In the United States District Court
for the
District of Kansas

Scott Johnson, *et al.*, Plaintiffs, v. **Justin Smith, D.V.M.**, Defendant.	Civil Action No. 6:22-cv-01243-KHV-ADM Plaintiffs' Response to Government's Motion for Summary Judgment; Exhibits A-N; Index of Exhibits; Certificate of Service. Oral Argument Requested

Plaintiffs' Response to Government's Motion for Summary Judgment

The Kansas Pet Animal Act, KSA § 47-1701, *et seq*. and its associated regulations, KAR § 9-18-4, *et seq*., are unconstitutional. *First*, the government's surprise warrantless search regime violates the Fourth Amendment. Training and housing a hunting dog isn't a pervasively regulated industry: there isn't a long history of warrantless searches, other jurisdictions don't impose sufficiently similar regimes, and there is nothing inherently dangerous about training or kenneling a hunting dog. *Johnson v. Smith*, 104 F.4th 153, 173 (10th Cir. 2024) (summarizing "pervasively regulated industry" factors). But even if it's pervasively regulated, the narrow exception still doesn't apply. The regime isn't informed by a substantial government interest, warrantless searches aren't necessary, and the regime doesn't provide a constitutionally adequate substitute for a warrant. *Id*. at 175-76 (summarizing exception's three-part test). *Second*, the Plaintiffs raised property-based claims under the *United States v. Jones*, 565 U.S. 400 (2012) and *Fla. v. Jardines*, 569 U.S. 1 (2013) framework. The government didn't move for summary judgment on that issue, but the Plaintiffs did. As such, this Court should grant the Plaintiffs motion. What's more, the warrantless search regime is patently unreasonable. *Third*, because the regime violates the Fourth Amendment, conditioning the mandatory annual license renewal on a Fourth Amendment waiver violates the unconstitutional conditions doctrine.

Because the government's licensing and warrantless search regime is plainly unconstitutional, and there are no genuine disputes about the material facts, this Court should grant Mr. Johnson, Ms. Hoyt, and Covey Find Kennel, LLC summary judgment. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-325 (1986); *Hicks v. City of Watonga*, 942 F.2d 737, 743 (10th Cir. 1991); *Pelt v. Utah*, 539 F.3d 1271, 1280 (10th Cir. 2008).

Response to Defendant's Statement of Facts

The following paragraphs from *Defendant's Statement of Facts (DSOF)* are admitted for purposes of this motion: 1-11, 13-14, 16-21, 29-31, 35-41, and 43-44.

In *DSOF* ¶¶ 46, 66-70, Director Thomason, Inspector Demel, and Inspector Washee state their opinion that surprise is necessary. Plaintiffs admit that Director Thomason, Inspector Demel, and Inspector Washee testified as such, but deny they have a factual basis for their testimony. Surprise warrantless searches were mandated in 2018, before Director Thomason, Inspector Demel, or Inspector Washee began working for Defendant. Doc. 82, Pre-Trial Order (PTO) at 2.a.xxxii-xxxiv; *see also DSOF* ¶¶ 5, 66, 68 (listing respective employment dates). As such, Director Thomason, Inspector Washee, and Inspector Demel lack foundation for their opinions. The Plaintiffs object under FRE 602, 701, and 702.

Plaintiffs object to *DSOF* ¶¶ 89-116, as hearsay under FRE 801 and 802. Furthermore, *DSOF* ¶¶ 89-90, 97-100, 106-112, and 115-116 are based on inspection reports by Ben Lancaster and Elaine Adams, neither of whom were disclosed as witnesses.

Plaintiffs further object to *DSOF* ¶¶ 89-90, 93-100, 102-103, 106-112, and 115-116 under FRE 801, 802, and 805 because they contain hearsay within hearsay. These reports contain statements made by third parties to inspectors.

Plaintiffs object to *DSOF* ¶¶ 89-90, 93-103, 106-112, and 115-116 under FRE 401-403.These inspection reports relate to complaint-based inspections, not routine inspections. The Plaintiffs have not challenged complaint-based inspections. Complaint-based inspections are analyzed differently from routine inspections. As such, the results of complaint-based inspections are not relevant to determining the constitutionality of surprise, warrantless routine inspections.

Plaintiffs object to *DSOF* ¶117, and Defendant's Exhibit Q, Doc, 89-17, under FRE 801, 802, and 805 because it is hearsay and contains hearsay within hearsay.

Plaintiffs object to *DSOF* ¶¶ 118-124 (news articles involving kennels in other states) under FRE 401-403, 801, 802, and 805. Defendant improperly asserts that these out of court statements are undisputed facts.

DSOF ¶¶ 11, 18, 23-28, 45-65, and Defendant's Exhibit Y, Doc. 89-25, are improper expert testimony and Plaintiffs object to their inclusion in the record for the reasons set forth in Doc. 85.

The Plaintiffs further object to Defendant's Exhibit Y, Doc. 89-25, an affidavit from Director Thomason, because it is the first time the Defendant has identified the substance of Director Thomason's opinions. The opinions contained in the affidavit were not contained in the expert disclosure, Doc. 73, and were not expressed during her deposition. Doc. 85 at 5, 6, 10.

Furthermore, Director Thomason testified that her opinions were not limited to boarding or training kennels, the subject of this lawsuit, but were about all categories of licenses. Ex. B, Thom. Dep. 60:21—63:20. Since her opinions are not specific to the industry at issue in this case, her opinions are neither helpful nor relevant and should be excluded under FRE 401-403 and 702.

12. **Response**: Admitted for boarding kennels. Denied for training kennels, which were first regulated in 1996. PTO, 2.a.xxix.

15. **Objection**: The phrase "puts applicants on notice" is an argumentative legal conclusion. Plaintiffs admit to the text of KSA § 47-1709.

22. **Objection**: Argumentative legal conclusion.

32. **Response**: Plaintiffs admit that this is what the regulations say. Plaintiffs deny that this is the only timeframe when inspections can occur. Despite the regulation's text, inspectors may search outside the inspection window, with the program manager's approval. Ex. A, Dem. Dep. 53:23—54:1-10; 57:1-8; Ex. B, Thom. Dep. 161:22—162:12; Ex. C, Smith Dep. 32:15—33:3; Ex. D, AFI Manual at OAG1207. Despite the regulation's text, the program director can keep a facility in the middle inspection window (nine to eighteen months) instead of the least-inspected window (fifteen to twenty-four months) if she wants. Ex. A, Dem. Dep. 48:13-20 (program director

may keep a passing licensee at a two-rating); Ex. D, AFI Manual at OAG1207 (describing ratings and inspection schedules). Despite the regulation's text, inspectors are able to conduct warrantless "status check" searches even if a licensee has passed their routine inspection. Ex. A, Dem. Dep. 57:9-11. The warrantless "status check" searches can be done outside the inspection window as well. Ex. A, Dem. Dep. 55:19—56:3; 57:2-4.

33. **Response**: *See* Response to *DSOF* ¶ 32.

34. **Objection**: Plaintiffs admit the text of KAR § 9-18-9(e), Defendant's commentary on the text of KAR § 9-18-9(e) is objectionable legal argument.

42. **Objection**: The assertion that the inspection process is "laid out clearly" is an argumentative legal conclusion.

Response: Plaintiffs admit that OAG001212-1215 includes some of the procedures for routine inspections. Plaintiffs deny that OAG001212-1215 are the full extent of the inspection procedures, which are found in OAG001172-OAG001283.

71. **Response**: Inspector Demel testified that serious animal separation issues that resulted in incompatible animals fighting could not be fixed within 15 or 30 minutes because injuries such as bite wounds, skin trauma, and scratches could not be healed or quickly concealed. Ex. A, Dem. Dep. 160:22—162:5. Additionally, Inspector Demel testified that this would not necessarily even create a welfare concern for the animal. Ex. A, Dem. Dep. 188:13—189:7.

72. **Objection**: Relevance; FRE 401-403. This statement of fact implies that there is a requirement that boarding or training kennel operators separate sexually intact animals. There is not. KAR § 9-18-16 only requires such segregation at animal shelters, rescue networks, and pet animal foster homes. Since there is no violation to begin with, there is no worry that a violation will be easily concealed with prior notice.

73. **Objection**: See Objection to *DSOF* ¶72.

Response: Inspector Demel testified that this is a problem at breeding facilities, but that he had never seen this issue in a boarding or training kennel. Ex. A, Dem. Dep. 201:4-12. Further, Inspector Demel testified that serious animal separation issues that resulted in animals

fighting could not be fixed within 15 or 30 minutes because injuries such as bite wounds, skin trauma, and scratches could not be healed or quickly concealed. Ex. A, Dem. Dep. 160:22—162:5. Additionally, Inspector Demel testified that this would not necessarily even create a welfare concern for the animal. Ex. A, Dem. Dep. 188:13—189:7.

74. **Response**: Inspector Demel testified that a dog which is dehydrated can be identified "just by looking" and that this can't be remedied within 15 or 30 minutes. Ex. A, Dem. Dep. 164:21—165:15. *See also* Ex. C, Smith Dep. 44:11—46:18. It "would be hard" to "hide" a dehydration issue in 30 minutes. Ex. A, Dem. Dep. 206:13-16. An entire kennel with significant and chronic dehydration issues is readily apparent to inspectors. Ex. C, Smith Dep. 50:21-25. Inspector Demel testified that a dog that had been given an insufficient amount of food such that it impacts a healthy body weight could not be concealed or remedied within 15 or 30 minutes. Ex. A, Dem. Dep. 152:14—153:5. Inspectors don't diagnose a slightly underweight animal. Ex. E, Wash. Dep. 63:20-22.

75. **Objection**: Relevance; FRE 401-403.This statement of fact implies that inspectors test or inspect animals for diseases. They do not. Since inspectors do not search for disease to begin with, there is no worry that housing diseased animals with healthy animals will be easily concealed with prior notice.

Response: The purpose of the inspections is not to check the animals' health. Ex. E, Wash. Dep. 68:13-16. Inspectors aren't permitted to diagnose disease in animals. Ex. B, Thom. Dep. 31:2-6; Ex. A, Dem. Dep. 101:6-14; *see also* Ex. B, Thom. Dep. 167:1-6. Inspectors don't test animals for contagious diseases. Ex. B, Thom. Dep. 31:11-13; Ex. A, Dem. Dep. 99:8-22; Ex. E, Wash. Dep. 69:22—70:1. Inspectors don't test animals for non-contagious diseases. Ex. B, Thom. Dep. 31:14-16; Ex. A, Dem. Dep. 99:8-13; Ex. E, Wash. Dep. 69:22—70:1. Inspectors don't test dogs for rabies, salmonella, influenza, hepatitis, ring worm, HIV, or Ebola. Ex. E, Wash. Dep. 69:23—70:12; Ex. A, Dem. Dep. 99:14-22. Inspectors are "not going in as, you know, veterinarians checking the health of every animal. That's not the purpose of our inspections." Ex. E, Wash. Dep. 68:13-16. Inspectors don't treat animals. Ex. B, Thom. Dep. 31:9-10, 166:23-25. If an animal is sick

or injured, the licensee works with their veterinarian, not the AFI program. Ex. B, Thom. Dep. 170:20—171:1-8.

76. **Response**: Plaintiffs admit Inspector Demel testified in this manner. Inspector Washee testified that a significant and chronic issue with bedding storage that resulted in spoilage, contamination, and vermin infestation, the resulting infestation would leave evidence such as rodent droppings and urine that would be difficult to conceal in 15 or 30 minutes. Ex. E, Wash. Dep. 86:1—87:8.

77. **Response**: Plaintiffs admit that Inspector Demel testified that "[t]echnically" a contingency plan could be drafted quickly, but Plaintiffs contend that this phraseology indicates that Demel doubts that a satisfactory contingency plan could actually be written on short notice.

78. **Response**: Inspector Demel testified that this would not necessarily even create a welfare concern for the animal. Ex. A, Dem. Dep. 188:13—189:7. Inspector Washee testified that a significant and chronic issue with food storage that resulted in vermin infestation, the resulting infestation would leave evidence such as rodent droppings and urine. Ex. E, Wash. Dep. 90:8—91:2. For the "food storage" inspection line item, an inspector wouldn't know if the licensee forgot to put the lid on the food container while on the way to greet the inspector. Ex. A, Dem. Dep. 209:4-12. But if a licensee had a significant and chronic violation of the food storage requirement, it would be readily apparent to the inspector. Ex. A, Dem. Dep. 210:2-6. Inspectors don't test food for contamination. Ex. B, Thom. Dep. 31:24—32-1; Ex. E, Wash. Dep. 70:16-18.

79. **Response**: Inspector Demel testified that this would not necessarily create a welfare concern for the animal. Ex. A, Dem. Dep. 188:13—189:7. Further, if the food storage issue is bad enough that it is contaminated with vermin urine or feces, moldy, or rancid, then this would be apparent to an inspector, even if the food is moved to a proper storage container prior to inspection. Inspector Washee testified that a significant and chronic issue with food storage that resulted in spoilage, contamination, and vermin infestation, the resulting infestation would leave evidence such as rodent droppings and urine that would be difficult to conceal in 15 or 30 minutes. Ex. E, Wash. Dep. 86:1—87:8. For the "food storage" inspection line item, an inspector wouldn't

know if the licensee forgot to put the lid on the food container while on the way to greet the inspector. Ex. A, Dem. Dep. 209:4-12. But if a licensee had a significant and chronic violation of the food storage requirement, it would be readily apparent to the inspector. Ex. A, Dem. Dep. 210:2-6.

80. **Response**: Inspector Demel testified that this would not necessarily create a welfare concern for the animal. Ex. A, Dem. Dep. 188:13—189:7.

81. **Response**: *See* Response to *DSOF* ¶ 80.

82. **Response**: Violations concerning the "surfaces" inspection line item, which includes chewed bowls, can't be quickly fixed. Ex. A, Dem. Dep. 193:15—196:1; Ex. D, AFI Manual at OAG1225-1226.

83. **Response**: Inspector Demel testified that for the "tethering" inspection line item, there is no way to determine a violation "unless there is a chronic issue" of tethering. Ex. A, Dem. Dep. 212:6-24; Ex. E, Wash. Dep. 149:11-23 (only way to determine violation is by talking to licensee or designated representative).

84. **Objection**: Relevance; FRE 401-403.There is no required ratio of employees-to-animals. Instead, inspectors determine a violation when a different violation "has been caused by a lack of employees/volunteers." Ex. D, AFI Manual at OAG001242. Since a violation for the number of employees is only triggered by the inspector discovering a different violation, there is no way that a licensee could call in additional employees after the inspector has already discovered the underlying violation.

85. **Objection**: Relevance; FRE 401-403.This statement of fact implies that there is a requirement that licensees bring dogs indoors during extreme heat or extreme cold. There is not. KAR § 9-18-12 regulates "outdoor housing facilities," and it is not a violation for outdoor housing facilities to leave animals outside in extreme heat or extreme cold. Since there is no violation to begin with, there is no worry that a violation will be easily concealed with prior notice.

Response: Inspector Demel testified that a dog which is dehydrated can be identified "just by looking" and that this can't be remedied within 15 or 30 minutes. Ex. A, Dem.

Dep. 164:21—165:15. It "would be hard" to "hide" a dehydration issue in 30 minutes. Ex. A, Dem. Dep. 206:13-16. *See also* Ex. C, Smith Dep. 44:11—46:18. An entire kennel with significant and chronic dehydration issues is readily apparent to inspectors. Ex. C, Smith Dep. 50:21-25. Inspector Demel testified that a chronic temperature problem would leave visible signs on an animal. Ex. A, Dem. Dep. 215:13-21.

86. **Response**: An animal's water bowl can develop algae in as little as a few hours; and can even develop during the length of an inspection. *See* Ex. A, Dem. Dep. 137:3-11; 140:5-23. Inspectors don't test water for contamination. Ex. B, Thom. Dep. 32:2-3; Ex. E, Wash. Dep. 70:13-15. Inspector Washee testified that collecting every water bowl in a kennel, washing them, and replacing them with clean water has the potential to take longer than 15 or 30 minutes. Ex. E, Wash. Dep. 134:23—135:4.

87. **Response**: Inspector Demel testified that a dog which is dehydrated can be identified "just by looking" and that this can't be remedied within 15 or 30 minutes. Ex. A, Dem. Dep. 164:21—165:15. *See also* Ex. C, Smith Dep. 44:11—46:18. It "would be hard" to "hide" a dehydration issue in 30 minutes. Ex. A, Dem. Dep. 206:13-16. An entire kennel with significant and chronic dehydration issues is readily apparent to inspectors. Ex. C, Smith Dep. 50:21-25.

88. **Response**: *See* Response to *DSOF* ¶ 87.

95. **Objection**: Plaintiffs admit the text of KSA § 47-1701(dd)(1), defendant's commentary on KSA § 47-1701(dd)(1) is argumentative legal opinion.

101. **Response**: While the "Purpose" section of this inspection report states that it was a routine inspection, the "Narrative" section of this report states that it was a complaint-based inspection, in which the complaint was deemed unfounded. OAG000971

105. **Objection**: Relevance; FRE 401-403. Defendant characterizes this heating/cooling issue as "not a technical violation at the time of the inspection." What the report actually finds is that the licensee was "compliant" with the law. OAG000607. An inspector finding that a licensee complied with the law is not relevant to the question of whether surprise, warrantless searches are constitutional or necessary.

The Plaintiffs' Additional Statement of Facts (*ASOF*)

1. Mr. Johnson cares for, houses, feeds, trains, and works with the dogs at CFK. Each dog's health and safety is his primary concern. If a dog gets injured or becomes sick, Mr. Johnson sees to it the dog is treated or taken to a veterinarian. Mr. Johnson receives compensation for housing, training, and handling, and reimbursement of medical expenses when necessary. PTO 2.a.xvi.

2. If Mr. Johnson doesn't treat the dogs right, or doesn't keep the kennels in proper shape, he wouldn't be able to secure new clients, he'd lose the trust of his current clients, and he'd lose all of their business. Doc. 1 ¶ 4, 49; Ex. F, Johnson. Dec. ¶ 9.

3. If Mr. Johnson didn't do right by the dogs, he'd suffer the consequences, including the potential loss of his livelihood. Doc. 1 ¶ 4, 49; Ex. F, Johnson. Dec. ¶ 9.

4. Mr. Johnson is accountable to the owners of the dogs at CFK. Doc. 1 ¶¶ 36-49, 153; Ex. F, Johnson. Dec. ¶ 9.

5. Training and kenneling dogs has been around for centuries. Ex. F, Johnson. Dec. ¶ 8.

6. In 1991, the Kansas Attorney General's Office opposed regulating boarding kennels because "a demonstrated need to regulate boarding kennels has not been shown." Ex. G, Camielle Nohe, *Testimony on Behalf of Attorney General Robert T. Stephen*, Hearing on S.B. 443 before the H. Cmte. on Ag., 1991 Kan. Sess. Laws Ch. 152 (Apr. 24, 1991), at 1.

7. In 1991, the Kansas Livestock Commissioner—the predecessor to the Animal Health Commissioner—opposed regulating boarding kennels because "there has been no demonstrated need to regulate boarding kennels in Kansas." Ex. H, R. Daniel Walker, *Testimony Presented by R. Daniel Walker, D.V.M. Kansas Livestock Commissioner*, Hearing on S.B. 443 before the H. Cmte. on Ag., 1991 Kan. Sess. Laws Ch. 152 (Apr. 24, 1991), at 5.

8. In 2012, the Kansas Legislature amended the Act to specifically include an administrative search warrant provision. PTO 2.a.xxxviii; *see* KSA § 47-1709(k).

9. The administrative search warrant provision was supported by the then-Animal Health Commissioner. Ex. C, Smith Dep. 33:16-25.

10. Since 2012, the AFI program has neither sought, nor received, an administrative warrant, for a routine inspection involving a boarding and training kennel licensee. PTO 2.a.xxxix; Ex. A, Dem. Dep. 177:21-23; *see also* Ex. I, Def. Sup. Ans. to RFA 31, 32; Ex. B, Thom. Dep. 39:3-5.

11. Neither the AFI program nor the Pet Animal Advisory Board suggested or proposed the 2018 amendments. Ex. C, Smith Dep. 22:23—23:18.

12. If there was a disease outbreak at a licensed facility, Commissioner Smith could issue orders, including quarantine orders, separate and apart from the Kansas Pet Animal Act. Ex. B, Thom. Dep. 162:17—163:12; Ex. C, Smith Dep. 52:13-21.

13. The AFI program doesn't "handle human health issues." For that, Director Thomason suggests a person "call your local health department if you're concerned or want more information." Ex. B, Thom. Dep. 166:5-7.

14. If there's a disease outbreak, the licensee is encouraged to reach out to the veterinarian overseeing the facility, not the AFI program. Ex. B, Thom. Dep. 166:8-22.

15. If there's a disease outbreak, "we just go and check and make sure that the vet's already in charge and handling that. And if so, then we tell them to call us if they need us, but they've got it handled." Ex. B, Thom. Dep. 167:7-20.

16. For unlicensed boarding and training kennels, the investigator normally turns them over to their respective local jurisdictions for prosecution under municipal law, not the Pet Animal Act. Ex. J, Bret. Dep. 38:24—39:1-2.

17. One of the most important things in preventing disease transmission is washing one's hands. Ex. B, Thom. Dep. 172:4-9.

18. The Pet Animal Act doesn't require training kennel operators to wash their hands. *See* KSA § 47-1701, *et seq*.

19. The Pet Animal Act doesn't require the use of gloves. Ex. B, Thom. Dep. 173:3-5.

20. Director Thomason is not aware of any Kansas-specific, peer-reviewed studies:

a. Analyzing the efficacy of the regime in preventing disease transmission between dogs. Ex. B, Thom. Dep. 72:25—73:1-5.

b. Analyzing the efficacy of the regime in preventing disease transmission between animals. Ex. B, Thom. Dep. 73:24—74:1.

c. Analyzing the efficacy of the regime in preventing disease transmission. Ex. B, Thom. Dep. 76:22-25—77:1-14.

d. Comparing the prevalence of zoonotic disease transmission between pet animals before the regulatory regime and after the regulatory regime went into effect. Ex. B, Thom. Dep. 75:15-76:3.

e. Comparing the prevalence of zoonotic disease transmission between pet animals and humans before the regulatory regime and after the regulatory regime went into effect. Ex. B, Thom. Dep. 76:4-14.

f. Comparing the prevalence of zoonotic disease transmission between pet animals and their owners in a nonregulated setting. Ex. B, Thom. Dep.76:15-21.

g. Analyzing whether an administrative warrant would impact the efficacy of the regime in preventing disease transmission. Ex. B, Thom. Dep. 77:21—78:4.

21. Licensees are inspected annually by a veterinarian to "ensure that the facility is adequate to properly control disease spread by reviewing and modifying a facility's cleaning and disinfection protocols, external and internal parasite control methods, and vaccination protocols in light of any advancements in veterinary medicine, as well as whether the facility has a sufficient quarantine area for any animals suspected of a disease. The annual visit also allows the veterinarian to ensure that vaccinations, prescriptions, other medications, and food and supplies, are all appropriate and being stored properly, and allows the veterinarian to observe the animals in their regular environment to ensure the program of veterinary care is adequate for the animals housed at the licensee's facility. Veterinary recommendations can vary greatly between facilities, depending on various factors including the layout, set up, purpose, proximity of the animals in the

facility, and installed conveniences including any drainage systems, sloping, water, and electric capabilities." Ex. K, Def. Suppl. Ans. to Interrog., Rog 6; Ex. L, Blank Vet Care Form.

22. Director Thomason isn't aware of any Kansas-specific, peer-reviewed studies or any other studies:

a. Analyzing the efficacy of the regime in preventing dehydration. Ex. B, Thom. Dep. 72:20-24; 73:19-23.

b. Analyzing the efficacy of the regime in preventing malnourishment. Ex. B, Thom. Dep. 73:6-10; 74:2-3.

c. Analyzing the efficacy of the regime in preventing animal abuse. Ex. B, Thom. Dep. 73:11-13; 74:4-5.

d. Analyzing the efficacy of the regime in preventing animal fights. Ex. B, Thom. Dep. 73:14-18; 74:6-7.

e. Comparing the prevalence of dehydration events before the regulatory regime and after the regulatory regime went into effect. Ex. B, Thom. Dep. 74:8-13.

f. Comparing the prevalence of malnourishment events before the regulatory regime and after the regulatory regime went into effect. Ex. B, Thom. Dep. 74:14-19.

g. Comparing the prevalence of animal abuse events before the regulatory regime and after the regulatory regime went into effect. Ex. B, Thom. Dep. 74:20-22.

h. Comparing the prevalence of animal fight events before the regulatory regime and after the regulatory regime went into effect. Ex. B, Thom. Dep. 74:23-25.

23. From at least 1996 to 2018, inspectors provided licensees advance notice of the inspections. PTO 2.a.xxxiv; Ex. C, Smith Dep. 19:15-19.

24. The ability to provide advance notice afforded inspectors more flexibility and reduced program costs. Ex. C, Smith Dep. 19:20-22, 20:3-18, 21:12-24; Ex. M, AFI Program Website FAQ.

25. In 2018, the Kansas Legislature banned providing advance notice to licensees. *See* Kan. Leg. 2018 HB 2477; KSA § 47-1709(b) (once licensed, notice of the inspections "shall not be given"); KAR § 9-18-9(g); PTO 2.a.xxxii, 2.a.xxxiii.

26. The thirty-minute requirement and no-contact penalties were also enacted in 2018. *See* Kan. Leg. 2018 HB 2477; PTO 2.a.xxxiii.

27. Director Thomason doesn't know the stated purpose of the Kansas Pet Animal Act. Ex. B, Thom. Dep. 78:11-13.

28. Director Thomason wasn't involved in the 1991, 1992, 1996, 2012, or 2018 legislative changes and amendments. Ex. B, Thom. Dep. 35:16—36:1-6, 11-14.

29. Director Thomason hasn't talked to any state legislators about her opinions. Ex. B, Thom. Dep. 70:10-18.

30. Director Thomason hasn't talked to any members of the Pet Animal Advisory Board about her opinions. Ex. B, Thom. Dep. 71:4-10.

31. The government admits that training, handling, and kenneling dogs is not intrinsically dangerous. Ex. K, Def. Suppl. Ans. to Interrog. at Rog. 3

32. CFK operates under a veterinary medical care plan, and the kennels are inspected by a veterinarian annually. PTO 2.a.xiii, 2.a.xiv; KSA § 47-1701(dd)(1).

33. Plaintiffs' business of training and handling hunting dogs is not dangerous. PTO 2.a.xi, xviii, xv, xix-xxviii.

34. Defendant never provided a factual basis for conducting routine inspections. *See* Ex. K, Def. Suppl. Ans. to Interrog. at Rog. 7.

35. The government's stated interest in this case is preventing cruelty, abuse, or neglect. PTO 3.b at 14, 18.

36. Director Thomason testified that "[p]eople consider their pets on the same plane as children. If not, it's not much below children." Ex. B, Thom. Dep. 67:15-17

37. Director Thomason testified that if a member of the public sees an issue they're concerned about, "you know, they'll tell everybody trying to get something done about it." Ex. B, Thom. Dep., 69:5-16.

38. Kennels operate under a veterinary medical care plan, including annual veterinary inspections. PTO 2.a.xiii-xiv; KSA § 47-1701(dd)(1).

39. The licensing form provides a space for the licensee to list their "preferred hours." Ex. C, Smith Dep. 16:16-21.

40. Instead, inspectors explain the "purpose of the visit" and the "process of the inspection." Ex. D, AFI Manual at OAG1212-1213; *see* Ex. A, Dem. Dep. 71:3-4, 15-18.

41. Inspectors look for "what violations currently are there, what violations could occur with something." Ex. A, Dem. Dep. 22:12-16; *see also id*. 73:14-15; 74:7-9.

42. During the inspection, licensees are "required to show [inspectors] all the areas that animals are housed, anywhere that the animal has access to, all areas where food, bedding, supplies, chemicals that they use inside the facility for the animals are housed. And so during the inspections, I just have them lead me to all those areas, and I make sure to ask multiple times if there's any other areas until we're done[.]" Ex. E, Wash. Dep. 40:10-20; *see also* KAR § 9-18-8.

43. During the inspection, inspectors are authorized to go inside:

a. A licensee's home. Ex. E, Wash. Dep. 70:19-25.

b. "Anywhere the animals are kept." Ex. A, Dem. Dep. 61:1.

c. "[E]ach" building that houses animals, food, or cleaning chemicals. Ex. E, Wash. Dep. 41:11-17; Ex. A, Dem. Dep. 61:13-18.

d. Kitchens. Ex. A, Dem. Dep. 61:10-12. ("If they have like a kitchen area where they prep food, that area we inspect as well").

e. Pantries. Ex. A, Dem. Dep. 61:9; *see also* Ex. E, Wash. Dep. 41:11-17

f. Sheds. Ex. E, Wash. Dep. 17:10-11; *see also* Ex. E, Wash. Dep. 41:11-17 (authorized to go into "each" building that houses animal, food, or cleaning chemicals).

g. Wherever a licensee's records are located. Ex. A, Dem. Dep. 62:19-22; Ex. E, Wash. Dep. 41:25—42:1-9.

h. The entire "property of the licensee that the licensed activity falls under and is being conducted." Ex. A, Dem. Dep. 62:15-17 (explaining the meaning of "premises").

i. Kennels. Ex. A, Dem. Dep. 64:17-21, 183:24-25—184:1-2.

44. The regime requires an operator to name a "designated representative" who is "18 years of age or older and mentally and physically capable of representing the licensee in the inspection process." KAR § 9-18-9(e); PTO 2.a.xlviii. If an operator or the "designated representative" is not present for the surprise warrantless search within thirty minutes of the inspector's arrival, the government assesses an automatic "no-contact" fee. KSA § 47-1721(d)(1); PTO 2.a.xlviii. The "no-contact inspection" triggers more warrantless searches, and each "no-contact inspection" results in "a $200 no-contact fee." *Id.*; KAR § 9-18-6(p). PTO 2.a.xlviii.

45. Designated representatives are required to understand a licensee's "protocols, procedures at the facility," Ex. E, Wash. Dep. 172:14-22, have access to, and produce, the licensee's records, *id.* 172:23—173:6, and fulfill the same role as a licensee, *id.* 176:22—177:1.

46. A designated representative's failure to produce records triggers an automatic unsatisfactory inspection, triggers another warrantless inspection, and moves the facility from a 3-rating to a 1-rating. Ex. E, Wash. Dep. 173:2-17.

47. Starting around 2014, Mr. Johnson listed Ms. Hoyt as the "designated representative," as the term is used in KAR 9-18-9. PTO 2.a.ix, xxxvii.

48. As fashioned, Ms. Hoyt opposes being the "designated representative." ¶¶ 119-121, 123 (with exception), 124. Ex. N, Hoyt Dec. ¶¶ 4, 4.a.

49. A single no-contact event may be sufficient to revoke a person's license, Ex. D, AFI Manual at OAG1259, and if there are three or more no contacts, Defendant's legal staff processes a "refusal of entry" which is grounds for a license suspension or revocation, Ex. D, AFI Manual at OAG1210.

50. If a licensee told an inspector they couldn't go inside their home, or to "get a warrant" before conducting an inspection, it's considered a "refusal" of entry. Ex. A, Dem. Dep. 66:6-13, 167:18-23, 174:7-18; PTO 2.a.xliii.

51. Declining an inspection is a violation. Ex. E, Wash. Dep. 164:19-25.

52. Every year, an operator must renew the license, KSA §§ 47-1701(r), 1721, 1723, and again "consent" to warrantless searches, KSA § 47-1709(b); PTO 2.a.xlix.

53. Under the regime, refusing a warrantless search is prohibited, constitutes a crime, and results in mandatory penalties. KSA §§ 47-1706(a)(11), 47-1709(b), 47-1707(a), 47-1715, 47-1735; PTO 2.a.l; PTO 2.a.xlix.

54. Violations of the regime are crimes and may result in other penalties. KSA § 47-1715; KSA § 47-1707(a); KSA § 47-1706(a); KSA § 47-1706(e); KSA § 47-1727; PTO 2.a.xlix.

55. Violations concerning the "acclimation statement" and "exercise" inspection line items cannot be quickly fixed. Ex. A, Dem. Dep. 190:14—192:12; Ex. D, AFI Manual at OAG1224.

56. Violations concerning the "surfaces" inspection line item can't be quickly fixed. Ex. A, Dem. Dep. 193:15—196:1; Ex. D, AFI Manual at OAG1225-1226.

57. Violations concerning the "animal well-being," "cleaning," and "drainage," inspection line items cannot be quickly "fixed." Ex. A, Dem. Dep. 195:23—196:1; Ex. D, AFI Manual at OAG1226.

58. Violations concerning the "pest control," "records," and "shelter," inspection line items cannot be quickly "fixed." Ex. A, Dem. Dep. 197:10—198:9; Ex. D, AFI Manual at OAG1227.

59. Violations concerning the "euthanasia" inspection line item cannot be quickly remedied. Ex. A, Dem. Dep. 197:10—198:9; Ex. D, AFI Manual at OAG1228.

60. Violations concerning the "feeding," "heating/cooling," "importation," "lack of veterinary care," "license fee/type/renewal," inspection line items cannot be fixed quickly or easily concealed. Ex. A, Dem. 199:21-25; Ex. D, AFI Manual at OAG1229.

61. For the "light/dark" inspection line item, an inspector can't typically determine whether there's a violation unless they ask the licensee. Ex. E, Wash. Dep. 101:7-16.

62. But if there was a significant and chronic violation of the lighting requirement, it would be readily apparent to the inspector that the animals were affected by the issue. Ex. A, Dem. Dep. 208:10—209:3.

63. For the "water & electric" inspection line item: it would be difficult to wire a facility for electricity within 30 minutes. Ex. A, Dem. Dep. 124:14-24; it would be difficult to plumb a facility within 30 minutes. Ex. A, Dem. Dep. 124:25—125:9; it would be difficult to remediate inadequate water within 30 minutes; Ex. A, Dem. Dep. 125:14-17; it would be difficult to install a wash facility within 30 minutes. Ex. E, Wash. Dep. 117:17-22.

64. It could take longer than 30 minutes to run lights off a generator, by the time one brings out the lights, fastens them to a structure, fills the generator with fuel, starts it, and puts the tools away. Ex. E, Wash. Dep. 117:6-16.

65. For the "construction" requirement, the facility must be "structurally sound," "contain the animals it is intended to contain, and keeps out all others;" "constructed in a manner that protects the animals from injury," and "maintained in good repair." Ex. D, AFI Manual at OAG1238.

66. Examples of "structural soundness" include rotten posts, leaking roofs, and "metal posts or fencing that has nearly rusted through." Ex. D, AFI Manual at OAG1238.

67. If there's a physical issue with a kennel, inspectors can give licensees thirty days to correct the issue. Ex. C, Smith Dep. 46:19—47:3.

68. Depending on the physical issue with the kennel, it can take thirty days to remediate it. Ex. C, Smith Dep. 47:4-17.

69. Repairing surface rust on a single kennel can take more than 30 minutes. Ex. A, Dem. Dep 121:2-14.

70. Painting over surface rust "doesn't work." Ex. E, Wash. Dep. 139:13-17.

71. If a licensee had just painted over surface rust, it would be readily apparent. Ex. E, Wash. Dep. 139:18-23; Ex. A, Dem. Dep. 121:15-20.

72. It would be difficult to remediate the floor of an improperly constructed kennel within 30 minutes. *See* Ex. E, Wash. Dep. 103:15—104:10.

73. It would be difficult to remediate the use of cattle panels as a kennel within 30 minutes. Ex. E, Wash. Dep. 107:9-20.

74. Fixing a rotten or leaning post would be difficult to remediate within 30 minutes. Ex. E, Wash. Dep. 136:13-21.

75. For the "drainage" inspection line item, it would be difficult to remediate the lack of drainage that allows for foul odors and the backup of sewage within 30 minutes. Ex. A, Dem. Dep. 145:3-12 (including remediating "standing water").

76. For the "sanitation" inspection line item, if there is an accumulation of dirt, debris, food waste, disease-causing microorganism and excreta, it could be difficult to remediate within 30 minutes. Ex. A, Dem. Dep. 147:3-14; Ex. E, Wash. Dep. 147:16-21.

77. An inspector is able to quickly determine whether a licensee is keeping the facility clean or trying to keep it clean. Ex. A, Dem. Dep. 136:23—137:2; Ex. E, Wash. Dep. 147:10-15 (acknowledging it's readily apparent whether a licensed facility was being cleaned).

78. An inspector is able to determine how long animal waste has been in the facility by looking at it. Ex. A, Dem. Dep. 127:4-10, 126:13-16; Ex. B, Thom. Dep. 92:17-22 ("average dog defecates once, twice a day, and so if you see seven or eight piles, it's probably four days worth, if not more").

79. It's readily apparent to an inspector if a facility hasn't been cleaned for days on end. Ex. C, Smith Dep. 43:15-25; Ex. A, Dem. Dep. 126:13-19; Ex. B, Thom. Dep. 91:19-23, 92:23—93:2.

80. It would be readily apparent if a licensee substantially and chronically failed to keep the facility clean. Ex. B, Thom. Dep. 93:5-19.

81. Depending on the kennel's flooring, remediating animal waste involves power washing. Ex. A, Dem. Dep. 127:14-20.

82. Remediating large amounts of waste would be difficult in 30 minutes, which is what inspectors are concerned about. Ex. A, Dem. Dep. 127:16—128:4.

83. Remediating a build-up of grime and filth would be difficult in 30 minutes, which is what inspectors are concerned about. Ex. A, Dem. Dep. 135:16-25

84. An animal that stands in feces or urine for a long time can develop sores or ulcers—sometimes called scalding—which is immediately apparent and takes months to recover from. Ex. C, Smith Dep. 40:2—42:3.

85. It can take more than 30 minutes to wash off a single muddy dog. Ex. A, Dem. Dep. 145:17-22.

86. Remediating matted fur on a single animal can take longer than 30 minutes. Ex. A, Dem. Dep. 129:15-25, 130:14-17; Ex. E, Wash. Dep. 121:11-16.

87. Remediating severe matting cannot happen in 30 minutes. Ex. E, Wash. Dep. 155:15-21.

88. An inspector would be able to readily determine if the licensee had recently shaved the matted fur. Ex. A, Dem. Dep. 121:17-24.

89. Remediating long and curling nails can require the use of clippers and a Dremel tool, and for a single animal, can take longer than 15 minutes. Ex. E, Wash. Dep. 124:2-23; Ex. A, Dem. Dep. 131:1-11.

90. Ear infections can't be remediated in 30 minutes. Ex. A, Dem. Dep. 133:13-18.

91. If an animal exhibits an ear infection such that it is red, swollen, and oozing, the licensee "would be required to have the animal seen [by a veterinarian] within 24 hours." Ex. E, Wash. Dep. 125:15-19.

92. Severe dental diseases can't be remediated in 30 minutes. Ex. A, Dem. Dep. 134:12-18; Ex. E, Wash. Dep. 155:22—156:2.

93. An emaciated dog is apparent to even a layperson. Ex. C, Smith Dep. 37:6—38:9.

94. It takes an emaciated dog "three to four months to start seeing visible changes to their condition." Ex. C, Smith Dep. 38:13-21.

95. An inspector who finds a severely emaciated dog doesn't immediately seize it—instead, she would require the licensee "to have the animal seen within 24 hours of the inspection." Ex. E, Wash. Dep. 62:13-20, 65:11-22.

96. An animal can become emaciated because of an underlying medical issue, rather than neglect. *See* Ex. B, Thom. Dep. 107:19-20.

97. A dog that is slightly underweight takes one month to recover, with the appropriate care. Ex. C, Smith Dep. 39:3-19.

98. For the "ventilation" inspection line item, the complete lack of ventilation can't typically be fixed in 30 minutes. Ex. A, Dem. Dep. 150:4-7.

99. If a licensee already had a ventilation system but wasn't using it, it could be difficult to remediate the inadequate ventilation within 30 minutes. Ex. A, Dem. Dep. 150:8-18.

100. For the "housekeeping" inspection line item, it would be difficult to remediate the violation of excessive weeds, grass, and brush within 30 minutes. Ex. A, Dem. Dep. 146:15-20. See Ex. E, Wash. Dep. 98:14-23 (doesn't know how long it would take to remediate a "year's worth of cobwebs"), 98:24—99:3 (doesn't know how long it would take to remediate a year's worth of "trash or junk").

101. An inspector is able to determine quickly whether or not a facility has a significant spacing violation. Ex. A, Dem. Dep. 149:12-17.

102. An animal with physical trauma, sometimes called a "hot spot," doesn't always need immediate attention, and sometimes won't require veterinary attention at all. Ex. C, Smith Dep. 49:4-23.

103. An animal with a "hot spot" can't be healed quickly and requires the shaving of hair. Ex. C, Smith Dep. 49:24—50:5.

104. Animals with neck, face, and bite wounds can't be remediated in 30 minutes. Ex. A, Dem. Dep. 161:4-7.

105. Animals with skin trauma, scratches, and bites, can't be remediated in 30 minutes. Ex. A, Dem. Dep. 161:8-12.

106. Ringworm, communicable diseases, and upper respiratory infections can't be remediated in 30 minutes. Ex. E, Wash. Dep. 159:2-10

107. Since 2012, no boarding and training kennel licensee has demanded an administrative warrant or any other type of warrant for a routine inspection. PTO 2.a.xl; Ex. B, Thom. Dep. 157:23—158:3, 39:9-12; *see also* Ex. A, Dem. Dep. 167:24-25—168:1-4; Ex. E, Wash. Dep. 166:2-5.

108. None of the current inspectors have received training on administrative warrants. Ex. A, Dem. Dep. 176:24—177:11; Ex. E, Wash. Dep. 174:11-13; Ex. B, Thom. Dep. 36:22-25.

109. The government's policies and procedures manual doesn't have any provisions regarding administrative warrants. Ex. B, Thom. Dep. 37:1-4.

110. Neither Commissioner Smith nor Director Thomason has ever authorized the use of an administrative warrant. Ex. C, Smith Dep. 51:25—52:1-4, Ex. B, Thom. Dep. 36:15-18.

111. Director Thomason has never authorized an inspector to apply for an administrative warrant. Ex. B, Thom. Dep. 36:19-21.

112. Director Thomason doesn't know how long it would take to secure an administrative warrant. Ex. B, Thom. Dep. 37:5-7.

113. From 2018 to the present, there have been no refusals of entries for boarding and training kennel licensees. PTO 2(a)(xli).

114. Neither Inspector Demel nor Inspector Washee is aware of any licensees who have refused to produce records. Ex. A, Dem. Dep. 168:5-10, Ex. E, Wash. Dep. 166:6-9.

115. According to the government's investigator, complaints are deemed "founded" even if the individual isn't breaking any rules, regulations, or laws. Ex. J, Bret. Dep. 47:1—48:8.

116. If a licensee asks the inspector to come back at a more convenient time, it's considered a "no-contact" event. Ex. A, Dem. Dep. 173:25—174:6.

117. Plaintiffs retain their subjective expectations of privacy and protected property interests in their homestead, and everything within it, including records. Doc. 1 ¶¶ 106-108; Ex. F, Johnson Dec. ¶ 5; Ex. N, Hoyt Dec. ¶ 4.

Argument

Following the Supreme Court's lead in *City of Los Angeles, Calif. v. Patel*, 576 U.S. 409 (2015), the Tenth Circuit made it plainly clear: the pervasively regulated exception is industry-specific, fact-dependent, incredibly narrow, and tightly circumscribed. The Tenth Circuit effectively foreclosed the idea that training and housing a hunting dog is a pervasively regulated industry or that the exception applies. Yet the government primarily reiterates the same arguments and cites largely the same cases as it did in its motion to dismiss and on appeal. Just like the Tenth Circuit did, this Court should reject them. The government's newly raised, post-appeal, and theoretical concerns with animal diseases is nothing more than a *post hoc* rationalization, attempting to backfill a theory with anecdotes. But as the Tenth Circuit meticulously explained, hypothetical concerns cannot satisfy the heavy burden of establishing that training and kenneling a hunting dog is a pervasively regulated industry on par with the nuclear power industry, or any of the four industries the Supreme Court deemed pervasively regulated either. Under the government's unprincipled theory of the case, rejected once already, the extremely narrow exception would "swallow the rule." *Patel*, 576 U.S. at 425. This Court should flatly reject its application here.

I. The government's warrantless search regime violates the Fourth Amendment.

Searches conducted without criminal warrants supported by traditional notions of probable cause are *presumptively unconstitutional. Patel*, 576 U.S. 409, 419; *Collins v. Virginia*, 584 U.S. 586, 593 (2018). That the Kansas Legislature has written a statute authorizing warrantless searches does not turn that constitutional principle on its head. *Patel*, 576 U.S. at 419 (warrantless searches authorized by municipal ordinance still considered "*per se* unreasonable") (italics in original); *Payton v. New York*, 445 U.S. 573, 586 (1980) (warrantless searches authorized by state statutes still considered "presumptively unreasonable").

Because the government hasn't satisfied its heavy Fourth Amendment burden of proving any recognized exception to the warrant requirement, that an administrative warrant won't suffice, or that the regime contains a legitimate precompliance review process, this Court should reject the government's motion for summary judgment and grant the Plaintiffs' instead. *Coolidge v. New Hampshire*, 403 U.S. 443, 454–55 (1971) (government's burden to prove exception); *Jones v. United States*, 357 U.S. 493, 499 (1958) (same); *Patel*, 576 U.S. at 420 (government also required to prove existence of "special need"); *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1241-42 (10th Cir. 2003) (same).

A. Mr. Johnson's business isn't a "pervasively regulated industry."

The Supreme Court has identified only four industries that qualify as pervasively regulated, and *none of them* involve anything remotely like training and housing hunting dogs from a rural homestead. *See Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (liquor), *United States v. Biswell*, 406 U.S. 311 (1972) (firearms), *Donovan v. Dewey*, 452 U.S. 594 (1981) (mining), *New York v. Burger*, 482 U.S. 691 (1987) (automobile dismantling).

The Supreme Court's most recent case discussing the issue was *Patel*, 576 U.S. 409. For the Supreme Court, "simply listing" the pervasively regulated industries was sufficient to conclude hotels didn't meet the incredibly narrow exception. *Id.* at 424. Under *Patel* alone—which the government never analyzes—this Court could reject the government's argument that training and kenneling a hunting dog is a pervasively regulated industry. But now the parties benefit from the Tenth Circuit's ruling in this case, which effectively foreclosed the idea. Under the Tenth Circuit's four-factor *Patel-Johnson* test, courts consider (1) the history of warrantless searches in the industry; (2) the extensiveness of the regulatory regime; (3) whether other jurisdictions impose similar regulatory schemes; and (4) the inherent danger presented by the industry. *Johnson*, 104 F.4th at 173. Try as it might, the government cannot overcome the heavy constitutional presumption against the surprise warrantless searches it conducts, the Tenth Circuit's ruling, or the factual record demonstrating that training and kenneling a dog is not a pervasively regulated industry or anything remotely like one.

1. Dog trainers and their kennels haven't been subjected to a long history of warrantless searches.

The government misconstrues the first relevant factor. It suggests that because there are marginally more boarding or training kennels now than a few years ago, the industry is pervasively regulated. Doc. 89 at 20. But if that were the standard, the Supreme Court would have deemed hotels pervasively regulated in *Patel*. After all, there are certainly far more hotels today than in the 1780s. Besides, the theory is incongruent with what the Tenth Circuit said. Whether an industry is "emerging" is only relevant at the time it was regulated, not after-the-fact. *Johnson*, 104 F.4th at 170. There is "no reason to think," let alone credible evidence establishing it, "that the boarding- or training-kennel industry was either new or emerging in 1991" or that it "poses enormous potential safety and health problems" "like nuclear power." *Johnson,* 104 F.4th at 170, 170 (cleaned up). Finally, the government's theory lacks limiting principles. Every industry would eventually become pervasively regulated so long as it experiences *some* growth. That's not how the incredibly narrow exception works after *Patel*, and certainly not how it works after the Tenth Circuit's ruling.

The government also suggests that anecdotes involving contemporary value judgments about pets, held by some, make the industry pervasively regulated. Doc. 89 at 20. Neither *Patel* nor *Johnson*, nor *any other* Fourth Amendment case suggests the Fourth Amendment loses its force because of public sentiment, no matter how sincere, or well-intentioned that sentiment might be. *See, e.g., Chandler v. Miller*, 520 U.S. 305, 322 (1997). Indeed, "[i]f times have changed," "the changes have made the values served by the Fourth Amendment *more*, not less, important." *Coolidge*, 403 U.S. 443, 455 (1971) (emphasis added). *See also Lange*, 594 U.S. at 309 (Fourth Amendment exceptions turn on Founding-era history). The Fourth Amendment is meant to provide consistent, robust protection, regardless of the value judgments held by others. Public opinions can sometimes change and can even vary from one side of a state to the other, but constitutional principles do not.

Indeed, as the Plaintiffs have previously explained, Doc. 87 at 30, under the first *Patel-Johnson* factor, what matters is "the history of *warrantless searches* in the industry." *Johnson*, 104 F. 4th at 173 (emphasis added); *see also Patel*, 576 U.S. at 425-26; *Lange*, 594 U.S. at 309 (Fourth Amendment exceptions turn on Founding-era history); *Mexican Gulf Fishing Co. v United States Dep't of Com.*, 60 F.4th 956, 970 (5th Cir. 2023) (same).

There is still no evidence that dog trainers and handlers were warrantlessly searched at or near the time of the Founding. At bottom then, when "compared to the timeframes for industries that the Supreme Court has found" to be pervasively regulated, *Johnson*, 104 F.4th at 170, training and kenneling dogs doesn't qualify for the incredibly narrow exception. *Id.* at 166, 170, 173, 174 (boarding or training kennels "have not been closely regulated historically"); *see also Patel*, 576 U.S. at 425-26 (even though hotel regulations started in 1786, they're still not considered pervasively regulated).

2. Extensiveness of the regime.

The Tenth Circuit remarked that Kansas regulates training kennels somewhat extensively. *See Johnson*, 104 F.4th at 170. But laws "regulating an industry" "are not the same as laws subjecting an industry to warrantless searches." *Id.* (cleaned up). Indeed, extensive regulations don't turn a business (or in this case, a rural homestead) into a warrant-free zone where the Fourth Amendment doesn't apply. *Id.* at 170-171; *Patel*, 576 U.S. at 425-26 (extensive regulations are not what makes an industry pervasively regulated). Otherwise, the government could simply regulate the Fourth Amendment out of existence. *See Johnson,* 104 F.4th at 170.

Nonethless the government argues that because it chooses to regulate how a person stores dog food, maintains a kennel, and cleans it, the "expectation of privacy" is "inherently reduce[d]." Doc. 89 at 21; *see also id.* (arguing expectations of privacy are *per se* reduced because of animal wellbeing and because public is "interested" "when things go wrong, as the attached news articles demonstrate"[1]). The government doesn't offer any caselaw or advance *any* theory,

[1] The articles are hearsay, and the Plaintiffs have objected to them.

let alone a principled one, that would explain *why* privacy would be reduced because of how one stores dog food, or *why* news articles reduce one's privacy, just that it *does*. The government's argument is barely more than "because I said so," and it's a position foreclosed by the law of this case, *Patel*, and the Fourth Amendment's underlying principles. Modern-day regulations alone, no matter how extensive, simply cannot be the basis for warrantless searches. *Lange*, 594 U.S. at 309; *Mexican Gulf Fishing*, 60 F.4th at 970; *see also Gonzalez v. United States*, 145 S. Ct. 529, 532 (2025) (Sotomayor, J., respecting denial of certiorari) (Supreme Court's "decisions in *Kyllo*, *Madrid*, *Jones*, *Moore*, and *Lange* all say, however, that the Fourth Amendment must protect at minimum those rights recognized by the founding-era common law"). What's more, the Johnson-Hoyt homestead isn't a pet shop—it's their home where "privacy expectations are most heightened." *Jardines*, 569 U.S. at 7; *ASOF* ¶ 117. And in any event, the government has never plausibly explained why *Ms. Hoyt*'s privacy would be reduced either.

So, while the Plaintiffs acknowledge the Tenth Circuit's statement that Kansas regulates training kennels somewhat extensively, it's not particularly relevant and certainly not outcome determinative.

3. Federal and state governments haven't adopted similar warrantless inspection regimes.

The government concedes this factor favors the Plaintiffs. Doc. 89 at 22. Of the "nine states" that authorize warrantless inspections though, "three" of them "specifically exclude kennels that train hunting dogs." *Johnson*, 104 F.4th 173 n.5 (cleaned up). That Kansas is *such* an outlier weighs heavily against being considered pervasively regulated.

4. Training and kenneling hunting dogs isn't intrinsically dangerous and doesn't inherently pose a clear and significant risk to the public welfare.

The government asserts that "inherent danger is not an *absolute prerequisite* to finding that a business is" pervasively regulated. Doc. 89 at 22 (emphasis added). That's not quite right, and in any event, misses the point, importance, and substance of the dangerousness analysis from *Patel* and the Tenth Circuit's ruling.

In *Patel*, the Supreme Court explained that the pervasively regulated industry doctrine is limited to industries that are intrinsically dangerous, the operation of which inherently poses a clear and significant risk to the public welfare. 576 U.S. at 424, 424 n.5. The Tenth Circuit acknowledged *Patel*'s dangerousness analysis sharply narrowed the doctrine. *Johnson*, 104 F.4th at 166, 166 n.2. It also understood the rather unremarkable notion that inherently risky businesses would pose clear and significant risks to the public if left unregulated. *Id.* at 173. Put somewhat differently, there's little daylight between an inherently dangerous business and a business that poses serious risks to the public if left unregulated. *Id.* at 166, 173–74. On that score, the Tenth Circuit repeatedly pointed to the nuclear power industry as the kind of dangerousness now required. *Id.* at 163, 166, 170. That makes sense, operating a nuclear power plant *is* intrinsically dangerous and *does* inherently pose a clear and significant risk to the public welfare if left unregulated.

Because trainers and their kennels weren't warrantlessly searched at or near the time of the Founding, because modern-day regulations on their own cannot be the basis for warrantless searches no matter how extensive they are, and because neither the federal government nor the vast majority of states have adopted similar warrantless search regimes, intrinsic dangerousness *is indeed* an absolute prerequisite here.

The government's "conce[ssion] that operating a boarding or training kennel is not an intrinsically or inherently dangerous activity," is therefore decisive, outcome determinative, and fatal to its case. Doc. 89 at 22. This Court should grant the Plaintiffs' summary judgment and reject the government's. Any further analysis is unnecessary.

The government's argument that unregulated dog training and housing could hypothetically pose some theoretical risks misses the mark. As explained above, when the Tenth Circuit used the phrase "if left unregulated," it did so in the context of *Patel*'s inherent dangerousness analysis. Because they are one in the same, the government's concession that training and housing a hunting dog isn't dangerous ends the inquiry altogether. Nevertheless, the government presses ahead and asks this Court to hypothesize what *could happen* if the Kansas Legislature *hadn't* regulated the industry. It argues, based on nothing more than anecdote, that

"unregulated" kennels "carry significant risks." Doc. 89 at 23. The hypothetical risks are "dehydration, malnourishment, or other animal abuse or neglect." Doc. 89 at 23-24. As the Tenth Circuit repeatedly explained though, the "concern for animal welfare is not enough," and given the nature of Mr. Johnson's business, moreover, he is already accountable to the dogs' owners. *Johnson*, 104 F.4th at 175; *ASOF* ¶ 4.

The government also suggests that if, as a hypothetical matter, Kansas had left training kennels unregulated, there could be a theoretical risk of disease transmissions. Doc. 89 at 23-24. The government's newly raised concern isn't grounded in evidence or the legislative record. Indeed, the record *belies* those newly raised concerns. Assessing animal health isn't the purpose of the inspection process. *RSOF* ¶ 75. Inspectors don't test the animals' food and water, nor do they diagnose, test, or treat animal diseases. *RSOF* ¶¶ 74, 75, 78, 86, *ASOF* ¶¶ 17-19. There is no evidence that the regime prevents or controls diseases. *ASOF* ¶ 20. One of the best ways to prevent disease transmission, washing one's hands, isn't required, and neither is wearing gloves. *ASOF* ¶¶ 17-19. If there is a disease outbreak, it's the licensee and their veterinarian who are responsible for responding to the outbreak, not the AFI program. *ASOF* ¶¶ 13-15, *see* 21. The government itself believed that there was no evidence that the regime is even necessary; *ASOF* ¶¶ 6, 7; there's no evidence the regime is efficacious in ensuring animal welfare; *ASOF* ¶ 22; and again, Mr. Johnson is accountable to the dogs' owners. S*ee Johnson*, 104 F.4th at 175.

It's precisely because the government doesn't have empirical evidence that it leans so heavily on Director Thomason's affidavit. But Director Thomason's opinions are not based on empirical data or even firsthand knowledge. She testified that she doesn't know the purpose of the act, she wasn't involved in any of its legislative changes, she doesn't have any knowledge about the efficacy of the regime, *ASOF* ¶¶ 20, 22, 27-30, isn't a properly qualified expert, and her opinions are unreliable, see Doc. 85.

Moreover, the Tenth Circuit's opinion conveyed an unmistakable message that hypothetical justifications—particularly those grounded in anecdote rather than data—are insufficient to turn an ancient and innocuous business like this one into a pervasively regulated one.

No amount of hypothesizing will make training and kenneling dogs comparable to the nuclear power industry, or any of the four industries the Supreme Court deemed pervasively regulated either. Crediting such hypothetical exercises would allow the incredibly narrow exception to "swallow the rule." *Patel*, 576 U.S. at 425.

For example, consider the mining industry, which the Supreme Court considers pervasively regulated because of its *actual* dangerousness. Congress conducted a multi-year *investigation* into the industry and made extensive findings, including that it was "among the most hazardous" industries "in the country." *Donovan*, 452 U.S. at 602. Unlike mining or nuclear power, the legislative record demonstrates training and housing a hunting dog isn't inherently dangerous if left unregulated. Indeed, the Kansas Attorney General and the predecessor to the Animal Health Commissioner *opposed* regulating boarding kennels because there wasn't any reason to do so. *ASOF* ¶¶ 6, 7.

Given the Tenth Circuit's extensive ruling in this case, including its analysis of *Patel,* which again, the government never addresses, the government's repeated citations to out-of-circuit, pre-*Patel* and pre-*Johnson* cases are completely irrelevant. This is especially true since none of the cited cases involve training a hunting dog, and many of them were already considered and rejected by the Tenth Circuit. *See* Doc. 89 at 22-23.

That some operators fail their inspections is insufficient to turn an incredibly narrow exception into the rule. Training kennels—"like practically all commercial premises or services—can be put to use for nefarious ends. But unlike the industries that the Court has found to be closely regulated," training kennels "are not intrinsically dangerous." *See Patel*, 576 U.S. at 424 n.5.

Mr. Johnson trains hunting dogs how to point on command, retrieve game birds, follow his commands, and he uses kennels to house them. For centuries, people have been training and kenneling hunting dogs without warrantless searches. *ASOF* ¶ 5, *RSOF* ¶ 12. In forty-three other states, they do so without being subjected to warrantless searches. *Johnson*, 104 F.4th at 172 n.5. Mr. Johnson's business is nothing at all like operating a nuclear power plant, which the Tenth

Circuit repeatedly pointed to as the quintessential pervasively regulated industry. Nor is it comparable to any of the four industries the Supreme Court deemed pervasively regulated either.

At bottom, "[a]lthough Kansas has an extensive regulatory scheme that applies to boarding or training kennels, such kennels have not been closely regulated historically or by a large number of other jurisdictions and the record does not show that they are inherently dangerous." *See Johnson*, 104 F.4th at 174. On this record, training a hunting dog from a rural homestead is not comparable to the firearms, liquor, automobile dismantling, and underground mining industries—all of which are intrinsically dangerous, and none of which were undertaken from the home—and is not a pervasively regulated industry. This Court should reject the government's over-the-top suggestion that it is.

B. Even if Mr. Johnson's business is "pervasively regulated," the exception still doesn't apply.

1. The government doesn't have a "substantial government interest."

The government can't prove the first *Burger-Johnson* criterion, a "substantial government interest" that justifies the training and handling regulatory regime. *Johnson*, 104 F.4th at 174-75 (stating exception's first criterion). Properly understood, the "evidence establishing a real need" to regulate, *id.* at 175, requires legislative "findings [] based on extensive evidence" of serious and dangerous problems for that particular industry, *Donovan*, 452 U.S. at 602 n.7; *Johnson*, 104 F.4th 162 (describing *Donovan*); *see also Johnson*, 104 F.4t at 160 (evidence of substantial interest in regulation of firearms came from "congressional findings"). Unlike Congress, the Kansas Legislature didn't conduct a comparable investigation into training kennels, it didn't conclude that training and kenneling a dog was among the most hazardous industries in the country, or that it kills or disables people daily. *Donovan*, 452 U.S. at 602; *Johnson*, 104 F.4th 162 (describing *Donovan*). Before Kansas started regulating boarding kennels or training kennels, *RSOF* ¶ 12, the Kansas Legislature didn't produce "legislative statements and reports as support for the proposition that" trainers and handlers were a "serious problem," that training facilities were "a significant contributor to the problem," and that "regulating" trainers would "reduce" the

serious problem. *Johnson*, 104 F.4th at 164, 175 (describing *Burger*). Again, the legislative history proves just the opposite. The Attorney General and Defendant's predecessor both testified that regulating boarding kennels was unnecessary. *ASOF* ¶¶ 6, 7. In 2018, Kansas dramatically changed the entire nature of the regime. *ASOF* ¶¶ 11, 23-25. Neither the AFI program nor the Pet Animal Advisory Board suggested or proposed the 2018 amendments. *ASOF* ¶¶ 11. The changes waste time, money, and government resources as well. *ASOF* ¶ 24.

Without any such legislative findings, the government is reduced to attaching "news coverage" involving *out-of-state* issues. Doc. 89 at 25.[2] Setting aside the fact they're inadmissible, random news articles from other states do not constitute the type of credible evidence required by the Tenth Circuit, as explained above.

The government is also reduced to attacking an argument the Plaintiffs have not made, that kennels "should be exempted from inspections." *See* Doc. 89 at 26. The Plaintiffs aren't saying they should be exempted from inspections; they're saying that for purposes of a Fourth Amendment analysis, where the government has the burden of proof, for an industry-specific, fact-dependent, incredibly narrow, and tightly circumscribed exception, the government can't prove it has a *substantial government interest* as articulated by the Tenth Circuit, *i.e.*, proving a "*real need to regulate*." *Johnson*, 104 F.4th 175 (emphasis added).

Just like it has done twice before, the government mistakenly relies on *Kerr v. Kimmel*, 740 F. Supp. 1525, 1529 (D. Kan. 1990), for the proposition there's a "legitimate government purpose of advancing quality control and humane treatment of animals." Doc. 89 at 26. The Tenth Circuit has *already* rejected *Kerr*'s applicability, explaining it "do[es] not show a need for regulation of the boarding- or training kennel industry." *Johnson*, 104 F.4th at 175 n.9. What's more, in *Kerr*, a case involving dog *breeding—not training or handling*—the district court engaged in a *Pike v. Bruce Church, Inc.* Commerce Clause analysis and held there was a "legitimate local public interest" under a *rational basis standard*. 740 F. Supp. at 1529. This isn't a rational basis case, it's not a dog

[2] The articles are hearsay, and the Plaintiffs have objected to them.

breeding case, and a legitimate public interest under the rational basis standard is not the same thing as a substantial government interest under the Fourth Amendment. Besides, *Kerr* pre-dated the regulation of both the boarding and training kennel industry in Kansas. The Tenth Circuit also rejected the government's other argument that all animal-related industries share the "same substantial government interest[.]" Doc. 89 at 26. *Johnson*, 104 F.4th at 175 n.9.

The government's claim that "one only needs to look at the number of complaints" to see that "pet owners are not a substitute for regulation" is just as misguided. Doc. 89 at 26. According to the government's investigator, complaints are deemed "founded" even if the individual isn't breaking any rules, regulations, or laws. *ASOF* ¶ 115. Besides, that some people take advantage of a regulatory regime does not prove there's a "need for regulation." *Johnson*, 104 F.4th at 175 n.9.

Since the government's substantial interest needs to exist at the time of regulation, not rationalized after-the-fact, *Johnson,* 104 F.4th at 175, the government's suggestion that some people treat their pets "almost like children" is irrelevant. *See* Doc. 89 at 27. It's also based on anecdotes from Director Thomason, who, as the Plaintiffs explained before, doesn't know the purpose of the act, wasn't involved in any of its legislative changes, doesn't have *any* knowledge about whether the regime *actually* works, *ASOF* ¶¶ 20, 22, 27-30, isn't an expert, and her opinions are unreliable, *see* Doc. 85. On this issue, the government's citation to *Rush v. Obledo*, 756 F.2d 713 (9th Cir. 1985) is misplaced as well. That some people treat their animals "*almost like children*" doesn't mean the government's "vital" and "urgent interest" in protecting children is the same for pets. And in any event, the Tenth Circuit has already concluded that "concern for animal welfare is not enough." *Johnson*, 104 F.4th at 175. Because the exception is industry-specific, fact-dependent, incredibly narrow, and tightly circumscribed, the analogy is particularly flawed. It also predates *Patel*.

On these facts, there isn't a "*real need*" to regulate. *See Johnson* 104 F.4th at 175 (emphasis added). Training and kenneling hunting dogs isn't dangerous, it's nothing like the nuclear power industry, and it doesn't pose a serious risk to the public. *ASOF* ¶¶ 1, 5-7, 31-33, *RSOF* ¶ 12. There's no articulable factual basis for conducting routine inspections. *ASOF* ¶ 34. Inspectors don't test

the animals' food and water, nor do they diagnose, test, or treat animal diseases. *RSOF* ¶¶ 74, 75, 78, 86, *ASOF* ¶¶ 17-19. There is no evidence that the regime prevents or controls diseases. *ASOF* ¶ 20. One of the best ways to prevent disease transmission, washing one's hands, isn't required. *ASOF* ¶¶ 17-18. Neither is wearing gloves. *ASOF* ¶ 19. If there is a disease outbreak, it's the licensee and their veterinarian who are responsible for it, not the program. *ASOF* ¶¶ 13-15, *see* 21. In the event of a major disease outbreak, Commissioner Smith's quarantine powers exist apart from the Pet Animal Act. *ASOF* ¶ 12.

What's more, the government's stated interest in preventing cruelty, abuse or neglect, Doc. 89 at 25; PTO at 18, *has already been rejected by the Tenth Circuit*. *Johnson*, 104 F.4th at 175 ("concern for animal welfare is not enough"). Besides, there's no evidence that the regime is efficacious in that regard, *ASOF* ¶ 115. If the program becomes aware of unlicensed activities, the investigator normally turns the cases over to their respective local jurisdictions for prosecution under the municipal code, rather than prosecute violations of the Pet Animal Act. *ASOF* ¶ 16.

That the Kansas Legislature doesn't *mandate* inspections undercuts *any* argument there's a "substantial government interest." KSA § 47-1709(b) ("may inspect"). Unlike other businesses, moreover, Mr. Johnson is accountable to the dogs' owners. S*ee Johnson*, 104 F.4th at 175 (Tenth Circuit crediting argument that "training kennels are accountable to dog owners" because customers "would likely take their business elsewhere if their dogs were mistreated."); *id.* at 169 (owners of the dogs housed in a boarding or training kennel "have a much stronger, and more personal, interest than any government inspector" in the wellbeing of their dogs.); *see also*, *ASOF* ¶¶ 1-4, 33, 36-37.

The government's theoretical interests, rationalized after-the-fact, aren't supported by the evidence, and don't establish the first *Burger-Johnson* criterion.

2. Surprise warrantless searches aren't "necessary."

The government can't prove the second *Burger-Johnson* criterion either, that warrantless searches are "*necessary*." *Johnson*, 104 F.4th at 176 (emphasis added); *Patel*, 576 U.S. at 426. The "necessity of warrantless searches is not apparent from the face of the Kansas regulations,"

Johnson, 104 F.4th at 176, and the government doesn't have any "evidence from practice" that surprise warrantless searches are the "*only*" way to enforce the regulatory regime. *Johnson*, 104 F.4th at 176-177 (explaining government's evidentiary burdens) (emphasis added).

What's more, the government's argument that warrantless searches are "necessary" is based on a misunderstanding about how administrative warrants work. The government mistakenly believes that an "administrative warrant" "can only be issued after there is probable cause to believe that a violation has already occurred." Doc. 89 at 30; id. at 2. ("Warrants can only be issued pursuant to probable cause that a violation has occurred"). Therefore, the government insists, requiring an administrative warrant would "completely frustrate the state's legitimate interest in preventing violations." Doc. 89 at 2; id at 30. That fundamental error causes the government's arguments to miss the mark. As the Tenth Circuit explained, the Supreme Court in *Camara v. Mun. Ct. of City & Cnty. of San Francisco*, 387 U.S. 523 (1967), "declined to impose a requirement that warrants may be issued only upon probable cause to believe a particular dwelling contains a violation of the code. Rather, probable cause to issue a warrant must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards may be based simply on the passage of time, the nature of the building (e.g., a multifamily apartment house), or the condition of the entire area and need not depend upon specific knowledge of the condition of the particular dwelling." *Johnson*, 104 F.4th at 158. The Supreme Court reiterated that principle in *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320-321 (1978) and again in *Patel*, 576 U.S. at 421; *see id.* at 426.

Just as in *Marshall*, there is no evidence that requiring an administrative warrant would impose serious burdens on the system or the courts, would prevent inspections, would make inspections any less effective, "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 get a warrant. *Patel*, 576 U.S. at 423. Given the government's admission that the AFI program has never

even tried to obtain an administrative warrant, and that Director Thomason doesn't know how long it would take to secure an administrative warrant, the argument that warrantless searches are the only workable solution rings hollow. *ASOF* ¶¶ 10, 107-112.

There is nothing specific or unique about training and housing a hunting dog that necessitates warrantless searches either. It's not dangerous, it doesn't pose a risk to the public, it doesn't raise an urgent or even serious risk of illegal activity, and it's nothing like the mining or nuclear power industries. *ASOF* ¶¶ 1, 5-7, 31-33; *RSOF* ¶ 12. The government doesn't *need* to conduct surprise warrantless searches because CFK is *already* inspected annually by a veterinarian, and it *already* operates under a veterinary plan of care. *ASOF* ¶¶ 1, 32, *see* 21. If there's an animal-health issue, CFK's veterinarian diagnoses and treats them, not the government. *RSOF* ¶¶ 74, 75, 78, 86, *ASOF* ¶¶ 1, 13-15, 17-19, 21. If Mr. Johnson and his veterinarian don't take their responsibilities seriously, both will lose their livelihoods. *See Johnson*, 104 F.4th at 175 (crediting accountability argument); *ASOF* ¶¶ 1-4, 33, 36-37 (Mr. Johnson is accountable to the dogs' owners). That the Kansas Legislature doesn't *mandate* inspections undercuts *any* argument that they're necessary. KSA § 47-1709(b) ("may inspect"). That the government asks a licensee for their "preferred hours" for inspections likewise undercuts their necessity argument. *ASOF* ¶ 39. That the government has the ability to search with a warrant fatally undercuts the 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's other argument, that some violations are easy to conceal, has *already* been rejected by the Tenth Circuit. *Johnson*, 104 F.4th at 176, (a "number of violations would be very difficult to quickly correct or conceal"); *see also Marshall*, 436 U.S. at 316 (rejecting government's arguments *even though* violations "could be corrected and thus escape the inspector's notice"). It's also factually incorrect. In the 15 minutes or less it would take to secure a warrant, *see Missouri v. McNeely*, 569 U.S. 141, 173 (2013), a licensee can't repair rusty kennels, clean up animal waste, mow weeds, manufacture the requisite records, fix rotten posts, and the like; and a number of violations would be readily apparent. *ASOF* ¶¶ 55-60, 63-83, 85-87, 89-90,

92, 94, 97-101, 103-106; *RSO*F ¶¶ 74, 78, 85, 87; *Free Speech Coal.*, 825 F.3d at 153–54, 172 (warrantless inspections of records were unnecessary in light of testimony that it's unlikely someone could assemble the records on short notice); *see also Johnson*, 104 F.4th at 176 (other violations "would be very hard to establish even in a surprise inspection"); *ASOF* ¶¶ 61, 96; *RSOF* ¶¶ 78, 79, 83, 86. The Tenth Circuit also explained that if the "violations are significant and chronic—the sort of abuse the law is most concerned about—remedying them is likely not possible during the time it would take to get a warrant and the effects on the dogs would be readily apparent. Inspectors could likely detect violations just by looking at the condition of the dogs." *Johnson*, 104 F.4th at 176; *see ASOF* ¶¶ 62, 84, 86-92, 93-95, 102-103; *RSOF* ¶¶ 74, 78, 83, 85-87.

Besides, "to establish that warrantless searches are necessary, the government needs to show more than just that violations *could* be concealed in the time it takes to obtain a warrant after a business refuses the inspection." *Id.* at 176-177 (emphasis in original). "It *needs evidence from practice* that the regulations could be effectively enforced *only* through a regime that relies on surprise warrantless inspections." *Id.* at 177 (emphasis added). The government doesn't have the requisite evidence. Before 1991 or 1996, boarding or training kennels weren't inspected at all. *RSOF* ¶ 12. The Attorney General and Defendant's predecessor testified that regulating and inspecting boarding kennels was unnecessary. *ASOF* ¶¶ 6, 7. From 1996 to 2018, training kennel operators were provided advance notice of the inspections. *ASOF* ¶¶ 23, 25-26. For more than thirty years, Kansas courts have been able to issue an administrative search warrant. *See City of Overland Park v. Niewald*, 258 Kan. 679 (1995). In 2012, the Legislature provided for an administrative warrant process specifically for the AFI program, which was supported by the then-Commissioner. *ASOF* ¶¶ 8, 9. Yet, the government has *never* sought an administrative warrant for routine inspection. *ASOF* ¶¶ 10; *see also ASOF* ¶¶ 108-112. Since 2012, no boarding or training kennel licensee has demanded an administrative warrant either. *ASOF* ¶ 107. That the government has the ability to search with a warrant, but has never used one, fatally undercuts the argument that searching without a warrant is necessary. *Mimics,* 394 F.3d at 844–45. From 2018 until now, there have been no refusals of entries for boarding and training kennel licensees. *ASOF* ¶ 113. There is

no evidence that any licensees have refused to produce records. *ASOF* ¶ 114. The government cannot prove "that the frequency of owners refusing to consent to inspection would make it unfeasible to obtain the number of *ex parte* warrants necessary to deal with such licensees," or that "warrants cannot adequately catch violations by uncooperative licensees." *Johnson*, 104 F.4th at 177; *Liberty Coins, LLC v. Goodman*, 880 F.3d 274, 290 (6th Cir. 2018) (warrantless records inspections unnecessary where only one dealer in three years had refused an inspector's records inspection).

As both the Supreme Court and the Tenth Circuit made plainly clear, whether warrantless searches are "necessary" is an industry-specific and fact-dependent inquiry. As such, the government's reliance on an outdated, out-of-circuit funeral parlor case from Pennsylvania, decided before *Patel*, is just as misplaced as its other citations. Doc. 89 at 29.

The government also makes the particularly strained argument that "boarding or training kennels are more akin to doggie daycares at which pet owners leave their dog for a day, or several days, at a time" and therefore should be treated like pawn shops or the automobile dismantling industry. Doc. 89 at 28-29. The analogy is particularly flawed. Unlike pawn shops and dismantling operations, there's no concern that dogs are being stolen and fenced at training kennels—indeed, dogs are returned to their owners. If anything, a doggie daycare is more akin to a hotel, which the Supreme Court has already said isn't pervasively regulated, and even if it were, warrantless searches aren't necessary.

The government cannot establish the second *Burger-Johnson* criterion, that warrantless searches are "*necessary*." *Johnson*, 104 F.4th at 176 (emphasis added); *Patel*, 576 U.S. at 426.

3. There isn't a "constitutionally adequate substitute for a warrant."

As to the third criterion, the Tenth Circuit assumed but didn't decide that the regime provides a constitutionally adequate substitute for a warrant. *Johnson*, 104 F.4th at 174-177 n.7. It doesn't. The government's surprise warrantless searches are sporadic, irregular, and random. *RSOF* ¶¶ 32. While the regulations purport to limit inspections to specified windows, inspectors can in fact search a property at any time with the program manager's approval, or by

recharacterizing the search as a "status check." *RSOF* ¶¶ 32. Lesser performing kennels can be inspected less often than better performing kennels. KAR § 9-18-9(b). The inspector's ability to search *wherever* and *whenever* it wants isn't properly circumscribed. *ASOF* ¶¶ 40-43. Considering the Fourth Amendment's history, purpose, and reasons for including a warrant requirement—including forever stamping out the suspicionless search, *see Boyd v. United States*, 116 U.S. 616, 625-630 (1886)—the regime doesn't provide a constitutionally adequate substitute for a warrant.

C. The regime violates the Fourth Amendment under a *Jones-Jardines* analysis.

This Court didn't previously address the Plaintiffs' property-based physical intrusion claims raised under the *United States v. Jones*, 565 U.S. 400 (2012) and *Fla. v. Jardines*, 569 U.S. 1 (2013) framework. *See* Doc. 38. On appeal, the Tenth Circuit didn't address a property-based analysis on the merits, instead choosing to "analyze the issue here in conformance with controlling precedent [e.g. *Patel*]." *Johnson*, 104 F.4th at 167. Because the government didn't move for summary judgment on this issue, but the Plaintiffs did, Doc. 87 at 38-39, this Court should grant the Plaintiffs' summary judgment on their property-based theory.

D. The licensing and warrantless search regime is unreasonable.

The licensing and warrantless search regime is patently unreasonable and unconstitutional. The searches are irregular, random, nonconsensual, suspicionless, without notice, and warrantless. Demanding a warrant is punishable. *ASOF* ¶¶ 49-51, 52-54. The regime's lack of any meaningful precompliance review process is reason enough to declare the regime unconstitutional. *Patel*, 576 U.S. at 420–21; *Airbnb, Inc. v. City of New York*, 373 F. Supp. 3d 467, 493-95 (S.D.N.Y. 2019); *Planned Parenthood of Southwest and Central Fla. v. Philip*, 194 F.Supp. 3d 1213, 1221 (N.D. Fla. 2016). If the licensee or the "designated representative" isn't available for the warrantless search within thirty minutes, moreover, the government assesses an automatic no-contact fee, which triggers more warrantless searches. *ASOF* ¶ 44-46, 49; *see also ASOF* ¶¶ 47, 48. Asking the inspector to come back at a more convenient time is punishable. *ASOF* ¶ 116.

Under the government's surprise warrantless search regime, which includes the designated representative, thirty-minute rule, and automatic no contact penalties, neither the Plaintiffs nor

other law-abiding Kansans have the meaningful protections the Fourth Amendment is supposed to afford. Instead, it permits the government to ignore the very reasons our Founders insisted on the Fourth Amendment to begin with: that a "man's house is his castle," *Paxton's Case* (Mass. 1761) (argument by James Otis); that property rights are sacred, natural rights, *Entick v. Carrington*, 19 How. St. Tr. 1029 (C.P. 1765); that the "power" to conduct general searches is "dangerous to freedom, and expressly contrary to the common law, which ever regarded a man's house, as his castle, or a place of perfect security," John Dickinson, *Letters from a Farmer in Pennsylvania*, Letter No. 9, 86 (1768); and that it was meant to forever stamp out the suspicionless search, *see Boyd*, 116 U.S. at 625-630. Because the Fourth Amendment provides "at a minimum the degree of protection it afforded when it was adopted," *Lange*, 594 U.S. at 309, the regime is unreasonable and unconstitutional. *Jones*, 565 U.S. at 411; *see also*, *Gonzalez*, 145 S. Ct. at 529, 531-532 (Sotomayor, J., respecting denial of certiorari) (reasonableness is based on notion that "Fourth Amendment must at a minimum provide those protections that the common law guaranteed"); *Steagald v. United States*, 451 U.S. 204, 217 (1981) (Founding-era common law "instructive in determining the types of searches the Framers of the Fourth Amendment regarded as reasonable").

II. The regime violates the unconstitutional conditions doctrine.

Because the warrantless search regime violates the Fourth Amendment, as shown above, conditioning the mandatory annual license renewal on a Fourth Amendment waiver violates the unconstitutional conditions doctrine as well. *See Johnson*, 104 F.4th at 177; *id.* (The "right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the federal Constitution.") (cleaned up); Doc. 87 at 40.

Conclusion

The licensing and warrantless search regime is patently unreasonable and unconstitutional for the reasons set forth in the Plaintiffs' motion for summary judgment, Doc. 87, and for all of the reasons above. Because there are no genuine disputes about the material facts, this Court should grant the Plaintiffs summary judgment on all their claims.

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Certificate of Service

The undersigned certifies that on March 21, 2025, the above document(s) were filed using the CM/ECF system, which will send notification of such filing to all participants.

/s/ Samuel G. MacRoberts
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