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.

Reply 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

Kansas Justice Institute
Samuel G. MacRoberts, 22781
Jeffrey S. Shaw, 29767
12980 Metcalf Avenue, Suite 130
Overland Park, Kansas 66213
(913) 213-5018
Sam@KansasJusticeInstitute.org
Jeff@KansasJusticeInstitute.org

Counsel of Record for Plaintiffs-Appellants

Table of Contents

Table of Contents i

Table of Authorities ii

Summary of the Reply Argument 1

Reply Argument 3

I. The government's "pervasively regulated industry" theory is unmoored from any limiting principles. 3

A. Training and handling dogs from a rural homestead is not a "pervasively regulated industry." 3

B. The "pervasively regulated industry" exception does not apply 9

1. The government does not have a "substantial interest" that justifies its warrantless searches. 10

2. The government's surprise warrantless searches are not "necessary." 11

3. The warrantless search regime does not provide a "constitutionally adequate substitute for a warrant." 15

II. The pervasively regulated industry exception does not apply to the Plaintiffs' *Jones-Jardines* physical intrusion claims. 17

III. The regime violates the unconstitutional conditions doctrine. 21

IV. The regime violates the right to travel and freely move about. 21

Conclusion 26

Certificate of Service 27

Certificate of Compliance 28

Certificate of Electronic Submission 29

Table of Authorities

Cases

Abdi v. Wray, 942 F.3d 1019 (10th Cir. 2019) 21, 22

Aptheker v. Sec'y of State, 378 U.S. 500 (1964) 23

Big Cats of Serenity Springs, Inc. v. Rhodes, 843 F.3d 853 (10th Cir. 2016) .. 1, 7, 8, 10, 11

Byrd v. United States, 138 S. Ct. 1518 (2018) 19

Camara v. Municipal Court, 387 U.S. 523 (1967) 5, 14

Carpenter v. United States, 138 S. Ct. 2206 (2018) 20

Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) 23

City of Los Angeles, Calif. v. Patel, 576 U.S. 409 (2015) 1, 2, 3, 4, 5, 6, 8, 10, 13, 14

City of Overland Park v. Niewald, 258 Kan. 679 (1995) 13

Collins v. Virginia, 138 S.Ct. 1663 (2018) 18, 19, 20

Coolidge v. New Hampshire, 403 U.S. 443 (1971) 20

Crandall v. Nevada, 73 U.S. 35 (1867) 23

D.L. v. Unified Sch. Dist. 497, 270 F. Supp. 2d 1217 (D. Kan. 2002) (vacated, 392 F.3d 1223 (10th Cir. 2004) 22

D.L. v. Unified Sch. Dist. No. 497, 596 F.3d 768 (10th Cir. 2010) 21

Fla. v. Jardines, 569 U.S. 1 (2013) 2, 9, 17, 18, 20

Katz v. United States, 389 U.S. 347 (1967) 18

Lange v. California, 141 S. Ct. 2011 (2021) 4

Liberty Coins, LLC v. Goodman, 880 F.3d 274 (6th Cir. 2018) 6, 12

Maehr v. United States Dep't of State, 5 F.4th 1100 (10th Cir. 2021) 10, 23, 24

Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) 3, 5, 13, 14

Matter of United States, 637 F. Supp. 3d 343 (E.D.N.C. 2022)............................... 19

McCraw v. City of Oklahoma City, 973 F.3d 1057 (10th Cir. 2020) 21, 22

Mexican Gulf Fishing Co. v. United States Dep't of Com., 60 F.4th 956 (5th Cir. 2023) 3, 4, 6, 9

Mimics, Inc. v. Vill. of Angel Fire, 394 F.3d 836 (10th Cir. 2005)............................13

New York v. Burger, 482 U.S. 691 (1987) 1

Prof'l Dog Breeders Advisory Council v. Wolff, No. 1:CV-09-0258, 2009 WL 2948527 (M.D. Pa. Sept. 11, 2009)... 6

Roska ex rel. Roska v. Peterson, 328 F.3d 1230 (10th Cir. 2003) 3

Saenz v. Roe, 526 U.S. 489 (1999) 24

See v. City of Seattle, 387 U.S. 541 (1967) 5

The Est. of Lockett by & through Lockett v. Fallin, 841 F.3d 1098 (10th Cir. 2016) 14

The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) 24

United States v. Gregory, 497 F. Supp. 3d 243 (E.D. Ky. 2020)............................... 19

United States v. Jones, 565 U.S. 400 (2012)......................................2, 17, 18, 19, 20

United States v. Shrum, 908 F.3d 1219 (10th Cir. 2018) 22

Von Saher v. Norton Simon Museum of Art at Pasadena, 754 F.3d 712 (9th Cir. 2014) 15

Washington v. Glucksberg, 521 U.S. 702 (1997) 24

Statutes and Regulations

3 P.S. § 459-102.. 6

7 U.S.C. § 2131.. 7

9 C.F.R. § 1.1 7

K.A.R. § 9-18-21 12

K.A.R. § 9-18-8 17

K.A.R. § 9-18-9(b)(2) 16

K.A.R. § 9-18-9(b)(3) 16

K.A.R. § 9-18-9(e) 22

K.S.A. § 22-2502 13

K.S.A. § 47-1701(dd)(1) 11, 12

K.S.A. § 47-1701(dd)(1)(A) 11, 12

K.S.A. § 47-1709(b) 11, 12

K.S.A. § 47-1709(k) 13

K.S.A. § 47-1721(d)(1) 22

Rules

Fed. R. Civ. P. 12(b)(6) 2, 8, 15, 20, 24

Constitutional Provisions

U.S. Const. amend. I 23

U.S. Const. amend. IV 2, 3, 5, 9, 17, 18, 21

U.S. Const. amend. XIV, § 1, cl. 2 .... 2, 21, 24, 25

U.S. Const. amend. XIV, §1, cl. 3 .... 2, 21, 24, 25

Summary of the Reply Argument

First, the government's surprise warrantless search regime violates the Fourth Amendment.

Dog training and handling from a rural homestead is not a pervasively regulated industry. Among many other reasons, it is not "intrinsically dangerous," and there is "nothing inherent in [its] operation" that poses a "clear and significant risk to the public welfare." *City of Los Angeles, Calif. v. Patel*, 576 U.S. 409, 424 n.5, 424 (2015).

The government now admits—contrary to its position below—that courts can consider *Patel*'s dangerousness and public welfare factors after all. *See* Br. of Govt. at 42 n.15. That admission alone justifies reversing the district court. Neither the government nor the district court considered *Patel*'s dangerousness and public welfare factors at all; and besides, based upon the facts, dog training and handling meets exactly none of the factors that make an industry pervasively regulated.

But even *if* dog training and handling from a rural homestead is a pervasively regulated industry, the district court committed reversible error: it misstated and misapplied *all three New York v. Burger* factors. 482 U.S. 691 (1987).

Properly stated, the government must prove a "substantial interest that justifies [its] warrantless inspections;" that warrantless searches are "necessary to further the regulatory scheme;" and that the regime provides "a constitutionally adequate substitute for a warrant." *Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853, 865 (10th Cir. 2016) (italics removed) (relying on *Burger*, 482 U.S. at 702-03 (1987)).

Even if properly stated though, whether the exception applies is a fact-dependent, business-specific inquiry, *Patel*, 576 U.S. at 426-28, that could almost never be resolved at the Fed. R. Civ. P. 12(b)(6) stage; and based upon the facts as alleged—taken as true and considered in the Plaintiffs' favor—simply could not have been resolved in the government's favor.

Second, the government *still* has not proven that the pervasively regulated industry exception—a privacy-based one—applies to the Plaintiffs' property-based claims raised under *United States v. Jones*, 565 U.S. 400 (2012) and *Fla. v. Jardines*, 569 U.S. 1 (2013), either. Instead, the government tries shifting the burden to the Plaintiffs to prove the exception *does not* apply. That is improper. Besides, the Plaintiffs *have* shown why the government's privacy-based exception does not apply to their property-based claims. The government has not met its procedural burden and it has not satisfied its heavy constitutional burden either.

Third, because the regime violates the Fourth Amendment, conditioning the mandatory annual license renewal on a Fourth Amendment waiver violates the unconstitutional conditions doctrine.

Fourth, the regime's thirty-minute restriction, designated representative mandate, and no-contact penalties violates the right to travel and freely move about under the Fourteenth Amendment's Due Process and Privileges or Immunities Clauses.

Reply Argument

I. The government's "pervasively regulated industry" theory is unmoored from any limiting principles.

A. Training and handling dogs from a rural homestead is not a "pervasively regulated industry."

The government insists—without *any* factual or relevant historical support in its favor—that the pervasively regulated industry doctrine applies to dog training and handling from a rural homestead. That position, as one *amici* put it, "borders on the absurd." Br. of *Amicus* NCLA at 4. The government's theory is completely unmoored from any limiting Fourth Amendment principles and should be rejected.

Properly considered, the pervasively regulated industry doctrine is industry-specific, fact-dependent, extremely narrow, and tightly circumscribed. *See Patel*, 576 U.S. at 424, 424 n.5; *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978). The industry and its scope must be "precisely identif[ied]." *Mexican Gulf Fishing Co. v. United States Dep't of Com.*, 60 F.4th 956, 969 (5th Cir. 2023).

The doctrine is limited to commercial industries that are intrinsically dangerous, *Patel*, 576 U.S. at 424 n.5, the operation of which inherently poses a clear and significant risk to the public welfare, *id*. at 424, and that raise an urgent or serious risk of illegal activity, *see id*.

There must be a "special need" to search without a warrant, grounded in facts, not conjecture. *Patel*, 576 U.S. at 420; *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1241-42 (10th Cir. 2003).

Courts considering the doctrine must be "tremendously cautious," otherwise it will "permit what has always been a narrow exception to swallow the rule." *Mexican Gulf Fishing*, 60 F.4th at 970 (cleaned up).

Applying the doctrine must be "consistent with the original public meaning of the Fourth Amendment," and in "accordance with constitutional text, history, and tradition—as interpreted and explained by our highest Court." *Id.* at 970; *see Lange v. California*, 141 S. Ct. 2011, 2022 (2021) (Fourth Amendment exceptions turn on Founding-era history).

The relevant historical inquiry is whether the particular industry was subjected to "warrantless searches" near the time of the Founding, not whether there is a duration of regulation. *See Patel*, 576 U.S. at 425-26; *Mexican Gulf Fishing*, 60 F.4th at 969-70.

All of these court-mandated guardrails are vital. Without them, any business the government regulates would be considered a pervasively regulated one. *Patel*, 576 U.S. at 425.

Against that backdrop, it is hard to imagine a business that is *less* susceptible to being considered a pervasively regulated industry than training and handling hunting dogs from a rural homestead.

The facts are undisputed: dog training and handling is not inherently dangerous, it does not pose any risk to the public, it does not raise an urgent or serious risk of illegal activity, (App. 16-18, ¶¶ 36-49; App. 37-38, ¶¶151-153); the current iteration of the warrantless search regime only began in 2018, (App. 169);

and more importantly, dog trainers were *not* subjected to warrantless searches at or near the time of the Founding. Br. of *Amicus* PLF at 28-29.

For its part, the government either entirely ignores or brushes aside *each* of the limiting principles from *Patel*, *Marshall*, and *Mexican Gulf Fishing*, the facts as they have been alleged, and still has not argued the existence of a "special need" or offered any compelling reason why it could not use an administrative warrant, or provide a precompliance review process, for records or otherwise. (App. 23-24, 31, 39-40, 157); *Patel*, 576 U.S. at 420-23. *Camara v. Municipal Court*, 387 U.S. 523 (1967), *See v. City of Seattle*, 387 U.S. 541 (1967).

Dog training must be pervasively regulated, the government insists, because Kansas has chosen to regulate kennels, *see* Br. of Govt. at 13; the act is "comprehensive," Br. of Govt. at 18; and because the Kansas Attorney General's Office had issued a non-binding, non-precedential opinion in 1990 declaring a different industry pervasively regulated, Br. of Govt. at 37.

The government's argument is barely more than, "because I said so," and it is a position foreclosed by *Marshall*, *Patel,* and the Fourth Amendment's underlying principles. *Marshall,* 436 U.S. at 313; *Patel*, 576 U.S. at 424-25. The government's quip that it is difficult to "successfully argue that the kennel industry is not pervasively regulated while at the same time maintaining that the kennel industry is too pervasively regulated," Br. of Govt. at 23 (cleaned up), helps illustrate its misunderstanding of the pervasively regulated industry doctrine. Under its circular logic, filing this lawsuit would prove the regime is pervasively regulated. Besides, it is a misapplication of *Prof'l Dog Breeders Advisory Council v. Wolff*, No. 1:CV-09-

0258, 2009 WL 2948527 (M.D. Pa. Sept. 11, 2009). That case involved dog breeding, not training and handling; and the statute at issue expressly excluded "dog training." 3 P.S. § 459-102. The pervasively regulated inquiry is an industry-specific one; and conflating industries is improper. *Mexican Gulf Fishing*, 60 F.4th at 968.

The government also maintains that because the regulations "are not of recent vintage," Br. of Govt. at 19, and because dog boarders have either been regulated since 1991 or 1996, *id*. at 20, dog training and handling from a rural homestead is a pervasively regulated industry. What matters, the government insists, is the duration of regulation. *Id*. at 17, 20 (relying on *Liberty Coins, LLC v. Goodman*, 880 F.3d 274, 282 (6th Cir. 2018)). That was Justice Scalia's argument in *Patel*, and it was soundly rejected. 576 U.S. at 432-34 (Scalia, J., dissenting). Hotels have been subjected to regulations since at least 1786—some 220 years longer than here—and they are not a pervasively regulated industry. *Id*. at 425-26. Instead, when it comes to history, what matters is whether the industry was subjected to warrantless searches at the time of the Founding, not the duration of regulation. *Patel*, 576 U.S. at 425-26; *Mexican Gulf Fishing*, 60 F.4th at 969-70.

Besides being wrong under *Patel* and *Mexican Gulf Fishing*, the government's "duration of regulation" theory does not make good sense—it would turn an unconstitutional warrantless search regime into a constitutional one by doing nothing more than crossing over an undefined and imaginary temporal threshold.

But even *if* duration mattered, the Kansas Legislature did not impose *this* more-stringent version of the regime until 2018 and the accompanying regulations

did not issue until 2019. This version—with its thirty-minute restriction, no-contact penalties, and surprise searches—is far more intrusive than previous ones.

Before 2018, inspectors were able to provide advance notice of their searches. 2018 Kan. Sess. Laws 326; (App. 169.) Indeed, inspectors were flexible (App. 29, ¶ 103), and they would sometimes call ahead if they were in the area (App. 10, ¶ 5.) But if they did not call, and Mr. Johnson was either busy or unavailable, they would come back another time. (App. 10, ¶ 5; 29, ¶ 103.) Mr. Johnson believed he had the right to have the official come back later. (App. 29, ¶ 103.)

History does not favor the government, even under its incorrect "duration of regulation" theory.

Given the doctrine is industry-specific, and fact-dependent, the government's attempts to compare *this* business and *this* regime to industries that have been deemed pervasively regulated elsewhere is particularly strained.

Every case the government cites analyzed entirely different industries than dog training and handling from a rural homestead, and most of the cases are either outdated or out-of-circuit. The one in-circuit, post-*Patel* case the government does cite, *Big Cats*, does not help it. The plaintiffs did not even challenge whether it was pervasively regulated. 843 F.3d 853, 866.

Moreover, the government's argument that the federal Animal Welfare Act, 7 U.S.C. § 2131, *et seq*, and its associated regulations, 9 C.F.R. § 1.1, *et seq*., make this business a pervasively regulated one is equally unavailing. The federal act does not regulate training and handling hunting dogs and it does not apply to the Plaintiffs. There is no legitimate comparison between those who publicly exhibit wild, exotic,

and dangerous animals—like tigers—and teaching a Brittany to sit or point on command from one's own homestead either. If referencing inapplicable federal laws is all it took to turn a state-regulated business into a pervasively regulated one, the "narrow exception" would indeed "swallow the rule." *Patel*, 576 U.S. at 424-25.

Patel's dangerousness and public welfare factors do not favor the government either. There is absolutely nothing in the record—*at all*—suggesting dog training and handling is dangerous, that it poses any risks to the public at all, or that it raises urgent or serious risks of illegal activity. *Patel*, 576 U.S. at 424 n.5, 424.

Whether a business meets any of those criteria is a fact-dependent, business-specific inquiry, *id*. at 425-26, that could almost never be resolved at the 12(b)(6) stage; and based upon the facts as they have been alleged here, simply could not have been resolved in the government's favor. (App. 16-18, ¶¶ 36-49; App. 37-38, ¶¶151-153.)

Because the government cannot reconcile the facts with its theory, it tries minimizing what *Patel* actually *says*. Br. of Govt. at 37. It even suggests *Big Cats* rejected *Patel*'s rationale because *Patel* was "referenced" in the government's "opening brief." *Id*. at 41. That mischaracterizes the briefing. The government cited *Patel* exactly once as indirectly supporting what *Burger* said about *other cases*. *Big Cats*, Br. of Appellants, 2015 WL 4638623, *34. And again, unlike here, the parties agreed the industry was a pervasively regulated one. 843 F.3d at 866.

But even under its dismissive and incorrect reading of *Patel*—the most recent Supreme Court case involving the doctrine—the government now concedes, *for the first time*, that courts "can consider whether an industry is inherently dangerous as

one factor, among others, in its initial analysis of whether a business is closely regulated." Br. of Govt. at 42 n.15. This concession is significant, fatal, and the judgment should be reversed because of it. Both the government and the district court ignored *Patel*'s dangerousness and public welfare factors below; and as shown above, based upon the facts as alleged, dog training and handling meets exactly none of the factors either.

The Johnson-Hoyt homestead is not a pet shop—it is their home where "privacy expectations are most heightened." *Jardines*, 569 U.S. at 7; (App. 14-16, ¶¶ 28-35; 30, ¶ 106-108).

The government's insistence that training a hunting dog from a rural homestead is a pervasively regulated industry, comparable to the firearms, liquor, automobile dismantling, and underground mining industries—all of which are intrinsically dangerous, pose clear and significant risks to the public, and raise urgent or serous risks of illegal activity, and none of which were undertaken from the home—is over-the-top and wrong. It takes an already shaky Fourth Amendment doctrine and unmoors it from any of its limiting principles, without any factual support.

If the government's unprincipled view is adopted, "few businesses will escape such a finding" of pervasive regulation. *Mexican Gulf Fishing Co.*, 60 F.4th at 968 (cleaned up).

B. The "pervasively regulated industry" exception does not apply.

Even *if* dog training and handling is a pervasively regulated industry, the exception still does not apply. The regime fails the exception's three-part test.

Properly stated, the government must prove a "substantial interest that justifies [its] warrantless inspections," *Big Cats*, 843 F.3d at 865 (italics removed); that warrantless searches are "necessary to further the regulatory scheme," *id*; and that the regime provides "a constitutionally adequate substitute for a warrant," *id*. All three parts are tethered to *Patel*'s dangerousness and public welfare factors. *Maehr v. United States Dep't of State*, 5 F.4th 1100, 1120 (10th Cir. 2021) (older cases interpreted in light of more recent ones).

Whether the exception applies is a fact-dependent, business-specific inquiry, *Patel*, 576 U.S. at 425-28; *Burger*, 482 at 710; and based upon the facts as alleged—taken as true and considered in the Plaintiffs' favor—simply could not have been resolved in the government's favor. There is nothing special or unique about dog training and handling that justifies the government's warrantless searches; and the regime's sporadic, irregular, and random warrantless searches are an inadequate substitute for a warrant.

1. The government does not have a "substantial interest" that justifies its warrantless searches.

The government must prove a "substantial interest that justifies [its] warrantless inspections." *Big Cats*, 843 F.3d at 865 (italics removed). The district misstated and misapplied the standard. (App. 245, 243-252.) That was reversible error.

But even *if* properly stated, the government still cannot satisfy the "substantial interest" prong. Further, the facts contradict the government's generalized interest in "regulating the industry to ensure" compliance with the

regime. Br. of Govt. at 29. 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 already operates under a veterinary plan of care, (*id.*), K.S.A. § 47-1701(dd)(1), K.A.R. § 9-18-21; and unlike other businesses, Mr. Johnson is accountable to the dogs' owners, (App. 16-18, ¶¶ 36-49; App. 38, ¶ 153).

That the Kansas Legislature does not even mandate inspections undercuts the government's entire substantial interest position. K.S.A. § 47-1709(b) (Once licensed, the Defendant "*may* inspect") (emphasis added).

2. The government's surprise warrantless searches are not "necessary."

The government must prove that its warrantless searches are "*necessary*." *Big Cats*, 843 F.3d at 865; *Patel*, 576 U.S. at 426. But the district court impermissibly lowered the government's constitutional burden. (App. 244, 245) (warrantless searches only "further" or "reasonably serve" government's interest).

The government's suggestion that the district court's error was a grammatical one that only a "strict English teacher" would "dissect[]" is not well taken. Br. of Govt. at 33. It was the *exact* version of the test the government asked the district court to apply. (App. 174.)

The district court's misstatement and misapplication of the "necessary" test "missed the mark badly," Br. of *Amicus* Buckeye at 22, and was reversible error.

But even *if* properly stated, the "necessary" prong still has not been satisfied. *Big Cats*, 843 F.3d at 865. There is nothing specific or unique about training and

handling that *necessitates* warrantless searches of the homestead: training and handling is not dangerous, (App. 16-18, ¶¶ 36-49; App. 38, ¶ 152), it does not pose a risk to the public, (*id*.), and it does not raise an urgent or even serious risk of illegal activity, (*id*.). Further, CFK is already inspected annually by a veterinarian, K.S.A. § 47-1701(dd)(1)(A), (App. 38, ¶ 153); it already operates under a veterinary plan of care, (id.), K.S.A. § 47-1701(dd)(1), K.A.R. § 9-18-21; and unlike other businesses, Mr. Johnson is accountable to the dogs' owners, (App. 16-18, ¶¶ 36-49; App. 38, ¶ 153). The Kansas Legislature does not mandate inspections either, undercutting the government's entire necessity argument. K.S.A. § 47-1709(b) (Once licensed, the Defendant "*may* inspect") (emphasis added).

The government's hypothetical justification that "many of the potential violations of the Act can be quickly concealed," Br. of Govt. at 30, and "an element of surprise is necessary to discover the mistreatment of kenneled animals," Br. of Govt. at 31, is directly contradicted by the *facts*. Mistreatment of dogs *cannot* be quickly hidden or remedied, and neither can other violations. (App. 38, ¶ 153.) Far from being "necessary," the government actually considers the element of surprise wasteful. (App. 23, ¶ 75) ("Routine inspections are no longer announced. Due to recent enactment of legislation, the program is no longer allowed to call ahead to those facilities with good history to save on program expenses"); Br. of Govt. at 52 (characterizing a no-contact event as a "wasted trip").

A generalized compliance concern is not enough to prove the searches *must be warrantless* either. *Liberty Coins*, 880 F.3d at 290. Put differently, there is still no

reason—supported by the record—why the government cannot conduct its searches with either an administrative or traditional warrant.

The Kansas judiciary has the general authority to issue administrative and criminal warrants irrespective of the regime, K.S.A. § 22-2502, *City of Overland Park v. Niewald*, 258 Kan. 679 (1995); the regime itself sets forth an administrative warrant procedure, K.S.A. § 47-1709(k); procuring an administrative or criminal warrant will not impair the government's ability to promptly inspect (App. 38, ¶ 153); and there is little risk that any alleged violations could be corrected during the search warrant process (App. 38, ¶ 153).

That the government has the ability to search *with* a warrant undercuts its argument that searching *without* a warrant is necessary. *Mimics, Inc. v. Vill. of Angel Fire*, 394 F.3d 836, 844–45 (10th Cir. 2005).

The government cannot satisfy its procedural burden or discharge its heavy constitutional burden with unsupported hypothetical conjecture, ignoring the Plaintiffs' "expansive complaint," Br. of Govt. at 11, in the process. The governments tried that in *Patel* and *Marshall*, and both times, it was firmly rejected. *Patel*, 576 U.S. at 422 (government "cited no evidence" supporting its arguments).

In *Marshall*, the Supreme Court reviewed a statutory regime that authorized OSHA "inspection[s] of business premises without a warrant." 436 U.S. at 311. OSHA argued, just like here, warrantless searches were "essential" because they preserved the "advantages of surprise." *Id.* at 316.

The Supreme Court expressly rejected the government's argument *even though* some violations of the Act "could be corrected and thus escape the

inspector's notice." *Id.* Requiring administrative warrants, the court said, would not impose serious burdens on the system, *id.*, or the courts, *id.*, would not prevent inspections, *id.*, and would not make inspections any less effective, *id.* In the end, the Court held that "for purposes of an administrative search such as this, probable cause justifying the issuance of a warrant" must exist before there's a search. *Marshall* at 321 (relying on *Camara*, *supra*).

Just as in *Marshall,* the government's argument should be rejected: "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." *Marshall*, 436 U.S. at 316. Besides, even if a few trainers and handlers did not consent, the solution is easy—just use a warrant. (App. 38, ¶ 153); *Patel*, 576 U.S. at 423.

Because there is absolutely nothing in the record that would allow the government to satisfy its heavy constitutional burden, the government and its *amicus* desperately cite irrelevant news articles. The government did it below, (App. 174 n.5), and tries doing it again here, Br. of Govt. at 26 n.9, 30-32. The Plaintiffs' objected below, (App. 189), in their opening brief, Br. of Appellants at 31 n.2, and do so again now. The articles are improper and should be disregarded. *The Est. of Lockett by & through Lockett v. Fallin*, 841 F.3d 1098, 1111 (10th Cir. 2016). *Amicus* KPA goes even further by insisting *its* improper articles establish that dog training and handling is "intrinsically dangerous." Br. of *Amicus* KPA at 8-9, 12 n.5. That is improper because it "characterizes the facts in a way that conflicts with the complaint, the

record before us and the parties' positions." *Von Saher v. Norton Simon Museum of Art at Pasadena*, 754 F.3d 712, 724 (9th Cir. 2014).

That the government and its *amicus* take the position that dismissal was appropriate under 12(b)(6) *and still* try to improperly introduce additional facts should be viewed for what it is: an admission that 12(b)(6) could not have been granted based upon the record facts.

In the end, the government has not discharged its heavy constitutional burden of proving that its searches must be warrantless.

3. The warrantless search regime does not provide a "constitutionally adequate substitute for a warrant."

The government must prove that the regime provides a "constitutionally adequate substitute for a warrant." *Big Cats*, 843 F.3d at 865; *Patel*, 576 U.S. at 426. The district court misstated and misapplied this prong too, again "miss[ing] the mark badly," Br. of *Amicus* Buckeye at 22; and just as before, the judgment should be reversed because of it.

Even *if* correctly stated though, the facts prove the regime does not provide a constitutionally adequate substitute for a warrant. The government's surprise, warrantless searches are sporadic, irregular, and random (App. 27-28, ¶¶ 91-94); there is *nothing* preventing the inspectors from searching the same location ten times a day, every day, for at least nine months at a time, (App. 27-28, ¶¶ 91-94; App. 83); the inspector is permitted to conduct a "full walk through" warrantless search "*anytime* to confirm progress, compliance with the KPAA, or document an informational visit," (App. 90) (emphasis added); and even under the

"performance-based schedule," the best performing operators can be searched every 15 months while the lesser performing ones may be searched every 18 months. *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).

The government's discretion is *so* broad, and *so* unlimited, an inspector is free to completely ignore the validly promulgated Kansas Administrative Regulations that establish the performance-based schedule, so long as the program manager approves it. (App. 83.) There is nothing in the handbook that circumscribes the program manager's discretion to authorize that, either.

So, when the government says, "Johnson knows he will not be subject to another routine inspection for over a year," Br. of Govt. at 34, "[l]icensees consistently know the intervals at which they will be inspected," *id.* at 33, and "inspectors' powers are circumscribed," *id.*, it is plainly wrong under the facts.

The government also takes the position that because the "license renewal form asks for the licensee's preferred inspection times," inspector discretion is sufficiently limited in a constitutionally adequate manner. Br. of Govt. at 34-5. But the form goes on to say, "inspections may be conducted outside [the] preferred hours," and that the government "cannot guarantee they will arrive during your preferred hours that are listed on your application." (App. 51.) The "preferred hours" also undercuts their necessity argument—if surprise is so crucial, why does the government ask for "preferred" inspection times? The government does not say.

The statutes and regulations do not constrain—in a constitutionally adequate manner—the inspector's discretion when choosing *where* or *how* to search either.

The inspector is free to "enter" and search the "premises," but "premises" is not limited to the kennels themselves. K.A.R. § 9-18-8. Instead, as written, it includes the home. The inspector is free to use *any* "room, table, or other facilities necessary for the examination of the records and inspection," Br. of Govt. at 34, as well. Given that which is defined, and that which is not, the inspector is free to roam wherever he or she would like.

Considering the Fourth Amendment's history, purpose, and reasons for including a warrant requirement, (App. 11, 35-36), Br. of *Amicus* Buckeye at 4-11, Br. of *Amicus* PLF at 20-33, the warrantless regime inadequately provides a substitute for a warrant.

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

For the first time on appeal, the government advances a new theory regarding the Plaintiffs' physical intrusion claims raised under *United States v. Jones*, 565 U.S. 400 (2012) and *Fla. v. Jardines*, 569 U.S. 1 (2013) (*Jones-Jardines*). While the government has always conceded—correctly—there is "no question a search occurred in this case," Br. of Govt. at 43, it now incorrectly argues that *because* a search occurred, *Jones* and *Jardines* are "inapplicable," *id.*

The government fundamentally misunderstands the holding and effect of *Jones* and *Jardines*, its impact on Fourth Amendment jurisprudence generally, and this case specifically.

The Fourth Amendment's text "reflects its close connection to property," *Jones*, 565 U.S. at 405, and *until 1967* was "tied to common-law trespass," *id.* That

is when *Katz v. United States* introduced the privacy-based framework. 389 U.S. 347 (1967). The Supreme Court reintroduced the property-based approach in *Jones*, 565 U.S. at 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 with the *Katz* formulation," *Jones*, 565 U.S. at 406, and an expectation of privacy analysis *is irrelevant*, *Jardines*, 569 U.S. at 11. Therefore, once there is a trespassory search under *Jones-Jardines*, reasonableness turns on a property-based analysis, not on a privacy-based one.

The Supreme Court in *Jones* and *Jardines* made clear the traditional property-based approach is the Fourth Amendment baseline, not *Katz*'s privacy framework. The government gets this history entirely backwards, incorrectly suggesting *Katz* is the baseline. Br. of Govt. at 42. That misunderstanding colors the government's entire Fourth Amendment analysis. In the government's view, the Fourth Amendment *does* rise and fall with *Katz* and questions of privacy—which explains why it ignored the Plaintiffs' *Jones-Jardines* claims in its motion to dismiss, still has not explained how its physical intrusions are justified under a property-based analysis, and still has not satisfied its heavy constitutional burden of establishing that a privacy-based exception applies to a property-based claim.

Nor can it. In *Collins v. Virginia,* 138 S.Ct. 1663 (2018), the Supreme Court rejected the argument the government makes here. There, a police officer went onto a driveway, lifted a tarp covering a motorcycle, and used the information he found to determine the motorcycle had been stolen. *Id*. at 1668-69. There was no dispute that the police officer's warrantless physical intrusion was a search. *Id*. at 1670, 1671 n2.

The question was whether the automobile exception justified the police officer's warrantless physical intrusion on the driveway. *Id.* at 1671. That exception is, of course, a *Katz*-based one, premised on a reduced expectation of privacy due to the "pervasive and continuing governmental regulation and controls" placed on cars. *Id.* at 1669 (cleaned up); *see also, Byrd v. United States*, 138 S. Ct. 1518, 1526 (2018) (explaining warrantless searches of automobile premised on "diminished expectation of privacy"). In *Collins*, the Supreme Court rejected the government's argument that the *Katz*-based, reduced expectation of privacy-grounded, automobile exception justified the warrantless physical intrusion onto the driveway. *Id.* at 1670-1675.

In *Matter of United States*, 637 F. Supp. 3d 343 (E.D.N.C. 2022), federal agents sought permission to conduct drone surveillance over two homes. *Id.* at 346-47. The district court criticized and ultimately rejected the agents' application because the proposed surveillance could "infringe on the interests of the property owner because it involves a trespass[.]" *Id.* at 355 (relying on *Jones*, 565 U.S. at 408 n.5). "Put another way," the district court said, "whether the suspects have a reasonable expectation of privacy in their activities on the two parcels is irrelevant to the constitutional calculus under the trespass theory." *Id.* at 355-56 (relying on *Jardines*, 569 U.S. at 5).

In *United States v. Gregory*, the district court explained that under the *Jones-Jardines* framework, a "warrantless physical intrusion" constitutes an "unreasonable search," 497 F. Supp. 3d 243, 258 (E.D. Ky. 2020). The district court held that because the government "physically intruded" onto Mr. Gregory's

property, without a search warrant or "license to do so," the "result is the same as in *Jardines* and *Collins*: a Fourth Amendment violation." *Id.* at 271. Moreover, the district court said, given the *Jones-Jardines* framework, "it need not consider whether Gregory held a reasonable expectation of privacy in that area." *Id.*

With nowhere else to turn, the government resorts to the same burden-shifting argument it tried below—that the "[Plaintiffs] offer no authority for their argument that *Jones* and *Jardines* limited" the pervasively regulated industry exception. Br. of Govt. at 44. But it is the government's heavy burden to prove the pervasively regulated exception applies to the Plaintiffs' *Jones-Jardines* claim, not the Plaintiffs' burden to prove it does not. *Coolidge v. New Hampshire*, 403 U.S. 443, 454–55 (1971).

The government has never given any cogent reason to believe its "trespass and [] warrantless search," *Collins*, 138 S. Ct. at 1675, of the Plaintiffs' property is authorized by the pervasively regulated industry exception. Because the government "pursued only a *Katz* 'reasonable expectations' argument," *Carpenter v. United States*, 138 S. Ct. 2206, 2272 (2018) (Gorsuch, J., dissenting), it did not discharge its 12(b)(6) burden or satisfy its heavy constitutional burden of proving that a privacy-based exception applies to a physical-intrusion claim, one in which expectations of privacy are irrelevant.

In the end, the Plaintiffs' property-based claims "keep[]" this "easy case[] easy." *Jardines*, 569 U.S. at 11. The government seeks information by conducting warrantless physical intrusions onto the homestead. The government does not have a license to enter the homestead and has never even suggested it does. There is no

property-based exception permitting the government's physical intrusions, nothing in the common law allows it, and neither the factual nor historical record supports it.

III. The regime violates the unconstitutional conditions doctrine.

The government argues there is no violation of the unconstitutional conditions doctrine solely because the pervasively regulated industry exception applies. Br. of Govt. at 45-46. Mr. Johnson disagrees. There is a Fourth Amendment violation, as shown in the opening brief, Br. of Appellants at 16-37, and again above; and conditioning the mandatory annual license renewal on a Fourth Amendment waiver indeed violates the unconstitutional conditions doctrine, for the reasons set forth in the opening brief. Br. of Appellants at 37-39.

IV. The regime violates the right to travel and freely move about.

The government argues its ability to restrict travel and movement within its borders, and beyond its borders, is unlimited by the Constitution. That argument is without merit and violates *both* the Due Process Clause and the Privileges or Immunities Clause of the Fourteenth Amendment.

The government argues that this Court's opinions in *D.L. v. Unified Sch. Dist. No. 497*, 596 F.3d 768 (10th Cir. 2010), *Abdi v. Wray*, 942 F.3d 1019 (10th Cir. 2019), and *McCraw v. City of Oklahoma City*, 973 F.3d 1057 (10th Cir. 2020) hold that there is no constitutional protection for intrastate travel. Br. of Govt. at 47-8. If this were true then the state could bar individuals from leaving their home, exercising any of their fundamental rights, or partaking in any of the normal activities of life.

But none of those cases involved the right to travel and move about freely as pleaded by Plaintiffs. *See D.L. v. Unified Sch. Dist. 497*, 270 F. Supp. 2d 1217, 1262

(D. Kan. 2002) (vacated, 392 F.3d 1223 (10th Cir. 2004) (right to have "as many residences as they desire"); *Abdi*, 942 F.3d at 1026 ("fundamental right to interstate travel and … his right to international travel"); *McCraw*, 973 F.3d at 1080 (right to "linger in traditionally open places"). Instead, the Tenth Circuit has recognized the "liberty interest in free movement." *United States v. Shrum*, 908 F.3d 1219, 1230 (10th Cir. 2018).

The government concedes that the right to interstate travel is a "basic right under the Constitution," Br. of Govt. at 48, but insists limiting travel to a 30-minute radius from the home is cured by naming a "designated representative."

The government misrepresents the legal responsibilities of the designated representative, arguing that they serve the "limited purpose of making the facilities and records available for inspection," Br. of Govt. at 50 n.19. The government would have this Court believe that all that is required is a designated *doorman*; but the statute, regulations, and handbook all require a designated *representative*. K.S.A. § 47-1721(d)(1); K.A.R. § 9-18-9(e); (App. 102).

Designated representatives must do far more than make the facilities and records available, they must be "mentally and physically capable of representing the licensee in the inspection process." K.A.R. § 9-18-9(e). Inspectors are required to discuss the results of the inspection with the designated representative, review any violations, discuss how to fix the violation, and provide a reinspection date. (App. 100-101). If an inspector has concerns about animal welfare the designated representative must take the animal to a veterinarian. (App. 125.) The designated representative *must* answer questions about: the operation of the facility; whether

other records exist; whether there are any other locations, rooms, barns or sheds where animals are housed; whether there are personal cats or dogs, and if so, where they are kept; where supplies are kept; and if there is a quarantine policy. (App. 97.) It is disingenuous to suggest that any stand-in could satisfy the designated representative mandate.

The government is prohibited from opening the homestead to third parties. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2077 (2021). Plaintiffs' fundamental rights may not be conditioned on their willingness to grant another person unfettered access to their property and the power to represent the licensee either. *Aptheker v. Sec'y of State*, 378 U.S. 500, 507 (1964).

Contrary to the government's arguments, *Aptheker's* holding is not limited to cases implicating the First Amendment. *See* 378 U.S. at 519-20 (Douglas, J. concurring) (travel is "important for job and business opportunities—for cultural, political, and social activities—for all the commingling which gregarious man enjoys"); *Maehr*, 5 F.4th at 1112 (*Aptheker's* "analysis was not circumscribed by [the First Amendment] context") (Lucero, J.).

The government also suggests that the fine at issue is small enough that "Johnson can also pay the $200 no-contact fee, which does not actually prohibit him from traveling, but fairly reflects the cost to the State for a wasted trip." Br. of Govt. at 52. But even a nominal $1 tax on travel is unconstitutional. *Crandall v. Nevada*, 73 U.S. 35, 46 (1867). The Government's insistence on conducting expensive surprise searches does not justify penalizing Plaintiffs for travelling.

Finally, the government incorrectly argues that there is no difference between the Due Process and Privileges or Immunities clauses, and that the government's motion to dismiss the Plaintiffs' Due Process claim "encompassed any claim based on the Privileges [or] Immunities Clause of the Fourteenth Amendment." Br. of Govt. at 52.

The Due Process Clause protects rights that are "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (cleaned up). While the Privileges or Immunities clause protects rights that "owe their existence to the Federal government, its National character, its Constitution, or its laws." *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873).

The Privileges or Immunities Clause protects the right to travel and freely move about. *Slaughter-House*, 83 U.S. at 79-80; *Saenz v. Roe*, 526 U.S. 489, 503 (1999); *Maehr*, 5 F.4th at 1108. This protection is independent of the Due Process Clause.

Plaintiffs alleged that the regime violated *both* the Due Process and Privileges or Immunities clauses. (App. 43-48.) The government's 12(b)(6) motion did not mention the Privileges or Immunities Clause. The government's brief in this Court does not even attempt to analyze the Privileges or Immunities Clause's text, history, or caselaw. The government did not move to dismiss the Privileges or Immunities claim, and the district court erred in granting a motion the government did not bring.

The Government's shockingly broad argument that the Constitution provides virtually no limit on the power of the state to limit or condition the right to travel and

move about freely is fatally undercut by the Due Process Clause and the Privileges or Immunities Clause and centuries of caselaw. The district court erred by dismissing the right to travel and freely move about claims.

Conclusion

The judgment should be reversed, and the case should be remanded for further proceedings. The district court repeatedly erred in its analysis, the government has not met its procedural burdens, and it has failed to satisfy its constitutional ones.

The warrantless search regime violates the Fourth Amendment, the unconstitutional conditions doctrine, and right to travel and freely move about, and the Plaintiffs' case should not have been dismissed as implausible.

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 argues—this Court should enter judgment in favor of the Plaintiffs.

Kansas Justice Institute

/s/ Samuel G. MacRoberts
Samuel G. MacRoberts, 22781
Jeffrey S. Shaw, 29767
12980 Metcalf Avenue, Suite 130
Overland Park, Kansas 66213
(913) 213-5018
Sam@KansasJusticeInstitute.org
Jeff@KansasJusticeInstitute.org

Counsel of Record for Plaintiffs-Appellants