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' Memorandum in Support of their Motion for Summary Judgment; Exhibits A-Y; Index of Exhibits; Certificate of Service. Oral Argument Requested

Plaintiffs' Memorandum in Support of their Motion for Summary Judgment

Scott Johnson is an award-winning and nationally recognized hunting dog trainer and handler. He runs Covey Find Kennel from the rural homestead he shares with his wife, Harlene Hoyt. Government officials don't have any concerns with Covey Find Kennel. Nor should they. Mr. Johnson is successful because he treats his clients' dogs right. His livelihood depends on it and it's the right thing to do. Nonetheless, government officials conduct surprise warrantless searches at the Johnson-Hoyt homestead. The searches are suspicionless, random, and demanding the government first secure a warrant is a crime. Even though the warrantless searches are unpredictable and unannounced, the government will automatically penalize Mr. Johnson if he or his "designated representative"—Ms. Hoyt—is not available for the warrantless search within thirty minutes. Mr. Johnson can't run CFK without a license, but the government conditions the annual license renewal on a Fourth Amendment waiver.

All of that is authorized by the Kansas Pet Animal Act, KSA § 47-1701, *et seq.* and its associated regulations, KAR § 9-18-4, *et seq.*—and it is unconstitutional. *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: 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 pervasively regulated industry exception—a privacy-based one—doesn't apply 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). 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).

Statement of Facts

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

1. Scott Johnson trains and handles hunting dogs for a living. Doc. 82, Pretrial Order (PTO) 2.a.viii, 2.a.xi, 2.a.xv; Doc. 1 ¶¶ 3, 4, 11, 22-25.[1]

2. Mr. Johnson is nationally recognized and has won numerous awards. PTO 2.a.xi; Ex. H, Johns. Dec. ¶ 5.d. (listing additional awards).

3. Mr. Johnson has been around dogs his entire life, he earns his living by training and handling dogs, and he has no incentive or desire to mistreat them. PTO 2.a.xxviii.

4. Mr. Johnson is successful because he treats dogs right; his livelihood depends on it, and he believes it's the right thing to do. ¶¶ 4, 22-25, 36-49; Ex. H, Johns. Dec.¶ 9.

[1] Except where noted, paragraph citations refer to Doc. 1, the Complaint. Mr. Johnson and Ms. Hoyt have each verified the complaint, with some exceptions. *See*, Ex. H, W.

5. Mr. Johnson operates Covey Find Kennel (CFK) from the rural homestead he jointly owns with his wife, Harlene Hoyt. PTO 2.a.x, 2.a.xii., 2.a.viii; 2.b.i; Ex. B-F, Photos.

6. Mr. Johnson owns CFK, a limited liability company, and Commissioner Smith issued the boarding or training kennel operator license to Mr. Johnson and CFK. PTO 2.a.x.

7. CFK's kennels are situated entirely inside a fence, a short distance from the Johnson-Hoyt house and their "shop," their "home away from home," as Ms. Hoyt describes it. ¶¶ 28-29. Both treat the shop as part of their home. ¶ 29. PTO 2.b.i; Ex. B-F, Photos.

8. The entire property surrounding the kennels is fenced to prevent unwanted visitors or intrusions, and for containment of the dogs. ¶¶ 31, 33; Ex. B-F, Photos.

9. Large trees and tall pampas grass comfort the dogs and provide additional privacy. ¶¶ 31, 34-35 (with exception); Ex. B-F, Photos.

10. The only way to access the kennels is to pass through the house, shop, or gates. ¶¶ 32, 34-35 (with exception); Ex. B-F, Photos.

11. The homestead isn't open to the public and clients must have an appointment before visiting. ¶¶ 33, 106-107.

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

12. Mr. Johnson accepts puppies as young as six months old and trains the dogs on—among other things—basic obedience commands such as "whoa" and "here." PTO 2.a.xviii.

13. Mr. Johnson prepares, develops, and implements a bird-dog training program in consultation with the dogs' owners. The duration of the training program is a collaborative process, and Mr. Johnson updates the owners as appropriate or when requested. Some owners send multiple dogs to the training program; some owners send their dogs to the training program for weeks, months, or years on end; and some are trained and handled at the kennel for nearly their entire lives. PTO 2.a.xv.

14. Mr. Johnson trains dogs to develop their association skills, and their pointing and retrieving abilities, for their first bird hunting season. PTO 2.a.xix.

15. After a season of bird hunting and practical field experience, Mr. Johnson usually begins the more advanced training phase. This includes steadiness on point, backing, and retrieving; and correcting issues such as a reluctance to honor, hold point, or where the dog exhibits gun-shy tendencies. PTO 2.a.xx.

16. Mr. Johnson also provides training that includes water work and upland discipline. PTO 2.a.xxi.

17. Mr. Johnson trains other people's dogs. PTO 2.a.xv.

18. Mr. Johnson's gun dog training program usually begins in May, in which he accepts as many as 16 dogs for a 6- to 8-week program. PTO 2.a.xxii.

19. Mr. Johnson's field-trial training and conditioning program usually runs from June through August for field trial dogs. PTO 2.a.xxiii.

20. Mr. Johnson usually spends December and January training dogs in the Flint Hills, carefully transporting some of the dogs while leaving others at the homestead. PTO 2.a.xxiv.

21. Mr. Johnson specializes in training and campaigning Brittanys but works field dogs from all sporting breeds. PTO 2.a.xxv.

22. Mr. Johnson's primary business is to train, show, and handle dogs in field trials—essentially competitive events for dogs. The field-trial seasons run from February through April and September through mid-December. Field trials are all around the country and Mr. Johnson cannot participate in them without traveling extensively. For these competitions, he carefully transports some of the dogs while leaving others at the homestead. Sometimes Ms. Hoyt joins him on these trips; other times she meets Mr. Johnson to visit or help him. PTO 2.a.xxvi.

23. Where appropriate, like when Mr. Johnson and Ms. Hoyt travel with each other, Mr. Johnson has someone help with the caretaking responsibilities back at the homestead. PTO 2.a.xxvii.

24. Mr. Johnson's helpers don't have access to all of CFK's records or the entire property, and they don't have the authority to represent Mr. Johnson or CFK. ¶ 118.

25. 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.

26. 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); KAR § 9-18-21.

27. While in the field, Mr. Johnson has limited cellular service. Ex. H, Johns. Dec. ¶ 10. It takes a significant amount of time to round up the animals, return to the vehicle, safely load the animals into the trailer, and drive back to the homestead. ¶¶ 38, 45, 122.

C. The licensing and warrantless search regime: an overview.

28. The Kansas Pet Animal Act regulates eight animal-related businesses and imposes licensing and warrantless inspection requirements. KSA§ 47-1701, *et seq*., KAR § 9-18-4, *et seq*.

29. Commissioner Smith oversees, implements, and enforces the Animal Facilities Inspection Program, which includes the licensing and search regime at issue here. PTO 2.a.i-iii.

30. Sasha Thomason is the AFI Program Director. She oversees its day-to-day operations, including routine inspections of licensed boarding and training kennels. PTO 2.a.iv-v.

31. Starting in 1972, the Kansas Pet Animal Act only regulated animal dealers, pet-shop operators, pounds or animal shelters, and research facilities. PTO 2.a.xliv. Kansas started regulating boarding kennels in 1991 and training kennels in 1996. PTO 2.a.xlv, 2.a.xxix.

32. Operating a boarding or training kennel requires a license. KSA §§ 47-1723, 1715(a); PTO 2.a.xlvi. An applicant obtaining an initial license must "consent" to the "right of entry and inspection" of the "premises" sought to be licensed or permitted. KSA § 47-1709(a); PTO 2.a.xlvi. The license application "shall conclusively be deemed to be the consent of the applicant to the right of entry and inspection of the premises sought to be licensed." KSA § 47-1709(a); PTO 2.a.xlvi. If an applicant refuses the initial inspection, the license is denied. KSA § 47-1709(a); PTO 2.a.xlvi.The government is permitted to notify the applicant when the initial inspection will occur.

KSA § 47-1709(a); PTO 2.a.xlvi. After the initial inspection, acceptance of the license "shall conclusively be deemed to be the consent of the licensee" "to the right of entry and inspection of the licensed or permitted premises." KSA § 47-1709(b); KAR 9-18-8, 9; PTO 2.a.xlvi. Ex. I, Wash. Dep. 163:15-19; Ex. J, Blank Licensing Form. Once licensed, notice of the warrantless searches "shall not be given." KSA § 47-1709(b); KAR § 9-18-9(g); PTO 2.a.xlvii.

33. The inspection process typically lasts between an hour and two hours. Ex. I, Wash. Dep. 17:16-17; Ex. K, Dem. Dep. 79:13-15.

34. Inspectors don't ask for consent before starting the inspection. Ex. I, Wash. Dep. 164:11-22; *see* Ex. K, Dem. Dep. 67:6-25.

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

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

37. The AFI Policy and Procedure Manual gives inspectors a non-exhaustive list of potential violations, examples of violations, and instructions for how to determine whether a violation exists, called the "Line-Item Quick Reference Guide." Ex. L, AFI Manual at OAG1224-1252.

38. Inspectors also have a "clipboard inspection checklist," which is essentially a condensed version of the "line-item quick reference guide." Ex. I, Wash. Dep. 74:13-25; Ex. K, Dem. Dep. 81:17-20; Ex. M, Clipboard Inspection Checklist.

39. The purpose of the line-item quick reference guide and clipboard inspection list is to determine whether there's a violation of the regulations set forth in KAR 9-18-4, *et seq*. Ex. L, AFI Manual at OAG1224 ("Understanding Regulations"); Ex. M, Clipboard Inspection Checklist at OAG151 (checklist is "a guide when conducting walk-through inspection").

40. 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. I, Wash. Dep. 40:10-20; *see also* KAR § 9-18-8.

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

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

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

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

d. Kitchens. Ex. K, 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. K, Dem. Dep. 61:9; *see also* Ex. I, Wash. Dep. 41:11-17

f. Sheds. Ex. I, Wash. Dep. 17:10-11; *see also* Ex. I, 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. K, Dem. Dep. 62:19-22; Ex. I, 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. K, Dem. Dep. 62:15-17 (explaining the meaning of "premises").

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

42. Inspectors review the licensee's records. Ex. L, AFI Manual at OAG1213, 1214; *see also* Ex. K, Dem. Dep. 74:18-19; Ex. I, Wash. Dep. 52:12-13; KSA § 47-1701(dd)(1)(C); KSA § 47-1712(a)(13); KAR § 9-18-7; KAR § 9-18-8.

43. The records inspection varies according to the licensee, but includes reviewing acquisition records, disposition records, veterinary care forms, medical records for individual animals, exercise plans, foster home agreements, records documenting the number of animals in foster care, including their age and altered status, and spay/neuter records. Ex. L, AFI Manual at OAG1214; *see also* Ex. I, Wash. Dep. 52:11—53:8 (describing records inspection process); Ex. K, Dem. Dep. 74:18-24 (same).

44. If the inspector doesn't have an updated record on file, they request a copy from the licensee and upload them into their computer system. Ex. K, Dem. Dep. 75:4-11.

45. Inspector Washee always inspects records. Ex. I, Wash. Dep. 52:6-10,

46. Inspector Washee always inspects a licensee's contingency plan, even if she's inspected it before. Ex. I, Wash. Dep. 53:9-25; KAR § 9-18-18.

47. The inspector finishes by tallying the number of violations and their severity level—A through C—and how many animals were impacted by each violation, to determine the "final inspection result." Ex. L, AFI Manual at OAG1216-1218.

48. The final inspection result is supposed to be used to determine whether the facility is rated 1, 2, or 3. Ex. K, Dem. Dep 47:13-25—48:1-2; *see also* Ex. L, AFI Manual at OAG1207.

49. The licensee passes the inspection if they have four or less level A violations. Ex. L, AFI Manual at OAG1216; Ex. K, Dem. Dep. 50:1-7.

50. The licensee passes the inspection if they have some level B violations, as long as the point total is four or less. Ex. L, AFI Manual at OAG1216; Ex. K, Dem. Dep. 50:1-7.

51. The licensee fails the inspection if they receive five points. Ex. L, AFI Manual at OAG1216; Ex. I, Wash. Dep. 75:25—76:1-9.

52. Over the years, some level A violations have moved to level B, and the number of level C violations have increased. Ex. I, Wash. Dep. 82:8-10, 16-20.

53. The violation severity levels (A through C), violation point system (1 through 5), and severity scale (using the percentage of animals impacted), are not set by statute. *See* KSA § 47-1701, *et seq*.

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

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

56. 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.

57. The Animal Facilities Inspection program didn't suggest or propose eliminating the ability to provide advance notice to licensees. Ex. N, Smith Dep. 22:23-25—23:1-8.

58. The Pet Animal Advisory Board didn't suggest or propose eliminating the ability to provide advance notice. Ex. N, Smith Dep. 23:9-19.

a. The Pet Animal Advisory Board is a statutorily required and government-appointed board. Ex. N, Smith Dep. 23:9-18.

b. Commissioner Smith considers the Board's "guidance" "very beneficial to our program" and takes their suggestions "very seriously." Ex. N, Smith 23:19-25.

59. According to the regulation's text, the surprise warrantless searches occur every 3-12 months, every 9-18 months, or every 15-24 months, KAR § 9-18-9(b)(1)-(3), depending on the previous inspections. PTO 2.a.xlvii.

60. Despite the regulation's text, inspectors may search outside the inspection window, with the program manager's approval. Ex. K, Dem. Dep. 53:23—54:1-10; 57:1-8; Ex. P, Thom. Dep. 161:22—162:12; Ex. N, Smith 32:15—33:3; Exhibit L, AFI Manual at OAG1207.

61. 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. K, Dem. Dep. 48:13-20 (program director may keep a passing licensee at a two-rating); Ex. L, AFI Manual at OAG1207 (describing ratings and inspection schedules).

62. Despite the regulation's text, inspectors are able to conduct warrantless "status check" searches even if a licensee has passed their routine inspection. Ex. K, Dem. Dep. 57:9-11.

63. The warrantless "status check" searches can be done outside the inspection window as well. Ex. K, Dem. Dep. 55:19—56:3; 57:2-4.

64. 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.

65. Designated representatives are required to understand a licensee's "protocols, procedures at the facility." Ex. I, Wash. Dep. 172:14-22.

66. Designated representatives must fulfill the same role as a licensee. Ex. I, Wash. Dep. 176:22—177:1.

67. Designated representatives must have access to, and produce, the licensee's records. Ex. I, Wash. Dep. 172:23—173:6.

68. 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. I, Wash. Dep. 173:2-17.

69. A single no-contact event may be sufficient to revoke a person's license, Ex. L, 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. L, AFI Manual at OAG1210.

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

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

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

73. If a licensee told an inspector to "get a warrant" before conducting an inspection, it's considered a "refusal" of entry. Ex. K, Dem. Dep. 167:18-23, 174:7-18; PTO 2.a.xliii.

74. If a licensee told an inspector they couldn't go inside their home, it's considered a "refusal." Ex. K, Dem. Dep. 66:6-13.

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

76. A "refusal" is sufficient to revoke a license. Ex. K, Dem. Dep. 167:7-11; PTO 2.a.xliii; Ex. I, Wash. Dep. 165:11-14.

77. The licensing form provides a licensee to list their "preferred hours." Ex. N, Smith Dep. 16:16-21.

78. Kennels must be inspected by a veterinarian annually. KSA § 47-1701(dd)(1)(A); *see* PTO 2.a.xiv; Ex. Q, Blank Vet Care Form at OAG406.

79. Kennels must operate under a veterinary medical care plan. KSA § 47-1701(dd)(1); KAR § 9-18-21; PTO 2.a.xiii; Ex. Q, Blank Vet Care Form at OAG406.

80. 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.

81. 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.

82. 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.

D. Training and kenneling hunting dogs is not dangerous.

83. Training and kenneling dogs has been around for centuries. Ex. H, Johns. Dec. ¶ 8.

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

85. When asked for the factual basis for the contention that training and kenneling dogs poses a risk to the public's welfare, the government first stated it was "purely a legal analysis." *See* Ex. R, Def. Suppl. Ans. to Interrog. at Rog. 2.

86. After the Tenth Circuit's ruling, the government contends that "if left unregulated," it "would pose a risk to public welfare, namely, the public and government the interest in the health, safety, and welfare of animals," "including but not limited to preventing the spread of disease amongst domestic animals and from animals to humans," "ensures that animals are treated humanely, safely, and hygienically," and contends a substantial government interest in "protecting domestic animals from cruel and inhumane conditions." Ex. R, Def. Suppl. Ans. to Interrog. at Rog. 2, and Rog. 1.

87. Inspectors aren't permitted to diagnose disease in animals. Ex. P, Thom. Dep. 31:2-6; Ex. K, Dem. Dep. 101:6-14; *see also* Ex. P, Thom. Dep. 167:1-6.

88. Inspectors don't test animals for contagious diseases. Ex. P, Thom. Dep. 31:11-13; Ex. K, Dem. Dep. 99:8-22; Ex. I, Wash. Dep. 69:22—70:1.

89. Inspectors don't test animals for non-contagious diseases. Ex. P, Thom. Dep. 31:14-16; Ex. K, Dem. Dep. 99:8-13; Ex. I, Wash. Dep. 69:22—70:1.

90. Inspectors don't test dogs for rabies, salmonella, influenza, hepatitis, ring worm, HIV or Ebola. Ex. I, Wash. Dep. 69:23—70:12; Ex. K, Dem. Dep. 99:14-22.

91. Inspectors are "not going in as, you know, veterinarians checking the health of every animal. That's not the purpose of our inspections." Ex. I, Wash. Dep. 68:13-16.

92. Inspectors don't treat animals. Ex. P, Thom. Dep. 31:9-10, 166:23-25.

93. If an animal is sick or injured, the licensee works with their veterinarian, not the AFI program. Ex. P, Thom. Dep. 170:20—171:1-8.

94. Inspectors don't test food for contamination. Ex. P, Thom. Dep. 31:24—32-1; Ex. I, Wash. Dep. 70:16-18.

95. Inspectors don't test water for contamination. Ex. P, Thom. Dep. 32:2-3; Ex. I, Wash. Dep. 70:13-15

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

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

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

99. The Pet Animal Act doesn't require specific disinfectants—that's left up to the licensee's veterinarian. Ex. P, Thom. Dep. 168:22—169:5.

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

101. 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. P, Thom. Dep. 166:5-7.

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

103. 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. P, Thom. Dep. 167:7-20.

104. The government proffers Director Thomason as a non-retained expert in, among other things, risks of disease transmission among animals and from animals to humans.[2]

105. 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. P, Thom. Dep. 72:25—73:1-5.

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

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

[2] Plaintiffs have twice objected to the government's non-retained expert designations, *see* Docs. 67 and 75, and have contemporaneously filed a motion to strike and/or exclude.

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

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

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

E. There is no evidence demonstrating a "real need" to regulate.

106. 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. ¶ 4, 49; Ex. H, Johns. Dec. ¶ 9.

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

108. Mr. Johnson is accountable to the owners of the dogs at CFK. ¶¶ 36-49, 153; Ex. H, Johns. Dec. ¶ 9.

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

110. 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. P, Thom. Dep., 69:5-16.

111. When asked for the factual basis for conducting routine inspections, the government first stated it was a "pure matter of law." *See* Ex. R, Def. Suppl. Ans. to Interrog. at Rog. 7.

112. After the Tenth Circuit's ruling, the government supplemented its answer but still didn't provide a factual basis for conducting routine inspections. Ex. R, Def. Suppl. Ans. to Interrog. at Rog. 7.

113. The government also proffers Director Thomason as a non-retained expert in the "State's interest in regulating and inspecting boarding and training kennels," including preventing dehydration, malnourishment, animal abuse, and animal fights. Doc. 73 at 1-2.

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

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

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

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

118. 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. P, Thom. Dep. 72:20-24; 73:19-23.

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

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

d. Analyzing the efficacy of the regime in preventing animal fights. Ex. P, 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. P, 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. P, 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. P, 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. P, Thom. Dep. 74:23-25.

119. The purpose of the inspections is not to check the animals' health. Ex. I, Wash. Dep. 68:13-16.

120. The AFI program hired its first investigator in September 2022. Ex. S, Bret. Dep. 7:11.

121. The investigator's "primary job duty is to find unlicensed activity and bring them into compliance, or ensure they stop unlicensed activity." Ex. S, Bret. Dep. 19:6-13; 38:20-23 (affirming majority of time is spent investigating whether a facility should be licensed).

122. The investigator has never received any training on search warrants, administrative or otherwise. Ex. S, Bret. Dep. 17:10-18.

123. The investigator doesn't investigate or follow up with complaints about licensed facilities. Ex. S, Bret. Dep. 24:25-25:3.

124. The majority of investigations are "complaint-based." Ex. S, Bret. Dep. 20:5-8.

125. If the complaint involves an unlicensed facility and doesn't have an animal-welfare concern, the investigator sends a "reason to believe" letter to the individual performing the allegedly unlicensed activity. Ex. S, Bret. Dep. 21:15—22:14.

126. If the individual returns a signed certificate indicating they are not practicing a licensable activity, the investigator closes the file. Ex. S, Bret. Dep. 22:15-19.

127. If the investigator suspects the individual filled out the certificate dishonestly though, she flags the account, places them on a watch list, monitors their social media activity, and keeps "documentation of everything." Ex. S, Bret. Dep. 22:20—23:24.

128. If the complaint involves an unlicensed facility with animal-welfare concerns, the investigator always contacts local law enforcement. Ex. S, Bret. Dep. 28:8—29:25.

129. Law enforcement then checks on the animal's welfare. Ex. S, Bret. Dep. 29:23-25.

130. The investigator always contacts law enforcement even if there is no evidence or proof substantiating the complaint because she "do[esn't] play with animal welfare." Ex. S, Bret. Dep. 29:3-10.

131. If law enforcement determines there isn't a welfare concern, but the investigator believes the individual is performing a licensable activity, she will send the person a "reason to believe" letter. Ex. S, Bret. Dep. 33:8—34:4.

132. For unlicensed boarding and training kennels, the investigator normally turns them over to their respective local jurisdictions. Ex. S, Bret. Dep. 38:24—39:1-2.

133. The investigator deems complaints "founded" even if the individual isn't breaking any rules, regulations, or laws. Ex. S, Bret. Dep. 47:1—48:8.

134. 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. T, 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.

135. 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. U, 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.

F. Remedying "significant and chronic" violations is not possible during the time it would take to get a warrant.

136. Inspectors have access to mobile phones, computers, and printers while in the field. Ex. K, Dem. Dep. 75:16-22; Ex. L, AFI Manual at OAG1181; *see also*, Ex. I, Wash. Dep. 175:20-24 (inspectors can upload documents while in the field).

137. Inspectors have access to Director Thomason at all hours of the day and are able to quickly contact her. Ex. I, Wash. Dep. 45:4-11; 17-18; Ex. P, Thom. Dep. 110:3-6 (inspectors can call if there's an animal health concern).

138. Inspectors have access to the AFI Program attorney while in the field. Ex. I, Wash. Dep. 45:12-24.

139. A facility that fails an inspection will be re-inspected, "usually" within thirty days, but possibly "10-14 days later" if there are "higher category violations." Ex. L, AFI Manual at OAG1208.

140. If a facility wasn't inspected because the licensee or designated representative wasn't available, the inspector is supposed to return to a facility "no later than two (2) weeks." Ex. L, AFI Manual at OAG1209-1210.

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

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

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

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

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

146. Inspectors are not concerned if there is a significant reduction in animals at a licensed boarding or training kennel facility but are concerned if it's a licensed breeding facility. Ex. I, Wash. Dep. 113:11—114:1-21.

147. 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. K, Demel 199:21-25; Ex. L, AFI Manual at OAG1229.

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

149. 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. K, Dem. Dep. 208:10—209:3.

150. 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. K, Dem. Dep. 209:4-12.

151. But if a licensee had a significant and chronic violation of the food storage requirement, it would be readily apparent to the inspector. Ex. K, Dem. Dep. 210:2-6.

152. For the "tethering" inspection line item, there is no way to determine a violation "unless there is a chronic issue" of tethering. Ex. K, Dem. Dep. 212:6-15; Ex. I, Wash. Dep. 149:11-23 (only way to determine violation is by talking to licensee or designated representative).

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

154. 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. I, Wash. Dep. 117:6-16.

155. 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. L, AFI Manual at OAG1238.

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

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

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

159. Inspectors aren't particularly concerned about kennels with small patches of surface rust. *See* Ex. P, Thom. Dep. 42:19-21 ("rust would have to be on the entire facility to get to fail just on that violation alone").

160. If there's surface rust, inspectors don't return to the facility for a follow-up inspection. Instead, officials "usually ask" the "license to send us a picture that it's been corrected." Ex. P, Thom. Dep. 42:22—43:1-9.

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

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

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

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

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

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

167. Even where there's an animal welfare concern because of a physical issue with a kennel, officials ask licensees to have the animal "get seen by their – their veterinarian and then we'll follow up with those – that facility to make sure that occurred." Ex. N, Smith Dep. 48:3-12.

168. 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. K, Dem. Dep. 145:3-12 (including remediating "standing water").

169. 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. K, Dem. Dep. 147:3-14; Ex. I, Wash. Dep. 147:16-21.

170. For the "cleaning" inspection line item, boarding and training kennel operators are supposed to clean the facilities to "make sure it's an appropriate living component for the dog and so as needed, frankly." Ex. N, Smith Dep. 43:1-6; *see generally*, Ex. X, Maintenance Book.

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

172. An inspector is able to determine how long animal waste has been in the facility by looking at it. Ex. K, Dem. Dep. 127:4-10, 126:13-16; Ex. P, 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").

173. It's readily apparent to an inspector if a facility hasn't been cleaned for days on end. Ex. N, Smith Dep. 43:15-25; Ex. K, Dem. Dep. 126:13-19 ("[Y]ou can tell a difference between if there's feces, for instance, if it's fairly new or if it's over a day's worth. You can tell a difference typically."); Ex. P, Thom. Dep. 91:19-23 (able to quickly determine by pictures whether a facility has not been routinely cleaned), 92:23—93:2 (able to quickly determine whether kennel had been cleaned that day).

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

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

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

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

178. 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. N, Smith Dep. 40:2—42:3. ("Q: So if it's a significant and chronic problem with scalding, it takes a long time for the animal to recuperate? A: That's correct.").

179. If there's scalding, the animal isn't immediately relinquished. Instead, the licensee is "probably" going to fail the inspection. Then, the AFI program asks the licensee to consult their veterinarian immediately and provide proof they did so. Ex. N, Smith Dep. 41:4-14.

180. For the "animal well being" inspection line item, violation examples include grooming issues, long/curling nails, dental disease, and dirty ears. Ex. L, AFI Manual at OAG1226.

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

182. Matted animal fur can cause health issues. Ex. I, Wash. Dep. 119:20-120:15.

183. Matted animal fur doesn't happen overnight. Ex. I, Wash. Dep. 121:3-10

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

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

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

187. 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. I, Wash. Dep. 124:2-23; Ex. K, Dem. Dep. 131:1-11.

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

189. 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. I, Wash. Dep. 125:15-19.

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

191. If an animal exhibits dental disease, an inspector asks to see medical records; and if the medical records indicate the animal hasn't been seen or treated for animal disease, the licensee has "24 hours to have their vet see the dog." Ex. I, Wash. Dep. 125:20—126:4.

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

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

194. 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. I, Wash. Dep. 62:13-20, 65:11-22.

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

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

197. Inspectors don't diagnose a slightly underweight animal. Ex. I, Wash. Dep. 63:20-22.

198. If an inspector suspects an animal is underweight, she sends photographs to the program director. Ex. I, Wash. Dep. 63:20—64:2.

199. An animal that's suffering from severe and chronic dehydration is readily apparent to an inspector and would take an estimated "48 hours or more" to recover. Ex. N, Smith Dep. 44:11—46:1-18.

200. An entire kennel with significant and chronic dehydration issues is readily apparent to inspectors. Ex. N, Smith Dep. 50:21-25.

201. It "would be hard" to "hide" a dehydration issue in 30 minutes. Ex. K, Dem. Dep. 206:13-16.

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

203. 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. K, Dem. Dep. 150:8-18.

204. For the "housekeeping" inspection line item, it would be difficult to remediate the violation of excessive weeds, grass, and brush, within 30 minutes. Ex. K, Dem. Dep. 146:15-20. *See* Ex. I, 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").

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

206. 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. N, Smith Dep. 49:4-23.

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

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

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

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

211. 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. K, Dem. Dep. 137:3-11; 140:5-23.

212. If an animal has a severe, life-threatening problem, the usual course of action is not to seize it. Instead, "we require them to have the animal seen" by the veterinarian within 24 to 72 hours. Ex. P, Thom. Dep. 110:23—111:13.

G. There is no "evidence from practice" that surprise warrantless searches are the "only" way to enforce the regime.

213. 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).

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

215. 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. K, Dem. Dep. 177:21-23; *see also* Exhibit V, Def. Sup. Ans. to RFA 31, 32 (In the last five years the government has "never applied for an administrative search warrant"); Ex. P, Thom. Dep. 39:3-5 ("Q. So there's never been an administrative warrant for just a routine inspection? A. No.").

216. 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. P, Thom. Dep. 157:23—158:3, 39:9-12; *see also* Ex. K, Dem. Dep. 167:24-25—168:1-4; Ex. I, Wash. Dep. 166:2-5.

217. None of the current inspectors have received training on administrative warrants. Ex. K, Dem. Dep. 176:24—177:11; Ex. I, Wash. Dep. 174:11-13; Ex. P, Thom. Dep. 36:22-25.

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

219. Commissioner Smith has never authorized the use of an administrative warrant. Ex. N, Smith Dep. 51:25—52:1-4.

220. Director Thomason has never authorized the use of an administrative warrant. Ex. P, Thom. Dep. 36:15-18.

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

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

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

224. Inspector Demel isn't aware of any licensees who have refused to produce records. Ex. K, Dem. Dep. 168:5-10.

225. Inspector Washee can't recall whether any licensees have refused to produce records. Ex. I, Wash. Dep. 166:6-9.

226. 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. R, Def. Suppl. Ans. to Interrog., Rog 6; Ex. Q, Blank Vet Care Form.

227. When asked for the factual basis for why warrantless searches were necessary, the government first stated it was "purely a legal analysis." Ex. R, Def. Suppl. Ans. to Interrog., p. 6.

228. After the Tenth Circuit's ruling, the government contends, in part, warrantless searches are "necessary" "because numerous violations can be easily and quickly concealed" and "some element of surprise is necessary not only for detection of violations, but also for deterrence of violations and to ensure consistent compliance." Ex. R, Def. Suppl. Ans. to Interrog., p. 6.

H. The effect of the government's licensing and warrantless search regime.

229. Sometime around 1999, an inspector told Mr. Johnson he needed to get a training kennel license. *See* ¶ 100; PTO 2.a.xxx.

230. For years afterward, Mr. Johnson tolerated the regime, ¶¶ 5, 103, because inspectors were flexible, ¶ 103, and they were able to provide advance notice of their searches, ¶ 5 PTO 2.a.xxxiv; Ex. N, Smith Dep. 19:15-19. If Mr. Johnson were unavailable, they would come back another time. ¶¶ 5, 103.

231. 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.

232. In January 2020, Inspector Chris Demel went to the homestead to conduct a routine inspection. *See* Ex. K, Dem. Dep. 180:18-25.

233. Mr. Johnson was in the field that day and had limited cellular services. Ex. H, Johns. Dec. ¶ 11.

234. Inspector Demel "tried getting ahold of Mr. Johnson" but "couldn't get ahold of him, so" Inspector Demel called Ms. Hoyt. Ex. K, Dem. Dep. 180:19-21.

235. Ms. Hoyt "was at work in town" when Inspector Demel called her. Ex. K, Dem. Dep. 180:21-22.

236. Ms. Hoyt left her job for the warrantless search. ¶¶ 6, 104. Ex. W, Hoyt Dec. ¶¶ 4, 4.a.

237. The government's warrantless searches involving Mr. Johnson and the kennels he operates began around 1999 or 2000 and have continued throughout the years since. PTO 2.a.xxxv.

238. Since 2018, CFK has been subjected to routine inspections on or about the following dates: February 12, 2018, January 7, 2020, August 30, 2021, and August 9, 2023. These were conducted without an administrative or criminal search warrant. PTO 2.a.xxxvi.

239. Inspector Demel conducted the January 7, 2020, Ex. K, Dem. Dep. 15:3-21, and August 30, 2021, Ex. K, Dem. Dep. 16:12-17, inspections; Inspector Washee conducted the August 9, 2023, inspection. Ex. I, Wash. Dep. 15:11—16:9.

240. Mr. Johnson does not want anyone to act on his behalf during the searches, or to give anyone else access to the homestead, records, animals, effects and so on. ¶ 118.

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

242. Mr. Johnson will continue training and handling dogs and renew his license, absent unforeseen circumstances. Ex. H, Johns. Dec. ¶ 5.c.

243. The government doesn't have any concerns with CFK. Ex. P, Thom. Dep. 35:6-15; Ex. I, Wash. Dep. 176:13-16.

244. Inspector Demel has been inside the Johnson-Hoyt's shop. Ex. K, Dem. Dep. 179:15-22; 181:21-23.

245. Inspector Demel has been inside Johnson-Hoyt's kennels and shed. Ex. K, Dem. Dep. 178:25—179:7.

246. At CFK, routine cleaning takes on average 90 minutes. Feeding adds about 30 additional minutes, on average. Routine maintenance projects typically take between 30-60 minutes. For bigger projects, it can take an entire day or several days. Ex. H, Johns. Dec. ¶¶ 6-7.

Argument

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. City of Los Angeles, Calif. v. Patel*, 576 U.S. 409 (2015); *Collins v. Virginia*, 584 U.S. 586, 593 (2018). That presumption is especially strong when, like here, the home and its curtilage are involved. *Fla. v. Jardines*, 569 U.S. 1, 6 (2013) (home is "first among

equals"); *Collins*, 584 U.S. at 592-93; *Maryland v. Buie*, 494 U.S. 325, 331 (1990); *Miller v. United States*, 357 U.S. 301, 307 (1958) (affirming "ancient adage that a man's house is his castle").

It's the government's heavy burden to prove a Fourth Amendment exception applies, not the Plaintiffs' burden to prove it doesn't. *Coolidge v. New Hampshire*, 403 U.S. 443, 454–55 (1971); *Jones v. United States*, 357 U.S. 493, 499 (1958); *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).

The government argues it's entitled to conduct warrantless entries and searches under the "pervasively regulated industry" doctrine. It's not for the reasons below.

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

The pervasively regulated industry doctrine is industry-specific, fact-dependent, incredibly narrow, and tightly circumscribed. *Johnson*, 104 F.4th at 159-167, 169-174; *Patel*, 576 U.S. at 424, 424 n.5; *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978). As a result, 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).

Because the pervasively regulated industry exception is a "narrow" one, *Johnson*, 104 F.4th at 165 (relying on *Patel*, 576 U.S. at 424-25), "courts must not define the industry at issue at too high a level of generality." *Johnson*, 104 F.4th at 168 (cleaned up); *Mexican Gulf Fishing Co. v. United States Dep't of Com.*, 60 F.4th 956, 968 (5th Cir. 2023).

The Tenth Circuit has already decided that for purposes of this case, the "at issue" industry is training and kenneling dogs, not the breeding, distributing, or pet shop industries. *Johnson*, 104 F.4th at 168-169. That's because Kansas itself "treats these types of kennels as a distinct category of business, requiring them to obtain boarding- or training-kennel licenses rather than any of the other types of licenses created by the Act," *id.* at 169, and because the federal

government and vast majority of states also treat boarding or training operations differently from other animal-related industries, *Johnson*, 104 F.4th at 169. Moreover, unlike other businesses, at CFK "there are already third parties with a strong interest in the treatment of the animals. Indeed, the owners of the animals housed in Mr. Johnson's kennel have a much stronger, and more personal, interest than any government inspector. If he fails to take good care of the dogs in his kennel, his business is in jeopardy." *Id.* at 169; *Statement of Facts* (*SOF*) ¶¶ 2-4, 106-110. Therefore, the Tenth Circuit concluded, "the analysis required under the [pervasively]-regulated-industry exception to the warrant requirement must be significantly different for boarding or training kennels than for other types of kennels that have traditionally been regulated more, and more intrusively." *Id.*

With that, training and kenneling hunting dogs from a rural homestead isn't a pervasively regulated industry under the four-factor *Johnson* test. *See id.* at 173 (summarizing all four factors).

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

The first relevant factor is "the history of *warrantless searches* in the industry." *Id.* at 173 (emphasis added). Because Kansas started regulating boarding kennels in 1991 and training kennels in 1996, they "have not been closely regulated historically." *Id.* at 174; *SOF* ¶ 31. Of particular importance though, is whether the industry was subjected to warrantless searches near the time of the Founding. *Patel*, 576 U.S. at 425-26; *see also Johnson*, 104 F.4th at 169-170 (favorably citing same); *Lange v. California*, 594 U.S. 295, 309 (2021) (Fourth Amendment exceptions turn on Founding-era history); *Mexican Gulf Fishing*, 60 F.4th at 970 (same). There is no evidence that dog trainers and handlers were warrantlessly searched at or near the time of the Founding.

Sometimes "history is less important" when deciding whether an industry is pervasively regulated, but that's only when "dealing with a new or emerging industry, like nuclear power, that poses enormous potential safety and health problems." *Johnson,* 104 F.4th at 170 (cleaned up). Training and kenneling hunting dogs wasn't new or emerging when Kansas started regulating it

and isn't anything like the nuclear power industry either. *See Johnson*, 104 F.4th at 170; *SOF* ¶¶ 12-22, 25, 31, 83-84, 134, 135.

In short, 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; *see also Patel*, 576 U.S. at 425-26 (hotel regulations starting in 1786 still not enough).

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

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 into a warrant-free zone where the Fourth Amendment doesn't apply. *Johnson*, 104 F.4th at 170-171; *Patel*, 576 U.S. at 425-26; *Marshall*, 436 U.S. at 313*; Free Speech Coal., Inc. v. Att'y Gen. United States*, 825 F.3d 149, 170 (3d Cir. 2016). Otherwise, the government could simply regulate the Fourth Amendment out of existence. *Johnson,* 104 F.4th at 166; *Free Speech Coal*. 825 F.3d at 170. Instead, an "industry is more likely to be considered closely regulated if the federal government or the great majority of States have adopted similar inspection regimes." *Johnson*, 104 F.4th at 171 (explaining comparative regulatory analysis factor).

The Tenth Circuit rigorously examined the federal Animal Welfare Act, conducted a comprehensive fifty-state survey, and decisively concluded that the warrantless inspection regimes did not satisfy *Johnson*'s comparative regulatory analysis factor. *See id*. at 171-174; *id*. at 174.

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

The Supreme Court explained in *Patel* that the pervasively regulated industry doctrine is extremely narrow and specifically limited to industries that are intrinsically dangerous, the operation of which poses a clear and significant risk to the public welfare. 576 U.S. at 424, 424 n.5.

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. The Tenth

Circuit recognized the significance of *Patel*'s dangerousness analysis, which sharply narrowed the doctrine. *Johnson*, 104 F.4th at 166, 166 n.2. To illustrate the kind of dangerousness now required, the Tenth Circuit consistently pointed to the nuclear power industry. *Id.* at 163, 166, 170.

But Mr. Johnson isn't splitting atoms in his backyard. He's training hunting dogs how to point on command, retrieve game birds, follow his commands, and he uses kennels to house them. *SOF* ¶¶ 12-22, 25-26. That's nothing at all like operating a nuclear power plant, which *is* intrinsically dangerous, and *does* pose a clear and significant risk to the public if left unregulated. Indeed, the government concedes Mr. Johnson's business isn't intrinsically dangerous. *SOF* ¶ 84.

The mere possibility of some theoretical risk isn't enough to turn an industry into a pervasively regulated one, otherwise the narrow exception would "swallow the rule." *Patel*, 576 U.S. at 425. Take the mining industry for instance, which the Supreme Court considers pervasively regulated because of its dangerousness. The determination that mining was "among the most hazardous" industries "in the country," *Donovan*, 452 U.S. at 602, wasn't based on speculation or conjecture; it was because Congress had conducted a multi-year *investigation* into the industry and made extensive findings, including that "[e]very working day of the year, at least one miner is killed and sixty-six miners suffer disabling injuries." S.Rep.No.95-181 (1977) (cited by *Donovan*, 452 U.S. at 602 n.7). Unlike Congress, the Kansas Legislature didn't comparably investigate training kennels, it didn't conclude that operating training kennels was among the most dangerous industries in the country, and it didn't have any evidence that operating training kennels kills or disables people daily. *Donovan*, 452 U.S. at 602. The legislative history proves just the opposite—that training kennels are *not* dangerous. The Kansas Attorney General and the predecessor to the Animal Health Commissioner opposed regulating boarding kennels because regulations were not necessary. *SOF* ¶¶ 134, 135.[3]

After the Tenth Circuit's ruling, the government now seems to suggest that training and kenneling a dog presents dangers on par with the mining or nuclear power industries because of a

[3] The 1996 amendment that regulated training kennels was a "clarifi[cation]." *Johnson*, 104 F.4th at 156.

theoretical concern about animal diseases. The government's new litigation position is belied by the record. Assessing animal health isn't the purpose of the inspection process. SOF ¶ 119. Inspectors don't test the animals' food and water, nor do they diagnose, test, or treat animal diseases. *SOF* ¶¶ 87-99, 197. There is no evidence that the regime prevents or controls diseases. *SOF* ¶ 105. One of the best ways to prevent disease transmission, washing one's hands, isn't required, and neither is wearing gloves. *SOF* ¶¶ 96-98. If there is a disease outbreak, it's the licensee and their veterinarian who are responsible for it, not the program. *SOF* ¶¶ 101-103, *see* 226. There is no evidence that the regime is necessary, *SOF* ¶¶ 134-135, "concern for animal welfare is not enough," *Johnson*, 104 F.4th at 175, there's no evidence the regime is efficacious in that regard, *SOF* ¶ 118, and Mr. Johnson is accountable to the dogs' owners. S*ee Johnson*, 104 F.4th at 175.

That some operators fail their inspections, and others operate without a license, 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.

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. Therefore, it's not a pervasively regulated industry.

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

Even if training and kenneling hunting dogs is a pervasively regulated industry, the incredibly 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 174-75 (summarizing exception's three-part test).

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); *id*. at 175 (criterion requires "evidence establishing a real need" to regulate).

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"). But 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, *SOF* ¶ 31, 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. *SOF* ¶¶ 134-135. In 2018, Kansas dramatically changed the entire nature of the regime. *SOF* ¶¶ 54-56, 71. Neither the AFI program nor the Pet Animal Advisory Board suggested or proposed the 2018 amendments. *SOF* ¶¶ 57-58, 72. The changes waste time, money, and government resources as well. *SOF* ¶ 55.

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, Director Thomason's testimony is largely, if not totally, irrelevant. Besides, Director Thomason 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, *SOF* ¶¶ 105, 114-118, isn't an expert, and her opinions are unreliable, *see* Doc. 85.

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. *SOF* ¶¶ 12-22, 25-26, 31, 83, 84, 134-135. There's no articulable factual basis for conducting routine inspections. *SOF* ¶¶ 111-112. Inspectors don't test the animals' food and water, nor do they diagnose, test, or treat animal diseases. *SOF* ¶¶ 87-99, 197. There is no evidence that the regime prevents or controls diseases. *SOF* ¶ 105. One of the best ways to prevent disease transmission, washing one's hands, isn't required. *SOF* ¶¶ 96-97. Neither is wearing gloves. *SOF* ¶ 98. If there is a disease outbreak, it's the licensee and their veterinarian who are responsible for it, not the program. *SOF* ¶¶ 101-103, *see* 226. Commissioner Smith's quarantine powers exist outside the Pet Animal Act. *SOF* ¶ 100. The government's stated interest in preventing cruelty, abuse or neglect, *SOF* ¶ 86, PTO at 14, 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, *SOF* ¶ 118. If the program becomes aware of unlicensed activities, the investigator normally turns the cases over to their respective local jurisdictions. *SOF* ¶ 132. 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*, *SOF* ¶¶ 2-4, 25, 106-110.

The government's theoretical interests, rationalized after-the-fact, aren't substantial, aren't supported by the evidence, and aren't enough to 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).

There is nothing specific or unique about training and housing a hunting dog that necessitates warrantless searches. 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. SOF ¶¶ 12-22, 25-26, 31, 83, 84, 134-135. 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. *SOF* ¶¶ 25-26, 78-79, *see* 226. If there's an animal-health issue, CFK's veterinarian diagnoses and treats them, not the government. *SOF* ¶¶ 25, 87-99, 101-103, 197, *see* 226. 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); *SOF* ¶¶ 2-4, 25, 106-110 (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. *SOF* ¶ 77.

The government's argument that violations could be quickly concealed, *SOF* ¶ 228, 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. *SOF* ¶¶ 141-147, 151, 153-158, 161-166, 168-169, 171-177, 181, 184-185, 187-188, 190, 193, 196, 201-205, 207-210; *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"); *SOF* ¶¶ 148, 150, 152, 195, 211. What's more, 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 SOF* ¶¶ 149, 151, 152, 178, 184-190, 192-194, 199-200, 206-207.

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. *SOF* ¶ 31. From 1996 to 2018, training kennel operators were provided advanced notice of the inspections. *SOF* ¶¶ 54, 56, 71. For more than thirty years, the government has been able to procure 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, which was supported by the then-Commissioner. *SOF* ¶¶ 213-214. The government has *never* sought an administrative warrant for routine inspection. *SOF* ¶¶ 215; *see also* SOF ¶¶ 217-222. Since 2012, no boarding or training kennel licensee has demanded an administrative warrant either. *SOF* ¶ 216. From 2018 until now, there have been no refusals of entries for boarding and training kennel licensees. *SOF* ¶ 223. There is no evidence that any licensees have refused to produce records. *SOF* ¶ 224-225. With that, 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).

Just like the Supreme Court in *Marshall*, this Court should reject the government's necessity argument: requiring administrative warrants would not impose serious burdens on the system or the courts, would not prevent inspections, would not 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.

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. *SOF* ¶¶ 59-63. 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. *SOF* ¶¶ 35-36, 40-41. Considering the Fourth Amendment's history, purpose, and reasons for including a warrant requirement, 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 foreclose a property-based analysis, instead "analyz[ing] the issue here in conformance with controlling precedent." *Johnson*, 104 F.4th at 167. Thus, the Plaintiffs respectfully seek summary judgment under this theory.

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 one's expectation of privacy *is irrelevant, Jardines*, 569 U.S. at 11. Property-based searches are analyzed differently from privacy-based ones.[4] What's more, once there is a trespassory search under the *Jones-Jardines* framework, reasonableness turns on a property-based analysis, not on a privacy-based one. *Jardines*, 569 U.S. at 11; *Jones*, 565 U.S. at 414 (Sotomayor, J., concurring); *see Carpenter v. United States*, 585 U.S. 296, 397-99 (2018) (Gorsuch, J., dissenting). In *Collins,* 584 U.S. 586, for instance, the government argued that the "automobile exception"—premised on its "pervasive regulation," *id*. at 592, a theory deriving from *Katz*—justified a warrantless physical intrusion by the government. The United States Supreme Court flatly rejected that notion. *Id*. at 593-601. Other courts have too. *See*, *e.g.*, *United States v. Gregory*, 497 F. Supp. 3d 243, 271 (E.D. Ky. 2020) (given the *Jones-Jardines* framework, "it need not consider whether Gregory held a reasonable expectation of privacy in that area"); *Matter of United States*, 637 F. Supp. 3d 343, 355-66 (E.D.N.C 2022) ("reasonable expectation of privacy" "is irrelevant to the constitutional calculus under the trespass theory") (relying on *Jardines*, 569 U.S. at 5).

In short, 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, into sheds, shops, kennels, and records. *SOF* ¶¶ 7-8, 10-11, 35-36, 40-46, 244-245. The government does not have a license to enter the homestead, has never 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.

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.

[4] *E.g., Collins*, 584 U.S. at 594; *Taylor v. City of Saginaw*, 922 F.3d 328, 332 (6th Cir. 2019); *Johnson v. VanderKooi*, 509 Mich. 524, 537 (2022); *United States v. Gregory*, 497 F. Supp. 3d 243, 271 (E.D. Ky. 2020).

Demanding a warrant is punishable. *SOF* ¶¶ 73-76, 80-82. If the licensee or the "designated representative" isn't available for the warrantless search within thirty minutes, the government assesses an automatic no-contact fee, which triggers more warrantless searches. *SOF* ¶ 64-69; *see also SOF* ¶¶ 231, 241. Asking the inspector to come back at a more convenient time is punishable. *SOF ¶* 70. 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 v. United States*, No. 24-5577, 2025 WL 581592, at *3 (U.S. Feb. 24, 2025) (Sotomayor, J., respecting denial of certiorari).

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).[5] *SOF* ¶¶ 32, 73-76, 80, 81-82, 242.

Conclusion

The licensing and warrantless search regime is patently unreasonable and unconstitutional 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 of their claims.

[5] *See also Herrera v. Santa Fe Pub.Sch.*, 792 F. Supp. 2d 1174, 1183 (D.N.M. 2011); *Herrera v. Santa Fe Pub. Sch.*, 956 F. Supp. 2d 1191, 1254 (D.N.M. 2013); *KT. & G Corp. v. Attorney General of Okla.*, 535 F.3d 1114, 1135 (10th Cir. 2008); *Pike v. Gallagher*, 829 F.Supp. 1254, 1263 (D.N.M. 1993); *Johnston v. Tampa Sports Auth.*, 530 F.3d 1320, 1329 (11th Cir. 2008); *Speiser v. Randall*, 357 U.S. 513, 518 (1958); *Stavrianoudakis v. United States Fish & Wildlife Serv.*, 108 F.4th 1128, 1136 (9th Cir. 2024) (doctrine is "especially important in the Fourth Amendment context").

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Certificate of Service

The undersigned certifies that on Feb. 28, 2025, the above document(s) were filed using the CM/ECF system, which will send notification of such filing to all participants.

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