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. 1:12-cv-00913-JRN
FRANK DENTON, Chairman of Commissioners of the Texas Department of Licensing and Regulation, in his official capacity DEFENDANT.	§	

PLAINTIFFS' REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Teresa M. Arnett, Sharleen Pelzl, James O. Smith and RPOA Texas Outreach, Inc. and file this Reply to Defendant's Response to Plaintiffs' Motion for Preliminary Injunctive Relief:

Background

1. Chapter 802 of the Texas Occupations Code concerns the creation and enforcement of a regulatory scheme on the breeders of certain dogs and cats within the State of Texas. This Chapter, originally known as House Bill 1451, arose from the 2011 Texas Legislative session. The title given to this chapter is "The Dog or Cat Breeders Act" (hereinafter "the Act").

2. As part of the Act, the Texas legislature charged the Texas Department of Licensing and Regulation (hereinafter "TDLR") with the task of promulgating the specific regulatory scheme and the rules that define and support such scheme.

3. In March of 2012, TDLR passed a regulatory scheme and rules supporting said scheme (hereinafter "the Rules"). The Rules are set forth in Title 16, Texas Administrative Code, Chapter 91.

4. Plaintiff RPOA Texas Outreach, Inc. (hereinafter "RPOA") along with a number of individuals and entities lobbied against HB 1451 and pointed out to numerous legislators not only the problems that

the legislation would create for the breeding industry but also the unconstitutional elements of the proposed legislation. Following the passage of the Act, RPOA, along with a number of individuals and entities, lobbied TDLR in an effort to create a system of regulations that would satisfy both the stated goals of the Act and result in fair treatment for breeders of dogs and cats. Despite their efforts, the Act and the Rules contain many of the damaging aspects for the breeding industry and the constitutional violations about which RPOA warned.

5. RPOA and Plaintiffs Teresa M. Arnett, Sharleen Pelzl and James O. Smith filed their Original Complaint on or about October 1, 2012 seeking declaratory and injunctive relief as well as monetary damages. The Plaintiffs filed a First Amended Complaint on or about October 5, 2012. That pleading cleaned up a minor error regarding a prior party and separated Plaintiffs' pleading from their request for injunctive relief. On or about October 31, 2012, Plaintiffs filed their Second Amended Complaint removing both the State of Texas as a party defendant and withdrawing their claims arising from the Texas Constitution.

6. On October 5, 2012, Plaintiffs filed their Motion for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction. On November 1, 2012, Defendant filed his Response to Plaintiffs' Motion for Preliminary Injunctive Relief.

Standards of Proof

7. The purpose of a preliminary injunction is to preserve the relative positions of the parties until a trial on the merits can be held. *Univ. of Texas v. Camenisch,* 451 U.S. 390, 395, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (5th Cir. 1981). An applicant is not required to fully prove his case at a preliminary injunction hearing as if it were a trial on the merits. *Id*. The Plaintiffs concur with the Defendant as to the requirements for granting a preliminary injunction. Specifically, the Plaintiffs must show (1) a substantial likelihood that they will prevail on the merits, (2) a substantial threat that they will suffer irreparable injury if the injunction is not granted, (3) their substantial injury outweighs the threatened harm to the party whom they seek to enjoin, and (4) granting the preliminary injunction will not disserve the public interest.

Bluefield Water Ass'n, Inc. v. City of Starkville, Miss., 577 F.3d 250, 252-53 (5th Cir. 2009). In a case concerning the constitutionality of a statute, the Court should focus its analysis on the first of these factors. If that factor is satisfied, the rest will follow. *Tex. Medical Providers Performing Abortion Services, et al., v. Lakey, et al.*, 806 F. Supp. 2d 942, 957 (W.D. Tex. 2011), vacated in part 667 F.3d 570 (5th Cir. 2012). If a plaintiff has a substantial likelihood of success on the merits, the law in question is, in whole or part, unconstitutional. Enforcement of an unconstitutional statute represents an irreparable injury. Id.; *Villas at Parkside Partners v. City of Farmers Branch*, 496 F. Supp. 2d 757, 776 (N. D. Tex. 2007).

8. Thus, the critical issue for this Court's determination concerning Plaintiffs' requested preliminary injunction is whether or not Plaintiffs can demonstrate a substantial likelihood that they will prevail on the merits.

9. In addition to their live pleadings, Plaintiffs have filed their Appendix in Support of Plaintiffs' Response to Defendant's Motion to Dismiss and Plaintiffs' Reply to Defendant's Response to Plaintiffs' Motion for Injunctive Relief which contains affidavits from Teresa M. Arnett, Sharleen Pelzl, James O. Smith and RPOA Executive Director Mary Beth Duerler to demonstrate the type of testimony that Plaintiffs will provide in this matter. These affidavits are attached as Exhibits "A-D" to the Appendix and are incorporated herein as if set forth at length. Additionally, Plaintiffs request the opportunity to call live witnesses at the hearing on this matter to evidence the substantial likelihood that they will prevail on the merits as well as the other elements necessary to entitle them to the requested injunctive relief.

Standing

10. Defendant's first claim that Plaintiffs lack standing to sue. Plaintiffs contend that they have pled sufficient factual content allowing this court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Further, the affidavits attached to this response provide additional evidence as to Plaintiffs' standing.

RPOA's Standing

11. Defendant contends that RPOA failed to identify any individual member of its organization that has been injured by the challenged law and rules. Ms. Duerler provides specific detail as to the membership of RPOA and how the Act and the Rules will substantially impact the business of the membership. Appendix, Exhibit "D".

12. The Defendant also contends that RPOA lacks associational standing because it fails to explain how the matters at issue in this suit are germane to the organization's purpose. Ms. Duerler's affidavit further describes how the Act and the Rules promulgated thereon would be devastating to the breeding industry in Texas and would compromise the constitutional rights of breeders and members of RPOA. Appendix, Exhibit "D".

Individual Claimants Standing

13. Defendant also alleges that the individual Plaintiffs have failed to explain how they will be harmed in any way by the Act or Rules. It is well established that enforcement of an unconstitutional statute represents an irreparable injury. *Villas at Parkside Partners v. City of Farmers Branch*, 496 F. Supp. 2d 757, 776 (N. D. Tex. 2007). Further, each Plaintiff has set forth the damage that this Act and the Rules will do to their business as well as the loss of constitutional rights. Appendix, Exhibits "A", "B" and "C".

Equal Protection Claim

14. Defendant next contends that Plaintiffs have failed to demonstrate a valid equal protection claim. Specifically, the Defendant contends that Plaintiffs have not shown that the exemptions in Section 802.005 of the Act lack any rational basis.

15. The Equal Protection Clause of the 14th Amendment to the United States Constitution mandates that all persons similarly situated be treated alike. *Wheeler v. Miller,* 168 F.3d 241, 252 (5th Cir. 1999). A law violates the equal protection clause when it treats one set of persons differently from others who are similarly situated. *Yates v. Stalder*, 217 F.3d 332, 334 (5th Cir. 2000). The standard for a claim for

violation of the equal protection clause that does not implicate a fundamental right is that those distinctions need only be rationally related to a legitimate governmental purpose. *Torres v. Shalala*, 48 F.3d 887, 891 (5th Cir. 1995).

16. Plaintiffs have alleged in paragraphs 14 and 23 of the First and Second Amended Complaint that no rational relationship exists between the exemption of dogs primarily used for herding livestock, hunting (including tracking, chasing, pointing, flushing or retrieving game) or competing in field trials, hunting tests or other similar organized performance events dogs, and any legitimate governmental interest. In the Plaintiffs' affidavits, the individual Plaintiffs, who have at least 20 years experience each in the animal breeding industry, all state that the exemption set forth in Section 802.005 of the Act has no rational relationship to any legitimate government interest. Appendix, Exhibits "A", "B" and "C". Specifically, the Plaintiffs explain that no difference exists in how a dog is bred with regard to its ultimate use. Appendix, Exhibits "A", "B" and "C". The ultimate use for a dog or a cat has absolutely no affect on the health and care of the animal during the breeding process. Appendix, Exhibits "A", "B" and "C". None of the Plaintiffs have ever seen or heard of any study showing that the classes of dogs exempted from the Act are somehow immune to bad breeding conduct. Appendix, Exhibits "A", "B" and "C".

17. Further, if the use of the dog determines the application of the exemption, the question becomes why do service dogs not receive the exemption? Plaintiff Arnett noted that the training for service dogs is far more rigorous and intensive than any training for hunting or herding. Appendix, Exhibit "A". Further, dogs, in general, have always been used and developed for some specific purpose. Appendix, Exhibits "D".

18. If the purpose of the Act was to promote the health and welfare of animals involved in breeding and if we know that the ultimate utility of the dog has nothing to do with the breeding activities, exempting any animals due to their ultimate use seems nonsensical and likely to lead to the very result that the Act is supposedly designed to prevent. Appendix, Exhibits "A", "B", "C" and "D".

19. Additionally, Ms. Duerler notes that the same breeds that would be used for herding, hunting or performance events can also be used as house pets, security forces or services animals. Appendix, Exhibit

"D". In fact, it is common for a breeder to sell puppies from the same litter to multiple buyers. Appendix, Exhibits "D". If one of those buyers ultimately uses one of the puppies for hunting and another uses one of the puppies as a house pet or service dog, how is the breeder to be classified? Moreover, why would there be a distinction?

20. But, Ms. Duerler provides the actual reason the Legislature created the exemption. Only by creating the exemption could the supporters of the Act eliminate the opposition to the Act from representatives of rural areas and the Governor. Appendix, Exhibit "D". This purpose cannot satisfy the rational relationship test of the Equal Protection Clause as passage of a law is not a legitimate governmental interest to justify treating similarly situated individuals differently.

21. Based on the case law and the evidence that Plaintiffs have adduced and will adduce at the hearing on this matter, this Court should grant Plaintiffs' request for a preliminary injunction based on violations of the Equal Protection Clause of the 14th Amendment to the United States Constitution.

Vagueness

22. Defendant next contends that the allegations of vagueness that Plaintiffs have raised should also be dismissed for failing to state a claim.

23. For a statute to be considered unconstitutionally vague, the terms must be so indefinite that men of common intelligence must guess at its meaning and differ as to its application. *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322 (1926).

24. Defendant first contends that Plaintiffs' complaints regarding the criminal background check fail to state a claim due to the statute not being vague. In paragraph 19 of Plaintiffs' First and Second Amended Complaints, Plaintiffs allege that Section 91.23 and 91.24 of the Rules mandate the successful completion of a criminal background check without any reference as to what level of criminal history is unacceptable and what actually constitutes a successful completion of the check. Plaintiffs contend that, pursuant to these Rules, the Defendant is free to make any determination he wishes and that individuals of common intelligence are left to simply guess at the meaning and its application. Appendix, Exhibit "C".

25. Defendant also contends that Plaintiffs' complaints that Sections 802.004 and 802.005 of the Act are unconstitutionally vague fails to state a claim because the statute is not vague. Defendant contends that his interpretation of these two sections is clear enough so that they cannot be vague. In this case, Plaintiffs pled in paragraphs 15 and 16 of their First and Second Amended Complaints that each of these provisions contains language that is vague and without any reference to any standards.

26. Specifically, in Section 802.004 of the Act the terms "*to the satisfaction of the department" and "other evidence reasonably acceptable to the department*" provide no basis for the criteria that the department must follow to determine whether a dog is used for breeding or not. Nothing in Section 802.004 of the Act states that breeding records will be sufficient to satisfy the department. Given the language of the statute, it is possible that a breeder to could show thorough breeding records that it has never used a particular animal for breeding and the inspector or the department could choose to list the dog as a breeding animal in spite of such documentation. Nothing in the section acts to bind the inspectors or the department to any course of action other than the one they deem satisfactory. Also, nothing in the section would inform a reasonable person as to the type of records or evidence that the Act would consider sufficient to categorize a dog or cat as not a breeding animal.

27. Further, the exemption in Section 802.005 of the Act refers to dogs bred for a particular intent. But, it does not say if the intent is determined by the end user or the breeder. It is possible that a breeder could intend for all of his animals to be used as hunting dogs but that the buyers of the dogs use them for other purposes. Based on the language in this section, it is impossible to tell whether the exemption would apply to that breeder or not. Moreover, despite the assertion of Defendant, the terms "*other agricultural uses*" and "*similar organized performance events*" as used in this section provide no guidance as to their meaning or interpretation. It is possible, if not likely, that a dog which lives as a normal house pet could be used to compete in some type of performance event that is organized similar to a field trial or hunting test. Based on these pleadings, the Plaintiffs have alleged sufficient facts to state a claim for relief that is plausible on its face.

28. Based on the case law and the evidence that Plaintiffs have adduced and will adduce at the hearing on this matter, this Court should grant Plaintiffs' request for a preliminary injunction based on the unconstitutionally vague portions of the Act.

Fourth Amendment Claims

29. Defendant next contends that the allegations of Fourth Amendment violations relating to warrantless searches that Plaintiffs have raised should also be dismissed for failing to state a claim. Specifically, Defendant contends that section 802.062 of the Act does not violate the Fourth Amendment as warrantless searches of commercial property carry a lesser degree of protection.

30. The Court long has recognized that the Fourth Amendment's prohibition on unreasonable searches and seizures is applicable to commercial premises, as well as to private homes. *See* v. *City of Seattle*, 387 U.S. 541, 543, 546 (1967). An owner or operator of a business has an expectation of privacy in commercial property. *Katz* v. *United States*, 389 U.S. 347, 361 (1967). This expectation exists not only with respect to traditional police searches conducted for the gathering of criminal evidence but also with respect to administrative inspections designed to enforce regulatory statutes. See *Marshall* v. *Barlow's, Inc*., 436 U.S. 307, 312-313 (1978). The Supreme Court in *See* went so far as to opine:

> 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 a warrant. *See*, 387 U.S. at 543.

31. The Supreme Court has also previously held that warrantless administrative searches violate the Fourth Amendment's protection against unreasonable searches and seizures. *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 528, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967). The Court determined that such administrative searches constitute significant intrusions upon the interest protected by the Fourth Amendment and that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees. *Id.* at 534. Further, in order to comply with *Camara*, a law which authorizes inspections must contain a warrant

procedure to be followed if a property owner refuses to consent. *Id.* at 538-9; *Dearmore v. City of Garland*, 400 F. Supp. 2d 894, 902-903 (N.D. Tex. 2005).

32. In the case at bar, Plaintiffs contend that the inspection process created in Section 802.062 of the Act authorizes warrantless searches "at least once in every 18-month period and at other times as necessary to ensure compliance with this chapter and rules adopted under this chapter." Tex. Occ. Code, Section 802.062. Plaintiffs contend that this aspect of the law constitutes a violation of their rights to be free from unreasonable governmental searches. Appendix, Exhibits "A", "B", "C" and "D". The Plaintiffs affidavits also describe their concern with this deprivation of their rights without any requirement of probable cause or judicial oversight. Appendix, Exhibits "C" and "D". Moreover, the Act has no provision instructing or requiring an inspector to obtain a warrant should a breeder refuse to consent to a search. Pursuant to substantial federal case law, Section 802.062 of the Act violates the Fourth Amendment's prohibitions against unreasonable searches and seizures.

33. Defendant cites *New York v. Burger* for the proposition that inspections of commercial property carry a lower level of protection from the Fourth Amendment. *New York* v. *Burger*, 482 U.S. 691 (1987). While the *Burger* case cited by Defendant considered the propriety of warrantless inspections of commercial property, it held that such lowered Fourth Amendment protection involved "closely regulated" industries such as liquor and firearms. *New York* v. *Burger*, 482 U.S. at 700. There is no evidence that animal breeders are considered a "closely regulated" industry as that term has been used by the Courts. As no state law licensed breeders prior to the Act, the animal breeding industry would not be a "closely regulated" business. Therefore, the *Burger* exception to warrantless searches of commercial property does not apply in this case.

34. But, even if this Court decides that *Burger* exception might apply, the Defendant still cannot avail himself of this loophole as the Act fails to meet the requirements for this exception. If the regulation at issue concerns a "closely regulated" industry, three factors must be met for warrantless inspections to be constitutionally permissible: (1) 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, must provide a constitutionally adequate substitute for a warrant. *Burger*, 482 U.S. at 702-03. To satisfy this third factor, the regulatory statute must advise the owner of the commercial premises that the search is being made pursuant to the law, it must properly describe a defined scope for the search and it must limit the discretion of the inspecting officers. *Id*. at 703. In order to limit the discretion of the inspector, the statute must carefully limit authorized inspections in time, place, and scope. *Id.*; *United States v. Biswell*, 406 U.S. 311, 315, 92 S. Ct. 1593, 32 L. Ed. 2d 87 (1972); *Club Retro LLC v. Hilton*, 568 F.3d 181, 197 (5th Cir. 2009).

35. In the case at bar, while it is true that any breeder would know of the possibility of such inspections, Section 802.062 does not provide any limit as to the number of inspections leaving that within the discretion of the inspector. Second, no evidence exists that warrantless inspections are necessary to further the regulatory scheme of the Act. No rational reason exists or has been proffered as to why the regulatory scheme of the Act would be imperiled or its effectiveness decreased by requiring the inspector to obtain a warrant when a breeder denies him access for an inspection. Third, the Act contains absolutely no limits to the discretion of the inspector. Section 802.062 contains only "soft" guidelines for the inspectors such as conducting the inspection during "normal business hours" or providing the breeder with "reasonable opportunity to be present". Pursuant to Section 802.062, an inspector is essentially authorized to show up at any time during the day and conduct an inspection without any limitations as to the scope. More disconcerting, the language in Section 802.062(b) which reads that a reasonable opportunity be made to give the breeder or his representative an opportunity to be present during the inspection implicitly authorizes the inspector to conduct warrantless searches on the breeder's property alone and without supervision should the department and the breeder not be able to work out a "reasonable opportunity" for the breeder to attend. Tex. Occ. Code Section 802.062. Even if this Court determines that *Burger* exception applies in this matter, the Act does not conform to the requirements laid out in *Burger* and, therefore, does not qualify for that exception.

36. Finally, the Defendant argues that by obtaining a license, the breeder necessarily and implicitly consents to such a search. The logical conclusion to the Defendant's argument is that the breeder is forced to choose between obtaining a license so that it may keep working in the industry or maintaining its constitutionally protected rights and not obtain such a license. This contention creates a constitutionally unacceptable dilemma. In order to waive constitutionally-protected rights, consent for the waiver must be voluntary and uncoerced. *United States v. Santiago*, 410 F.3d 193, 198-99 (5th Cir. 2005); *United States v. Olivier-Becerril*, 861 F.2d 424, 425 (5th Cir. 1988). In *Dearmore v. City of Garland*, the District Court determined that when a property owner is forced to choose between obtaining a permit to conduct a business operation and consenting in advance to warrantless inspections and not obtaining a permit and being unable to continue with business operations, the consent to the warrantless inspection is involuntary. *Dearmore v. City of Garland*, 400 F. Supp. 2d 894, 902-903 (N.D. Tex. 2005). The Court in *Dearmore* granted the Plaintiff's requested injunctive relief to halt enforcement of the ordinance. Id. at 905-906.

37. Based on the case law and the evidence that Plaintiffs have adduced and will adduce at the hearing on this matter, this Court should grant Plaintiffs' request for a preliminary injunction based on the Act's violation of the Fourth Amendment to the United States Constitution.

Plaintiffs are Entitled to Preliminary Injunction

38. Plaintiffs have demonstrated a substantial likelihood that they will prevail on the merits in this matter. As set forth previously, a claim for a constitutional violation hinges on the substantial likelihood analysis. *Lakey,* 806 F. Supp. 2d at 957. Federal case law holds that enforcement of an unconstitutional statute represents an irreparable injury. Id.; *Villas at Parkside Partners*, 496 F. Supp. 2d at 776. Moreover, Plaintiffs affidavits specifically describe the harm to their businesses and to their constitutionally-protected rights which will occur if enforcement of the Act is permitted. Appendix, Exhibits "A", "B", "C" and "D". As in *Lakey*, the society is served when legislation that abrogates the constitutionally-guaranteed rights of its citizens is not able to be enforced. Since Plaintiffs have

demonstrated a substantial likelihood that they will prevail on the merits, the Defendant will suffer no harm at all if he cannot continue to enforce the Act.

Conclusion and Prayer

39. Through both affidavits and case law, Plaintiffs have proven that the Act violates the Equal Protection Clause of the 14th Amendment, the prohibition against unreasonable searches and seizures set forth in the Fourth Amendment and that several sections of the Act are so vague as to be unconstitutional. Plaintiffs have also met their burden so as to entitle them to a preliminary injunction halting the implementation and enforcement of the Act. Therefore, Plaintiffs request that this Court preliminarily enjoin the Defendant from enforcing the Act through the trial of this matter.

Respectfully submitted,

WESTERBURG & THORNTON, P.C.
6060 N. Central Expressway, Suite 690
Dallas, Texas 75206
Phone No.: 214.528.6040
Facsimile: 214.528.6170

By: /s/ Steven Thornton
Steven Thornton
State Bar No. 00789678

ATTORNEY FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I certify that a true copy of the above was served on opposing counsel of record or party in accordance with the Federal Rules of Civil Procedure on this 13th day of November, 2012.

/s/ Steven Thornton
Steven Thornton