slaughter of animals raised for meat and poultry.

In 1978, the United States Congress passed the Human Methods of Slaughter Act, which required that animals used for food are unconscious when they are killed. MERK Act Legislative History, 1. Despite Congress updating the regulation in 1978, deplorable abuse of animals at slaughter plants remains a problem today. Id. at 2, 3. Unfortunately, the USDA lacks the staff and resources to be able to ensure that all animals at slaughter plants are treated humanely. Id. at 3-4. In recent years, there have been numerous cases of egregious animal abuse at slaughter plants. Id. at 4. Not only are these practices, some of which have been captured on undercover video, cruel to animals, but the killing and mistreatment of sick and injured animals also poses a serious risk to public health. Id.

When the 2008 and 2010 undercover videos depicting cruel treatment of animals at slaughter plants became public, consumers were outraged. Id. Not only were consumers upset by the extreme cruelty inflicted on animals used for food and poultry, but, currently, there is no way for consumers to know how animals are treated at slaughter plants as labels cannot accurately convey this information. Id.

Accordingly, in response to growing public concern about the treatment of animals in slaughter plants, on January 25, 2012, Representative Panop T. Kahn introduced the MERK Act. Id. at 1. The MERK Act mandates that any USDA-inspected facility that slaughters animals for meat or poultry "must produce video recordings capturing every location of the slaughter plant" where animals (both live and dead) are present. H.R. 108 § 3. In order to educate consumers

about where their food comes from, the MERK Act requires the slaughter plants to live stream the videos captured at their facilities. H.R. 108 § 4. If a slaughter plant does not have a company website, the plant shall turn over the videos to the USDA, which will make them available to consumers. Id. If slaughter plants do not comply with the MERK Act's requirements, the slaughter plant will be subject to "a fine of not less than $1,000 per day." H.R. 108 § 5. In order to give slaughter plants a chance to comply with the new regulations, the MERK Act's effective date is March 2, 2015, over three years since it was introduced. H.R. 108 § 6.

As Representative Kahn noted, the MERK Act will help "end the deplorable abuse of animals" in slaughter plants by providing consumers with enough information so they can "vote with their wallets." MERK Act Legislative History, 2. Accordingly, Congress, finding information about how animals are treated at slaughter plants to be of "vial importance to the American consumer," passed the MERK Act in March 2012. H.R. 108 § 1.

SUMMARY OF THE ARGUMENTS

This district's decision to dismiss Appellant's constitutional claims was appropriate because the MERK Act does not violate the First nor Fourth Amendments.

First, the district court was correct in using the rational basis review of commercial speech in Zauderer v. Office of Disciplinary Counsel to evaluate the MERK Act because the MERK Act compels slaughter plants to provide factual disclosure to consumers, and the Act does not place speech restrictions on slaughter plants. 471 U.S. 626, 637 (1985). Acknowledging that commercial speech receives less constitutional protection than other forms of speech, Zauderer provides that a statute, which compels commercial speech, must serve a government interest and use a means that is reasonably related to that interest in order to be permissible under the First Amendment. Additionally, the district court's ruling that Zauderer should extend to

government interests beyond curing deception of consumers furthers the First Amendment's goals of having well-informed consumers and promoting truth in the marketplace.

Second, the MERK Act meets the Zauderer standard because the government can prove that it has interests in preventing animal cruelty, promoting public health, and informing consumers, and the MERK Act's means, video surveillance of slaughter plants, are reasonably related to the government's interests. Indeed, because labels are inadequate at showing the treatment of animals in slaughter plants, video surveillance is the only way to give customers reliable, accurate information so they can make informed choices and influence the marketplace to promote more humane treatment of animals and better public health.

As to the second issue, this Court should not entertain Appellant's facial challenge against the MERK Act's Fourth Amendment compliance. The Supreme Court has repeatedly discussed its skepticism of facial challenges in a Fourth Amendment context because of its tradition to evaluate Fourth Amendment claims on a case-by-case analysis, examining each set of facts in turn. A facial challenge of an act that has yet to take force does not allow for this, and instead forces the Court to make an evaluation based solely on speculation; this poses a threat to the judicial process.

Even if this Court agrees to entertain Appellant's facial challenge – and it should proceed with serious caution if it intends to do so – it should find that the facial challenge fails because of the MERK Act's adherence to the "administrative search" exception set out in New York v. Burger. 482 U.S. 691, 702 (1987). This exception allows warrantless searches of the commercial premises of a closely regulated industry so long as three requirements are met. First, the government must have a substantial interest in regulating this industry. Secondly, the statute in

question must be necessary to further that government interest. Lastly, the statute must offer a constitutionally adequate substitute in place of a warrant.

In this case, the MERK Act adheres to all three requirements. First, precedent and Congressional acts indicate that the government's interest in monitoring the activities of slaughterhouses is substantial. There are numerous laws about humane treatment of animals already in place, and the MERK Act's required video surveillance would be in furtherance of the government's substantial interest in regulating slaughterhouse behavior. Secondly, there is overwhelming evidence that the statutes in place are not sufficient to eradicate animal cruelty in slaughterhouses. The surveillance pursuant to the MERK Act is necessary to advance this regulatory goal by "cracking down" on slaughterhouse activity. Lastly, the MERK Act provides slaughterhouse operators the constitutional equivalent of a warrant by giving them notice of the surveillance, and through its limited scope regarding which areas are filmed. For these reasons, this Court should find the MERK Act does not violate the Fourth Amendment, and should affirm the lower court's decision to grant summary judgment on behalf of the government.

ARGUMENTS

I. THIS COURT SHOULD AFFIRM THE DISMISSAL OF THE APPELLANT'S FIRST AMENDMENT CLAIM SINCE THE MEAT EATERS' RIGHT TO KNOW ACT IS CONSTITUTIONAL BECAUSE IT SERVES THE GOVERNMENT'S INTERESTS AND USES A MEANS THAT IS REASONABLY RELATED TO THOSE INTERESTS.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Yet, different types of speech receive different protections under the law. While the Supreme Court has extended First Amendment protection to commercial speech, it generally receives less protection than other, noncommercial forms of speech. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978); see also, Zauderer v. Office

of Disciplinary Counsel, 471 U.S. 626, 637 (1985). "Commercial speech is subject to 'less stringent constitutional requirements' than are other forms of speech." Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 113 (2d Cir. 2001) (quoting Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 72 (2d Cir. 1996)). This Court uses "de novo [review to evaluate] challenges to the constitutionality of federal statutes." United States v. Volungus, 595 F.3d 1, 4 (1st Cir. 2010).

A. Since The MERK Act Compels Commercial Disclosure, And Does Not Restrict Commercial Speech, This Court Should Apply The Zauderer Rational Basis Standard To Evaluate If The MERK Act Is Constitutional Under The First Amendment.

There are two tests, which are subject to different standards of review, which apply to statutes that govern commercial speech. In Central Hudson, the Court provided a four-part analysis for determining if restricting commercial speech is constitutional under the First Amendment and said the court should consider whether: the commercial speech "concern[s] lawful activity and" is not "misleading," "the governmental interest is substantial," "the regulation directly advances the governmental interest asserted," and "[the regulation] is not more extensive than is necessary to serve that interest." Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980). Whereas, the Zauderer Court instructed courts to find statutes, which compel commercial speech, constitutional under the First Amendment if the statute is "reasonably related to the State's interest in preventing deception of consumers." 471 U.S. at 651. In Central Hudson, "the Court established that a restriction on commercial speech is subject to intermediate scrutiny," while in Zauderer, "the Court created an exception that an informational disclosure law—as opposed to a prohibition on speech—was subject to rational review." Safelite Group, Inc. v. Jepsen, 762 F.3d 258, 261-62 (2d Cir. 2014).

There are key differences between statutes that compel speech and statutes that restrict speech, and because the MERK Act compels slaughter plants to disclose their treatment of

animals, this Court should apply the Zauderer rational review standard. When statutes "'impose a disclosure requirement rather than an affirmative limitation on speech,' Zauderer, not Central Hudson, applies." Spirit Airlines, Inc. v. U.S. Dep't of Transp., 687 F.3d 403, 412 (D.C. Cir. 2012) (quoting Milavetz, Gallop. v. United States, 599 U.S. 229, 249 (2010)). The Supreme Court has noted that there are "material differences between disclosure requirements and outright prohibitions on speech" and explained that "the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed." Zauderer, 471 U.S. at 650, 651 n.14. Indeed, "[r]egulations that compel 'purely factual and uncontroversial' commercial speech are subject to more lenient review than regulations that restrict accurate commercial speech." Sorrell, 272 F.3d at 113 (quoting Zauderer, 471 U.S. at 651).

Images can serve as factual disclosure. Discount Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 559 (6th Cir. 2012). In Discount Tobacco, a case that dealt with a statute that required cigarette manufacturers to put graphic warning labels on the back of packs, the court found that "many graphic warnings . . . would constitute factual disclosures under Zauderer." Id. at 520, 559. The court issued a non-exhaustive list of images that would count as compelled disclosure under Zauderer, which included pictures of medical conditions caused by smoking and images of people suffering from a "smoking-related medical condition." Id. at 559. Here, the MERK Act mandates that the government use images (albeit moving ones) to disclose what happens to animals in slaughter plants. H.R. 108 § 3. Like the images of people suffering in Discount Tobacco, images of potential animal suffering would be tantamount to factual disclosure as the video would reveal the truth about the treatment of animals who enter the food supply.

In addition to images qualifying as factual disclosure, the Second Circuit extended Zauderer and noted that the state's interest in informing consumers goes beyond just preventing deception. Sorrell, 272 F.3d at 115; N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114, 133 (2d Cir. 2009). The Second Circuit has said that compelled disclosure that seeks to "better inform consumers about the products they purchase," even if the disclosure does not intentionally try to prevent consumer deception, passes the Zauderer test. Sorrell, 272 F.3d at 115. This Court also noted that it has "found no cases limiting Zauderer" to only prevent deceptive advertisements. Pharm. Case Mgmt. Ass'n v. Rowe, 429 F.3d 294, 310 n.8 (1st Cir. 2005). Further, last year, the D.C. Circuit held that "Zauderer in fact does reach beyond problems of deception" and overruled *all* cases in that circuit "limiting Zauderer to cases in which the government points to an interest in correcting deception." Am. Meat Inst. v. United States Dep't of Agric., 760 F.3d 18, 20, 22 (2014).

If courts were to limit Zauderer to only a government interest in preventing consumer deception, the government would have a much harder time preventing dangerous harms (like mercury poisoning and obesity discussed below in Sorrell and New York State Restaurant) as compelling disclosure of this information would not be permissible under the First Amendment. Sorrell, 272 F.3d at 115; N.Y. State Rest. Ass'n, 556 F.3d at 136. Because extending Zauderer beyond an interest in preventing deception is supported by this and multiple other circuits, this Court should recognize that the government is interested in preventing cruelty to animals and promoting public health, and rule that the government be able, under the First Amendment, to compel commercial disclosure to further those goals.

1. Using The Rational Review Standard To Evaluate The MERK Act Allows A Promotion Of The Goals Of The First Amendment.

Applying Zauderer to statutes that compel speech furthers the goals of the First Amendment. The Supreme Court noted that the First Amendment serves to not only "foster[] individual self-expression but [it] also . . . afford[s] the public access to discussion, debate, and the dissemination of information and ideas." First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978). Indeed, "the purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas." Red Lion Broad. Co. v. F.C.C., 395 U.S. 367, 390 (1969). Moreover, the Supreme Court has a rich history of wanting consumers to have access to accurate information, and "[t]he Court has long viewed the First Amendment as protecting a marketplace for the clash of different views and conflicting ideas." Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981).

Accordingly, compelling slaughter plants to allow consumers to see what really happens to animals in them is consistent with "the First Amendment goal of the discovery of truth." Sorrell, 272 F.3d at 114. If one of the goals of the First Amendment is to have a more informed public, the government should expand the information to which the public has access, not restrict consumers from gaining new information. Thus, this Court should apply Zauderer to determine that the MERK Act is constitutional under the First Amendment.

2. Because The Government Has An Interest In Preventing Cruelty To Animals, Promoting Public Health, And Informing Consumers, The MERK Act Meets The First Prong Of Zauderer.

Preventing cruelty to animals is a legitimate government interest. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 538 (1993). In Lukumi, the plaintiff was a church that practiced animal sacrifice as a form of religious devotion. Id. at 524. After the plaintiff "announced plans to establish a house of worship as well as a school, cultural center,

and museum" in a Florida city, "the city council adopted three substantive ordinances" banning religious animal sacrifice, which the plaintiff then challenged under the Free Exercise Clause of the First Amendment. Id. at 526, 527, 528. Because the ordinances had exceptions for other animal slaughter, the Supreme Court ultimately determined that the ordinances were unconstitutional because they "devalue[d] religious reasons for killing by judging them to be of lesser import than nonreligious reasons," thus discriminating against religious practice. Id. at 537-38. However, the Court noted that laws that promote "legitimate governmental interests in protecting the public health and preventing cruelty to animals" are constitutional under the First Amendment if they are applied neutrally. Id. at 538, 540.

The importance of humane treatment of animals has long been recognized by state and federal governments, and the necessity of preventing cruelty to animals was specifically addressed by Congress in response to United States v. Stevens. United States v. Richards, 755 F.3d 269, 278 (5th Cir. 2014). In Richards, the Fifth Circuit upheld a statute which "ma[d]e it a crime to create, sell, market, advertise, exchange, or distribute" obscene videos depicting animal cruelty. 755 F.3d at 271. Noting that all states criminalize animal cruelty, the court concluded that preventing cruelty to animals is a compelling government interest, and the statute in question was narrowly tailored enough to serve that interest. Id. at 278-79. The appellant mischaracterizes the court's reasoning in Stevens; while Stevens struck down a previous version of the statute in question (that did not contain an obscenity provision), the court did so, *not* because the humane treatment of animals is unimportant, but because the court applied a strict scrutiny test (since it was a restriction on an individual's speech, which carries a higher burden to meet than compelled commercial disclosure) and declared that the law was not narrowly tailored enough to meet the test. United States v. Stevens, 533 F.3d 218, 228, 232-34 (3rd Cir. 2008). After the Stevens

decision, Congress acknowledged the importance of preventing cruelty to animals and responded by narrowing the statute, adding an obscenity component and "overwhelmingly" passing the new version. Richards, 755 F.3d at 275.

Protecting human health is a "legitimate and significant public goal." Sorrell, 272 F.3d at 115. In Sorrell, the Second Circuit upheld a statute under the First Amendment that compelled commercial disclosure by requiring manufacturers of light bulbs to label the bulbs if they contained mercury. Id. at 107. The court used a Zauderer analysis and determined that reducing mercury to prevent mercury poisoning and protect public health was an important governmental goal. Id. at 113, 115. Similarly, in New York State Restaurant, the Second Circuit used Zauderer's rational basis review to uphold a statute that required fast food restaurants to post calorie content in an effort to reduce the obesity epidemic, and noted the importance of public health to the state. 556 F.3d at 117, 134-35. Also, the court in New York State Restaurant addressed the claim in International Dairy, which the appellant mistakenly relies on, that consumer curiosity is not enough of a government interest to meet Zauderber, and said that when the government has additional interests (in that case, preventing obesity), then Zauderer *is* satisfied. Id. at 134. The Second Circuit also has noted that disclosure requirements further the goal the First Amendment goal of having a well-informed public; "[p]rotection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal." Sorrell, 272 F.3d at 114. Further, the court stated that "[r]equired disclosure of accurate, factual commercial information presents little risk" of the state "forcing speakers to adopt disagree-able state-sanctioned positions." Id. Additionally, the D.C. Circuit recognized disclosure requirements

to combat "individual health concerns and market impacts that can arise in the event of a food-borne illness outbreak" as a substantial government interest. Am. Meat Inst., 760 F.3d at 23.

The present case is similar to Lukumi and Richards, where the courts found that the government has a legitimate interest in preventing cruelty to animals. Lukumi, 508 U.S. at 538; Richards, 755 F.3d at 278. In the MERK Act, Congress found that the public has an interest in "the humane treatment and slaughter of animals raised for meat and poultry" and that the "abuse of livestock animals on farms and in slaughterhouses" violates that interest. H.R. 108 § 1. Not only did Congress recognize the importance of humane treatment of farmed animals by passing the Humane Methods of Slaughter Act thirty-five years ago, Representative Kahn said he receives thousands of correspondences from constituents, reflecting the public's outrage at animal cruelty. MERK Act Legislative History, at 1. Additionally, as the Committee on Agriculture reported, "[a] 2010 Consumer Reports survey revealed that animal welfare is a top concern for consumers, and also the subject about which labels fail to convey any meaningful information." MERK Act Legislative History, at 4. The court in Lukumi also found that statutes that aim to prevent cruelty to animals are constitutional under the First Amendment if they are applied neutrally. 508 U.S. at 538, 540. Here, the MERK Act applies across the board to all slaughter plants, which are licensed to inspection by the USDA, meaning no plant will be singled out. H.R. 108 § 4.

This case is also similar to Sorrell, New York State Restaurant, and American Meat, where the courts determined that public health is a significant government goal. The Supreme Court instructs that when there is a constitutional challenge to a statute, it is important to look to "the intent of Congress" to "eliminate . . . doubts" about the statute's constitutionality. United States v. X–Citement Video, Inc., 513 U.S. 64, 78 (1994). Here, before enacting the MERK Act,

Congress expressed its concern about the public health issues that arise from inhumane treatment of non-ambulatory cows and indicated its intent to try to combat the problem. MERK Act Legislative History, at 2. In passing the MERK Act, Congress specifically referenced the Hallmark/Westwood slaughter plant incident, where undercover video surveillance showed the mistreatment of animals and "triggered the largest beef recall in United States history." MERK Act Legislative History, at 2; see facts in, Nat'l Meat Ass'n v. Brown, 599 F.3d 1093, 1096 (9th Cir. 2010). The Ninth Circuit has acknowledged the health impacts of "'downer' cows [who are] more likely to be diseased," and Representative Kahn also indicated the importance of "prevent[ing] the next meat recall" due to public health concerns. MERK Act Legislative History, at 2; Brown, 599 F.3d at 1096.

The MERK Act acknowledges that providing information about the treatment of farmed animals is of "vital importance to the American consumer." H.R. 108 § 1. The government's interest in consumers being able to "possess the greatest possible information about the treatment of animals in slaughterhouse" is also similar to the Second and D.C. circuits' findings that the government has an interest in helping consumers make informed choices about their food. H.R. 108 § 6; N.Y. State Rest. Ass'n, 556 F.3d at 136; Am. Meat Inst., 760 F.3d at 24. Like mandatory calorie content labels in New York State Restaurant and food-origin labels in American Meat, the MERK Act's video surveillance help the consumers educate themselves and make informed decisions before purchasing food products. N.Y. State Rest. Ass'n, 556 F.3d at 136; Am. Meat Inst., 760 F.3d at 24.

3. Because Allowing Consumers To View Video Surveillance Of Animal Treatment In Slaughter Plants Is Reasonably Related To The Government's Interest In Preventing Animal Cruelty, Promoting Public Health, And Informing Consumers, The MERK Act Meets The Second Prong Of Zauderer And Thus, Is Constitutional Under The First Amendment.

Compelled disclosures of product information are reasonably related to better informing consumers and changing market practices. N.Y. State Rest. Ass'n, 556 F.3d at 136; see also, Rowe, 429 F.3d at 310. In American Meat, the D.C. Circuit upheld a statute requiring country-of-origin labels on meat products under the First Amendment because the labels were reasonably related to Congress's purpose for the statute: "enabling customers to make informed choices based on characteristics of the products they wished to purchase." 760 F.3d at 24. Also, in New York State Restaurant, the court ruled that a statute, which required fast food restaurants to disclose the calorie content in their food, was reasonably related to the public health goal of reducing obesity as it allowed consumers to make better informed choices at restaurant counters. 556 F.3d at 134-36. When evaluating whether compelled disclosure is reasonably related to a governmental interest, the Second Circuit has indicated courts should look at the means the government uses. Sorrell, 272 F.3d at 115. "The [First] Amendment is satisfied, therefore, by a rational connection between the purpose of a commercial disclosure requirement and the means employed to realize that purpose." Id. Moreover, in Rowe, under a Zauderer analysis of the First Amendment, this Court upheld a law which compelled disclosure in an effort to change certain market practices. Rowe, 429 F.3d at 310. This Court said the case's statute, which required pharmacy benefit managers to "disclose conflicts of interest," was reasonably related to "help[ing] control prescription drug costs and increas[ing] access to prescription drugs" because it allowed Maine health benefit providers and their customers to make more informed choices, thus influencing market practices. Id. at 298-99, 310.

Courts should uphold compelled disclosure regulations as reasonably related when the regulations are consistent with the government's goals. Envtl. Def. Ctr. v. United States Envtl. Prot. Agency, 344 F.3d 832, 849 (9th Cir. 2003). In Environmental Defense, the court upheld a

requirement that storm sewer providers had to "educate the public about the impacts of stormwater discharge on water bodies." Id. The court cited Woodley v. Maynard, and noted how the Supreme Court has clarified that if compelled disclosure statutes provide facts, but not the government's opinion, then they should be upheld under the First Amendment. Id. (quoting Wooley v. Maynard, 430 U.S. 705, 715 (1977)). Because the requirement only mandated sewer providers to educate about environmental impacts, rather than assert an opinion about the environment, the Ninth Circuit said the statute was constitutional under the First Amendment. Envtl. Def. Ctr., 344 F.3d at 849.

To be reasonably related to a governmental interest, the statute does not have to make "the greatest possible contribution" in furthering the government's goal; instead, it only has to "likely contribute directly" to the government's goal. Sorrell, 272 F.3d at 115. Further, in American Meat, the court rejected the argument that the government's measure must "directly advance" the government's goal when "informing consumers about a particular product trait." 760 F.3d at 26. In Sorrell, the Second Circuit indicated that a law compelling manufacturers to disclose if their products contain mercury is enough to meet the "reasonable relationship" test of Zauderer because "[i]t is probable that some mercury lamp purchasers, newly informed by the Vermont label, will properly dispose of them and thereby reduce mercury pollution." Id. Additionally, the court stressed the importance of providing consumers with information and noted that "[b]y encouraging such changes in consumer behavior, the labeling requirement is rationally related to the state's goal of reducing mercury contamination." Id.

The MERK Act is similar to the statutes in New York State Restaurant and American Meat, where, under the First Amendment, the courts upheld the statutes that required labels on food products because they were reasonably related to the government's interests of having

consumers make better informed choices. Am. Meat Inst., 760 F.3d at 24; N.Y. State Rest. Ass'n, 556 F.3d at 136. Like, in New York State Restaurant, where the court ruled that customers having information was reasonably related to the government's goal of reducing obesity because the customers could use that information to make healthier food choices, here, customers could use video surveillance to "vote with their wallets," which would reduce animal suffering. N.Y. State Rest. Ass'n, 556 F.3d at 136; MERK Act Legislative History, at 2. Moreover, Representative Kahn remarked that introducing video surveillance in slaughter plants and allowing consumers to see where their food comes from "could very likely prevent the next meat recall," as it would assist consumers in only purchasing from slaughter plants that put healthy animals in the food supply; thus, it is reasonably related to the government's interest in promoting public health. MERK Act Legislative History, at 2. As the court in Sorrell noted, the First Amendment is satisfied if the disclosure requirement is rationally connected to "the means employed to realize that purpose." 272 F.3d at 115. The MERK Act's means are appropriate because labels are inadequate and "fail to convey any meaningful information" in showing how animals are treated when they are at a slaughter plant. MERK Act Legislative History, at 4. Further, "[i]nspectors don't have eyes on the backs of their heads, and can't check for ineffective stunning or overdriving of animals while they're also looking out for Salmonella." Id., at 1. And, as the Committee on Agriculture noted, "[i]nspectors are often absent or engaged in food safety inspection duties, and thus fail to notice or prevent the abuse of animals in slaughterhouses." Id., at 3. Accordingly, if the government's interest is promoting the humane treatment of animals, consumers must be able to witness this treatment directly in order to make informed choices and influence market practices, and the MERK Act's mandatory video surveillance allows them to do so.

Further, the MERK Act is consistent with the government's goals, promotes purely factual disclosure, and is not unduly burdensome. Here, the government's goal is to reduce animal cruelty by promoting "transparency in the food industry." H.R. 108 § 1. Because the MERK Act requires cameras to record anywhere where there is an animal present, under the statute, the practices at slaughter plants would be transparent, creating informed consumers who can promote the humane treatment of animals by rewarding slaughter plants, which treat animals more humanely, with their purchases. H.R. 108 § 3. Additionally, the video surveillance qualifies as a purely factual disclosure because it does not require the government to give its opinion. Like the requirement in Environmental Defense Center, the MERK Act compels disclosure to educate the consumer; slaughter plants merely set up the cameras and let the consumers decide for themselves. 344 F.3d at 849.

Mandatory video surveillance laws are increasing in other industries as well, and state governments have passed statutes requiring other private industries (such as the wireless telephone, scrap metal, and marijuana dispensary industries) to install cameras. See, Or. Admin. R. 333-008-1170 (2014); Minn. Stat. Ann. § 325E.319 (West 2014); Minn. Stat. Ann. § 325E.21 (West 2014). Additionally, the MERK Act's requirements are not too burdensome as they allow for a three year phase-in process. H.R. 108 § 6. The MERK Act does not carry a burden of maintaining a company website as slaughter plants can "make their video recordings available to the United States Department of Agriculture." H.R. 108 § 4.

This case is also similar to Sorrell, where the court found that a statute is reasonably related to a government interest if the statute is likely to contribute to a problem the government seeks to solve. 272 F.3d at 115. In Sorrell, the court noted that while disclosure labels on light bulbs might not eliminate mercury poisoning completely, they would still aid in reducing levels

of mercury by allowing consumers to make better choices. Id. Here, like Sorrell, video surveillance might not completely eliminate all animal cruelty, but the fact that consumers can watch video which captures "every location of the slaughter plant at which live animals or carcasses are handled or slaughtered" will likely contribute to consumers being more informed, making better choices, and demanding the market to change to promote the more humane treatment of animals in slaughter plants. H.R. 108 § 3. As this Circuit has noted, consumer behavior can influence market practice, and allowing consumers to make decisions informed by factual video disclosure can contribute to them reducing animal cruelty by purchasing meat from slaughter plants with better treatment of animals, thus putting economic pressure on all slaughter to change their behavior and treat animals more humanely. Rowe, 429 F.3d at 310.

In conclusion, because the government has interests in preventing cruelty to animals, promoting public health, and informing consumers where their food comes from, and because video surveillance is a means that is reasonably related to those interests, this Court should apply Zauderer rational basis review and find the MERK Act constitutional under the First Amendment.

II. THE DISMISSAL OF APPELLANT'S FOURTH AMENDMENT CLAIM SHOULD BE AFFIRMED BECAUSE IT RAISES A PREMATURE FACIAL CHALLENGE WHICH, IF ALLOWED, COULD GRANT NO RELIEF BECAUSE THE VIDEO SURVEILLANCE OF SLAUGHTERHOUSES CONSTITUTES A PERMISSIBLE WARRANTLESS SEARCH OF A CLOSELY REGULATED INDUSTRY.

The Fourth Amendment ensures the preservation of an individual's right to privacy from government intrusion. Its exact verbiage protects "persons, houses, papers, and effects, against unreasonable searches and seizures," directing any public actor interested in searching these items to get a warrant first. U.S. Const. amend. IV. This is a basic right each American enjoys. Judicial precedent has demonstrated, however, the existence of circumstances in which the right to privacy has required flexibility, and has created several exceptions in order to give the Fourth

Amendment some breathing room. See, Brigham City, Utah v. Stuart, 547 U.S. 398 (2006) (creating a public safety exception for warrantless entries); Warden v. Hayden, 387 U.S. 294 (1967) (allowing police to enter a home without a warrant when they are in hot pursuit of a felon and have probable cause to believe the felon is in that home).

These exceptions were carved out after thorough consideration of the constitutionality of specific searches based on the "totality of the circumstances" in each case in order to meet the needs of the situation. Warshak v. United States, 532 F.3d 521, 528 (6th Cir. 2008). This history indicates Fourth Amendment challenges should stem from the facts of a specific occurrence, such as an impact on personal privacy through the implementation of a certain statute, rather than an abstract situation. Indeed, the Supreme Court has frowned upon facial Fourth Amendment statutory challenges because of the Court's long-standing precedent to evaluate alleged privacy violations on a fact-intensive basis.

Facial challenges carry with them a heavy burden, since a plaintiff must prove that absolutely no circumstances can exist in which the statute could possibly be valid in order for the challenge to succeed. United States v. Salerno, 481 U.S. 739, 746 (1987). Indeed, some wonder how the Court can be expected to conduct a Fourth Amendment analysis when its Fourth Amendment holdings have consistently relied on specific facts. In the present case, Appellant urges this Court to censure the effects of the MERK Act, an act that has yet to enter into force. How can its impact on slaughterhouses be evaluated if it has yet to compel compliance? This facial Fourth Amendment challenge should not be indulged by this Court.

However, other courts have deemed facial challenges on Fourth Amendment grounds acceptable in the past. The Supreme Court has noted that searches are reasonable when conducted for administrative purposes so long as the government satisfies three requirements:

> 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."

New York v. Burger, 482 U.S. 691, 702 (1987). In this case, the MERK Act satisfies all of these requirements. Slaughterhouses are a facet of commercial activity in which the government has a substantial regulatory interest. In the same vein, the warrantless inspection of video surveillance is needed to further the regulatory goal of assuring consumers that their food is cultivated in an environment free from abuse or neglect. Lastly, the MERK Act provides a sufficient substitution for a warrant because its passage provides slaughterhouses with necessary notice of the surveillance while simultaneously limiting the discretion of the inspectors to determine on whom to enforce the Act.

When ruling on Constitutional claims, this Court has adopted a de novo standard of review. United States v. Bongiorno, 106 F.3d 1027, 1030 (1st Cir. 1997).

A. The ASA's Facial Challenge Of The MERK Act On Fourth Amendment Grounds Should Not Stand Because Of The Supreme Court's Negative Characterization Of Facial Challenges As Speculative And Threatening to Judicial Restraint.

The Supreme Court has not been shy about its concern over the validity of facial challenges on Fourth Amendment grounds, having voiced it several times in the past. Sibron v. New York, 392 U.S. 40 (1968); Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008). Other lower courts have followed suit, recognizing that Fourth Amendment

challenges are mounted successfully when a full set of facts is presented to the court instead of an abstract notion of a facial challenge. Warshak, 532 F.3d at 528.

The Supreme Court has approached the notion of statutory constitutional challenges on Fourth Amendment grounds with a hefty amount of skepticism, viewing these challenges as theoretical and, therefore, outside of the norm for Fourth Amendment challenges. Sibron, 392 U.S. at 59. Here, the Court refused to entertain a facial challenge to a New York "stop-and-frisk" statute, "declin[ing] . . . to be drawn into what [it] view[ed] as the abstract and unproductive exercise" of comparing the state statute with the Fourth Amendment to identify common ground. Id. The Court questioned whether it could even evaluate the statute's constitutionality without a "concrete factual context of [an] individual case." In this opinion, the Court demonstrated its disdain for facial Fourth Amendment challenges by refusing to even consider the question.

Facial challenges collide with the longstanding concept of judicial restraint, which urges courts neither to anticipate a constitutional question before it is "ripe," nor paint a rule of constitutional law broader than the facts of the situation dictate. Wash. State Grange, 552 U.S. at 450. Here, the Court again recognized the caution with which it must tread when considering facial challenges at all. The Court acknowledged the ability of facial challenges to potentially "short circuit the democratic process," yet decided to proceed with the First Amendment challenge brought by the plaintiffs. Id. at 451. The Court ultimately found such a challenge unconvincing. Id. at 457.

The continued discouragement of facial challenges in general can be observed in some Circuit Courts as well, rooted in the distrust of such challenges since they rely heavily on speculations and hypothetical situations, offering little to no facts for support. Warshak, 532 F.3d at 525. The Sixth Circuit remarked on the logical error in assessing a claim without first

examining the "totality of the circumstances" on which courts rely to produce "case-by-case determinations that turn on the concrete" concerning Fourth Amendment issues. Id. at 528. The court also holds that the Fourth Amendment is typically "applied after [factual] circumstances unfold, not before," stressing that facial challenges without facts "carr[y] little weight." Id.

An isolated instance in which the Supreme Court chose to entertain such a facial challenge occurred in its term preceding Sibron, facially evaluating and finding unconstitutional a New York wiretapping statute. Berger v. New York, 388 U.S. 41 (1967). The statute permitted any local judge to authorize and "ex parte order[s] for eavesdropping" when sworn affidavits gave reason to believe such wiretapping would produce evidence of a crime, even when no exigent circumstances existed. Id. at 112. The Court acknowledged the "statute's failure to describe with particularity the conversations sought giv[ing an] officer a roving commission to 'seize' any and all conversations" as a primary reason the statute was evaluated facially. Id. at 59. Even still, four of the nine justices refused to decide on the statute's facial constitutionality, with some recognizing that "[n]othing in the cases of this Court supports this wholly ambiguous standard" of a facial challenge. Id. at 90 (Harlan, J., dissenting). Those objecting to a facial challenge still ruled the statute unconstitutional based on the specific facts of the situation in question. Id. at 70-71.

In the case at hand, Appellant attempts to strike down the MERK Act on Fourth Amendment grounds before the act even goes into effect. Memorandum Opinion, 2 (D. Mass. 2014). By asking this Court to consider its facial challenge, Appellant also asks this Court to cast aside the precedent of the United States Supreme Court which is openly opposed to such Fourth Amendment challenges. In bringing this challenge, Appellant urges this Court to abandon the typical "totality of the circumstances" analysis to warrantless searches and to instead favor a

reliance on the speculative characteristic of facial claims. It is not yet clear the impact the MERK Act will have upon slaughterhouses, and it cannot be known for certain until the act takes effect. To substitute facts with speculation and hypotheticals would violate the notion of judicial restraint the Court sought to protect in Washington State Grange.

Appellant mistakenly relies on the Supreme Court's decision to entertain a facial challenge in Berger as evidence that this type of challenge is allowable, even though nearly half of the justices refused to do just that. More than one of these justices specifically mentioned their disdain for facial challenges, electing to decide based on the facts alone. In subsequent cases, the Supreme Court has made clear that constitutional challenges are to be decided based on how the statute in question was applied in *that particular case*, not in all possible cases. Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973). This is not a compelling argument. Portraying an unusual decision as the norm – as Appellants seek to do here – does a disservice to the overwhelming Supreme Court precedent which discourages facial challenges in favor of fact-specific ones.

This Court should reverse the lower court's decision to even hear Appellants' facial challenge of the MERK Act. As precedent suggests, the Supreme Court is wary of the dangers of facial challenges on Fourth Amendment grounds, and it seems sound logic for this Court to follow suit. This Court should find the government's argument favorable and dismiss Appellants' facial claim entirely as improper and premature. Since no facts exist in which this Court could analyze the MERK Act's relationship with the Fourth Amendment, this Court should dismiss Appellant's claim under Federal Rule of Civil Procedure 12(b)(6).

B. Even If This Court Decides To Hear Appellant's Facial Claim, This Court Should Affirm The District Court's Motion To Dismiss Because The Video Surveillance Of Slaughterhouses Is An Administrative Search That Monitors A "Closely Regulated Industry" And Is Not A Violation Of The Fourth Amendment Under The *New York v. Burger* Test.

While protection against intrusions of privacy is a basic human right, the Supreme Court has set some boundaries on this protection. The Court is only prepared to assert an individual's right to privacy against a government search if he has manifested his expectation of privacy through his actions and if society is willing to consider his expectation reasonable. Katz v. United States, 389 U.S. 347 (1967). Situations in which one – or both – of these requirements is lacking have recognized no search that implicated the Fourth Amendment. Id at 361 (Harlan, J., concurring). Exceptions exist that allow warrantless police automobile searches on public roads in light of a diminished expectation of privacy that comes with operating a vehicle on public roads, which are subject to heavy regulation. Chimel v. California, 395 U.S. 752 (1969).

Similarly, the Supreme Court has recognized an important Fourth Amendment exception concerning warrantless searches of businesses or commercial premises, which can be called the "administrative search" exception. Burger, 482 U.S. at 716. For this exception to apply, a "substantial government interest" must be at play that relates to the closely regulated industry being searched. Id. at 702. Keeping with this exception, an industry which undergoes consistent government monitoring can be subject to searches that might otherwise violate the Fourth Amendment, so long as the warrantless searches or inspections are "necessary to further [the] regulatory scheme." Id.at 702 (quoting Donovan v. Dewey, 452 U.S. 594, 600 (1981)). Lastly, the Supreme Court recognizes this exception when the statute authorizing such searches offers a "constitutionally adequate substitute for a warrant." Id. at 703 (quoting Donovan, 452 U.S. at 603).

The MERK Act adheres to these three requirements. Firstly, its application to slaughterhouses, which appear to be of regulatory importance to the meat-producing industry as evidenced through the Act's legislative history and additional federal livestock laws. Secondly,

the video surveillance is necessary to educate consumers who are concerned about the way in which their meat is treated in slaughterhouses, which is encompassed by the regulatory scheme of monitoring slaughterhouses. Lastly, the MERK Act offers slaughterhouses with certainty that their premises will be monitored, thereby offering a constitutional alternative through providing notice of such surveillance. Therefore, the MERK Act satisfies all prongs of the Burger test and this Court should affirm the lower court's determination to dismiss Appellant's claim.

1. This Court Should Recognize The Slaughterhouse Industry As A "Closely Regulated Industry" Because Of The Long History Of Federal Statutes Governing This Commercial Industry, Which Demonstrates This Area Is Of Substantial Government Interest In Accordance With The Burger Test.

Before demonstrating the MERK Act's adherence to the Burger test, the Government first addresses Appellant's allegation that slaughterhouses have never been deemed "closely regulated industry" through any court precedent, and therefore cannot be categorized as such. Memorandum Opinion, 13 (D. Mass. 2014). In New York v. Burger, the Supreme Court recognized the vehicle dismantling industry as heavily regulated and carved out an exception to warrantless searches based on the need to monitor this type of industry. 482 U.S. at 702. In a commercial pursuit with such extensive regulations, the expectation of privacy is "weakened and the government interests in regulating [such] businesses . . . [is] heightened" and therefore, "warrantless inspection of commercial premises may well be reasonable within the Fourth Amendment." Id. The Court reasoned that businesses with "a long tradition of close government supervision" qualify as industries that are "closely regulated." Id. at 700.

The Supreme Court's articulation of a specific industry as one that qualifies as "closely regulated" is reasoning that has be translated to similarly-monitored industries. United States v. Argent Chemical Laboratories, Inc., 93 F.3d 572 (9th Cir. 1996). The Ninth Circuit was able to apply the Supreme Court's definition of "closely regulated industry," not to the vehicle

dismantling industry, but to the veterinary medicine industry. Id. at 576. The Circuit Court remarked, "The veterinary drug industry is certainly regulated as extensively as the vehicle dismantling industry, which the Supreme Court has held to be 'closely regulated,'" rationally comparing its own situation to that in Burger, even though the Supreme Court did not specifically mention the veterinary industry in its decision. Id.

Despite Appellant's claim that the courts have never specified slaughterhouses as "closely regulated industry," it is clear the exception in Burger encompasses this industry even still. Congressional acts concerned with the quality of meat production industries spans centuries, and includes acts such as the Federal Meat Inspection Act of 1906, the Poultry Products Inspection Act of 1957, and the Agricultural Marketing Act. 21 U.S.C.A. § 601; 21 U.S.C.A. § 453; 7 U.S.C.A. § 1621. This country's long history of regulating meat production – identified more elaborately in this brief's First Amendment issue – renders it a "closely regulated industry" for Fourth Amendment purposes. It is quite likely that even if a court were to present Appellant with an enumerated list of industries the court deemed "closely regulated," such a list would still not be exhaustive. No reason exists to deny that slaughterhouses are an industry under heavy government regulation given the tremendous amounts of regulations imposed upon this commercial activity.

A high volume of rules and restrictions imposed on a commercial industry suggest a substantial government interest in warrantless Fourth Amendment searches of commercial premises. Burger, 482 U.S. at 704. In Burger, the Supreme Court, in evaluating regulations on the vehicle-dismantling field, acknowledged that those involved in this field "cannot engage in this industry without first obtaining a license," which is accompanied by fees and requirements. Id. The Court then outlines several other burdens to be met, noting that the failure to do so opens

up operators to criminal liability if they do not comply. Id. The Court held "the State has a substantial interest in regulating the vehicle-dismantling . . . industry because motor vehicle theft has increased in the State . . . [which] is associated with this industry." Id. at 708.

The current case presents similar interests at play. The legislative history of the MERK Act identifies an interest in meat production. MERK Act Legislative History, 1. Representative Kahn points out "an avalanche of concern and interest in the way animals are treated . . . in slaughterhouses" that is alive and well thirty-five years after Congress passed the Humane Methods of Slaughter Act ("the HMSA"). Id. The past and current concern of consumers lends credence to the notion that monitoring slaughterhouse activity will serve a substantial interest to the government. Therefore, the video surveillance imposed by the MERK Act passes the first prong of the Burger test.

2. The MERK Act's Warrantless Video Surveillance Is Necessary To Further The Government Interest In Monitoring Slaughterhouses Because The Current Penalties Are Too Weak To Compel The Humane Treatment Of Animals, And The Heightened Enforcement Of Video Surveillance Will Do More To Hold Slaughterhouses Accountable.

The government has a substantial interest in implementing additional safeguards if the initial rules prove ineffective in accomplishing the intended regulatory goal. Burger, 482 U.S. at 710. This can encompass warrantless searches of commercial premises that would otherwise be impermissible. Id. The Supreme Court proclaims the following in a decision preceding Burger:

> [I]f inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible.

United States v. Biswell, 406 U.S. 311, 316 (1972).

This Court has adopted the Supreme Court's reasoning on whether warrantless searches "advance the regulatory agenda" in a case regarding searches of commercial trucks. United

States v. Maldonado, 356 F.3d 130, 135 (1st Cir. 2004). This Court recognized the difficulty in monitoring commercial trucks due to their mobility, saying, "[T]he interests justifying warrantless searches in the interstate trucking are . . . greater . . . because of the speed with which commercial vehicles move from place to place." Id. at 136. In addition, this Court acknowledged "violations of the regulatory scheme often are not apparent to a patrolling officer," declaring such warrantless exceptions one of the only ways violations are uncovered. Id.

The concern of this Court in Maldonado rings true in the present matter. Data shows slaughterhouse inspectors who monitor under the current HMSA guidelines oftentimes "fail to notice or prevent the abuse of animals in slaughterhouses . . . which has allowed egregious mistreatment of livestock to . . . go unnoticed." MERK Act Legislative History, 3-4. Representative Kahn notes the "weak penalties" for slaughterhouses that violate the HMSA "simply don't provide a meaningful deterrent to animal abuse." Id. at 1. Congress's enactment of the HMSA demonstrates the government's commitment to keeping slaughterhouses in check, and the video surveillance mandated by the MERK Act provides the USDA with "stronger tools to prevent animal abuse in slaughterhouses." Id. This surveillance is necessary to further the regulatory scheme because of the inadequacy of current regulation, so the MERK Act satisfies the second prong of the Burger test for warrantless administrative searches.

3. The MERK Act's Inspection Program Provides Slaughterhouses With A Constitutionally Adequate Substitute For A Warrant Because The Statute Both Notifies The Slaughterhouses Of The Search And Limits The Search's Scope To Areas Where Live Animals Are Handled.

The final prong of the Burger test requires that the statute authorizing warrantless searches of these closely regulated industries provides them with "a constitutionally adequate substitute" in lieu of a warrant. 482 U.S. at 703. In order to accomplish this, the language in a statute authorizing such warrantless searches must be clear enough "that the owner of

commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." Donovan, 452 U.S. at 600.

A statute that informs commercial entities that their premises will be subject to warrantless searches in furtherance of a regulatory scheme effectively provides notice to these entities of such searches. United States v. Gonsalves, 435 F.3d 64, 68 (1st Cir. 2006). This Court held that a medical practitioner was given notice through the relevant statute "that his office was subject to administrative search for misbranded or adulterated drugs," even though he was not told a specific time that an inspection would take place. Id. This Court found the statute alone offered a fitting substitute for a warrant in the circumstances.

It is important to ensure warrantless searches are limited in time, place, and scope so that the searches provide the second function of a warrant to act against general searches. Biswell, 406 U.S. at 315; Burger, 482 U.S. at 711. The Supreme Court elaborated on the limited scope requirement in Burger, identifying that the officers in that case enjoy only a limited discretion regarding areas they can search. Burger, 482 U.S. at 711. The officers were permitted to conduct inspections during business hours and could only be made "of vehicle-dismantling related industries." Id. The Court also identified the types of inspections officers are permitted to conduct, which included business records and any machinery or vehicle parts that required bookkeeping as part of a pre-existing statute. Id. at 711-12.

In deciding the present case, this Court should echo its own precedent regarding what constitutes as an adequate alternative to a warrant. Once the MERK Act takes effect, Slaughterhouses will know that the cameras will be rolling, "know[ing] that consumers and the USDA are watching." Memorandum Opinion, 15 (D. Mass. 2012). This knowledge

accomplishes one of the primary functions of a warrant, which is alerting the owner that a search is being conducted in accordance with the law. Burger, 482 U.S. at 703.

As far as evaluating the MERK Act's scope, this Court should dissect the Supreme Court's standard in Burger. The language in that case sweeps broadly, allowing inspectors to examine *any* part of a vehicle that statutorily required recordkeeping, yet the Court thought the standard sufficient. Id.at 711-12. This Court should reach a similar outcome here. The MERK Act encompasses an array of activities within slaughterhouses, activities that are already governed by existing statutes. The additional surveillance is still limited to areas where slaughtering actually takes place, such as the "truck unloading areas, pens, and chutes . . . the stun box, shackle area, kill line, and processing areas." H.R. 108 § 3. This list *does* exclude some areas of the slaughterhouse, so this Court should recognize such exclusions as a limitation in the MERK Act's scope.

Because the MERK Act is limited in scope and provides notice to slaughterhouses of the video surveillance of killing areas, the Act satisfies the third and final prong of the Burger test for warrantless administrative searches. This Court should find that the Act remains constitutional and does not violate the Fourth Amendment.

CONCLUSION

For the foregoing reasons, we request that this Court affirm the lower court's decision to grant the U.S.D.A.'s motion for summary judgment under Federal Rule of Civil Procedure 12(b)(6), finding neither a valid First Amendment claim nor a Fourth Amendment claim upon which relief can be granted.