No. 23-3091

United States Court of Appeals
for the Tenth Circuit

SCOTT JOHNSON, ET AL.,
Appellants,

v.

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

On Appeal from the United States District Court
for the District of Kansas

BRIEF OF AMICUS THE BUCKEYE INSTITUTE IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE

Amicus curiae, The Buckeye Institute,[1] was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states. The staff at The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing those policy solutions for implementation in Ohio and replication throughout the country. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization as defined by I.R.C. section 501(c)(3). The Buckeye Institute's Legal Center files lawsuits and amicus briefs that are consistent with its mission and goals.

The Buckeye Institute is dedicated to promoting free-market policy solutions and protecting individual liberties, especially those liberties guaranteed by the Constitution of the United States, against government overreach. The Buckeye Institute has taken the lead in Ohio and across the country in advocating for the roll-back of government regulations that burden citizens' ability to exercise their constitutional rights to make free use of their property.

[1] Pursuant to Rule 29(a), The Buckeye Institute states that all parties have given consent to file this amicus brief. Further, no counsel for any party has authored this brief in whole or in part and no person other than the amicus has made any monetary contribution to this brief's preparation or submission. The Buckeye Institute has no parent corporation and no publicly held corporation owns 10% or more of its stock.

SUMMARY OF ARGUMENT

The Fourth Amendment's protections are the outgrowth of violations to personal and business privacy. The Court has long maintained that searches "outside the judicial process, without prior approval by [a] judge or [a] magistrate [judge], are per se unreasonable." *City of Los Angeles, Calif. v. Patel*, 576 U.S. 409, 419 (2015) (quoting *Arizona v. Gant*, 556 U.S. 332, 338 (2009)). Administrative searches or, in other words, searches conducted to enforce a regulatory scheme, conducted outside the judicial process or absent a special circumstance, are also unreasonable under the Fourth Amendment. Pre-authorization from the legislature to conduct a search does not satisfy the Fourth Amendment. Absent a risk of probable, imminent harm or destruction of evidence, the searching agency must justify its search to a neutral and detached judicial official before conducting a search. And the subject of the search must be afforded the opportunity for precompliance review. "This rule 'applies to commercial premises as well as to homes.'" *Id.* at 419–420 (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978)).

Any rule regarding administrative searches must follow this interpretation of the Fourth Amendment. The privacy interest in a business, especially one intimately intertwined with a home, should be granted the same protection as any other privacy interest. To justify an administrative search, there must be prior approval by a neutral and detached decisionmaker or a probable, imminent risk of harm or destruction of

evidence. In *Patel*, the Court reversed the trend of many lower courts of expanding the administrative search exception to the Fourth Amendment and allowed a presumption of "reasonableness" of administrative searches of businesses only where the business poses "a clear and significant risk to the public welfare," is pervasively regulated, *and* a warrantless search is necessary to further a regulatory scheme in which there is a substantial government interest, and the administrative search structure provides adequate constitutional safeguards.

Similar to the law struck down in *Patel*—which addressed the legality of anytime and no-notice administrative searches of hotel guest registries—the law here offers no opportunity for a neutral decisionmaker to review the need for the search and punishes those who do not comply. In this case, if the business owner is not at the premises within 30 minutes and does not consent to the search, he will be charged—or fined—a $200 no-contact fee, and the government will attempt another warrantless search. K.S.A. § 47-1721(d). If the business owner is not available for the follow-up search, he will again be charged a $200 no-contact fee. *Id.* After three attempts, the state may suspend or revoke the business owner's license. K.S.A. § 47-1709(b).

Additionally, refusing a warrantless search or violating the regulatory scheme constitutes a misdemeanor. K.S.A. § 47-1715(a). A violation may also result in civil penalties, K.S.A. § 47-1707(a); a license suspension or revocation, K.S.A. § 47-

1706(a); seizure or impoundment of animals, K.S.A. § 47-1706(e); and the government may obtain a restraining order preventing the operation of the business, K.S.A. § 47-1727.

This Court must abide by *Patel*'s limits on the administrative search exception and reverse the lower court's decision.

ARGUMENT

I. The Fourth Amendment protects a privacy interest in one's business.

"The security of one's privacy against arbitrary intrusion * * *—which is at the core of the Fourth Amendment—is basic to a free society." *Wolf v. People of the State of Colo.*, 338 U.S. 25, 27 (1949), *overruled on other grounds by Mapp v. Ohio*, 367 U.S. 643 (1961). The Fourth Amendment's security extends outside the home and even to one's business.

> The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by warrant.

See v. City of Seattle, 387 U.S. 541, 543 (1967).

The Founders knew the risks inherent in warrantless and unreasonable searches of businesses. "Objections first raised by religious minorities in the 1580s were echoed in the 1640s by merchants protesting customs searches, artisans condemning guild searches, and Parliamentary complaints about searches of its

members." Morgan Cloud, *Searching Through History; Searching for History*, 63 U. Chi. L. Rev. 1707, 1725 (1996) (citing William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602–1791* 193 (UMI 1990). "*Ex officio* searches by customs officers are an important example of warrantless searches that produced opposition in the colonies in the years preceding the Revolution." *Id.* at 1726 n. 60 (citing M.H. Smith, *The Writs of Assistance Case* 116–118 (1978); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 Wm & Mary L. Rev. 197, 219–222 (1993)).

As the text of the Fourth Amendment evidences, warrantless searches were not the only concern of the Founders. The Founders' concern that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized," arose from the Crown's use of general warrants. These general warrants—and their colonial counterparts, writs of assistance—possessed "a power that place[d] the liberty of every man in the hands of every petty officer." James Otis, *Against Writs of Assistance* (Feb. 24, 1761). The risks inherent in general warrants and writs of assistance fell on individuals and businesses.

> Around the time of the ratification of the Constitution, England [ ] authorized general warrants for new categories of searches. In 1789, English law retained general warrants to enforce treason, felony, vagrancy, *customs*, and *excise tax laws*. Six years later, legislation

> expanded the list to permit general searches for the impressment of seamen and for *economic regulation* (p 984).

Cloud, *supra*, at 1727 n. 65 (emphasis added). *See also Frank v. State of Md.*, 359 U.S. 360, 379 (1959) (Douglas, J., dissenting) (discussing general warrant statutes regulating customs and "forfeitures of goods shipped into the Colonies in violation of English shipping regulations"), *overruled by Camara v. Mun. Ct. of City & Cnty. of San Francisco*, 387 U.S. 523 (1967).

Much like modern administrative searches, Parliament enacted statutes to authorize certain types of general warrants. From the fourteenth through the seventeenth century, "the legislation was 'uniformly characterized by the granting of general and unrestricted powers.' Legislation enabling customs searches and seizures was adopted in 1662, authorizing searches without suspicion anywhere the searcher desired to look." Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 Ind. L. J. 979, 991 (2011). Additionally, writs of assistance "were not issued as a result of any information that contraband was stored at a specified place; instead, the customs officials could search wherever they chose. 'The discretion delegated to the official was therefore practically absolute and unlimited.'" *Id.*

The Founders distained this absolute and unlimited power. They understood that the privacy interest in one's person, house, papers, and effects, exists regardless of where they are located or the purpose for which they are used.

> [W]hile the Fourth Amendment "was written against the background of the general warrants in England and the writs of assistance in the American colonies," it "gives a protection wider than these abuses." It was designed to protect the citizen against uncontrolled invasion of his privacy. It does not make the home a place of refuge from the law. It only r*equires the sanction of the judiciary rather than the executive* before that privacy may be invaded.

Frank, 359 U.S. at 381–382 (Douglas, J., dissenting), *overruled by Camara*, 387 U.S. 523 (emphasis added and citations omitted).

Ever since then, governments at all levels have tested the limits of the Fourth Amendment. They always have—and always will—assert the need to evade, ignore or cut back on Fourth Amendment protections. And there is always a purported reason for it, whether to protect the public, protect employees, protect animals, or to benefit some greater good. The government can always rationalize law enforcement's need to enter unannounced, and without the bother of a neutral decisionmaker scrutinizing that need, to prevent ne'er-do-wells from evading the law or causing trouble. But the Founders knew well both the capacity of ne'er-do-wells to do bad things and their efforts to evade the law and balanced them against the individuals' privacy rights under the Fourth Amendment. The courts have—thankfully—usually come down on the side of the right to privacy. Indeed, the courts are the bulwark against all such invasions. As

> [i]mplicit in the Fourth Amendment's protection from unreasonable searches and seizures is its recognition of individual freedom. That safeguard has been declared to be "as of the very essence of constitutional liberty" the guaranty of which "is as important and as

> imperative as are the guaranties of the other fundamental rights of the individual citizen."

Ker v. State of Cal., 374 U.S. 23, 32 (1963) (quoting *Gouled v. United States*, 255 U.S. 298, 304 (1921)).

II. The privacy interest in one's business is at its greatest when the business co-located in one's home.

The Court has long recognized that the Fourth Amendment's protections are strongest at home. *Florida v. Jardines*, 569 U.S. 1, 6 (2013). But the protection given to the home extends beyond its walls to the curtilage surrounding the home. *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018) ("[T]he Court considers curtilage—'the area immediately surrounding and associated with the home'—to be 'part of the home itself for Fourth Amendment purposes.'" (quoting *Jardines*, 569 U.S. at 6)). That protection is intended to "assure[] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo v. United States*, 533 U.S. 31, 34 (2001). And the privacy interest in the home and its curtilage should not dissipate merely because it is used for commercial purposes.

Founding-era cases challenging general warrants provide useful examples of when personal privacy and commercial privacy intersect. Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1196 (2016). Three pivotal cases "laid the groundwork for the Founders' rejection of general warrants: *Entick v Carrington* in 1765, *Wilkes v Wood* in 1763, and *Leach v Money* in 1765." *Id.*; *see*

also Boyd v. United States, 116 U.S. 616, 624 (1886) (discussing the Founder's knowledge and importance of the cases), *overruled on other grounds by Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967). Each of these cases mixed home with work. In all three cases, the writers and printers of weekly newspaper essays were accused of lambasting the Crown. In one, a general warrant was ordered "to make strict and diligent search for the authors, printers and publishers of a seditious and treasonable paper," and "to apprehend and seize [them], together with their papers * * * ." Donohue, *supra*, at 1201 (citation omitted). The homes of three men were searched, and the men, along with their personal and professional papers, were seized.

When the searches were challenged as trespasses, the courts took issue with the searches. The court in *Wilkes* condemned the search, noting that "[b]eyond the privacy invasion, significant risk accompanied the proposition '[t]hat some papers, quite innocent in themselves, might, by the slightest alteration, be converted to criminal action.'" Donohue, *supra*, at 1203 (quoting *Wilkes v. Wood*, 19 How. St. Tr. 1153, 1154 (1763)). Wilkes "obtained a verdict of £1,000 against Wood, one of the party who made the search, and £4,000 against Lord Halifax, the secretary of state, who issued the warrant." *Boyd*, 116 U.S. at 626, *overruled on other grounds by Hayden*, 387 U.S. 294. In *Leach*, the court held the general warrants void and the jury awarded Leach damages of £400. *Money v. Leach*, 97 Eng. Rep. 1075, 1077,

1088 (1765). In *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765), Lord Camden pronounced "that the warrant to seize and carry away the party's papers in the case of a seditious, is illegal and void," *id.*, and "the law as expounded by him has been regarded as settled * * *," *Boyd*, 116 U.S. at 626, *overruled on other grounds by Hayden*, 387 U.S. 294. Lord Camden's judgment in *Entick* "is considered as one of the landmarks of English liberty." *Id.*

The Founders, aware of these issues, understood that the location of professional papers at a home does not reduce the privacy interest in the home.

> As every American statesmen, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures.

Id. at 626–627. A contrary view would degrade the Fourth Amendment's protections.

In this case, the district court's reliance on *Rush v. Obledo,* 756 F.2d 713 (9th Cir. 1985), creates such a degradation. Contrary to the district court's reasoning, simply because an individual runs a business in the home and knows that the government regulates that business, does not mean that the individual surrenders Fourth Amendment protections. By the district court's reasoning, anyone with a home office, who was required to work from home during Covid-19, or who has a home business—or even a side business at home—relinquishes some Fourth

Amendment protections. Such a ruling would force individuals to choose between the economic benefit of a home office and their constitutionally protected privacy. While different regulations certainly apply to businesses as compared to private residences, when the two are intertwined, the minimal level of Fourth Amendment protection—barring some very special circumstance—ought to be that which a home would ordinarily receive. An individual must be free to earn a living while working at home without giving up the privacy of his or her home.

III. The administrative search doctrine contravenes the Fourth Amendment.

The administrative search exception—at least as often exercised—does not comport with the Fourth Amendment. The exception tends to "water[] down" the "resounding phrase" that the Fourth Amendment was designed to protect the citizen against uncontrolled invasion of his privacy "to embrace only certain invasions of one's privacy." *Frank*, 359 U.S. at 375 (1959) (Douglas, J., dissenting), *overruled by Camara*, 387 U.S. 523. The Court's earliest adoption of the administrative search exception for "closely regulated businesses" relied on the longstanding regulation of the liquor industry. *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970). But early congressional practice does not necessarily reflect the original meaning of the Constitution.

> "Standing alone," [ ] "historical patterns cannot justify contemporary violations of constitutional guarantees," *Marsh v. Chambers*, 463 U.S. 783, 790 (1983), even when the practice in question "covers our entire national existence and indeed predates it," *Walz v. Tax Comm'n of City*

> *of New York*, 397 U.S. 664, 678 (1970). Nor is enactment by the First Congress a guarantee of a statute's constitutionality. See *Marbury v. Madison*, 1 Cranch 137 (1803).

United States v. Exec. Health Res., No. 21-1052, 35 (U.S. Jun. 16, 2023) (Thomas, J., dissenting).

Over the years, the Court struggled to find a clear doctrine for the administrative search exception for closely regulated businesses. *See generally* Note, *Rethinking Closely Regulated Industries*, 129 Harv. L. R. 797, 802–803 (2016). The court re-jiggered its direction on the doctrine more than once, causing confusion among the lower courts. The court indicated in *United States v. Biswell*, 406 U.S. 311 (1972), that the determining factor was if the industry was pervasively regulated. It seems that governments took the hint and tried to impose administrative searches on many other industries by enacting new pervasive regulatory schemes. State and lower federal courts sanctioned this expansion by approving administrative searches of dozens and dozens more businesses. *Rethinking Closely Regulated Industries*, *supra*, at 804. Now it is hard to identify a business that is not arguably pervasively regulated, which—under that standard—leads to the total evisceration of the Fourth Amendment as applied to any commercial venture. *See Patel*, 576 U.S. at 425. And the pervasive regulation standard allows the legislature to determine—on a categorical basis—when there is no reasonable expectation of privacy. It places the

constitutionally-guaranteed privacy interests of businesses at the mercy of the legislature.

"[U]nlike other warrant exceptions such as exigent circumstance or search incident to arrest, the applicability of the closely regulated industry exception does not require the occurrence of atypical situations; once the inspection scheme has been enacted, the exception is always available." *Rethinking Closely Regulated Industries*, *supra*, at 812. Thus, by allowing government agents to enter a business' property—even to review records—without individualized suspicion, the administrative search exception also grants the government agents the right to search and seize anything in plain view. *See Michigan v. Clifford*, 464 U.S. 287, 294–295 (1984). Or, when combined with the third-party doctrine, the administrative search exception

> enables broad governmental surveillance of information that citizens routinely turn over to businesses, which raises grave First Amendment concerns. As Justice Sotomayor recently explained, "[a]wareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse."

Rethinking Closely Regulated Industries, *supra*, at 812–813 (quoting *United States v. Jones*, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring)).

Fortunately in 2015 the Supreme Court had had enough. The Court began to reign in the administrative search doctrine, and pervasiveness alone is no longer enough.

IV. *Patel* has narrowed the closely regulated industry exception.

In *Patel*, the Court tried to reign in the lower courts. It rejected the expansive view of allowing administrative searches simply because governments had engaged in pervasive regulating. Governments can no longer create Fourth Amendment-free zones through oppressive—or "pervasive"—regulatory schemes.

The *Patel* Court's overview of the administrative search exception is revealing. The Court first reminded us that under the Fourth Amendment "searches conducted outside the judicial process, without prior approval by [a] judge or [a] magistrate [judge], are per se unreasonable" with only a few exceptions. *Patel*, 576 U.S. at 419 (interior citations omitted). Next, it emphasized that "[t]his rule 'applies to commercial premises as well as to homes.'" *Id*. at 419–420 (quoting *Barlow's, Inc*., 436 U.S. at 312). Turning to the administrative search exception, the Court emphasized the requirement that the government provide the business the "opportunity to obtain precompliance review before a neutral decisionmaker." *Id.* at 420 (citing *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984) ("noting that an administrative search may proceed with only a subpoena where the subpoenaed party is sufficiently protected by the opportunity to 'question the reasonableness of the subpoena, before suffering any penalties for refusing to comply with it, by raising objections in an action in district court.'")). Finally, it emphasized that administrative searches are to be the exception, not the rule. *Id*.

The Court then gave three reasons why the subject hotel administrative search law was unconstitutional under the Fourth Amendment, any of which would be sufficient to strike down the law as unconstitutional. First, it did not—as did other administrative search regimes previously approved by the Court—involve industries that posed "a clear and significant risk to the public welfare." *Id*. at 424. Second, it was not part of a "comprehensive regulatory" scheme, which would have suggested that the industry was pervasively regulated. *Id.* at 425. Third, it did not pass the *Burger* test. *Id.* at 426–428.

1. The *Patel* Three-Part Test.

The three reasons given by the *Patel* Court for why the hotel search law was unconstitutional created a three-part test lower courts must follow. If a law fails any part of the test, the administrative search scheme is unconstitutional.

a. The industry subject to administrative searches without a warrant must pose "a clear and significant risk to the public welfare."

Patel begins by explaining its first reason for rejecting administrative searches for hotels: In the 45 years since the Court created the doctrine, the Court has identified only four industries where "there is no reasonable expectation of privacy," and pointed out that the underlying rationale for such designation was that those industries posed a "clear and significant risk to the public welfare." *Id*. at 424. By contrast, the Court explained, the government had not shown that the hotel industry

posed a clear and significant risk to the public welfare. That was enough to reject the challenged statute. *See generally Rethinking Closely Regulated Industries*, *supra*, at 806.

Obviously, the Court was aware of all of the many lower courts' extensive designations of pervasively regulated industries, most of which do not pose a clear and significant risk to the public welfare. It was no accident that the Court gave this new guidance to lower courts. This rationale should dispose of—at least by implication—some lower courts' expansions of the administrative search doctrine into many industries.

One might argue—and some have—that the clear and significant risk to the public welfare rationale was merely dictum, but it is not. "A dictum is an assertion in a court's opinion of a proposition of law which does not explain why the court's judgment goes in favor of the winner." Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1256 (2006). In fact, the "clear and significant risk" reasoning is one of three alternative reasons why the court struck down the subject law. Indeed, "[w]hen [multiple] independent reasons support a decision, neither can be considered obiter dictum, each represents a valid holding of the court." *Sutton v. Addressograph–Multigraph Corp.*, 627 F.2d 115, 117 n. 2 (8th Cir. 1980) (per curiam).

Post *Patel*, many "courts have been hesitant to expand the categories which are designated as 'closely regulated.'" *Club Madonna, Inc. v. City of Miami Beach*, No. 16-25378-CIV, 2019 WL 8456493, at *23 (S.D. Fla. Oct. 24, 2019), *report and recommendation adopted*, 2020 WL 830582 (S.D. Fla. Feb. 20, 2020), *aff'd*, 42 F.4th 1231 (11th Cir. 2022). The Eighth Circuit accepted that under *Patel* "in the case of commercial property that is involved in a closely regulated industry whose operation 'poses a clear and significant risk to the public welfare,' the property owner has a reduced expectation of privacy." *Calzone v. Olson*, 931 F.3d 722, 724 (8th Cir. 2019). The Seventh Circuit similarly explained that "the Supreme Court signaled in *Patel* that courts should consider whether the industry is inherently dangerous." *Owner-Operator Indep. Drivers Ass'n, Inc. v. United States Dep't of Transportation*, 840 F.3d 879, 894 (7th Cir. 2016).[2] This Court should follow the Supreme Court's directive in requiring that an industry "pose a clear and significant risk to the public welfare" before allowing a government to impose an administrative search scheme on an industry.

[2] Some courts continue to ignore, or only pay lip service to, the "clear and significant risk to the public welfare" requirement. *See, e.g., Killgore v. City of S. El Monte*, 3 F.4th 1186 (9th Cir. 2021) (finding massage parlors to be a pervasively regulated industry without even mentioning the clear and significant risk to the public welfare language of *Patel*).

b. Industries can only be subjected to administrative searches if they are regulated as part of a "pervasive regulatory" scheme.

The *Patel* Court then moved to a second rationale for its holding, beginning with the word "moreover." *Patel*, 576 U.S. at 424. Moreover means "in addition to." *Moreover*, Merriam-Webster, https://www.merriam-webster.com/dictionary/moreover (last accessed Jul. 10, 2023). It does not suggest that the preceding argument is to be disregarded, that it is not enough on its own, or that it is not controlling. The Court's moreover clause provides another reason why, *even if there were* a clear and significant risk to the public welfare, the law would *still* be unconstitutional. The Court emphasized that the closely regulated industry exception is "the exception," and it should not swallow the rule. *Patel*, 576 U.S. at 424. Continuing, the Court explained that the government must show that the industry was "pervasively regulated" as evidenced by it being part of a comprehensive regulatory scheme and by the historical record. *Id.* at 425–426. That test—if that were enough by itself—would enable any government to create a scheme whereby "it would be hard to imagine a type of business that" could not become a pervasively regulated business, and thereby lose its Fourth Amendment protections, simply by the government enacting a new "pervasive regulatory scheme." *Patel*, 576 U.S. at 425. Surely it cannot be that the Court was giving a green light to governments to evade the Fourth Amendment just by creating enough regulations to "pervasively

regulate" an industry. And again, *Patel* pointed out that it had only approved the use of administrative searches (without the requisite safeguards) for four industries.

c. Any Administrative Search scheme must also satisfy the *Burger* Test.

The Court next turned to a third reason why the subject statute was unconstitutional: "Even if we were to find [under tests one and two] that hotels are pervasively regulated" they would still need to pass the *Burger* test. *Id*. at 426. There can be little question that this test is on top of the *Patel* Court's previous two rationales for striking down the hotel regulations in that case. For regulations to satisfy the Fourth Amendment under the *Burger* test,

> (1) "[T]here 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] provid[e] a *constitutionally adequate substitute for a warrant.*"

Id. (emphasis added) (quoting *New York v. Burger*, 482 U.S. 691, 701–702 (1987)).

2. The district court did not apply the *Patel* Three-Part Test.

a. The district court did not apply the "clear and significant risk to the public welfare" test.

Though the court below acknowledged the *Patel* Court's clear and significant risk to the public welfare reasoning, it failed to recognize it as a test and failed to apply it to the dog training and boarding industry. App. 242–244. Of course, dog training and boarding—"like practically all commercial premises or services—can

be put to use for nefarious ends. But unlike the industries that the Court has found to be closely regulated, [dog training and boarding] are not intrinsically dangerous." *Patel*, 576 U.S. at 424 n. 5. In fact, the Appellee did not argue, and no court has found, that dog training and boarding pose a clear and significant risk to the public welfare. *See* Opening Br. of Pls.-Appellants at 25–26.

In its evaluation of the State's interest, the court below relied on Kansas statutes regulating the humane treatment of animals and regulating the operation of puppy mills to support its finding. App. at 245–246. However, the humane treatment of animals is a universal responsibility of every animal owner and every person who encounters an animal. *E.g.,* K.S.A. § 21-6412. Thus, this cannot be a rationale for designating the dog training industry or the dog boarding industry as posing a clear and significant risk to the public welfare.

Accordingly, to search the subject premises for any supposed nefarious ends, the government must comply with the Fourth Amendment—it must prove to a detached decisionmaker that invasion of a specific training facility's rights is justified for a specified reason.

b. The district court improperly found dog training and boarding to be part of a pervasive regulatory scheme.

"Moreover"—to use the Court's language—categorizing dog training and boarding industries as being pervasively regulated makes it "hard to imagine a type of industry that would not qualify." *Patel*, 576 U.S. at 424–425. Indeed, these

industries are nothing like liquor sales, firearms dealing, automobile junkyards, or mining, where the Court has found a pervasive regulatory scheme. Comparing the regulatory schemes in those earlier Supreme Court cases to the regulations here, the State's interests are not "relatively unique circumstances" with respect to "certain carefully defined" industries. *Barlow's, Inc.,* 436 U.S. at 313 (internal quotation marks omitted). And history does not support treating the dog training and dog boarding industries as pervasively regulated. *See Patel*, 576 U.S. at 424.

In *Patel*, the dissent pointed out that hotels have been regulated from "the time of the founding" of the country, including allowing "warrantless searches." *Id*. at 433 (Scalia, J., dissenting). Yet the majority rejected that reasoning, noting that while "history is relevant when determining if the industry is closely regulated," it was not enough. *Id.* at 425. By contrast here, the district court found Kansas' regulation of dog training and dog kennels did not start until 1991. App. at 243. That is hardly a long history of regulation as compared to hotels, especially considering the 2018 changes to the dog industries' regulations, which implemented the 30-minute restriction, no-contact penalties, and prevented inspectors from providing advance notice of their searches. *See* App. at 169.

If general regulations such as those adopted here are "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. The Court has recognized that the

exception applies only in "relatively unique circumstances." *Barlow's, Inc.,* 436 U.S. at 313 (internal quotation marks omitted); *Burger*, 482 U.S. at 700–701 (recognizing the "narrow focus" of the doctrine to address a "unique" problem). *Patel* emphasized that the administrative search exception is "a narrow exception" and cautioned against it "swallow[ing] the rule." *Patel*, 576 U.S. at 410. And all the circuit courts—including this one—recognize that administrative searches are an "exception" and not the rule. *See, e.g., Kozel v. Duncan*, 421 F. App'x 843, 849 (10th Cir. 2011) (finding "well-established exception to the warrant requirement for administrative inspections of 'closely regulated' businesses" did not apply) (citation omitted)). The Court should hold the line and avoid expanding the exception.

c. The district court misapplied the *Burger* test.

Patel directed that even if an administrative search regime passed the first two tests, it must still pass the *Burger* test. The lower court claimed the subject law did so, but it missed the mark badly on at least parts two and three of the *Burger* test. The lower court stated the *Burger* test thusly:

> [T]he state must establish that (1) it has a substantial interest in regulating the industry which it seeks to inspect; (2) warrantless searches will further that interest; and (3) the regulatory scheme advises the owner of the commercial enterprise that the search is being made pursuant to the law and has a properly defined scope and it must limit the discretion of the inspecting officers.

App. at 242. But that is not the *Burger* test as *Patel* defined it.

The lower court correctly stated that the state has the burden, but *Patel* explained parts two and three of the *Burger* test to require that: "(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] provid[e] a constitutionally adequate substitute for a warrant.'" *Patel*, 576 U.S. at 426 (quoting *Burger*, 482 U.S. at 702–703).[3] The Court's second element is that the warrantless inspections be "*necessary*" to further a regulatory scheme that the government has a substantial interest in, *not* that the inspection will simply "further the substantial interest." The third element is that the inspection program must provide a constitutionally adequate substitute for a warrant, *not* that "it has a properly defined scope." The Supreme Court focused on government compliance with the Fourth Amendment to protect individual rights; the district court's test seems to focus on facilitating governmental intervention. In any event, the district court clearly did not apply the *Burger* test correctly. This Court should remand the case for proper evaluation based on the correct *Burger* test.

[3] The district court's confusion may stem from the fact that *Burger* expounded on the *third* element of the *Burger* test as follows: "In other words, the regulatory statute must perform the two basic functions of a warrant: it 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 inspecting officers." *Burger*, 482 U.S. at 703. But that does not change the test as set forth in *Patel*.

CONCLUSION

The Founders understood the Fourth Amendment to protect a privacy interest in one's affairs, whether for profit or not. *See*, 387 U.S. at 546. Failure to limit the administrative search exception would place constitutional rights at the mercy of the legislature. Thus, as the *Patel* Court reaffirmed, closely regulated industries are "the exception," and warrantless searches of businesses are permitted only as "responses to relatively unique circumstances." The Court curtailed the exception by requiring administrative searches to be limited to intrinsically dangerous industries, that are pervasively regulated, and only when constitutionally sound. For the reasons stated in the Appellants' brief and this *amicus* brief, this Court should reverse the decision of the United States District Court for the District of Kansas.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Amicus Brief was served on all counsel of record via the Court's electronic filing system on this 17th day of July, 2023.

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