THE UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SCOTT JOHNSON, et al. Plaintiff, v. JUSTIN SMITH, DVM, in his official capacity as Animal Health Commissioner at the Kansas Department of Agriculture Defendants.	Case No. 22-1134-EFM-ADM

DEFENDANT'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiffs operate a boarding or training kennel in Kansas. In that business, Plaintiffs are responsible for taking care of other peoples' dogs. Those people—and the state—have a substantial interest in making sure that their dogs are humanely and competently cared for. And so, for more than 30 years, operators of boarding or training kennels—like Plaintiffs—have been subject to regulation under the Pet Animal Act, K.S.A. 47-1701, *et seq*. That regulation includes routine inspections, as well as additional inspections when warranted, conducted by trained state employees in accordance with the time, place, and scope explicitly enumerated in the Pet Animal Act and its implementing regulations.

Those inspections are conducted to ensure compliance with the Pet Animal Act and its implementing regulations found in Section 9, Article 18 of the Kansas Administrative Regulations. The inspections, and the statutes and regulations underpinning them, advance the government's interest not only in preventing and detecting animal neglect or abuse, but also protecting against the spread of disease amongst animals, or from animals to the general human population. Although inspections are somewhat predictable, conducted under regulations setting forth reasonable time frames for and scope of inspections, an element of surprise is a crucial component as well. The primary

goal of the inspections is deterrence, prevention, and to encourage compliance with the Pet Animal Act at all times, not just in the day or two prior to a pre-scheduled inspection. Therefore, the warrantless, surprise nature of the inspections is essential to the underlying statutes and regulations.

And because the primary goal of the inspections is prevention and deterrence, the government's interest could not be adequately advanced if warrants were required for each inspection. Warrants can only be issued pursuant to probable cause that a violation has occurred. In other words, to require a warrant would completely frustrate the state's legitimate interest in preventing violations; on the contrary, a warrant requirement would make violations a prerequisite for an inspection, even though the primary purpose of the inspections is to prevent such violations.

Under the framework set forth by the Tenth Circuit, Kansas' warrantless inspections are reasonable and therefore constitutional. And for that reason, Defendant is entitled to summary judgment.

STATEMENT OF FACTS

1. Defendant Justin Smith is the Animal Health Commissioner for the Kansas Department of Agriculture. (PTO, at 2(a)(i)).

2. In that role, Smith is the Chief Administrative Officer of the Division of Animal Health, which oversees the Animal Facilities Inspection ("AFI") program. (PTO, at 2(a)(ii)-(iii)).

3. Sasha Thomason, DVM, is the AFI Program Director. She reports to Smith, and oversees the day-to-day operations of the AFI Program, which includes routine inspections of licensed boarding or training kennels. (*Id.* at 2(a)(iv)-(v)).

4. Dr. Thomason is a licensed veterinarian with a master's in public health training. (Exhibit Y, Exhibit Y, Thomason Affidavit, ¶ 1).

5. Dr. Thomason has been the AFI Program Director since January 2022. (Exhibit BB, Thomason Depo, 7:2-11).

6. Prior to serving as AFI Program Director, Dr. Thomason worked for two and a half years as a small animal consultant veterinarian for the Kansas State University Veterinary Diagnostic Lab. (Exhibit BB, Thomason Depo, 8:21 – 9:2).

7. For the 17 years before working as a small animal consultant K-State, Dr. Thomason worked as a small animal emergency medical veterinarian. In that role, she treated sick and injured animals in an emergency room setting. (Exhibit BB, Thomason Depo, 9:14-24).

8. For the first 11 of those 17 years, Dr. Thomason was in private practice. For the last 6 of those 17 years, she ran the small animal emergency service department for K-State's veterinary teaching hospital, while also teaching fourth-year veterinary students. (Exhibit BB, Thomason Depo, 10:12-22).

9. The AFI Program currently employs three inspectors: Christopher Demel, Sara Washee, and Ben Lancaster. They are responsible for conducting routine inspections of facilities that are licensed under the Pet Animal Act, K.S.A. 47-1701, *et seq.* (*Id.* at 2(a)(vi)-(vii)).

10. There are eight categories of facilities that the AFI program licenses and inspects. In addition to boarding or training kennels, there are animal distributors, K.S.A. 47-1702, pet shop operators, K.S.A. 47-1703, pounds or animal shelters, K.S.A. 47-1704, hobby breeders, K.S.A. 47-1719, research facilities, K.S.A. 47-1720, animal breeders, K.S.A. 47-1733, and retail breeders, K.S.A. 47-1736.

11. The key factor that distinguishes boarding or training kennels from the other categories is that boarding or training kennels house pets that are owned and claimed by others. (*Compare* K.S.A. 47-1701(p) *with* K.S.A 47-1701(f),(g), (t),(aa),(m),(w),(gg); *see also* Affidavit of Thomason, at ¶ 7).

12. Kansas started regulating boarding or training kennels in 1991. (PTO, 2(a)(xlv)).

13. Plaintiff Scott Johnson owns and operates Covey Find Kennel, LLC ("CFK"). CFK is licensed as a boarding and training kennel. (*Id.* at 2(a)(viii)).

14. CFK has been a licensed facility since around 1999 or 2000. (*Id.* at 2(a)(xxx)).

15. The application for a boarding or training license puts applicants on notice that their property will be subject to inspections under the Pet Animal Act. (PTO, 2(a)(xlvi)).

16. A boarding or training kennel operator is defined by statute as "any person who operates an establishment where four or more dogs or cats, or both, are maintained in any one week during the license year for boarding, training or similar purposes for a fee or compensation." K.S.A. 47-1701(p).

17. And so, the umbrella of boarding or training kennels covers hunting dog trainers, like Plaintiff, who may board dogs over an extended period of time in order to train them as bird hunting dogs. (PTO, at 2(a)(xv)-(xxiv)).

18. The umbrella of boarding or training kennels also covers "dog hotels" or "dog daycares," at which pet owners will have their dogs boarded at a facility for a shorter period of time while they are traveling or otherwise occupied. (Exhibit AA, Washee Depo, 55:9-21; Exhibit Z, Demel Depo, 73:7-10); Exhibit Y, Thomason Affidavit, ¶ 8).

19. In March 2022, there were 189 licensed boarding or training kennels in Kansas. (Exhibit A, March 2022 KPAAB Slideshow, OAG001337).

20. By September 2023, there were 198 licensed boarding or training kennels in Kansas. (Exhibit B, September 2023 KPAAB Slideshow, OAG001405).

21. In September 2024, there were 214 licensed boarding or training kennels in Kansas. (Exhibit C, September 2024 slideshow, OAG001379).

22. And so, the number of licensed and boarding training kennels has steadily increased in Kansas over recent years. (Exhibits A-C).

23. This growth in boarding and training kennels is consistent with Dr. Thomason's observations during her time both as a clinician and the AFI Director. She has observed a "huge change" in how people value and treat their animals. More dogs live in the home, and pet owners often think of them as same level that parents think of children. (Exhibit BB, Thomason Depo, 67:6-21).

24. It is now very common for these dogs to live in the home with their owners, lie on the couch with their owners, sleep in the same bed with their owners, and lick the faces of their owners, all of which increases the likelihood of spreading disease to humans. (Exhibit Y, Thomason Affidavit, ¶ 20).

25. As Dr. Thomason notes, when she first started as a veterinarian, only a handful of pet owners were willing to invest in medical care for their dogs, and even then, would rarely spend more than $200.00. (Exhibit BB, Thomason Depo, 68:1-4).

26. In more recent years, she saw several people a day willing to pay around $6,000 for treatment to keep their dogs alive longer. (Exhibit BB, Thomason Depo, 68:4-14).

27. The increased prevalence of boarding and training kennels is consistent with this change in attitudes. There is an increased demand from pet owners for boarding or training kennels at which to leave their dog while they are away. (Exhibit BB, Thomason Depo, 68:15-25).

28. Dr. Thomason remarked that people used to board their animals at their veterinarian's when they went on vacation; now, there are more privately owned boarders due to a surge in demand. (Exhibit BB, Thomason Depo, 68:19-25).

29. Facilities that are licensed under the AFI program are subject to routine inspections. AFI Inspectors do not need a warrant to conduct these inspections. (PTO, 2(a)(xxxi)).

30. From 1996 through 2018, inspectors were required to provide advanced notice of inspections; in 2018, the Pet Animal Act was amended to provided that notice shall not be given prior to an inspection. (PTO, 2(a)(xxxii)-(xxxiv)).

31. K.S.A. 47-1709(b) provides that such inspections be made "at reasonable times, with the owner or owner's representative present."

32. The frequency with which a facility will be subject to inspection is dependent on the results of previous inspections. An inspection will be conducted every 15 to 24 months if the premises passed its three most recent inspections; every 9 to 18 months if it passed its two most recent inspections;

and every 3 to 12 months if it failed either of its two most recent inspections. K.A.R. § 9-18-9(b); (PTO, 2(a)(xlvii)).

33. Additionally, a facility may be subject to an additional, follow up inspection if: (1) A violation was found in a previous inspection; (2) A complaint is filed regarding the premises; (3) The ownership of the premises changed in the previous year; (4) The license for the premises was not renewed in a timely manner. K.A.R. § 9-18-9(c).

34. For convenience of the owners or operators of licensed facilities, the Kansas regulations allow a licensee to identify a "designated representative," to be present for inspections if the owner or operator is not routinely available. K.A.R. § 9-18-9(e).

35. Routine inspections can only be made on Monday through Friday, between 7:00 a.m. and 7:00 p.m., unless all persons involved in the inspection agree otherwise. K.A.R. § 9-18-9(d).

36. The AFI Program Director drafts a Policy and Procedure Manual ("P&P Manual") that provides guidance and direction for the AFI Inspection Program. (Exhibit BB, Thomason Depo, 15:20 – 18:25).

37. The P&P Manual identifies the type of violations that AFI Inspectors are to look for when inspecting a facility. (Exhibit D, P&P Manual, OAG001217- OAG001218).

38. Violations are grouped in categories A, B, C, with A being least serious and C being most serious. (Exhibit D, OAG001216).

39. Violations are also assigned a severity level between 1 and 5, with 5 signifying the highest severity. The severity level is determined based on the number of animals impacted by the violation. (Exhibit D, OAG001216).

40. When conducting an inspection, inspectors inspect areas where the licensee keeps the animals in question, or where the licensee stores or preps food for the animals. (Exhibit Z, Demel Depo 60:22-61:12); K.A.R. § 9-18-8.

41. Inspectors are also allowed to inspect areas where records are kept, pursuant to K.A.R. § 9-18-7 and K.A.R. § 9-18-8(b); (Exhibit Z, Demel Depo 62:19-22).

42. The process for routine inspections is laid out clearly in the P&P Manual. (Exhibit D, OAG001212- OAG001215).

43. Inspectors are tasked with looking for specific violations that are tied to relevant regulations. (*Compare* Exhibit D, OAG001231- OAG001251 *with* Section 9, Article 18 of the Kansas Administrative Regulations).

44. When violations are found, inspectors assign a correction date by which the violation or issue should be corrected. (Exhibit D, OAG001215- OAG001216).

45. Dr. Thomason testified that the inspections are primarily concerned with prevention and maintaining compliance with the regulations governing licensees. (Thomason, 177:10-18).

46. To further that aim, Dr. Thomason noted that an element of surprise is important to keep licensees "on their toes," and that a licensee's compliance may temporary, and timed around a routine inspection, if advanced notice were given. (Thomason, 128:21-22, 177:9-18).

47. According to Dr. Thomason, unlicensed, or poorly managed boarding or training facilities carry significant risks to animals, including dehydration, malnourishment, or other animal abuse or neglect. (Exhibit Y, Thomason Affidavit, ¶ 11).

48. Violations that appear minor, such as those related to food and trash storage, can have serious downstream impacts. Those violations are meant to prevent vermin infestation or food spoilage, both of which contribute to the spread of disease. (Exhibit Y, Thomason Affidavit, ¶ 12).

49. For example, mice carry multiple diseases that can also infect dogs and humans. These diseases include leptospirosis, salmonella, campylobacter, tularemia, or hantavirus. (Exhibit Y, Thomason Affidavit, ¶ 13).

50. When an infestation occurs at a pet animal facility, it allows the mice to have closer contact with the animals and, directly or indirectly, with the humans. This increases the chances of a disease being spread from the mice to the animals. (Exhibit Y, Thomason Affidavit, ¶ 13).

51. For most of the diseases listed above, direct contact with a mouse is not necessary for disease transmission. Contact with the mouse droppings can spread the disease. (Exhibit Y, Thomason Affidavit, ¶ 13).

52. Mice also transport disease-carrying ticks and fleas closer to dogs and humans, increasing the likelihood the ticks or fleas will move off the mouse onto a dog or human. (Exhibit Y, Thomason Affidavit, ¶ 13).

53. Food that has spoiled allows bacteria and fungus to grow on it. When eaten, it can cause serious gastrointestinal upset such as inappetence, vomiting, and diarrhea. (Exhibit Y, Thomason Affidavit, ¶ 14).

54. Fungi commonly produce toxins called mycotoxins that can cause illness ranging from gastrointestinal upset to liver toxicity to neurological symptoms such as seizures. (Exhibit Y, Thomason Affidavit, ¶ 14).

55. Contact with animal waste is the most common method of disease transmission for the following zoonotic diseases: intestinal parasites, coccidia, giardia, and leptospirosis. (Exhibit Y, Thomason Affidavit, ¶ 15).

56. Failure to properly clean up animal waste in a timely manner increases the chances that dogs (or humans) will come into contact with it and whatever disease-causing organisms that are in the fecal and urine waste. (Exhibit Y, Thomason Affidavit, ¶ 15).

57. Also, if regulations are not followed, dogs can be neglected, even to the point of being left out in extreme weather or without proper food or water. (Exhibit Y, Thomason Affidavit, ¶ 16).

58. During extreme cold or high temperatures plus high humidity, it can take as little as 30 minutes for a dog to succumb to life-threatening hypothermia or heat stroke. (Exhibit Y, Thomason Affidavit, ¶ 17).

59. During very hot, humid days, when dogs are not provided with access to water, they rapidly dehydrate which prevents them from being able to cool themselves, leading to heat stroke. Dogs can still succumb to heat stroke even if they have access to water, but not having water readily available for them to drink speeds up the process. (Exhibit Y, Thomason Affidavit, ¶ 18).

60. Dogs that live in the home with their owners, which is a temperature-controlled environment, are not acclimated to outdoor temperature extremes which makes them more susceptible to adverse reactions to extreme heat or cold than dogs that live strictly outdoors. (Exhibit Y, Thomason Affidavit, ¶ 21).

61. Because boarding and training kennels involve dogs mingling with other strange dogs, there is an increased risk of animal fights, accidental breeding, or the spread of disease. The diseases can then exit the kennel back into their owners' homes, where the diseases can spread even further. (Exhibit Y, Thomason Affidavit, ¶ 19).

62. Seventy-five percent of all emerging infectious diseases can be spread from animals to people. Over two-thirds of all currently known infectious diseases can be spread from animals to people. (Exhibit Y, Thomason Affidavit, ¶ 22).

63. When she practiced emergency medicine, one of the most common things Dr. Thomason treated was injuries from dog fights. (Exhibit Y, Thomason Affidavit, ¶ 9).

64. Some of these injuries can be quite severe, including extensive bite wounds that required anesthesia for cleaning, flushing, and drain placement; extensive life-threatening wounds that required exploratory abdominal surgery to assess internal organ damage; wounds that punctured the chest

cavity, causing respiratory distress and infection of the chest cavity; etc. (Exhibit Y, Thomason Affidavit, ¶ 9).

65. Dr. Thomason also had to euthanize dogs that were brought in after being mortally wounded in a dog fight to end suffering because they were injured so badly, there was nothing that could be done and death was imminent. (Exhibit Y, Thomason Affidavit, ¶ 10).

66. Inspector Chris Demel, who has been an AFI inspector since 2019, agreed that an element of surprise was necessary. He testified that it not only ensures compliance with the Pet Animal Act, but also, is necessary for the welfare of the animals. (Exhibit Z, Demel Depo 7:5-12; 207:18 – 208:5).

67. As Demel noted, unannounced inspections help not only with catching violations that impact animal welfare, but also, with seeing small issues that can be fixed before they become big problems. (Exhibit Z, Demel Depo, 208:1-5).

68. Inspector Sara Washee, who has been an AFI inspector since 2022, also agreed that an element of surprise is important. (Exhibit AA, Washee Depo, 7:8 – 12; 177:8-11).

69. Specifically, Washee noted that prior notice can give licensees "a chance" to move things or objects around, or hide issues, prior to the inspection. (Exhibit AA, Washee Depo, 177:12-23).

70. According to Washee, an element of surprise helps ensure compliance, and a licensee is more likely to be in compliance at all times, "whether or not they know [she's] coming to do the inspection." (Exhibit AA, Washee Depo, 177:8-178:6).

71. Demel identified several violations that could be easily concealed if a licensee had prior notice. For example, Demel noted that animal separation—which involves incompatible dogs being placed together—is a violation that can be easily remedied with notice by simply moving dogs. (Exhibit Z, Demel Depo, 188:13-22; 200:1 – 201:9); K.A.R. 9-18-15, 9-18-16.

72. Demel testified that failure to separate intact male and female dogs carries a risk of unwanted pregnancy amongst pets. (Exhibit Z, Demel Depo, 200:21-23).

73. In a similar vein, Demel testified that grouping two male dogs with one in-heat female can cause aggression issues and fighting amongst dogs, and would be easy to quickly remedy with notice by moving an animal. (Exhibit Z, Demel Depo, 201:4-12).

74. Likewise, Demel testified that it would be easy to quickly conceal violations of the regulations relating to incompatible dogs, such as dogs who will not let other dogs eat or drink, if stored together. (Exhibit Z, Demel Depo 201:21- 202:14).

75. Another concern identified by Demel was the grouping of diseased animals with healthy animals, which Demel also noted could be easily concealed by moving animals. (Exhibit Z, Demel Depo 202:15-23).

76. Demel noted that the requirement that bedding be stored in a sealed contained with a tight-fitting lid could be easily concealable. (Exhibit Z, Demel Depo 190:20-25); K.A.R. 9-18-10(e).

77. Failure to have a contingency plan on hand is another violation the Demel testified could be easily concealed. (Exhibit Z, Demel Depo 190:7-17); K.A.R. 9-18-18.

78. Demel also identified numerous food storage violations that would be easy to quickly remedy with prior notice. (Exhibit Z, Demel Depo 191:19 – 192:19); K.A.R. 9-18-10(e).

79. Demel noted that food storage is important because food that is improperly stored can become contaminated with vermin urine or feces or can become moldy or rancid, in a way that would be harmful or cause disease to dogs that are boarded. (Exhibit Z, Demel Depo 192:20 – 193:11).

80. The regulation related to covering waste receptacles is another violation that Demel testified would be easily concealable. (Exhibit Z, Demel Depo 195:8-17); K.A.R. 9-18-1(f).

81. According to Demel, that regulation serves to prevent cross-contamination with dogs and reduce the prevalence of flies in a kennel. (Exhibit Z, Demel Depo 195:8-22).

82. Demel also identified regulations relating to a licensee utilizing chewed up or dirty bowls, which are more difficult to clean, and therefore, harbor dirt and bacteria, as a violation that would be

easy to quickly remedy by quickly disposing of or changing out the bowl. (Exhibit Z, Demel Depo 196:9 – 197:1, 197:20-198:6); K.A.R. 9-18-17(a)(2)(D).

83. Likewise, Demel testified the violations of tethering regulations would be easily concealable with prior notice. (Exhibit Z, Demel Depo 198:20-23; 199:18-20); K.A.R. 9-18-30.

84. Demel further testified that regulations relating to the ratio of employees-to-animals would be easy to remedy with prior notice, because a licensee could try to bring in another employee or move animals around after getting notice of an inspection. (Exhibit Z, Demel Depo 199:8-14).

85. Demel also testified that a dog being left out in the extreme heat or extreme cold as being a violation that could be easily remedied with prior notice, simply by bringing the dog inside. (Exhibit Z, Demel Depo 203:18 – 204:11); K.A.R. 9-18-12.

86. Demel testified that a licensee could easily remedy issues with unclean water, if given prior notice. (Exhibit Z, Demel Depo 204:18-25); K.A.R. 9-18-17(b).

87. Demel also testified that, if enough notice were given, a licensee could even try to conceal extreme thirst or dehydration by constantly providing water to a dog prior to an inspection. (Exhibit Z, Demel Depo 205:8 – 206:12).

88. But Demel testified that given only 30 minutes' notice, "it would be hard" for a licensee to conceal extreme thirst in dogs. (Exhibit Z, Demel Depo 206:13 – 16).

89. AFI Inspectors have uncovered serious violations at boarding or training kennels. For example, in 2018, former AFI Inspector Elaine Adams conducted an inspection in response to a complaint that a bulldog and two boxers were housed together, and the bulldog was found deceased. The cause of the death was unknown. (Exhibit E, Inspection Report 7-26-18, OAG000345).

90. When responding to that Complaint, Inspector Adams also saw that a Yorkiepoo dog had simply disappeared from the facility due to an inadequate housing and a lack of attentiveness by the kennel. (Exhibit E, Inspection Report 7-26-18, OAG000345).

91. On June 21, 2022, Inspector Washee conducted a routine inspection of a boarding or training kennel in which she found cats housed in neighboring kennels in close proximity to dogs. (Exhibit F, Inspection Report 6-21-22, OAG000954).

92. The kennel was cited for violations of K.A.R. 9-18-15, which requires that incompatible animals not be housed together. (Exhibit F, Inspection Report 6-21-22, OAG000954).

93. On August 4, 2022, Inspector Demel conducted an inspection in response to a complaint at a boarding or training kennel in which he found a significant buildup of dirt, grime, urine, and mice feces. (Exhibit G, Inspection Report 8-4-22, OAG000392 – OAG000394).

94. At that same inspection, Inspector Demel also found that the kennel did not have a Veterinary Care Form. (Exhibit G, Inspection Report 8-4-22, OAG000392 – OAG000394).

95. The Veterinary Care Form is a part of the Pet Animal Act's Requirement that kennels have a documented program of disease control and prevention, euthanasia, and routine veterinary care. K.S.A. 47-1701(dd)(1).

96. On January April 12, 2023, AFI Inspector Washee conducted an inspection in response to a complaint at a boarding or training kennel. When she responded, there was only one employee tending to over 40 dogs. (Exhibit H, Inspection Report 4-12-23, OAG000387-OAG000389).

97. On March 20, 2023, Inspector Lancaster conducted an inspection or a boarding or training kennel in response to a complaint. The incident giving rise to the complaint involved a 90 pound Great Pyrenes being kept in a play area with two small dogs—a 20 pound Goldendoodle and a 10-15 pound Shih Tzu. Although nobody saw what happened, it appeared that the larger dog attacked the smaller dogs, resulting in their deaths. (Exhibit I, Inspection Report 3-20-23, OAG000579 – OAG000580).

98. The kennel was cited for a severity 5 violation of K.A.R. 9-18-15's requirement that incompatible dogs not be kept together. (Exhibit I, OAG000580).

99. In response to the incident and response by AFI, the kennel implemented procedures to not mix day care dogs with boarding dogs, and further, to limit the amount of animals in the facility at any given time. (Exhibit I, OAG000580).

100. It was also cited for a severity 5 violation of K.A.R. 9-18-19 in that the employees failed to evaluate the animal's behaviors before co-mingling them, or adequately supervising the dogs in the play area. (Exhibit I, OAG000581).

101. On March 31, 2023, Inspector Demel conducted a routine inspection at a boarding or training kennel in which three incompatible dogs were stored together and actually began fighting during the inspection. (Exhibit J, Inspection Report 3-31-23, OAG000971).

102. On June 28, 2023, Inspector Washee conducted an inspection pursuant to a complaint of high temperatures inside of a boarding and training kennel. The complaint was founded, in that Washee observed the temperature to be 90 degrees indoors. (Exhibit K, Inspection Report 6-28-23, OAG000562 – 000563). The owner of the kennel reported to Washee that, within four hours, the temperature would likely not get lower than 88 degrees. (Exhibit K, OAG000562 – OAG000563).

103. The kennel was ordered to correct the temperature issue within two days. (Exhibit K, OAG000562).

104. On September 6, 2023, Inspector Demel conducted a routine inspection of a boarding or training kennel. He noted a handful of violations related to cleaning, sanitation, and pest control, as well as housekeeping issues. (Exhibit L, Inspection Report 11-16-22, OAG000607 – OAG000608).

105. Importantly, although it was not a technical violation at the time of the inspection, Demel also noted that there was the potential for heating/cooling issues in the area where dogs are placed for timeouts, so that the facility owner could take steps to prevent a situation where animals were housed in extreme temperatures. (Exhibit L, OAG000607).

106. On September 7, 2023, Inspector Lancaster conducted an inspection of a boarding or training kennel in response to a complaint. The complaint asserted that a dog had been diagnosed with heat stroke upon leaving the facility. (Exhibit M, Inspection Report 9-7-23, OAG001101 – OAG001103).

107. The inspector found that a dog had been left outside, without water, for an hour-and-a-half in 100 degree weather. (Exhibit M, OAG001101).

108. Relatedly, the inspector also found that the kennel did not have enough employees to adequately monitor and intervene with animals as needed. (Exhibit M, OAG001103).

109. On September 28, 2023, Inspector Lancaster conducted an inspection of a boarding or training kennel in response to a complaint of overcrowding. (Exhibit N, Inspection Report 9-28-23, OAG000880 – OAG000881).

110. Inspector Lancaster observed feces in a play yard, and the licensee reported that they never clean that specific area. (Exhibit N, OAG000880).

111. Inspector Lancaster also noted that sexually intact adult animals, of different sexes, were housed together in violation of K.A.R. 9-18-16. (Exhibit N, OAG000881).

112. He further observed a cockroach, and noted that the licensee's pest control and/or sanitation practices were insufficient to ensure the health, safety, and welfare of animals due to the risk of disease spread via cockroaches. (Exhibit N, OAG00881).

113. On July 9, 2024, Inspector Demel conducted a routine inspection of a boarding or training kennel in southwest Kansas. (Exhibit O, Inspection Report 7-9-24, OAG000810 – OAG000812).

114. During the inspection, Demel found:

- Food improperly stored in open containers;
- Overgrowth of weeds or vegetation in the area;

- Exposed rust and sharp edges in numerous areas;
- Dried animal feces in five separate kennels;
- A buildup of leaves, grass, hair, and dirt, in various kennels;
- A large amount of mice feces throughout the kennels;
- A large amount of cob webs on top of the kennels;
- Used water and food dishes that had not been cleaned in a week; and
- The kennel did not have a current veterinary care form on file.

(Exhibit O, OAG000810 – OAG000812).

115. In September 2024, in response to a complaint, Inspector Lancaster found that a Kennel had been improperly boarding an incompatible dog, "Diesel," that had a history of attacking and biting employees and other dogs. (Exhibit P, Inspection Report 9-11-24, OAG001284 – OAG001288).

116. It was also found that this kennel did not have employees adequately trained to manage aggressive dogs and had improper ventilation. (Exhibit P, OAG001284 – OAG001288).

117. These examples of the types of violations that inspectors see are not a comprehensive list. From January 2018 through August 2024, there were approximately 62 failed inspections amongst boarding or training kennels. (Exhibit Q, OAG000417-OAG000431 - Failed Inspection Spreadsheet 1-1-18 to current).

118. Incidents at boarding or training kennels have also been the subject of news coverage, both nationally and regionally. For example, WKOW 27 News out of Madison, Wisconsin, reported on two dogs being strangled to death at boarding and training kennel in 2020. (Exhibit R, OAG000898-OAG000901).

119. KDRV News out of Oregon reported in 2022 about 13 dogs were seized from a boarding kennel due to malnourishment requiring immediate care from veterinarians. (Exhibit S, OAG0000944 –OAG000947).

120. OurQuadCitiesNews out of Iowa reported that a French Bulldog had died of heat stroke after a boarding kennel left it outside in high heat, then failed to provide veterinarian care to the animal. (Exhibit T, OAG000948 – OAG000949).

121. WFSB News out of Connecticut reported in 2023 that family's dog died while they boarded it at a kennel during their vacation. According to the article, the dog was attacked by another dog, and then the kennel failed to seek veterinary care for the injured animal. (Exhibit U, OAG000964 – OAG000966).

122. CBSNewsTexas reported that the owner of a dog training kennel, called K-9 Direction, faced criminal charges after three dos died of suspected animal abuse while under his care. (Exhibit V, OAG001008 – OAG001010).

123. Fox43 News reported in 2018 on a Kansas City, Missouri, woman whose dog died at a Missouri kennel and daycare. According to the article, the dog died of heat stroke due to the kennel's failure to provide an adequately cooled environment. (Exhibit W, OAG001018 – OAG001020).

124. Fox4KC reported in January 2024 about an animal trainer in Pleasant Hill, Missouri, that abused and killed dogs that were entrusted in his care for training purposes. (Exhibit X, OAG001046 – OAG001048).

LEGAL STANDARD

Summary judgment is appropriate if the moving party demonstrates that "no genuine dispute [about] any material fact" exists and that it "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). If the movant meets its initial burden, the non-moving party "may not rest upon its pleadings, but must bring forward specific facts showing a genuine issue for trial [on] those dispositive matters

for which it carries the burden of proof." *Kannady v. City of Kiowa*, 590 F.3d 1161, 1169 (10th Cir. 2010) (internal quotation marks and citations omitted). To survive summary judgment, the non-moving party's "evidence, including testimony, must be based on more than mere speculation, conjecture, or surmise." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998)(citing *Rice v. United States*, 166 F.3d 1088, 1092 (10th Cir. 1999)).

ARGUMENT AND AUTHORITY

Plaintiffs claim that unannounced, warrantless inspections of boarding or training kennels violate the Fourth Amendment. Warrantless searches are normally presumed to be unreasonable, unless the search fits into one of the narrow exceptions to the warrant requirement. *Mexican Gulf Fishing Co. v. United States DOC*, 60 F.4th 956, 967 (5th Cir. 2023); *Vondra v. Billings*, 736 F. Supp. 3d 933, 939 (D. Mont. 2024). One of those exceptions, the closely-regulated business exception, is applicable to the inspection of boarding or training kennels in Kansas under the Pet Animal Act. And that statutory structure is entitled a presumption of constitutionality. *Gillmor v. Thomas*, 490 F.3d 791, 798 (10th Cir. 2007).

This matter has already been to the Tenth Circuit at the motion to dismiss stage. The Tenth Circuit provided the parties with the precise lens through which this matter should be viewed. First, the Tenth Circuit defined the industry at issue in this matter. The Tenth Circuit declined to lump Plaintiff's business in, broadly, with all categories of licensees that are subject to inspections by the AFI program. *Johnson v. Smith*, 104 F.4th 153, 167-69 (10th Cir. 2024). Rather, the analysis was limited to the industry of boarding and training kennels, as defined in the Pet Animal Act. *Id.* at 169.

Having defined the industry, the Tenth Circuit laid out the relevant standard for the analysis of the inspections at issue, citing *New York v. Burger*, 482 U.S. 691 (1987), and its progeny.

> Warrantless inspections of certain businesses or industries are constitutionally permissible when the regulatory regime authorizing the inspections passes a two-part test. First, the business or industry to be inspected must be closely regulated. Then, the regime must satisfy three additional criteria (generally referred to as the Burger

> criteria) for warrantless inspections to be reasonable under the Fourth Amendment: (1) There must be a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made; (2) the warrantless inspections must be necessary to further the regulatory scheme; and (3) the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant.

104 F.4th at 159 (citation cleaned up). Applied here, especially in light of the summary judgment standard and the presentation of Defendant's own evidence, the Pet Animal Act's warrantless, routine inspections do not violate the Fourth Amendment as applied to boarding and training kennels.

I. Boarding and training kennels are a closely regulated industry.

The relevant factors for determining whether an industry is closely regulated "are the history of warrantless inspections in the industry, the extensiveness and intrusiveness of the regulatory scheme, whether other jurisdictions impose similar regulatory schemes, and whether the industry would pose a threat to the public welfare if left unregulated." *Id.* at 166 (internal quotation marks and citations omitted).

A. History of warrantless inspections.

Warrantless searches of boarding and training kennels have been in place since at least 1991. In analyzing Defendant's motion to dismiss, on appeal, the Tenth Circuit noted that "[t]he 33 (now 34) years that boarding or training kennels have been subject to warrantless searches is not entitled to particular weight." *Id.* at 170. Notably, the Tenth Circuit did not observe that Kansas' three-decade history of warrantless searches was entitled to no weight; and it certainly did not determine that those three decades weighed in Plaintiff's favor. Rather, it elected not to assign "particular weight" to those three decades.

More importantly, the Tenth Circuit's observation about the history of warrantless inspections was made at the motion to dismiss stage, wherein the Court could not stray from the four corners of Plaintiff's Complaint. But the Tenth Circuit noted that history of warrantless searches "is less important with a 'new or emerging' industry," and went on to observe that "nothing in the complaint

provides reason to think that the boarding-or-training-kennel industry was [] new or emerging in 1991." *Id.* at 170.

That is not the case, here. Dr. Thomason, with her 17 years of experience in private practice, and in her three years as AFI Director, has observed first-hand that boarding or training kennels are emerging in both number and importance. The number of boarding or training kennels in Kansas has steadily increased during Dr. Thomason's tenure. Further, as Dr. Thomason has testified, she has observed a "huge change" in how people value and treat their animals, with people equating their pets with their children and there being an increased demand for private boarding kennels. People no longer board their pets alone at their veterinarian's office; rather, they seek out licensed boarding or training facilities to ensure their animal's comfort and safety. The evidence suggests that boarding and training kennels are a growing industry, and is one in which pet owners are increasingly interested. Given this context, this first factor supports a finding that boarding or training kennels are closely regulated.

B. The extensiveness and intrusiveness of the regulatory scheme.

This factor also weighs in favor of a determination that boarding or training kennels are closely regulated. The Tenth Circuit has already explored the Pet Animal Act and the regulations found in Section 9, Article 18 of the Kansas Administrative Regulations, and found they are "narrowly directed at a limited number of businesses, which tends to weigh in favor of finding that the industry is closely regulated." *Johnson*, 104 F.4th at 170.

The Tenth Circuit also instructed that, in addition to looking at the extensiveness of the regulation, the Court must also ask "whether the existence of the regulations governing training or boarding kennels clearly inform those in the industry that they will be subject to unannounced warrantless inspections." *Id.* at 171. This goes to the fundamental question when determining whether a business is closely regulated: does an individual's voluntary choice to engage in a specific business

come with a reduced expectation of privacy? *Burger*, 482 U.S. at 701. At the motion to dismiss stage, the Court then turned to the next factor—whether other jurisdictions impose similar schemes—to answer that question. *Johnson*, 104 F.4th at 171. At the summary judgment stage, the Court can also look at the evidentiary record.

The distinct aspect of boarding and training kennels is that those licensees are taking care of other people's dogs. Some kennels take people's dogs for months at a time, others take them for a day or two. Given the greater importance the public has placed on animal wellbeing, it follows logically that licensees that are responsible for the health, safety, and wellbeing of the property of others have a lessened expectation of privacy. Members of the public take their dogs to licensed kennels in reliance that with that license comes a certain standard relating to housing facilities, K.A.R. §§ 9-18-10 – 9-18-13, cleaning, sanitation, and pest control, K.A.R. § 9-18-14, separation of animals, K.A.R. §§ 9-18-15 – 9-18-16, and the like. *See Johnson*, 104 F.4th at 170. As illustrated by the inspection reports referenced above, when a pet owner has an issue with a boarding or training kennel—such as when their dogs are attacked or subjected to heat stroke—they complain to Defendant, who responds to the complaint. When an individual endeavors to board or train the public's dogs, he does so subject to regulations touching on the way he stores food, the way he maintains kennels, the way he heats and cools his space, and the way he cleans his facility. These regulations inherently reduce one's expectation of privacy. Further, the public is interested in and concerned about what happens at boarding and training kennels, especially when things go wrong, as the attached news articles demonstrate.

Boarding or training kennels are extensively and intrusively regulated in Kansas, in order to protect pet owners across the state. It goes without saying that these licensees—who open their facility to the public's dogs, and subject themselves to regulations as to how they care for those dogs—have a reduced expectation of privacy in Kansas, and this factor weighs in favor of finding that the industry is closely and pervasively regulated.

C. Whether other jurisdictions impose similar regulatory schemes.

Defendant concedes that the Tenth Circuit addressed this factor in detail and having defined boarding and training kennels as its own sub-industry, determined that this factor did not weigh in favor of a finding that boarding or training kennels are closely regulated. *Johnson*, 104 F.4th at 171-173. But Defendant would simply note that Kansas is not the only state, or even one of a handful of states, with a similar regulatory scheme. Nine other states also allow for the inspection of boarding and training kennels. And so, although the law of the case may dictate that this factor weighs in Plaintiff's favor, it does not do so overwhelmingly.

D. The public welfare.

The Tenth Circuit's analysis of the fourth factor was succinct, in light of the 12(b)(6) standard it was applying. Defendant concedes that operating a boarding or training kennel is not an intrinsically or inherently dangerous activity. But inherent danger is not an absolute prerequisite to finding that a business is closely or pervasively regulated. *Mexican Gulf Fishing Co. v. United States DOC*, 60 F.4th 956, 967-68 (5th Cir. 2023). It is enough if "the industry would pose a threat to the public welfare if left unregulated." *Id.* at 166 (quoting *Zadeh v. Robinson*, 928 F.3d 457, 465 (5th Cir. 2019)).

This follows logically, as numerous courts have found industries that are not inherently dangerous were still closely or pervasively regulated. *Club Madonna Inc. v. City of Miami Beach*, 42 F.4th 1231, 1249 (11th Cir. 2022) (nude dancing and adult entertainment); *Liberty Coins, LLC v. Goodman*, 880 F.3d 274, 282-83 (6th Cir. 2018) (precious metal dealers); *Heffner v. Murphy*, 745 F.3d 56, 67 (3d Cir. 2014) (funeral homes); *United Taxidermists Ass'n v. Ill. Dep't of Nat. Res.*, 436 F.App'x 692, 693 (7th Cir. 2011) (taxidermists) *S&S Pawn Shop Inc. v. City of Del. City*, 947 F.2d 432, 437 (10th Cir. 1991) (pawn shops); *United States v. Chuang*, 897 F.2d 646, 651 (2d Cir. 1990) (banking); *Rush v. Obledo*, 756 F.2d 713, 723 (9th Cir. 1985) (daycares); *Stogner v. Kentucky*, 638 F. Supp. 1, 3 (W.D. Kent. 1985) (barbershops).

More applicable here, although Defendant is aware of no precedent either way relating specifically to boarding or training kennels, courts have found, or in some circumstances at least assumed, that industries in which animal welfare is implicated are also closely and pervasively regulated. *See Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853, 866 (10th Cir. 2016) (neither party contesting that exotic animal industry was closely regulated); *Lesser v. Espy*, 34 F.3d 1301, 1306-08 (7th Cir. 1994) (rabbitries closely regulated); *Serpas v. Schmidt*, 827 F.2d 23, 28 (7th Cir. 1987) ("We have no doubt that horse racing is and ought to be pervasively regulated."); *Prof'l Dog Breeders Advis. Council v. Wolff*, 2009 U.S. Dist. LEXIS 83054, at *25-26 (M.D. Penn. Sept. 11, 2009) (dog breeding closely regulated); *State v. Warren*, 2019 MT 49, 395 Mont. 15, 439 P.3d 357, ¶ 25 (2019) (dog breeding closely regulated).

Numerous courts have recognized a public interest in animal safety and animal welfare. *United States v. Stevens*, 559 U.S. 460, 469 (2010) ("[T]he prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies."); *see also Arnett v. Denton*, 2013 U.S. Dist. LEXIS 207186, at *19 (W.D. Tex. Feb. 15, 2013) ("There is certainly a substantial government interest served by the random inspections, as the protection and welfare of animals is served by field inspectors conducting random visits to breeding facilities to ensure licensed breeders are meeting minimum standards of care."); *see also State v. Marshall*, 821 S.W.2d 550, 551-52 (Mo. App. 1991) (noting that animal abuse statutes are "public welfare" statutes, through which "[t]he evil sought to be avoided is neglect of an animal whose care has been assumed by the person having ownership or custody of it."). Indeed, K.S.A. 21-6411, *et. seq.*, which can be found in Article 64, Crimes Against the Public Morals, of the Kansas Criminal Code, criminalizes specific situations that the Pet Animal Act, with its inspection scheme, seeks to prohibit. *See* K.S.A. 21-6412(a)(3),(5).

As Dr. Thomason opined, unregulated boarding and training kennels, that are not subject to routine inspections and standards, carry significant risks. Those include dehydration, malnourishment,

or other animal abuse or neglect. Dogs that live in the house—which one would expect to see at a boarding kennel—are most susceptible to harm as a result of extreme temperatures. Further, because boarding and training kennels involve dogs mingling with other strange dogs, there is an increased risk of animal fights, accidental breeding, or the spread of disease. Injuries from dog fights were one of the most common things Dr. Thomason treated in private practice. And the injuries resulting from those fights could be quite serious, including life-threatening injuries that required surgery or euthanasia.

Additionally, violations of food regulations can lead to an increase and sickness and disease in the dogs. Contact with vermin or spoiled food significantly increases the risk of the spread of disease throughout dogs in boarding or training kennels. Mice can carry leptospirosis, salmonella, campylobacter, tularemia, or hantavirus. They also bring disease-carrying ticks and fleas into close contact people's pets. Those diseases can then exit the kennel back into their owners' homes, where the diseases can spread even further. Most of these diseases do not stop at animals, but rather, can be transmitted zoonotically. Likewise, regulations related to cleaning up feces—which are often violated and corrected in inspections—are critical to avoiding the spread of disease because contact with animal waste is the most common method of the transmission of numerous zoonotic diseases.

Routine inspections regularly catch, but more often prevent, these sorts of issues. Dr. Thomason, Demel, and Washee all testified about the importance of the inspections in ensuring compliance and educating licensees on compliance with the Pet Animal Act.

There is a government interest in regulating board or training kennels, and if left unregulated, there would be increased risks of animal neglect, animal abuse, animal injury, and the spread of disease to pets and their owners alike.

II. Applying the *Burger* factors.

Because boarding or training kennels are a closely regulated industry, the next question is

whether Defendant's routine inspection scheme satisfies the *Burger* criteria. To pass muster, (1) the scheme must be informed by a substantial government interest; (2) warrantless inspections must be necessary to further the regulatory scheme; (3) and the warrantless regime must provide a constitutionally adequate substitute for a warrant. *Johnson*, 104 F.4th at 174.

A. The scheme is informed by a substantial government interest.

At the motion to dismiss stage, the Tenth Circuit accepted as true the allegations in Plaintiffs' Complaint that there is no substantial government interest because dog training and handling is not dangerous, and training kennels are accountable to dog owners. *Id.* at 175. That said, the Court recognized that this analysis could be different at the summary judgment stage. *Id.*

This analysis overlaps to some degree with the public welfare prong of the closely regulated business analysis. And in that regard, there can be no doubt that there is a substantial government interest in protecting against animal abuse and neglect. Again, Kansas criminalizes animal neglect and abuse. *See* K.S.A. 21-6411, *et. seq.*[1] Various courts have recognized the long-standing governmental interest in protecting against animal abuse and neglect. *Stevens*, 559 U.S. at 469; *Benigni v. Mass*, 1993 U.S. App. LEXIS 31629, at *6-7 (8th Cir. Dec. 8, 1993); *Hodgins v. United States Dep't of Ag.*, 2000 U.S. App. LEXIS 29892, at *15-16 (6th Cir. Nov. 20, 2000). *Arnett*, 2013 U.S. Dist. LEXIS 207186, at *19; *Wolff*, 2009 U.S. Dist. LEXIS 83054, at *28; *Marshall*, 821 S.W.2d at 551-52 (Mo. App. 1991). This governmental interest is echoed in the public interest in safe and humane boarding or training kennels, as illustrated in the widespread news coverage that follows when the public trust is violated and somebody's pet is harmed by a kennel responsible for its safekeeping.

That interest is no less substantial in this case, and Plaintiff's theories do not overcome that interest. An industry need not be inherently dangerous to be closely regulated or for the government

[1] The Tenth Circuit noted that these statutes were not targeted only at boarding and training kennels. 104 F. 4th at n. 9. Although that is true, the criminalization of animal neglect and abuse still reflects a public interest in preventing such conduct at a licensed facility.

to have a substantial interest in regulating it. It is enough that the absence of regulation can be injurious to the public welfare, which is the case here. As set forth above, the standards set forth in the Pet Animal Act and its implementing regulations are in place to prevent serious issues such as heat stroke, animal dehydration, animal attacks resulting in injury or death, animal neglect, unauthorized breeding, and the spread of disease not only amongst animals, but from animals to humans. The same substantial government interest that applies to breeders, horse racing, and other animal-based industries apply no less to boarding or training kennels. In 1990, this Court found that the Pet Animal Act serves a legitimate purpose of advancing "quality control and humane treatment of animals." *Kerr v. Kimmell*, 740 F. Supp. 1525, 1529 (D. Kan. 1990). That remains true today. There can be inhumane treatment of animals in boarding or training kennels, too. Dogs can die at boarding or training kennels. Dogs can be left unattended at boarding or training kennels. Dogs can be left without water, or out in extreme conditions at boarding or training kennels.

Plaintiffs' other argument, that boarding or training kennels should be exempted from inspections because licensees are accountable to pet owners, is similarly unavailing. First, the very fact that dogs still sometimes die or suffer neglect at boarding or training kennels significantly undercuts that grand pronouncement. Again, there were at least 62 failed inspections of boarding or training kennels from January 2018 through August 2024. Second, one only needs to look at the number of complaints that Defendant responds to see that pet owners are not a substitute for regulation; rather, pet owners rely on regulation when boarding or training their pets. Pet owners feel comfortable taking their dogs to licensed boarding or training facilities because those facilities are subject to regulation and inspections. When an owner suspects mistreatment of his or her dog, he files a complaint with Defendant who, in turn, addresses the complaint via an unannounced, warrantless inspection.

Finally, the fact that boarding or training kennels are taking care of other people's dogs only strengthens the degree of the government's substantial interest. Because dogs come and go out of

boarding or training kennels, only to return to their families, the risk of the spread of disease is higher in such kennels. Spoiled food or mice droppings can be the first step in a disease that travels from a pet to its owner, then to the owner's children, then to the children's school, and so on and so forth. Further, because boarding or training kennels take care of other people's property, the government has a significant interest in licensing these kennels. This is true for two reasons: first, members of the public rely on the fact that boarding and training kennels are subject to governmental regulation, standards, and inspections when they entrust their pet to such a kennel; second, the government has an interest in ensuring that these licensed agencies are responsible stewards of other people's pets which, again, many people treat almost like children. *C.f. Rush*, 756 F.2d at 723 (recognizing constitutionality of warrantless inspections of daycares).

B. Warrantless inspections are necessary to further the regulatory scheme.

"[W]arrantless searches are necessary if a warrant requirement could significantly frustrate effective enforcement of the Act." *Liberty Coins*, 880 F.3d at 285. But Defendant "need not show that warrantless searches are the most necessary way to advance its regulatory interest." *Heffner*, 745 F.3d at 68. Based solely on the allegations in Plaintiffs' Complaint, the Tenth Circuit focused exclusively on the government's interest in detecting violations when considering this factor. 104 F.4th at 176-77. The Tenth Circuit noted that, based on Plaintiffs' allegations, many violations would be easy to conceal or difficult to detect, and that those violations that are easily concealable would eventually be detected "if they were significant and chronic" by looking at "the condition of the dogs." *Id.* at 176.

Whether violations are easy to conceal is a key factor in determining whether warrantless searches are necessary to further a regime. *Donavan v. Dewey*, 452 U.S. 594, 603 (1980); *Hopkins Cty. Coal, LLC v. Acosta*, 875 F.3d 279, 293-94 (6th Cir. 2017). Plaintiffs' allegations about the detection of violations no longer carry the day at the summary judgment stage. For starters, there is evidence of numerous, serious violations that are easy to quickly conceal or remedy. (DSOF, ¶¶ 70-86).

Some of those violations are serious even in a single occurrence: one instance of animal separation can lead to animal death, the spread of disease, or unauthorized breeding. Similarly, violations of watering and/or temperature regulations can result in dehydration and heat stroke, like the dog that suffered heat stroke after only an hour-and-a-half at a kennel. As Dr. Thomason notes, it can take as little as 30 minutes for a dog to succumb to life-threatening hypothermia or heat stroke, and indoor dogs are much more susceptible to such an incident. Other easily concealable violations can cause problems over time, such as those related to bedding and both the storage and provision of food and water would also be easy to remedy with prior notice. Those regulations are in place to prevent the spread of disease or vermin infestations amongst the dogs, and violations of those regulations are also easy to quickly conceal. Defendant would much rather prevent mice infestations or spoiled food at a kennel than later discover the inhumane fruits of infestations or food spoilation that are "significant or chronic."

And contrary to the Tenth Circuit's determination based solely on Plaintiffs' allegations, in many circumstances, there would be no way of knowing about those violations if they were simply concealed by a licensee who was given notice of an inspection. It may be true for licensees like Plaintiffs—who keep dogs for a long period of time—that evidence of malnourishment or abuse would eventually become detectable in dogs that had been subjected to significant and chronic maltreatment. But not all boarding or training kennels keep the same dogs for extended periods of time. On the contrary, many—if not most—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 so, violations, even if significant and chronic, may not be readily apparent just by looking at a dog during an inspection. The dog that was dehydrated yesterday may be gone, while the dog in front of the inspector might just be starting to get thirsty. As the Sixth Circuit has observed, warrantless inspections are necessary "if the search objects are likely to change hands quickly." *Liberty Coins*, 880 F.3d at 285; *see*

also Burger, 482 U.S. at 710 ("Because stolen cars and parts often pass quickly through an automobile junkyard, 'frequent' and 'unannounced' inspections are necessary in order to detect them.").

Furthermore, the regime is not in place only to catch violations. Dr. Thomason, the AFI Program Director, testified that compliance and prevention of violations was the primary purpose of the inspection regime. Demel and Washee echoed that sentiment. They all testified that an element of surprise was necessary. Dr. Thomason noted that surprise is important to keep licensees "on their toes," and that a licensee's compliance may be temporary, and timed around a routine inspection, if he had notice. Similarly, Demel noted that unannounced inspections help not only in catching violations, but also in seeing small issues, and intervening, before the violations become a big issue that can cause real harm. Washee echoed the sentiment, noting that the warrantless searches ensure that a licensee is more likely to be complying at all times, "whether or not they know [she's] coming to do the inspection." The state's interest in prevention of animal abuse and neglect, and to ensure compliance, renders warrantless searches necessary.

> According to the Plaintiffs, inspectors' searches of funeral establishments are likely to focus on compliance with such regulations as building standards, and the need for surprise inspections is therefore attenuated to such an extent that it cannot justify a warrantless intrusion under Burger. Although that may be true, it is neither outcome determinative nor does it advance our inquiry. Although the need for unannounced inspections of funeral parlors may not be as great as for other kinds of businesses, that does not negate the need for surprise inspections of funeral parlors. The Board need not show that warrantless searches are the most necessary way to advance its regulatory interest.
>
> The Board persuasively explains that **if inspectors are barred from entering funeral homes without a search warrant or advance notice, unscrupulous funeral practitioners could bring their establishments into regulatory compliance prior to an inspection, only to let them fall below prescribed standards when the threat of detection passes. We agree.** Thus, Pennsylvania's warrantless search regime is not qualitatively different from various other administrative inspection schemes that depend on the element of surprise to both detect and deter violations.

Heffner, 745 F.3d at 67-68 (internal quotation marks and citations omitted) (emphasis added); *see also Benigni*, 1993 U.S. App. LEXIS 31629 at *6-7. Ensuring compliance, or put another way, "serv[ing] as

a credible deterrent" is a justification for warrantless inspections. *Burger*, 482 U.S. 710 (quoting *United States v. Biswell*, 406 U.S. 311, 316 (1972)). And the seeking of a criminal or administrative warrant, which can only be issued after there is probable cause to believe that a violation has already occurred, would seriously frustrate that goal. A warrant would only be sought once there was probable cause to believe a licensee was not in compliance. Thus, by the time the warrant was sought, easily concealed violations would be fixed and the neglect or abuse sought to be prevented would have already happened. The primary purpose of the regime—prevention and compliance—would have been frustrated.

Defendant is far more interested in preventing animal abuse and neglect than catching violations after the abuse or neglect has already happened. And the existence of warrantless search regime is necessary to further that goal.

C. The inspection program provides a constitutionally adequate substitute for a warrant.

The third *Burger* factor looks at the government's inspection program "in terms of the certainty and regularity of its application." *Burger*, 482 U.S. at 703. The challenged regime "must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the of the inspecting officers." *Id.* This factor is met if the regulations are "sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." *Id.* Although the Tenth Circuit assumed that this factor was met, in a footnote, it laid out quite clearly why this factor is satisfied. *Johnson*, 104 F.4th at n. 7. That analysis controls here.

Both the Pet Animal Act and applications for a boarding or training kennel license put licensees on notice of the inspection procedures. Licensees are advised that the search is being made pursuant to law, and the searches have a well-defined scope, as articulated in the Pet Animal Act and its implementing regulations. Routine inspections are conducted every 15 to 24 months if the premises

passed its three most recent inspections; every 9 to 18 months if it passed its two most recent inspections; and every 3 to 12 months if it failed either of its two most recent inspections. K.A.R. § 9-18-9(b). The only other inspections allowed are re-inspections after a failed inspection, inspections pursuant to a complaint, inspections when ownership has changed, or inspections where the license was not timely-renewed. K.A.R. § 9-18-9(c). Inspections may take place only Monday through Friday between 7:00 a.m. and 7:00 p.m., *see id.* § 9-18-9(d), and licensees may specify their preferred times for inspection. The regulations also define the scope of searches. Inspectors are authorized to enter the place of business, examine and make copies of required records, inspect premises and dogs as necessary to enforce the Act and its regulations, document conditions and areas of noncompliance, and use a room, table, or other facilities necessary for the examination of the records and inspection.

For a regime to not meet this third *Burger* criteria, searches must be "so random, infrequent, or unpredictable that the owner, for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials." *Liberty Coins*, 880 F.3d at 286 (internal quotation marks and citations omitted). It cannot seriously be argued that the Pet Animal Act allows for random, infrequent, or unpredictable searches, especially when compared to other regimes that have passed constitutional muster. For example, in *Dewey*, the Supreme Court approved a regime that allowed for searches of surface mines "at least twice annually" and of all underground mines "at least four times annually." *Dewey*, 452 U.S. at 604. Furthermore, like the Pet Animal Act, the regime in *Dewey* also mandated routine follow-up searches when violations were found. *Id; see also Burger*, 482 U.S. 694 n.1, 711 (allowing for inspections on a "regular basis," and only "during [] regular and usual business hours.").

The regulatory framework is comprehensive, predictable, and provides a constitutionally adequate substitute for a warrant.

III. Because Defendant's inspections are reasonable under *Burger*, Plaintiffs' unconstitutional conditions doctrine claim must fail.

Plaintiffs also claim that Defendant's inspection regime imposes unconstitutional conditions on them. Under the unconstitutional conditions doctrine, "the government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Reedy v. Werholtz*, 660 F.3d 1270, 1277 (10th Cir. 2011) (citation omitted). The doctrine applies only if a constitutional right is implicated. "[I]f no constitutional rights have been jeopardized, no claim for unconstitutional conditions can be sustained." *Id.* at 1277 (citation omitted).

As set forth above, boarding or training kennels is a closely regulated industry, and the Pet Animal Act's inspection regime satisfies the *Burger* criteria. And so, because Plaintiffs' Fourth Amendment rights have not been violated, Plaintiffs' unconstitutional conditions doctrine must be dismissed.

CONCLUSION

For the reasons set forth above, the Defendant is entitled to summary judgment on all of Plaintiffs' claims.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on this 28th day of February 2025, the above and foregoing Memorandum in Support of Motion for Summary Judgment was filed with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to registered counsel.

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