No. 23-3091

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SCOTT JOHNSON, *et al.*,
Plaintiffs-Appellants,

v.

JUSTIN SMITH, D.V.M.,
Animal Health Commissioner, Kansas Department of Agriculture,
Defendant-Appellee.

Appeal from the United States District Court for the District of Kansas
Honorable Kathryn H. Vratil, United States District Judge
Case No. 6:22-CV-01243-KHV

BRIEF OF APPELLEE

OFFICE OF ATTORNEY GENERAL
KRIS W. KOBACH

Anthony J. Powell
Solicitor General
Kurtis K. Wiard
Assistant Solicitor General
120 SW 10th Ave., 2nd Floor
Topeka, KS 66612-1597
[redacted]
Attorneys for Defendant-Appellee

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

* * * * *

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Rules

Other Authorities

* * * * *

GLOSSARY

AFI	Animal Facilities Inspection
AWA	Animal Welfare Act, 7 U.S.C. § 2131, *et seq.*
Big Cats	*Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853 (10th Cir. 2016)

* * * * *

PRIOR AND RELATED APPEALS

None.

* * * * *

INTRODUCTION

Scott Johnson is a licensed boarding or training kennel operator who trains and kennels hunting dogs at his facilities for "weeks, months, or years on end." (App. 17).[1] Johnson and others sued Justin Smith, Kansas's Animal Health Commissioner ("Commissioner"), alleging the Kansas Pet Animal Act's ("Act"), Kan. Stat. Ann. § 47-1701, *et seq*., inspection scheme violates the Fourth Amendment, the unconstitutional conditions doctrine, and the constitutional right to travel.

None of these claims are plausible. Kansas closely regulates dog boarding and training kennels, and the Act's inspections are necessary to ensure animals are being treated humanely. The Commissioner consistently administers the program, which licensees can easily comprehend. In short, the inspection scheme is reasonable. Likewise, the Act does not impose unconstitutional conditions, and rather than inhibit interstate travel, the Act facilitates travel by allowing licensees to designate any number of people to represent them in their absence.

This Court should affirm the district court's dismissal of the suit.

[1] Because the appendix contains a single volume, Smith will cite to only the relevant page number.

STATEMENT OF JURISDICTION

The United States District Court had jurisdiction over this civil action "arising under the Constitution, laws, or treaties of the United States" pursuant to 28 U.S.C. § 1331. On May 5, 2023, the district court dismissed Plaintiffs-Appellants' complaint under Fed. R. Civ. P. 12(b)(6). (App. 234-53); *Johnson v. Smith*, ___ F. Supp. 3d ___, 2023 WL 3275782 (D. Kan. 2023). Plaintiffs-Appellants timely appealed on May 19, 2023. (App. 254). This Court has jurisdiction under 28 U.S.C. § 1291.

* * * * *

STATEMENT OF ISSUES

I. Whether the Act's Inspection Program is Reasonable Under the Fourth Amendment.

II. Whether the Act Imposes Unconstitutional Conditions.

III. Whether the Act Violates a Licensee's Constitutional Right to Interstate Travel.

* * * * *

STATEMENT OF THE CASE

1. Kansas Pet Animal Act

In order to operate a boarding or training kennel in Kansas, a person must obtain a license from the Commissioner and renew it annually. Kan. Stat. Ann. § 47-1723(a). A "boarding or training kennel operator" is defined as "any person who operates an establishment where four or more dogs or cats, or both, are maintained in any one week during the license year for boarding, training or similar purposes for a fee or compensation." Kan. Stat. Ann. § 47-1701(p). The Act also requires the annual licensure of animal breeders, animal distributors, pet shop operators, animal shelters, hobby breeders, retail breeders, animal research facilities, and out-of-state distributors.[2]

The Kansas Legislature has directed the Commissioner to adopt extensive rules and regulations governing these entities, which must address the matters of: (1) reasonable treatment of animals; (2) visible symptoms of communicable diseases in certain animals;

[2] Kan. Stat. Ann. §§ 47-1702 (animal distributor), 47-1703 (pet shop operator), 47-1704 (animal shelter), 47-1719 (hobby breeder), 47-1720 (animal research facility), 47-1733 (animal breeder), 47-1734 (out-of-state distributor), 47-1736 (retail breeder).

(3) identification of animals handled; (4) primary enclosures; (5) housing facilities; (6) sanitation; (7) euthanasia; (8) ambient temperatures; (9) feeding; (10) watering; (11) adequate veterinary medical care; (12) inspections of licensed premises, investigations of complaints, and training of inspectors; and (13) the maintenance of necessary records. Kan. Stat. Ann. § 47-1712(a). The several regulations adopted pursuant to this directive are found in Article 18 of the Kansas Department of Agriculture's regulations. *See* Kan. Admin. Regs. §§ 9-18-4 to 9-18-31.

Essential to the effective licensing of these entities is the Act's inspection program, known as the Animal Facilities Inspection (AFI) Program. (App. 54). To obtain a license or permit under the Act, an initial inspection of the premises must be completed. Kan. Stat. Ann. § 47-1709(a). An 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 or permitted . . . at reasonable times with the owner or owner's representative present." *Id.* Applicants may be notified when the initial inspection will occur, but if they refuse the initial inspection, the Commissioner is precluded from issuing a license or permit. *Id.*

Once a license or permit has been issued, periodic inspections are conducted. Kan. Stat. Ann. § 47-1709(b). The "acceptance of a license or permit shall conclusively be deemed to be the consent of the licensee or permittee to the right of entry and inspection of the licensed or permitted premises . . . at reasonable times with the owner or owner's representative present." *Id.* During periodic inspections, an inspector is authorized to do the following:

(1) enter the premises;

(2) examine business records;[3]

(3) copy the business records;

(4) inspect the premises and animals;

(5) document conditions and places of noncompliance; and

(6) use a table, room, or other facilities needed to examine records and inspect the premises.

Kan. Admin. Regs. § 9-18-8(a)-(f).

The intervals at which periodic inspections occur depends on the licensee's prior compliance. If the premises passed its three most recent inspections, one shall be conducted every 15 to 24 months. Kan. Admin.

[3] Kan. Admin. Regs. § 9-18-7 details the records that must be maintained.

Regs. § 9-18-9(b)(3). If it passed the two most recent inspections, an inspection shall occur every 9 to 18 months. *Id.* at (b)(2). And if it failed one of its two prior inspections, an inspection shall be completed every 3 to 12 months. *Id.* at (b)(1).[4]

Unless all parties agree on a different time, an inspection can occur only between Monday and Friday, between 7:00 A.M. and 7:00 P.M. Kan. Admin. Regs. §§ 9-18-9(d), 9-18-8.[5] If the owner of the premises is unavailable during these times, the owner must designate in writing a representative who can be present during an inspection, and there is no limit to the number of representatives who may be designated. Kan. Admin. Regs. § 9-18-9(e). Unlike the initial inspection, an inspector is not permitted to give prior notice of a periodic inspection. Kan. Stat. Ann.

[4] An additional inspection may occur if (1) a violation was found in a previous inspection; (2) a complaint is filed; (3) ownership of the premises has changed in the previous year; or (4) the license was not timely renewed. Kan. Admin. Regs. § 9-18-9(c). If there is an allegation that an animal's health, safety, or welfare is in jeopardy in violation of the Act, an inspection may occur on any day of the week at a reasonably necessary time. *Id.* at (f).

[5] The license renewal form asks for the licensee's preferred times of inspection, which Johnson listed as between 3:00 P.M. and 7:00 P.M. (App. 181).

§ 47-1709(b). Prior to 2018, the statute allowed inspectors to give licensees notice of a periodic inspection. *See* 2018 Kan. Sess. Laws 326.

There are specific consequences for failing to make available the premises or refusing an inspection. If a licensee or the designated representative cannot make the premises available for inspection within 30 minutes of the arrival of the inspector, a $200 no-contact fee is imposed against the licensee, and the inspector must try to inspect the premises on a different occasion. Kan. Stat. Ann. § 47-1721(d)(1). If the licensee refuses inspection, an administrative warrant may be obtained, and the license may be suspended or revoked. Kan. Stat. Ann. § 47-1709(b), (k).

More broadly, there are a variety of possible consequences for failing to comply with the Act. Violations of the Act constitute a class A nonperson misdemeanor. Kan. Stat. Ann. § 47-1715(a). A violation may result in either a civil penalty not exceeding $1,000 or an educational course focused on the proper care and treatment of animals. *Id.* And notwithstanding any ongoing administrative or criminal proceedings, the Commissioner may obtain an injunction to prevent the unlawful operation of a facility. Kan. Stat. Ann. § 47-1727.

2. Covey Find Kennel

Scott Johnson owns and operates Covey Find Kennel, LLC ("CFK"), in rural Cowley County, Kansas. (App. 11, 32-33). In exchange for compensation, Johnson cares for, houses, feeds, and trains hunting dogs at CFK's facilities. (App. 16-18). The facilities are licensed to accommodate up to 40 dogs at once, and owners kennel their dogs at the facilities for "weeks, months, or years on end." (App. 16-17, 181). Johnson also trains dogs to participate in field trials at locations across the country, which are "essentially competitive events for dogs." (App. 18). On occasion, Johnson leaves dogs kenneled at CFK's facilities when he takes other dogs to offsite locations for field training or field trials at certain times of the year. (App. 17-18).

CFK is located on a parcel of land that is jointly owned by Johnson and his wife, Harlene Hoyt. (App. 11-12, 14). CFK's kennels are situated inside a fenced area directly behind a shop. (App. 15-16). Johnson and Hoyt's house is west of the shop and southwest of the kennels. (App. 12, 15-16). The kennels can be accessed through two gates: one between the shop and the property line and the other between the house and the shop.

(App. 15-16). The shop contains a mixture of business and personal items, and Johnson and Hoyt claim it is part of their home. (App. 15).

Sometime around 1999, Johnson first learned from an inspector that he needed a license to operate his business. (App. 29). The Kansas Department of Agriculture, Division of Animal Health currently licenses Johnson as a "boarding or training kennel operator" as defined by the Act. (App. 11, 181). Smith is the Animal Health Commissioner, who is charged with implementing the Act. *See* Kan. Stat. Ann. § 47-1712; (App. 12). Since Johnson obtained his license, CFK's facilities have been routinely inspected. (App. 10, 29).

Hoyt is a "designated representative," meaning that if Johnson is unavailable for a routine inspection, she can be present at CFK's facilities for the inspection. *See* Kan. Admin. Regs. § 9-18-9(e); (App. 12, 29). Hoyt works as a clinic manager at a hospital, but she sometimes helps Johnson with CFK's operations and joins Johnson on trips to field trials. (App. 14, 18). Besides Hoyt, other individuals assist Johnson with the dogs, and when he and Hoyt are gone, Johnson has someone care for the dogs kenneled at CFK's facilities.[6] (App. 18, 32).

[6] For the first time on appeal, Johnson characterizes these people as

3. The Present Challenge

In October 2022, Appellants filed an expansive complaint against Smith, arguing that (1) the AFI Program violates the Fourth Amendment; (2) the Act's compelled consent provisions impose unconstitutional conditions; and (3) portions of the program violate their right to travel. (App. 9-48). Appellants sought an injunction against Smith, prohibiting him from enforcing the allegedly unconstitutional portions of the Act. (App. 47-48).

In January 2023, Smith moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6). (App. 163-80). The district court eventually granted the motion. (App. 234-52). The court first determined that the "dog boarding and training kennel industry" is closely regulated in Kansas, which "employs a comprehensive scheme" that has long notified kennel

---

"independent contractors," who "do not have access to all of CFK's records or the entire property," and who have "limited" roles. Appellant's Br. at 6. None of these facts were alleged in his complaint. Instead, the complaint simply describes them as "the people who help him with the dogs" (App. 32) and "someone [who] assist[s] with the caretaking responsibilities back at the homestead." (App. 18). This is how the district court characterized these individuals. (App. 238). "This court cannot and will not act solely upon the basis of general factual contentions raised for the first time on appeal." *United States v. Jordan*, 890 F.2d 247, 254 (10th Cir. 1989). Although these new facts have no bearing on the outcome of this case, the Court should disregard them.

operators they are subject to periodic inspections. (App. 241-44). The court then applied the three-part test in *New York v. Burger*, 482 U.S. 691 (1987), and held that (1) Kansas has a substantial state interest in protecting domestic animals from inhumane conditions; (2) unannounced warrantless inspections are necessary to further this substantial interest by ensuring operators are unable to conceal violations of the Act prior to a routine inspection; and (3) the AFI Program is sufficiently comprehensive and clear so licensees know they are subject to routine inspections that are limited in time, scope, and place. (App. 244-47).

Because the Act did not authorize unconstitutional searches, the court next determined that the Act's compelled consent requirements did not impose unconstitutional conditions on a licensee. (App. 247-48).

Finally, consistent with Tenth Circuit precedent, the court held that Johnson and Hoyt lack a fundamental right to intrastate travel. (App. 248-49). It further held that the 30-minute response mandate, designated representative provision, and no-contact penalty do not prohibit or severely restrict interstate travel, instead finding the ability to designate representatives facilitates "unfettered travel for licensees." (App. 251).

* * * * *

SUMMARY OF ARGUMENT

First, the AFI Program does not violate the Fourth Amendment. The Kansas Legislature long ago passed the Act, which is a comprehensive and clearly defined law that resembles other federal and state laws regulating animal boarders. Kansas thus closely regulates boarding and training kennels. And the Act's inspection scheme is reasonable because (1) Kansas has a substantial interest in ensuring domestic animals are not subject to cruel and inhumane conditions; (2) Kansas cannot achieve this interest without unannounced routine inspections; and (3) the Act is comprehensive and clearly defined so that training kennel operators cannot help but know their facilities are subject to periodic inspections for specific, limited purposes.

Second, because the Act does not violate a licensee's Fourth Amendment rights, the Act's compelled consent provisions do not place unconstitutional conditions upon the issuance and renewal of a license.

Third, Circuit precedent dictates that there is no fundamental right to intrastate travel or "movement" in general. The Act does not directly and substantially impair a licensee's ability to interstate travel. Rather, the designated representative provision aids interstate travel.

ARGUMENT

This Court reviews *de novo* the district court's dismissal of a complaint under Fed. R. Civ. P. 12(b)(6), applying the same standards as the district court. *Audubon of Kansas, Inc. v. United States Dep't of Interior*, 67 F.4th 1093, 1108 (10th Cir. 2023). "[A] complaint must have enough allegations of fact, taken as true, 'to state a claim to relief that is plausible on its face.'" *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[A] court should disregard all conclusory statements of law and consider whether the remaining specific factual allegations, if assumed to be true, plausibly suggest the defendant is liable." *Kansas Penn Gaming, LLC*, 656 F.3d at 1214.

Appellants failed to plausibly plead that the Act (1) violates their Fourth Amendment rights; (2) imposes unconstitutional conditions; and (3) infringes on their right to travel.

I. Dog Kenneling is Closely Regulated, and the AFI Program Satisfies the Fourth Amendment.

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The Fourth Amendment applies to searches of both private and commercial property. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978). "Nevertheless, because the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions." *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006).

One exception is for "closely" or "pervasively" regulated businesses. *Barlow's, Inc.*, 436 U.S. at 313; *United States v. Biswell*, 406 U.S. 311, 316 (1972). The exception is grounded in the long-accepted understanding that "the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory

schemes authorizing warrantless inspections." *Donovan v. Dewey*, 452 U.S. 594, 598-99 (1981); *Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853, 865 (10th Cir. 2016) ("*Big Cats*"). It is also grounded in the rationale that a person who has decided to operate a closely regulated business "has voluntarily decided to 'subject himself to a full arsenal of governmental regulation.'" *Big Cats*, 843 F.3d at 865 (*quoting Barlow's, Inc.*, 436 U.S. at 313). Given the voluntary decision by a business owner, the closely regulated business exception applies to home businesses and businesses on private property near a home. *See Lesser v. Espy*, 34 F.3d 1301, 1304 (7th Cir. 1994) (finding closely regulated business exception applied to rabbitry located on same parcel of land as the residence of the licensee's home); *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").

The threshold question is whether the industry is, in fact, closely regulated. *United States v. Vasquez-Castillo*, 258 F.3d 1207, 1210 (10th Cir. 2001). If it is, the ensuing analysis is whether the regulatory scheme satisfies the three-part test articulated in *New York v. Burger*, 482 U.S.

691 (1987), which "guard[s] against unreasonable administrative searches." *Big Cats*, 843 F.3d at 865. Warrantless administrative searches of closely regulated businesses "do not *per se* violate the Fourth Amendment." *Id.* (citing 5 Wayne R. LaFave, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.2(f) (5th ed. 2012); 2 William E. Ringel, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS § 14:8 (2d ed. Nov. 2016 Update)).

A. Kansas closely regulates boarding and training kennels.

To determine whether a particular business is closely regulated, courts consider "(1) 'the pervasiveness and regularity' of regulations governing an industry; (2) 'the duration of a particular regulatory scheme'; and (3) whether other states have imposed similarly extensive regulatory requirements." *Liberty Coins, LLC v. Goodman*, 880 F.3d 274, 282 (6th Cir. 2018) (*quoting Burger*, 482 U.S. at 701, 705). The Supreme Court has stressed that "the proper focus is on whether the 'regulatory presence is sufficiently comprehensive and defined that the owner of a commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.'" *Burger*,

482 U.S. at 705 n. 16 (*quoting Donovan*, 452 U.S. at 600). The Act meets this standard.

First, the Act is comprehensive and clearly defined. As previously detailed, a boarding or training kennel operator must obtain a license from the Commissioner and renew it annually. Kan. Stat. Ann. § 47-1723(a). The licensee is subject to many of the detailed regulations found in Article 18 of the Kansas Department of Agriculture's regulations. For example, Kan. Admin. Regs. §§ 9-18-10, 9-18-11, 9-18-12, and 9-18-13 detail the several specific requirements for housing dogs in a variety of facilities or enclosures. A statute plainly notifies licensees that they are consenting to an initial inspection as well as periodic inspections "at reasonable times," Kan. Stat. Ann. § 47-1709(a), (b), which the Commissioner has defined as between Monday and Friday, between 7:00 A.M. and 7:00 P.M. Kan. Admin. Regs. §§ 9-18-9(d), 9-18-8. Licensees know the specific actions inspectors may take to ensure compliance with the Act. *See* Kan. Admin. Regs. § 9-18-8(a)-(f). Lastly, licensees are aware of the nine-month period in which their premises will be inspected based on their prior history of compliance. Kan. Admin. Regs. § 9-18-9(b).

Johnson cannot claim he does not know his property is subject to routine inspections for specific purposes.

This scheme is at least as extensive as the vehicle dismantling regulations in *Burger*, 482 U.S. at 703-05, and far more comprehensive than the "hodgepodge" of municipal regulations in *City of Los Angeles v. Patel*, 576 U.S. 409 (2015). One of the regulations in *Patel* required hotel operators to maintain a registry containing guests' personal information that had to be made available to law enforcement officers on demand. 576 U.S. at 412-13, 425. The *Patel* Court concluded that the handful of hotel regulations were "more akin to the widely applicable minimum wage and maximum hour rules that the Court rejected as a basis for deeming 'the entirety of American interstate commerce' to be closely regulated in *Barlow's, Inc.*" *Id.* at 425 (citation omitted). Unlike the businesses in *Patel* and *Barlow's, Inc.*, Johnson cannot help but know CFK's premises are subject to routine inspection to uncover potential violations of the Act. *See Liberty Coins, LLC*, 880 F.3d at 283 ("These requirements are more comprehensive than those applicable to the hotel industry in *Patel*.").

Second, the Act is not of recent vintage. While the "the pervasiveness and regularity" of the regulatory scheme is the key inquiry

when determining whether a business is closely regulated, the length of government regulation "will often be an important factor." *Donovan*, 452 U.S. at 606; *accord Patel*, 576 U.S. at 425 (2015) ("History is relevant when determining whether an industry is closely regulated."). A version of the Act has been in existence since 1972, and kennel operators have been regulated for over thirty years. 1991 Kan. Sess. Laws 1021; *see* 1996 Kan. Sess. Laws 503 (clarifying that kennel operator includes boarding dogs for "training or similar purposes"). In fact, Johnson has known for over 22 years that his business is subject to extensive regulation, including regular inspections. (App. 29). The history of regulation supports the conclusion that boarding and training kennels are closely regulated. *See Liberty Coins, LLC*, 880 F.3d at 284 (noting that the first iteration of the law in question "went into effect in 1987, more than thirty years ago").

Third, other jurisdictions have similar statutes. In 1966, Congress first passed the Animal Welfare Act ("AWA"), Pub. L. No. 89-544, 80 Stat. 350 (1966), and the current provisions can be found at 7 U.S.C. § 2131, *et seq*. *See* 9 C.F.R. § 1.1, *et seq*. (regulations implementing AWA). Furthermore, "more than half" of all states "have enacted statutes that

cover either commercial breeders or kennel operators." 77 A.L.R.6th 393 (Originally published in 2012). *See Burger*, 482 U.S. at 705 ("That other States besides New York have imposed similarly extensive regulations on automobile junkyards further supports the 'closely regulated' status of this industry."); *V-1 Oil Co. v. Means*, 94 F.3d 1420, 1426 (10th Cir. 1996) ("Motor carriers are closely regulated by both state and federal governments."). The widespread regulation of those who kennel animals militates strongly in favor of finding that boarding and training kennels are closely regulated.

In *Big Cats*, federal agents searched a facility that was licensed pursuant to the AWA, which housed and cared for exotic animals. 843 F.3d at 857-58. In the context of analyzing the facility's *Bivens* claim,[7] this Court concluded: "The government has a substantial interest in animal safety and welfare and surprise inspections help further those interests. And the regulations implementing the AWA allow routine inspections of regulated premises during 'business hours' with

[7] In *Big Cats*, federal inspectors forcibly entered the facility by cutting chains and locks, so the ultimate question was whether there was clearly established law indicating an inspector could not forcibly enter a facility to conduct a non-emergency inspection. 843 F.3d at 858.

protections for business to have the inspections conducted by authorized personnel." *Id.* at 866.

While the animal facility in *Big Cats* did not challenge the Court's assumption that the AWA satisfied the three *Burger* criteria, it is hard to ignore the similarities between the AWA and the Act. Like the Act, the AWA requires the facility to "meet care and sanitation standards," "require licensees to handle animals safely," "provide adequate veterinary care," and "mark animals for identification." *Compare* 7 U.S.C. § 2143(a), *with* Kan. Stat. Ann. § 47-1712(a); 843 F.3d at 857 (listing these AWA requirements). And also like the Act, the AWA relies on an inspection scheme to enforce these provisions. *Compare* 7 U.S.C. § 2146(a), *with* Kan. Stat. Ann. § 47-1709. This Court's decision in *Big Cats* strongly supports the conclusion that boarding or training kennels are closely regulated. *See also Vasquez-Castillo*, 258 F.3d at 1210 (commercial trucking is closely regulated); *United States v. Johnson*, 994 F.2d 740, 742 (10th Cir. 1993) (taxidermy is closely regulated); *S&S Pawn Shop Inc. v. City of Del City*, 947 F.2d 432, 437 (10th Cir. 1991) (pawnshops are closely regulated); *V-1 Oil Co. v. Wyoming Dep't of Envtl.*

Quality, 902 F.2d 1482, 1486 (10th Cir. 1990) (gasoline dealers are closely regulated).

Other courts have held that kennels are closely regulated. In a case the district court characterized as "nearly identical" to this one (App. 243), a federal district court held that dog breeding is closely regulated. *Prof'l Dog Breeders Advisory Council v. Wolff*, No. 1:CV-09-0258, 2009 WL 2948527, at *9 (M.D. Pa. 2009). In reaching this decision, the court reasoned that the plaintiffs could not "successfully argue that the kennel industry is not pervasively regulated while at the same time maintaining that the kennel industry is too pervasively regulated." *Id.* Appellants have the same difficulty in this case. The Montana Supreme Court has also held that dog breeding is closely regulated, emphasizing Montana's several statutes regulating the control of domestic animals. *State v. Warren*, 439 P.3d 357, 364 (Mont. 2019). Like these courts, this Court should find that the dog kenneling and training industry is closely regulated and apply the *Burger* test.

Appellants argue *Wolff* and *Warren* are inapplicable because they concern dog *breeding*, leading them to assert the district court characterized CFK at "an incredibly high level of generality" when it

found it to be part of the "dog boarding and training kennel industry." (App. 245). Appellant's Br. at 22-27. Quite the opposite is true. The district court carefully defined the relevant industry. (App. 241-44).

The core concerns that attend dog breeding also accompany dog kenneling and dog training. Although Appellants argue their "business is training and handling hunting dogs," their complaint alleged 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." (App. 17). CFK's licensing paperwork states that its facilities can house up to 40 dogs at one time. (App. 181). Just as Kansas has a substantial state interest[8] in ensuring animal breeders house their animals in clean and safe facilities and provide adequate care, the same substantial state interest applies with the same force to similar facilities that house several animals for extended periods of time.

The regulations themselves illustrate the absence of a meaningful distinction between dog breeding and dog kenneling for the purpose of defining the relevant industry. While Johnson asks this Court to consider only the training elements of his program, he cites no regulation or

[8] *See infra* Section I(B)(1) at 28-30.

statute distinctly addressing the training of dogs. Instead, the regulations overwhelmingly concern the conditions in which animals are housed, *see* Kan. Admin. Regs. §§ 9-18-10 to 9-18-14, and their general care, *see* Kan. Admin. Regs. §§ 9-18-15 to 9-18-18, 9-18-19 to 9-18-23, and 9-18-30 to 9-18-31. Appellants cannot identify a significant difference between dog breeders, dog boarders, and dog training kennels.

The Act's legislative history further illustrates the similarity of those who kennel animals. In 1991, the Kansas Legislature first added kennel operators to the Act, which were defined as, "any person who operates an establishment where animals are maintained for boarding or similar purposes for a fee or compensation." 1991 Kan. Sess. Laws 1021. By its plain language, CFK's facilities would have been considered a "kennel operator" in 1991. But in 1996, the Legislature clarified any possible ambiguity by inserting "training" before "or similar purposes for a fee or compensation." 1996 Kan. Sess. Laws 503. The Kansas

Legislature has already decided that training kennels such as CFK are part of the kennel industry. [9]

The analogous treatment of facilities that house animals is what distinguishes this case from the facts in *Mexican Gulf Fishing Co. v. United States Dep't of Commerce*, 60 F.4th 956 (5th Cir. 2023). There the Fifth Circuit said the district court could not conflate the charter boat fishing industry with the commercial fishing industry under the guise of "the general fishing industry." *Id.* at 969. This was too broad a field, the court said, where "federal statutes and regulations distinguish between fishing and charter-boat fishing, as well as between commercial and recreational fishing," ultimately concluding, "the charter boat fishing industry is different in kind and degree from the commercial fishing industry." *Id.* at 969. Here, however, the core regulatory provisions apply across the board to those who care for kenneled animals.

Appellants' reliance on *United States v. Herrera*, 444 F.3d 1238 (10th Cir. 2006) and *United States v. Seslar*, 996 F.2d 1058 (10th Cir.

[9] To further illustrate the scope of the industry, the American Kennel Club maintains information regarding dog training programs, including a database on affiliated "Performance Clubs," which include "Field Trial Clubs" and "Hunting Test Clubs." American Kennel Club, Club Search and Directory, https://tinyurl.com/y6yh3p4f (last visited Sept. 8, 2023).

1993), is similarly misplaced. The criminal defendants in those cases were not actually engaged in the closely regulated commercial motor industry. *See Vasquez-Castillo*, 258 F.3d at 1210. Herrera was driving a pickup truck, and Seslar was driving a rental truck, neither of which were subject to commercial vehicle regulations. *Herrera*, 444 F.3d at 1240; *Seslar*, 996 F.2d at 1063. In this case, there is no question Appellants are subject to the Act.

This Court should find that CFK is part and parcel of the dog boarding and kenneling industry, which is closely regulated.

B. The AFI Program is reasonable because it satisfies the three *Burger* criteria.

Since dog kenneling is a closely regulated business, the next step is to determine whether the state "regulatory scheme is a sufficient substitute for a warrant." *United States v. Mitchell*, 518 F.3d 740, 751 (10th Cir. 2008).

> To guard against unreasonable administrative searches, in *Burger* the Supreme Court articulated several criteria the government must meet to justify warrantless inspections: (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, 843 F.3d at 865 (*citing Burger*, 482 U.S. at 702-03). The Act satisfies these three criteria.

1. Kansas has a substantial interest in protecting animals from cruel and inhumane conditions.

Kansas—like all states and the federal government—has a substantial interest in protecting animals from cruel and inhumane conditions. *See* Kan. Stat. Ann. § 21-6412 (criminalizing cruelty to animals)[10]; *Big Cats*, 843 F.3d at 866 ("The government has a substantial interest in animal safety and welfare."); *Wolff*, 2009 WL 2948527, at *9 ("The Commonwealth has shown they have a substantial government interest in regulating the dog breeding industry."); *Kerr v. Kimmell*, 740 F. Supp. 1525, 1527 (D. Kan. 1990) (holding that the Kansas Animal Dealers Act serves the legitimate public interests of "quality control and humane treatment of animals"); *Cory v. Graybill*, 149 P. 417, 420 (Kan. 1915) ("The Legislature has invested the live stock sanitary

[10] Appellants continue to falsely claim that citing Kansas's criminal animal cruelty law in support of this argument amounts to a claim that the substantial interest was "investigating and prosecuting crimes under a statute." Appellants Br. at 29-30. "The purpose of an Animal Facilities Inspector is to ensure compliance with the Kansas Pet Animal Act[,]" not the criminal code. (App. 55, 130).

commissioner with very extensive powers for the protection of the health of the domestic animals of the state, and an error of judgment on his part may be quite disastrous to public or private interests, or both."); *State v. Marsh*, 823 P.2d 823, 827-28 (Kan. App. 1991) ("We believe that there is a substantial government interest in regulating the operation of 'puppy mills' in the State of Kansas.").

Appellants argue the State has no such interest. They claim under a *Burger* analysis, the question is not whether the State has a substantial interest in *regulating* an industry but whether the State has a substantial interest in conducting *warrantless searches*. Appellant's Br. at 28-30. Appellants cite no authority to support their claim. In contrast, the Supreme Court has said New York could conduct warrantless inspections on the automobile junkyard industry where it had "a substantial interest in *regulating*" the industry. *Burger*, 482 U.S. at 708 (emphasis added). Under a *Burger* analysis, if there is a substantial interest in regulating an industry, there is a substantial interest in inspecting the industry to ensure the law is being followed.

While Johnson alleges that *he* takes good care of the dogs in his custody, the same cannot be said of others who board dogs in Kansas,[11] including other licensed boarding or training kennels.[12] Kansas has a substantial state interest in protecting animals from cruel and inhumane conditions.

2. Unannounced warrantless inspections are necessary to fulfill the substantial state interest.

Inspections are essential to ensure that operators of boarding and training kennels are unable to conceal violations of the Act on the eve of a routine inspection. Many of the potential violations of the Act can be quickly concealed. *See, e.g.*, Kan. Admin. Regs. §§ 9-18-14 (cleaning, sanitization, and pest control); 9-18-17 (feeding and watering); 9-18-30 (tethering of animals by boarding or training kennel operators). As this Court said in *Big Cats*, "surprise inspections help further" the government's interest in animal safety and welfare. 843 F.3d at 866. And

---

[11] Erin Socha, *Osawatomie pound may revert to killing animals if city declines aid*, Kansas Reflector (June 6, 2023), https://tinyurl.com/3nbwy8nb; KAKE News, *7 Kansas puppy mills included in humane society's 'horrible hundred' report* (May 10, 2021), https://tinyurl.com/y932tfh6.

[12] Angie Ricono, *Second dog dies from injuries from dog attack at Olathe's Lucky PawsKC*, KCTV (March 20, 2023), https://tinyurl.com/475bcev6.

as the Supreme Court explained in *Burger*, "surprise is crucial if the regulatory scheme aimed at remedying this major social problem is to function at all." 482 U.S. at 711; *see Lesser*, 34 F.3d at 1308 ("[T]he Department correctly observes that preserving the element of surprise and the possibility of frequent inspections is necessary in order to detect violators."). Just like in these industries, an element of surprise is necessary to discover the mistreatment of kenneled animals. This is particularly true because boarding and training kennels are closed to the public. *See Wolff*, 2009 WL 2948527, at *10 ("Rarely are commercial kennels open to the public.").

And while Johnson stresses he is accountable to the dogs' owners, the proper focus is on the State's interest, not the owners' interests, which may not coincide. *See Big Cats*, 843 F.3d at 866; *Lesser*, 34 F.3d at 1307 (disregarding similar argument that "market forces may drive sellers of unhealthy research animals out of business"). While one would hope that all dog owners would want their dogs kenneled and handled in an ethical manner, not all might be as concerned with the welfare of the dog as long as it learns how to hunt. *See* J.B. Walker, *Hunting a Home: The Abandonment and Neglect of Hunting Dogs*, Exigence, at 2, available at

https://tinyurl.com/mrww8388 (discussing interview with avid dog hunter who said "he has known several hunters (even a couple of relatives) in his lifetime who have less been than kind to their dogs" and even some "who starve their dogs to make them hunt better" and others "who have killed their dogs at the end of a hunting season to save money."). The State's interest is in the health and welfare of the dogs, irrespective of their hunting skill.

Appellants also stress that "the regime itself sets forth an administrative warrant procedure [in Kan. Stat. Ann.] § 47-1709(k)." Appellant's Br. at 31. But that statute allows the Commissioner to seek an administrative warrant only if an inspector "is denied access to any location where such access is sought for the purposes authorized under the [Act]." Kan. Stat. Ann. § 47-1709(k). In other words, an administrative warrant may be sought only after the licensee has learned his premises are going to be inspected, giving him time to conceal violations. The Commissioner's ability to secure an administrative warrant does not, by itself, enable the Commissioner to ensure animals are not being subject to cruel or inhumane conditions. As a result,

unannounced inspections are necessary to fulfill the State's substantial interest.

Finally, Appellants claim the district court misapplied the second *Burger* prong by mimicking a rational basis review. While the court initially stated that inspections "reasonably serve" the State's substantial interest, it clearly quoted *Burger*'s explanation that unannounced inspections "are essential" as well as *Big Cat*'s statement that unannounced inspections "further those interests." (App. 245-46); *cf. Grant v. Royal*, 886 F.3d 874, 905 (10th Cir. 2018) ("[W]e properly eschew the role of strict English teacher, finely dissecting every sentence of a state court's ruling to ensure all is in good order.").

3. Inspections are conducted in a sufficiently certain and regular manner.

The Act's inspection program supplies a constitutionally adequate substitute for a warrant. Licensees consistently know the intervals at which they will be inspected, routine inspections are made at reasonable times, and inspectors' powers are circumscribed.

To begin, the initial inspection can be arranged with the licensee, Kan. Stat. Ann. § 47-1709(a), and the handbook directs that the initial inspection "is always made by appointment." (App. 82).

Routine inspections occur according to a schedule defined in Kan. Admin. Regs. § 9-18-9(b). One is completed every 15 to 24 months if the premises passed its three most recent inspections; every 9 to 18 months if it passed its two most recent inspections; and every 3 to 12 months if it failed one of its two most recent inspections. *Id.* So assuming CFK passed its three most recent inspections, Johnson knows he will not be subject to another routine inspection for over a year. *See Donovan*, 452 U.S. at 603 (stressing that the Act defined the frequency of inspection); *Burger*, 482 U.S. at 711 ("The statute informs the operator of a vehicle dismantling business that inspections will be made on a regular basis."); *Vasquez-Castillo*, 258 F.3d at 1211 ("We find that the regulatory scheme governing commercial carriers provides adequate notice to owners and operators of commercial carriers that their property will be subject to periodic inspections and adequately limits the discretion of inspectors in place and scope.").

Routine inspections occur at reasonable times. They must occur on regular business days between 7:00 A.M. and 7:00 P.M. Kan. Admin. Regs. § 9-18-9(d). And the license renewal form asks for the licensee's

preferred times for inspection, which Johnson has listed as between 3:00 P.M. and 7:00 P.M. (App. 181).

And during the inspection, the inspector may only

(1) enter the premises;

(2) examine business records;

(3) copy the business records;

(4) inspect the premises and animals;

(5) document conditions and places of noncompliance; and

(6) use a table, room, or other facilities needed to examine records and inspect the premises.

Kan. Admin. Regs. § 9-18-8(a)-(f).

Put simply, Johnson "could not help but be aware that his property was subject to periodic inspections undertaken for specific purposes." *Vasquez-Castillo*, 258 F.3d at 1211 (*quoting United States v. Burch*, 153 F.3d 1140, 1142 (10th Cir. 1998)). This comprehensive scheme is a far cry from the municipal code in *Patel*, which did not "constrain police officers' discretion as to which hotels to search and under what circumstances." 576 U.S. at 427-28 ("While the Court has upheld inspection schemes of closely regulated industries that called for searches at least four times a

year . . . or on a 'regular basis,' . . .[, the provision] imposes no comparable standard.") (*citing Dewey,* 452 U.S. at 604 and *Burger*, 482 U.S. at 711). At its core, the Act's inspection framework is reasonable, meaning it does not violate the Fourth Amendment. *See Lesser*, 34 F.3d at 1308-09 (holding nearly identical federal regulations were "only as broad as is necessary to assure compliance" with AWA); *see also W. States Cattle Co. v. Edwards*, 895 F.2d 438, 442 (8th Cir. 1990) (observing scheme in Packing and Stockyards Act authorizing inspections of records and premises of business only during normal business hours was similar to the statute upheld in *Burger*).

Appellants incorrectly claim that "[t]he government's *own* handbook credibly proves that discretion is not at all limited." Appellant's Br. at 32. Their fears are overblown. The handbook language they rely on states that "[i]nspectors may use discretion regarding the elapsed time before they return to a facility *within the correlating rating inspection range schedule*." (App. 83) (emphasis added). Rather than authorizing inspectors "to search the same location ten times a day, every day, for months on end," Appellant's Br. at 32, the handbook simply states an

inspector may choose when to inspect the premises within the nine-month window provided by law.

Over thirty years ago, the Kansas Attorney General opined that searches under the Act are reasonable pursuant to the closely regulated business exception. Kan. Att'y Gen. Op. 1990-123. The same remains true today. This Court should hold that the Act satisfies the three *Burger* criteria.

C. *Patel* did not significantly alter the closely regulated business exception.

Appellants and amici rely heavily on *Patel*, painting it as a "sea change" in the Supreme Court's closely regulated exception jurisprudence. *Patel*'s reach is not as far as they believe. As previously noted, *Patel* concerned 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 Supreme Court held that Los Angeles's "hodgepodge" of hotel regulations did not render its hotel industry closely regulated. *Id.* at 424-28. As a result, the Court did not apply the *Burger* factors. Instead, it

categorically delineated between "the general administrative search doctrine" and "the more relaxed standard" that applies to closely regulated businesses, *id.* at 424, striking down the law under the general doctrine because it did not offer an opportunity for precompliance review before a neutral decisionmaker.[13] *Id.* at 419-23. Precompliance review is not required under the closely regulated business exception. *Killgore v. City of S. El Monte*, 3 F.4th 1186, 1192 n. 7 (9th Cir. 2021) (rejecting same argument); *Zadeh v. Robinson*, 928 F.3d 457, 464 (5th Cir. 2019) (same).

Appellants and amici also make much of the fact that the Supreme Court has recognized only four industries as closely regulated. *See Burger*, 482 U.S. 691 (automobile junkyards); *Donovan*, 452 U.S. 594 (1981) (mining); *Biswell*, 406 U.S. 311 (1972) (firearms dealing); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (liquor sales). Yet this "statistic . . . tells us more about how this Court exercises

[13] While discussing the general administrative search doctrine, the Court mentioned a State's "special need" that "make[s] the warrant and probable-cause requirement impracticable," *id.* at 420, and the State's ability to secure an administrative warrant. *Id.* at 423. Presumably, these are the sources of Appellants' claim that Smith must show a special need to inspect CFK's facilities absent an administrative warrant. This claim is meritless for the same reason precompliance review is not required.

its discretionary review than it does about the number of industries that qualify as closely regulated," *Patel*, 576 U.S. at 435-36 (Scalia, J., dissenting) (collecting cases), which explains why pre- and post-*Patel*, courts have recognized and continue to recognize additional closely regulated businesses. *E.g. Killgore*, 3 F.4th at 1191-92 (collecting several post-*Patel* cases across various circuits).

In a similar yet more refined argument, Appellants and amici argue *Patel* recast the closely regulated business exception by imposing a new public welfare test. The genesis of their argument is *Patel*'s comparison of the hotel industry to the industries it previously recognized as closely regulated:

> Over the past 45 years, the Court has identified only four industries that "have such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise[.]" Simply listing these industries refutes petitioner's argument that hotels should be counted among them. Unlike liquor sales, firearms dealing, mining, or running an automobile junkyard, nothing inherent in the operation of hotels poses a clear and significant risk to the public welfare.

576 U.S. at 424 (citations omitted) & n.5 (describing the businesses as "intrinsically dangerous").

As the Fifth Circuit recently explained, "[s]ince *Patel*, this argument has been raised several times" and "[a]mong courts of appeals, it seems only the Sixth, Seventh, and Eighth Circuits have considered the issue." *Mexican Gulf Fishing Co.*, 60 F.4th at 967. The Fifth Circuit joined the Sixth and Seventh Circuits in rejecting this claim, concluding "that *Patel* 'simply recognized that the industries the Court had deemed closely regulated in the past . . . were intrinsically dangerous." *Id.* at 968 (quoting *Liberty Coins, LLC*, 880 F.3d at 284); *see also Rivera-Corraliza v. Morales*, 794 F.3d 208, 219 (1st Cir. 2015) (holding adult entertainment machines were closely regulated and rejecting similar argument by observing that "businesses identified as closely regulated when defendants acted include those that are *not* inherently dangerous to persons (like, for example, auto junkyards)").[14] The Fifth Circuit further reasoned that because the "Appellants fail[ed] to identify any textual or historical reason why the Fourth Amendment distinguishes between

[14] According to the Fifth Circuit, the Eighth Circuit "did not address the question at length, but seemed to say dangerousness is now a requirement." *Id.* at 967 (*citing Calzone v. Olson*, 931 F.3d 722, 724 (8th Cir. 2019)). But a review of *Calzone* reveals the court did not, in fact, analyze this argument. Tellingly, Appellants do not cite *Calzone* to support their claim.

industries that pose a clear and significant risk to the public welfare, and those that do not," it held that *Patel* did not impose a new "inherently dangerous" test on the closely regulated business doctrine. *Id.*

The Fifth Circuit's reasoning is compelling. The majority opinion in *Patel* was simply comparing the industry at hand with the ones it had previously found to be closely regulated. There is no suggestion that "*Patel* detonated the long line of cases applying the 'closely regulated' industry doctrine to additional businesses." *Killgore*, 3 F.4th at 1191. Indeed, this Court in *Big Cats* did not read *Patel* to impose such a test even though the appellants referenced the case in their opening brief. *Big Cats*, 843 F.3d at 865-67; Appellants' Br., Case. No.: 15-1174, ECF No. 18. Other circuits applying *Patel* have not imposed a new "inherently dangerous" standard. *Killgore*, 3 F.4th at 1191-92; *Zadeh*, 928 F.3d at 464; *Free Speech Coalition v. Att'y Gen. United States*, 825 F.3d 149, 168 (3d Cir. 2016). And Appellants have offered no historical or textual reason why the Fourth Amendment applies differently to inherently

dangerous businesses and those that are not inherently dangerous. This Court should find no merit in this argument.[15]

D. The closely regulated business exception applies regardless of how Appellants frame their Fourth Amendment challenge.

Appellants next claim that the closely regulated business exception does not apply to "physical intrusion" claims, Appellants Br. at 33-37, but the argument is confused. In determining whether a Fourth Amendment search has occurred, the Supreme Court has historically looked to reasonable expectations of privacy. *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring); *accord, e.g.*, *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018). In *United States v. Jones*, 565 U.S. 400 (2012), and *Florida v. Jardines*, 569 U.S. 1 (2013), the Supreme Court recognized that physical intrusions on property can establish a search under the Fourth Amendment. These cases addressed the baseline

[15] At most, *Patel*'s statement could be read as a signal that courts can consider whether an industry is inherently dangerous as one factor, among others, in the initial analysis of whether a business is closely regulated. *See Owner-Operator Indep. Drivers Ass'n, Inc. v. United States Dep't of Transp.*, 840 F.3d 879, 894 (7th Cir. 2016). This makes the most sense because *Patel* addressed only this threshold question and because concerns about inherently dangerous activities are often what prompts legislative action in the first place.

question of whether there was a Fourth Amendment search in the first instance. *E.g.*, *United States v. Ackerman*, 831 F.3d 1292, 1307 (10th Cir. 2016) ("*Jones* held that the *Katz* formula is but one way to determine if a constitutionally qualifying 'search' has taken place."). *Jardines*, for example, applied "the traditional property-based understanding of the Fourth Amendment" to answer the initial question of whether the police's entry onto a defendant's porch constituted a search. 569 U.S. at 5, 11. Neither *Jones* nor *Jardines* extended its analysis beyond this initial question. *Jardines*, 569 U.S. at 11-12; *Jones*, 565 U.S. at 413. Since there is no question a search occurred in this case, *Jones* and *Jardines* are inapplicable.

Nonetheless, Appellants argue "*Katz*-based exceptions" do not "rigidly apply" to "*Jones-Jardines*" claims, which includes *Burger* and the closely-regulated-industry line of cases. Appellant's Brief at 23. But *Burger*—which itself involved physical entry onto private property—addresses the question of whether a search was reasonable, not whether there was a search. 482 U.S. at 693. These are two fundamentally different issues. A physical intrusion on property without a warrant may nonetheless be reasonable under the Fourth Amendment; *Jones* itself

clearly separated these two issues. 565 U.S. at 413. Appellants offer no authority for their argument that *Jones* and *Jardines* limited the closely regulated business exception.[16] Appellants' claims are striking in their potential reach, and altering the closely regulated business exception is the province of the Supreme Court alone. *See Rodriguez de Quijas v. Shearson/Am. Express*, 490 U.S. 477, 484-85 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls" and "leav[e] to this Court the prerogative of overruling its own decisions.").[17]

All in all, there is no distinct "*Jones-Jardine*" claim in this case. As a result, Smith's motion was both procedurally and substantively sufficient, and this Court should affirm.

---

[16] Besides, the closely regulated business exception is not wholly grounded in an expectation of privacy rationale; it is also based on the understanding that a person who has decided to operate a closely regulated business "has voluntarily decided to 'subject himself to a full arsenal of governmental regulation.'" *Big Cats*, 843 F.3d at 865 (*quoting Barlow's, Inc.*, 436 U.S. at 313).

[17] Appellants also rely on *Virginia v. Collins*, 138 S. Ct. 1663 (2018), which did not imply the Supreme Court has created a distinct property-based Fourth Amendment claim. *Collins* simply held that an officer "must have a lawful right of access to a vehicle in order to search it pursuant to the automobile exception." 138 S. Ct. at 1672.

II. The Act Does Not Impose Unconstitutional Conditions.

Johnson next alleges that the Act imposes unconstitutional conditions on licensees. Specifically, he claims Kan. Stat. Ann. § 47-1709(b)'s "mandatory annual renewal on a Fourth Amendment waiver . . . violates the unconstitutional conditions doctrine." Appellants Br. at 37. For the reasons stated in the first issue, this claim also fails.

Generally a State, "having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose." *Frost & Frost Trucking Co. v. R.R. Comm'n*, 271 U.S. 583, 593 (1926). But under the unconstitutional conditions doctrine, "the government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Reedy v. Werholtz*, 660 F.3d 1270, 1277 (10th Cir. 2011) (quotation omitted). The doctrine applies only if a constitutional right is implicated. "[I]f no constitutional rights have been jeopardized, no claim for unconstitutional conditions can be sustained." *Reedy*, 660 F.3d at 1277 (citation omitted); *see Benjamin Trust v. Stemple*, 915 F.3d 1066, 1068 (6th Cir. 2019) (unconstitutional conditions

challenge to city code requiring consent from property owner to search dangerous property was a "straightforward Fourth Amendment claim").

As discussed above, the closely regulated business exception applies, and Appellants' Fourth Amendment rights are not being jeopardized. Stated differently, "because the consent form asked them to waive rights they do not have, ... [it] becomes a run-of-the-mine exercise of the [State's] police power." *Benjamin Trust*, 915 F.3d at 1068. This claim also fails.

III. The Act Does Not Infringe on Johnson's and Hoyt's Right to Interstate Travel.

Lastly, Johnson and Hoyt claim the Act violates "their fundamental right to travel and freely move about." Appellants Br. at 39. Bound by circuit precedent, the district court dismissed the intrastate travel claims. (App. 248-49). The district court further held that Johnson and Hoyt had not alleged sufficient facts establishing a direct and substantial impairment of their right to interstate travel. (App. 249-51). Since there is no fundamental right to intrastate travel, and they cannot show how Kansas is directly and substantially impairing their ability to travel interstate, this Court should affirm.

First, Appellants cannot maintain an intrastate or "free movement" claim. This Circuit recently considered these arguments, out-of-circuit decisions, Supreme Court dicta, and unequivocally held that the constitutional right to travel does not encompass intrastate travel or "local movement." *McCraw v. City of Oklahoma City*, 973 F.3d 1057, 1081 (10th Cir. 2020), *cert. denied* 141 S. Ct. 1738 (2021) (refusing to depart from circuit precedent); *Abdi v. Wray*, 942 F.3d 1019, 1029 (10th Cir. 2019) ("[W]e cannot and do not create a new, more expansive right to 'movement.'"); *D.L. v. Unified Sch. Dist. No. 497*, 596 F.3d 768, 776 (10th Cir. 2010) (holding that there is only a fundamental right to interstate travel). This Court is "bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." *Strauss v. Angie's List, Inc.*, 951 F.3d 1263, 1269 (10th Cir. 2020) (internal quotations omitted). Despite Johnson and Hoyt's attempts to remake the holdings in *McCraw* and *D.L.*, they and *Abdi* squarely foreclose their "free movement" and intrastate travel claims.

Because intrastate travel and "free movement" are not fundamental rights, the Act "need only be rationally related to a legitimate government purpose." *McCraw*, 973 F.3d at 1081. As discussed

in the first issue, unannounced inspections of boarding and training kennels serve the substantial government interest of protecting domestic animals from cruel and inhumane conditions.[18]

Second, Johnson and Hoyt's interstate travel claim also fails. The "[f]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution." *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972) (citation omitted). The constitutional right to travel has at least three components: (1) the right to free interstate movement of citizens; (2) the "right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present" in another State; and (3) the right to become a permanent resident of another State and be treated like other citizens of that State. *Saenz v. Roe*, 526 U.S. 489, 500 (1999). This case concerns only the first component—the free movement between states, and more specifically, the ability of citizens to depart from their state of residence.

"The Supreme Court has made clear that the right[] to interstate . . . travel [is] not unlimited[,]" and "reasonable restrictions on the right to interstate travel are permissible." *Abdi*, 942 F.3d at 1029. A law that

[18] *See Supra* Sections I(B)(1) & (2) at 28-33.

"does not directly and substantially 'impair the exercise of the right to free interstate movement' does not amount to a constitutional violation." *Id.* (quoting *Saenz*, 526 U.S. at 501). A law implicates the right to travel if it "actually deters such travel, when impeding travel is its primary objective, or when it uses 'any classification which serves to penalize the exercise of that right.'" *Att'y Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (citations omitted).

Johnson and Hoyt claim three aspects of the Act's inspection scheme violate their right to interstate travel: (1) the designated-representative regulation; (2) the thirty-minute inspection window; and (3) the $200 no-contact fee. Rather than explain how these provisions directly and substantially impair their ability to travel across state lines, they focus on the district court's correct finding that the ability to designate any number of representatives actually "facilitates unfettered travel for licensees." (App. 251); Kan. Admin. Regs. § 9-18-9(e).

Of course, Johnson says that other than Hoyt, he "does not want to" allow others to be present during an inspection. Appellants Br. at 44. But his groundless explanation is unconvincing when he twice stated in his complaint that he has individuals other than himself and Hoyt access

CFK's facilities to care for the dogs when he and Hoyt are absent.[19] (App. 18, 32). Johnson's unwillingness to designate additional representatives notwithstanding his willingness to allow others to access his property in his absence reflects a voluntary injury conjured for the purposes of asserting a right-to-travel claim. It has been long held that "[n]o [party] can be heard to complain about damage inflicted by its own hand," *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976), and "self-inflicted injuries" do not confer standing. *Clapper v. Amnesty Int'l, USA*, 568 U.S. 398, 418 (2013); *Colorado v. E.P.A.*, 989 F.3d 874, 888 (10th Cir. 2021). This Court should find Johnson's defense unavailing.

Equally unavailing is Johnson's reliance on *Aptheker v. Sec'y of State*, 378 U.S. 500 (1964), which held that the right to travel guaranteed by the Fifth Amendment's due process clause was violated when the federal government refused to issue passports to citizens simply because they were members of the Communist Party. *Id.* at 507. The Supreme Court found this to be a "severe restriction upon, and in effect a

[19] It matters not whether these people are "independent contractors" or "employees." *See supra* note 6, at 10-11. Johnson could still designate them as representatives for the limited purpose of making the facilities and records available for inspection in his absence.

prohibition against, world-wide foreign travel." *Id.* The Court then rebuffed the government's position that a member of the Communist Party could regain his freedom to travel by simply abandoning his membership when the right to freedom of association is guaranteed by the First Amendment. *Id.* In the end, the Court said that "freedom of travel is a constitutional liberty closely related to rights of free speech and association." *Id.* at 517.

Aptheker is inapposite. Johnson and Hoyt have not alleged that their First Amendment right to expressive association is at stake, which was essential to *Aptheker*'s holding. *Maehr v. United States Dep't of State*, 5 F.4th 1100, 1121 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 1123 (2022) (explaining that subsequent Supreme Court cases have "suggested that 'First Amendment rights . . . controlled in . . . *Aptheker*,'" and noting that "Mr. Maehr has not argued that his First Amendment rights are implicated in this case") (*quoting Regan v. Wald*, 468 U.S. 222, 241 (1984)). And even if Johnson and Hoyt had alleged a First Amendment claim, the Act is not so severe as to prohibit "world-wide foreign travel." The Act *permits* travel by allowing Johnson to designate any number of representatives. He may even designate a new representative "in real

time" after an inspector has arrived at CFK. (App. 102). Johnson can also pay the $200 no-contact fee, which does not actually prohibit him from travelling, but fairly reflects the cost to the State for a wasted trip.

Johnson and Hoyt also claim the district court erred in granting the motion to dismiss because it did not address their alleged Privileges and Immunities claim. Appellants Br. at 49-51. The argument is factually incorrect. A review of Smith's motion to dismiss reveals it did not narrow its focus to only those claims based on a particular source of the right to travel. (App. 177-79). This makes sense because the Supreme Court has explained that although "[t]he textual source of the constitutional right to travel . . . has proved elusive," it has "not felt impelled to locate this right definitively in any particular constitutional provision." *Soto-Lopez*, 476 U.S. at 902. Smith's motion encompassed any claim based on the Privileges and Immunities Clause of the Fourteenth Amendment, and the district court correctly recognized Appellants could not "circumvent" the motion through this maneuver. (App. 250 n. 5).

Regardless of the source of Johnson and Hoyt's claim, they still cannot explain how the Act actually deters their ability to travel interstate, has the primary objective of deterring travel, or uses a

classification to penalize the right to travel. Since it does not substantially interfere with their right to interstate travel, this court "need not and [should] not analyze whether the government's conduct passes the applicable level of scrutiny." *Abdi*, 942 F.3d at 1028. Nonetheless, if this Court wishes to apply a level of scrutiny, it should employ a rational basis review. *See Soto-Lopez*, 476 U.S. at 921 (O'Connor, J., dissenting) ("[I]t is fair to infer that something more than a negligible or minimal impact on the right to travel is required before strict scrutiny is applied."). As previously explained, unannounced inspections of boarding and training kennels serve the substantial government interest of protecting domestic animals from cruel and inhumane conditions.

This Court should affirm the dismissal of Johnson and Hoyt's travel claims.

* * * * *

CONCLUSION

This Court should affirm the judgment of the district court granting the motion to dismiss, holding (1) the Act's inspection scheme is reasonable under the closely regulated business exception; (2) the Act does not impose unconstitutional conditions; and (3) the Act does not violate a licensee's right to interstate travel.

STATEMENT ON ORAL ARGUMENT

Since this case concerns novel constitutional claims, Smith agrees oral argument would assist the panel, but he believes fifteen minutes of argument for each party would suffice.

Respectfully submitted,

/s/ *Kurtis K. Wiard*
Anthony J. Powell
Solicitor General
Kurtis K. Wiard
Assistant Solicitor General
Office of Kansas Attorney General
Kris W. Kobach
120 SW 10th Ave., 2nd Floor
Topeka, KS 66612-1597
[redacted]

Attorneys for Defendant-Appellee