No. 23-3091

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SCOTT JOHNSON, HARLENE HOYT, COVEY FIND KENNEL, LLC,
Plaintiffs-Appellants,

v.

JUSTIN SMITH, D.V.M., in his official capacity as Animal Health Commissioner at the Kansas Department of Agriculture,
Defendant-Appellee.

On Appeal from the U.S. District Court
for the District of Kansas
Case No. 6:22-cv-1243-KHV-ADM
Honorable Kathryn H. Vratil, presiding

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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STATEMENT OF INTEREST

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from the administrative state's depredations.[1] The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself: such as jury trial, due process of law, and the people's right to be secure in their persons and houses against unreasonable searches and seizures. Yet these selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, federal agencies, and even sometimes the courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by reasserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a different sort of government—a type, in fact, the Constitution was designed to prevent. This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's concern.

NCLA is particularly concerned by administrative agencies' Fourth Amendment violations intruding on the property and privacy of Americans. NCLA believes that the district court's ruling incorrectly applied a privacy-based exception to a property-based Fourth Amendment violation, thereby allowing a warrantless search regime where one should be prohibited. In the process, the ruling below disregarded the Supreme Court's

[1] NCLA states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than NCLA and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of the brief.

binding precedent in this area, expanding the closely regulated industry exception to privacy-invading searches so widely that a great number of additional industries would lose safeguards against unreasonable searches. A decision so thoroughly undermining Fourth Amendment protections was particularly improper at this stage in the litigation.

SUMMARY OF ARGUMENT

Appellant Scott Johnson owns and operates Covey Find Kennel, LLC (CFK), which is located on land in Winfield, Kansas, jointly owned with his wife, Harlene Hoyt. (App. 10-12, 14-16). Johnson and Hoyt's home is located on the same land as CFK. (App. 14-15). CFK is a dog training and handling business (App. 16-18), which is required to be licensed by the Kansas Department of Agriculture (App. 9-12, 19, 29, 31–32). As part of the licensing regulations under the Kansas Pet Animal Act (the Act), Kan. Stat. Ann. § 47-1701, *et seq.*, CFK is subject to unannounced physical searches of its facilities. (App. 9–11, 23–26, 28, 32–33, 38–40). If Johnson or Hoyt, who is a designated representative for CFK, is not present within 30 minutes of an inspector's notice, CFK risks being charged with a no-contact fee. (App. 9–12, 24–26, 28, 32–33, 39, 44–46).

The Appellants sought a declaratory judgment (App. 13, 47–48) that the Act's licensing and warrantless search regime violates the Fourth Amendment (App. 34–41), the unconstitutional conditions doctrine (App. 41–43), and the fundamental right to travel and freely move about, as protected by the Fourteenth Amendment's Due Process and Privileges or Immunities Clauses (App. 43–46). The Plaintiffs also sought

injunctive relief enjoining the Appellee from enforcing the unconstitutional portions of the regime. (App. 34, 47–48).

The government filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) (App. 163), arguing that the pervasively regulated industry exception applies (App. 171–75), that the Act does not set unconstitutional conditions (App. 176–77), and that the Act does not violate the right to travel (App. 177–79). The Appellee did not move to dismiss the Appellants' *Jones-Jardines* physical intrusion claims (App. 191), or their claims raised under the Privileges or Immunities Clause regarding Johnson and Hoyt's right to travel and move freely (App. 193), and only addressed them for the first time in its reply. The Appellants filed a motion to disregard the newly raised arguments or leave to file a sur-reply, which the district court allowed. (App. 209–12).

The district court dismissed the Plaintiffs' entire lawsuit (App. 234–52), including their property-based claims, by misapplying the privacy-based, closely regulated industry exception to the Fourth Amendment to a dog training and handling business.

Appellants' argument that the district court erred in dismissing their lawsuit is correct because the court applied a privacy-based analysis to a property-based claim. Furthermore, even if a privacy-based analysis were appropriate, the court violated the standard for adjudging a motion to dismiss. The court not only failed to consider the allegations in the light most favorable to the Plaintiffs, but it also assumed facts not contained in the complaint to reach its conclusions. If the court had evaluated the motion to dismiss under the proper standard, it would have found there was not

sufficient information in the complaint or relevant case law to support holding that a dog training and handling business is a closely regulated industry meeting the requirements of the *Burger* test. *See New York v. Burger*, 482 U.S. 691 (1987). Indeed, trying to shoehorn a business like the training of hunting dogs into the closely regulated industry exception borders on the absurd.

This court should hold that the closely regulated business exception does not apply to property-based searches—nor to the dog handling and training industry—and it should clarify for the benefit of district courts in the Tenth Circuit that the closely regulated business exception is quite narrow and should not be expanded readily. It should then reverse the judgment below and remand the case for further proceedings.

ARGUMENT

I. The District Court Erred in Holding that the 'Closely Regulated Business' Exception Applies to the Dog Training Industry, and that the Warrantless Inspection Requirements Thus Do Not Violate the Fourth Amendment

A. The Act's Unannounced, Warrantless Inspections Are Searches Under Either the Property-Based or Privacy-Based Approach to the Fourth Amendment

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," providing that "no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV. "The 'basic purpose of this Amendment[]' … 'is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.'" *Carpenter*

v. United States, 138 S. Ct. 2206, 2213 (2018) (quoting *Camara v. Mun. Ct. of City & Cnty. of S.F.*, 387 U.S. 523, 528 (1967)).

> Few protections are as essential to individual liberty as the right to be free from unreasonable searches and seizures. The Framers made that right explicit in the Bill of Rights following their experience with the indignities and invasions of privacy wrought by "general warrants and warrantless searches" that had so alienated the colonists and had helped speed the movement for independence.

Byrd v. United States, 138 S.Ct. 1518, 1526 (2018) (citations omitted).

The imposition of unannounced, warrantless inspections of a business, which in this case is located at the home of private citizens, with a requirement that a business owner or designated representative arrive within 30 minutes to facilitate the inspections is a dangerous and utterly unreasonable government intrusion into Americans' private lives. The inspection requirement in the Act does not protect the rights of individuals to be secure in their homes from unreasonable search. Instead, it permits the Department of Agriculture to trespass on individuals' property and invade their privacy without the usual requirement to show probable cause to a neutral judge first. Given the promiscuously broad application of the "closely regulated industry" exception by the district court in this case, such intrusions would become commonplace across a wide range of Kansas industries, as long as they face some regulations—which nearly every industry does. This breathtaking expansion of government power violates the Fourth Amendment, goes against clear Supreme Court case law, and severely reduces liberty.

Given the case's posture, the decision below also inappropriately failed to accept the allegations of the Appellants as true and in the light most favorable to them.

Broadly speaking, the Supreme Court recognizes two approaches to analyzing whether government action constitutes a Fourth Amendment "search" that must be preceded by a showing of probable cause to a neutral judge and accompanied by a warrant specifying reasonable parameters for the search in advance. The "two different tests articulated in the Fourth Amendment jurisprudence" are "the reasonable-expectation-of-privacy test and the common-law trespassory test." *United States v. Cantu*, 684 F. App'x 703, 705 (10th Cir. 2017). The property-based approach applies when the government "(1) trespasses upon a constitutionally protected area, (2) to obtain information." *Taylor v. City of Saginaw*, 922 F.3d 328, 332 (6th Cir. 2019) (citing *United States v. Jones*, 565 U.S. 400, 404 (2012)). The privacy-based approach asks, even if the search did not stem from a trespass in physical property, whether the government invaded a person's reasonable expectation of privacy. *Carpenter*, 138 S. Ct. at 2213. Unannounced physical inspections of private citizens' businesses constitute searches under both approaches.

In this case, there is no dispute the warrantless inspections at issue constitute searches. The district court, however, held "the dog boarding and training kennel industry is pervasively regulated" and the inspections therefore fell within the exception outlined in *Burger*. Opinion at 11. However, the closely regulated industry doctrine is meant to have a "narrow" focus that only applies to those few industries that have

"such a history of government oversight that no reasonable expectation of privacy could exist." *Burger*, 482 U.S. at 699–700 (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978) (internal citation omitted)). Where the exception applies, it lowers the threshold for determining whether a search is reasonable. *Burger*, 482 U.S. at 702–03. But that narrow exception simply does not apply here—not under the property-based approach nor under the privacy-based approach.

B. As the Unannounced, Warrantless Inspections Are Property-Based Searches, the 'Closely Regulated Business' Exception Cannot Apply

A physical inspection of a dog handler and trainer's property constitutes a property-based search because each search trespasses upon a constitutionally protected area to obtain information. *Taylor*, 922 F.3d at 332 (citing *Jones*, 565 U.S. at 404). As correctly noted by the district court, except in a carefully circumscribed class of cases, a search of property is unreasonable unless it has been authorized in advance by a proper search warrant. *See Camara*, 387 U.S. at 528–29. This rule applies to commercial premises as well as homes. *Marshall*, 436 U.S. at 312.

The district court, however, found the inspections at issue did not violate the Fourth Amendment because dog handling and training fell under the closely regulated industry exception. Opinion at 11. But as noted above, that exception is based solely on a *privacy* analysis, rather than the proper *property* analysis. *Burger*, 482 U.S. at 699.

A physical inspection of a dog handler and trainer's property constitutes a property-based search because it trespasses upon constitutionally protected physical

property. It involves government "(1) trespass[ing] upon a constitutionally protected area, (2) to obtain information." *Taylor*, 922 F.3d at 332) (citing *Jones*, 565 U.S. at 404). It does not matter that the trespass is *de minimis* or if the information obtained lies in plain view—chalking a vehicle's tire to verify the duration it was parked in a public space is a property-based search. *Taylor*, 922 F.3d at 332. The unannounced inspection regime at issue here results in far greater intrusion on private property than merely chalking tires and is a search under the traditional property-based approach.

Expectations of privacy are irrelevant in the context of a property-based violation. *Florida v. Jardines*, 569 U.S. 1, 11 (2013). The privacy-based inquiry "has been *added to,* not *substituted for,* the traditional property-based understanding of the Fourth Amendment." *Jardines*, 569 U.S. at 11 (emphasis in original; internal quotations marks omitted). Therefore, the Court explained, it "is unnecessary to consider" the privacy-based test "when the government gains evidence by physically intruding on constitutionally protected areas." *Id.* (citation omitted).

The Appellants pleaded a *Jones-Jardines* physical-intrusion claim. (App. 34–38). However, the government only moved to dismiss the Appellants' privacy-based claims. (App. 191.) The district court then applied the pervasively regulated industry exception, which could only be relevant to a privacy-based analysis, to the Appellants' property-based, physical-intrusion claims. (App. 241–47.) That was reversible legal error for the district court to apply a privacy-based exception to a search intruding on physical property.

C. Even If the 'Closely Regulated Business' Exception Applied to Physical Searches, the Exception's Requirements Are Not Met Here

The unannounced, warrantless physical inspection would also violate Appellants' reasonable expectations of privacy by conducting an unconstitutional search under the privacy-based approach to the Fourth Amendment as articulated in *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

As the district court rightly noted, given the commercial property in this case is located at the Appellants' home, their expectation of privacy is heightened. Opinion at 8. "The circumstances of a particular commercial property dictate the level of an individual's expectation of privacy. As a consequence, a broad invitation to the general public would result in a lesser expectation of privacy compared to the expectation of privacy associated with a commercial property closed to the general public." *Mimics, Inc. v. Vill. of Angel Fire*, 394 F.3d 836, 843 (10th Cir. 2005) (quoting *United States v. Bute*, 43 F.3d 531, 536–37 (10th Cir.1994)). "[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. U.S. Dist. Ct. for E. Dist. Of Mich., S. Div.*, 407 U.S. 297, 313 (1972).

The closely regulated industry doctrine does not excuse a warrantless property-based search as a categorical matter. Nor would it excuse the search of the dog training and handling business here under a privacy-based analysis. That "narrow" exception, *Burger*, 482 U.S. at 700, turns on several factors, including whether the relevant industry has a history of warrantless searches, the extensiveness of the regulatory scheme, *id.* at

704, and whether the industry poses a "clear and significant risk to the public welfare," *City of Los Angeles v. Patel*, 576 U.S. 409, 424 (2015) (citing authorities). Moreover, the government must establish that the warrantless inspections are "necessary" to advance a "substantial" government interest in the regulatory scheme and must "provid[e] a constitutionally adequate substitute for a warrant." *Burger*, 482 U.S. at 702–03 (quoting *Donovan*, 452 U.S. at 603). None of those requirements was established below.

1. Dog Training and Handling Is Not a 'Closely Regulated Industry'

The district court did not identify any history of warrantless searches of dog-training businesses. Opinion at 8–11. Nor did the court identify a basis to conclude that the regulatory scheme for this kind of business is particularly extensive compared with other businesses. Opinion at 8–11.

The narrowness of this closely regulated industry exception is demonstrated by the minimal number of industries where the Supreme Court has found it applicable—a total of only *four*(!). The Supreme Court upheld the warrantless search of a liquor dealer in *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), on the ground that the dealer belonged to a closely regulated industry with diminished expectations of privacy dating back to 1791, the year the Fourth Amendment was ratified, *id.* at 74. It has extended this doctrine to only three additional industries: firearms sales, *United States v. Biswell*, 406 U.S. 311 (1972); mining, *Donovan v. Dewey*, 452 U.S. 594 (1981); and automobile junkyards, *Burger*, 482 U.S. 691. As the Court explained, there are "indeed exceptions, but they represent responses to relatively unique circumstances." *Marshall*,

436 U.S. at 313. Three dissenting justices warned in *Burger* that a lax test for defining a closely regulated industry would mean "few businesses will escape such a finding" and the "warrant requirement [would become] the exception not the rule." *Burger*, 482 U.S. at 721 (Brennan, J., dissenting). That warning proved prescient as lower courts promiscuously expanded the exception for many years to circumvent warrants in an endless list of industries, ranging from childcare, *Rush v. Obledo*, 756 F.2d 713, 720–21 (9th Cir. 2009), to pet sales, *Lesser v. Espy*, 34 F.3d 1301, 1307 (7th Cir. 1994).

However, the Supreme Court corrected course in *Patel*, which held the exception does not apply to hotels. *Patel*, 576 U.S. 409. *Patel* reminded lower courts that the closely regulated industry doctrine "has always been a narrow exception" that must not "swallow the rule" of the warrant requirement. *Id.* at 424–25. To this end, *Patel* announced that hotels do not fall within the exception because "nothing inherent in the operation of hotels poses a clear and significant risk to the public welfare." *Id.* at 424. An attenuated connection to public welfare is not enough, and the industry instead must be "intrinsically dangerous." *Id.* at 424 n. 5.

The district court held that because "the regulatory presence here is sufficiently comprehensive and defined" the dog training and handling business is closely regulated, Opinion at 11, but it erred by assuming that the common regulatory scheme applicable to this business suffices to qualify for the narrow "closely regulated industry" exception. Rather than be "tremendously cautious" in applying that narrow and industry-specific exception, the court also "define[d] the industry … at too high a level of generality."

Mexican Gulf Fishing Co. v. United States Dep't of Com., 60 F.4th 956, 968–70 (5th Cir. 2023). That dog won't hunt. Even if some other subset of the industry pertaining to raising dogs merits treatment as a closely regulated industry—itself a dubious premise—proper consideration of the facts around the training and handling of hunting dogs would show that this industry subset does not.

Besides, the case law cited by the district court addressed a different industry—dog breeding—which is a different subset of the industry related to dogs. The court first cited an outdated (pre-*Patel*), out-of-circuit, district court opinion, *Dog Breeders Advisory Council v. Wolff*, which concluded that "dog breeding [wa]s a pervasively regulated activity." *Dog Breeders Advisory Council v. Wolff*, No. CIV. 1:CV-09-0258, 2009 WL 2948527, *9 (M.D. Pa. Sept. 11, 2009). The second case it cited, *State v. Warren*, was a Montana state case that relied on *Wolff's* conclusion. *State v. Warren*, 395 Mont. 15, 26 (2019). Neither case the district court invoked thus addressed the specific industry in this case. "[P]ervasive regulation within a subset of an industry does not necessarily extend to the whole industry." *Mexican Gulf*, 60 F.4th at 968 (citing *Zadeh v. Robinson*, 928 F.3d 457, 466 (5th Cir. 2019)).

The district court also brushed aside *Patel*'s fact-intensive approach and relied on the mere existence of kennel regulations to hold that dog training and handling counted as a "closely regulated industry." Opinion at 10. The court even referenced the Act itself as an example of how the industry is closely regulated, Opinion at 10, which is impermissible. "[T]he Government … cannot rely on the inspection provisions of the

Statutes and regulations to themselves establish that the industry is closely regulated." *Free Speech Coal., Inc. v. Att'y Gen. United States*, 825 F.3d 149, 170 (3d Cir. 2016). *See Patel*, 576 U.S. at 425 ("The City wisely refrains from arguing that [the challenged inspection provision] itself renders hotels closely regulated."); *Burger*, 482 U.S. at 720 (Brennan, J., dissenting) ("[T]he inspections themselves cannot be cited as proof of pervasive regulation justifying elimination of the warrant requirement; that would be obvious bootstrapping."). Two of the other regulations cited by the court, 7 U.S.C. § 2131, *et seq.*, and 9 C.F.R. § 1.1 *et seq.*, apply to dog dealers, exhibitors, and breeders, not to the Appellants' dog handling and training business.

The district court's reliance on the existence of some regulations of *kennels* is insufficient on its own to determine *dog handling and training* is a "closely regulated industry." Such a rationale would sweep virtually all regulated industries into the scope of this exception to Fourth Amendment protections. "The Supreme Court intended [the closely regulated industry] exception to apply only where a specific industry is pervasively regulated, and not to apply where a particular activity … is broadly regulated among all businesses that operate in interstate commerce." *United States v. Hajduk*, 396 F. Supp. 2d 1216, 1234 (D. Colo. 2005).

And, if anything, regulation of dog kenneling operations incidental to the training and handling of hunting dogs more closely resembles a kind of dog hotel operation, so it is quite analogous to an industry that the Supreme Court in *Patel* explicitly held not to be intrinsically dangerous. Certainly, dog kenneling operations are more analogous to

the hotel industry than they are to businesses involving liquor sales, mining, firearms sales or automobile junkyards—junkyard dogs notwithstanding!

Indeed, the district court's approach would expand the closely regulated industry exception to cover virtually every business activity relating to dogs. The district court itself acknowledged that the Act also applies to hobby breeders and pet shops. Opinion at 3 n.1. So, under the district court's reasoning, every hobbyist who breeds dogs, and every pet shop in Kansas, would lose the protections of the Fourth Amendment.

Worse, the district court's approach would extend the exception even more broadly, to sweep in a wide range of other commonplace business activities. Kansas maintains similar regulatory schemes, including some with license and inspection requirements, for industries as mundane as barber shops, Kan. Admin. Regs. § 61-1-1; and beauty shops that provide cosmetic services and manicures, Kan. Admin. Regs. § 69-13-2. Surely the "narrow" exception the Supreme Court articulated in *Burger*, 482 U.S. at 700, does not encompass all such licensed industries.

This conclusion is confirmed by again noting the only four industries where the Supreme Court has applied the exception. Three of these industries pose obvious risks of physical harm—firearms, mining, and automobile junkyards. The fourth—intoxicating liquor—has been subject to regulation so longstanding, pervasive, and idiosyncratic that a federal statute permits federal inspections, *see* 26 U.S.C. § 5123, and it has its own Constitutional amendment, U.S. Const. amend. XXI. Hunting dogs pose no similar risk of physical harm, dog-related businesses are subject to no parallel federal

inspections, and no Constitutional amendment addresses the regulation of man's best friend.

2. The District Court Identified No Basis to Find that Dog Training and Handling Businesses Pose a Threat to the Public

Nor did the district court identify a basis to conclude that the dog training and handling business "poses a clear and significant risk to the public welfare," which the Supreme Court deemed required in *Patel*, 576 U.S. at 424. This is a fact-intensive inquiry, *id.* at 416, that cannot properly be resolved on a motion to dismiss.

The "intrinsically dangerous" industries determined to have qualified as closely regulated were ones in which there was a substantial government interest vitiating warrants under *Burger* related to their danger. *Cf., e.g., Kilgore v. City of S. El Monte*, 3 F.4th 1186, 1192 (9th Cir. 2021) ("curtailing prostitution and human trafficking is a substantial government interest"); *Calzone v. Olson*, 931 F.3d 722, 725 (8th Cir. 2019) ("Missouri has a substantial interest in ensuring the safety of the motorists on its highways"); *Owner-Operator Indep. Drivers Ass'n, Inc. v. U.S. Dep't of Transportation*, 840 F.3d 879, 895 (7th Cir. 2016) ("The public safety concerns inherent in commercial trucking give the government a substantial interest."). The unannounced inspection requirement here is unrelated to an intrinsically dangerous activity.

Virtually all regulated industries because of externalities would arguably endanger the public welfare in some way. Such reasoning improperly dilutes *Patel*'s dangerousness criterion to mean "regulated for public welfare," because if "general regulations were

sufficient to invoke the closely regulated industry exception, it would be hard to imagine a type of business that would not qualify." *Patel*, 576 U.S. at 425. An attenuated connection to public danger is not enough, otherwise a narrow exception would swallow the rule. The Supreme Court therefore emphasized that while "[h]otels—like practically all commercial premises or services—can be put to use for nefarious ends," they still do not qualify because the industry must be "intrinsically dangerous." *Id.* at 424 n.5. Simply put, nothing in the complaint or the law supports the district court's conclusion that the training and handling of hunting dogs behind Appellants' house poses any intrinsic danger to the public, so, it cannot be a closely regulated industry.

3. The District Court Provided No Basis to Conclude Warrantless Searches Are 'Necessary' to Advance a Substantial Government Interest

Nor did the district court identify a basis to conclude the warrant exception is "necessary" to accomplishing a "substantial" government interest relating to dog training and handling businesses. *Burger*, 482 U.S. at 702–03. Even if dog handling and training were intrinsically dangerous, the closely regulated industry exception to warrantless searches still would not apply because the unannounced inspection requirement flunks the three *Burger* requirements for that exception, 482 U.S. at 702–03. Specifically, (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

government must "provid[e] a constitutionally adequate substitute for a warrant." *Id.* (quoting *Donovan*, 452 U.S. at 603).

The district court did not appropriately cite case law to support the claim the government has a "substantial" interest supported by the requirement. The Senate Report cited by the court was focused specifically on "humane treatment of those animals *which are destined for use in research facilities*." S. Rep. No. 89-1281, at 5. (emphasis added). The first case cited by the court, *State v. Marsh*, specifically related to "puppy mills," which is specific to the dog-breeding industry, not the dog training and handling industry. *State v. Marsh*, 823 P.2d 823, 827–28 (Kan. Ct. App. 1991). The second case cited by the court, *Kerr v. Kimmell*, also addressed the question of regulations on "animal breeders," rather than trainers and handlers. 740 F. Supp. 1525, 1528 (D. Kan. 1990).

Additionally, the warrant exception must be "necessary" to accomplishing the government's interest. The government's "interest in safeguarding the well-being of the public … does not necessarily equate with a need for" warrantless governmental searches. *Mimics*, 394 F.3d at 844–45. The burden for proving this need for the exception is on the government. *See Coolidge v. New Hampshire*, 403 U.S. 443, 454–55 (1971); *California v. Acevedo*, 500 U.S. 565, 589 n.5 (1991).

The district court did not adequately cite case law—nor a specific factual reason supported in the record—to explain the necessity for unannounced warrantless inspections in this case. The court only cited a general purpose for the inspections to "ensure humane conditions of animals in kennels" and "ensur[e] that training kennel

operators comply with the Act." Opinion at 12–13. The district court cited nothing to support the government's argument that such inspections are "necessary." The one case cited by the court related to the wild animal exhibitor industry in which the Tenth Circuit "assume[d]" the regulation at issue "fit[] within the analytical framework of *Burger*." *Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853, 866 (10th Cir. 2016). Hunting dogs are not wild animals. And the district court did not explain what actions the Appellants would be prevented from taking by searching them unannounced without a warrant, which would assist the government in obtaining this general purpose. This lack alone shows dismissal at this stage was inappropriate.

In cases where a warrant exception has been allowed, the industry has had a specified need for such searches. These have included instances "when the objects of a search lend themselves to easy concealment or alteration," when "the search objects are likely to change hands quickly," and "to identify stolen items before they were resold." *Liberty Coins, LLC v. Goodman*, 880 F.3d 274, 285 (6th Cir. 2018). Furthermore, "the Supreme Court has cautioned that simply seeking to prevent falsification of records or looking to avoid administrative burdens will not be sufficient to conduct a warrantless search." *Id.* (citing *Patel*, 576 U.S. at 427).

The district court did not cite any facts alleged in the complaint to support its holding that the unannounced inspections were necessary. Warrantless searches are unnecessary where "there is no basis to believe … spot checks" are "unworkable." *Patel*, 576 U.S. at 427. The lack of support also shows dismissal was inappropriate.

One of the possible needs for the inspection requirement seems similar to the need expressed by the government, but rejected by the Supreme Court, in *Patel.* The inspection requirement allows inspectors to "examine records required to be kept under K.A.R. 9-18-7" and "make copies of the records." Kan. Admin. Regs. § 9-18-8. This activity seems to be directly analogous to the review of hotel records the Supreme Court did not allow under *Patel*. *Patel*, 576 U.S. at 426–27. The Supreme Court "has previously rejected this exact argument, which could be made regarding any recordkeeping requirement." *Id.* at 427. *Burger*'s necessity prong requires a far more compelling need.

Another possible need for the inspection requirement seems purely compliance-focused, and thus not substantial enough to be considered a necessity. Inspectors additionally may "inspect premises and animals" and "document, by the taking of photographs and other means, any conditions and areas of noncompliance." Kan. Admin. Regs. § 9-18-8. "The state's specified reason for needing access to this additional information is merely so that it can ensure compliance with the Act. … But it is unclear why *warrantless* searches would be required to effectuate this compliance-based purpose." *Liberty Coins*, 880 F.3d at 290 (emphasis in original).

Additionally, the district court cited no specific reason why obtaining a warrant would not be feasible even though Kansas courts can issue warrants, Kan. Stat. Ann. § 22-2502, and the regime itself sets forth an administrative warrant procedure, Kan. Stat. Ann. § 47-1709(k).

Necessity is further undermined by the fact that dog trainers and handlers already must submit to oversight of their operations. CFK is already inspected annually by a veterinarian, Kan. Stat. Ann. § 47-1701(dd)(1)(A) (App. 38, ¶ 153); it operates under a veterinary plan of care, Kan. Stat. Ann. § 47-1701(dd)(1), Kan. Admin. Regs. § 9-18-21 (*id.*); and unlike other businesses, Mr. Johnson is accountable to the dogs' owners (App. 16-18, ¶¶ 36-49; App. 38, ¶ 153.).

Furthermore, requiring individuals to be within 30 minutes of their business properties to be able to facilitate unannounced inspections is far from "necessary." Appellants have a right to be able to travel and engage in other activities that may prevent them from being able to return to their businesses in such a short timeframe. The district court failed to address why Appellees need to be able to inspect the Appellants' papers and premises unannounced.

Finally, the unannounced inspection requirement is also devoid of "a constitutionally adequate substitute for a warrant." *Burger*, 482 U.S. at 702–03 (quoting *Donovan*, 452 U.S. at 603). This third criterion requires warrantless searches to be "carefully limited in time, place, and scope." *Id.* at 703 (quoting *Biswell*, 406 U.S. at 315). In *Zadeh*, 928 F.3d at 467, the Fifth Circuit held warrantless inspections of medical facilities failed to provide constitutionally adequate limits where "only licensees are subject to the subpoena; only medical records must be produced; and it is the [agency] or its representatives who will be asking for the records." The Act is even worse, as it allows Appellees to require individuals to be within 30 minutes of their businesses to

facilitate unannounced inspections, thus limiting those individuals' freedom of movement and infringing on their rights to engage in other far-flung activities.

The district court did not appropriately consider the facts as alleged in the light most favorable to the Appellants. The Appellants alleged the inspections are sporadic, irregular, and random. (App. 27-28, ¶¶ 91-94). They also alleged the government's handbook did not limit its discretion. (App. 28, ¶ 94; App. 83). Additionally, they alleged there were not upper limits on inspectors' ability to search. (App. 27-28, ¶¶ 9-94; App. 83). These unrebutted allegations undermine a finding of there being an adequate warrant substitute.

D. The Government's Voluntary Consent Argument Justifying the Unannounced, Warrantless Inspections Also Fails

The government's argument that the Appellants consented to the searches also fails. Consent is a factual question, which the government acknowledged. (App. 176). Additionally, the Appellants are seeking prospective relief. (App. 12-13, 34, 41, 47-48). There is therefore not enough in the record to make a determination about consent at this stage. Even if the record were sufficient, the government's argument would fail. The government suggests the obtaining of a license to run a kennel is voluntary. If one doesn't want to have to return to one's business to facilitate an inspection, according to its logic, simply don't train or handle dogs. This amounts to purchasing submission by a regulatory agency and is not a valid use of regulatory power. *See generally,* PHILIP HAMBURGER, PURCHASING SUBMISSION: CONDITIONS, POWER AND FREEDOM 230–32,

243–44 (Harvard Univ. Press, 2021). Here the waiver of Fourth Amendment rights and the acquiescence to the taking of their property is the type of coercion through regulation disapproved of by the Court in *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987) (requiring an easement in exchange for regulatory permission to build unlawful condition) and *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994) (requiring a portion of property for traffic and flood control for permission to build constitutes unlawful regulatory action under the Fifth Amendment). The Act is not free choice but rather compulsion. *Garrity v. New Jersey*, 385 U.S. 493, 497–98 (1967) ("The option to lose their means of livelihood . . . is the antithesis of free choice."). Accordingly, the Court should not interpret authority under Kan. Stat. Ann. § 47-1701, *et seq*., to permit such an unconstitutional mandate to engage in unwanted commerce.

CONCLUSION

For the foregoing reasons, this court should reverse the judgment below and remand the case for further proceedings.

Dated: July 17, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the requirements of Federal Rule of Appellate Procedure 32(g)(1) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(g)(1) because it contains 5,669 words according to the count of Microsoft Word.

I further certify that the facts supporting consideration of this motion are true and complete.

/s/ Markham S. Chenoweth
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Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that:

☒ All other parties to this litigation are either: (1) represented by attorneys; or
(2) have consented to electronic service in this case; or

☐ On ____________________________ I sent a copy of this Entry of Appearance,
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Certificate of Interested Parties, and Disclosure Statement to:

New Civil Liberties Alliance
[name of party]

at 1225 19th Street NW, Suite 450, Washington, DC 20036,
[address]

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Email.
[method of service]

7/17/2023

Date

/s/ *Markham S. Chenoweth*
Signature