IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TERESA M. ARNETT, SHARLEEN PELZL, JAMES O. SMITH and RPOA TEXAS OUTREACH, INC., PLAINTIFFS	§	
VS.	§	CIVIL ACTION NO. A-12-CV-0913-LY
FRANK DENTON, Chairman of Commissioners of the Texas Department of Licensing and Regulation, in his official Capacity and the STATE OF TEXAS, DEFENDANTS	§	

DEFENDANTS' RESPONSE TO MOTION FOR PRELIMINARY INJUNCTION

Defendants Frank Denton, in his official capacity as Chair of the Commissioners of the Texas Department of Licensing and Regulation (TDLR) and the State of Texas (collectively, "Defendants") file this Response in Opposition to Plaintiffs' Motion for Preliminary Injunction, and would respectfully show as follows:

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs are three individuals (Teresa M. Arnett, Sharleen Pelzl and James O. Smith) who reside in Texas as well as RPOA Texas Outreach, an organization of pet owners, breeders and trainers who assert that the organization's mission is to make a contribution to the quality of life for animals and people. *First Amended Complaint* ¶ 11.[1]

[1] Plaintiffs filed a Second Amended Complaint on October 31, 2012. (Doc. 10). Although Defendants do not object to the filing of the Second Amended Complaint, it appears that Plaintiffs may have been required to seek leave to file it because the rules permit the filing of only *one* amended complaint without leave of court. *See* Fed. R. Civ. P. 15(a). Because the filing of the Second Amended Complaint may be deficient because it was filed without leave, out of an abundance of caution Defendants response here is based on the First Amended Complaint. Defendants note, however, that the arguments made herein in oppositions to Plaintiffs' request for a preliminary injunction remain the same regardless of whether the Second Amended Complaint is the effective live pleading or not, because

Plaintiffs bring this suit to challenge various sections of HB 1451 (the "Dog or Cat Breeders Act" or "the Act"), passed during the 2011 Texas Legislative regular session, as well as certain implementing regulations promulgated by TDLR, the entity charged with enforcing the statute. *See* TEX. OCC. CODE § 802.001 et seq.; 16 TEX. ADMIN. CODE § 91.1 et seq. The intent of the Act was to enable the establishment of regulations to ensure that facilities that breed dogs and cats for sale in Texas "provide a minimum standard of care for these animals." *See* Author's/Sponsor's Statement Of Intent, Committee Report (Substitute) Bill Analysis, HB 1451, 82nd Legislature, R.S., (May 14, 2011) (recognizing that many commercial breeding facilities "oftentimes do not provide adequate and humane care for the animals they are breeding, many times failing to keep animals properly sheltered or to provide adequate veterinary attention").

The Act went into effect in September 2011 and TDLR's implementing regulations became effective May 1, 2012.[2] Among other things, the Act and regulations require that commercial dog and cat breeders obtain a license to operate, agree to periodic inspections of their facilities, and agree to maintain certain standards of care for the animals in these breeding facilities. *See* TEX. OCC. CODE § 802.001 et seq.; 16 TEX. ADMIN. CODE § 91.1 et seq. A breeder that fails to comply with the Act or TDLR's regulations may be subject to administrative action, including the imposition of sanctions or penalties. 16 TEX. ADMIN. CODE § 91.90.

Plaintiffs make the following complaints about the Act and implementing regulations:

- Plaintiffs complain about sections 802.003 and 802.005 of the Act to the extent they exempt from its scope those animals subject to the Texas Racing Act and dogs bred to

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the only difference between the two pleadings is the removal of the State as a defendant from the Second Amended Complaint.

[2] Because the Act created a new licensing program in the State, TDLR's current focus is on ensuring those that fall within the scope of the Act become licensed as expeditiously as possible. Accordingly, TDLR's enforcement of the Act's requirements are not yet fully ramped up as staff is more heavily dedicated to ensuring facilities obtain a license if required.

use for herding livestock, hunting or competing in field trials or hunting tests, to the extent the animals are bred for personal use. *First Amended Complaint* ¶ 15. Plaintiffs claim that these exceptions constitute disparate treatment amongst dog breeders in violation of the equal protection clause. *Id.* ¶ 24.

- Plaintiffs complain that sections 802.004 and 802.005 are unconstitutionally vague because they fail to include sufficient information to know when the exceptions listed in this statutes may apply. *First Amended Complaint* ¶¶ 16, 17, 25. They also complain about 16 TEX. ADMIN. CODE §§ 91.23 and 91.24 because, they allege, the rules do not sufficiently explain what is required in order to successfully complete a criminal background check.

- Plaintiffs complain about section 802.062 of the Act to the extent it providers that a breeding facility inspector may access a portion of the breeder's residence if "necessary to access animals or other property relevant to the care of the animals" subject to the Act's protections, because they claim that this violates their right to be free from unreasonable searches and seizures. *First Amended Complaint* ¶ 26.

- Plaintiffs complain that 16 TEX. ADMIN. CODE §§ 91.23 and 91.24 are unconstitutionally vague because, they allege, the rules do not sufficiently explain what is required in order to successfully complete a criminal background check. *First Amended Complaint* ¶ 20.

- Plaintiffs complain that 16 TEX. ADMIN. CODE § 91.27 violates due process because it does not expressly provide that a person whose breeder license application is denied may appeal that denial. *First Amended Complaint* ¶ 21.

- Finally, Plaintiffs assert that this Court should strike down the entirety of the Act because the provisions they attack above cannot be severed from the rest of the Act, rendering the entire statutory scheme infirm. *First Amended Complaint* ¶ 28.

Plaintiffs seek both injunctive and declaratory relief from this Court, as well as attorneys' fees.

Relevant here, Plaintiffs also ask this Court to issue a preliminary injunction and order that TDLR is barred from enforcing the provisions of the Act in any respect. *See Motion for Preliminary Injunction* ¶ 13. Without citation to any evidence, they claim that if the Act is enforced many breeders will be forced to close their operations because the cost of complying with the Act is too great. *Id.* ¶ 14.

ARGUMENT AND AUTHORITIES

I. Plaintiffs have not demonstrated that they are entitled to the extraordinary remedy of preliminary injunctive relief.

To obtain preliminary injunctive relief, the applicant must show (1) a substantial likelihood that he will prevail on the merits, (2) a substantial threat that he will suffer irreparable injury if the injunction is not granted, (3) that his threatened injury outweighs the threatened harm to the party whom he seeks to enjoin, and (4) that granting the relief will serve the public interest. *See Planned Parenthood of Houston & Southeast Tex. v. Sanchez*, 403 F.3d 324, 329 (5th Cir. 2005). Relief in the form of "federal injunctive decrees directing state officials" is an extraordinary remedy. *Morrow v. Harwell*, 768 F.2d 619, 627 (5th Cir. 1985). A court should not grant such relief "unless the party seeking it has clearly carried the burden of persuasion on all four requirements." *PCI Transp. Inc. v. Fort Worth & Wstrn R.R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005). In the instant matter, Plaintiffs have failed to "clearly carry" their burden of persuasion on the four requirements articulated above. Accordingly, issuance of the extraordinary relief of the preliminary injunction is not warranted, and Plaintiffs' motion should be denied in its entirety.

II. Plaintiffs cannot show a likelihood of success on the merits

Plaintiffs' motion for preliminary injunction should be rejected outright because they have pled no claim upon which they are likely to succeed. Indeed, the Plaintiffs' claims should be dismissed in their entirety, for the following reasons.

a. The State is not a person capable of being sued under 42 U.S.C. § 1983.

To the extent Plaintiffs name the State as a Defendant in this action, that claims fails because it is well settled that the State is simply not a "person" capable of being sued under 42

U.S.C. § 1983, and Plaintiffs constitutional claims must necessarily be brought under that statute.[3] *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 63-71 (1989). Plaintiffs cannot amend their pleadings to cure this fatal defect; accordingly, the claims against the State should be dismissed in its entirety.

b. Plaintiffs have pled insufficient facts to demonstrate standing to sue.

The requisites of Article III standing require a plaintiff demonstrate: "(1) it has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000). Certain prudential considerations may also compel dismissal based on lack of standing. "These judicially created limits concern whether a plaintiff's grievance arguably falls within the zone of interests protected by the statutory provision invoked in the suit, whether the complaint raises abstract questions or a generalized grievance more properly addressed by the legislative branch, and whether the plaintiff is asserting his or her own legal rights and interests rather than the legal rights and interests of third parties." *P&G v. Amway Corp.*, 242 F.3d 539, 560 (5th Cir. 2001) (quoting *ACORN v. Fowler*, 178 F.3d 350, 363 (5th Cir. 1999)). A plaintiff must demonstrate standing to maintain each and every claim pled, and the court must analyze separately the

[3] Federal constitutional claims must necessarily be brought under 42 U.S.C. § 1983. *See Hearth, Inc. v. Dep't of Pub. Welfare*, 617 F.2d 381, 382 83 (5th Cir. 1980) (Congress provided 42 U.S.C. § 1983 as the method for seeking relief against a state official for a federal constitutional violation); *see also Burns Toole v. Byrne*, 11 F.3d 1270, 1273 n.3 (5th Cir. 1994); *see also Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001) (a "litigant complaining of a violation of a constitutional right does not have a direct cause of action under the United States Constitution but must utilize 42 U.S.C. § 1983"). And, to the extent Plaintiffs' complaint can be construed to make claims under the Texas constitution, any such state law claims made against the State and its officials in this federal court are expressly barred by the State's Eleventh Amendment immunity from suit. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) ("it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law").

plaintiff's standing as to each asserted claim. *See Pederson v. La. State Univ.*, 213 F.3d 858, 874 (5th Cir. 2000) (citing *Henschen v. City of Houston*, 959 F.2d 584, 587 (5th Cir. 1992)).

1. RPOA has failed to plead facts to demonstrate associational standing.

To have associational standing to bring suit, RPOA must demonstrate that "its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth*, 528 U.S. at 181 (citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977)). Here, RPOA lacks associational standing and should be dismissed from this suit. First, RPOA has failed entirely to identify any individual member of its organization that has been injured by the challenged law and rules. Indeed, it unclear if any members of RPOA—which Plaintiffs describe as primarily a group of concerned pet owners—are in any way harmed by the statutes and rules challenged in this suit. As a result, RPOA has failed to identify any members that have standing to sue in their own right, and thereby fail to satisfy the first prong of associational standing. *See, e.g., Am. Canine Found. v. Sun*, No. C-06-4713, 2007 U.S. Dist. LEXIS 90004 at *9 (N.D. Cal. Nov. 27, 2007) (holding for similar reason that American Canine Foundation lacked associational standing to challenge ordinance requiring dogs and cats be spayed or neutered). Second, RPOA lacks associational standing because it fails entirely to explain how the matters at issue in this suit are germane to the organization's rather amorphous purpose. RPOA generally alleges that its purpose is to "make a lasting contribution to the quality of life for animals and people," but it fails to explain how this generalized interest relates to, or is furthered by, any matter at issue in this lawsuit. In the absence of some connection between the organizations purpose and the matters at issue in this suit, RPOA's claim of associational standing must fail. *See, e.g., Am.*

Canine Found., 2007 U.S. Dist. LEXIS 90004 at *10 (finding same with respect to American Canine Foundation's claim of associational standing).

2. The individual plaintiffs have failed to plead a cognizable injury.

Individual Plaintiffs Arnett, Pelzl and Smith generally allege they engage in the business of pet breeding and are subject to the Act. *See First Amended Complaint* ¶ 22. However, none of these individual Plaintiffs explain how they will be harmed in any way by the Act or TDLR's implementing regulations. Although Plaintiffs generally allege that certain breeders may have to go out of business if regulated, none of the individually named plaintiffs plead specific facts to demonstrate that they will be harmed in any such way. In the absence of any claimed harmed, these named Plaintiffs lack standing to maintain this suit and should be dismissed from it. *See Friends of the Earth, Inc.*, 528 U.S. at180-81.

c. Defendants are immune from claims brought here under the Texas Constitution.

To the extent Plaintiffs seek to bring claims under the Texas Constitution in this federal court, those claims are entirely barred by Eleventh Amendment immunity. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (suits based on state law in federal court seeking relief, whether prospective or retrospective, do not meet the Ex parte Young exception to Eleventh Amendment immunity); *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 322 n.5 (5th Cir. 2009) ("state law cannot be the basis on which a federal court either enters an injunction or an award of monetary relief against a state"). Accordingly, any claims made by Plaintiffs under the Texas Constitution or other state law must be dismissed immediately. *See id.*

d. Plaintiffs fail to plead adequate facts to support a federal constitutional claim against the state official defendant.

1. Plaintiffs fail to state a valid equal protection claim because the laws at issue have a rational basis.

Plaintiffs complain about sections 802.003 and 802.005 of the Act to the extent they exempt from the Act's scope those animals subject to the Texas Racing Act and dogs bred to use for herding livestock, hunting or competing in field trials or hunting tests, to the extent the animals are bred for personal use. *First Amended Complaint* ¶ 15; TEX. OCC. CODE §§ 802.003, 802.005. Plaintiffs claim that these exceptions constitute disparate treatment amongst dog breeders in violation of the equal protection clause of the U.S. Constitution. *First Amended Complaint* ¶ 24. These claims fail, however, because Plaintiffs have failed to plead any facts to meet their heavy burden of demonstrating the challenged statutes lack any rational basis.

The government regulations challenged in this case do not interfere with the exercise of a fundamental right or rely upon inherently suspect classifications such as race, religion or alienage; accordingly, they are presumed to be constitutionally valid. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976). Moreover, such regulations need only "be rationally related to a legitimate state interest" to survive an equal protection challenge. *Dukes*, 427 U.S. at 303; *Anderson v. Winter*, 631 F.2d 1238, 1240-41 (5th Cir. 1980) ("courts will not strike down state laws regulating economic and social concerns merely because they may be unwise, improvident, or out of harmony with a particular school of thought. If the challenged classification bears a reasonable relationship to the accomplishment of some legitimate governmental objective, the statute must be upheld.") (internal quotations and citations omitted). Accordingly, "'a classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification,' and the burden is on the challenger to 'negative every conceivable basis which might support

[the classification].'" *El Paso Apartment Ass'n v. City of El Paso*, 415 F. App'x 574, 578 (5th Cir. 2011) (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)).

Here, Plaintiffs simply have not and cannot "negative every conceivable basis" for the exceptions to the Act and the exceptions plainly have a rational basis. First, the Act's exception for dogs already regulated by the Texas Racing Act is similar to exceptions found in the federal Animal Welfare Act, 7 U.S.C. § 2132(g), and it is entirely rational that the Legislature excepted from the Act governing breeders certain racing animals that were already regulated under the Texas Racing Act. *See* Tex. Rev. Civ. Stat. art. 179e, § 10 (Racing Act regulations governing racing greyhounds); *see also Kerr v. Kimmell*, 740 F. Supp. 1525, 1530 (D. Kan. 1990) (rejecting similar equal protection challenge to Kansas animal welfare law that excepted greyhounds from its scope).

To the extent the Act also excepts from its scope those animals bred with the intent they be used for herding or hunting, that exception also has a rational basis because animals bred for this specialized purpose simply were not the focus of the Act. Rather, the Act was passed to address concerns about "puppy mills"; that is, it was passed in order to help ensure safer conditions for those dogs and cats bred for use as domestic pets and sold in retail stores or through internet and newspaper ads. *See Author's/Sponsor's Statement Of Intent, Committee Report (Substitute) Bill Analysis*, HB 1451, 82nd Legislature, R.S. (May 14, 2011); *see also* TEX. OCC. CODE § 802.201(a) (directing TDLR to "adopt rules establishing minimum standards for the humane handling, care, housing, and transportation of dogs and cats by a dog or cat breeder to ensure the overall health, safety, and well-being of each animal in the breeder's possession").

Given that the distinctions in the statute have a plain, rational basis, and that Plaintiffs have not and cannot plead any facts to negate this rational basis, they have failed to plead a

colorable equal protection claim and it should be dismissed. *See Kerr*, 740 F. Supp. at 1530 (dismissing similar challenge to animal welfare law); *see also Am. Canine Found.*, 2007 U.S. Dist. LEXIS 90004 at *20 (dismissing equal protection challenge to spay and neuter law because city's claims that the law would "increase the safety of its citizens, [] reduce animal overpopulation, and [] aid in animal identification and reunification" were rational bases).

2. Plaintiffs fail to state a valid void for vagueness claim.

Plaintiffs have failed to state a claim with respect to their void for vagueness challenges to Texas Occupation Code §§ 802.004 and 802.005, and 16 Texas Administrative Code §§ 91.23 and 91.24; accordingly, this claim can form no basis for the issuance of preliminary injunctive relief. Although a statute may be deemed void if its language is unduly vague, *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972), the prohibition against vague statutes does not invalidate a law simply because it could have been drafted more precisely. *Harper v. Lindsey*, 616 F.2d 849, 857 (5th Cir. 1980). Rather, to be deemed void for vagueness a statute must be so vague as to be substantially incomprehensible. *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 507 (5th Cir. 2001); *see also Hill v. Colorado*, 530 U.S. 703, 733 (2000) ("speculation about possible vagueness in hypothetical situations not before the [c]ourt will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications.") (internal citation and quotations omitted). The mere fact that varying interpretations may be ascribed to a law does not render it void for vagueness. *See, e.g., Texas Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 580 (5th Cir. 2012) (vagueness analysis cannot "focus upon the marginal cases in which an ordinarily plain statutory command can nonetheless yield some mote of uncertainty"); *Bailey v. Morales*, 190 F.3d 320, 326 (5th Cir. 1999) ("the fact that the law may be susceptible to differing constructions by the judiciary and

law enforcement officers does not create a vagueness problem"). Relevant here, in the face of a vagueness challenge there is a "greater tolerance for statutes imposing civil penalties and those tempered by scienter requirements." *Lakey*, 667 F.3d at 580.

(a) The criminal history background requirement is not vague.

Plaintiffs complain that 16 TEX. ADMIN. CODE §§ 91.23 and 91.24 are unconstitutionally vague because, they allege, the rules do not sufficiently explain what is required in order to successfully complete a criminal background check. *First Amended Complaint* ¶ 20. This conclusory allegation fails to state a valid void for vagueness claim. In fact, the claim necessarily must fail because the Act itself provides sufficient clarity as to what may disqualify a potential breeder from obtaining a license. More specifically, the Act makes clear that TDLR may deny a license to any potential licensee that "has pled guilty to, been convicted of, or received deferred adjudication for animal cruelty or neglect in this state or any other jurisdiction in the five years preceding the person's initial or renewal application for a license." TEX. OCC. CODE § 802.107(a). Further, in addition to denying a license based on a conviction for animal cruelty, TDLR is granted authority to, among other things, deny a license if an applicant has been convicted of an offense within five years of the license application or has ever been convicted of certain other violent offenses enumerated in the Occupations Code.[4] *See* TEX. OCC. CODE § 53.021.

Moreover, Plaintiffs fail to recognize that further details related to the operation of criminal background checks for those licensed by TDLR are found at TEX. OCC. CODE § 53.001 *et seq*. Among other things, these statues provide that a potential licensee may request a criminal

[4] Moreover, pursuant to Occupations Code § 53.025 TDLR has set forth specific criminal violations that can lead to the denial of a licensed breeder application. See https://www.license.state.tx.us/crimconvict.htm#bre.

history evaluation letter from the Department, prior to actually applying for a license, to allow a person to know before formally applying for a license if they are likely to be denied based on their criminal history. See *id.* § 51.4012. In addition, a person who is denied a license due to a criminal background check must be notified of the specific basis for the denial and is granted the right to have such a decision reviewed. *See id.* §§ 53.052.

Given the foregoing, it simply cannot be said that the criminal background requirement for licensed breeders is vague in any respect, and Plaintiffs conclusory assertion to the contrary must be rejected and this claim dismissed.

(b) The exceptions in 802.004 and 802.005 are reasonably clear.

Plaintiffs also complain of section 802.004 of the Act, which provides in part that "each adult intact female animal possessed by a person engaged in the business of breeding animals for direct or indirect sale or for exchange in return for consideration is presumed to be used for breeding purposes unless the person establishes to the satisfaction of the department, based on the person's breeding records or other evidence reasonably acceptable to the department, that the animal is not used for breeding." TEX. OCC. CODE § 802.004. Plaintiffs claim that this provision is vague because it "sets no standards for overcoming this presumption and simply leaves it in the hands of the department to make its own judgment." *First Amended Complaint* ¶ 16. This allegation fails to state a valid void for vagueness claim, however, because the statute is not incomprehensible by any means, and a statute is not vague simply because it leaves room for interpretation by the enforcing entity. *See, e.g, Lakey*, 667 F.3d at 580. By section 802.004's plain language, a breeder who possesses a non-spayed female capable of reproduction may demonstrate to TDLR that such an animal is not used for breeding by providing "breeding records" that demonstrate the animal is not part of the licensee's breeding operation. TEX. OCC.

CODE § 802.004. Because the Act requires breeders to keep detailed records of their animals, including records of their breeding females, *see* 16 TEX. ADMIN. CODE § 91.77, providing documentation demonstrating a particular animal is not used for breeding should not be a difficult hurdle for a breeder to surmount. Accordingly, the vagueness challenge to section 802.004 must fail because this statute is one an objectively reasonable person can understand.

Plaintiffs further claim that section 802.005 of the Act—which excepts from the Act animals "bred with the intent" that they be used primarily for hunting and herding—is vague because the statute fails to clearly define what animals fall within the scope of the exception. *See First Amended Complaint* ¶ 17. This claim fails because an objectively reasonable person can discern the scope of this exception. For example, although Plaintiffs complain that 802.005 is vague because it "does not specify whether it is the intent of the breeder or the end purchaser of the dog that controls the analysis" of whether an animal is "bred with the intent" of being used for herding/hunting, this is a near-specious argument because it must obviously be the intent of the person breeding the animal that is relevant to the question of whether the animal was "*bred* with the intent" that it be used as a hunting or herding animal. Accordingly, the meaning of this particular statutory language is readily discernible and not vague.

Plaintiffs also complain that section 802.005 is vague because it does not define the terms "other agricultural uses" and "similar organized performance events." However, the statute is not vague simply because it fails to define every single word used in it. Here, the term "other agricultural uses" appears as part of the phrase explaining that section 802.005's exception applies to animals bred to be used for "herding livestock, as defined by Section 1.003, Agriculture Code, or other agricultural uses." TEX. OCC. CODE § 802.005(a)(1). It is clear from the context in which the term "other agricultural uses" is used that it is meant to refer to using the

animal for work on in an agricultural setting like a farm or ranch. To the extent Plaintiffs complain that the phrase "similar organized performance events" in 802.005 is vague, that term appears as part of the phrase explaining that section 802.005's exception also applies to animals bred to be used for "competing in field trials, hunting tests, or similar organized performance events." Again, the context in which the term "*similar* organized performance events" is used must be considered, as it simply refers to events that are "similar" to "field trials" and "hunting tests." Given this, there is nothing vague about this term.

In short, all of Plaintiffs' claims of vagueness must fail, this Court should dismiss the claim entirely, and it can form no basis for the issuance of preliminary injunctive relief.

3. Plaintiffs fail to state a valid claim alleging unlawful search and seizure because surprise periodic inspections of a regulated business do not violate the Fourth Amendment.

Plaintiffs complain about section 802.062 of the Act to the extent it provides that a breeding facility inspector, in the course of conducting a statutorily authorized inspection, may access a portion of the breeder's residence if "necessary to access animals or other property relevant to the care of the animals" subject to the Act's protections; Plaintiffs claim that this violates their right to be free from unreasonable searches and seizures. *First Amended Complaint* ¶ 26. Plaintiffs have failed by this assertion to state a valid Fourth Amendment claim because the statute does not permit unreasonable searches and seizures.[5] *See, e.g., Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989) ("the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable").

[5] Among other things, plaintiffs presume, improperly, that the statutes and regulations authorize a TDLR inspector to somehow force entry into a residence if a licensed breeder refuses access during the course of an inspection. This is incorrect; rather, the breeder's refusal to allow entry to a part of a facility deemed necessary to complete an inspection would simply be a violation of the rules a licensed breeder must abide by, and that may subject the breeder to administrative sanctions and/or administrative penalties. *See* 16 TEX. ADMIN. CODE §§ 91.78; 91.90.

The provisions of the Act governing inspections of breeding facilities expressly provide that inspectors are not to access any portion of licensed breeder's residence, *unless* it is necessary as part of the inspection to gain access to an animal subject to the Act's protections. TEX OCC. CODE § 802.062(d). This caveat in the inspection statute makes sense, because any place in which an animal used for breeding is "kept" is considered a breeding "facility" subject to the provisions of the Act. *Id.* § 802.001(9) (defining breeding "facility" as "the premises used by a dog or cat breeder for *keeping* or breeding animals") (emphasis added). Put another way, when a licensed breeder is "keeping" animals used in their breeding operation in their residence, that part of the residence is considered part of the regulated commercial breeding "facility." And, it is well settled that the Fourth Amendment does not prohibit inspections—even surprise inspections—of such regulated businesses.

Indeed, those who obtain licenses to be breeders under the Act agree by doing so to be subject to periodic inspections of their breeding "facilities" and business records. *See* TEX OCC. CODE § 802.062; *see also, e.g., United States v. Biswell,* 406 U.S. 311, 316 (1972) (noting in firearms case that "[w]hen a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection"). And, it is settled that the expectation of privacy with respect to a regulated commercial enterprise is different from and much less than for a solely residential premises. *See Donovan v. Dewey*, 452 U.S. 594, 598-599 (1981). For this reason, the U.S. Supreme Court has held that "a warrantless inspection of commercial premises may well be reasonable within the meaning of the Fourth Amendment." *New York v. Burger*, 482 U.S. 691, 702 (1987).

A warrantless search of a regulated business is permissible if three criteria are met. First, there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made. *United States v. Biswell*, 406 U.S. at 315, *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 75 (1970). Second, the warrantless inspections must be "necessary to further [the] regulatory scheme." *Dewey*, 452 U.S. at 600; *Biswell*, 406 U.S. at 316 ("If inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential."). Finally, "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.* To satisfy this third prong, the inspection scheme must be so "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." *Dewey*, 452 U.S. at 600; *Biswell*, 406 U.S. at 315 (inspection scheme must be "carefully limited in time, place, and scope."); *see also Club Retro LLC v. Hilton*, 568 F.3d 181, 197 (5th Cir. 2009).

In this matter, the licensed breeder inspection scheme satisfies these three criteria and permits the TDLR's to inspect a breeder's "facilities," without a warrant, pursuant to the Act's inspection provisions. First, there is a substantial government interest served by the Act's inspection provision, as it is plainly necessary to serve the animal welfare goals of the Act. *See, e.g., Hodgins v. United States Dep't of Agric.*, No. 97-3899, 2000 U.S. App. LEXIS 29892 at *15 (6th Cir. 2000) (recognizing animal welfare goals of federal Animal Welfare Act served a substantial government interest justifying warrantless inspections of facilities that kept animals subject to the act's protections); *see also Benigni v. Maas*, No. 93-2134, 1993 U.S. App. LEXIS 31629, at *6 (8th Cir. 1993) (same). Second, because providing significant advance warning may allow a person wishing to circumvent the Act to hide or otherwise get rid of dogs or cats

subject to the Act's protections, the Act's purpose would be frustrated if surprise inspections were not permitted. *See, e.g., Hodgins*, 2000 U.S. App. LEXIS 2982 at *20 (surprise inspections under the Animal Welfare Act warranted because "[d]irty cages could be cleaned, improperly-treated animals euthanized or hidden, and records falsified in short order should a search be announced ahead of time").

Finally, the Act's inspection scheme is sufficiently detailed and reasonably limits the time, place and scope of the inspections to put all licensed breeders on notice that their breeding facilities are subject to surprise inspection. The Act makes clear that TDLR's inspections are: (1) limited in scope to only those premises deemed "facilities" under the Act, (2) will occur at least every 18 months, (3) will occur during normal business hours, and (4) that the licensee or his representative will be given an opportunity to be present. *See* TEX OCC. CODE § 802.062. In addition, TDLR's implementing regulations provide further detail as to when a breeder may be subject to more frequent inspections than the typical 18-month period. *See* 16 TEX. ADMIN. CODE § 91.53. Given this, the inspection scheme is sufficiently detailed in the statute to provide those subject to it with reasonable, advance notice, in compliance with the Fourth Amendment. *See Biswell*, 406 U.S. at 315

Given the foregoing, Plaintiffs have not, and cannot, plead any facts to support a valid Fourth Amendment claim, and their conclusory assertions contained in the Amended Complaint and Motion for Preliminary Injunction are insufficient to state a valid claim. For this reason, the Fourth Amendment claim should be dismissed and is no basis for the issuance of preliminary injunctive relief.

4. Plaintiffs fail to state a valid due process claim.

Finally, Plaintiffs complain that 16 TEX. ADMIN. CODE § 91.27 violates their right to due process because it does not expressly provide that a person whose breeder license application is denied may appeal that denial. *First Amended Complaint* ¶ 21. This claim must be rejected because it is based on the false premise that breeder license denials are not reviewable. Indeed, assuming for the sake of argument that Plaintiffs even have a property interest in obtaining a breeder's license, their due process claim must be rejected because plaintiffs fail to recognize that a person who is denied a license by TDLR may seek a hearing to challenge that denial through the State Office of Administrative Hearings, and such a hearing is subject to the contested case procedures of the Texas Administrative Procedures Act. *See* TEX. OCC. CODE § 51.354. Further, a person who is denied a license specifically due to a criminal background check must be notified of the specific basis for the denial and is granted the right to have such a decision administrative reviewed and is also granted the right to judicial review. *See id.* §53.052. Given that Plaintiffs wholly ignore relevant Texas law granting TDLR license applicants a right to administrative and, if necessary, judicial review of a license denial, the Plaintiffs' conclusory assertions that form the basis of their due process claim cannot be credited by this Court and the due process claim should be dismissed in its entirety.

III. Plaintiffs cannot show they will suffer irreparable harm if injunctive relief does not issue.

Plaintiffs have not and cannot demonstrate that they will suffer an irreparable injury if an injunction does not issue; for this reason alone, the Motion for Preliminary Injunction should be denied.

The Fifth Circuit has made clear that, with respect to a Plaintiffs' burden to demonstrate irreparable injury to justify issuance of injunctive relief, "[s]peculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant" for injunctive relief. *Holland Am. Ins. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985). Here, Plaintiffs allege that they may go out of business if they are required to comply with the licensed breeder requirements. This claimed injury is conclusorily pled and speculative at best; accordingly, it can form no basis for issuance of injunctive relief. *See, e.g., Winter v. NRDC, Inc.*, 555 U.S. 7, 22 (2008) (plaintiff must "demonstrate that irreparable injury is *likely* in the absence of an injunction") (emphasis in original).

Plaintiffs have not and cannot offer any competent evidence to demonstrate that they will suffer any severe consequences as a result of the licensing scheme at issue, and their conclusory assertion that they will go out of business if faced merely with complying with the Act's basic animal welfare requirements is entirely unsupported. Moreover, Plaintiffs' claimed "loss of business" injury is quintessentially the type of injury that may be redressed by an adequate remedy at law; in such cases, injunctive relief is not appropriate. *See, e.g., Greater Dallas Home Care Alliance v. United States,* 10 F. Supp. 2d 638, 650 (N.D. Tex. 1998).

IV. Plaintiffs cannot show that less harm will result to Defendants if the injunction issues than to Plaintiffs if the injunction does not issue, and the public interest weighs in favor of denying the sweeping injunctive relief requested by Plaintiffs.

Plaintiffs have wholly failed to show that the balance of the equities weighs in favor of this Court issuing injunctive relief.

It is well settled that because a "preliminary injunction is an extraordinary remedy never awarded as of right," the Court is required to "balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *See*

Winter, 555 U.S. at 24 (internal quotations and citations omitted). Here, the laws that Plaintiffs attack were enacted to address a long-recognized, substantial government interest of ensuring the welfare of animals by imposing standards of care upon those who engage in the breeding of domesticated pets for profit. *See Author's/Sponsor's Statement Of Intent*, Committee Report (Substitute) Bill Analysis, HB 1451, 82nd Legislature, R.S., (May 14, 2011) (noting that many of the breeding facilities targeted by the new regulations "oftentimes do not provide adequate and humane care for the animals they are breeding, many times failing to keep animals properly sheltered or to provide adequate veterinary attention"). If this Court were to enjoin the enforcement of the challenged regulations, the public's interest in ensuring animal welfare that is served by the Act will be harmed.

In contrast, Plaintiffs have not and cannot show that any significant harm will befall those subject to the Act's licensing requirements if this Court declines to issue the requested injunctive relief. The Act merely imposes minimum standards of care—including housing, exercise and medical care standards for breeding animals—on those persons who chose to engage in the business of pet breeding. Plaintiffs have pointed to noting specific about these regulations that imposes a significant burden upon them, particular when compared to the important animal welfare interests that are served by the laws. Given this, Plaintiffs simply cannot demonstrate that the equities weigh in favor of issuing injunctive relief.

CONCLUSION

For the foregoing reasons, Defendants request the Court DENY Plaintiffs' request for preliminary injunctive relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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