No. 14-954

In the
Supreme Court of The United States

ANIMAL CARE TRUST, ACTING UNDER THE ASSUMED NAME OF MCKAMEY ANIMAL CARE OR MCKAMEY ANIMAL CARE AND ADOPTION CENTER; PAULA HURN; AND KAREN WALSH, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES
Petitioners,

v.

UNITED PET SUPPLY, INC.
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit correctly held, in accordance with clear precedent, that qualified immunity is not an available defense in an official-capacity suit.

2. Whether the Sixth Circuit stated the proper rule of law when it denied Defendants-Petitioners, Karen Walsh and Paula Hurn, qualified immunity.

PARTIES TO THE PROCEEDINGS

Defendants-Petitioners before the Court of Appeals were: Animal Care Trust, acting under the assumed name of McKamey Animal Care or McKamey Animal Care and Adoption Center; Paula Hurn; Karen Walsh; and Marvin Nicholson, in their individual and official capacities.

The City of Chattanooga is a Defendant in the case but did not appear before the Court of Appeals.

Plaintiff-Respondent before the Court of Appeals was United Pet Supply, Inc.

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rules 14.1(b) and 29.6, Respondent, United Pet Supply, Inc. (Pet Supply) states that it does not have a parent corporation and no publicly held corporation owns 10% or more of Pet Supply.

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The United States District Court for the Eastern District of Tennessee entered an Order on Petitioners' motions for judgment on the pleadings on February 5, 2013. *United Pet Supply, Inc. v. City of Chattanooga*, 921 F. Supp. 2d 835 (E.D. Tenn. 2013). A copy of the District Court's memorandum opinion appears at Petition Appx. 48a and its Order at *id.* at 107a.

On February 6, 2013, the United States District Court for the Eastern District of Tennessee entered an Order on the Petitioners' and the Respondent's cross motions for summary judgment. *United Pet Supply, Inc. v. City of Chattanooga*, No. 1:11-CV-157, 1:11-CV-193, 2013 WL 449760 (E. D. Tenn. Feb. 6, 2013). A copy of the District Court's memorandum opinion appears at *id.* at 109a and *id.* at 145a. This opinion of the District Court incorporated its opinions and holdings regarding Petitioners' motions for judgment on the pleadings in *United Pet Supply, Inc. v. City of Chattanooga*, 921 F. Supp. 2d 835 (E.D. Tenn. 2013). *Id.* at 123a, 126a, & 131a.

Subsequently, the Petitioners sought appellate review of the District's Order regarding the cross motions for summary judgment. On September 18, 2014, in a published opinion, the United States Court of Appeals for the Sixth Circuit issued an Order and memorandum opinion on the Petitioners' appeal. *United Pet Supply, Inc. v. City of Chattanooga*, 768 F.3d 434 (6th Cir. 2014). A copy of the Sixth Circuit's

memorandum opinion appears at Petition Appx. 1a and its Order at Petition Appx. 145a.

On November 6, 2014, the Sixth Circuit denied the Petitioners' Petition for Panel Rehearing or Rehearing in en banc. A copy of the Order appears at Petition Appx. 149a.

STATEMENT OF JURISDICTION

The Respondent ("Pet Supply") originally filed this action in the United States District Court for the Eastern District of Tennessee against the City and the Petitioners in their individual and official capacities pursuant to 42 U.S.C. § 1983 for the deprivation of its Fourteenth Amendment due process and Fourth Amendment rights, and for violations of Tennessee law. The District Court issued a memorandum opinion on the parties' cross motions for summary judgment, which incorporated the District Court's rulings on the City and Petitioners' motions for judgment on the pleadings.

The District Court granted Pet Supply summary judgment as to its procedural due process claim for the deprivation of its Permit. The District Court held that Pet Supply's alleged constitutional violations were of clearly established rights save the procedural due process claim regarding the taking of its records. Importantly, the District Court denied all parties summary judgment on Pet Supply's claims of a procedural due process violation for the seizure of its animals and for all Pet Supply's Fourth Amendment claims because of factual disputes.

The Petitioners then sought interlocutory appellate review before the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1291 for denials of summary judgment based upon qualified immunity. The Sixth Circuit only had appellate review of these denials of qualified immunity "to the extent that [they] turn[ed] on an issue of law, *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), because a denial of summary judgment based upon a finding of a factual dispute is not an appealable decision, *see Johnson v. Jones*, 515 U.S. 304, 319-20 (1995). Moreover, the appeal of the denial of summary judgment based on qualified immunity limited the Sixth Circuit's review to whether the constitutional rights allegedly violated were clearly established taking the best view of Pet Supply's facts. *See Mitchell*, 472 U.S. at 528-30; *Quigley v. Tuong Vinh Thai*, 707 F.3d 675, 679-680 (6th Cir. 2013).

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on September 18, 2014. The Sixth Circuit denied Petitioners' Petition for Panel Rehearing or Rehearing in en banc on November 6, 2014. This Petition was filed within 90 days thereafter. This Court has jurisdiction under 28 U.S.C. § 1254(1). This Court also has jurisdiction over plain errors.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND ORDINANCES INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated."

The Fourteenth Amendment provides in relevant part that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law."

Section 1983 of Title 42 of the United States Code states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

Section 7-33(a) of the Chattanooga City Code provides:

> Any pet/animal dealer, as defined in this Chapter, must apply for and receive a pet/animal dealer permit from McKamey Animal Center.

Section 7-34(e) of the Chattanooga City Code provides:

> Such permits may be revoked if negligence in care or misconduct occurs that is detrimental to animal welfare or to the public. Revocation of such permit may only be reinstated after successfully passing an inspection of such facilities and paying the cost of such permit and any application fines and fees . . .

STATEMENT OF THE CASE

A. Pet Supply Operated A Pet Store Pursuant To A City Permit And A State License.

Pet Supply operated retail pet stores for over thirty (30) years in malls in the Northeast, Atlanta, and the Hamilton Place Mall in Chattanooga. Respondent's Appx. 23a. Pet Supply opened a commercial pet store in the Hamilton Place Mall in Chattanooga, Tennessee in 2004. *Id.* The store was operated in full view of the public seven (7) days a week from 10:00 a.m. to 9:00 p.m. with slightly reduced hours on Sunday. *Id.* Pet Supply retained a licensed veterinarian to examine its animals weekly.

Id. Pet Supply never had a state pet dealer license suspended or revoked in any state, including Tennessee, in the entire history of the company. *Id.*

The Chattanooga City Code required Pet Supply to obtain a "Pet Dealer Permit" from McKamey for an annual fee of $300.00. *Id.* Pet Supply was also required to apply and obtain a license issued by the Tennessee Department of Agriculture for a yearly fee of $1,000.00. *Id.* The City Code's required City Permit was, therefore, duplicative of the comprehensive State licensing procedures set forth in Tenn. Code Ann. § 44-17-122. *Id.*

Between January, 2010 and April, 2010, McKamey representatives visited Pet Supply's store on seven (7) different occasions. *Id.* at 24a. In the course of those seven visits, McKamey issued one "warning", asking for record of treatment for a canary, which was duly provided. *Id.* On May 11, 2010, McKamey issued a city permit to Pet Supply stating as follows:

> This certifies that The Pet Company #29 has met the requirements of the Code of the City of Chattanooga and is approved by The McKamey Animal Services Division to operate as Pet Dealer in the City of Chattanooga.

Id. at 24a-25a. This city permit was signed by Ms. Walsh. *Id.*

B. Petitioners Appeared At Pet Supply's Shop, Seized Its Animals, Seized Its Records, And Revoked Its City Permit.

On June 15, 2010, at approximately 8:10 a.m., and prior to Pet Supply's business hours, representatives from McKamey, including Walsh, Nicholson and Hurn, raided Pet Supply's premises without a warrant, confiscated its animals, business records and other property, its license, and summarily shut down its business operations. *Id.* The raid included a state inspector, Joe Burns from the State Department of Agriculture, who was present at the behest of Walsh. *Id.* McKamey conducted its inspection while Pet Supply's employees *were in the process of the cleaning the store*. *Id.*

McKamey's raid of Pet Supply's store premises was contrary to *state* law governing administrative inspections, which permitted inspection during business hours only. *Id.* McKamey asserted its official authority to "inspect" Pet Supply's premises, even though no provision of the City Code permitted an inspection at 8:10 a.m. *Id.* at 26a.

As a result of the raid, the State did not revoke the state license or otherwise provide, on June 15, 2010, any documentation stating that it intended to revoke the license. *Id.* Instead, the state issued Pet Supply a "warning", Burn's 6/15/10 Report, which was later changed, inexplicably, to a "notice of violation". *Id.* McKamey, on the other hand, seized Pet Supply's animals and records and summarily

revoked its City Permit. *Id.* Walsh issued an official letter to Pet Supply, dated June 15, 2010, which stated:

> This case will be in city court on June 24, 2010 at 9:00 am. During this time you are not able to sell pets. This does not mean that you are unable to sell retail items during the period between now and court.
> /s/ Karen S. Walsh, Executive Director

Id. at 26a-27a. She issued citations to Pet Supply and wrote "Revoked permit" on the citations. *Id.* at 27a.

D. The Conditions At The Store Never Violated Applicable State Law.

Petitioners routinely assert throughout the Petition that the conditions in the store justified its actions. The record, however, belies that assertion and shows, in fact, that the conditions in the store never violated applicable law. TENN. CODE ANN. § 44-17-118 states that "the commissioner may promulgate such rules and regulations as are reasonably necessary to implement this part." *Id.* at 35a. Rule 0080-2-15-.06 of the *Rules of Tennessee Department of Agriculture* states that "each dealer licensed under this chapter shall comply in all respects with the regulations of this chapter and the standards set forth in Part 3 of Title 9 of the Code of Federal Regulations as amended, for the humane, care, treatment, housing, and transportation of

animals." *Id.* at 35a-36a. The record shows that Pet Supply violated none of these federal regulations. *Id.*

The temperature never exceeded the applicable State law. *Id.* at 36a. State Inspector Burns testified under oath that his principal concern with Pet Supply on June 15 was the temperature, and that "the other things just weren't quite as big a deal". *Id.* The State law requires that the "ambient temperature … must not ***rise above 85° F*** … for more than 4 consecutive hours when dogs or cats are present." *Id.* There is no proof in the record that the temperature rose above 85° degrees for more than four hours at any point. Ms. Hurn admitted, on cross-examination, that her temperature readings never exceeded 85° for more than four hours and conceded that Pet Supply complied with this regulation. *Id.* at 37a. Moreover, State Inspector Burns offered unrebutted testimony that there was ventilation running through the storefront dog kennels in the form of an auxiliary fan. *Id.* The proof was likewise unrebutted that auxiliary ventilation, in the form of exhaust vents and fans, was also provided, in full compliance with the law, throughout the remainder of the store. *Id.* Pet Supply, thus, complied with the applicable State Law by providing auxiliary ventilation when the temperature reached 85° degrees. *Id.*

The proof at the City Court trial showed that Pet Supply properly cleaned the kennels. Pet Supply was in the process of cleaning when the inspection began. *Id.* The testimony was unrebutted that Brandy Hallman and another employee were at the

store at 7:00 a.m. cleaning the store to prepare it for store opening. *Id.* at 38a; see 9 C.F.R. § 3.1(c)(3) (requiring "spot-clean daily and sanitize" hard surfaces "with which the dogs or cats come in contact"). When McKamey and State Inspector Burns arrived at approximately 8:15 a.m., the cleaning ceased and was not completed. *Id.* The raid interrupted the cleaning process to the point that it was effectively impossible to clean the facility appropriately after McKamey arrived. *Id.* Moreover, Pet Supply's cleaning procedures - in the morning and throughout the day as necessary - was essentially identical to McKamey's: A McKamey employee would arrive at McKamey in the morning to clean kennels left unattended overnight. *Id.*

The record shows that Pet Supply provided the animals water in compliance with the applicable State Law. *Id.* The State law required Pet Supply to provide water to the animals continually or twice per day for intervals of at least one hour. *Id.* at 38a-39a; *see* 9 C.F.R. § 3.10 (stating that "[i]f potable water is not continually available to the dogs and cats, it must offered to the dogs and cats as often as necessary to ensure their health and well-being, but not less than twice daily for at least 1 hour each time…."). The unrebutted proof showed that the animals were provided water continuously the day before the inspection. *Id.* at 39a. The City was unable, in fact, to show otherwise inasmuch as there was no proof that any representative of McKamey was present at Pet Supply on June 14 (the day before the raid). *Id.* Pet Supply's manager, Brandy Hallman, testified in the City Court trial that the animals were provided

water throughout the day on June 14 (the day before the inspection) and that she checked to insure that the animals had water when she arrived on June 15. *Id.*

E. Prior To The City Court Trial, Petitioners Solicited Public Support to "Close Pet Supply".

After the raid and before the commencement of the City Court trial, McKamey posted a link on its website to an online petition entitled "Close Pet Supply in Chattanooga, Tn". *Id.* at 27a. McKamey stated, on its website, "You can also sign the on-line petition, which now has over 4,000 signatures, to help close Pet Supply: www.PetitionOnline.com...." *Id.* The petition itself stated, among other things, "Please close the pet store at Hamilton Place Mall in Chattanooga, Tennessee", and described the author's opposition of so-called "puppy mill brokers", which sell their puppies to pet stores. *Id.* The petition also elicited a boycott of Pet Supply's landlord at Hamilton Place with a boycott of the Mall until Pet Supply "closes its doors forever". *Id.* Finally, McKamey's website solicited donations to McKamey in conjunction with the petition. *Id.*

F. After Trial, Pet Supply Retained Its City Permit, And The City Court Dismisses The Case.

Having suffered these deprivations without a hearing, Pet Supply retained counsel and proceeded to trial. After several hearings, City Court Judge

Paty ruled on July 14, 2010 that she would not revoke Pet Supply's City permit. *Id.* at 28a. The State never suspended or revoked Pet Supply's State License. *Id.* at 29a.

Seven (7) days after Judge Paty's decision, Pet Supply asked the City Court to return its City Permit in accordance with its previous ruling, but McKamey refused, arguing that the status of the Permit was not before the Court. *Id.* At this hearing, McKamey took the position - after Judge Paty's ruling - that revocation of the Pet Store's permit was an administrative decision, apparently one which lay outside the Court's power and instead within McKamey's discretion *Id.* at 29a-30a. McKamey's counsel stated specifically that McKamey would determine whether to reinstate the Permit after Pet Supply re-applied. *Id.* The City Court, likewise, reiterated that it understood that it was trying the issue whether Pet Supply's City Permit would be revoked. *Id.* Nevertheless, McKamey did not immediately return Pet Supply's City Permit. *Id.* at 31a.

Thereafter, on July 26, 2010 – and before the McKamey returned Pet Supply's City Permit - Judge Paty declared a mistrial and recused herself because of *ex parte* communications she received from the City's mayor, Ron Littlefield. *Id.* After recusal, Judge Harris replaced Judge Paty.

McKamey did not return Pet Supply's permit, forcing Pet Supply to file a motion compelling McKamey, again, to reinstate the Permit in

compliance with City Court's previous order. *Id.* McKamey responded to that motion by seemingly abandoning its previous argument – *i.e.,* that it could determine whether to return the City Permit on re-application – and argued instead that the City Court trial determined whether it would revoke the City Permit. *Id.*

The City subsequently returned the City Permit, following written demand by Pet Supply. *Id.* at 32a. In a subsequent order of dismissal, however, Judge Harris determined that "the City Court has no authority to revoke or make any order relative to the license of the Pet Company." *Id.* at 33a. Judge Harris dismissed the case in its entirety on double jeopardy grounds. *Id.* In an article in the Chattanoogan, an online newspaper, the City Attorney, Mike McMahan, stated that the City "screwed up" because the City Code provided no mechanism for a hearing to revoke a City Permit. *Id.*

G. Pet Supply Filed A Complaint In Federal Court.

Pet Supply thereafter filed a Complaint against the City of Chattanooga and all the Petitioners in their individual and official capacities pursuant to 42 U.S.C. § 1983 claiming deprivations of constitutionally protected rights. Pet Supply claimed violations of its procedural due process rights and violations of its Fourth Amendment rights.

Petitioners are McKamey, which is a non-profit private entity that contracted with the City of

Chattanooga to operate an animal shelter and enforce the City Code's animal welfare provisions. At all relevant times, Petitioner Karen Walsh was McKamey's Executive Director, Petitioner Paula Hurn was McKamey's Director of Operations and Petitioner Marvin Nicholson was an Animal Services Officer for McKamey. Petitioners Walsh and Nicholson were also commissioned as special police officers of the City of Chattanooga.

In the Complaint, Pet Supply alleged the following causes of action:

1. Violation of Pet Supply's right to procedural due process regarding the summary revocation of Pet Supply's City issued Permit to operate a commercial pet store by the City and Petitioners, McKamey and Walsh in their individual and official capacities.

2. Violation of Pet Supply's right to procedural due process regarding the taking of its animals and business records by the City and all Petitioners in their individual and official capacities.

3. Violation of Pet Supply's Fourth Amendment for the unreasonable search of its premises, and seizures of its animals and business records by the City and all Petitioners in their individual and official capacities.

4. Abuse of process by McKamey in its individual and official capacity.

5. Conversion by the Petitioners in their individual and official capacities.

6. Tortious interference with a business relationship by the Petitioners in their individual and official capacities.

7. Tortious interference with a contract by the Petitioners in their individual and official capacities.

The City and all the Petitioners filed motions for judgment on the pleadings, and the District Court for the Eastern District of Tennessee issued a memorandum opinion on February 5, 2013. The District Court granted the City and the Petitioners judgment on the pleadings regarding Pet Supply's procedural due process claim involving the deprivation of its business records. The District Court also granted judgment on the pleadings regarding the conversion claims against Petitioners Hurn, Nicholson and Walsh and on Pet Supply's tortious interference with a business relationship and tortious interference with a contract in *toto*.

Otherwise, the District Court held that Pet Supply's Complaint properly alleged clearly established constitutional violations on its procedural due process and Fourth Amendment claims. Since these rights were clearly established, the District Court denied Petitioners Walsh, Hurn and Nicholson qualified immunity in their individual capacities. The District Court did not address qualified

immunity as it related to Petitioner McKamey in its individual capacity; however, the District Court did find that McKamey could seek qualified immunity in its official capacity but denied its entitlement having found the rights clearly established.

The City, Petitioners and Pet Supply also filed cross motions for summary judgment. The District Court for the Eastern District of Tennessee issued a memorandum opinion on February 6, 2013, which granted Pet Supply summary judgment on its procedural due process claim regarding the revocation of its Permit against Petitioners, the City and Walsh. The District Court also granted the City and Petitioners summary judgment on Pet Supply's Fourth Amendment unreasonable search claim. The District Court did not grant any party summary judgment on the procedural due process claim regarding the taking of Pet Supply's animals or the Fourth Amendment claim regarding the unreasonable seizure of Pet Supply's animals and records finding that factual disputes prevented a decision as a matter of law.

The District Court again denied the Petitioners qualified immunity as all the remaining constitutional alleges were of clearly established rights. The District Court also denied Petitioner McKamey's motions for summary judgment regarding Pet Supply's abuse of process and conversion claims.

Petitioners thereafter sought interlocutory appellate review by the Sixth Circuit of the District

Court's decisions regarding the cross motions for summary judgment. The issues on appeal were whether Pet Supply's due process and Fourth Amendment rights were clearly established and whether Petitioner McKamey was entitled to qualified immunity.

The Sixth Circuit first addressed whether Petitioners Walsh, Nicholson or Hurn could claim qualified immunity in their individual capacities and decided that Walsh and Nicholson could claim qualified immunity as both private animal-welfare officers and as specially-commissioned police officers of the City. The Sixth Circuit held that Petitioner Hurn could claim qualified immunity. The Sixth Circuit did not address McKamey's entitlement to qualified immunity in its individual capacity. The Court also held that according to clear Supreme Court precedent qualified immunity was unavailable in official capacity suits.

Having determined that qualified immunity was unavailable to Petitioner Hurn, the Sixth Circuit addressed whether Pet Supply's remaining procedural due process and Fourth Amendment violations were clearly established for the purpose of determining whether Petitioners Walsh and Nicholson were entitled to qualified immunity.

The Sixth Circuit held that Pet Supply's claim of a procedural due process violation for the revocation of its Permit was clearly established and denied Walsh summary judgment based upon qualified immunity. The Sixth Circuit held that Pet

Supply's claim of procedural due process for the seizure of its animals was not clearly established and granted both Petitioners Walsh and Nicholson summary judgment based upon qualified immunity.

Regarding Pet Supply's claims of Fourth Amendment violations, the Sixth Circuit held that the seizure of the animals did not implicate a clearly established right granting both Petitioners Walsh and Nicholson summary judgment based upon qualified immunity. The Sixth Circuit denied Walsh qualified immunity holding that the seizure of business records implicated a clearly established right. The Sixth Circuit, however, granted Petitioner Nicholson Summary judgment on this same claim holding that the facts as alleged did not demonstrate that Nicholson violated a constitutional right.

SUMMARY OF THE ARGUMENT

The Court should deny the Petition for Certiorari because the present case does not present either a split of authority or a novel issue which requires the Court's attention. Contrary to the arguments of Petitioners, the Sixth Circuit did not "categorically" rule that a corporate defendant is ineligible to assert qualified immunity. Instead, the Sixth Circuit only held that qualified immunity is not available to a defendant sued in his/her or its official capacity.

In addition, the Sixth Circuit properly applied the Court's analysis for determining whether a private defendant is permitted to assert qualified

immunity. The Sixth Circuit committed no error in determining that Petitioners Hurn or Walsh were not entitled to qualified immunity as held by the Sixth Circuit. The Sixth Circuit correctly analyzed their claims of qualified immunity in accordance with clear precedent.

ARGUMENT

I. It Is Well Settled That Qualified Immunity Is Not Available For Official Capacity Claims Of Constitutional Violations Such That There Is No Conflict Counseling This Court's Review.

The Court should deny the Petition because the Sixth Circuit did not hold that private defendants are "categorically ineligible" to assert qualified immunity; it simply followed the long-standing precedent of this Court, holding that no defendant – whether it is a corporation or individual – is permitted to assert qualified immunity when facing a case in its official capacity. There is, moreover, no split among the Circuits on this discreet issue because any contrary ruling would contradict this Court's clear precedent.

A. The Sixth Circuit Did Not Hold That Qualified Immunity Is Categorically Unavailable to Private Entities.

Respondents are in error when they contend that the Sixth Circuit held that "qualified immunity is categorically unavailable to private entities." *See*

Petition at 17. As the Sixth Circuit stated in its opinion below, it has "previously permitted a corporate defendant to assert qualified immunity as a defense to an individual-capacity suit…" Petition Appx. 31a-32a at n.3. Nowhere in its opinion does the Sixth Circuit hold, or infer, that a corporate or private defendant is "categorically ineligible" to assert qualified immunity. This is not, therefore, an appropriate case for the Court to consider this ostensibly "important and recurring issue".

B. There Is No Split Among The Circuits On The Actual Holding Of The Sixth Circuit: That Qualified Immunity Is Unavailable In A Claim Brought Against A Defendant In An Official Capacity.

Plainly stated, the Petitioner apparently misapprehends the Sixth Circuit's ruling. The Sixth Circuit did not hold that "private entities are categorically ineligible to claim qualified immunity." On the contrary, the Sixth Circuit simply held, in compliance with clear precedent of this Court, that an entity, whether that entity is a corporation or individual, is not entitled to assert the defense of qualified immunity to a claim alleging that the entity acted within its official capacity. Petition Appx. 29a-31a. Specifically, the Sixth Circuit stated:

> We have always understood qualified immunity to be a defense available only to individual government officials sued in their personal capacity. "As qualified

> immunity protects the public official in his individual capacity from civil damages, such immunity is unavailable to the public entity itself." *Everson v. Leis*, 556 F.3d 484, 501 n. 7(6th Cir. 2009); see also *Hidden Vill., LLC v. City of Lakewood*, 734 F.3d 519, 523 (6th Cir. 2013) ("Lakewood is not eligible for qualified immunity because it is a city, not an individual."). That McKamey is a private entity acting in a governmental capacity does not change the unavailability of qualified immunity as a defense in an official-capacity suit. Just as the City of Chattanooga cannot assert qualified immunity as a defense against an official-capacity suit, neither can Walsh, Nicholson, Hurn or McKamey.

Id. at 31a. The Sixth Circuit then referenced, in a footnote, a case in which a private corporation asserted a defense of qualified immunity, but the Sixth Circuit stated explicitly that it was unclear whether the claim was asserted against that corporate defendant in its official or individual capacity. The Sixth Circuit stated:

> We note that in *Bartell* we permitted a non-profit entity to assert qualified immunity in a case where it was not specified whether defendants were sued in their official or individual capacity. *Bartell*, 215 F.3d. 557. Because we

> previously permitted a corporate defendant to assert qualified immunity as a defense to an individual-capacity suit, *Cullinan*, 123 F.3d 310-11, and because permitting an assertion of qualified immunity as a defense to an official-capacity suit would conflict with clear Supreme Court precedent, we presume that *Bartell* involved an assertion of qualified immunity only in the defendants' individual capacity.

Id. at 31a-32a at n.3. The Sixth Circuit simply did not rule that a corporation is "categorically ineligible" to assert qualified immunity. Instead, the Court followed "clear Supreme Court precedent" precluding a defendant – regardless of whether it was a government employee, private-actor or private entity – from asserting qualified immunity when it has been sued in its official capacity. *Id.* at 29a-31a. As this Court has held, qualified immunity is only afforded to parties sued in their individual capacity. *Owen v. City of Independence*, 445 U.S. 622 (1980); *Brandon v. Holt*, 469 U.S. 464 (1985); *Kentucky v. Graham*, 473 U.S. 159 (1985).

There is, more importantly, no split among the Circuits on the Sixth Circuit's specific holding: whether a corporate defendant - sued in its *official capacity* - may assert qualified immunity. The Sixth Circuit considered rulings from other Circuits in which corporate defendants asserted qualified immunity but determined that it was unclear

whether the corporate defendants in those cases were sued in their official or individual capacity:

> A handful of other Circuits have permitted private corporations to assert qualified immunity, but all of the cases were similarly unclear as to whether the suit was in the corporation's personal capacity or official capacity.

Id. at 31a-32a at n.3.

Additionally, Petitioners argue that opinions from the Sixth and Ninth Circuits create a conflict with the other Circuits regarding a private-actor or entity's entitlement to qualified immunity is misplaced. As discussed *supra* Part I.A., the Sixth Circuit did not categorically hold that a private-actor or entity could not claim qualified immunity but only that qualified immunity is unavailable to official capacity claims. The Ninth Circuit similarly has not created a conflict with this Court's decisions in *Filarsky v. Delia*, 132 S. Ct. 1657 (2012) and *Richardson v. McKnight*, 521 U.S. 399 (1997) regarding a private actor or entity's entitlement to qualified immunity. All the authority cited by the Petitioners, which the Petitioners allege demonstrates a conflict, pre-date this Court's 2012 decision in *Filarsky*. Moreover, since the *Filarsky* decision, the Ninth Circuit has recognized the applicability of *Filarsky* to violations brought pursuant to 42 U.S.C. § 1983 but has not yet had an opportunity to apply the precedent to a private-actor seeking qualified immunity on a § 1983 claim. *See*

Gomez v. Campbell-Ewald Co., 768 F.3d 871, 881-82 (9th Cir. 2014).

Because there is no split among the Circuits on this issue before the Court there is no reason for the Court to consider this issue in the present case.

C. The Sixth Circuit Properly Held that McKamey Violated A Constitutional Right Which Was Clearly Established.

Moreover, if McKamey is entitled to qualified immunity, that entitlement would only apply to a claim against it in its individual capacity. Regardless, qualified immunity is not available where the violated constitutional right was clearly established. *Pearson v. Callahan*, 555 U.S. 223, 231-32 (2009) (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). As the District Court and the Sixth Circuit properly held, the right to procedural due process for the revocation of Pet Supply's Permit and the seizure of its business records were clearly established. *See infra* Part II; *see also* Petitioner Appx. 131a.

II. The Sixth Circuit Stated And Applied The Correct Rule Of Law When It Denied The Petitioners Hurn and Walsh Summary Judgment Based Upon Qualified Immunity.

The Sixth Circuit properly stated and applied the correct rule of law when it denied the Petitioners

Hurn and Walsh summary judgment based on qualified immunity, and therefore, this Court should not grant the Petition for review on these issues. The Sixth Circuit's review of Hurn and Walsh's entitlement to summary judgment was limited to whether as a matter of law and according to the Pet Supply's allegations the rights allegedly violated were clearly established. *See id.* at 41a. Since the Sixth Circuit's determination that the rights were clearly established was based on the correct rule of law, these Petitioners inappropriately seek review claiming a misapplication of the correct rule of law, which does not justify granting the Petition for a writ of certiorari.

a. The Sixth Circuit accurately stated and applied the correct rule of law when it denied Petitioner Hurn qualified immunity and review by this Court is not warranted.

The Sixth Circuit accurately stated and applied the correct rule of law when it denied Petitioner Hurn qualified immunity. Moreover, the Sixth Circuit's holding did not conflict with the correct rule of law. Therefore, this Court should deny the Petition's request for review of Hurn's denial of qualified immunity.

In denying Hurn qualified immunity, the Sixth Circuit employed this Court's approach to private-actor immunity. Petition Appx. 19a-29a (analyzing *Filarsky v. Delia*, 132 S. Ct. 1657 (2012) and *Richardson v. McKnight*, 521 U.S. 399 (1997)). The

Sixth Circuit followed this Court's precedent in determining whether qualified immunity is available to a private-actor by considering the "general principles of tort immunities and defenses applicable at common law, and the reasons [this Court has] afforded protection from suit under § 1983" as set forth in *Filarsky*, 132 S. Ct. at 1662 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 418 (1951)). Petition Appx. 19a-29a. Specifically, the Sixth Circuit determined that qualified immunity was unavailable to Hurn after analyzing the history of qualified immunity and the purposes of the immunity according to this Court's precedent. *Id.*

The Sixth Circuit's fact intensive analysis of *Richardson* and conclusion did not conflict with *Filarsky*. The Court in *Filarksy* affirmed the analysis in *Richardson* regarding circumstances involving:

> a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertak[ing] that task for profit and potentially in competition with other firms"—combined sufficiently to mitigate the concerns underlying recognition of governmental immunity under § 1983.

132 S. Ct. at 1667 (quoting *Richarson*, 521 U.S. at 413). The reason *Filarsky* did not conduct the *Richardson* analysis was because factually "[n]othing

of that sort is involved here." *Filarsky*, 132 S. Ct. at 1667. Therefore, *Filarsky* did not overrule *Richardson* but recognized its application in a different factual circumstance.

The Sixth Circuit recognized and cited both *Richardson* and *Filarsky*. Petition Appx. 19a-29a. The Sixth Circuit determined that factually it had to employee the *Richardson* analysis for determining if Hurn as a private-actor employee of a state contractor, i.e. McKamey, was entitled to assert qualified immunity. *Id.* The Sixth Circuit determined Hurn was not entitled to qualified immunity based on the application of this precedent. *Id.*

The Sixth Circuit, therefore, accurately stated and applied the correct rule of law when it determined Hurn was not entitled to assert qualified immunity, which does not counsel review by this Court.

b. Pet Supply's right to its Permit was clearly established such that Petitioner Walsh is not entitled to qualified immunity.

Pet Supply had a clearly established protected property interest in its Permit such that Walsh could not revoke the Permit without due process and is not entitled to qualified immunity. Moreover, Petitioners acknowledge that Pet Supply had a protected property interest in its Permit and yet did not afford Pet Supply process before ultimately revoking its

Permit. *Id.* at 39a-41a. The Sixth Circuit, therefore, correctly determined in accordance with clear precedent that "[t]his is one of the rare situations where the unconstitutionality of the application of a statute to a situation is plainly obvious." *Id.* at 41a.

Due process requires an opportunity to be heard at a "meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Moreover, when the government issues a permit that can only be suspended or revoked for cause, it "has engendered a clear expectation of continued enjoyment of a [Permit] absent proof of culpable conduct." *Barry v. Barchi*, 443 U.S. 55, 64 at n.11 (1979). Therefore, "it has become a truism that some form of hearing is required before the owner is finally deprived of a protected property interest." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 570-71 at n.8 (1972)). Furthermore, a government entity or state actor "may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement. *Logan*, 455 U.S. at 434 (citing *Bell v. Burson*, 402 U.S. 535, 542 (1971)).

The Sixth Circuit determined that the revocation of Pet Supply's Permit was without process violating a clearly established right. Petition Appx. 39a-41a. The Sixth Circuit not only affirmed the District Court's determination that this right was clearly established but also affirmed the District Court's grant of summary judgment to Pet Supply on this claim. *Id.* This determination was based on the

fact that when the Permit was revoked, there was no process for it being reinstated without requiring Pet Supply to reinitiate the process to obtain the Permit – there was no opportunity to be heard at a meaningful time and in a meaningful manner. *Id.* As the Sixth Circuit acknowledged:

> It was the policy and practice of McKamey and the City of Chattanooga to require an individual or company whose permit was revoked to apply for a new permit. This process does not truly allow for reinstatement of the permit; even if the City Court were to conclude that the permit holder had not violated the City Code, the permit holder was nonetheless required to apply for a new permit, pay the fee, and go through the inspection process again. The fact that the permit holder can ultimately obtain a new permit after jumping through various hoops does not address the lack of a mechanism to challenge the initial revocation.

Id. at 39a-40a. Based upon this policy and practice, Pet Supply was ultimately deprived of its Permit without process. *Id.* at 39a-41a.

Petitioner Walsh's argument that she could rely on a presumptively valid City Code and could presume the City Court had jurisdiction over the revocation does not entitle her qualified immunity. As discussed above, the policy and practice of

McKamey and the City was that after revocation of the Permit, Pet Supply had to reapply just as if it never had a Permit. The policy and procedure, therefore, ultimately deprived Pet Supply of its Permit regardless of whether the City Court had jurisdiction. Pet Supply had no "mechanism to challenge the initial revocation." *Id.* at 39a-40a. Such a policy and procedure flies in the face of clear precedent protecting Pet Supply's property right to its Permit, and no reasonable officer could conclude or even presume that it was valid. *See id.* at 39a-41a.

Moreover, Petitioner Walsh was not required by the City Code to revoke Pet Supply's Permit. The City Code states that the Permit "may be revoked if negligence in care or misconduct occurs…" *Id.* at 41a. Even assuming the conditions at Pet Supply's store permitted revocation of the Permit – a fact which Pet Supply disputes and which the District Court held was the subject of a factual dispute – Walsh was not required to revoke the Permit. *Id.* This is not a situation where Walsh as a state actor was required to choose between enforcing the law and violating a constitutional right.

The Sixth Circuit determination that Pet Supply was entitled to due process based on a protected property interest in its City issued Permit is clearly established. Based upon the City and McKamey's stated policy regarding revocation of the Permit, Pet Supply never received due process before the Permit was finally revoked. *Id.* at 39a-41a. The total lack of process before finally depriving Pet Supply of a protected property interest is likewise

clearly established violation of a constitutional right. *See Logan*, 455 U.S. at 433-34.

Walsh, therefore, is not entitled to qualified immunity because Pet Supply's right not to have its Permit revoked without process was clearly established. Moreover, the District Court held and the Sixth Circuit affirmed that no factual dispute existed and that Pet Supply is entitled to summary judgment for this deprivation. The clearly established nature of the Pet Supply's right does not counsel this Court's review of Walsh denial of qualified immunity for the deprivation of Pet Supply's Permit without due process.

c. Pet Supply's right not to have its business records seized was clearly established such that Petitioner Walsh is not entitled to qualified immunity.

The Sixth Circuit stated and applied the correct rule of law when it denied Petitioner Walsh summary judgment based upon qualified immunity by holding that Pet Supply's claim that its business records were seized in violation of the Fourth Amendment was clearly established. Petition Appx. 42a-47a.

Petitioners' seizure of the Pet Supply's business records constitutes a seizure of property within the Fourth Amendment and the only issue is whether the warrantless seizure of the business records violated a clearly established right. *Id.* at

42a. According to this Court's precedent, a seizure of property "occurs when there is some meaningful interference with an individual's possessory interest in that property." *Soldal v. Cook Cnty.*, 506 U.S. 56, 561 (1992) (citing *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). The Fourth Amendment protects individuals from unreasonable seizures of property. At the time of the Petitioners' seizure, the Fourth Amendment's protection of commercial premises was clearly established. *New York v. Burger*, 482 U.S. 691, 699 (1987).

Warrantless seizures of property protected by the Fourth Amendment are *per se* unreasonable absent an exigent circumstance or other exception. *See Coolidge v. New Hampshire*, 403 U.S. 443, 474-75 (1971). Petitioners here claim that the warrantless seizure of the records was justified by exigent circumstances and by the plain-view doctrine. Petitioner Appx. 43a. Absent a finding of an exigency or other exception, Pet Supply's right not to have its business records seized without a warrant was clearly established. *Id.* at 42a-47a.

The Sixth Circuit correctly held there was no exigency that authorized the warrantless taking of Pet Supply's business records. *Id.* at 46a-47a. The exigency exception to the Fourth Amendment requires a "need for prompt action [because] delay to secure a warrant would be unacceptable under the circumstances." *Kovacic v. Cuyahoga Cnty. Dep't of Children and Family Servs.*, 724 F.3d 687, 395 (6th Cir. 2013). Examples of an exigent circumstance include the prevention of destruction of evidence, *see*

Illinois v. McArthur, 531 U.S. 326, 331-32 (2001), and prevention of harm, *Kovacic*, 724 F.3d at 695. The Sixth Circuit did not find an exigency because there was no evidence that the business records provided evidence of a crime or legal violation that Petitioners' feared would be destroyed. Petitioner Appx. 46a-47a. The Sixth Circuit also did not find that the business records posed any threat of harm. *Id.*

Likewise, the Sixth Circuit correctly held that the business records were not justifiably seized without a warrant under the plain-view doctrine. *Id.* In fact, the Sixth Circuit held that the Petitioners did "not even attempt to argue that the very nature of the records was incrimination, so the seizure was not justified by the plain view doctrine." *Id.* at 46a. Pet Supply's right not to have its business records seized without a warrant was clearly established. *Id.* at 46a-47a.

Importantly, the District Court's denial of the Petitioners' motions for summary judgment was based on the fact that "significant factual disputes exist regarding the severity of the condition present in the store at the time of the inspection." *Id.* at 130a. The District Court held that "[a]ll of [Petitioners'] theories rely on the Court's crediting their version of the events…" *Id.* The District Court, therefore, did not find summary judgment appropriate where the Petitioners "claimed numerous violations of the City Code, which the complaint suggested were nonexistent." *Id.* at 94a (citing *Siebert v. Severino*, 256 F.3d 648, 658-59 (7th Cir. 2001) and incorporated by reference in the

District Court's opinion regarding the cross motions for summary judgment at Petition Appx. 131a). The District Court went so far as noting that based on Pet Supply's allegations that violations identified by the Petitioners were "exaggerated or wholly contrived." *Id.* Because of these factual disputes, the issue on appeal is whether the Fourth Amendment violation as alleged by Pet Supply is clearly established. *See Mitchell v. Forsyth*, 472 U.S. 511, 528-30 (1985).

Therefore, to the extent Petitioner Walsh seeks qualified immunity based on her version of the facts such a determination is not before this Court. Even if a state court authorized Walsh to take the business records, Pet Supply has alleged that the violations Walsh identified were nonexistent and based upon Walsh and the other Petitioners' antipathy for pet stores. The District Court even noted that Pet Supply's allegations to this fact were "corroborated by allegations in the complaint [that] McKamey sought a boycott against [Pet Supply] on its website in an effort to close the store." Petitioner Appx. 94a.

Moreover, it is clearly established that qualified immunity is not available where the reasons justifying the constitutional violation are "greatly exaggerated". *Siebert*, 256 F.3d at 658. In *Siebert*, property owners brought a §1983 action against Severino, who was an investigator for the Department of Agriculture, for the warrantless seizure of their horses. Severino sought summary judgment pursuant to qualified immunity claiming that based upon his observation of the physical condition of the horses and the premises there was

an exigency justifying the warrantless seizure. The *Siebert* Court denied Severino qualified immunity at the summary judgment phase finding that the allegations were that Severino greatly exaggerated the conditions he observed and that he claimed created the exigency. *Siebert*, 256 F.3d at 658 (citing *Brokaw v. Mercer Cnty.*, 235 F.3d 1000, 1022 (7th Cir. 2000) (holding that "[i]t's clearly established law that a government official's procurement through distortion, misrepresentation and omission of a court order to seize a child is a violation of the Fourth Amendment").

The District Court's denial of qualified immunity on Pet Supply's Fourth Amendment seizure of its business records claim limits this Court's review to the facts as alleged by Pet Supply. Clear precedent affords Pet Supply constitutional protection for its premises and its business records. Petitioners have not stated legally sufficient grounds that an exigency or an exception permitted the warrantless seizure of the business records.

Finally, this Court cannot rely on Petitioners' factual claims justifying the seizure because as the District Court held such a decision would require the resolution of factual disputes and crediting the Petitioners' version of the facts. This Court's jurisdiction is limited to legal questions regarding the sufficiency of Pet Supply's allegations of a clearly established right and cannot resolve factual disputes. Moreover, the District Court held that based upon Pet Supply's allegations that Petitioners' factual claims were exaggerated or wholly contrived.

Based upon the foregoing, this Court should not grant the Petition as it seeks resolution of disputed facts and where the constitutional violation as alleged by Pet Supply was clearly established.

CONCLUSION

This Court should deny this Petition for a Writ of Certiorari. First, this Court should deny the Petition because there is no conflict in the Circuits. It is clear that qualified immunity is only available for suits against parties in their individual capacity. Second, this Court should deny the Petition as to Hurn's claim for qualified immunity as the Sixth Circuit applied the correct rule of law when it determined she was not entitled to qualified immunity. Finally, this Court should deny the Petition as to Walsh's claims for qualified immunity because Pet Supply's right to its Permit and against the warrantless seizure of its business records was clearly established.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICIES

APPENDIX A – BRIEF OF THE APPELLEE UNITED PET SUPPLY, INC.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 13-5181

UNITED PET SUPPLY, INC.,

Plaintiff-Appellee,

v.

CITY OF CHATTANOOGA, TENNESSEE

Defendant,

ANIMAL CARE TRUST; PAULA HURN, KAREN WALSH, and MARVIN NICHOLSON, JR., in their individual and official capacities,

Defendants – Appellants.

Appeal from the United States District Court for the Eastern District of Tennessee Cases No. 1:11-cv-157 and 1:11-cv-193 –
Curtis L. Collier, District Judge

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JURISDICTIONAL STATEMENT

Appellee, United Pet Supply, Inc. (the "Pet Shop" hereinafter) brought suit against Appellants, Animal Care Trust, Karen Walsh, Marvin Nicholson, Jr. and Paula Hurn ("McKamey" collectively hereinafter), in their individual and official capacities pursuant to 42 U.S.C. § 1983 for the deprivation of its Fourteenth Amendment due process and Fourth Amendment rights and for violations of Tennessee law. The United States District Court for the Eastern District of Tennessee exercised subject-matter jurisdiction over this suit pursuant to 28 U.S.C. § 1331. On February 6, 2013 the District Court denied McKamey's motions for summary judgment seeking qualified immunity. See generally Memorandum & Order, R146 & 147, Page ID #3769-3795. The district court also incorporated its holdings and denials of qualified immunity to McKamey as stated in its ruling on McKamey's Motion for Judgment on the Pleadings. Memorandum, R146, Page ID #3778, 3780

& 3784 (referencing holdings from Judg. on Pldg., R143 & 144, Page ID #3717-3761). The District Court predicated its Order on a determination that material facts were in dispute and that Pet Shop's constitutional rights were clearly established. Id.

This Court has "jurisdiction of appeals from all **final decisions** of the district courts." 28 U.S.C. § 1291 (emphasis added). "A district's court denial of qualified immunity is an appealable final decision under § 1291 only to the extent that it turns on an issue of law." Quigley v. Thai, 707 F.3d 675, 679-80 (6th Cir. 2013) (quoting Estate of Carter v. City of Detroit, 408 F.3d 305, 309 (6th Cir. 2005) (quoting Mitchell v. Forsyth, 472 U.S. 511, 530 (1985))) (internal quotation marks omitted). This appellate jurisdiction is narrow, Berryman v. Rieger, 150 F.3d 561, 562 (6th Cir. 1998), such that this Court does not have jurisdiction to determine if the record "sets forth a genuine dispute of material fact for trial." Quigley, 707 F.3d at 680 (citing Johnson v. Jones, 515 U.S. 304, 319-20 (1995)).

Jurisdiction, therefore, is limited to abstract or pure issues of law regarding whether or not a clearly established right was violated. Berryman, 150 F.3d at 563 (citing Behrens v. Pelletier, 516 U.S. 299, 313 (1996)); see accord Quigley, 707 F.3d at 680. This Court, however, does not have jurisdiction over factual issues and does not have jurisdiction to review a district court's denial of qualified immunity from a summary judgment based upon **factual disputes**. Quigley, 707 F.3d at 680 (emphasis added). Qualified immunity arguments proffered on disputed factual issues are improper, beyond this

Court's jurisdiction and should be dismissed. Id.; (citing Estate of Carter, 408 F.3d at 310).

Moreover, McKamey Appellants are private parties, not government officials, operating pursuant to a contract with the City of Chattanooga for animal control services. McKamey is therefore not entitled to invoke qualified immunity. Richardson v. McKnight, 521 U.S. 399 (1997), 132 S. Ct. at 1666.

STATEMENT OF THE ISSUES

The Pet Shop incorporates its "Jurisdictional Statement" in this "Statement of the Issues". The only issues properly before this Court and within this Court's jurisdiction are limited to McKamey's arguments regarding whether the "facts show that the [McKamey] violated clearly established law." Quigley, 707 F.3d at 680. McKamey's arguments on issues that the District Court denied summary judgment and qualified immunity involving disputes of material fact are not issues that this Court may resolve on this appeal.

The Pet Shop respectfully contends that the only issues, which the Court may consider on this appeal, are the District Court's denial of qualified immunity and more particularly whether Pet Shop's rights were clearly established. The District Court granted Pet Shop summary judgment on its procedural due process claims regarding the summary revocation of its City Permit finding that Pet Shop was entitled to a pre-deprivation hearing under clearly established law. The District Court, however, refused to grant either party summary judgment, which included denying McKamey qualified immunity, on Pet Shop's remaining due process claim regarding the

confiscation of its animals and its Fourth Amendment unreasonable seizure claims finding that factual disputes precluded such determinations.

Specifically, the District Court could not grant summary judgment on the Pet Shop's due process claim regarding the confiscation of its animals because the "parties dispute the condition of the animals upon McKamey's arrival, as well as the condition of the premises." Dist. Ct. Summary Judg. Memo. Op., R146, Page ID #3779. The District Court "conclude[d] significant factual disputes exist to render disposition on summary judgment inappropriate." Id. at 3778. McKamey argued before, as it does again now, that exigent circumstances at the Pet Shop's store justified the confiscation without a hearing, however, the District Court concluded:

> Whether these conditions [at the store] are consistent with normal cleaning procedure is a question of fact not appropriate for disposition on summary judgment. The Court is not in a position to grant summary judgment for either party on this [due process] claim.

Id. at 3780.

Similarly, the District Court could not grant summary judgment on the Pet Shop's Fourth Amendment seizure claims because of factual disputes. The District Court held that "substantial issues of fact remain regarding the seizure of [the Pet Shop's] animals and business records." Id. at 3782. The District Court explicitly denied McKamey's reliance on exigent circumstances as justification for its seizures when it held:

> All of [McKamey's] theories rely on the Court's crediting their version of the events; namely, the Court must assume the animals were in significant danger and accordingly seizure was justified under one of the above exceptions to the warrant requirement. Given the factual disputes detailed above, the Court is not in a position to make that determination on summary judgment.

Id. at 3783-84.

Finally, the District Court denied McKamey qualified immunity because of these factual disputes and because the Pet Shop's rights as alleged were "clearly established to a reasonable individual." Id. at 3784-85. Noting the factual disputes, the District Court was, therefore, unable to credit McKamey's arguments that its conduct "in light of the surrounding circumstances" was reasonable. Id.

Since McKamey's appeal of the District Court's denial of qualified immunity involves factual disputes, the Court's inquiry is limited to whether the Pet Shop's rights were clearly established when viewing the facts in the light most favorable to the Pet Shop.

The issues as presented by the Appellants, therefore, are improper, impermissible and beyond this Court's jurisdiction insofar as they rely upon and argue facts that the District Court held were in dispute. Assuming, arguendo, that as private parties McKamey may invoke a qualified immunity defense, the issues properly before this Court on appeal are:

(1) Whether the facts, when viewed in the light most favorable to the Pet Shop, demonstrate that its due process rights regarding the deprivation of its Permit and animals were clearly established; and

(2) Whether the facts, when viewed in the light most favorable to the Pet Shop, demonstrate that its Fourth Amendment rights regarding the seizure of its animals and business records were clearly established.

STATEMENT OF THE CASE

The Pet Shop brought suit against McKamey in their individual and official capacities pursuant to 42 U.S.C. § 1983 claiming deprivation of constitutionally protected rights. Pertinent to this appeal, the Pet Shop claimed procedural due process violations for the revocation of its City Permit and the confiscation of its animals, and Fourth Amendment violations for the seizure of its animals and business records.

The District Court then issued Orders and accompanying Memorandum Opinions in response to McKamey's Motion for Judgment on the pleadings, R143 & 144, Page ID #3717-3760, and in response to multiple Summary Judgment Motions, R146 & 147, Page ID #3769-3795. In these rulings the District Court denied McKamey qualified immunity for these deprivations finding factual disputes precluded a determination of the circumstance surrounding the deprivations. The District Court granted the Pet Shop summary judgment on its procedural due process claim for the revocation of its license holding that the undisputed facts showed that its right to the license was constitutionally protected and clearly established. Importantly, the District Court held that the Pet Shop's right to a pre-deprivation due process hearing on its license and animals and its Fourth Amendment right to be free from unreasonable seizures were all clearly established constitutional rights. Memorandum, R146, Page ID #3784.

McKamey filed a notice of appeal challenging the district court's denial of qualified immunity. Notice of Appeal, R148, Page ID #3796. The District Court

then stayed all proceedings pending this interlocutory appeal. Order, R150, Page ID #3799.

STATEMENT OF THE FACTS

The Pet Shop operated retail pet stores for over thirty (30) years in malls in the Northeast, Atlanta, and the Hamilton Place Mall in Chattanooga. Zerilli Aff. at ¶ 3, R96-4, Page ID #3264-3265. The Pet Shop opened a commercial pet store in the Hamilton Place Mall in Chattanooga, Tennessee in 2004. The store was operated in full view of the public seven (7) days a week from 10:00 a.m. to 9:00 p.m. with slightly reduced hours on Sunday. Id. at 3266. The Pet Shop retained a licensed veterinarian to examine its animals weekly. Id. at 3266. The Pet Shop never had a state pet dealer license suspended or revoked in any state, including Tennessee, in the entire history of the company. Id. at 3269.

The Chattanooga City Code required the Pet Shop to obtain a "Pet Dealer Permit" from McKamey for an annual fee of $300.00. City Code, R69-1, Page ID #1334-35. The Pet Shop was also required to apply and obtain a license issued by the Tennessee Department of Agriculture for a yearly fee of $1,000.00. Id. at 3266. The City Code's required City Permit was, therefore, duplicative of the comprehensive State licensing procedures set forth in TENN. CODE ANN. § 44-17-122.

McKamey operates pursuant to a contract with the City of Chattanooga. R70-2, Page ID #1410-35. The contract states that McKamey will lease its facility from the City, Id. at 1410, and receive yearly remuneration, Id. at 1420. The contract requires McKamey to carry liability insurance. The contract further requires, under certain circumstances, McKamey to indemnify the City. Id. at 1428-30. McKamey's employees do not have law enforcement

authority to make arrests. Walsh Depo. R90-4, Page ID #3046. Instead, their authority is limited, by TENN. CODE ANN. § 7-63-201, to the issuance of ordinance summonses.

Between January, 2010 and April, 2010, McKamey representatives visited the Pet Shop's store on seven (7) different occasions. Zerilli Aff., R96-4, Page ID #3270. In the course of those seven visits, McKamey issued one "warning", asking for record of treatment for a canary, which was duly provided. Id. On May 11, 2010, McKamey issued a city permit to the Pet Shop stating as follows:

> This certifies that The Pet Company #29 has met the requirements of the Code of the City of Chattanooga and is approved by The McKamey Animal Services Division to operate as Pet Dealer in the City of Chattanooga.

Pet Dealer Permit, R69-3, Page ID #1340. This city permit was signed by Ms. Walsh. Id.

Four weeks later, on June 15, 2010, at approximately 8:10 a.m., and prior to Pet Supply's business hours, representatives from McKamey, including Walsh, Nicholson and Hurn, raided the Pet Shop's premises without a warrant, confiscated its animals, business records and other property, its license, and summarily shut down its business operations. See Walsh Note, R69-6, Page ID #1345. The raid included a state inspector, Joe Burns from the State Department of Agriculture, who was present at the behest of Walsh. Burn's Aff., R72-6, Page ID #1878-83. McKamey conducted its inspection while the Pet Shop's employees were in

the process of the cleaning the store. City Court Tr. Trans., R69-4, Page ID #1342.

McKamey's raid of the Pet Shop's store premises was contrary to state law governing administrative inspections, which permitted inspection during business hours only. TN Dept. of Ag. Rules & Regs., R90-1, Page ID #3020-25. McKamey asserted its official authority to "inspect" the Pet Shop's premises, even though no provision of the City Code permitted an inspection at 8:10 a.m. City Code, R69-1, Page ID #1331-36.

As a result of the raid, the State did not revoke the state license or otherwise provide, on June 15, 2010, any documentation stating that it intended to revoke the license. See Burns Aff., R72-6, Page ID #1886-89. Instead, the state issued the Pet Shop a "warning", Burn's 6/15/10 Report, R90-12, Page ID #3120, which was later changed, inexplicably, to a "notice of violation". Aff. of. Joe Burns, R72-6, Page ID #1886. McKamey, on the other hand, seized the Pet Shop's animals and records and summarily revoked its City Permit. Walsh issued an official letter to the Pet Shop, dated June 15, 2010, which stated:

> This case will be in city court on June 24, 2010 at 9:00 am. During this time you are not able to sell pets. This does not mean that you are unable to sell retail items during the period between now and court.
>
> /s/ Karen S. Walsh, Executive Director

Walsh Note, R69-6, Page ID #1345. She issued citations to the Pet Shop and wrote "Revoked permit" on the citations. Citation, R69-7, Page ID #1346.

After the raid and before the commencement of the City Court trial, McKamey posted a link on its website to an online petition entitled "Close Pet Shop in Chattanooga, Tn". R69-14, Page ID #1374-79. McKamey stated, on its website, "You can also sign the on-line petition, which now has over 4,000 signatures, to help close The Pet Shop: www.PetitionOnline.com...." Id. at 1374. The petition itself stated, among other things, "Please close the pet store at Hamilton Place Mall in Chattanooga, Tennessee", and described the author's opposition of so-called "puppy mill brokers", which sell their puppies to pet stores. Id. at 1377. The petition also elicited a boycott of the Pet Shop's landlord at Hamilton Place with a boycott of the Mall until the Pet Shop "closes its doors forever". Id. Finally, McKamey's website solicited donations to McKamey in conjunction with the petition. Id. at 1374.

McKameys' motivation was further evidenced by State Inspector Burns, who testified in the City Court Litigation as follows:

> Q: Mr. Burns, when you went out to the Pet Store the second time, did you tell anyone at the Pet Store that McKamey wanted to shut them down?
>
> A: No. I don't recall saying that.
>
> Q: Is that your opinion?

A: It's probably my opinion.

Burns Testimony, R69-16, Page ID #1384.

A. City Court Trial

Having suffered these deprivations without a hearing, the Pet Shop retained counsel and proceeded to trial. After several hearings, City Court Judge Paty ruled on July 14, 2010 that she would not revoke the Pet Shop's City permit. Paty's Ruling, R69-8 Page ID #1348. The Court explicitly held:

> I'm reserving the issue of expenses, fines, court costs until next Wednesday at 1:00. I'm not making any ruling in that regard until all the proof has been introduced with regard to those expenses. But I am not going to prohibit the Pet Company from – **I'm not going to revoke the permit or prohibit them from operating their Store at this point unless subject to the State, unless the state department of agriculture suspends or revokes the license for some reason, whether it's one of these or something else.**

Id. (emphasis added). The State never suspended or revoked the Pet Shop's State License.

Seven (7) days after Judge Paty's decision, the Pet Shop asked the City Court to return its City Permit in accordance with its previous ruling, but McKamey refused, arguing that the status of the Permit was not before the Court. City Court Trans., R69-9, Page

ID #1350-55. At this hearing, McKamey took the position - after Judge Paty's ruling - that revocation of the Pet Store's permit was an administrative decision, apparently one which lay outside the Court's power and instead within McKamey's discretion Id. McKamey's counsel stated specifically that McKamey would determine whether to reinstate the Permit after the Pet Shop re-applied. Id. The City Court, likewise, reiterated that it understood that it was trying the issue whether the Pet Shop's City Permit would be revoked:

> MR. LITCHFORD: Your Honor, respectfully, that is an administrative decision. If they want to reapply, they can do that. That's how it works.
>
> THE COURT: Again, who makes that decision?
>
> MR. LITCHFORD: Your Honor, the City will make that. McKamey will make that. Your Honor, we understand that --
>
> THE COURT: But the revocation, unless I'm wrong, would be done in court. That is what these citations were issued for, for revocation of their city license or permit, the pet dealer permit.

Id. at 1351-52. Judge Paty went on to state that McKamey:

> filed or served citations for revocation of the permit, which would be decided

> after a hearing, after notice to them and after a hearing. I don't think the revocation can occur prior to notice and a hearing just because they took the permit.

Id. at 1353. Nevertheless, McKamey did not immediately return the Pet Shop's City Permit.

Thereafter, on July 26, 2010 – and before the McKamey returned the Pet Shop's City Permit - Judge Paty declared a mistrial and recused herself because of *ex parte* communications she received from the City's mayor, Ron Littlefield. Paty's Recusal, R69-10, Page ID #1356-60. McKamey did not return the Pet Shop's permit, forcing the Pet Shop to file a Motion compelling McKamey, again, to reinstate the Permit in compliance with City Court's previous order. McKamey responded to that motion by seemingly abandoning its previous argument – i.e., that it could determine whether to return the City Permit on re-application – and argued that the City Court trial determined whether it would revoke the City Permit. Response to Mot. to Compel, R69-11, Page ID #1361-67. Specifically, McKamey asserted the following:

> In this case, the Pet Company participated in a hearing before the City Court on June 24, 2010, nine (9) days after the revocation of the permit on June 15, 2010. . . **The hearing before the City Court Judge on June 24, 2010 therefore satisfied any procedural due process requirement to provide a hearing at**

> **a meaningful and reasonable time following the deprivation of an alleged property interest.**
>
> **. . . The trial of this case, which included the determination of whether the City properly revoked the Pet Company's permit, commenced on June 24, 2010 and continued on June 30, 2010 and finally on July 21, 2010.**

Id. at 1364-65 (emphasis added).

The City subsequently returned the City Permit, following written demand by the Pet Shop. In a subsequent order of dismissal, however, Judge Harris determined that "the City Court has no authority to revoke or make any order relative to the license of the Pet Company." Harris' Order, R69-12, Page ID# 1368-1371. Judge Harris dismissed the case in its entirety on double jeopardy grounds. Id. In an article in the Chattanoogan, an online newspaper, the City Attorney, Mike McMahan, stated that the City "screwed up" because the City Code provided no mechanism for a hearing to revoke a City Permit. Article, R69-13, Page ID# 1372-1373.

The Pet Shop's dogs were held even longer and were not returned until the Pet Shop procured a Court order on September 29, 2010 from the Circuit Court of Hamilton County, which was nearly four (4) months after the animals were confiscated.

After the City Court trial, Ms. Walsh, on behalf of McKamey, submitted an application for a

grant with the American Society for the Prevention of Cruelty to Animals (the "ASPCA"). In response to a question on the application, Ms. Walsh, wrote:

> [QUESTION]: Which of the following outcomes will this project BEST address? Only select outcomes that directly relate to your project. You will be asked to report on all outcomes you select.
>
> [ANSWER]: CRUELTY: Efforts toward the elimination of the U.S. puppy mill industry.

ASPCA App., R69-15, Page ID #1382. At the time that McKamey completed this application, the City Court litigation had concluded in a dismissal and all animals had been ordered returned to the Pet Shop. Nevertheless, in the application, McKamey stated that it was planning a way to return to the Pet Shop's Hamilton Place store:

> [QUESTION]: Grant Timeline and Evaluation
>
> Include your timeline for utilizing grant funds and explain how you will measure the success of the project.
>
> [ANSWER]: We have already spent the money fighting this case.

> **We are trying to regroup and figure out how to go back in a different way. We have not given up on these animals.**

Id. at 1381. (Emphasis added).

B. The conditions at the Pet Shop never violated the applicable State law.

McKamey routinely asserts throughout its Brief that the conditions in the store somehow justified its actions. The record, however, belies that assertion and shows, in fact, that the conditions in the store never violated applicable law. Noticeably absent from its Brief is any reference to the actual State standards for the store. TENN. CODE ANN. § 44-17-118 states that "the commissioner may promulgate such rules and regulations as are reasonably necessary to implement this part." Rule 0080-2-15-.06 of the Rules of Tennessee Department of Agriculture states that "each dealer licensed under this chapter shall comply in all respects with the regulations of this chapter and the standards set forth in Part 3 of Title 9 of the Code of Federal Regulations as amended, for the humane, care, treatment, housing, and transportation of animals." TN Dept. of Ag. Rules & Regs., R90-1, Page ID #3020-25. The record shows that the Pet Shop violated none of these federal regulations.

a. The temperature never exceeded the applicable State law

State Inspector Burns testified under oath that his principal concern with Pet Supply on June 15 was

the temperature, and that "the other things just weren't quite as big a deal". City Trial Trans., R90-2, Page ID #3027. The State law requires that the "ambient temperature … must not **rise above 85° F** … for more than 4 consecutive hours when dogs or cats are present." TN Dept. of Ag. Rules & Regs., R90-1, Page ID #3023 (adopting 9 C.F.R. § 3.2(a)). (Emphasis added). There is no proof in the record that the temperature rose above 85° degrees for more than four hours at any point. In fact, as McKamey conceded in its submissions in District Court, the temperature at the store did **not** rise above 85° degrees for more than four hours. See McKamey Memorandum, R 71, Page ID #1774. "During this period, Hurn continued to record the temperature, which **remained at or above 85** degrees in the store." Id. (Emphasis added). Ms. Hurn admitted, on cross-examination, that her temperature readings never exceeded 85° for more than four hours and conceded that the Pet Shop complied with this regulation. City Trial Trans., R90-10, Page ID #3109-11. Moreover, State Inspector Burns offered unrebutted testimony that there was ventilation running through the storefront dog kennels in the form of an auxiliary fan. See City Trial Trans., R90-2, Page ID #3027. The proof was likewise unrebutted that auxiliary ventilation, in the form of exhaust vents and fans, was also provided, in full compliance with the law, throughout the remainder of the store. Id. The Pet Shop, thus, complied with the applicable State Law by providing auxiliary ventilation when the temperature reached 85° degrees.

b. The proof at the City Court trial showed that the Pet Shop properly cleaned the kennels.

McKamey attempts to argue that the Pet Shop failed to clean the store appropriately. The Pet Shop appropriately cleaned the facility and was in the process of cleaning when the inspection began. City Trial Trans., R90-3, Page ID #3028-42. The testimony was unrebutted that Brandy Hallman and another employee were at the store at 7:00 a.m. cleaning the store to prepare it for store opening. Id.; see 9 C.F.R. § 3.1(c)(3) (requiring Pet Supplys to "spot-clean daily and sanitize" hard surfaces "with which the dogs or cats come in contact"). When McKamey and State Inspector Burns arrived at approximately 8:15 a.m., the cleaning ceased and was not completed. Id. at 3036-37. The investigation interrupted the cleaning process to the point that it was effectively impossible to clean the facility appropriately after McKamey arrived. Id. Moreover, the Pet Shop's cleaning procedures - in the morning and throughout the day as necessary - was essentially identical to McKamey's: A McKamey employee would arrive at McKamey in the morning to clean kennels left unattended overnight. City Trial Trans., R90-14, Page ID# 3135-37.

c. The record shows that the Pet Shop provided the animals water in compliance with the applicable State Law.

The State law required the Pet Shop to provide water to the animals continually or twice per day for intervals of at least one hour. See 9 C.F.R. § 3.10 (requiring "[i]f potable water is not continually available to the dogs and cats, it must offered to the dogs and cats as often as necessary to ensure their

health and well-being, but not less than twice daily for at least 1 hour each time….”). The unrebutted proof showed that the animals were provided water continuously the day before the inspection. City Trial Trans., R90-3, Page ID #3032-33. The City was unable, in fact, to show otherwise inasmuch as there is no proof that any representative of McKamey was present at the Pet Shop on June 14 (the day before the inspection). The Pet Shop’s manager, Brandy Hallman, testified in the City Court trial that the animals were provided water throughout the day on June 14 (the day before the inspection) and that she checked to insure that the animals had water when she arrived on June 15. Id. at 3032-33.

In addition, McKamey makes various references to the actions of the State in connection with the investigation. However, **the State never revoked the Pet Shop’s State Pet Dealer License**. On June 15, 2010, moreover, the State provided the Pet Shop with a warning, before changing it to a “notice of violation”. Burn’s Report, R90-12, Page ID #3120.

C. The City Code and the State Regulations.

No provision of the City Code defined a procedure for revoking the Pet Shop’s City Permit or prescribed a hearing before revocation. By contrast, the State implemented procedures that apprised the Pet Store of the time, place and manner by which the State could revoke the State License. Specifically, State law required a hearing on the revocation of a commercial pet dealer’s license before the revocation,

ten (10) days after notice, and permitted an appeal from the hearing to either the Circuit or Chancery Courts in the pet dealer's residence or place of business. TN Dept. of Ag. Rules & Regs., R90-1, Page ID #3021-22.

In stark contrast to the specific guidance of the State law, the City Code provided no procedural guidance whatsoever:

Sec. 7-34. Permits Generally.

. . . .

> (e) Such permits may be revoked if negligence in care or misconduct occurs that is detrimental to animal welfare or to the public. Revocation of such permit may only be reinstated after successfully passing an inspection of such facilities and paying the cost of such permit and any applicable fines and fee.

City Code, R69-1, Page ID #1334-35. In its Answer to the Complaint, McKamey explained its policy for revocation as follows:

> The Answering Defendants aver that ACT's position with respect to a pet dealer's permit was, and is**, that a pet dealer's permit can be revoked upon a finding of negligence in care, misconduct, abuse and/or cruelty by a duly appointed officer of the City of Chattanooga and upon issue of a citation to City Court for such conduct. The Answering Defendants aver that**

> **ACT's policy is to reinstate the license if an effective order from the Chattanooga City Court determines there is no violation of the Chattanooga City Code or upon a satisfactory inspection of the pet dealer's premises**.

Id. at 159 (emphasis added). This policy was not specified or recorded in the City Code, which referenced no hearing before the City Court.

Similarly, McKamey misapplied the City Code's provisions for animals running at large, to permit confiscation of the Pet Shop's animals without a hearing.

> **Section 7-21. Notification of Impounding.**
>
> Immediately upon impounding an animal, the McKamey Animal Center or its designee shall give notice by postcard or letter sent certified by United States mail to the address of the owner, if known, with in two (2) business days after the seizure of such animal. The letter or postcard shall inform such owner of the condition whereby the animal may be redeemed. Notification by mail shall not be required for animals which have been impounded pursuant to this Chapter if a citation has been issued to the owner of for owner relinquished, abandoned or quarantined animals or wildlife.

City Code, R72-11, Page ID #1950-51.

> **Section 7-27. Notice of Seizure of Animal.**
>
> Excluding Owner-surrendered animals, if the McKamey Animal Center takes custody of a domestic animal pursuant to this Chapter, the Division or its designee shall give notice of such seizure by posting a copy of it at the property location at which the animal was seized or and at the property at which an Animal Services officer reasonably believes the animal may reside or by delivering it to a person residing on such properties with two (2) business days of the time the animal was seized.

Id. at 1953. Therefore, just as with the revocation of a pet dealer's permit, McKamey applied the City Code provisions to permit the confiscation of the Pet Shop's animals on private property, without a hearing, and without redemption.

McKamey was, or should have been, warned of constitutional problems with the City Code months before the raid. A meeting of the City's Legal and Legislative Committee on January 5, 2010, revealed that the City Attorney's office had "noticed a few problems" with the laws by which McKamey orchestrated the raid:

> Councilwoman Scott mentioned that the City Attorney's office indicated that **there might be some constitutional issues**. Ms. Malueg stated that she, personally, had not worked on this; that it was a concern of Attorney Bobo; that they got the last draft later, **and they noticed a few potential problems**.
>
> Mayor Littlefield stated that they had such Ordinances in other communities, and it had been tested in other places. He wanted to know about the constitutional issue. Ms. Mauleg stated that it was something about fines. Marie Chinery added that it was **something about search warrants**."

City Legal & Legislative Committee Minutes, R69-2, Page ID #1339 (emphasis added).

SUMMARY OF THE ARGUMENT

McKamey impermissibly seeks review and resolution of factual disputes in their favor claiming that the circumstances surrounding their deprivations of the Pet Shop's constitutional rights were not clearly established, or in the alternative, that the Pet Shop's rights were not clearly established. While this Court has appellate jurisdiction to review a district's court's determination of whether a right is clearly established, this Court's review is limited in two respects: (1) First, this Court cannot resolve factual disputes; and (2) second, his Court must view the facts in the light most favorable to the Pet Shop.

McKamey argues throughout its Brief, however, that the circumstances surrounding the deprivations constituted exigencies justifying its conduct, and that its conduct, in light of these exigencies, was constitutional. These arguments are impermissible before this Court because the District Court has already denied summary judgment on McKamey's qualified immunity on these very same arguments finding the existence of genuine issues of disputed facts. This Court's jurisdiction, therefore, is limited to whether or not the Pet Shop's alleged and factually supported deprivations stated violations of clearly established rights.

The only issue before this Court that does not involve a factual dispute is the District Court's grant of summary judgment to the Pet Shop and the denial of qualified immunity to McKamey for the deprivation of the Pet Shop's City Permit without a prior due process hearing. An application of Mathews v. Eldridge and other case law precedent clearly established the Pet Shop's right to a prior due process hearing before McKamey could summarily take its license.

The remaining due process and Fourth Amendment claims before this Court involve factual disputes. This Court's limited, interlocutory jurisdiction cannot be invoked to resolve these disputed facts which must be viewed in the light most favorable to the Pet Shop. The Pet Shop's factually supported allegations and case law precedent demonstrates that its rights to due process and Fourth Amendment protection are clearly established.

Finally, the District Court applied the correct constitutional standard, so its denial of qualified

immunity was correct as a matter of law. Due to the factual disputes, the District Court was precluded from analyzing the particular circumstances surrounding the deprivations and doing so would have required it to impermissibly resolve disputed factual issues. Likewise, this Court cannot resolve these very same factual disputes, and its jurisdiction limited to whether the Pet Shop's rights when viewed in the most favorable light are clearly established.

STANDARD OF REVIEW

This Court reviews a district court's denial of summary judgment based upon qualified immunity grounds *de novo*. Quigley v. Thai, 707 F.3d 675, 679 (6th Cir. 2013). This Court "consider[s] the evidence in the light most favorable to [the Pet Shop] and draws all reasonable inferences in [its] favor. Id. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). "Because [this Court does] not have jurisdiction over factual issues, 'a defendant must concede the most favorable view of the facts to the plaintiff for purposes of appeal.'" Quigley, 707 F.3d at 680 (quoting Estate of Carter, 408 F.3d at 309-10).

ARGUMENT

I. MCKAMEY DEPRIVED THE PET SHOP OF ITS CLEARLY ESTABLISHED DUE PROCESS RIGHTS AND IS NOT ENTITLED TO QUALIFIED IMMUNITY

The Pet Shop's right to a due process hearing before the revocation of its City Permit and the confiscation of its animals was clearly established.

A. This Court's jurisdiction is narrow.

This Court has "jurisdiction of appeals from all **final decisions** of the district courts." 28 U.S.C. § 1291 (emphasis added). "A district's court denial of qualified immunity is an appealable final decision under § 1291 only to the extent that it turns on an issue of law." Quigley v. Thai, 707 F.3d 675, 679-80 (6th Cir. 2013) (quoting Estate of Carter v. City of Detroit, 408 F.3d 305, 309 (6th Cir. 2005) (quoting Mitchell v. Forsyth, 472 U.S. 511, 530 (1985))) (internal quotation marks omitted). This appellate jurisdiction is narrow, Berryman v. Rieger, 150 F.3d 561, 562 (6th Cir. 1998).

1. Jurisdiction is limited to the purely legal question of whether the Pet Shop's due process rights were clearly established and precludes resolution of factual disputes.

Jurisdiction, therefore, is limited to abstract or pure issues of law regarding whether or not a clearly established right was violated. Berryman, 150 F.3d at 563 (citing Behrens v. Pelletier, 516 U.S. 299, 313 (1996)); see accord Quigley, 707 F.3d at 680. This Court, however, does not have jurisdiction over factual issues and does not have jurisdiction to review a district court's denial of qualified immunity from a summary judgment based upon **factual disputes**. Quigley, 707 F.3d at 680 (emphasis added).

2. Jurisdiction over factual disputes requires that this Court to determine whether the Pet Shop's rights were clearly established by viewing the facts in the light most favorable to the Pet Shop.

Qualified immunity arguments proffered on disputed factual issues are improper, beyond this Court's jurisdiction and should be dismissed. Id.; (citing Estate of Carter, 408 F.3d at 310). Presented with factual disputes, this Court must view the facts in the light most favorable to the Pet Shop. See Id.

B. The Pet Shop's due process right to a pre-deprivation hearing was clearly established.

In determining whether McKamey is entitled to qualified immunity, the Court must make two inquiries:

> (1) "[Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right[,]" and (2) was the right "clearly established" to the extent that a reasonable person in the officer's position would know that the conduct complained of was unlawful.

O'Malley v. City of Flint, 652 F.3d 662, 667 (6th Cir. 2011) (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001) (overruled on other grounds by Pearson v. Callahan, 555 U.S. 223 (2009) (holding that the Saucier analysis can be undertaken in any order)). Case law precedent affirmatively establishes that the Pet Shop had a protected property interest in its City Permit and animals such that it was entitled to a meaningful hearing before their deprivation and that these rights were clearly established. As the District Court properly held, qualified immunity is not

afforded an official whose conduct violates a clearly established constitutional right. See Pearson v. Callahan, 555 U.S. 223 (2009); Saucier, 533 U.S. at 201. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable [official] that [the] conduct was unlawful in the situation [] confronted." Brosseau v. Haugen, 543 U.S. 194, 199 (2004). Whether a reasonable official should know that the conduct is clearly unconstitutional is an objective inquiry "in light of pre-existing law." Wilson v. Lane, 526 U.S. 603, 614-15 (1999).

1. The Pet Shop had a constitutionally-recognized property interest in its City Permit and animals.

Clearly established state law and case law precedent provided the Pet Shop due process protection against the deprivation by state actors of its lawfully issued Permit and animals. Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Parratt v. Taylor, 451 U.S. 527, 529 n.1 (1981) (quoting Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577-78 (1972)); see accord Warren v. City of Athens, 411 F.3d 697, 708 (6th Cir. 2005). This Court has previously held:

> When governmental institutions regulate careers or occupations in the public interest through the licensing process, their definitions of rights in a

> license or other statutory entitlement may give rise to competition rights and constraints that define property interests.

Wilkerson v. Johnson, 699 F.2d 325, 328 (6th Cir. 1983) (citing Bell v. Burson, 402 U.S. 535, 539 (1971)). Without a doubt, due process protects the right to "engage in any of the common occupations of life." Meyer v. Nebraska, 262 U.S. 390, 399 (1923). Moreover, when the government issues a permit that can only be suspended or revoked for cause the holder has a "constitutionally protectable property interest because the holder of the [permit] has a clear expectation that he or she will be able to continue to hold the license absent proof of culpable conduct." Martin v. Sizemore, 78 S.W.3d 249, 262-23 (Tenn. Ct. App. 2001) (citing Barry v. Barchi, 443 U.S. 55, 64 & n.11 (1979)).

The Pet Shop clearly had a constitutionally-recognized property interest in its Permit and its animals – a point which McKamey apparently concedes in its arguments before this Court. See Appellant Brief at p. 42 and p. 47.

> 2. Due Processs required McKamey to provide the Pet Shop a pre-deprivation hearing before revoking its Permit and confiscating its animals.

After a party establishes that it was deprived of constitutionally protected right "the question remains what process is due." Lowery v. Faires, 57 F. Supp. 2d 483, 489 (E.D. Tenn. 1998) (internal citations omitted) (quoting Morrissey v. Brewer, 408

U.S. 471, 481 (1972)). The fundamental requirement of due process is the right to be heard "at a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333 (1976). "The Court usually has held that the Constitution requires some kind of a hearing **before** the State deprives a person of liberty or property." Zinermon v. Burch, 494 U.S. 113, 127 (1990) (emphasis added); see e.g. Fuentes v. Shevin, 407 U.S. 67, 80-84 (1972) (hearing required before issuance of writ allowing repossession of property); Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (hearing required before termination of welfare benefits). The policy behind this general rule is to "minimize the risk of substantial error, to assure fairness in the decision making process, and to assure that the individual affected has a participatory role in process." Howard v. Grinage, 82 F.3d 1343, 1349 (6th Cir. 1996).

A party alleging a due process violation and seeking damages pursuant to 42 U.S.C. § 1983 must demonstrate either "(1) an established state procedure that itself violates due process rights, or (2) a 'random and unauthorized act' causing a loss for which available state remedies would not adequately compensate." Warren, 411 F.3d at 709. The analysis under these two theories is different. When a party claims that an established state procedure violates due process the Court conduct a balancing of factors as laid out in Mathews v. Eldridge to determine if the right required a hearing prior to deprivation. When, however, a party claims a random and unauthorized act or an exigent circumstance, the Court has held that the analysis in Parratt v. Taylor, 451 U.S. 527 (1981) applies. Under the Mathews analysis the

Court "must evaluate the challenged procedures directly to ensure that they comport with due process," Moore v. Bd. of Educ. of Johnson City Schools, 134 F.3d 781 (6th Cir. 1998), while under the Parratt analysis, the Court evaluates the post-deprivation process to determine if it was adequate to right the wrong at issue, Macene v. MJW, Inc., 951 F.2d 700, 706 (6th Cir. 1991). "[I]t is not necessarily the case that a due process challenge to state action not involving an 'established state procedure' must automatically come with the Parratt . . . rule governing random and unauthorized acts." Mertik v. Blalock, 983 F.2d 1353, 1365-66 (6th Cir. 1993). Where actions are taken pursuant to an agency policy, those actions are said to be in compliance with established procedures and considered an attack on established state procedure for the purposes of procedural process. See Watts v. Burkhart, 854 F.2d 839, 843-44 (6th Cir. 1988).

The Supreme Court in Zinermon v. Burch addressed a similar challenge to due process in the absence of an established procedure but where there was authority for the deprivation and a policy for its execution. Importantly the Zinermon Court held:

> Burch's suit is neither an action challenging the facial adequacy of a State's statutory procedures, nor an action based only on state officials' random and unauthorized violations of state laws. Burch is not simply attempting to blame the State for misconduct by its employees. He seeks to hold state officials accountable for their abuse of their broadly delegated,

> uncircumscribed power to effect the deprivation at issue.

494 U.S. at 135-36. With this categorization of Burch's complaint, the Court held Parratt inapplicable for three reasons. First, any deprivation would not be unpredictable. Id. at 136. Second, a prior deprivation hearing was possible. Id. at 136-37. Third, the conduct was not unauthorized. Id. at 138. Thus, this Court has held that it must look "to the nature of the deprivation complained of and the circumstances under which the deprivation occurred to determine whether the rule of Parratt . . . applies to defeat a procedural due process claim." Mertik, 983 F.2d at 1366. This analysis is "particularly warranted" where "the plaintiff specifically alleges the conduct at issue was not random and unauthorized (and thus outside the rule of Parratt . . .) but does not specifically challenge or identify an established state procedure that caused the liberty and property deprivations at issue." Id. at 1366-67.

In the present case, the City Code provided no established procedures for the revocation of permits; however, there was authority for the deprivations and an agency policy that the revocations of such permits were done without providing a prior hearing. First, McKamey has specifically and repeatedly alleged that Section 7-34(e) of the City Code provided the authority for revocation of the City Permit even though it was silent as to the procedures to be followed. City Code, R69-1, Page ID #1334-35. Second, McKamey admitted in its Answer to the Complaint that its policy, pursuant to the City Code, was to revoke licenses without a pre-deprivation

hearing for alleged violations of the Code, regardless of the nature of the severity. McKamey's Answer, R20, Page ID #159.

Based on these facts and Supreme Court's analysis in Zinermon, the District Court properly held that the Parratt rule is not applicable. First, the revocation of the license is predictable in the sense that it will only occur after negligence or mistreatment has been discovered. Moreover, the City Code conferred inspection authority on McKamey, such that their discovery would be no surprise because McKamey would know when it was going to inspect. Second, a prior hearing was certainly possible, as illustrated by the fact the State of Tennessee provided such a procedure. See Tenn. Code Ann. § 44-17-107. Finally, the City Code explicitly authorized McKamey to "provide animal services for the City of Chattanooga", City Code, R69-1, Page ID #1331, and Section 7-34(e) gave McKamey the authority to revoke the license, Id. at 1334-35.

Since the Parratt random and unauthorized act analysis is inapplicable, this Court must analyze the Pet Shop's due process claim under the Mathews Court's established state procedures analysis. Penn Cent. Corp. v. U.S. R.R. Vest Corp., 955 F.2d 1158, 1163 (7th Cir. 1976). The determination under Mathews as to the constitutional adequacy of the due process protections afforded involves the consideration of three distinct factors.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of

> additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews 424 U.S. at 335.

A consideration of these three factors demonstrates that the Pet Shop's protected property right in its license required a prior hearing before its deprivation. First, the Pet Shop has a strong interest in operating a business and pursuing its livelihood. See e.g. Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Burson v. Bell, 402 U.S. 535, 539 (1971); Sisay v. Smith, 310 F. App'x 832, 848-49 (6th Cir. 2009); Spinelli v. City of New York, 579 F.3d 160, 171 (2d Cir. 2009); Tanassee v. City of St. George, 172 F.3d 63 (10th Cir. 1999). "The Supreme Court has held repeatedly that the property interest in a person's means of livelihood is one of the most significant that an individual possess." Ramsey v. Bd. of Educ. of Whitley County, Ky., 844 F.2d 1268, 1273 (6th Cir. 1988). Moreover, even though the Pet Shop disputes McKamey's characterization of its deprivation as "temporary", temporary deprivations "are subject to the strictures of due process." Peralta v. Heights Medical Center, Inc., 485 U.S. 80, 85 (1988).

Second, undoubtedly a deprivation hearing would lessen the risk of an erroneous deprivation. Certainly the procedural safeguard of an opportunity to be heard prior to deprivation would permit a more informed decision. See Revis v. Meldrum, 489 F.3d

273, 282 (6th Cir. 2007) (holding that "[a]dditional pre-deprivation process, such as notice and an opportunity to be heard, would permit an owner or tenants to raise these concerns and thereby decrease the risk of an erroneous deprivation.")

Third, the burden upon McKamey would be slight. According to the City Code, which McKamey was required to enforce, there was already a procedure in place for the reinstatement of a revoked license. City Code, R69-1, Page ID #1334-35. McKamey's burden to hold a hearing was slight; much more so when it at least anticipated that its inspection of the Pet Shop might reveal City Code violations. The State procedure – requiring a hearing before revocation – underscores the fact that a hearing prior to revocation would impose minimal burden on McKamey. In fact, when McKamey summarily revoked the City Permit, it essentially eviscerated the due process protections provided by the applicable State Law on the State License because both the State License and the City Permit granted the same right: the authority to operate a commercial pet store.

McKamey attempts to justify its actions its actions on its erroneous contention that the conditions in the store warranted immediate action, a contention that the record belies. First, McKamey entered the store for an inspection while the Pet Shop's employees were cleaning the store, and then argued that the store conditions were unclean. By entering the store while the cleaning was in progress, McKamey essentially "stacked the deck" by gathering evidence of allegedly unsanitary conditions before the Pet Shop's employees were able to complete the cleaning.

This point is bolstered by the fact that McKamey employed essentially the same cleaning procedures for dogs at McKamey's facility: a McKamey employee would arrive at McKamey's facility early in the morning to clean McKamey's dog kennels after they were left unattended overnight.

Second, the State never revoked the Pet Shop's State Pet Dealer License, either **before** or **after** a hearing, despite the fact that the State Inspector, Joe Burns was present for the same inspection. In fact, Burns specifically stated that his principal concern was the temperature and that all other issues with the store "the other things just weren't quite as big a deal". City Trial Trans., R90-2, Page ID #3027.

Third, the record is abundantly clear that the Pet Shop never violated applicable State Law on the temperature, ventilation, cleaning the animals or providing water to the animals. This is a far cry from an "exigency". Because it was unable to show a violation of the applicable State Law, McKamey was left in the untenable position of arguing that the Pet Shop somehow violated the subjective City Code, which is not permissible under Tennessee law. Specifically, it is fundamental in Tennessee that a municipality may not apply a more stringent regulatory standard than the state unless permitted to do so by the state. Municipal ordinances that are repugnant to state law of a general character and state-wide application are universally held to be invalid. Crawley v. Hamilton County, 193 S.W.3d 453, 456 (Tenn. 2006); see also 421 Corp. v. Metropolitan Government of Nashville and Davidson County, 36 S.W.3d 469, 475 (Tenn. Ct. App. 2000). If the city ordinance designates higher standards than

state law, and has the effect of closing avenues of trade and commerce in violation of federal and state law, the ordinance may not stand. See State ex re. Beasley v. Mayor and Aldermen of Town of Fayetteville, 268 S.W.2d 330, 333 (Tenn. 1954) (citing State ex rel. Nashville Pure Milk Co. v. Town of Shelbyville, 240 S.W.2d 239 (Tenn. 1951). Nowhere has Tennessee authorized a municipality to enact more stringent standards for the enforcement of animal regulations than the applicable state standards. Therefore, McKamey is unable even to show a violation of applicable law because it cannot show a violation of applicable state law.

Fourth, and perhaps most compelling, the City Court ultimately determined that it had no jurisdiction to take any action on the Pet Shop's City Court Permit. Specifically, Judge Harris stated, in his order of dismissal, that "the City Court has no authority to revoke or make any order relative to the license of the Pet Company." Harris' Order, R69-12, Page ID #1368-71. The City Attorney, Mike McMahan, stated that the City "screwed up" because the City Code provided no mechanism for a hearing to revoke a City Permit. Article, R69-13, Page ID #1372-73. It is abundantly clear, therefore, that the Pet Shop received **no hearing whatsoever** on the revocation of its City Permit, which was ultimately returned only by agreement of the City and McKamey. Any assertion that the Pet Shop received a hearing on the revocation of its City Permit is therefore meritless. Therefore, all discussion about when, where and how a hearing was required is largely academic because the plain fact remains that the Pet Shop was really never given any meaningful hearing whatsoever.

3. The Pet Shop's right to a prior due process hearing was clearly established

Existing precedent or a case on point establishes what a reasonable officer should know under the circumstances and thus, what rights are clearly established. Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2073 (2011); see ibid Carver v. City of Cincinnati, 474 F.3d 283, 287 (6th Cir. 2007). In making its clearly established determination, this Court has looked at precedent from other jurisdictions. See Bell v. Johnson, 308 F.3d 594, 612-23 (6th Cir. 2002); see accord Donovan v. City of Milwaukee, 17 F.3d 944, 952 (7th Cir. 1994) (holding that binding precedent from within a particular circuit is not required). Moreover, "it has been clearly established since Logan v. Zimmerman Brush Co. 455 U.S. 422 (1982), that unless pre-deprivation relief is impractical, it must be provided. Siebert v. Severino, 256 F.3d 648, 660-61 (7th Cir. 2001).

"The relevant, dispositive inquiry in determining whether a right is clearly established is **whether it would be clear to a reasonable [official] that [the] conduct was unlawful in the situation [] confronted**." Brosseau v. Haugen, 543 U.S. 194, 199 (2004) (emphasis added). Whether a reasonable official should know that the conduct is clearly unconstitutional is an objective inquiry "in light of pre-existing law." Wilson v. Lane, 526 U.S. 603, 614-15 (1999). When viewed in the context of McKamy's knowledge on June 15, 2010, McKamey's summary revocation of the City Permit and confiscation of the animals was clearly unreasonable.

First, McKamey knew or should have known that the State Law required a hearing before the State could deprive the Pet Shop of its State Pet Dealer License, particularly in view of the fact that McKamey attended the June 15, 2010 inspection with Burns, a representative of the Department of Agriculture. McKamey. A reasonable officer in McKamey's position therefore was on notice that a hearing was required before McKamey could revoke the City Permit.

Because of the State's statutory scheme – requiring a hearing before revocation – there was no reasonable basis for McKamey to believe that the summary revocation of its Permit and confiscation of its animals was permissible. See Freeman v. Blair, 862 F.2d 1330, 1332 (8th Cir. 1988). The Freeman Court held that the presence of a state law governing deprivations of a state issued license defined what an objectively reasonable officer knows and makes the state law clearly established. Id. Here, by revoking the Pet Shop's City Permit and confiscating its animals McKamey violated applicable State law – meaning they violated a clearly established right – and are thus, not entitled to qualified immunity. See id.

Second, a reasonable officer in McKamey's position would not believe that his or her action was authorized based on any alleged "exigency" because, contrary to McKamey's repeated assertions, there was no exigency. In this matter of disputed facts, the Court must take the facts in the light most favorable to the Pet Shop. As the Pet Shop has demonstrated, no exigency existed which would justify McKamey's actions. Therefore, taking the facts in the light most

favorable to the Pet Shop, McKamey's actions in summarily revoking the City Permit and confiscating the animals was patently unreasonable under the circumstances.

Third, there was no stated procedure in the City Code for a hearing, and McKamey had no predetermined plan for providing a hearing. Instead, it decided to revoke the permit and then set about the business of finding a place to justify its actions. McKamey started in the City Court, which ordered it to return the City Permit, an order which McKamey refused to obey. City Court Trans., R69-9, Page ID #1350-55. The second City Court judge, Judge Harris, stated that "the City Court has no authority to revoke or make any order relative to the license of the Pet Company." Harris' Order, R69-12, Page ID #1368-71). Had he not dismissed the hearing on double jeopardy grounds, therefore, Judge Harris would not have taken any action on the revocation of the City Permit. The point is clear: McKamey's summary revocation of the City Permit was inherently unreasonable in view of the fact that it had no predetermined forum or mechanism for a meaningful revocation hearing.

C. The Pet Shop's right to some due process hearing is unequivocally clearly established.

The undisputed facts show that McKamey never afforded the Pet Shop any due process hearing. Clear precedent "consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. Mathews 424 U.S. at 333. "Thus it has become a truism that '*some*

form of hearing' is required before the owner is finally deprived of a protected property interest." Logan 455 U.S. at 433-34 (quoting Roth, 408 U.S. at 570-71 n.8.). Even "cases which have excused the prior-hearing requirement have rested in part on the availability of some meaningful opportunity subsequent to the initial taking for a determination of rights and liabilities." Parratt, 451 U.S. at 541-42.

Moreover, once a property interest is found, the holder has an absolute right to some process and "a complete absence of process does violate a clearly established right," which removes the availability of qualified immunity. Pucci v. Nineteenth Dist. Court, 628 F.3d 752, 767 (6th Cir. 2010). Therefore, even if the issue of what process may be due exists, the failure to afford any process is a violation of clearly established right. Id. McKamey never afforded the Pet Shop any process regarding the revocation of its Permit.

McKamey erroneously argues that the deprivation was "temporary", but McKamey's actions in the City Court trial contradict this assertion. First, and most importantly, the Pet Shop's store was shut down for three (3) months – a substantial amount of time for any commercial retailer. Second, when the City Court ordered McKamey to return the City Permit, McKamey initially refused, arguing that the Pet Shop would have to re-apply for its City Permit. This is a permanent revocation because it would require the Pet Shop to apply in the same manner as a new business. McKamey likewise cannot argue that the deprivation was temporary – pending a determination by the City Court - inasmuch as the City Court ordered McKamey to return the City

Permit, yet McKamey refused that order, taking the position that McKamey would make the final determination whether to reinstate the City Permit. Moreover, McKamey cannot argue that the expedited hearing for injunctive relief justified its deprivations. As McKamey concedes, the TRO hearing "did not expressly address the propriety of permit suspension…." Appellant Brief at p. 48. This argument fails, moreover, because McKamey asserted that McKamey would ultimately decide whether to reinstate the City Permit after the Pet Shop was required to re-apply for the City Permit. City Court Trans., R69-9, Page ID #1350-55. It is therefore apparent, based on McKamey's position in the City Court trial, that neither the City Court Trial nor the TRO hearing was a hearing on the Pet Shop's City Permit.

II. THE PET SHOP'S FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEIZURES WAS CLEARLY ESTABLISHED

The Fourth Amendment protected the Pet Shop's animals and related business records against unreasonable seizure, and this protection was clearly established. The District Court determined that the circumstances surrounding the seizures was disputed and that it could not resolve the issues on summary judgment; therefore it denied summary judgment to all parties and denied McKamey qualified immunity. Because McKamey is appealing the District Court's denial of qualified immunity based on factual disputes, the Pet Shop is entitled to the most

favorable view of the facts, and any factual arguments are impermissible and beyond this Court's jurisdicition. When viewing the facts in the light most favorable to the Pet Shop, McKamey's seizure deprived the Pet Shop of a clearly established Fourth Amendment right.

A. This Court must view the facts in the light most favorable to the Pet Shop because all the Fourth Amendment claims involve factual disputes.

The only permissible argument before this Court on the Pet Shop's Fourth Amendment seizure claims is whether the facts, when viewed in the light most favorable to the Pet Shop, demonstrate that its Fourth Amendment rights were clearly established. See Quigley v. Thai, 707 F.3d 675, 680 (6th Cir. 2013); see accord Estate of Carter v. City of Detroit, 408 F.3d 305, 309-10 (6th Cir. 2005). This Court's jurisdiction and appellate review is so limited because the District Court held that "substantial issues of fact remain[ed] regarding the seizure of [Pet Supply's] animals and business records." Dist. Ct. Summary Judg. Memo. Op., R146, Page ID #3782. The District Court was unable to "credit" McKamey's arguments on the issue of the conditions of the Pet Shop during its inspection, which they claimed justified the seizures. The District Court held:

> All of [the City, McKamey, Walsh, Nicholson and Hurn's] theories rely on the Court's crediting their version of the events; namely, the Court must assume the animals were in significant danger

> and accordingly seizure was justified under one of the above exceptions to the warrant requirement. Given the factual disputes detailed above, the Court is not in a position to make that determination on summary judgment.

Id. at 3783-84.

This analysis is on all fours with this Court's opinion from earlier this year in Quigley, a case in which the defendant, Thai, appealed his denial of qualified immunity. The District Court had denied Thai's motion for summary judgment on the issues of qualified immunity finding that factual disputes prevented granting qualified immunity. In his appeal, Thai again raised and argued issues of fact that the District Court had already determined were in dispute. Despite Thai's factual arguments, this Court held that "regardless of the district court's reasons for denying qualified immunity, we may exercise jurisdiction over [defendant's] appeal to the extent it raises questions of law." Quigley, 707 F.3d at 68. This Court, therefore, narrowly defined its jurisdiction on appeal as follows:

> So even where, as here, the defendant makes 'impermissible argument regarding disputes of fact,' if the defendant also raises the purely legal issue of whether the plaintiff's facts show that the defendant violated clearly established law, 'then there is an

> issue over which this court has jurisdiction.'

Id. at 680; (quoting Estate of Carter, 408 F.3d at 310).

This Court, therefore, only considered Thai's arguments on appeal regarding the purely legal issue of whether or not Quigley's facts demonstrated that his alleged constitutional right was clearly established. Construing this narrow inquiry, the Court explicitly held: "Thai once again vigorously disputes these facts. . . But this battle of the experts is a factual dispute we are without jurisdiction to review." Id. at 682 n.4. Since Thai's appeal was from a motion for summary judgment on his entitlement to qualified immunity, this Court held that summary judgment was inappropriate "unless the facts, when viewed in the light most favorable to [Quigley], would permit a reasonable juror to find that" the right was clearly established. Id. at 680.

Because this Court must give the Pet Shop the most favorable view of its pleaded and supported facts, the standard of review on appeal is the same as an appeal from a denial of a motion to dismiss or a motion for judgment on the pleadings. See Stanley v. City of Norton, 124 Fed.Appx. 305, 308-309, (6th Cir. 2005). Therefore, this Court's decision in Carver v. City Cincinnati, 474 F.3d 283 (6th Cir. 2007), which was the appeal of a denial of defendants' motion to dismiss based on qualified immunity, is instructive. The Carver Court held that it would only dismiss a complaint "if a violation of a clearly established right could not be 'found under any set of facts that could be proven consistent with the allegations or

pleadings.'" 474 F.3d at 285; (quoting Cooper v. Parrish, 203 F.3d 937, 944 (6th Cir. 2000)).

This Court's jurisdiction, therefore, is narrowly limited to the purely legal question of whether the facts when viewed in light most favorable to the Pet Shop as alleged in its Complaint show a violation of a clearly established right.

B. McKamey deprived the Pet Shop of its clearly established Fourth Amendment right against unreasonable seizures.

The Fourth Amendment prohibits unreasonable seizures, U.S. Const. amend. IV. See Ruby v. Horner, 39 F. App'x 284, 286 (6th Cir. 2002). At the time of McKamey's seizure, the Fourth Amendment's protection of commercial premises was clearly established. See New York v. Burger, 482 U.S. 691, 699 (1987). In examining a Fourth Amendment seizure claim, this Court:

> [M]ust examine the facts and circumstances surrounding the [seizure of property]. Such an inquiry does not require a determination of whether there was in fact a need for the [defendants] to [seize the property]; instead we are required to determine whether the [defendants'] decision to [seize the property] was reasonable under the circumstances.

Lowery v. Faires, 57 F.Supp.2d 483, 495-96 (E.D. Tenn. 1998) (quoting Collins v. Nagle, 892 F.2d 489, 493 (6th Cir.1989)). Accordingly, this Court "must

balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." Scott v. Harris, 550 U.S. 372, 383 (U.S. 2007). The analysis "must be undertaken in light of the specific context of the case, not as broad general proposition." Brosseau v. Haugen, 543 U.S. 194, 199 (2004) (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)). "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2083 (2011) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

Existing precedent or a case on point establishes what a reasonable officer should know under the circumstances and thus, what rights are clearly established. Ashcroft, 131 S. Ct. at 2073; see ibid Carver v. City of Cincinnati, 474 F.3d 283, 287 (6th Cir. 2007). In making its clearly established determination, this Court has looked at precedent from other jurisdictions. See Bell v. Johnson, 308 F.3d 594, 612-23 (6th Cir. 2002); see accord Donovan v. City of Milwaukee, 17 F.3d 944, 952 (7th Cir. 1994) (holding that binding precedent from within a particular circuit is not required).

The District Court in this case both held the Pet Shop's pleaded allegations properly asserted Fourth Amendment violations and its supported facts created genuine issues precluding either dismissal or summary judgment on McKamey's qualified immunity defense. See Dist. Ct. Summary Judg.

Memo. Op., R146, Page ID #3769-93. Therefore, while a Fourth Amendment analysis of the question of the existence of a clearly established right normally requires a fact intensive and situational particular inquiry, the presence of disputed facts precludes such analysis here for two reasons. First, for this Court to analyze the circumstances of the Pet Shop's claims and McKamey's arguments justifying its seizure would require it to resolve genuine issues of disputed facts. Second, this Court does not have jurisdiction to undertake this analysis and resolve such factual disputes on appeal. Finally, the District Court applied the appropriate legal standard when it denied McKamey's application for qualified immunity when it determined that disputed facts precluded this same under the circumstances inquiry. See Dist. Ct. Judg. on Pleadings Mem. Op., R143, Page ID #3743 ("Whether the seizure itself was reasonable under the circumstances is a fact-intensive inquiry . . .").

Viewing the Pet Shop's allegations and supported proof in the most favorable light establishes that its Fourth Amendment rights were clearly established. The Pet Shop, as an owner and operator of a business, had an established reasonable expectation of privacy protected by the Fourth Amendment in its business premises, which extended to even administrative searches. Burger, 482 U.S. at 699-700. McKamey's confiscation constituted a seizure for the purposes of the Fourth amendment entitling the Pet Shop to Fourth Amendment protection. See e.g. Seibert v. Severino, 256 F.3d 648 (7th Cir. 2001); Lesher v. Reed, 12 F.3d 148, 150 (8th Cir. 1994). Furthermore, even a temporary seizure

requires Fourth Amendment protection. Peete v. Metropolitan Government of Nashville and Davidson County, 486 F.3d 217, 220-21 (6th Cir. 2007) (citations omitted).

McKamey's seizure was a significant and a clearly established intrusion upon private rights. As the Pet Shop has shown, it had a clearly established right in its animals and its ability to conduct business for profit. Moreover, precedent clearly establishes that there is a substantial private interest in maintaining animals for profit. "[T]here can be no dispute that an animal owner has a substantial interest in maintaining his rights in a seized animal. Such is especially the case with potential income-generating animals. . ." Porter v. DiBlasio, 93 F.3d 301, 306 (7th Cir. 1996). At least two other circuits have relied on Porter for this proposition. See Reams v. Irvin, 561 F.3d 1258, 1264 (11th Cir. 2009); see also Seibert, 256 F.3d at 660.

The Pet Shop's supported facts demonstrate that at the time of McKamey's seizure it lawfully possessed both a State License and a City Permit to hold animals and operate a for-profit business selling those animals. Moreover, in reviewing the facts in the light most favorable to the Pet Shop, the record shows that at the time of the seizure, the Pet Shop was in compliance with both State law and the City Code for the maintenance of this Permit, and that its animals were healthy. Therefore, while exigent circumstances may justify a warrantless seizure, see e.g. DiCesare v. Stuart, 12 F.3d 973, 977 (10th Cir. 1993), the facts viewed in the light most favorable to the Pet Shop affirmatively demonstrate that no exigency justifying their warrantless seizure existed.

Viewing the evidence in the light most favorable to the Pet Shop, McKamey's representations of the circumstances surrounding its seizure were "either exaggerated or wholly contrived." Dist. Ct. Judg. on Pleadings Mem. Op., R143, Page ID #3749. It is clearly established that such misrepresentations preclude a finding of qualified immunity. See Siebert, 256 F.3d at 658-59. Furthermore, the Pet Shop contends that McKamey's searched the premises and misrepresented the circumstances surrounding its seizure as pretext for closing down the Pet Shop. Id. at 3750. It is clearly established that such pre-text cannot justify administrative searches and seizures. See Ruttenberg v. Jones, 283 F. App'x 121, 133 (4th Cir. 2008).

McKamey's brief goes to great lengths to argue that exigent circumstances, the plain view doctrine and the temporary nature of its seizure provided a reasonable basis for its seizure of the Pet Shop's animals and related business records. All of these arguments, however, hinge on this Court crediting their version of the facts and circumstances regarding these deprivations. See Dist. Ct. Summary Judg. Memo. Op., R146, Page ID #3783-84. The District Court explicitly refused to credit McKamey's arguments because of the existence of genuine disputes of facts. Id. McKamey's arguments on the issues the District Court held were in dispute are, therefore, impermissible and not within this Court's jurisdiction on appeal. See Quigley, 707 F.3d at 682 n.4. Indeed, as the Pet Shop has shown, it never violated state law, such that no emergency existed.

In addition, McKamey has no law enforcement authority; their authority is limited to the issuance of

summonses for city court violations. See TENN. CODE ANN. § 7-63-201 (stating that authority of animal control "…who, upon witnessing a violation of any ordinance, law or regulation of that municipal, metropolitan or city government, may issue an ordinance summons, leaving a copy with the offender, showing the offense charged and the time and place when such offender is to appear in court."). Because McKamey had no law enforcement authority, the Pet Shop respectfully contends that its reliance on law enforcement exceptions to the Fourth Amendment – plain view and exigent circumstances – is misplaced.

Based upon a view of the facts in the most favorable light the Pet Shop, precedent clearly establishes that its Fourth Amendment rights were violated by McKamey when its animals and related business records were seized.

III. Qualified immunity is not available to McKamey

McKamey is not entitled to invoke the defense of qualified immunity because it is a private party that was not performing a governmental function firmly rooted in a tradition of immunity, and because McKamey's conduct, although pursuant to its authority to enforce the Code, was distinctly motivated by a private agenda and was not calculated to enhance the public welfare.

A. Animal control agencies and its agents like McKamey have no firmly rooted tradition of immunity.

The United States Supreme Court made it clear that qualified immunity is only available to private state actors where there is a tradition of immunity evidenced by the "general principles of tort immunities and defenses applicable at common law. Filarsky v. Delia, 132 S. Ct. 1657, 1662 (2012) (internal citations omitted). This "inquiry begins with the common law as it existed when Congress passed [42 U.S.C.] § 1983 in 1871." Id. Explaining this inquiry, the Supreme Court held that it "accorded certain government officials either absolute or qualified immunity from suit if the tradition of immunity was **so firmly rooted in the common law and was supported by such strong policy reasons**. . ." Wyatt v. Cole, 504 U.S. 158, 163-64 (1992) (emphasis added).

The test for extending qualified immunity to private individuals does not depend on whether those individuals perform a governmental function. Richardson v. McKnight, 521 U.S. 399, 408-09 (1997).

> Indeed a purely functional approach bristles with difficulty, particularly since, in many areas, government and private industry may engage in fundamentally similar activities, ranging from electricity production, to waste disposal, to even mail delivery.

Id. at 409. McKamey's reliance on the fact that it works "for the government in pursuit of [] government[al] objectives", Appellate Brief at p. 67, therefore, is inapposite in this Court's inquiry of McKamey's entitlement to qualified immunity. Similarly, the fact that a party is subject to 42 U.S.C.

§ 1983 liability does not mean necessarily that it is entitled to qualified immunity. McCullum v. Tepe, 693 F.3d 696, 700 (6th Cir. 2012).

In contravention of Richardson's holding, some Courts have extended qualified immunity to private actors based solely upon their performance of governmental functions. See Fabrikant v. French, 691 F.3d 193 (2d Cir. 2012); Vawser v. Updegrove, No. 4:06-cv-3217, 2009 WL 1383264 (D. Neb. May 14, 2009); Daskalea v. Washington Humane Soc., 577 F. Supp. 2d 90 (D.D.C. 2008). Basically, these cases just determined that animal control agencies and their agents were state actors who performed governmental functions, were subject to § 1983 liability and were, therefore, entitled to qualified immunity. This analysis not only misapprehends the Supreme Court's holdings in Filarsky, Richardson and Wyatt, which recognized that not every private actor subject to § 1983 liability is necessarily entitled to qualified immunity, but it also contradicts this Court's holding in McCullum that § 1983 liability, which is always premised on state action, does not entitle a private party to qualified immunity.

McKamey, as a private actor subject to § 1983 liability, must prove its entitlement to qualified immunity. There is no firmly rooted tradition of immunity for animal control officers and agents, and no case in the Sixth Circuit has found such entitlement to qualified immunity. Moreover, the case Kauffman v. Penn. Soc. for the Prevention of Cruelty to Animals, et al. 766 F.Supp.2d 555 (E.D. Pa. 2011) properly conducted an immunity analysis of a private animal control agency seeking qualified immunity by analyzing the common law looking for a

firmly rooted tradition of immunity. Kauffman held: "[O]ur research reveals not one case concerning a humane society or a society for the prevention of cruelty to animals that predates 1871." Id. at 564. Moreover, where there are no cases or precedent to extend qualified immunity to private actors, this Court has refused such *ad hoc* extension to private actors. See McCullum, 693 F.3d 696.

Accordingly, although a state actor and subject to § 1983 liability, McKamey is not entitled to qualified immunity as a private party because there is no firmly rooted tradition of such immunity.

B. The purpose of qualified immunity to private actors militates against extending qualified immunity to McKamey.

In the absence of a firmly rooted tradition, private parties are only entitled to qualified immunity where there is a particularly specialized reason related to the purpose of the doctrine. This purpose is threefold: (1) prevent unwarranted timidity, (2) ensure talented candidates are not deterred in entering public service, and (3) avoid unwarranted distractions. Filarsky v. Delia, 132 S. Ct. at 1665 ("such immunity protects government's ability to perform its traditional functions") (citations omitted). The Supreme Court's decision in Filarsky explicitly affirmed the prior holdings, analysis and prohibitions against providing qualified immunity to private individuals like the defendants in Wyatt and in Richardson based upon this specialized inquiry of the purpose of immunity. 132 S. Ct. at 1666. Filarsky explained that the Wyatt defendants were not entitled to qualified immunity because they had "no

connection to government and pursued purely private ends." Id. at 1667. Moreover, the Wyatt defendants were not "principally concerned with enhancing the public good." Id. Therefore, Filarsky concluded that declining to extend the Wyatt defendants qualified immunity would not affect their decision-making ability or deter others from entering public service.

The Filarsky Court considered whether an individual performing a singular action could invoke qualified immunity. 132 S. Ct. at 1666 (extending immunity to "private individuals [who] work in close coordination with public employees"). Richardson, however, analyzed an organization "systematically organized to perform a major administrative task" independently and without "direct state supervision." 521 U.S. at 409. Even though Filarsky extended immunity to an individual, it affirmed Richardson's denial of immunity to an organization because market incentives would not lead to timidity or deter others in carrying out their duties. 132 S.Ct. at 1667.

McKamey's conduct in the seizure of the Pet Shop's animals and business records accompanied by its complete failure to afford the Pet Shop due process, therefore, satisfies the reasons provided in Wyatt and Richardson for denying qualified immunity. Like the defendants in Wyatt, McKamey's conduct was motivated by its own private agenda and was not aimed at enhancing the public good. The District Court held the circumstances that McKamey, under the auspices of its Code enforcement authority, claimed justified its conduct were allegedly wholly contrived and motivated by antipathy for companies like the Pet Shop. Dist. Ct. Judg. on Pleadings Mem. Op., R143, Page ID #3749. McKamey essentially

admitted this motivation in its application for funds from the ASPCA and its online petition to shut the Pet Shop down. R69-14, Page ID #1374-79; R69-15, Page ID #1382-83. These facts support the Pet Shop's contention that McKamey's conduct was not aimed to enhance the public welfare, but was instead motivated by private interests. Therefore, denying McKamey qualified immunity will not create timidity for others in the animal control field.

Because McKamey is an organization tasked with an administrative task of enforcing the City Code without City or State supervision, it is factually similar to Richardson. Moreover, McKamey's conduct was controlled by market pressures even though it is a non-profit organization because it competed with the Pet Shop for the same resources, i.e. homes for animals and money spent on animals. C.f. McCullum, 693 F.3d 696 (holding that the non-profit status of a prison doctor was not a determinative factor in granting qualified immunity); Rosewood Servs., Inc. v. Sunflower Diversified Servs., Inc., 413 F.3d 1163, 1168 (10th Cir. 2005) (holding that non-profit status is not a shield from competitive pressure and that non-profits are concerned with their profit levels).

Both the Pet Shop and McKamey are in the business of connecting people with animals and this creates competition for discrete resources. McKamey also relies on donations creating competition for money - another discrete resource. This market competition pressure was evident when McKamey publicized its raid of the Pet Shop and placed the Pet Shop's animals on its website seeking donations. R69-14, Page ID #1374-79. Therefore, even though McKamey is a non-profit organization, it competed

directly with the Pet Shop over limited resources. These market pressures will adequately, as in Richardson, function as a proxy for the availability of qualified immunity.

Furthermore, McKamey's contract with the City evidences a business relationship rife with market pressures. See McKamey/City Contract, R70-2, Page ID #1410-35. Specifically, the Contract provided that McKamey would lease its facility from the City, Id. at 1410, and that McKamey would receive yearly remuneration, Id. at 1420. Also the Contract required McKamey to carry insurance covering its own conduct and would indemnify the City. Id. at 1428-30. Because McKamey was required to purchase this insurance, the market pressures to avoid liability sufficiently motivated proper conduct such that qualified immunity like in Richardson is not necessary to prevent the chilling effect of denying qualified immunity.

McKamey is not entitled to qualified immunity and even if this Court determines animal control agencies and officers could take shelter under qualified immunity, the facts of this case are in line with the decisions in Wyatt and Richardson, such that qualified immunity is not available to McKamey.

CONCLUSION

Based on the arguments and authorities cited herein, the Pet Shop respectfully contends that the Court should affirm the issues raised in this appeal denying McKamey's Motion for Judgment on the Pleadings and Motion for Summary Judgment on its defenses of qualified immunity.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 28.1(e)(2)(B) and 32(a)(7) and Sixth Circuit Rule 32(a), I certify this brief complies with the applicable type-volume limitation. According to the word count in Microsoft Word, there are 13,600 words in this brief.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2013, a copy of the foregoing document was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

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