No. 23-3091

In the United States Court of Appeals
For the Tenth Circuit

Scott Johnson, Harlene Hoyt, Covey Find Kennel, LLC
Plaintiffs-Appellants

v.

Justin Smith, D.V.M., in his official capacity as Animal Health Commissioner at the Kansas Department of Agriculture
Defendant-Appellee.

Opening Brief of Plaintiffs-Appellants

Appeal from the United States District Court
For the District of Kansas
The Honorable Kathryn H. Vratil
Case No. 6:22-cv-1243-KHV-ADM

Oral Argument Requested

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Table of Contents

Table of Authorities

Cases

Statutes and Regulations

Other Authorities

Rules

Constitutional Provisions

Statement of Prior or Related Appeals

None.

Jurisdictional Statement

Scott Johnson, Harlene Hoyt, and Covey Find Kennel, LLC filed suit for prospective declaratory and injunctive relief under 42 U.S.C. § 1983 challenging the constitutionality of the licensing and warrantless search regime authorized by the Kansas Pet Animal Act, K.S.A. § 47-1701, *et seq*. and its associated regulations. (App. 9-162.) The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343, 2201 and 2202.

The district court entered final judgment against the Plaintiffs on May 5, 2023 (App. 253), all of whom timely appealed on May 19, 2023 (App. 254-55). Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction under 28 U.S.C. § 1291.

Statement of the Issues

I. The district court erred when it dismissed the Plaintiffs' Fourth Amendment claims. Accepting the Plaintiffs' allegations as true and considering them in the most Plaintiffs-friendly light, the district court wrongly concluded the "pervasively regulated industry" exception to the Fourth Amendment applied.

II. The district court erred in dismissing Mr. Johnson's unconstitutional conditions claim. Accepting his allegations as true and considering them in a light most favorable to him, conditioning Mr. Johnson's annual mandatory license renewal on a Fourth Amendment waiver violates the unconstitutional conditions doctrine.

III. The district court erred in dismissing the Johnson-Hoyts' right to travel and freely move about claims. Accepting the Johnson-Hoyts' allegations as true and considering them in a light most favorable to them, they plausibly alleged that the regime's automatic penalties for traveling together more than thirty minutes from their rural homestead violates their rights to travel and freely move about under the Fourteenth Amendment's Due Process and Privileges or Immunities Clauses.

Statement of the Case

A. Scott Johnson, Harlene Hoyt, and their rural homestead.

Scott Johnson trains and handles hunting dogs for a living. (App. 10-11, 13-14.) He is nationally recognized, successful, and has won numerous awards.[1] (App. 10, 13-14, 16-17.) Mr. Johnson knows training and handling and he knows how to care for dogs. (App. 10-11, 13-14, 16-18.) He is a second-generation trainer and handler, and he has trained and handled hunting dogs his entire life. (App. 10, 14, 18.)

Mr. Johnson is successful because he treats dogs right. (App. 10, 13-14, 16-18.) His livelihood depends on it, and he believes it is the right thing to do. (App. 10, 18.)

Mr. Johnson owns Covey Find Kennel, LLC (CFK), which he operates from the rural homestead he jointly owns with his wife, Harlene Hoyt. (App. 10-12, 14-16.) The homestead is in rural Cowley County, Kansas, about 50 minutes from Wichita and 25 minutes from Arkansas City. (App. 2-3, 6, 24.)

Ms. Hoyt is a clinic manager at William Newton Hospital, a 25-bed critical access hospital in Winfield, Kansas. (App. 14.) She manages six practices and supervises approximately 30 people. (App. 14.) Ms. Hoyt helps with caring for the animals and CFK's paperwork. (App. 12, 14, 18.)

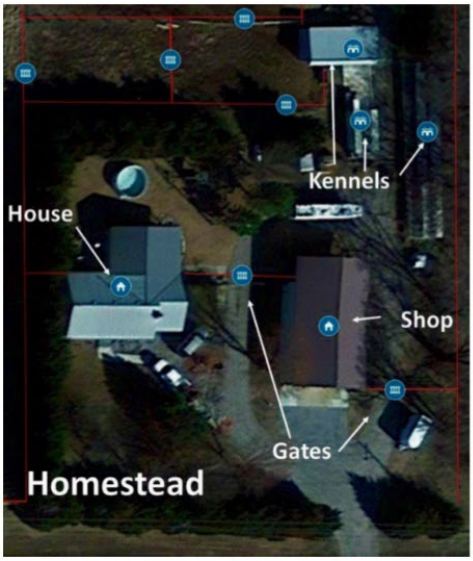
[1] Mr. Johnson won the 2022 Garmin Shooting Dog Award, the 2021 Garmin Shooting Dog Award, the 2021 United States Open Brittany Championship, and was the Champion of the 2020 and 2021 American Brittany Club National Gun Dog Championship, as a handler. (App. 14.) Mr. Johnson trained and handled Poki-Dot, a 2015 inductee of the Brittany Field Trial Hall of Fame. (App. 14.)

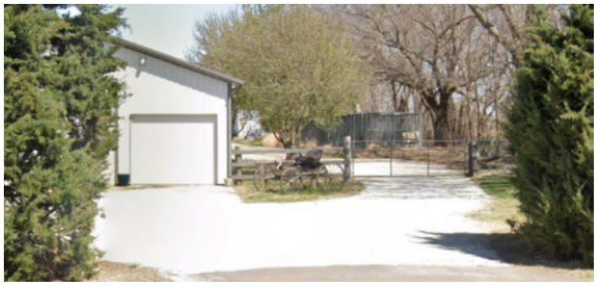
CFK's kennels are situated entirely inside a fence, a short distance from the Johnson-Hoyt house and their "shop"—their "home away from home," as Ms. Hoyt describes it. (App. 14-15.) Both treat the shop as part of their home. (App. 15).

The Johnson-Hoyts routinely socialize with one another there. (App. 15.) It contains tools, work items, personal items, recliners, a bar, a refrigerator, posters, a collection of old Budweiser signs, a television, and an upstairs loft for work and relaxation. (App. 15.)

Slightly north of the house and the shop sits a playground set for their grandkids, a bench, a firepit, and other residential amenities. (App. 014-015.) Directly to the northeast of the house and shop are the kennels, which sit within the same fenced boundary as the house and shop. (App. 14-15.)

The entire property surrounding the kennels is fenced to prevent unwanted visitors or intrusions, and for containment of the dogs. (App. 15.) Large trees and tall pampas grass provide comfort for the dogs and additional privacy. (App. 15, 16.) The only way to access CFK's training kennels is to pass through the house, the shop, or the gates. (App. 15-16.) With the exception of the pool—which is no longer there—the following is a true and accurate depiction of the homestead, with the red lines denoting fencing (App. 14-16):





B. Mr. Johnson's training and handling program.

Mr. Johnson trains young hunting dogs to obey basic commands like "whoa," and "here." (App. 16-18.) More experienced dogs receive training on sighting birds, pointing, backing, retrieving, and steadiness on point. (App. 16-18.)

Mr. Johnson trains other people's dogs. (App. 16, 18). The training program is a collaborative process between the dogs' owners and Mr. Johnson. (App. 16-18.) Given Mr. Johnson's success, some owners send their dogs to the training program for weeks, months, or years on end—and some are trained and handled at CFK for nearly their entire lives. (App. 16-17.)

The health and safety of dogs in his care is Mr. Johnson's primary concern. (App. 17.) He provides the dogs with all necessary veterinary care. (App. 17.) He runs the kennels under a veterinary medical care plan. K.S.A. § 47-1701(dd)(1) *et seq*; K.A.R. § 9-18-21; (App. 38). The kennels are inspected by a veterinarian annually. K.S.A. § 47-1701(dd)(1)(A); (App. 38).

Given the nature of training hunting dogs, Mr. Johnson regularly takes the dogs away from the homestead to gain practical experience in the field. (App. 16-18.) This field training requires Mr. Johnson to carefully transport some of the dogs to the field, usually somewhere in the Flint Hills. (App. 16-18.) While in the field, Mr. Johnson has limited cellular service. (App. 29.) It takes a significant amount of time to round up the animals, return to the vehicle, safely load the animals into the trailer, and drive back to the homestead. (App. 16-18, 33.)

Mr. Johnson's primary business purpose is training, showing, and handling dogs in field trials, which are essentially competitive events for dogs. (App. 16-18.) The field-trial seasons run from February through April and September through mid-December, and they take place all around the country. (App. 16-18.) Mr. Johnson travels extensively throughout the Midwest, and sometimes beyond. (App. 16-18.) Mr. Johnson carefully transports some of the dogs while leaving others at the homestead. (App. 17.) Sometimes Ms. Hoyt accompanies him on these trips; other times she meets Mr. Johnson to visit or help him. (App. 16-18.)

When neither Mr. Johnson nor Ms. Hoyt is available—when they are traveling for field trials, for instance—Mr. Johnson has independent contractors provide food, water, and other care for the dogs remaining at CFK. (App. 18, 32.) The role of these contractors is limited. They do not have access to all of CFK's records or the entire property, and they do not have the authority to represent Mr. Johnson or CFK. (App. 32.)

The homestead is not open to the public and clients may not visit without an appointment. (App. 16, 30.) Mr. Johnson and Ms. Hoyt—as owners of the

homestead—are the only individuals with rights to access any of the homestead property. (App. 30.)

C. The licensing and warrantless search regime.

Operating a training kennel requires a license. K.S.A. §§ 47-1723, 1715(a). (App. 9-12, 19, 29, 31-32.) Obtaining an initial license requires the applicant to "consent" to the "right of entry and inspection" of the "premises" sought to be licensed or permitted. K.S.A. § 47-1709(a).

The license application "shall conclusively be deemed to be the consent of the applicant to the right of entry and inspection of the premises sought to be licensed[.]" K.S.A. § 47-1709(a). If an applicant refuses the initial inspection, the license is denied. K.S.A. § 47-1709(a). The government is permitted to notify the applicant when the initial inspection will occur. *See id.*

After the initial inspection, acceptance of the license "shall conclusively be deemed to be the consent of the licensee" "to the right of entry and inspection of the licensed or permitted premises[.]" K.S.A. § 47-1709(b).

Once licensed, notice of the warrantless searches "shall not be given." K.S.A. § 47-1709(b); K.A.R. § 9-18-9(g); (App. 9-11, 23-26, 28, 32-33, 38-40.)

For some, the surprise warrantless searches occur every three to twelve months. K.A.R. § 9-18-9(b)(1). For others, they occur every nine to eighteen months. K.A.R. § 9-18-9(b)(2). For some others, they occur every fifteen to twenty-four months. K.A.R. § 9-18-9(b)(3). The inspector has the discretion to determine when, and how often, to search, within the corresponding search period. (App. 28, ¶ 94; App. 83).

The regime requires an operator to name a "designated representative," who "shall be 18 years of age or older and mentally and physically capable of representing the licensee in the inspection process." K.A.R. § 9-18-9(e); (App. 25-27.)

If an operator or their "designated representative" is not present for the surprise warrantless search within thirty minutes of the inspector's arrival, the government assesses an automatic "no-contact" fee. K.S.A. § 47-1721(d)(1) (App. 9-12, 24-26, 28, 32-33, 39, 44-46). The "no-contact" triggers more warrantless searches, K.S.A. § 47-1721(d)(1), (App. 24, 32), and each "no-contact" results in "a $200 no-contact fee." K.S.A. § 47-1721(d); K.A.R. § 9-18-6(p). If there are three or more "no-contacts," Defendant's legal staff processes a "refusal of entry" which is grounds for a license suspension or revocation. (App. 25, ¶ 82.)

If an operator asks the inspector to come back at a more convenient time, it is considered a "no-contact" event (App. 24, ¶ 79), in addition to the other consequences.

Refusing a warrantless search is prohibited, constitutes a misdemeanor, and will result in mandatory penalties. K.S.A. § 47-1706(a)(11); K.S.A. § 47-1709(b); K.S.A. § 47-1707(a); K.S.A. § 47-1715; K.S.A. § 47-1735; (App. 22-24, 90-91.)

Every year, an operator must renew the license, K.S.A. §§ 47-1701(r), 1721, 1723, (App. 20-21), and again "consent" to warrantless searches, K.S.A. § 47-1709(b).

Violations of the regime constitute a Class A nonperson misdemeanor. K.S.A. § 47-1715. A violation may result in civil penalties, K.S.A. § 47-1707(a); a license suspension or revocation, K.S.A. § 47-1706(a); seizure or impoundment of animals,

K.S.A. § 47-1706(e); and the government may obtain a restraining order, K.S.A. § 47-1727.

D. The licensing and warrantless search regime's effect.

Sometime around 1999, an inspector told Mr. Johnson he needed to get a training kennel license. (App. 29.) Mr. Johnson was already operating a training kennel and did not have any other option but to get one—so he did. (App. 29.)

For years, Mr. Johnson tolerated the regime. (App. 10, ¶¶ 5, 103.) Inspectors were flexible (App. 10, ¶ 103) and would sometimes call ahead when they were in the area (App. 10, ¶ 5). If they did not call, and Mr. Johnson was either busy or unavailable, they would come back another time. (App. 10, ¶¶ 5, 103.) Mr. Johnson believed he had the right to have the official come back later. (App. 29, ¶ 103). Inspectors were able to provide advance notice of their searches. *See* Kan. Leg. 2018 HB 2477; (App. 169.)

In 2018, the regime changed. The thirty-minute restriction and no-contact penalties were enacted, and inspectors cannot provide advance notice of their searches. *See* Kan. Leg. 2018 HB 2477, (App. 169.) That changed the nature of the designated representative provision.

In January 2020, Ms. Hoyt—the mandated "designated representative (App. 10, ¶ 6; App. 12, ¶ 12; App. 29, ¶ 102)—had to leave her job during the middle of the day for a warrantless search. (App. 10, ¶ 6; App. 29 ¶ 104). Mr. Johnson was in the field that day and had limited cellular services. (App. 29, ¶ 104.) The inspector told her there would be a fine if she did not return to the property in 15-20 minutes, so she did. (App. 29, ¶ 104.)

The warrantless searches began around 1999 or 2000 and have continued since. (App. 29, ¶ 101.) More recently, they occurred on or about February 12, 2018, January 7, 2020, and August 30, 2021. (App. 29, ¶ 105.)

Mr. Johnson named Ms. Hoyt the "designated representative" only because it is required. (App. 32, ¶ 118.) He does not want to designate anyone to act on his behalf during the searches, or to give anyone else unfettered access to the homestead, records, animals, animals under their care, or their effects. (App. 32, ¶ 118.) As fashioned, Ms. Hoyt opposes being the "designated representative. (App. 32-33.)

E. Proceedings below.

In October 2022, the Plaintiffs filed a civil rights lawsuit against Justin Smith in his official capacity as the Animal Health Commissioner. (App. 9-162.) He oversees and implements the regime. (App. 12, 28, 34.)

The Plaintiffs sought a declaratory judgment (App. 13, 47-48) that the regime violates the Fourth Amendment (App. 34-41), the unconstitutional conditions doctrine (App. 41-43), and the fundamental right to travel and freely move about, as protected by the Fourteenth Amendment's Due Process and Privileges or Immunities clauses (App. 43-46). The Plaintiffs also sought injunctive relief enjoining the Defendant from enforcing the unconstitutional portions of the regime. (App. 34, 47-48.)

For their Fourth Amendment claims, the Plaintiffs alleged the regime violates the property-based framework described in *United States v. Jones*, 565 U.S. 400 (2012) and *Fla. v. Jardines*, 569 U.S. 1 (2013) (collectively referred to as "*Jones*-

Jardines") (App. 36-37, ¶¶ 141-143, 146-151); and that it violates the privacy-based framework flowing from *Katz v. United States*, 389 U.S. 347 (1967). (App. 36.)

The Plaintiffs specifically alleged that Fourth Amendment exceptions premised on alleged reduced expectations of privacy do not or should not apply to their *Jones-Jardines* physical intrusion claims (App. 37, ¶ 149); that dog training and handing is not a pervasively regulated industry (App. 37, ¶ 151); that it is not intrinsically or inherently dangerous (App. 37, ¶ 152); that it does not pose an obvious risk or inherent risk to the public (*id.*); that it does not raise a serious risk of illegal activity (*id.*); that—given the nature of training and handling hunting dogs—warrantless, nonconsensual, and surprise searches are not necessary (App. 38, ¶ 153); that the homestead is closed to the public (App. 15-16, 30); and that the thirty-minute restriction, designated representative mandate, and no-contact penalties, were unreasonable under the Fourth Amendment (App. 39-40, ¶ 157).

Regarding Mr. Johnson's unconstitutional conditions claim, he alleged that because the government conditions his mandatory annual license renewal on a Fourth Amendment waiver, the regime violates the unconstitutional conditions doctrine. (App. 41-43.)

Finally, Mr. Johnson and Ms. Hoyt alleged the regime's thirty-minute restriction, designated representative mandate, and no-contact penalties violate their fundamental rights to travel and freely move about, (App. 43-48), which applies to interstate and intrastate travel (App. 44). The Johnson-Hoyts brought these claims under the Fourteenth Amendment's Due Process and Privileges or Immunities clauses. (App. 43-48).

The government filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) (App. 163), arguing the pervasively regulated industry exception applies (App. 171-175), that the Act does not set unconstitutional conditions (App. 176-177), and that the Act does not violate the right to travel (App. 177-179).

The government did not move to dismiss the Plaintiffs' *Jones-Jardines* physical intrusion claims (App. 191), or the Johnson-Hoyts' right to travel and freely move about claims raised under the Privileges or Immunities Clause (App. 193), instead addressing them for the first time in its reply. As such, the Plaintiffs filed a motion to disregard the newly raised arguments or leave to file a sur-reply—which the district court permitted the Plaintiffs to file. (App. 209-212.) After briefing closed, the government filed a notice of supplemental authorities (App. 213-231), to which the Plaintiffs responded (App. 232-233).

The district court dismissed the Plaintiffs' entire lawsuit (App. 234-252) and this appeal timely followed.

Summary of the Argument

In Kansas, hunting dog trainers and handlers are subjected to surprise warrantless searches of their homes, property, records, and effects. The searches are suspicionless, random, and demanding the government first secure a warrant is punishable. Even though the warrantless searches are unpredictable and unannounced, the government automatically penalizes trainers if they or their government mandated "designated representatives" are not available for the warrantless searches within thirty minutes. Trainers and handlers cannot operate their business without a license, but the government conditions the annual license renewal on a Fourth Amendment waiver. All of that is authorized by the Kansas Pet Animal Act, K.S.A.§ 47-1701, *et seq*. and its associated regulations, K.A.R. § 9-18-4, *et seq*.—and it is unconstitutional.

The district court erred when it dismissed the Plaintiffs' lawsuit. At every important step, the district court critically erred.

The district court wrongly concluded the "pervasively regulated industry" exception applied to training and handling hunting dogs from a rural homestead. The district court applied the exception in the absence of a "special need;" it did not consider whether an administrative warrant would suffice; and the regime does not provide a legitimate precompliance review process. Asking the government to "get a warrant" is a crime.

Throughout its ruling, the district court generalized and conflated industries by taking the position—despite the facts—that training and handling dogs from a rural homestead is the same as dog breeding. And the district court applied the

exception even though dog training and handling is not "intrinsically dangerous" and does not pose a "clear and significant risk" to the public. *City of Los Angeles, Calif. v. Patel*, 576 U.S. 409, n.5, 424 (2015). The district court then misstated and misapplied all three *New York v. Burger* factors. 482 U.S. 691 (1987).

The district court erred when it applied the "pervasively regulated industry" exception—a privacy-based Fourth Amendment exception—to the Plaintiffs' *Jones-Jardines* physical intrusion claims.

Given the district court's sweeping ruling, law-abiding Kansans have none of the meaningful protections the Fourth Amendment is supposed to afford; and the government is permitted to continue ignoring the very reasons our Founders insisted on the Fourth Amendment to begin with: that a "man's house is his castle," *Paxton's Case* (Mass. 1761) (argument by James Otis); that property rights are sacred, natural rights, *Entick v. Carrington*, 19 How. St. Tr. 1001 (C.P. 1765); that the "power" to conduct general searches is "dangerous to freedom, and expressly contrary to the common law, which ever regarded a man's house, as his castle, or a place of perfect security," John Dickinson, *Letters from a Farmer in Pennsylvania*, Letter No. 9, 86 (1768); and that it was meant to forever stamp out the suspicionless search, *see Boyd v. United States*, 116 U.S. 616, 625-630 (1886). Everyone has a right to be secure in their homes, persons, papers, and effects. Even hunting dog trainers.

The district court also erred by holding—despite the well-pleaded allegations—that the regime did not violate the unconstitutional conditions doctrine even though Mr. Johnson's mandatory annual license renewal is conditioned on a Fourth Amendment waiver.

Finally, the district court erred in concluding that the Johnson-Hoyts' rights to travel and freely move about are not burdened, even though they cannot travel beyond thirty minutes from their homestead without being subjected to potential penalties.

The judgment should be reversed.

Argument

Standard of Appellate Review

Review is *de novo*. *Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853, 858 (10th Cir. 2016). The Complaint must be viewed in the most Plaintiffs-favorable light, all well-pleaded allegations are accepted as true, and all doubts and inferences are resolved in the Plaintiffs' favor. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). If the Complaint gives fair notice of the claims and grounds—as judged against Fed. R. Civ. P. 8—the 12(b)(6) motion should have been denied. *See Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 319 (2007). Plausibility is enough. *See Twombly*, 550 U.S. at 559.

A 12(b)(6) motion should be denied when a defendant challenges only part of a claim, ignores other theories of liability, or where the defendant's asserted defenses do not dispose of a claim in its entirety. *Fed. Trade Comm'n v. Nudge, LLC*, 430 F. Supp. 3d 1230, 1246 (D. Utah 2019); *Bilek v. Fed. Ins. Co.*, 8 F.4th 581, 587 (7th Cir. 2021).

I. The district court erred when it dismissed the Plaintiffs' Fourth Amendment claims. Accepting the Plaintiffs' allegations as true and considering them in the most Plaintiffs-friendly light, the district court wrongly concluded the "pervasively regulated industry" exception to the Fourth Amendment applied.

Searches conducted without criminal warrants supported by traditional notions of probable cause are *presumptively unconstitutional. City of Los Angeles, Calif. v. Patel*, 576 U.S. 409 (2015); *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018). The presumption of unconstitutionality is especially strong when, like here, the home and its curtilage is involved. *Fla. v. Jardines*, 569 U.S. 1, 6 (2013) (home is "first among

equals"); *Collins*, 138 S. Ct. at 1670; *Boyd*, 116 U.S. at 630; *Maryland v. Buie*, 494 U.S. 325, 331 (1990); *Miller v. United States*, 357 U.S. 301, 307 (1958) (affirming "ancient adage that a man's house is his castle").

Procedurally, the burden is always on the government to prove a plaintiff failed to state a claim under Rule 12(b)(6). Substantively, the burden is always on the government to prove the applicability of a Fourth Amendment exception—and it is a heavy one. *See Coolidge v. New Hampshire*, 403 U.S. 443, 454–55 (1971); *California v. Acevedo*, 500 U.S. 565, 589 n.5 (1991); *Pike v. Gallagher*, 829 F. Supp. 1254, 1262 (D.N.M. 1993); *Jones v. United States*, 357 U.S. 493, 499 (1958).

When the home is involved—like here—the only exceptions potentially available are exigent circumstances and consent. *See, e.g., Steagald v. United States*, 451 U.S. 204, 211-212 (1981)*; Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1242 (10th Cir. 2003); *Mincey v. Arizona*, 437 U.S. 385, 393-94 (1978); *Collins*, 138 S. Ct. at 1672 (2018); *Lange v. California*, 141 S. Ct. 2011, 2016 (2021); *Caniglia v. Strom*, 141 S. Ct. 1596, 1599 (2021). Unless, of course, a person is on felony probation or parole. *See Griffin v. Wisconsin*, 483 U.S. 868 (1987).

But the district court flipped 12(b)(6) and Fourth Amendment black letter principles on their heads by applying a facts-based Fourth Amendment exception—the "pervasively regulated industry" exception—at the 12(b)(6) stage, despite the well-pleaded facts.

If the district court's decision is not reversed, "few businesses will escape such a finding" of pervasive regulation, *Mexican Gulf Fishing Co. v. United States Dep't of Com.*, 60 F.4th 956, 968 (5th Cir. 2023) (quoting Justice Brennan's dissent

in *New York v. Burger*), and turn what is supposed to be an extremely narrow Fourth Amendment exception into the rule. *Patel*, 576 U.S. at 424-25.

A. On these facts, the "pervasively regulated industry" exception does not apply.

The district court either failed to address or misinterpreted nearly every critical component of the pervasively regulated industry exception framework but applied it anyway—even though all well-pleaded facts and inferences must be construed in favor of the Plaintiffs.

1. The government did not satisfy its initial burden.

Before the district court could even consider applying the pervasively regulated industry exception, the government first needed to establish a "special need" to search without a traditional criminal warrant. *Patel*, 576 U.S. at 420; *Roska*, 328 F.3d at 1242; *Chandler v. Miller*, 520 U.S. 305, 321–22 (1997); *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1212 (10th Cir. 2003). Otherwise, the "inquiry is complete, and the [regime] must be struck down as unconstitutional." *19 Solid Waste Dep't Mechanics v. City of Albuquerque*, 156 F.3d 1068, 1073 (10th Cir. 1998)

The government's need must be compelling, *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989), vital, Christopher Mebane, *Rediscovering the Foundation of the Special Needs Exception to the Fourth Amendment in Ferguson v. City of Charleston*, 40 Hous. L. Rev. 177, 178 (2003), or urgent, *Roska* at 1242.

Courts cannot "simply accept the [government's] invocation of a special need" either. *Ferguson v. City of Charleston*, 532 U.S. 67, 81 (2001) (cleaned up);

Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989); *Lebron v. Sec'y, Fla. Dep't of Children & Families*, 710 F.3d 1202, 1207 (11th Cir. 2013).

The government never argued there was a "special need"—much less an actual, urgent, vital, and compelling one—despite Plaintiffs raising the issue in their Complaint (App. 37-38).

But even *if* the government established a special need, it is still required to use an administrative warrant. *Patel* at 420-23 (relying on *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 534 (1967); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978); or at the very least, the subject of the search must be afforded "an opportunity to obtain precompliance review before a neutral decisionmaker." *Patel*, (relying on *See v. City of Seattle*, 387 U.S. 541 (1967)). After all, this regime is akin to the administrative code compliance searches in *Patel*, *Camara*, and *See*.

The government never gave any reason—let alone a persuasive one—why obtaining an administrative warrant would not suffice. Nor could it. Kansas courts can issue administrative warrants and the regime itself sets forth an administrative warrant procedure. K.S.A. § 47-1709(k). There is no legitimate precompliance review process either. The regime has criminalized demanding the government secure warrant (App. 23-24, 39-40), and on that basis alone, it is unconstitutional under *Patel*. *Airbnb, Inc. v. City of New York,* 373 F. Supp. 3d 467, 493-95 (S.D.N.Y. 2019); *Planned Parenthood of Southwest and Central Fla. v. Philip*, 194 F.Supp. 3d 1213, 1221 (N.D. Fla. 2016).

The district court erred when it applied the exception in the absence of a special need, without determining whether an administrative warrant would suffice, and because the regime does not offer a precompliance review process.

2. The "pervasively regulated industry" exception is incredibly narrow. It only applies to intrinsically dangerous, uniquely situated, and specific commercial industries, the operation of which inherently poses a clear and significant risk to the public's welfare.

The pervasively regulated industry exception is extremely narrow, tightly circumscribed, and on *this* record, at *this* stage of proceedings, the district court erred in applying it.

In its entire history, the Supreme Court has identified only four industries that qualify as pervasively regulated, and *none of them* involved anything remotely like dog training and handling from a rural homestead like the Johnson-Hoyt's. *See*, *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (liquor industry), *United States v. Biswell*, 406 U.S. 311 (1972) (firearms industry), *Donovan v. Dewey*, 452 U.S. 594 (1981) (underground mining industry), *New York v. Burger*, 482 U.S. 691 (1987) (automobile dismantling industry).

The exception is limited to intrinsically dangerous, uniquely situated, and specific commercial industries, the operation of which poses a clear and significant risk to the public's welfare—not activities like the training and handling of hunting dogs. *Patel*, 576 U.S. at 424, n.5; *Marshall*, 436 U.S. at 313; *Patel* at 424.

Patel sharply limited the pervasively regulated industry doctrine and flatly contradicts the district court's 12(b)(6) dismissal.

In *Patel*, hotel owners successfully challenged a Los Angeles warrantless search regime. 576 U.S. at 412. Before searching, city officials did not secure a traditional search warrant, an administrative warrant, or offer the owners any type of precompliance review process. That was facially unconstitutional. *Id*. at 419.

Patel made plain that the pervasively regulated industry exception is a "narrow exception" which cannot be permitted to "swallow the rule," *Patel,* 576 U.S. at 424-25, that it applies to commercial premises for a civil purpose, *see id.* 420, 424, that it only applies to industries that are intrinsically dangerous, *id.* at 424, n.5, the operation of which inherently poses a clear and significant risk to the public welfare, *id*. at 424, and that extensive regulations are not what makes an industry pervasively regulated, *id.* at 425-26.

Instead, it is whether that particular industry was subjected to "warrantless searches" *near the time of the founding* that matters. *See id.* at 425-26; *Mexican Gulf Fishing*, 60 F.4th at 970 (After *Patel*, "future recognition" of a pervasively regulated industry must be "consistent with the original public meaning of the Fourth Amendment," and must be in "accordance with the constitutional text, history, and tradition—as interpreted and explained by our highest Court").

Similarly, in *Marshall v. Barlow's, Inc.*, the Supreme Court reviewed a statutory regime that authorized OSHA "inspection[s] of business premises without a warrant." 436 U.S. 307, 311 (1978). The Supreme Court expressly rejected the government's pervasively regulated industry argument since it would turn "the exception" into "the rule." *Id.* at 313. The inquiry was an industry-specific one. *Id.* at 321. Requiring administrative warrants, the court said, would *not* impose serious

burdens on the system, *id.* at 316, or the courts, *id.*, would *not* prevent inspections, *id.*, and would *not* make inspections any less effective, *id.* The court concluded that "for purposes of an administrative search such as this," "probable cause justifying the issuance of a warrant" must exist before there is a search. *id.* at 320-21 (relying on *Camara, supra*).

The district court below glossed over *Patel* and *Marshall*, generalized and conflated what it is the Plaintiffs do, and did not analyze whether training and handling hunting dogs is intrinsically dangerous.

3. The training and handling of hunting dogs from a rural homestead is not a "pervasively regulated industry."

The district court was supposed to be "tremendously cautious," *Mexican Gulf Fishing,* 60 F.4th at 970, in applying the narrow and industry-specific "pervasively regulated industry" exception but was not. Instead, it "define[d] the industr[ies]" "at too high a level of generality," *id.*, and applied the exception even though dog training and handling is not "intrinsically dangerous" and does not pose a "clear and substantial risk" to the public. *Patel*, 576 U.S. at 424, n.5. The district court's ruling "permit[s] what has always been a narrow exception to swallow the rule." *Patel*, 576 U.S. at 424–25; *Marshall*, 436 U.S. at 313.

The district court below made the same reversible mistakes as the district courts in *Mexican Gulf Fishing, Herrera* and *Seslar*: defining one industry at too high a level of generality, broadly applying the exception to an altogether different business; and assuming that if one industry-subset is pervasively regulated, another industry-subset is too. *Mexican Gulf Fishing*, 60 F.4th at 968 (even if the commercial

fishing industry is pervasively regulated, the exception does not apply to the charter fishing industry); *United States v. Herrera*, 444 F.3d 1238, 1243–45 (10th Cir. 2006) (even though commercial motor industry is pervasively regulated, the exception does not apply to man in a pickup truck); *United States v. Seslar*, 996 F.2d 1058, 1062 (10th Cir. 1993) (even though commercial motor industry is pervasively regulated, the exception does not apply to people driving rental trucks).

Plaintiffs' business is training and handling hunting dogs. Not breeding. Other than the presence of dogs, the two are nothing alike. Unlike dog breeders—who have no comparable third-party oversight—Mr. Johnson's business model is entirely client-based. He trains other people's dogs. If Mr. Johnson does not treat his clients' dogs right, or improperly maintains the kennels, he will lose his livelihood. His clients are not going to pay him good money if he mistreats their dogs. Plaintiffs' business model ensures the interests of the dogs. (App. 16-18, 38.)

The district court did not cite a single case that held dog training and handling was a pervasively regulated industry. Instead, it relied almost exclusively on an outdated, out-of-circuit, district court opinion, *Dog Breeders Advisory Council v. Wolff*, No. CIV. 1:CV-09-0258, 2009 WL 2948527 (M.D. Pa. Sept. 11, 2009), that analyzed an *entirely different industry*—dog breeding—generically described it as involving the "kennel industry," (App. 244), and then held that because the *kennel industry* had been deemed pervasively regulated there, dog training and handling is too. (App. 244). *Wolff* is not—in any way—a "nearly identical case" (App. 243) as this one.

In *Wolff*, the district court concluded that "dog breeding is a pervasively regulated activity," *id.* at *9, because "regulations concerning the kennel industry" have been "around for years," *id.* *Wolff* is not controlling, persuasive, or nearly identical: it pre-dated *Patel*; it did not analyze *Marshall*; it defined the industry at too high a level of generality; it never addressed the special needs requirement; it never considered dangerousness; it never analyzed whether the breeding industry was subjected to warrantless searches at or near the time of the founding; and the federal statutes and regulations cited in *Wolff*—7 U.S.C. § 2131, *et seq.* and 9 C.F.R. § 1.1 *et seq.*—do not apply to the Plaintiffs. They apply to breeders. The district court incorrectly believed they did (App. 243), which formed at least a partial basis for its incorrect holding (*Id.*).

The district court below also cited *State v. Warren*, 395 Mont. 15 (2019) for the incorrect proposition that the "animal kennel industry" is pervasively regulated. (App. 244.) But *Warren* was not about the "animal kennel industry," it was about the dog breeding industry. 395 Mont. at 26 (noting that due to 7 U.S.C. § 2131, *et seq.*, and 9 C.F.R. § 1.1, *et seq.*, the district court in *Wolff* "concluded that dog breeding is a closely regulated industry").

Because *Warren* based its analysis on *Wolff*, it shares all of *Wolff*'s problems and then some. *Wolff* did not have the benefit of *Patel*, *Warren* did—and *Warren* all but ignored *Patel*, citing it twice for two unremarkable propositions: that there is such a thing as the pervasively regulated industry exception, *id.* at 25; and an administrative search's primary purpose must be distinguishable from the general interest in crime control, *id.*

Because the inquiry is an industry-specific one, whether dog breeding was considered pervasively regulated elsewhere is irrelevant—the Plaintiffs are not breeders. *Marshall*, 436 U.S. at 313, 321; *Mexican Gulf Fishing*, 60 F.4th at 968; *United States v. Herrera*, 444 F.3d 1238, 1243–45; *United States v. Seslar*, 996 F.2d 1058, 1062 (10th Cir. 1993).

Furthermore, by generically describing the industries in *Wolff* and *Warren* at an incredibly high level of generality and applying them to this case—as though they were the same thing—the district court conflated breeding with training *and* misconstrued the Plaintiffs' well-pleaded facts. The result was a sweeping ruling that *any* animal-related business with a kennel is a warrant-free zone where the Fourth Amendment does not apply. The district court's ruling is tantamount to deciding that *New York v. Burger*, *supra*, a case about New York automobile dismantling shops, is really about the automobile industry; and therefore, a car washing business—also dealing with automobiles—is pervasively regulated. Under the district court's view, there is no escaping a pervasively regulated industry designation for any animal-related business with a kennel.

The district court erred further by applying the exception in direct contravention to *Patel*'s dangerousness and public welfare factors. There is absolutely nothing in the record—*at all*—that suggests dog training and handling is "intrinsically dangerous," *Patel*, at 424, n.5, that it inherently poses a clear and significant risk to the public welfare, *id.* at 424, or that it raises an urgent or even serious risk of illegal activity, *see id.* The government never argued dangerousness or public welfare in its 12(b)(6) motion, nor could it. Based on the facts and all

reasonable inferences drawn from them, dog training and handling is not dangerous, it does not pose a risk to the public, and it does not raise an urgent or serious risk of illegal activity. (App. 16-18, ¶¶ 36-49; App. 37-38, ¶¶151-153.) But the district court applied the exception anyway. That was reversible error.

At its core, the district court's ruling takes the position if the government "subject[s] a "business" to "extensive regulation," (App. 243), the pervasively regulated industry exception applies. That was an argument that the government "wisely refrain[ed] from" making in *Patel*, 576 U.S. at 425, and flatly rejected in *Marshall*. Regulations themselves do not justify the exception. *See id.* at 425; *Free Speech Coal., Inc. v. Att'y Gen. United States*, 825 F.3d 149, 170 (3d Cir. 2016). Otherwise, the government could just regulate-away the Fourth Amendment.

The district court did not cite *any* founding-era history supporting its conclusion that dog training and handling is pervasively regulated, as it should have. *See Patel* at 425-26; *Mexican Gulf Fishing*, 60 F.4th at 970. Instead, the district court reasoned that because Kansas has regulated kennel operators since 1991 the exception applies. (App. 243, 244). That was Justice Scalia's position in *Patel,* and it was soundly rejected. 576 U.S. at 432-34 (Scalia, J., dissenting) (arguing exception should apply because hotels have been regulated for hundreds of years). Besides, it is an incorrect comparison. *Today's* regime is significantly different than the 1996 version, when training kennels were first licensed, 1996 Kansas Laws Ch. 151, § 6, (App. 172), because of the 2018 changes. *See* Kan. Leg. 2018 HB 2477; (App. 169.)

The district court's reasoning—mirroring Justice Scalia's—should be rejected. The regime's warrantless, random, and suspicionless searches are

inconsistent with the "original public meaning of the Fourth Amendment" and not in "accordance with the constitutional text, history, and tradition—as interpreted and explained by our highest Court." *Mexican Gulf Fishing*, 60 F.4th at 970.

In sum, "[s]imply listing" the industries the Supreme Court has deemed pervasively regulated "refutes" the district court's order that dog training and handling from a rural homestead like the Johnson-Hoyt's "should be counted among them." *Patel*, 576 U.S. at 424. If dog training and handling from a rural homestead is pervasively regulated, nearly everything is—and that is not how the exception works after *Patel*.

B. The district court misstated and misapplied all three *New York v. Burger* factors.

Even *if* dog training and handling were a pervasively regulated industry, the regime would *still* be unconstitutional because it fails the three-part *New York v. Burger* test. 482 U.S. 691 (1987).

Specifically, "(1) the government must prove a *substantial interest* that justifies warrantless inspections; (2) the warrantless inspections must be *necessary to further the regulatory scheme*; and (3) the inspection program must be *sufficiently certain and regular* to provide a constitutionally adequate substitute for a warrant." *Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853, 865 (10th Cir. 2016) (emphasis in original) (relying on *Burger*). And because an industry qualifies for the pervasively regulated industry exception if it is intrinsically dangerous, the operation of which inherently poses a clear and significant risk to the public welfare, *Patel*, *supra*, the three-part *Burger* test is tethered to dangerousness. *Maehr v. United States Dep't of*

State, 5 F.4th 1100, 1120 (10th Cir. 2021) ("When analyzing Supreme Court cases, we must interpret older ones in light of more recent Supreme Court elaboration.") (cleaned up).

The district court erred when it misstated all three *Burger* factors, and then, directly contradicting the well-pleaded facts, misapplied those misstated factors.

Under *Burger*'s first prong, it is *not* whether the government has a "substantial interest in *regulating* the dog boarding and training kennel industry," as the district court said—twice. (App. 245) (emphasis added); (*id.*) ("Defendant clearly has *a substantial interest in regulating the kennel industry*.") (emphasis added). Instead, *Burger* requires the government to prove a substantial interest *justifying the warrantless searches*. *Patel*, 576 U.S. at 426 (relying on *Burger*). Put differently, whether the government has a substantial interest in *regulating* an industry is not the same thing as a substantial interest in conducting *warrantless searches*.

Because the district court never held there was a substantial interest justifying warrantless searches—just that there was a substantial interest in "regulating the dog boarding and training and kennel industry," (App. 234-252)—it committed reversible error by applying the pervasively regulated industry exception anyway.

The district court cited two outdated cases for its incorrect *Burger* analysis, *State v. Marsh*, 16 Kan. App. 2d 377, 823 P.2d 823 (1991) and *Kerr v. Kimmell*, 740 F. Supp. 1525 (D. Kan. 1990). (App. 245.) Neither case demonstrates there is a substantial interest in imposing random warrantless searches on the Plaintiffs.

In *Marsh*, the Kansas Court of Appeals affirmed a trial court's order suppressing evidence in a case involving a search of an unlicensed dog breeder—not

a trainer or handler. 823 P.2d at 826. Just like the district court below did, *Marsh* misstated *Burger*'s first prong: "there is a substantial government interest in regulating the operation of 'puppy mills' in the State of Kansas." *Id*. at 827-28. But again, whether the government has an interest in *regulating* the dog breeding industry is irrelevant—that is not what matters under *Burger*. *Patel*, 576 U.S. at 426 (relying on *Burger*). The government's interest in *regulating* breeding mills does not justify *warrantless searches* for hunting dog trainers and handlers. And besides, *Marsh* limited its holding, expressly stating that "such language" regarding the constitutionality of the act is "nothing more than dicta." *Id*. at 826.

In *Kerr*, a case involving dog breeding—not training or handling—the district court engaged in a *Pike v. Bruce Church, Inc.* Commerce Clause analysis and held, under a rational basis standard, "that a legitimate local public interest is served by the stated purposes of the Act, i.e., quality control and humane treatment of animals." 740 F. Supp. at 1529. Satisfying the Commerce Clause's highly deferential standard does not satisfy the more exacting Fourth Amendment one—and the two analyses are not the same thing at all.

Moreover, *Marsh* and *Kerr* pre-dated *this* training kennel license, first created in 1996; *this* version of the regime, enacted in 2018; recent sea-changes in Fourth Amendment law—*Patel*, *Jones*, and *Jardines*; and Kansas District Courts *can* issue administrative warrants now, under the regime and their general authority.

But even if the district had correctly stated *Burger*'s first prong, there *still* is no substantial interest that justifies warrantless searches. The government's stated "substantial interest" was investigating and prosecuting crimes under a criminal

statute, K.S.A. § 21-6412. (App. 173-174.) That requires a traditional search warrant. *Patel* at 420; *Payton v. New York*, 445 U.S. 573, 586 (1980).

On these facts, there is no sufficient governmental interest to conduct suspicionless, random, and warrantless searches. Dog training and handling is not dangerous. (App. 16-18, ¶¶ 36-49; App. 38, ¶ 152.) It does not pose a risk to the public. (*Id.*) CFK is already inspected annually by a veterinarian, K.S.A. § 47-1701(dd)(1)(A), (App. 38, ¶ 153); it operates under a veterinary plan of care, K.S.A. § 47-1701(dd)(1), K.A.R. § 9-18-21, (*id.*); and unlike other businesses, Mr. Johnson is accountable to the dogs' owners, (App. 16-18, ¶¶ 36-49; App. 38, ¶ 153.)

The district court misstated and misapplied *Burger*'s second prong as well, mimicking a rational basis standard of review. (App. 244-246.) It is not whether surprise warrantless searches "reasonably serve" the government's interest, as the district court said. (App. 245.) It is whether such warrantless searches are "*necessary*." *Burger*, 482 U.S. at 702 (emphasis added); *Patel*, 576 U.S. at 426; *Planned Parenthood*, 194 F. Supp. 3d at 1221. This inquiry is, again, *industry specific*. *Patel,* 426-28.

Because the district court never held that warrantless searches were "necessary," just that they reasonably served the government's interest (App. 245), it erred by applying the exception. But even if the district *had* stated the test correctly, *Burger*'s second prong still was not satisfied.

The government never alleged, and the district court never held, there was a major societal problem involving *trainers or handlers;* or explained why *trainers and handlers* needed surprise warrantless searches; or articulated a specific factual

reason—supported in the record—why surprise warrantless searches are *necessary* for *trainers and handlers*;[2] or credibly explain why *either* a traditional or administrative warrant will not suffice. Given the 12(b)(6) standard, they could not.

Kansas courts can issue warrants, K.S.A. § 22-2502; the regime itself sets forth an administrative warrant procedure, K.S.A. § 47-1709(k); procuring a warrant will not impair its ability to promptly inspect (App. 18, ¶ 49; App. 38, ¶ 153); there is little risk that any alleged violations could be corrected during the search warrant process (App. 38, ¶ 153); there is third-party oversight and accountability, unlike other industries (App. 38, ¶ 153); and again, training and handling is not dangerous; it does not pose a risk to the public; kennels already operate under veterinary medical care; and they are inspected by veterinarians annually.

Furthermore, "the great majority" of trainers and handlers "can be expected in normal course to consent" to a pre-scheduled search "without [a] warrant; [and] the [government] has not brought to this Court's attention any widespread pattern of refusal." *See Marshall*, 436 U.S. at 316. Even if a few trainers and handlers did not consent, the solution is *easy*—just secure a warrant. (App. 38, ¶ 153.)

The district court erred in holding *Burger*'s second prong had been satisfied (App. 246). *Patel* at 427-28; *Free Speech Coal., Inc.*, 825 F.3d at 171.

Burger's third prong requires certainty and regularity of the regime's application, such that it provides a *constitutionally adequate substitute for a warrant*. *Patel*, 576 U.S. at 426. The purpose of this prong is to sufficiently constrain the

[2] The Plaintiffs renew their objection (App. 189) to the government's improper news article involving breeders.

government's discretion so it is *not* performing random, unpredictable searches. *See id.* The district court held the regime "puts owners on notice that" "state officials will periodically inspect their facilities to ensure compliance with the Act," (App. 247), that it "adequately advises licensees that inspectors are conducting such searches pursuant to law," (App. 247), the act sufficiently limits the searches, and therefore they "do not offend the Fourth Amendment," (App. 247.)

But under the facts as alleged, the searches are sporadic, irregular, and random. (App. 27-28, ¶¶ 91-94). The government's *own* handbook credibly proves that discretion is not at all limited. (App. 28, ¶ 94; App. 83.) Inspectors are free to search the same location ten times a day, every day, for months on end, if they like. (App. 27-28, ¶¶ 9-94; App. 83.) Even under the "performance-based schedule," the best performing operators can be searched more often than lesser performing ones. *Compare* K.A.R. § 9-18-9(b)(3) (search may occur every fifteen months) to K.A.R. § 9-18-9(b)(2) (search may occur every eighteen months). That is hardly a constitutionally adequate substitute for a warrant—especially considering the Fourth Amendment's history and purpose. (App. 11, 35-36.)

Considering the record in the light most favorable to the Plaintiffs, there is no substantial interest justifying the warrantless searches, the warrantless searches are not necessary, and because the searches are random and unpredictable, they do not provide an adequate substitute for a warrant.

C. The pervasively regulated industry exception does not apply to the Plaintiffs' *Jones-Jardines* physical intrusion claims.

The Supreme Court recognizes two approaches to analyzing Fourth Amendment claims: one based on expectations of privacy, *e.g.*, *Katz v. United States*, 389 U.S. 347 (1967), the other on property, *e.g.*, *United States v. Jones*, 565 U.S. 400 (2012), *Fla. v. Jardines*, 569 U.S. 1 (2013).

The Plaintiffs pleaded a *Jones-Jardines* physical intrusion claim. (App. 34-38). But the government only moved to dismiss the Plaintiffs' privacy-based claims. (App. 191.) Nonetheless, the district court applied the pervasively regulated industry exception—premised on reduced expectations of privacy, *Patel*, 576 U.S. at 424—to the Plaintiffs' property-based physical intrusion claims. (App. 241-247.) That was reversible error as a procedural and substantive matter.

The Fourth Amendment's text "reflects its close connection to property," *Jones*, and until 1967 was "tied to common-law trespass," *id.* That is when *Katz v. United States* introduced the now well-known *privacy*-based framework. 389 U.S. 347 (1967). The *Katz* reasonable-expectation-of-privacy test *supplemented* the Fourth Amendment's original property-based framework—it did not displace it. *Jones* at 400; *Byrd v. United States*, 138 S. Ct. 1518, 1526 (2018); *United States v. Ackerman*, 831 F.3d 1292, 1307 (10th Cir. 2016). *Katz* was supposed to provide protection in situations without a physical intrusion.

For the four-plus decades since *Katz*—during which all of the Court's pervasively regulated industry jurisprudence was developed—the Supreme Court decided Fourth Amendment questions based upon the reasonableness of the

person's privacy expectations. But *Katz*'s privacy-based framework proved challenging. *Carpenter v. United States*, 138 S. Ct. 2206, 2266 (2018) (Gorsuch, J, dissenting) ("*Katz* has yielded an often unpredictable—and sometimes unbelievable—jurisprudence.")

The Supreme Court *reintroduced* the property-based approach in *Jones*, 565 U.S. 400, 411, and affirmed the framework one year later in *Jardines*, 569 U.S. 1.

Under the *Jones-Jardines* property-based framework, Fourth Amendment protections do not "rise or fall on the *Katz* formulation." *Jones*, 565 U.S. at 406. One's expectation of privacy is irrelevant. *Jardines*, 569 U.S. at 11. While the two approaches ask the same question at the outset—is there a "search"—whether a warrant is required turns on altogether different inquiries. Fourth Amendment protections could be "extinguish[ed]" under *Katz* but could nonetheless be protected under the property-based rubric. *See Carpenter v. United States*, 138 S. Ct. 2206, 2269 (2018) (Gorsuch, J., dissenting).

Jones-Jardines undermine any plausible notion that *Katz*-based exceptions rigidly apply to physical intrusion claims. As Justice Sotomayor explained in *Jones*—which eschewed the *Katz* framework altogether—folding *Katz* back into physical intrusion analysis would erode the "irreducible constitutional minimum" protection afforded by the physical intrusion test. *Jones*, 565 U.S. at 414 (Sotomayor, J., concurring). And it would completely undermine the rule's pragmatic value in "keep[ing] easy cases easy." *Jardines*, 569 U.S. at 11.

The clear import since *Jones-Jardines* is that the analytical framework is *different from Katz*. *E.g.*, *United States v. Ackerman*, 831 F.3d 1292, 1307 (10th Cir.

2016) (Gorsuch, J.); *Taylor v. City of Saginaw, Michigan*, 11 F.4th 483, 487 (6th Cir. 2021), reh'g denied (Sept. 14, 2021); *Johnson v. VanderKooi*, 509 Mich. 524, 536–37, 983 N.W.2d 779, 786 (2022); *Matter of United States*, No. 5:22-MJ-02005-RN, 2022 WL 16757941 (E.D.N.C. Oct. 26, 2022).

For instance, in *Collins,* 138 S. Ct. 1663, the government argued that the "automobile exception"—premised on its "pervasive regulation," *id.* at 1669, a theory deriving from *Katz*—justified a warrantless physical intrusion by the government. The Supreme Court flatly rejected that notion. *Id.* at 1670-1675.

The two Fourth Amendment approaches—one based on expectations of privacy, the other on property—are two separate inquiries that rely on two separate notions, with two independent concerns. The property-based approach must be independently applied, irrespective of whether there is a reasonable expectation of privacy. Applying privacy-based exceptions to physical intrusion claims is the analytical equivalent of trying to jam a square peg into a round hole—it just does not work.

Procedurally then, it was the government's burden to credibly prove the Plaintiffs' *Jones-Jardines* claims were not plausible. But the government did not move to dismiss the Plaintiffs' physical intrusion claims, just the privacy-based ones; and the *only* Fourth Amendment exception it relied upon, other than consent, was privacy-based. *Patel*, 576 U.S. at 424 (pervasive regulation exception premised on reduced expectations of privacy).

When the Plaintiffs highlighted the government's omission (App. 191), the government replied that the Plaintiffs failed to cite enough caselaw in response *to a*

motion the government never made. (App. 201.) Because the government "pursued only a *Katz* 'reasonable expectations' argument" and "did not invoke the law of property or any analogies to the common law," *Carpenter*, 138 S. Ct. at 2272 (Gorsuch, J., dissenting), it did not discharge its 12(b)(6) burden of proving the Plaintiffs' *Jones-Jardines* physical intrusion was implausible. The government's failure precluded the district court from dismissing the Plaintiffs' *entire* Fourth Amendment claims. *Fed. Trade Comm'n v. Nudge, LLC*, 430 F. Supp. 3d 1230, 1246 (D. Utah 2019); *Bilek v. Fed. Ins. Co.*, 8 F.4th 581, 587 (7th Cir. 2021). But it did anyway, and that was reversible error.

The district court erred as a matter of substance as well. The government did not carry its heavy constitutional burden of explaining how a Fourth Amendment exception premised on an alleged reduced expectation of privacy applied to Plaintiffs' *Jones-Jardines* physical intrusion claims. Instead, it presented an improper burden-shifting argument: that it was the Plaintiffs' burden to prove why the government's purported privacy-based exception *did not* apply to Plaintiffs' property-based claim under *Jones-Jardines*. (App. 201.) But this is not a rational basis case—it is a Fourth Amendment one. It was the government's heavy burden to prove an exception applies, not the Plaintiffs' burden to prove it did not. The district court committed reversible error by holding the government discharged its constitutional burden even though it never substantively addressed the Plaintiffs' physical intrusion claims.

The district reversibly erred as both a procedural and substantive matter. If the decision stands, it would "render hollow the core Fourth Amendment

protection[s] … and transform what was meant to be an exception into a tool with far broader application." *Collins v. Virginia*, 138 S. Ct. 1663, 1672-1673 (2018). And it would undermine the long-held constitutionally-mandated precept that Fourth Amendment exceptions are "few," *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016) (Sotomayor, J., concurring in part and dissenting in part), "specifically established," *id.*, "well-delineated," *id.*, and "jealously and carefully drawn," *Jones v. United States*, 357 U.S. 493, 499 (1958).

II. The district court erred in dismissing Mr. Johnson's unconstitutional conditions claim. Accepting his allegations as true and considering them in a light most favorable to him, conditioning Mr. Johnson's annual mandatory license renewal on a Fourth Amendment waiver violates the unconstitutional conditions doctrine.

The district court dismissed Mr. Johnson's claim under the unconstitutional conditions doctrine because, in its view, the regime does not violate the Fourth Amendment. (App. 248.) That was error for the reasons stated above. As shown next, because the government conditions Mr. Johnson's mandatory annual renewal on a Fourth Amendment waiver, the regime violates the unconstitutional conditions doctrine.

Stated plainly, the "[g]overnment may not condition the receipt of a benefit or privilege on the relinquishment of a constitutional right," *Herrera v. Santa Fe Pub. Sch.*, 792 F. Supp. 2d 1174, 1183 (D.N.M. 2011) (*Herrera I*) , even if a person has "no entitlement to the [governmental] benefit" and "even though the government can deny the benefit for a number of other reasons," *KT. & G Corp. v. Attorney General of Okla.*, 535 F.3d 1114, 1135 (10th Cir. 2008); *Pike v. Gallagher*, 829 F.Supp. 1254,

1263 (D.N.M. 1993); *Johnston v. Tampa Sports Auth.*, 530 F.3d 1320, 1329 (11th Cir. 2008); *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

In *Herrera*, a student challenged the school's policy of conducting warrantless searches as a condition of entering school events. 792 F. Supp. 2d at 1182-83. The trial court ruled, under the unconstitutional conditions doctrine, the government cannot condition the benefit of attending prom on a relinquishment of a constitutional right. *Id.* at 1183. At summary judgment, the government argued "that any reasonable student should have understood that, to avoid the infringement on their Fourth Amendment rights," they "merely had to refrain from entering the Prom," "or not receive the benefit that the government was providing." *Herrera v. Santa Fe Pub. Sch.*, 956 F. Supp. 2d 1191, 1254 (D.N.M. 2013) (*Herrera II*). The trial court again rejected the government's argument because it "violates the unconstitutional-conditions doctrine," *id.*, and the mere "request" for the "searches as a condition for entrance to the prom violated the Plaintiffs' constitutional rights," *id.* at 1256.

The *Herrera* unconstitutional conditions reasoning applies neatly here. The government expressly conditions Mr. Johnson's license renewal on a relinquishment of his Fourth Amendment rights. K.S.A. § 47-1709(b); (App. 20-21, 31-33, 39-40, 42-43.) That is improper and unconstitutional.

If the proceedings below are indicative of the government's argument here, the government might again incongruously claim that Mr. Johnson consented to *past* searches, and that it is Mr. Johnson's burden to establish consent was involuntary—therefore there is no unconstitutional conditions violation. (App. 175-76.) That

would be wrong on both accounts. (App. 9-10, 13, 29, 31-32, 39-40, 42);[3] *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973); *Bumper v. North Carolina*, 391 U.S. 543, 549 (1968); *Pike, supra; Dearmore v. City of Garland*, 400 F. Supp. 2d 894, 902–04 (N.D. Tex. 2005); *McDonell v. Hunter*, 809 F.2d 1302, 1310 (8th Cir. 1987); *Herrera II,* 956 F. Supp. 2d at 1253; *Coolidge, supra*.

Consent is a factual question anyway, which the government acknowledges (App. 176); and regardless, Mr. Johnson seeks *prospective* relief from the regime. (App. 12-13, 34, 41, 47-48.)

Mr. Johnson did not consent in the constitutional sense, the regime violates the unconstitutional conditions doctrine, and the district court reversibly erred by dismissing Mr. Johnson's unconstitutional conditions claim.

III. The district court erred in dismissing the Johnson-Hoyts' rights to travel and freely move about claims. Accepting the Johnson-Hoyts' allegations as true and considering them in a light most favorable to them, they plausibly alleged that the regime's automatic penalties for traveling together more than thirty minutes from their rural homestead violates their right to travel and freely move about under the Fourteenth Amendment's Due Process and Privileges or Immunities Clauses.

The Johnson-Hoyts cannot travel more than thirty minutes from their homestead without risking punishment. That violates their fundamental right to travel and freely move about, protected by both the Due Process and Privileges or

[3] Plaintiffs objected below (App. 193) to Defendant's Exhibit A (App. 181) to the extent it was proffered to establish consent and do so again here. The district court did not rule on the objection but did not appear to consider it either.

Immunities clauses of the Fourteenth Amendment. The district court erred by dismissing their claims under both clauses.

A. The right to travel and freely move about is objectively and deeply rooted in our nation's history and traditions, implicit in the concept of ordered liberty, long protected by the American courts, and the United States Constitution.

The right to travel and freely move about is ancient and integral to personal liberty. *Magna Carta* (1215) (Cl. 39, 41, & 42); Jane McAdam, *An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty*, 12 Melbourne Journal of International Law 1, 6 (2011).

Blackstone described the absolute right of personal liberty, which "consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct." 1 W. Blackstone, *Commentaries on the Laws of England* *134 (1769). Restrictions on this power of locomotion violate Magna Carta's "law of the land" clause, as well as the Fifth and Fourteenth Amendments' Due Process Clauses. *Id.*; *Kerry v. Din*, 576 U.S. 86, 92 (2015); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 96 (1965) (Douglas, J., concurring); *Bell v. State of Md.*, 378 U.S. 226, 293 n.10 (1964) (Goldberg, J., concurring); *Edwards v. California*, 314 U.S. 160, 179 (1941) (Douglas., J. concurring); *Williams v. Fears*, 179 U.S. 270, 274 (1900).

From the colonial era through the Founding, citizens were free to travel and move about both within and between the states. *United States v. Wheeler*, 254 U.S. 281, 293 (1920) (noting the long history of "the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their

respective states, to move at will from place to place therein, and to have free ingress thereto and egress therefrom") (disapproved of on other grounds in *United States v. Guest*, 383 U.S. 745 (1966)); Joseph Story, *Commentaries on the Constitution of the United States* § 178 (1833); Richard Sobel, *The Right to Travel and Privacy: Intersecting Fundamental Freedoms*, 30. J. Marshal J. Info. Tech. & Privacy L. 639, 640 (2014). The Fourteenth Amendment guaranteed "freedom of movement" to everyone. *Students for Fair Admissions v. Harvard*, 600 U.S. ___ (2023) (Thomas, J., concurring) (slip op., at 4-5). Other fundamental rights—such as freedom of assembly or going to church—and the mundane activities of life rest upon the right to travel and freely move about. *Aptheker v. Sec'y of State*, 378 U.S. 500, 520 (1964) (Douglas, J., concurring).

The right to travel and freely move about throughout the entire nation has long been recognized by federal courts, *see*, *e.g.*, *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823); *Smith v. Turner* (*The Passenger Cases*), 48 U.S. 283, 492 (1849); *Williams v. Fears*, 179 U.S. 270, 274 (1900); *Edwards*, 314 U.S. at 174; *Shuttlesworth*, 382 U.S. at 96 (1965) (Douglas, J., concurring), as well as state courts, *see, e.g.*, *Pinkerton v. Verberg*, 78 Mich. 573 (1889); *Douglass v. Stephens*, 1 Del. Ch. 465, 471 (1821); *Florida v. J.P.*, 907 So. 2d 1101, 1113 (Fla. 2004). There is no distinction between the right to travel and freely move about across state lines or within. *Kent v. Dulles*, 357 U.S. 116, 126 (1958) (recognizing right to move "across frontiers" and "inside frontiers"); *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648 (2nd Cir. 1971) (it is "meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative

constitutional right to travel within a state."). Kansas recognizes "that freedom to travel throughout this state and this nation is a fundamental right." *Manzanares v. Bell*, 214 Kan. 589, 600 (1974).

B. The district court erred when it dismissed the Johnson-Hoyts' Due Process claims.

As shown above, the right to travel and move about freely is "deeply rooted in this Nation's history and traditions, and implicit in the concept of ordered liberty," *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (cleaned up), and is a fundamental right protected by the Due Process Clause. *Kent*, 357 U.S. at 126 ("Freedom of movement is basic in our scheme of values."); *Maehr*, 5 F.4th at 1117-18. Burdens on fundamental rights must satisfy strict scrutiny. *Glucksberg*, 521 U.S. at 721; *Maehr*, 5 F.4th at 1117-18. The district court erred by holding that the regime did not directly and substantially impair the fundamental right to interstate travel. (App. 251.) Then the district court erred by bifurcating the right to travel and freely move about into two distinct rights of *interstate* travel and *intrastate* travel. (App. 248-9.) Finally, the district court erred in relegating the right to intrastate travel status of "non-fundamental right." (App. 249.)

1. The regime directly and substantially interferes with interstate travel.

The district court correctly acknowledged that the right to interstate travel is a fundamental right, and that laws burdening that right are subjected to strict scrutiny, (App. 249-50), *Maehr*, 5 F.4th at 1118, but the district court declined to apply strict scrutiny. Instead, it held the regime does not "directly and substantially

impair" the fundamental right to travel, and "does not amount to a constitutional violation." (App. 250-51.)

The government will automatically punish the Johnson-Hoyts if they are more than thirty minutes from their homestead during a surprise search. K.S.A. § 47-1721(d)(1). But the Johnson-Hoyts cannot drive from their homestead to any state border or major city within thirty minutes. (App. 32-33.) In fact, the government called Ms. Hoyt while she was working at the hospital and threatened fines if she did not leave work and return to the homestead. (App. 10, 29.)

The district court held that even though the Johnson-Hoyts cannot travel out of state without risking punishment, the right to interstate travel only "prohibits burdens which activate upon the traveler's crossing of a state boundary." (App. 250.) The district court's "activation" analysis misunderstands the right to travel and freely move about and is unsupported by caselaw. The district court cites no case—and the Johnson-Hoyts are not aware of any case—which has held that the fundamental right to interstate travel only prohibits burdens which "activate" upon crossing a state boundary. For good reason.

The "activation" test would render the right to interstate travel meaningless. Under the district court's view, a state could forbid all interstate travel simply by stopping travelers *before* they reach the border. Since the Johnson-Hoyts are unable to reach any state border within thirty minutes, the burdens of the regime always "activate" before they can cross the border. (App. 32-33.) They inherently risk punishment by the government if they leave Kansas. That "directly and substantially

impairs" the right to interstate travel just as surely as a law that "activates" at the border.

Further, the district court held—despite the facts—that any burden on the Johnson-Hoyts' rights to travel and freely move about are cured by naming additional designated representatives for inspections. (App. 250-51.) But that requires the Johnson-Hoyts to grant a third party unfettered access to, and control over, their property, records, and the animals under their care. K.A.R. § 9-18-8. The law requires the designated representative to do more than simply opening the gate for the inspector. The designated representative must fully "represent[] the licensee in the process" and assist the inspector in accessing the homestead, examining records, making copies, inspecting the premises and animals, and providing a room and table for the inspector's use. *Id.*; K.A.R. § 9-18-9. Mr. Johnson does not want to grant anyone this level of access to the homestead, or the authority to represent him and make business decisions on his behalf during inspections. (App. 32.)

Requiring Mr. Johnson to surrender that level of access to the homestead, and authority over the business, to a designated representative just so the Johnson-Hoyts can travel is a direct and substantial impairment of the interstate right to travel. *Aptheker v. Sec'y of State*, 378 U.S. 500, 507 (1964) (right to travel cannot be conditioned on surrendering other constitutional right). The Johnson-Hoyts have the constitutional right to travel and the right to exclude others from their homestead. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021). The government cannot condition the Johnson-Hoyts' rights to travel on the surrender

of their right to exclude others from their homestead or Mr. Johnson's right to control his business.

The district court discounted *Aptheker* on the grounds that "the restriction at issue was 'severe . . . and in effect a prohibition' of international travel," while the regime "does not prohibit interstate travel or even severely restrict such travel." (App. 251.) But this reasoning is circular: the reason the district court thinks the travel restrictions are not severe is because the Johnson-Hoyts can designate a representative, while at the same time saying conditioning the right to travel on designating a representative is acceptable because the travel restrictions are not severe. Both cannot be true.

Mr. Johnson's livelihood depends on the ability to travel interstate for field trials and to have Ms. Hoyt help him there. (App. 18.) Yet the regime makes it impossible to travel interstate without risking punishment. (App. 32-33.) That is a direct and substantial burden on the "virtually unqualified" right to interstate travel. *Califano v. Gautier Torres*, 435 U.S. 1, 4 n.6 (1978). Defendant cannot condition the Johnson-Hoyts' rights to interstate travel on the surrender of other rights. The district court should have applied strict scrutiny, and erred in holding that the regime does not directly and substantially impair the Johnson-Hoyts' rights to travel and freely move about. *Maehr*, 5 F.4th at 1117.

2. The district court erred when it held the right to intrastate travel is non-fundamental.

The district court misinterpreted two Tenth Circuit cases to hold that the right to travel and freely move about only applies to interstate travel. (App. 248-49.)

But the right to travel and freely move about *inter*state – if it is to mean anything – inherently includes the right to travel and move freely about *intra*state as well.

Due process claims rest upon a "careful description" of the asserted right, *Glucksberg*, 521 U.S. at 721, but the district court used a generalized description of the "right to travel" to conflate *this* case with *D.L. v. Unified Sch. Dist. No. 497*, 596 F.3d 768 (10th Cir. 2010) and *McCraw v. City of Oklahoma City*, 973 F.3d 1057 (10th Cir. 2020). Relying upon generalized language in *D.L.* and *McCraw*, the district court concluded that the "right to travel" only includes interstate travel. (App. 248-49.) While those cases alleged a "right to travel" claim, they are nothing like the rights the Johnson-Hoyts alleged.

In *D.L.,* a mother enrolled her special-needs kids in a school, but the school district did not think she was a *bona fide* resident, so they sued her for fraud. 596 F.3d at 770. The mother responded by alleging the district's suit violated federal statutes. *Id.* The case did not involve travel or movement, and the briefing focused on the statutory claims. The mother also argued, ambitiously, that she and her children had "rights to education, to travel, and to have as many residences as they desire." *D.L. v. Unified Sch. Dist. 497*, 270 F. Supp. 2d 1217, 1262 (D. Kan. 2002) (vacated, 392 F.3d 1223 (10th Cir. 2004)) (cleaned up).

The school district responded to the travel line by incorrectly arguing that *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) held that the Constitution "guarantees only the right to interstate travel." Appellee's Opening Brief at 44, *D.L.*, 596 F.3d 786 (No. 08-3273) (10th Cir. Mar. 9, 2009). But the question in *Bray* did not involve intrastate travel—only interstate travel. *Bray*, 506

U.S. at 274 ("Respondents, like the courts below, rely upon the right to *interstate* travel") (emphasis added).

McCraw involved a challenge to a city ordinance banning protesting and panhandling in street medians. 973 F.3d at 1061. The ordinance did not restrict travel or movement—it restricted plaintiffs' ability to engage in specific activity on particular parcels of public property. This Court devoted almost all its opinion to a forum analysis under the First Amendment. *Id.* at 1065-80. This Court made clear that the proposed fundamental right at issue in the Due Process claim was "linger[ing] in traditionally open public places." *Id.* at 1080.

D.L. and *McCraw* may have been labeled as "right to travel" claims by the plaintiffs in those cases, but neither involved the right to travel and freely move about as pleaded by the Johnson-Hoyts in this case. (App. 13, 32-3, 43-6.) Due process requires a "careful description" of the right at issue, and the district court erred by considering *D.L.*, *McCraw*, and *this* case under the generic heading of "right to travel."

Unlike *D.L.* and *McCraw*, the Johnson-Hoyts have not alleged a right to attend a school or to linger in traditionally open public places. They have alleged the fundamental rights "to travel and freely move about." (App. 13, 32-3, 43-6.) Blackstone described this right as the "power of locomotion." 1 Blackstone *134. Other Circuits describe it as the right to travel "through public spaces and roadways," *Lutz v. City of York, Pa.*, 899 F.2d 255, 268 (3d Cir. 1990); *Johnson v. City of Cincinnati*, 310 F.3d 484, 495 (6th Cir. 2002), or as "*movement between*

places," *Williams v. Town of Greenburgh*, 535 F.3d 71, 75 (2nd Cir. 2008) (emphasis in original).

The district court should have analyzed whether the right to travel and freely move about—as pleaded—is "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty." *Glucksberg*, 521 U.S. at 721. It is. *See above.*

The Second, Third, Sixth, and Ninth Circuits have correctly recognized the fundamental intrastate right to travel and freely move about. *See Williams*, 535 F.3d at 75; *King*, 442 F.2d at 648; *Lutz*, 899 F.2d at 268; *Johnson*, 310 F.3d at 498; *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 944 (9th Cir. 1997) (recognizing "fundamental right of free movement").

Because the right to travel and freely move about is a fundamental right, the district court should have applied strict scrutiny. However, even if the district court is correct that intrastate travel is different from interstate travel, and therefore entitled to lesser protections, the district court should have applied intermediate scrutiny. *See Maehr*, 5 F.4th at 1115-6 (Lucero, J., concurring in the judgment).

Even under rational basis though, the district court should not have dismissed this case at the 12(b)(6) stage. *Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1184 (10th Cir. 2009) (cleaned up) (dismissal inappropriate "even if it strikes [the court] that a recovery is very remote and unlikely."). The Johnson-Hoyts have stated plausible claims that the travel restrictions do not even satisfy rational basis (App. 45), and are entitled to "marshal enough evidence to prevail on the merits of their claim[s] that the [regime] is irrational." *Id.*

As stated above, the intrastate right to travel and freely move about is fundamental. The district court was incorrect in holding that *D.L.* and *McCraw* had abrogated the fundamental right to travel and freely move about within a state. Under any level of scrutiny, the district court erred in dismissing the claim.

C. The district court erred when it dismissed the Johnson-Hoyts' Privileges or Immunities claims.

The Johnson-Hoyts alleged that their rights to travel and freely move about are protected by the Privileges or Immunities Clause of the Fourteenth Amendment. (App. 44, 47-8.) The government's 12(b)(6) motion did not mention the Privilege or Immunities Clause, its text, or its history. (App. 165-80.) Because the government did not move to dismiss the Privileges or Immunities claim, it was error for the district court to dismiss the claim under Rule 12(b)(6). *Nudge, LLC*, 430 F. Supp. 3d at 1246; *Bilek*, 8 F.4th at 587.

Further, the district court improperly relegated the Privileges or Immunities Clause to a single footnote, holding that "the Tenth Circuit analyzes fundamental right to travel claims under a due process framework." (App. 250 n.5.) But the Privileges or Immunities Clause has always guaranteed the right to travel and freely move about. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79-80 (1873); *Saenz v. Roe*, 526 U.S. 489, 503 (1999); *Maehr v*, 5 F.4th at 1108 (stating "the scope of [the Privileges or Immunities Clause], as limited by the *Slaughter-House Cases*, does include the 'right to travel'").

Shortly after its enactment, the Court in *Slaughter-House* narrowly interpreted the Clause to only protect rights "which owe their existence to the Federal

government, its National character, its Constitution, or its laws." 83 U.S. at 79. Yet even under its narrow holding, *Slaughter-House* lists several rights that are protected by the Clause, including the right to travel and freely move about. Citizens possess the right to travel "to the seat of government" or to any of the federal "seaports," "subtreasuries," "land offices," "courts of justice," or other federal offices throughout the nation. *Id.* at 79 (quoting *Crandall v. Nevada*, 73 U.S. 35 (1867)).

Crandall struck down a nominal $1 head-tax imposed by Nevada on all leaving the state, paid by the common-carrier. 73 U.S. at 46. The only way a federal republic can function is if its citizenry is free to travel and freely move about. The federal government maintained its capitol in Washington, D.C. and "offices of secondary importance in all other parts of the country." *Id.* at 43-4. The proper functioning of the federal government requires its citizens to be able to travel and freely move about to access federal facilities throughout the land. Any state law burdening the right of citizens to travel and freely move about, even a nominal $1 tax, threatened the supremacy of the United States.

The Constitution granted citizens "correlative rights" to travel and freely move about to access federal facilities. *Id.* at 44. And that right included travel throughout the entire nation, or wholly within any state, so that the citizen would be able to access any federal facilities such as "sea-ports," "sub-treasuries," "land offices," "revenue offices," and "the courts of justice in the several States." *Id.* "[T]his right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it." *Id.* The Court held that "[w]e are all citizens of the

United States, and as members of the same community must have the right to pass and repass through *every part* of it without interruption." *Id.* at 49 (emphasis added).

It is this right to travel and freely move about throughout the entire Union that the Court held to be a privilege or immunity of United States citizenship in *Slaughter-House*. 83 U.S. at 79. As a "correlative right" of the Supremacy Clause, it "owe[s] [its] existence to the Federal government, its National character, its Constitution, or its laws," and is a privilege or immunity of citizenship. *Id.* This Court agrees. *Maehr*, 5 F.4th at 1108. If the Privileges or Immunities Clause is to mean anything, it must at least protect those rights expressly mentioned in *Slaughter-House*, including the right to travel and freely move about. [4]

The regime burdens the Johnson-Hoyts ability to travel more than thirty minutes from their homestead, preventing them from accessing almost all federal facilities, including the "courts of justice in the several States." They cannot travel to any federal courthouse in the District of Kansas, or to the Tenth Circuit, or to the Supreme Court. If the Johnson-Hoyts travel to vindicate their rights before this very Court, they risk being punished by the Defendant. This violates the Privileges or Immunities Clause, and the district court wrongly dismissed the claim.

[4] Should this Court rule that the Privileges or Immunities Clause is so narrow that it does not even protect those rights specifically listed in *Slaughter-House*, then the Johnson-Hoyts preserve their right to argue that *Slaughter-House* should be overturned.

Conclusion

The district court erred, the judgment should be reversed, and the case should be remanded for further proceedings.

Alternatively, if this Court agrees with the Plaintiffs that the case should not have been dismissed, but also finds that the issues raised are purely legal questions—as the government has repeatedly argued—this Court should enter judgment in favor of the Plaintiffs.

Statement Regarding Oral Argument

The constitutional issues on appeal are complex and nuanced. The interchange of oral argument would assist this Court in deciding them. The Plaintiffs request 20 minutes per side.

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