ORAL ARGUMENT IS REQUESTED

15-1174

BIG CATS OF SERENITY SPRINGS, INC., doing business as Serenity Springs Wildlife Center, NICK SCULAC, JULIE WALKER, and JULES INVESTMENT, INC.,

Plaintiffs-Appellees.

v.

CINDY RHODES and TRACY THOMPSON,

Defendants-Appellants,

and

THOMAS J. VILSACK, in his official capacity as Secretary of Agriculture, and OTHER UNNAMED USDA EMPLOYEES,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
No. 13-CV-03275
(ROBERT E. BLACKBURN, J.)

BRIEF FOR THE APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Big Cats of Serenity Springs, Inc. is a 501(c)(3) organization. It does not have a parent corporation and no publicly held company owns more than 10% of its stock.

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GLOSSARY

Acronym	Definition
APA	Administrative Procedures Act
APHIS	Animal and Plant Health Inspection Service
ATF	Bureau of Alcohol, Tobacco and Firearms
AWA	Animal Welfare Act
USDA	United States Department of Agriculture

STATEMENT OF JURISDICTION

The district court had "federal question" jurisdiction over Plaintiffs' *Bivens* and 28 U.S.C. § 1983 claims, including determining whether the individual defendants were entitled to qualified immunity. *See* 28 U.S.C. § 1331; *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1230-31 (10th Cir. 2005); *see also* 28 U.S.C. § 1343(a)(3) (granting district courts jurisdiction over Section 1983 claims).

Although appellate jurisdiction under 28 U.S.C. § 1291 is limited to "final decisions" of district courts, this appeal falls within the collateral order exception. *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Specifically, when an order denying qualified immunity deals with "abstract issues of law" as opposed to an issue of "evidence insufficiency" (whether the record lacked sufficient evidence to raise a triable issue of fact), then the order is immediately appealable. *Compare, e.g., Mitchell v. Forsyth*, 472 U.S. 511 (1985) (order denying qualified immunity immediately appealable as it dealt with whether the right was clearly established) *with Johnson v. Jones*, 515 U.S. 304 (1995) (order denying qualified immunity not immediately appealable as it was decided on evidence insufficiency). *See also Estate of Booker v. Gomez*, 745 F.3d 405, 409-10 (10th Cir. 2014); *Fancher v. Barrientos*, 723 F.3d 1191, 1198 (10th Cir. 2013) ("The denial of qualified immunity to a public official, however, is immediately

appealable under the collateral order doctrine to the extent it involves abstract issues of law.").

Given that the appealed order was decided on a motion to dismiss and, therefore, all facts are necessarily resolved in favor of Appellee, the current appeal involves only "abstract issues of law." *Fancher*, 723 F.3d at 1198. As such, the Court has jurisdiction to hear this interlocutory appeal.

Moreover, although the Court's jurisdiction is arguably limited to the determination of whether qualified immunity was properly denied (and not Appellants' initial argument about whether a *Bivens* remedy lies), the Supreme Court in *Wilkie v. Robbins* stated that this latter question was sufficiently implicated by the qualified immunity defense such that appellate jurisdiction is appropriate over it as well. 551 U.S. at 549 n.4.

STATEMENT OF THE ISSUES

1. Whether a *Bivens* claim lies against federal officials who violated Appellees' Fourth Amendment right to be free from unreasonable searches.
2. Whether the federal officials are entitled to qualified immunity when they forcibly, and without a warrant, entered Appellees' property in violation of Supreme Court precedent, AWA regulations, and APHIS policies and procedures.
3. Whether the federal officials are also liable under 28 U.S.C. § 1983 when they enlisted local law enforcement to cut the locks to the private facility and gave the local authorities false information to induce them to forcibly enter the premises.

STATEMENT OF THE CASE

In its complaint, Plaintiffs seek redress for an unconstitutional search conducted by several APHIS inspectors on May 7, 2013. As part of this redress, Plaintiffs seek a declaratory judgment that (1) APHIS cannot conduct a warrantless search of the Big Cats facility outside of its business hours solely because an inspector "wants to;" and (2) APHIS cannot overrule the medical advice of Big Cats' veterinarians (as it did on May 7, 2013).

Apart from this incident, Nick Sculac also seeks a declaratory judgment that, pursuant to federal regulations governing when APHIS can and cannot inspect a licensed facility, Mr. Sculac's designation of 9 a.m. to 1 p.m. Monday through Friday is "a reasonable number of hours between 7 a.m. and 7 p.m., Monday through Friday" during which Big Cats is available for inspection. 9 C.F.R. § 1.1.

On April 24, 2014, Defendants filed a motion to dismiss the First Amended Complaint asserting a lack of jurisdiction and failure to state plausible claims. After briefing and oral argument, Magistrate Judge Mix wrote an extensive recommendation to deny Defendants' motion.[1] After further briefing, on March

[1] Magistrate Judge Mix recommended granting the motion in part – namely that only the USDA license holder (and not the additional plaintiffs) could bring the declaratory judgment claims. That determination (adopted by Judge Blackburn) has not been appealed.

25, 2015, Judge Blackburn overruled Defendants' objection to the recommendation and adopted it in full, noting that "[t]he recommendation is exhaustively detailed and cogently reasoned. So thoroughly has the magistrate judge considered and analyzed the issues . . . that any further exegesis on my part would constitute little more than a festooned reiteration of her excellent work." Aplt. App. at 171. Defendants-Appellants filed a notice appealing Judge Blackburn's order adopting the recommendation on May 22, 2015.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

Big Cats of Serenity Springs, Inc. ("Big Cats") is a nonprofit organization dedicated to providing a safe, stable, and permanent home for exotic felines and other animals. Aplt. App. at 9 ¶ 1. Big Cats provides housing, food, and veterinary care for more than 140 exotic animals at its facility in Calhan, Colorado. *Id.* Nick Sculac is the founder and Director of Facilities for Big Cats, and his wife, Julie Walker, is the Director of Operations. *Id.* at 10 ¶¶ 5-6. As a non-profit, Big Cats relies heavily on volunteer time and donations to feed, house, and care for its animals.

A. APHIS Inspections of Maverick and Baxter.

Defendants Rhodes and Thompson are inspectors employed by the United States Department of Agriculture ("USDA"). *Id.* at 11 ¶¶ 9-10. They work for the Animal and Plant Health Inspection Service ("APHIS"), an agency of the USDA, and they inspect facilities licensed by the USDA to ensure compliance with the Animal Welfare Act ("AWA") and its regulations. *Id.* at ¶ 15. Recently, Inspectors Rhodes and Thompson have abused their authority – citing Mr. Sculac for extremely questionable or nonexistent violations, and filing public inspection reports that are inaccurate and misleading. *Id.* at 13 ¶¶ 22-23. Several reports involve the veterinary care provided to Maverick, a young tiger cub, and (to a lesser extent) his litter-mate, Baxter. *Id.* at ¶ 24.

On May 6, 2013, Inspectors Rhodes and Thompson conducted a follow-up inspection of Maverick, who was injured. *Id.* at 13-14 ¶ 25. Maverick had been examined by two veterinarians, Dr. Colella and Dr. Marsden; had x-rays taken of his injured forelimb; was on an antibiotic, two pain killers, calcium supplements, and anti-inflammatory medicine; and Dr. Colella was scheduled to come out again that week to re-examine him. *Id.* Maverick's litter-mate, Baxter, had also recently been found with an injured leg. *Id.* He had been prescribed (and was taking) Meloxicam (an anti-inflammatory) and calcium supplements. *Id.* He was also scheduled to be examined by Dr. Colella that week. *Id.*

Notwithstanding this treatment, Inspectors Rhodes and Thompson cited Mr. Sculac for failing to take "appropriate methods to relieve [Maverick's and Baxter's] pain and distress . . . ." Aplt. App. at 37. This citation was specious and the report inaccurate and misleading. *Id.* at 14 ¶ 26. The inspectors failed to acknowledge the medicine that both cubs were on, assert how that medicine was inappropriate, or suggest what additional medication would be appropriate to relieve the animals' "pain and distress." *Id.* In fact, in response to this citation, Dr. Marsden called Inspector Thompson and inquired what else Inspector Thompson was asserting should be done to relieve Maverick's pain. *Id.* Inspector Thompson refused to answer. *Id.*

Inspector Thompson demanded that the cubs be evaluated no later than 8:00 the following morning (May 7, 2013) or risk another citation, which could result in a substantial fine. *Id.* at 14-15 ¶¶ 27 & 28. Mr. Sculac informed Inspector Thompson that Dr. Colella was scheduled for a follow-up appointment on May 8, 2013 and asked Inspector Thompson if Maverick and Baxter could be seen then, as scheduled (one day after the deadline Inspector Thompson imposed). *Id.* at ¶ 27. Inspector Thompson refused. *Id.*

Mr. Sculac immediately contacted Dr. Colella and Dr. Marsden to see if they could come to the facility and evaluate Maverick and Baxter the following morning. *Id.* at 15 ¶ 28. By that time, it was already late in the afternoon, and neither doctor could make arrangements to come to the facility on such short notice. *Id.* Dr. Marsden was able to rearrange her schedule to accommodate the cubs if Mr. Sculac could bring them in, but she did not want the cubs to be transported and risk aggravating their injuries by the capturing, loading, and jostling that invariably occurs in transporting tigers. *Id.* at ¶ 30. Dr. Marsden called Inspector Thompson and recommended that they wait until Dr. Colella could come out on May 8th to evaluate and x-ray the cubs at the facility. *Id.* Both veterinarians (Dr. Marsden and Dr. Colella) believed the one-day delay was preferable to transporting the animals. *Id.* Inspector Thompson refused the

requested extension and demanded that the cubs be evaluated the next morning. *Id.* at ¶ 31.

Reluctantly, but in compliance with the inspector's ill-advised and potentially dangerous demands, Mr. Sculac arrived at Big Cats at approximately 6:00 a.m. on May 7th and captured and loaded the cubs. *Id.* at 15-16 ¶ 32. He transported them to Dr. Marsden's clinic arriving at approximately 7:00 a.m. and assisted Dr. Marsden with her examination of Maverick. *Id*. At approximately 10:00 a.m., he went to his truck to bring in Baxter and heard his cell phone ringing (which had been left in the truck). *Id.* The call was from Devon Devries, an employee at Big Cats, who was upset because APHIS inspectors and armed police officers had broken into the locked facility and confronted her. *Id.*

B. May 7, 2013 Illegal Search of the Big Cats Facility.

Inspectors Rhodes and Thompson and at least one other USDA employee had arrived at the Big Cats facility at approximately 8:00 a.m. on May 7, 2013, the time by which Inspector Thompson had demanded that Maverick and Baxter be evaluated by a veterinarian. *Id.* at 16 ¶ 33. The outer gate to the Big Cats facility was locked – with signs warning against trespassing. *Id.* at ¶ 34.

At approximately 8:45 a.m., Inspector Thompson phoned the El Paso Sheriff's Office and requested "urgent" assistance at the Big Cats facility. Aplt. App. at 44. In response to the call, Deputies Porter and French arrived, heavily

armed, at the facility. *Id.* at 41. In order to induce the deputies to cut the chains and escort the inspectors into the facility, Inspectors Thompson and Rhodes falsely told the deputies that: (1) they had "court orders" to enter the facility and seize two animal cubs; (2) Mr. Sculac was "refusing to allow them access to the facility;" (3) they were unsure to what lengths someone at the facility would go to keep the animals; and (4) they were concerned that someone could get hurt if one of the cats were let loose. *Id.* at 16-17 ¶ 37; *see also id.* at 41.

Relying upon these misrepresentations, the deputies cut the chains on the external gate, and the inspectors and deputies entered the locked facility. *Id.* at 17 ¶ 38. They then parked their vehicles (within the facility's perimeter) and proceeded to a second, locked gate (securing the interior fence), with a sign stating, "DO NOT ENTER WITHOUT AN EMPLOYEE." *Id.* at ¶ 39. At the direction of the APHIS inspectors and in reliance on their misrepresentations, the deputies cut the chains on this second gate, and the inspectors and deputies then entered the main "compound" area of the facility. *Id.* at ¶ 40. The inspectors and deputies walked through a significant portion of the facility before arriving where Maverick and Baxter were housed. *Id.*

An employee of the facility, Devon Devries, was working at the facility that morning and was surprised and alarmed to suddenly see the APHIS inspectors and heavily armed deputies inside the locked, private facility. *Id.* at 17-18 ¶ 41. The

APHIS officials approached Ms. Devries and demanded to know where Maverick and Baxter were. *Id.* Ms. Devries responded that the cubs were with Mr. Sculac at the veterinarian clinic. *Id.* Not long thereafter, the APHIS inspectors and the police officers left, the latter apologizing for what had happened. *Id.* at 18 ¶ 43.

At no point on May 7, 2013 or at any point did the Plaintiffs give the APHIS inspectors permission to forcibly enter the locked facility. *Id.* at ¶ 45.

C. Magistrate Judge Mix's Recommendation.

Plaintiffs filed their complaint on December 4, 2013. Aplt. App. at 2. After seeking multiple extensions, Defendants filed their motion to dismiss on April 21, 2014. *Id.* at 3-5. After extensive briefing and oral argument, Magistrate Judge Mix entered her recommendation on the motion to dismiss on January 15, 2015. *Id.* at 6-7.

Defendants' first argument was that the court should refrain from creating a new *Bivens* remedy in this case. Aplt. App. at 70-74. Magistrate Judge Mix correctly rejected this argument, noting that "Defendants ignore the fact that *Bivens* itself recognized a remedy for alleged Fourth Amendment violations" and that "alleged Fourth Amendment violations by federal officers, alleged violations of the equal protection component of the Due Process Clause of the Fifth Amendment; and alleged Eighth Amendment Violations" all give rise to a *Bivens* action under Supreme Court precedence. Aplt. App. at 143. As such, "it is unclear

. . . why Defendants maintain that the Court must fashion a *new Bivens* remedy to allow Plaintiffs' Fourth Amendment claim . . . to proceed." *Id.* (emphasis in original).

With respect to whether or not the inspectors were entitled to qualified immunity, Magistrate Judge Mix first determined whether the right was clearly established and then whether Plaintiffs had alleged a constitutional violation. *Id.* at 144-56. Defendants argued that because the overall statutory scheme governing inspections of USDA licensed facilities is constitutional, the inspectors' actions in conducting searches of licensed facilities is *per se* constitutional – irrespective of how the inspectors act during a particular inspection. *Id.* at 146-150. Magistrate Judge Mix correctly rejected this argument noting that Plaintiffs were not alleging that all warrantless inspections of USDA licensed facilities were unconstitutional – only the May 7th search. *Id.*

Turning to the actual conduct on May 7, 2013, Magistrate Judge Mix determined that the USDA statutes and regulations did not "authorize the use of forcible entry" to conduct USDA inspections. *Id.* at 150-154. Because *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), decided more than forty years earlier, held that "where Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictions apply," the inspectors were on notice that "forcibly entering

premises to conduct an inspection under the AWA in the absence of definite statutory authority or a warrant was unlawful . . . ." *Id.* at 154.

Turning to the second element of the qualified immunity analysis – whether the facts sufficiently allege a constitutional violation – Magistrate Judge Mix had little difficulty affirming that they did. Plaintiffs alleged in detail the no trespassing signs at the facility; the chains on two sets of gates that were cut in order to allow Defendants access to the private facility; the fact that, after entering, the Defendants walked through a significant portion of the facility; and the fact that at no time did Plaintiffs give Defendants permission to enter the property. *Id.* at 154-156. "[W]hile licensees are subject to warrantless searches pursuant to the AWA . . . forcible entry was not authorized by Congress." *Id.* at 156. As such, Plaintiffs sufficiently alleged a constitutional violation. *Id.*

With respect to Plaintiffs' Section 1983 claim, Magistrate Judge Mix recognized that there was no binding Tenth Circuit opinion that gave guidance on what test to use when Plaintiffs allege federal officials are acting under color of state law. *Id.* at 159. Magistrate Judge Mix determined that the most comparable test was the "joint action test" used to determine if private parties could be held liable under 42 U.S.C. § 1983. *Id.* at 160-61. Magistrate Judge Mix recognized, however, that this test did not fit because Plaintiffs did not allege that the federal defendants and local police were acting "jointly" – sharing a specific goal to

violate Plaintiffs' constitutional rights. *Id.* To the contrary, Plaintiffs alleged that the inspectors gave false information to the local police in order to induce them to cut the locks to the facility. *Id.* Accordingly, the court rejected this test and relied on the facts that (1) "the local law enforcement officers were used to breach the barrier to entrance of the private . . . facility;" (2) "there is no reason to believe that the Inspector Defendants could have breached the Big Cats facility without the deputies' assistance;" and (3) "the breach . . . was undertaken by local law enforcement officers at the request of the Inspector Defendants," to find that Plaintiffs had sufficiently made a claim under Section 1983. *Id.* at 161.

Finally, with respect to the declaratory judgment claims, Magistrate Judge Mix correctly noted that (1) Plaintiffs were not required to seek to amend the very regulations they sought the court to interpret in this case; (2) there were no administrative remedies to exhaust before filing this suit; and (3) the USDA license holder had standing to bring the declaratory judgement claims. *Id.* 162-68. With respect to this latter point, Magistrate Judge Mix recommended granting the motion to dismiss the declaratory judgment claims brought by Plaintiffs which did not hold a USDA license. *Id.* at 168. On all other grounds, she recommended denying the motion. *Id.*

D. Judge Blackburn's Order Adopting Recommendation.

Defendants filed objections to the recommendation, making nearly identical arguments to the ones raised in their motion to dismiss. Judge Blackburn had little difficulty overruling these objections and adopted the recommendation. Aplt. App. at 170-173. In so doing, Judge Blackburn stated that "[l]ike the arguments of the motion, defendants' objections generally attempt to characterize plaintiffs' claims regarding defendants' conduct of the search of their premises as challenges to the inspection report generated as a result thereof. Plaintiffs' claims are not so described or delimited, however, and it is their allegations that control in resolving the present motion." *Id.* at 171.

Judge Blackburn also concurred that a *Bivens* remedy was cognizable under the facts alleged by Plaintiffs (without creating a new remedy), and recognized that finding (in some circumstances) federal officials liable under Section 1983 traces back at least as far as 1969 with the Second Circuit's decision in *Kletschka v. Driver*, 411 F. 3d 436 (2d Cir. 1969). *Id.* Accordingly, Judge Blackburn adopted the recommendation in full. *Id.* at 172.

E. Appeal.

On May 22, 2015, Defendants-Appellants filed a notice of appeal, appealing Judge Blackburn's order overruling their objections and adopting Magistrate Judge Mix's recommendation. Aplt. App. at 174. Appellants then filed their opening

brief, making similar (and in some cases identical) arguments to those already rejected by both Magistrate Judge Mix and Judge Blackburn.

SUMMARY OF ARGUMENT

Magistrate Judge Mix's recommendation was thorough, well-reasoned, and correct, and the Court should affirm Judge Blackburn's order adopting it.

When determining if a *Bivens* remedy is available, a court must first determine if the claims fall within an already established *Bivens* remedy or if they present a "new context" for which a new *Bivens* remedy must be created. Because the facts of this case (involving an unreasonable, forcible search of the Big Cats facility in violation of the Fourth Amendment) fit squarely within the context of a *Bivens* claim, the Court need not (and should not) engage in an analysis of whether a new *Bivens* remedy should be created.

Moreover, even if the Court were to engage in such an analysis, there is no alternative, statutory scheme that would give Appellees an avenue to vindicate their Fourth Amendment claims. Thus, even if a new *Bivens* remedy were required (which it is not), there is grounds for this Court to fashion such a remedy.

Additionally, the APHIS inspectors are not entitled to qualified immunity because their illegal search violated Appellees' "clearly established" right to be free from unreasonable searches. Specifically, Supreme Court precedent decided more than forty years ago unequivocally held that federal agents cannot forcibly enter a licensee's premises when conducting a warrantless, administrative search (in the absence of clear statutory authority permitting such forcible entry). In this

case, nothing in the AWA, its implementing regulations, or APHIS policies and procedures authorizes forcible entry when conducting an administrative, warrantless search. Moreover, the AWA regulations and the APHIS policies and procedures explicitly prohibit the use of such force. As such, Appellees' right to be free from forcible entry was clearly established and no reasonable official in the Appellants' shoes would have believed differently.

Finally, in carrying out their unlawful search, the APHIS inspectors enlisted the help of local police to forcibly enter the facility and misled the police by falsely telling them that the inspectors had "court orders" to enter the facility and seize animals therein. As such, the forcible entry of the facility was done under "color of state law" and the inspectors can also be held liable under 42 U.S.C. § 1983 for this conduct.

ARGUMENT

A. The Court Need Not Fashion a New *Bivens* Remedy.

There is no dispute that: (1) *Bivens* allows plaintiffs to sue federal officials for money damages for searching their premises in violation of the Fourth Amendment right to be free from unreasonable searches; (2) the Supreme Court has extended *Bivens* to allow plaintiffs to seek money damages for claims alleging a violation of (a) the Eight Amendment right to be free from cruel and unusual punishment, and (b) the equal protection component of the Due Process Clause of the Fifth Amendment; and (3) the Supreme Court has declined to extend *Bivens* in other contexts. Ignoring the first proposition, Appellants focus on the third and argue that this Court should not create a new *Bivens* remedy in this case. Appellants' argument is misplaced for several reasons.

1. *Bivens* Applies to Claims Where, as Here, Plaintiffs Seek Redress for an Unreasonable Search in Violation of the Fourth Amendment.

First, just as in *Bivens*, this case involves a Plaintiff (1) seeking money damages (2) from federal officials (3) for a violation of the Fourth Amendment right to be free from unreasonable searches and seizures. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); *See also Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988) ("the victim of a Fourth Amendment violation by federal officers acting under color of their authority may

bring suit for money damages against the officers in federal court."); *Wilkie v. Robbins*, 551 U.S. 537, 549 (2007) (*Bivens* "held that the victim of a Fourth Amendment violation by federal officers had a claim for damage."). As such, the Court need not (and should not) determine if it is appropriate to create a *new* *Bivens* remedy. In fact, although the Supreme Court has cited *Bivens* on 126 occasions, not once has it stated that seeking money damages for an unreasonable search of a plaintiff's premises would require a "new" *Bivens* remedy.

Moreover, Appellants' attempt to cast doubt on the validity of *Bivens* arguing that it is "under a cloud" and based on the outdated notion that courts could "infer" rights of action from federal statutes or the Constitutions is immaterial. Aplt. Br. at 22 (quoting *Robinson v. Sherrod*, 631 F.3d 839, 842 (7th Cir. 2011)). First, although the Supreme Court has frequently cited *Bivens*, it has never suggested that it no longer applies to Fourth Amendment claims (even as it refused to extend it to other contexts). Second, even if the Supreme Court had cast "a cloud" over the continuing viability of *Bivens* as it applies to unreasonable searches and seizures, this Court would still be bound by *Bivens*. *See, e.g.*, *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989). As such, *Bivens* applies to Appellees' claim.

2. A Claim for an Unreasonable Search of a Private Facility in Violation of the Fourth Amendment Is Not a "New Context" for *Bivens.*

Appellants are correct that whether a *Bivens* remedy is available is not determined *solely* by which amendment to the Constitution is alleged to have been violated. Aplt. Br. at 25. For instance, the Supreme Court found a *Bivens* remedy for a violation of the equal protection component of the Due Process clause of the Fifth Amendment, *Davis v. Passaman*, 442 U.S. 228 (1979), while later refusing to extend *Bivens* to a Fifth Amendment claim for an improper denial of Social Security Benefits, *Chilicky*, 487 U.S. 412. The "context" of these two claims, however, was obviously different.

In *Passaman*, a former congressional staff member sued because she was terminated solely on the basis of her gender. 442 U.S. at 230-31. *Chilincky*, in contrast, dealt with a recipient of social security benefits whose benefits were improperly terminated during a disability review. Notably, *Chilincky* said nothing about equal protection (the basis for the claim in *Passman*). Although both cases dealt with the Fifth Amendment, they were different claims in very different contexts focusing on different protections provided for by the Fifth Amendment. In this case, however, just as in *Bivens*, Appellees allege that a federal official violated their right to be free from an unreasonable search of their private premises.

Bivens, 403 U.S. at 389. As such, the Court need not "extend" *Bivens* or create a "new" *Bivens* remedy.

Such a result is made clear by the Second Circuit's decisions in *Arar v. Ashcroft* and *Turkmen v. Hasty*. In *Arar*, an alien (dual citizen of Syria and Canada) filed suit after he was (allegedly) detained at the Kennedy Airport in New York and "mistreated for twelve days while in United States custody" and then removed to Syria where "he would be detained and interrogated under torture by Syrian officials." *Arar v. Ashcroft*, 585 F.3d 559, 563 (2d Cir. 2009). The Second Circuit was faced with the question of whether Arar's "claims for detention and torture in Syria can be asserted under *Bivens* . . . ." *Id.*[2] The court held that (1) these claims, involving "extraordinary rendition" (the extrajudicial transfer of a person from one country to another), would extend *Bivens* into a new context, and (2) special factors (including effects on diplomacy, foreign policy, and the security of the nation) precluded such an extension in that case. *Id.* at 563-64, 574. The court determined that "extraordinary rendition" was a "new context" for *Bivens* because it "is treated as a distinct phenomenon in international law" and "no court has previously afforded a *Bivens* remedy for extraordinary rendition." *Id.* at 572.

[2] Arar's claims of wrongful detention while in United States custody were insufficiently pled and were dismissed with leave to re-plead. *Id.* at 563.

After *Arar*, the Second Circuit was asked to address a similar *Bivens* question when eight Arab and Muslim detainees were (allegedly) wrongfully detained and abused in a federal detention center in New York shortly after the September 11, 2001 terrorist attacks. *Turkmen v. Hasty*, 789 F.3d 218 (2d Cir. 2015). In *Turkmen*, the government sought to dismiss the *Bivens* action by relying on *Arar* and arguing that the case would require the creation of a new *Bivens* remedy because (1) the "context" of the suit was the nation's "response to an unprecedented terrorist attack," and (2) the plaintiffs were not U.S. citizens, but out-of-status aliens. *Id.* at 234, 236. The Second Circuit rejected this argument and held that the claims (illegal detention and unreasonable searches while in detention) "fall[] within the an established *Bivens* context." *Id.* at 236-37. "Indeed," the court stated, "the right violated certainly falls within a recognized *Bivens* context: the Fourth Amendment is at the core of the *Bivens* jurisprudence, as *Bivens* itself concerned a Fourth Amendment claim." *Id.* at 237.

Recognizing that both the Supreme Court and the Second Circuit recognized *Bivens* claims involving "unreasonable searches," the court held that a *Bivens* remedy was available for plaintiffs' claims under the Fourth Amendment. *Id.* The court also recognized a pre-existing *Bivens* remedy for "the Due Process and Equal Protection Clauses of the Fifth Amendment." *Id.* Notably, while upholding the *Bivens* remedy for these claims, the court held that the plaintiffs' First Amendment

claim (that defendants deliberately interfered with plaintiffs' religious practices by refusing to timely provide access to the Koran, denying Halal food, and interfering with plaintiffs' prayers) would extend *Bivens* into a new context, which the court was unwilling to do. *Id.* at 236-37.

Just as with *Turkmen*, Appellees' claim in this case is "at the core of *Bivens* jurisprudence." Because the Supreme Court, this Circuit, and other circuits have long held that an action against federal officials for violating a plaintiff's Fourth Amendment Right to be free from unreasonable searches lies under *Bivens*,[3] this court need not create a "new" *Bivens* remedy to encompass Appellees' claim.

Appellants' sole argument that Appellees' *Bivens* claim involves a "new context" is that "there is an alternative statutory process for protecting the constitutional interests at issue [in this case]." Aplt. Br. at 26. In doing so, Appellants conflate the second prong of the *Bivens* analysis (whether there is an alternative remedial scheme and whether "special factors" counsel hesitation

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[3] *See, e.g., Bivens*, 403 U.S. 388; *Groh v. Ramirez*, 540 U.S. 551, 555 (2004) (recognizing the availability of a *Bivens* remedy for a Fourth Amendment claim of an unreasonable search of plaintiff's ranch as the result of a facially invalid warrant); *Lawmaster v. Ward*, 125 F.3d 1341, 1351 (10th Cir. 1997) (*Bivens* action lies for Fourth Amendment unreasonable search claim); *Castro v. United States*, 34 F.3d 106 (2d Cir. 1994) (same).

against creating a new remedy) with the first (whether the claim involves a "new context" for a *Bivens* remedy). *See, e.g.*, *Turkmen*, 789 F.3d at 234 ("First, the court must determine whether the underlying claims extend *Bivens* into a 'new context.' If, and only if, the answer to this first step is yes, the court must then consider" alternative remedial schemes and special factors that counsel against creating a new remedy.) In other words, if the present case does not a present a "new context" into which *Bivens* may be extended (which it does not), there is no reason to discuss whether an alternative remedy exists.

Notably, Appellants do provide two examples of when a "new context" for *Bivens* may be found – "[1] a new alternative remedy or [2] a new class of defendant." Aplt. Br. at 26 (brackets added). Neither of those examples, however, are remotely applicable to this case. Appellees are seeking money damages (the same remedy as in *Bivens*), and the federal officials here are not "a new class of defendant," *contrast, e.g.*, *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61 (2001) (refusing to extend *Bivens* relief against a *private entity* that operated a halfway house).

In sum, because courts have long held that a *Bivens* remedy lies for allegations that a federal official has violated a plaintiff's Fourth Amendment right to be free from an unreasonable search, this Court need not determine whether to create a new *Bivens* remedy.

B. The Existing AWA Statutory Scheme Does Not Provide an Adequate, Alternative Remedy for Appellees' Constitutional Claim.

Appellants contend that a *Bivens* remedy cannot be created in this case because "the AWA expressly provides a series of remedies to regulated entities." Aplt. Br. at 26. As already noted, a new *Bivens* remedy need not be created; but even if it did, the "remedies" identified by Appellants have no application to this case. Because there is not "any alternative, existing process for protecting the interest" Appellees are seeking to protect via their complaint, *Wilkie*, 551 U.S. at 550, Appellees' remedy is, as with *Bivens*, "damages or nothing," *Bivens*, 403 U.S. at 410.

1. Plaintiffs Are Seeking to Vindicate a Constitutional Right, Not Appeal an Adverse Inspection Report.

As they did below, Appellants misconstrue Appellees' claim and the relief they are seeking in this action. *See, e.g.,* Aplt. App. at 171. Although Appellants discuss how a licensee may appeal an adverse inspection report, this remedy is inapplicable to this case. This case is not about whether, on May 7, 2103, Appellees violated the AWA by refusing to allow access to their facility (as alleged in the adverse inspection report). Instead, this case is about whether APHIS inspectors violated Appellees' constitutional rights when they forcibly entered the facility. Arguing that Appellees can obtain judicial review over an inspection

report, while (mostly) true, does nothing to address the reason for Appellees' complaint – that their Fourth Amendment rights were violated.

Moreover, even if Appellees were seeking to overturn the adverse inspection report, the "remedies" outlined by Appellants do not include redress for their constitutional claim. Appellants fail to provide any authority for the proposition that a licensee can overturn an adverse inspection report based on the *inspectors'* actions and not based upon the *licensee's* actions (or omissions). Simply put, an inspection report is issued when a licensee is alleged to have violated the AWA and its implementing regulations (e.g., by failing to provide adequate veterinary care or by failing to maintain adequate records). If a licensee has, in fact, violated the AWA, it is no defense for the licensee to argue that the inspectors *also* violated the Constitution.[4] In other words, Appellees cannot avoid a finding that they failed to allow the inspectors access to the facility on May 7, 2013 by arguing that the inspectors forcibly entered the premises and conducted an unconstitutional search. The latter argument, in fact, precludes the former because a licensee cannot

[4] For example, although a criminal defendant can, in some instances, suppress evidence seized in violation of the Fourth Amendment, the violation of the defendant's constitutional rights is not, of itself, a defense to the crime charged. *Cf. Illinois v. Krull*, 480 U.S. 340 (1987)(discussing exclusionary rule and exceptions thereto).

simultaneously maintain that he allowed access to the facility and that the inspectors forcibly entered the facility without permission.

This point is further supported by the statutes cited by Appellants. If a licensee violates the AWA, the USDA can assess civil penalties, issue cease and desist orders, and suspend or revoke a license. 7 U.S.C. § 2149. The statute, however, does not permit a licensee to avoid liability by arguing that APHIS inspectors entered the property illegally. *See id.* Likewise, the AWA regulations permit the Secretary to bring an administrative suit to suspend a license or assess a civil penalty; however, there is no corresponding provision if the licensee wishes to bring suit. *See* 7 C.F.R § 1.133. Thus, neither the AWA nor its regulations allow a licensee to assert constitutional violations against the USDA inspectors. Simply put, this case is a stand-alone constitutional tort that cannot be remedied by appealing an adverse inspection report.

Holding otherwise would put licensees like Appellees in an untenable position. If, as Appellants state, an adverse inspection report were required in order for Appellees to vindicate their constitutional rights, then to foreclose judicial review all an inspector would have to do is refuse to write an adverse report (which, if the inspector just violated a licensees' constitutional right she would have ample incentive to do). Likewise, all APHIS would have to do is amend or remove the report once it has been written (or appealed administratively)

to preclude judicial review. *See* http://www.aphis.usda.gov/publications/animal_welfare/2014/appeals_process.pdf (APHIS can to amend, modify, or remove citations). Giving an APHIS inspector and the agency itself complete discretion as to whether a licensee can seek judicial review of his or her constitutional claim is not an adequate "alternative statutory process for protecting the constitutional interests" of a licensee. Aplt. Br. at 26.

2. Forcing a Licensee to Appeal an Inspection Report in Order to Redress Constitutional Violations Is Also Inadequate Because There Is No Formalized, Mandated Appeals Process.

Finally, appealing an inspection report is not an "alternative statutory process for protecting [Appellees'] constitutional interests" because there is no statutory (or even regulatory) appeals process. As opposed to the comprehensive statutory appeals process for, example, social security disability claimants and civil service employees, APHIS merely has "fact sheets" that it has recently posted to its website. *Contrast Chilicky*, 487 U.S. 424-25 (discussing the extensive statutory and regulatory appeals process claimants for social security disability benefits are entitled to and noting that the "procedures of the Social Security system . . . are of a size and extent difficult to comprehend"); *Bush v. Lucas*, 462 U.S. 367 (1983) (discussing the "comprehensive procedural and substantive provisions" including numerous, concrete appeal rights for civil service employees).

APHIS is under no obligation (statutory or otherwise) to follow these recently created "fact sheets." In fact, Nick Sculac and Big Cats have tried unsuccessfully in the past to appeal adverse inspection reports. Nearly two years ago (on December 20, 2013), they appealed an adverse inspection report. Despite APHIS's recent "fact sheet" that states a final decision or a request for more information will be made within *three weeks*, and despite multiple letters sent to APHIS requesting that the appeal be decided, Appellees have still, nearly two years later, received absolutely no response from APHIS regarding this appeal. An unformalized appeal process not grounded in statute or federal regulation free to be followed or ignored at the agency's whim is clearly not "an alternative statutory process for protecting the constitutional interests at issue." Aplt. Br. at 26.

C. The APHIS Inspectors Are Not Entitled to Qualified Immunity.

Qualified immunity "is intended to balance two concerns." *Lawrence v. Reed*, 406 F.3d 1224, 1229-30 (10th Cir. 2005). "On one hand, when an official abuses his office, 'an action for damages may offer the only realistic avenue for vindication of constitutional guarantees.' *Harlow v. Fitzgerald,* 457 U.S. 800, 814 (1982). On the other hand, exposing government officials to damages suits 'entail[s] substantial social costs, *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).'" *Id.* In striking this balance, the Supreme Court has stated that courts must determine (1) whether the facts plaintiff has alleged make out a violation of a

constitutional right, and (2) whether the right was "clearly established" at the time of the violation. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). If so, the official is not entitled to immunity. *Id.*

Courts have discretion in which order to decide these two elements, although both must be proven for a plaintiff to prevail. *Id.* Although Appellants argued both elements below, they have, with respect to the *Bivens* claim, abandoned any argument with respect to the first element (whether the facts alleged make out a constitutional violation). *See* Aplt. Br. at 31-42; *Coleman v. B–G Maint. Mgmt. of Colo., Inc.*, 108 F.3d 1199, 1205 (10th Cir. 1997) ("Issues not raised in the opening brief are deemed abandoned or waived."); *Phillips v. Calhoun*, 956 F.2d 949, 953–54 (10th Cir. 1992) ("[a] litigant who fails to press a point by supporting it with pertinent authority, or by showing why it is sound despite a lack of supporting authority or in the face of contrary authority, forfeits the point.").

Appellants' concession is well-taken given that the allegations in the Complaint – forcibly entry of a locked, private premises without a warrant – easily make out a Fourth Amendment violation. *See, e.g., Kyllo v. United States*, 533 U.S. 27, 33 (2001) (A search subject to Fourth Amendment protection occurs "when the government violates a subjective expectation of privacy that society recognizes as reasonable."); *United States v. Bute*, 43 F.3d 531, 536 (10th Cir.

1994) (Individuals have a reasonable expectation of privacy in commercial property).

1. Appellees' Right to Be Free from the Unreasonable May 7th Search Was Clearly Established.

In the second-prong of the qualified immunity analysis, a plaintiff must demonstrate that the alleged constitutional violation was "clearly established." *E.g., Saucier v. Katz*, 533 U.S. 194, 202 (2001). "The key to the analysis is notice—an official somehow must be on notice that the conduct in question could violate the plaintiff's constitutional rights." *Seamons v. Snow*, 84 F.3d 1226, 1238 (10th Cir. 1996). "There need not be precedent declaring the exact conduct at issue to be unlawful, as long as the alleged unlawfulness was apparent in light of preexisting law." *Id.* "The facts of previous decisions need not correlate exactly with those of the case at issue, as long as there is 'some factual correspondence' between the two." *DeSpain v. Uphoff*, 264 F.3d 965, 979 (10th Cir. 2001) (quoting *Hidahl v. Gilpin County Dep't of Social Servs.*, 938 F.2d 1150, 1155 (10th Cir. 1991)). The "essential inquiry" in this analysis is "would an objectively reasonable official have known that his conduct was unlawful?" *Lawrence*, 406 F.3d at 1230.

To answer this question, the court must determine the "level of generality at which the relevant 'legal rule' is to be identified." *Anderson*, 483 U.S. at 639. The relevant inquiry in this case is whether "an objectively reasonable" APHIS

inspector would have known that it was unlawful to: (1) mislead local police officers in order to induce the officers to cut two sets of locks securing the Big Cats facility, and (2) enter the facility despite unambiguous APHIS procedures that prevent such entry. An objectively reasonable APHIS inspector would have known that such conduct was unlawful for two reasons: (1) *Colonnade* clearly and unmistakably put federal agents on notice that they cannot forcibly enter a locked facility in order to conduct a warrantless, administrative search absent congressional authority permitting forcible entry; and (2) the AWA, its regulations, and the APHIS Animal Care Guide put the APHIS inspectors on "notice" that such conduct would be unlawful.

2. The Supreme Court Has Held that Federal Agents Cannot *Forcibly* Enter a Licensee's Premises Without a Warrant.

In *Colonnade*, a federal liquor licensee refused to allow federal agents to inspect his liquor storeroom without a warrant. 397 U.S. 72, 73 (1970). The agents contended that they did not need a warrant based on federal liquor laws that gave them broad authority to inspect the buildings and storerooms of liquor licensees. *Id.* at 73-74. Accordingly, the federal agents broke the lock to the storeroom, searched the storeroom, and seized several bottles of liquor they suspected were being illegally refilled. *Id.* at 73. The liquor licensee sued, arguing that the federal agents violated his Fourth Amendment right to be free

from unreasonable searches and seizures. *Id.* The Supreme Court determined that the federal liquor laws gave the agents power to inspect the licensee's premises, including the storeroom, without a warrant. *Id.* at 75-76. However, the liquor laws also provided that any licensee who refuses to allow an inspection shall be fined $500. *Id.* (citing 26 U.S.C. § 7342). The question before the Supreme Court then was "whether the imposition of a fine for refusal to permit entry-with the attendant consequences that violation of inspection laws may have in this closely regulated industry-is under this statutory scheme the exclusive sanction, absent a warrant to break and enter." 397, U.S. at 74.

The Supreme Court "agree[d] that Congress has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand," and that warrantless inspections of liquor licensees were not prohibited by the Fourth Amendment. *Id.* at 76. Exercising its "broad powers," Congress decided to fine licensees who refused to permit inspections instead of allowing agents to forcibly enter without a warrant. *Id.* 77. "Under the existing statutes, Congress selected a standard that does not include forcible entries without a warrant. It resolved the issue, not by authorizing forcible, warrantless entries, but by making it an offense for a licensee to refuse admission to the inspector." *Id.* As such, the agents could not forcibly inspect the facility without a warrant. *Id.*

The same result applies to the present case because the AWA, like the liquor laws in *Colonnade*, does not authorize forcible entry, but instead provides for a penalty when a licensee refuses to permit a warrantless inspection. Specifically, Licensee's who refuse to allow an inspection violate 9 c.f.r. 2.126(a), for which they can be fined $10,000 per violation, receive a cease and desist order, have their license revoked, and even be subject to criminal penalties (including imprisonment up to a year and/or a fine of $2,500). 7 U.S.C. § 2149. Additionally, "[a]ny person who . . . resists, opposes, impedes, intimidates, or interferes with any person while engaged in or on account of the performance of his official duties under [the AWA] shall be fined not more than $5,000, or imprisoned not more than three years, or both." 7 U.S.C. § 2146(b).

Accordingly, cutting the chains securing the Big Cats facility and entering the premises without consent violates Plaintiffs' Fourth Amendment rights for the same reasons the federal agents' similar actions were found unconstitutional in *Colonnade.* And, given that *Colonnade* was decided more than forty years previously and clearly and unambiguously held that federal officials conducting a warrantless, administrative search cannot forcibly enter a locked premise without explicit statutory authority to do so, the right in this case was "clearly established." *See, e.g., Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009) ("[T]here is no need that the very action in question have previously been held

unlawful."); *DeSpain*, 264 F.3d at 979 ("The facts of previous decisions need not correlate exactly with those of the case at issue, as long as there is 'some factual correspondence' between the two."); *see also Mimics, Inc. v. Vill. of Angel Fire*, 394 F.3d 836, 847 (10th Cir. 2005) (building inspector not entitled to qualified immunity when search was conducted out of conformance with the building code search procedures).

3. The Inspectors Violated the Very Procedural Safeguards That May Have Otherwise Permitted the Warrantless Search.

Following *Colonnade*, the Supreme Court has upheld some statutory schemes that provide for warrantless searches in "highly regulated" industries, *see, e.g.*, *New York v. Burger*, 482 U.S. 691 (1987) (vehicle dismantling businesses); *Donovan v. Dewey*, 452 U.S. 594 (1981) (mining facilities), and has refused to uphold others, *see Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (warrantless inspections under OSHA violate Fourth Amendment). Central to the Court's decision in upholding some administrative, warrantless searches is its conclusion that the statutes contain "safeguards" that "limit the discretion of the inspecting officers." *Burger*, 482 U.S. at 703. (The inspectors' discretion "must be 'carefully limited in time, place, and scope.'") (quoting *United States v. Biswell*, 406 U.S. 311, 315 (1972)). Without these "safeguards," the searches would be unconstitutional. *Id.* at 702-03 ("even in the context of a pervasively regulated

business, [a warrantless inspection] will be deemed to be reasonable only so long as . . . [the] inspection program . . . provid[es] a constitutionally adequate substitute for a warrant.").

The AWA, its implementing regulations, and its policies and procedures provide various "safeguards" that limit the discretion of APHIS inspectors. When the inspectors follow these "safeguards" a warrantless search *may* be reasonable. *See Lesser v. Espy*, 34 F.3d 1301 (7th Cir. 1994). But when inspectors ignore these safeguards and exercise their discretion in violation thereof, they are no longer entitled to claim that a warrantless search is reasonable. *Cf. Turner v. Dammon*, 848 F.2d 440, 446 (4th Cir. 1988) (Upholding warrantless administrative search of topless bar, but refusing to grant federal officials summary judgment given the way they executed the searches) *abrogated on other grounds by Johnson v. Jones*, 515 U.S. 304 (1995); *Gem Fin. Serv.*, 13-CV-1686 MKB, 2014 WL 1010408 (E.D.N.Y. Mar. 17, 2014); *Lesser v. Espy*, 53 Agric. Dec. 1063 (Agric. Dec. Aug. 30, 1994) ("[W]arrantless searches will be tolerated only so long as the impact on the inspected's property and business operations is no more than that *necessary* to further the overall regulatory scheme . . . . [O]nce an individual begins to receive distinctive treatment without apparent justification . . . oversight such as that provided by the warrant process may be required to assure that the

inspected's Fourth Amendment guarantees are met.") *aff'd* 34 F.3d 1301 (7th Cir. 1994).

This is similar to the "safeguards" provided by a valid search warrant. A valid search warrant must be supported by probable cause, be supported by a sworn affidavit, adequately describe the place to be searched, and adequately describe the things to be seized. U.S. CONST. Amend. IV; *Groh*, 540 U.S. at 557. If these "safeguards" are not followed, the warrant is found deficient and the search or seizure is unconstitutional. *See, e.g.*, *Groh*, 540 U.S. 551; *Massachusetts v. Sheppard*, 468 U.S. 981, 988 n.5 (1984); *Cassady v. Goering*, 567 F.3d 628, 636-40 (10th Cir. 2009). Likewise, if a APHIS inspector ignores or violates the "safeguards" that are set in place to be "an adequate substitute" for a valid warrant, the search is unconstitutional.

In the present case, there are two safeguards that are particularly relevant. First, an inspector is not permitted to enter a licensed facility with locked gates or no trespassing signs unless "prior approval has been obtained from the facility." Aplee. Supp. App. at 2, 13.[5] At the Big Cats facility there are two sets of gates,

[5] Appellees do not argue that a violation of the Animal Care Guide alone is a violation of the Fourth Amendment. Instead, Appellees argue that assuming USDA inspectors can conduct a warrantless search without violating the Fourth Amendment, they must follow the safeguards set forth in the AWA, the AWA

both with No Trespassing[6] signs. Both gates were locked on May 7, 2013, and none of the Appellees gave the Appellants prior approval to enter the locked facility. As such, the inspectors in this case violated a very specific safeguard – do not enter facilities with locked gates or no trespassing signs without approval from the licensee.

Second, a "responsible adult" must be at the facility to accompany an inspector. 9 C.F.R § 2.126(b); Aplee. Supp. App. at 17. If a responsible adult is unavailable, the inspector is not permitted to perform an inspection; instead, the inspector may cite the facility for violating 9 C.F.R § 2.126. *Id.* ("If you do not find anyone at the facility, follow the procedure to complete an attempted inspection."). This citation is publicly available, and the Secretary can impose a $10,000 penalty for violating section 2.126(b). 7 U.S.C. § 2149(b). Additionally, if a licensee refuses to allow an inspection and therefore "resists, opposes, impedes . . . or interferes" with the inspectors' "official duties" he can be fined up to $5,000, imprisoned for up to three years, or both. 7 U.S.C. § 2146(b). Nowhere in the AWA, the regulations governing inspections, or the Animal Care Guide are

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regulations, and APHIS policies and procedures in order for that warrantless search to remain "reasonable."

[6] The sign by the outer gate states "NO TRESPASSING." Aplt. App. at 16 ¶ 34. The sign by the inner gate states "DO NOT ENTER WITHOUT AN EMPLOYEE." *Id.* ¶ 39.

inspectors given authority to cut locks or otherwise forcibly enter private facilities without the authorization of the licensee.

Because Inspectors Thompson and Rhodes disregarded the very procedures that otherwise *may have* permitted their warrantless search, the search was unreasonable. *See Gem Fin.*, 2014 WL 1010408; *Turner*, 848 F.2d at 446-47; *Lesser v. Epsy*, 53 Agric. Dec. 1063 (USDA 1994); *Cf. Donovan v. Dewey*, 452 U.S. 594, 598-99 (1981) ("a warrant may be necessary to protect the owner from the 'unbridled discretion [of] executive and administrative officers,' by assuring him that 'reasonable legislative or administrative standards for conducting an ... inspection are satisfied with respect to a particular [establishment].'") (internal citations omitted); *Blue v. Fed. Postal Inspector Skafettie*, No. 07-CV-01459, 2009 WL 801735 (D. Colo. Mar. 25, 2009). *Contrast Aida Food & Liquor, Inc. v. City of Chicago*, 03 C 4341, 2005 WL 736015 (N.D. Ill. Mar. 29, 2005) ("An examination of the evidence clearly shows that Coffman's *inspections were conducted within the parameters of the Chicago Municipal Code and the Chicago Board of Health Rules and Regulations*, a valid regulatory scheme, and as such, do not violate Plaintiffs' Fourth Amendment rights.") (emphasis added) *aff'd*, 439 F.3d 397 (7th Cir. 2006).

The Supreme Court decision in *Groh v. Ramirez* is also instructive on this point. 540 U.S. 551. In that case, a federal agent searched the farm of defendant

Ramirez after receiving a tip that illegal firearms were present on the farm. *Id.* at 554. The agent prepared the application for the warrant and filled out the warrant form. *Id.* Although the agent correctly identified the items to be seized (various firearms and automatic weapons) on the application supporting the warrant, in the field on the warrant form describing the items to be seized, the agent mistakenly put a description of the respondent's home. *Id.* Despite this error, a magistrate signed the warrant and a search was executed pursuant to it. Afterwards, Ramirez filed a *Bivens* action arguing that his Fourth Amendment right to be free from unreasonable searches was violated due to the deficient warrant. The agent contended that the search was not unreasonable, and, even if so, he was entitled to qualified immunity. *Id.* at 563-65. The Supreme Court disagreed. Holding that the warrant was facially invalid, the Supreme Court held that "no reasonable officer could believe that a warrant" that failed to list the items to be seized "was valid." *Id.* at 563. Furthermore, "the guidelines of petitioner's own department placed him on notice that he might be liable for executing a manifestly invalid warrant" *Id.* at 564.

Similarly, in this case, the inspectors were on notice that forcible entry of a licensee's premise is not permitted. In addition to *Colonnade,* the Animal Care Guide, like the department guidelines in *Groh*, put the inspectors on notice that they were not to enter locked facilities or facilities with no trespassing signs. In

fact, qualified immunity is even less appropriate in this case than in *Groh* because in *Groh*, it was mere negligence that caused the agent to list the items in the warrant's application and not the warrant. *Id.* at 565. In this case, the inspectors did not act negligently; they ignored direct and unequivocal instructions not to enter locked facilities or facilities with no trespassing signs.

4. The *Burger* Analysis Applies to Challenges to Administrative Schemes as a Whole and, Therefore, a Statute's Compliance with the *Burger* Factors Does Not Shield an Inspector from Liability When They Conduct Searches Outside the Bounds of the Administrative Scheme.

Appellants try to avoid the unambiguous holding in *Colonnade* by arguing that (1) it was reasonable for the inspectors to believe that because the administrative search scheme under the AWA is constitutional, "their own actions in conformance with that statutory scheme are necessarily consistent with the Constitution;" (2) there is a lack of case law on "as applied" challenges to particular searches carried out under an administrative search scheme (as opposed constitutional challenges to those schemes; and (3) the AWA regulations authorized the inspectors to contact local police to help the inspectors enter the facility. None of these arguments are availing.

a. The inspectors were not conducting the inspection in accordance with the administrative scheme.

First, Plaintiffs have consistently alleged that the Inspectors' actions were *not* "in accordance with" the statutory scheme. Specifically, the AWA does *not* provide for forcible entry when a licensee is not present, and the regulations and the APHIS Animal Care guide explicitly *preclude* such entry. *See* 7 U.S.C. § 2146(a); 9 C.F.R § 2.126(b); Aplee. Supp. App. at 2, 13. Thus, Appellants' argument that a reasonable inspector acting "in accordance with" a constitutional statutory scheme has a reasonable belief that her actions are constitutional is of no moment; that is simply not the case here. *See Mimics*, 394 F.3d at 847 (denying qualified immunity to building inspector; inspector's "reliance on the statute and regulations does not make his conduct objectively reasonable because there is evidence that [the inspector] did not comply with the terms of the statute and regulations.").

Moreover, Appellants' argument that "there is virtually no authority for the proposition that a party subject to an administrative search may challenge the agents' conduct in a specific warrantless entry," Aplt. Br. at 36-37, is both wrong and immaterial. It is wrong, because as discussed further *supra*, there are a number of cases that support this proposition; it is immaterial because the clear holding of *Colonnade* put federal official on notice that forcible entry was impermissible even

if there were no direct authority indicating that an individual can challenge both the constitutionality of an administrative scheme and the constitutionality of a particular search under that scheme.

b. There Is Ample Case Law Demonstrating that Individuals May Challenge Particular Searches Under an Administrative Scheme in Addition to (or Instead of) Challenging the Scheme as a Whole.

Appellants argue that there is "virtually no authority" that would put an official on notice that they could be held liable for conducting a search pursuant to an otherwise lawful administrative scheme. Aplt. Br. at 36. There is, however, ample authority for this proposition.

Colonnade itself was such a case – the warrantless scheme was determined constitutional, but the specific search under that scheme was unlawful because the administrative scheme did not permit forcible entry of a locked premises.

United States v. Johnson, 408 F.3d 1313 (10th Cir. 2005) is another case where a party challenged a particular search under a warrantless administrative scheme (and not the scheme as a whole). Specifically, the defendant argued that opening his looked toolbox was unconstitutional and beyond the authority provided for in the administrative scheme authorizing warrantless searches. 408 F.3d at 1322. This Court disagreed and held that police officers "did not exceed what is permissible under the administrative inspection statutes [providing for

warrantless searches of savage yards] when they searched Johnson's toolbox." *Id.* at 1322.

Notably, when faced with this challenge, the Court did *not* address *Burger* and then ignore the actual search that was challenged (as Appellants suggest this Court should do); instead, the Court had to determine "whether the officers' conduct in this case, in particular, their search of the locked toolbox, exceeded what is permitted by [the warrantless administrative scheme]." *Id.* at 1322. That is the same question the Plaintiffs want the court to answer – did the May 7, 2013 search exceed what is permissible under the warrantless administrative scheme and therefore violate the Fourth Amendment? That is also the exact question Appellants (incorrectly) argue the court is prohibited from answering.

Apart from *Colonnade* and *Johnson* there is additional case law from this circuit and from other circuits that also put Appellants on notice that their actions in conducting a warrantless search may be subject to judicial review. *See Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1252 (10th Cir. 2003); *Gem Fin.*, 2014 WL 1010408; *Turner*, 848 F.2d at 446-47; *Blue v. Fed. Postal Inspector Skafettie*, No. 07-CV-01459, 2009 WL 801735; *Aida Food & Liquor, Inc. v. City of Chicago*, 03 C 4341, 2005 WL 736015 *aff'd*, 439 F.3d 397. Accordingly, the inspectors in this case had ample notice of the (uncontroversial) principle that an inspector is not at

liberty to exceed the scope of an otherwise valid warrantless scheme when conducting a search pursuant to that scheme.

The cases cited by Appellants do not mandate a different result and, in fact, support the principle that a court can look beyond *Burger* and determine if an agent's actions were unconstitutional when executing a search pursuant to an otherwise constitutional scheme. First, in *S&S Pawn Shop Inc. v. City of Del City*, the plaintiff filed an action "requesting that the district court order appellees to cease all searches of S & S Pawn Shop, Inc. without a valid search warrant" along with an order declaring the administrative search scheme unconstitutional. 947 F.2d 432, 435 (10th Cir. 1991). Faced with this challenge, the district court and this Court applied the three-prong analysis in *Burger* and upheld the constitutionality of the warrantless search scheme. *Id.* 436-440.

In *S&S Pawn*, however, it was clear that the inspections of plaintiff's "premises were conducted only after a pawned item matched an item reported as stolen or when the person who pawned the item was known to traffic in stolen goods." *Id.* at 440. Instead of conducting routine inspections disconnected from any information that criminal activity may be occurring on the premises, the warrantless inspections were *only* occurring after criminal activity was suspected. This Court rejected such a use of the warrantless administrative scheme relying on *Burger* which "did not endorse a scheme that would allow a warrantless search

based on recently discovered evidence that criminal activity had occurred" and numerous other cases *Id.* (collecting cases). Accordingly, although the warrantless scheme standing alone was constitutional, when the searches were conducted in this manner, this Court "remand[ed] the cause [sic] to the district court to proceed with appellant's challenge of the provision **as it was applied to him**." *Id.* at 441 (emphasis added).

This is precisely what Appellees are asking the Court to do in this case. As in *S&S Pawn*, the Court should allow the district court to develop the factual record and determine the constitutionality of the May 7, 2013 search "as applied" to the Appellees.

Similarly, in *United States v. Gwathney*, this Court analyzed and upheld (under *Burger*) a state administrative scheme providing for warrantless searches of commercial trucks. 465 F.3d 1133, 1138-40 (10th Cir. 2006). The state scheme allowed the officer to inspect the cargo hold of a commercial trailer, but it was not clear whether the scheme also allowed the officer to open boxes in the cargo hold. *Id.* The Court did not need to reach this issue, however, because the officer had probable cause to believe the boxes held contraband. *Id.* at 1141. Without a finding of probable cause, the Court would have had to decide whether or not the officer was permitted to open the boxes.

That is the issue before the Court in this case. It is not whether a warrantless

search under the AWA is constitutional, but whether APHIS inspectors can "open the boxes" (forcibly enter a locked facility) in violation of APHIS regulations and procedures. Notably, in *Gwathney*, this Court quoted *United States v. Maldaonado*, 356 F.3d 130 (1st Cir. 2004) stating that "the *Burger* criteria apply to a regulatory scheme generally, not to the particular search at issue." *Id.* at 1139-40. That is precisely what Appellees have been arguing (and the district court held) – the *Burger* criteria are not dispositive because they apply "to a regulatory scheme generally" and "not to the particular search at issue." *Id.*

Accordingly, inspectors have long been on notice that courts can, and will, look beyond the constitutionality of a warrantless administrative scheme when it is alleged that those inspectors have acted in violation of that scheme. Therefore, it is not reasonable for an inspector to believe that conducting a warrantless search outside the bounds of an administrative scheme (i.e., by forcibly entering a locked facility when the scheme does not permit forcibly entry) is constitutional just because the administrative scheme is constitutional.

c. APHIS regulations governing the confiscation of animals are immaterial to this suit, and, even if they were material, do not authorize forcible entry.

As they did below, Appellants rely on a regulation governing confiscation of animals to justify their May 7, 203 inspection and forcibly entry. *Compare* Aplt.

App. at 80-82 *with* Aplt. Br. at 39-42. Appellants' reliance on this regulation, however, is misplaced for three reasons.

First, Plaintiffs have consistently alleged that the May 7, 2013 search at issue in this case was a routine, follow-up inspection and not a confiscation. *See, e.g.*, Aplt. App. 11-15, ¶¶ 15-21, 25-27, 31-33, and 44. Moreover, the adverse inspection report authored by the Appellants with respect to the May 7, 2014 inspection clearly identifies it as a "ROUTINE INSPECTION" and not an confiscation. Aplt. App. at 90. Given that the appealed order was on a motion to dismiss Plaintiffs' complaint, Appellants are not at liberty to re-write or misconstrue Plaintiffs allegations in order to support their legal theory. *See, e.g., Ruiz v. McDonnell*, 299 F.3d 1173, 1181 (10th Cir. 2002).

Second, even if the inspection could be analyzed under 9 C.F.R § 2.129, a statute or regulation alone "does not render the conduct per se reasonable." *Roska*, 328 F.3d at 1252 (10th Cir. 2003). Instead, "the existence of a statute or ordinance authorizing particular conduct is a factor which militates in favor of the conclusion that a reasonable official would find that conduct constitutional." *Id.* (quoting *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir.1994)). Because the inspectors failed to follow the requirements for a confiscation, however, the regulation militates against (and not in favor) of their qualified immunity argument.

APHIS inspectors *cannot* confiscate an animal (1) without prior approval from the Administrator (the top ranking APHIS official) and (2) unless a licensee "refuses to comply with" an APHIS official's request that "adequate care be given to alleviate the animal's suffering or distress." 9 C.F.R § 2.129(a). Additionally, there are established procedures that an APHIS inspector must follow *before* confiscating an animal. 9 C.F.R § 2.129; Animal Care Guide[7] § 8-25 (APHIS inspectors have responsibility to "initiate confiscation procedures in accordance with the regulations and resource material."). As part of these procedures, the inspector must "[c]learly communicate to the authorized representative, verbally and in writing, all conditions that are causing animal suffering and the actions necessary for providing relief of that suffering." *Id.* "This includes writing a detailed inspection report *that accompanies the Notice of Intent to Confiscate.*" *Id.* (emphasis added). The Notice of Intent to Confiscate is signed by the APHIS Administrator and must be delivered to the licensee. *Id.* at 8-31. It is this notice that evinces that the Administrator (and not just an inspector) authorizes the confiscation. *See* 9 C.F.R § 2.129(a).

[7] A September 2013 copy of the guide is available at: http://www.aphis.usda.gov/animal_welfare/downloads/Inspection Guide - November 2013.pdf

Plaintiffs, however, did not "refuse . . . to alleviate the animals' suffering or distress" (and, in fact, the animals were actively being treated by a qualified veterinarian); Plaintiffs were never given the required "Notice of Intent to Confiscate;" and there is not even an assertion that Administrator Kevin Shea approved of any confiscation. Moreover, at no time on May 7th – even after the APHIS inspectors went to the clinic where Maverick and Baxter were being treated – or at any time thereafter did the APHIS inspectors attempt to confiscate the animals. Accordingly, Appellants cannot rely on the confiscation regulation to justify the forcible entry onto Appellees' property given that they failed to follow the necessary confiscation procedures. *See, e.g., Mimics*, 394 F.3d at 846-47; *Roska*, 328 F.3d at 1252.

Third, even if this incident had related to a confiscation effort, which it did not, 9 C.F.R. § 2.129 does not authorize a warrantless, forcible entry into a licensed facility. Although the regulation states that the inspector "shall contact a local police or other law officer to accompany him to the premises," it says nothing about forcibly entering those premises. 9 C.F.R. § 2.129. The "local police" and APHIS inspector are still bound by the Fourth Amendment. *See, e.g., Colonnade*, 397 U.S. 72, at 77 ("Where Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply.").

Appellants state that the regulations "imply" a right of forcible entry, but a reasonable inspector would not believe that forcible entry of a locked premise is appropriate when executing a warrantless search given *Colonnade's* clear mandate and the unambiguous language in the Animal Care Guide just because a regulation *may* "imply" such a right. *See Roska*, 328 F.3d at 1252 (reliance on a statute "could not render the defendants' conduct objectively reasonable, insofar as the statute did not authorize the unconstitutional conduct in question").

D. Having Intentionally Sought Ought and Misled State Actors to Forcibly Enter the Facility, the Inspectors Can Be Liable Under Section 1983.

Inspectors Rhodes and Thompson may be held liable under 42 U.S.C. § 1983 because the state police officers "significantly participated in the challenged activity." *Gibson v. United States*, 781 F.2d 1334, 1343 (9th Cir. 1986). Several cases demonstrate that when the federal actors conscript local law enforcement, they can be found to be acting under color of state law.

For instance, in *Reynoso v. City and County of San Francisco*, the court found that federal ATF agents could be held liable under Section 1983 when they significantly participated in an allegedly unconstitutional search and seizure with local law enforcement agents. 2012 WL 646232 (N.D. Cal. Feb 28, 2012). Specifically, the court found that:

> The [local police] conducted the initial entry into plaintiffs' residence. After the premises was secured, the ATF agents "merely substituted

> themselves for the agents of the City and County of San Francisco in the break-in of plaintiffs' home and took up the search and seizure initiated by the City and County of San Francisco authorities." . . . The federal defendants "significantly participated" in the search in question and therefore acted under color of state law. Plaintiffs can proceed under Section 1983 against Megan Long and the 20 Unknown ATF agents.

Reynoso, 2012 WL 646232 at *6.

Also, In *Knights of Klu Klux Clan, Realm of Louisiana v. East Baton Rouge Parish School Board*, the Fifth Circuit upheld an award of attorneys' fees against federal and state officials who had been found to violate Section 1983. 735 F.2d 895, 900 (5th Cir. 1984). Federal officials had threatened to withhold funding to a school board if they allowed the KKK to use a school gym. The Fifth Circuit held that "when federal officials conspire or act jointly with state officials to deny constitutional rights, 'the state officials provide the requisite state action to make the entire conspiracy actionable under section 1983.'" *Id.* (citing cases).

Other cases have likewise found that when federal officials act in concert with state officials to deny constitutional rights, the federal officials can be held liable under Section 1983. *See Merrit v. Mackay*, 932 F.2d 1317, 1323-24 (9th Cir. 1991) (a federal and state official jointly evaluated and agreed to terminate the plaintiff. Accordingly, the federal official could be held liable under Section 1983.); *Hampton v. Hanrahan*, 600 F.2d 600, 623 (7th Cir. 1979) (federal officials who planned a joint raid with state officials were liable under Section 1983.

"There can be no question that the state defendants played a significant role in the result.") (internal quotation marks and citations omitted) *cert. granted in part, judgment rev'd on other grounds in part*, 446 U.S. 754 (1980); *Brown v. Stewart*, 910 F.Supp. 1064, 1068-69 (W.D. Pa. 1996) (Federal agents who arrested plaintiff liable under Section 1983).

When Inspectors Rhodes and Thompson induced the police officers to cut the chains securing Big Cats' gates – by falsely telling the officers that they had a "court order" to "seiz[e] . . . the animals and ent[er] . . . the property to do so" – and then accompanied the police officers into the facility and searched it, they were acting under color of state law. Aplt. App. at 41. The "local police conducted the initial entry" into the Big Cats facility and then the APHIS inspectors "took up the search . . . ," *Reynoso*, 2012 WL 646232 at *6; the APHIS inspectors "act[ed] jointly" with the state officers in forcibly entering and inspecting the facility, *Knights of Klu Klux Clan*, 735 F.2d at 900; and the local place played a "significant role" in cutting the chains and entering the facility, *Hampton*, 600 F.2d at 623. As such, the inspectors can be held liable under Section 1983.

Such a conclusion is buttressed by the fact that the inspectors could have, if they chose to, unlawfully cut the chains and entered the facility on their own.

Instead, the inspectors wanted to use state authority (and state actors) to initiate the illegal search. As such, the inspectors are liable under Section 1983.

Appellants take issue with the (alleged) fact that "the magistrate judge treated federal officials exactly the same as private citizens in analyzing whether action taken together with state or local officials is under color of state law." Aplt. Br. at 43-44. This is incorrect. Magistrate Judge Mix recognized that there was no binding Tenth Circuit precedent on point and, instead, tried to analogize to the most comparable test available (whether state actors and private parties acted in concert such that they could both be liable under Section 1983). Aplt. App. at 160. Magistrate Judge Mix, however, recognized the "significant problems with application of [this] test" to the case at hand and, instead, relied on *Reynoso* for her recommendation that federal actors could be held liable under Section 1983. Aplt. App. at 161. Magistrate Judge Mix, therefore, explicitly eschewed the very test Appellants spend multiple pages arguing that she should not have used. Aplt. Br. at 43-46.

Moreover, although Appellants point out that "[t]he Supreme Court has never accepted the idea that federal officials can engage in state action," Aplt. Br. at 44, it has never rejected that idea either. And, when Circuit Courts have been faced with this question, they have determined that, in certain circumstances, federal officials *can* act under color of state law. *See, e.g.*, *Merrit*, 932 F.2d at

1323-24; *Hampton*, 600 F.2d at 623; *Kletschka*, 411 F.3d at 448-49; *Knights of Klu Klux Clan*, 735 F.2d at 900; *Premachandra v. Mitts*, 753 F.2d 635, 641 (8th Cir. 1985). Such circumstances are present in this case, and the Court should therefore affirm the district court order.

E. Conclusion.

For the foregoing reasons, the Court should affirm in all respects the district court order overruling Defendants' objections and adopting the Magistrate Judge recommendation.

September 8, 2015

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Appellees have requested oral argument in this case. The case involves important constitutional issues as well as a determination of the extent to which federal officials can be liable under Section 1983. Appellees believe that oral argument may assist the Court in resolving these issues.

CERTIFICATE OF COMPLIANCE

I certify that this brief is proportionately spaced, using Times New Roman, 14 point type. Based on a word count under Microsoft Word 2010, this brief contains 12,282 words, including the footnotes but excluding the tables, disclosure statement, and certificates.

/s/ Duston K. Barton
Duston K. Barton

CERTIFICATE OF DIGITAL SUBMISSION

I certify that (1) all required privacy redactions have been made per 10th Cir. R. 25.5; (2) the ECF submission is an exact copy of the hard copies submitted to the Court; and (3) the ECF submission has been scanned for viruses with the most recent version of a commercial virus scanning programs and, according to that program, is free from viruses.

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CERTIFICATE OF SERVICE

I certify that on September 8, 2015, I served the forgoing Brief for the Appellees on the following be filing the brief through the ECF system:

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I also certify that seven copies of the Brief for Appellees will be mailed, via Federal Express Overnight Delivery, to the Clerk of the United States Court of Appeals for the Tenth Circuit on September 9, 2015.

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