IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SCOTT JOHNSON, *et al.*, *Plaintiffs*, v. JUSTIN SMITH, D.V.M., *Animal Health Commissioner, Kansas Department of Agriculture*, *Defendant*.	Case No. 6:22-cv-01243-KHV-ADM

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS

I. The Act Does Not Violate Plaintiffs' Fourth Amendment Rights.

Throughout their response, Plaintiffs conflate Fourth Amendment law as it applies to homes and to businesses, claiming CFK's facilities enjoy the same protections as a home because CFK operates on property adjacent to Johnson and Hoyt's home. "An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home. This expectation is particularly attenuated in commercial property employed in 'closely regulated' industries." *New York v. Burger*, 482 U.S. 691, 700 (1987) (citations omitted). The issue here is not whether a warrant is required to search a home; it is whether routine inspections of CFK's premises are reasonable. *See Rush v. Obledo*, 756 F.2d 713, 717 (9th Cir. 1985) (home daycare providers know that by caring for children in their homes, "regulations govern the operation and condition of [their] home[s] which are different from those covering other private residences").

Plaintiffs' primary defense is that the Supreme Court's decision in *City of Los Angeles v. Patel*, 576 U.S. 409 (2015), "recast the entire doctrine" of the administrative search exception. (ECF 13, 2-9) They misread *Patel* to hold more than it did. *Patel* involved a challenge to a municipal code requiring every hotel operator to maintain a registry containing guests' personal information. 576 U.S. at 412-13. Hotel operators had to make the registry available to law enforcement officers on demand, and if they refused to do so, they could be arrested on the spot. *Id.* at 413, 421. The Court found that hotels are not a closely regulated industry subject to the *Burger* factors, *id.* at 424-28, and struck down the law under "the general administrative search doctrine" because it did not offer an opportunity for precompliance review before a neutral decisionmaker. *Id.* at 419-23.

First, Plaintiffs incorrectly claim *Patel* imposes a precompliance review requirement on closely regulated business. The Supreme Court recognized two distinct analytical paths, imposing a precompliance review requirement only because it found hotels were not closely regulated. *Patel*, 576 U.S. at 419-28; *Killgore v. City of South El Monte*, 3 F.4th 1186, 1192 n. 7 (9th Cir. 2021) (rejecting same argument). Because boarding and training kennels are closely regulated businesses, only the *Burger* test applies. *E.g. Western Oilfields Supply Co. v. Sec. of Labor and Fed. Mine Safety*, 946 F.3d 584, 591 n. 7 (D.C. Cir. 2020).

Second, *Patel* did not "significantly narrow[] the test for closely regulated industries." *Liberty Coins, LLC v. Goodman*, 880 F.3d 274, 283 (6th Cir. 2018). Plaintiffs cite no language from *Patel* indicating the Court was overruling its prior

decisions or significantly altering its precedent concerning closely regulated businesses.[1] And while the Court has recognized only four closely regulated industries, lower federal courts before and after *Patel* have recognized additional closely regulated businesses.[2] *Killgore*, 3 F.4th at 1191-92 (collecting several post-*Patel* cases across various circuits); *see Patel*, 576 U.S. at 435-36 (Scalia, J., dissenting) (collecting cases and explaining that the Court's recognition of only four industries "tells us more about how this Court exercises its discretionary review than it does about the number of industries that qualify as closely regulated").

Third, *Patel* is distinguishable. Unlike boarding and training kennels, the Supreme Court has long recognized the hotel industry enjoys core Fourth Amendment privileges. *See, e.g.*, *United States v. Jeffers*, 342 U.S. 48, 51-52 (1951). And *Patel* held that the few municipal regulations imposed on hotels did not create a "comprehensive" scheme alerting hotel owners that their properties would be subject to periodic inspections for specific purposes. 576 U.S. at 425. As Defendant has already explained, the extensive regulatory scheme here makes Plaintiffs aware of the intervals at which they will be inspected for the limited purpose of uncovering violations of the Act. (ECF 13, 9-11.)

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[1] As an example of Plaintiffs' incorrect reading of *Patel*, they claim the Court limited the closely regulated industry doctrine to "industries that were inherently dangerous to the public." (ECF 13, 4). Rather, it stated that "nothing inherent in the operation of hotels poses a clear and significant risk to the public welfare." *Patel*, 576 U.S. at 424.

[2] Contrary to Plaintiffs' claim, the Montana Supreme Court did consider *Patel* when it concluded that dog breeding is a pervasively regulated industry. *State v. Warren*, 395 Mont. 15, ¶¶ 23, 24, 439 P.3d 357 (2019).

Besides overreading *Patel*, Plaintiffs incorrectly claim that "dog training isn't at all like dog breeding." (ECF X, 7.) Yet Plaintiffs admit that CFK's facilities house dogs for "weeks, months, or years on end—and some are trained and handled at the kennel for nearly their entire lives." Compl. ¶ 36. CFK's facilities are licensed to accommodate up to 40 dogs at one time. Exh. A. Just as animal breeders are regulated to ensure that animals are properly cared for in safe facilities, the same substantial state interest[3] is fulfilled by routinely inspecting boarding and training kennels that house several dogs for long periods of time.[4] At bottom, Plaintiffs can identify no meaningful difference between the State's substantial interest in regulated dog breeders, dog boarders, and dog training kennels alike.

Finally, Plaintiffs cite no authority establishing that this court's analysis of the closely regulated business exception differs under a property-based framework. *But see Byrd v. United States*, 138 S. Ct. 1518, 1526 (2018) (*Katz*'s privacy-based understanding "supplements, rather than displaces" property-based rationale).

II. The Act Does Not Set Unconstitutional Conditions.

Plaintiffs do not dispute that "if no constitutional rights have been jeopardized, no claim for unconstitutional conditions can be sustained." *Reedy v.*

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[3] Defendant has not claimed the primary purpose of the Act is "to investigate and prosecute crimes under" Kan. Stat. Ann. § 21-6412. (ECF 13, 5, 8) Animal health inspectors are tasked with enforcing the Act. *See* Kan. Stat. Ann. § 47-1709. The statute was cited for the purpose of demonstrating the substantial state interest of protecting domestic animals from cruel and inhumane conditions.

[4] Although Plaintiffs claim market forces will ensure that only ethical dog trainers remain in business, this is an argument of public policy, which is the province of the Kansas Legislature, not the courts. *See Resolution Trust Corp. v. Westgate Partners, Ltd.*, 937 F.2d 526, 531 (10th Cir. 1991).

Werholtz, 660 F.3d 1270, 1277 (10th Cir. 2011). Because the Act does not violate Plaintiffs' Fourth Amendment rights, it imposes no unconstitutional conditions.

III. The Kansas Pet Animal Act Does Not Violate The Right To Travel.

Plaintiffs continue to assert the Act's inspection regime prevents them from traveling. As previously explained, Plaintiffs remain free to travel. They choose not designate another representative even though they allege other people access CFK's facilities to care for the dogs when Johnson and Hoyt travel. Compl. ¶¶ 48, 118.

Plaintiffs still have not explained how the thirty-minute window, no-contact fee, and designated-representative provisions (1) actually deter their ability to travel interstate; (2) have the primary objective of deterring travel; or (3) use a classification to penalize the right to travel. *See Att'y Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986). Besides, their arguments prove too much. If any licensee could voluntarily refuse to designate a representative for routine inspections, it is easy to see how animal breeders, animal distributors, pet shop operators, and other licensees under the Act could easily manipulate circumstances to plead an interstate travel claim.

Additionally, Plaintiffs' threadbare citation to the Privileges or Immunities Clause does not make his travel claims plausible. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). And while Plaintiffs assert "[m]ost agree the *Slaughter-House Cases*, 83 U.S. 36 (1872), were wrongly decided," they remain good law. *Maehr v. U.S. Dept. of State*, 5 F.4th 1100, 1107 (10th Cir. 2021).

CONCLUSION

For the foregoing reasons, this Court should dismiss Plaintiffs' complaint.

OFFICE OF ATTORNEY GENERAL
KRIS KOBACH

/s/ Kurtis K. Wiard
Kurtis K. Wiard, KS S. Ct. #26373
Assistant Solicitor General
Arthur S. Chalmers, KS S. Ct. #11088
Assistant Attorney General
120 SW 10th Ave., 2nd Floor
Topeka, Kansas 66612
Ph: (785) 296-2215
Fax: (785) 291-3767
Email: kurtis.wiard@ag.ks.gov
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2023, the foregoing was filed with the clerk of the court using the CM/ECF system, which will send a notice of electronic to all counsel of record, including the following:

Samuel G. MacRoberts
Kansas Justice Institute
12980 Metcalf Avenue, Suite 130
Overland Park, Kansas 66213
Sam.MacRoberts@KansasJusticeInstitute.org
Attorney for Plaintiffs

/s/ Kurtis K. Wiard
Kurtis K. Wiard