Given the recent notice of a 3 pm House Rules Committee work session on Senate Bill 6, I ask – if at all possible – that the following be entered in the Committee record as my testimony about the likely unconstitutionality of Sections 10 and 11, Thank you.

I believe that the 9th Circuit's decision in *Rush v. State of California,* 750 F.2d 713 (9th Cir. 1984) continues to accurately outline the limits of warrantless or administrative searches and support the argument that Sections 10 and 11 of SB 6 authorize unconstitutional warrantless searches.

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Rush involved home-operated day care centers. The court determined that the "pervasively regulated business" exception should be applied because of existing specifically focused health and safety standards but offered the following *caveat*:

> "In holding that a sufficiently limited program of **warrantless** inspections of family day care homes would not violate the Fourth Amendment we are not suggesting that such a program would be valid for any business subject to **licensing** requirements. *See Marshall v. Barlow's, Inc.,* 436 U.S. at 321–22, 98 S.Ct. at 1824–25. We cannot stress forcibly enough that there is no basis for applying the "pervasively regulated business" exception to the warrant requirement merely because a business conducted in a home or elsewhere requires a **license**. For this exception to apply, the environment in which the **licensed** business is conducted must be pervasively regulated and an urgent governmental interest must be furthered by **warrantless** inspections. *See United States v. Biswell,* 406 U.S. at 315–17, 92 S.Ct. at 1596–97. Family day care homes are subject to pervasive regulations, expressly applying only to them, governing their interiors and yards. These regulations are necessary to protect the health and safety of the small children taken into these homes during the day while their parents are at work. This is not the case with other **licensed** professions, such as the legal profession, which are not subject to any such specific health and safety standards but only to those generally covering all commercial or residential properties. *See See v. City of Seattle,* 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967);*Camara v. Municipal Court,* 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967).
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> In this case we uphold only the firmly established but narrow exception to the warrant requirement known as the "pervasively regulated business" exception. As ****723*** stated in *Donovan v. Dewey,* the cases of *Colonnade* and *Biswell* make clear that a warrant may not be constitutionally required when Congress has reasonably determined that **warrantless searches** are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.
> *Donovan v. Dewey,* 452 U.S. 594, 600, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981)

I am convinced that home-operated "animal rescue entities" – the targets of Sections 10 and 11 of SB 6 – fall well outside the limits outlined in *Rush* and that sections' license and search provisions are unconstitutional.

In addition, I believe that a series of very recent decisions from the Court of Appeals makes it clear that our state standards are not more lenient that those outlined in *Rush.* See, for example and despite the different context, the following passage from *State v. Magana,* June 19, 2013 (Oregon Court of Appeals):

> "We begin our analysis by noting Oregon's longstanding principle that persons have a heightened privacy interest in their homes and "[t]he very purpose of [Article I, section 9, of the Oregon Constitution] was to protect a person's home from governmental intrusions." *State v. Martin,* 222 Or.App. 138, 142, 193 P.3d 993 (2008), *rev. den.,* 345 Or. 690, 201 P.3d 910 (2009) (internal quotations marks and citations omitted; brackets in original); *accord, State v. Fair,* 353 Or. 588, –––, –– P.3d ––––, 2013 WL 2370571 (2013). The general rule is that "warrantless searches are *per se* unreasonable [,]" but a defendant's consent to search is one of the exceptions to that general rule. *State v. Guzman,* 164 Or.App. 90, 99, 990 P.2d 370 (1999), *rev. den.,* 331 Or. 191, 18 P.3d 1098 (2000).

> The state has the burden of proving, by a preponderance of the evidence, that a defendant's consent to search is voluntary. *Id.* To determine whether a defendant's consent is voluntary, "we examine 'whether, in the light of the totality of the circumstances, defendant's consent was a product of his own free will or was the result of coercion, express or implied.' "*Id.* (quoting*State v. Charlesworth/Parks*, 151 Or.App. 100, 114, 951 P.2d 153 (1997), *rev. den.*, 327 Or. 82 (1998)); *State v. Berg*, 223 Or.App. 387, 391, 196 P.3d 547 (2008) *adh'd to as mod on recons.*, 228 Or.App. 754, 208 P.3d 1006, *rev. den.*, 346 Or. 361, 211 P.3d 930 (2009). Although we are bound by the trial court's findings of historical fact, so long as there is constitutionally sufficient evidence to support them, *Ehly*, 317 Or. at 75, 854 P.2d 421, "[t]he determination of whether consent was voluntary is a legal issue that we review independently," *Guzman*, 164 Or.App. at 99, 990 P.2d 370 (internal brackets and quotation marks omitted).
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> Courts may look to a variety of factors for guidance to determine whether the defendant's consent was voluntary or a result of coercion, such as "whether physical force was used or threatened"; "whether weapons were displayed"; "whether the consent was obtained in public"; "whether the person who gives consent is the subject of an investigation"; "and whether the atmosphere surrounding the consent [was] antagonistic or oppressive [.]" *State v. Larson*, 141 Or.App. 186, 198, 917 P.2d 519, *rev. den.*, 324 Or. 229, 925 P.2d 908 (1996)."

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In my judgment, it is clear that our courts are very protective of individuals' homes and would be very reluctant to find that a "consent to search" required as part of mandatory licensing is "a product of [one's] own free will." Sections 10 and 11 of Senate Bill 6 are, in my opinion, unconstitutional.

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