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IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

PETER STAVRIANOUDAKIS, et al.

Plaintiffs,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,

Defendants.

CASE NO. 1:18-CV-01505-LJO-BAM

MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO DISMISS

DATE: April 15, 2019
TIME: 8:30 a.m.
COURT: Courtroom 4, 7th Floor
2500 Tulare Street
Fresno, CA 93721
JUDGE: Hon. Lawrence J. O'Neill

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Defendants the United States Fish and Wildlife Service and Margaret Everson, sued in her official capacity as the Principal Deputy Director of the U.S. Fish and Wildlife Service (collectively, the "Federal Defendants") respectfully submit this memorandum in support of their motion to dismiss plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief ("FAC") (ECF 16).

BACKGROUND

Plaintiffs Peter Stavrianoudakis, Katherine Stavrianoudakis, Scott Timmons, Eric Ariyoshi, and the American Falconry Conservancy (together, "Plaintiffs") have filed this suit to obtain a declaration that certain federal and California state regulations relating to falconry are unconstitutional under the Fourth Amendment and the First Amendment, as well as an injunction against enforcement of those regulations. The claims as to the Federal Defendants are not ripe and, in any event, fail as a matter of law.

A. The Migratory Bird Treaty Act

Congress enacted and amended the Migratory Bird Treaty Act ("MBTA") to implement the provisions of several treaties designed to conserve and protect migratory bird species in the United States and three other countries. *See* 16 U.S.C. § 703(a) (MBTA applies to birds included in terms of conventions between the United States and Great Britain dated August 16, 1916, the United States and Mexico dated February 7, 1936, the United States and Japan dated March 4, 1972, and the United States and Soviet Union dated November 19, 1976). The act only applies to migratory bird species that are native to the United States, including extirpated species that have since been reintroduced as part of a federal agency's program. *Id.* § 703(b). Falconry species that are native to the United States therefore are protected by the MBTA, while those that are not native are not subject to its restrictions. Specific species that are protected under the act are listed at 50 C.F.R. § 10.13, and includes several types of Falconiformes (a category that includes birds commonly known as falcons, vultures, kites, eagles, hawks, and caracaras), as well as Strigiformes (which includes native owl species). *See* 50 C.F.R. §§ 10.13, 21.29(a)(1)(i). Collectively, these species are referred to as "raptors" throughout this memorandum. Species protected under the MBTA may also be subject to additional protections under

other statutes, such as the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668 *et seq.*, or the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*

The main provision of the MBTA prohibits virtually all possession, capture, or intentional killing of protected species unless permitted by regulations promulgated by the Secretary of the Interior:

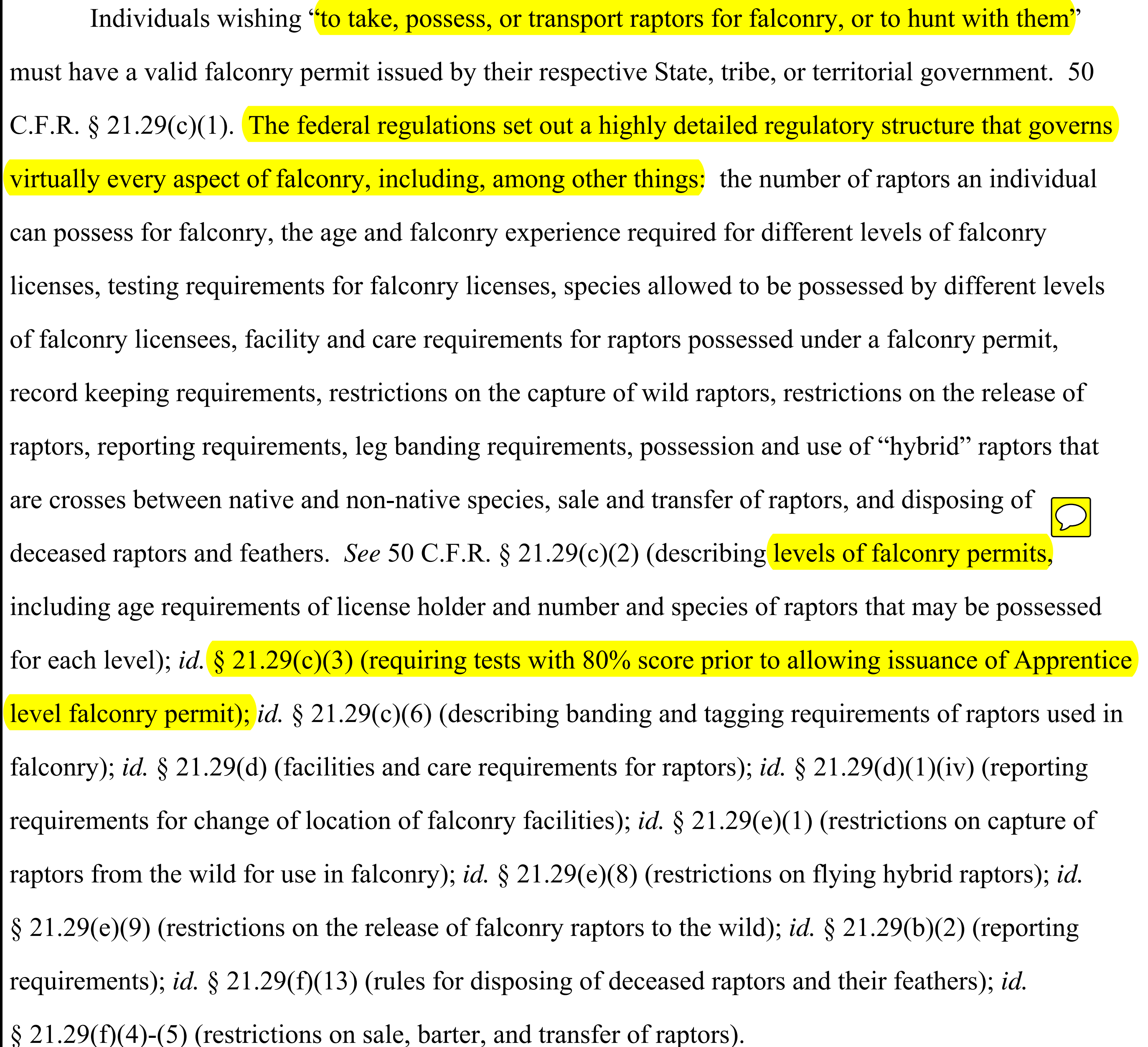
> Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof, included in the terms of the [covered conventions].

16 U.S.C. § 703(a); *see generally Andrus v. Allard*, 444 U.S. 51, 59 (1979) (discussing MBTA prohibition). The MBTA subsequently authorizes the Secretary of the Interior "to adopt suitable regulations" relating to when protected birds, bird parts, nests, or eggs may be hunted, taken, captured, killed, possessed, sold, purchased, shipped, transported, carried, or exported. 16 U.S.C. § 704(a).

B. MBTA Implementing Regulations

Pursuant to statutory authority, the Secretary of the Interior has promulgated detailed regulations to implement the MBTA, including regulations that apply to the practice of falconry.[1] Among these is 50 C.F.R. § 21.29, which is the regulation at issue in this case. The current version of this regulation became effective in November 2008. *See* 73 Fed. Reg. 59,448 (Oct. 8, 2008). This regulation permits the Secretary of the Interior to delegate responsibility for issuing falconry licenses and enforcing falconry standards to the relevant state, territorial, or tribal government upon a showing that their own laws and regulations meet the standards established in § 21.29. *See* 50 C.F.R. §§ 21.29(b)(1)(i), (b)(3) ("If we concur that the regulations and the examination meet the requirements of this section, we will publish a rule in the Federal Register adding the State, tribe, or territory to the list of those approved for allowing the practice of falconry."). After a state has been certified as complying with § 21.29, the

[1] As noted above, the practice of "falconry" covers the use of species that may not be popularly known as "falcons."



federal government terminates federal falconry permitting in that state, giving way to state officials to perform those functions. *See id.* § 21.29(b)(3). California was certified as complying with the relevant standards in December 2013, and took over all falconry permitting functions in California on January 1, 2014. *See* Migratory Bird Permits; Delegating Falconry Permitting Authority to 17 States, 78 Fed. Reg. 72,830, 72,830-33 (Dec. 4, 2013).

Individuals wishing "to take, possess, or transport raptors for falconry, or to hunt with them" must have a valid falconry permit issued by their respective State, tribe, or territorial government. 50 C.F.R. § 21.29(c)(1). The federal regulations set out a highly detailed regulatory structure that governs virtually every aspect of falconry, including, among other things: the number of raptors an individual can possess for falconry, the age and falconry experience required for different levels of falconry licenses, testing requirements for falconry licenses, species allowed to be possessed by different levels of falconry licensees, facility and care requirements for raptors possessed under a falconry permit, record keeping requirements, restrictions on the capture of wild raptors, restrictions on the release of raptors, reporting requirements, leg banding requirements, possession and use of "hybrid" raptors that are crosses between native and non-native species, sale and transfer of raptors, and disposing of deceased raptors and feathers. *See* 50 C.F.R. § 21.29(c)(2) (describing levels of falconry permits, including age requirements of license holder and number and species of raptors that may be possessed for each level); *id.* § 21.29(c)(3) (requiring tests with 80% score prior to allowing issuance of Apprentice level falconry permit); *id.* § 21.29(c)(6) (describing banding and tagging requirements of raptors used in falconry); *id.* § 21.29(d) (facilities and care requirements for raptors); *id.* § 21.29(d)(1)(iv) (reporting requirements for change of location of falconry facilities); *id.* § 21.29(e)(1) (restrictions on capture of raptors from the wild for use in falconry); *id.* § 21.29(e)(8) (restrictions on flying hybrid raptors); *id.* § 21.29(e)(9) (restrictions on the release of falconry raptors to the wild); *id.* § 21.29(b)(2) (reporting requirements); *id.* § 21.29(f)(13) (rules for disposing of deceased raptors and their feathers); *id.* § 21.29(f)(4)-(5) (restrictions on sale, barter, and transfer of raptors).

In addition to the federal regulations, a state that has been certified to allow the practice of falconry under its own laws may implement regulations that are more restrictive than the federal regulation. *See* 50 C.F.R. § 21.29(b)(1)(ii) ("State, tribal, or territorial laws may be more restrictive than

these Federal standards but may not be less restrictive. For instance, a State, tribe, or territory may choose not to allow possession of some species of raptors otherwise allowed in this section."). Pursuant to that authority, California has implemented its own falconry regulations. *See* 14 Cal. Code Reg. § 670.

C. Federal Regulations Challenged in This Case

Plaintiffs challenge two portions of the federal falconry regulations contained in 50 C.F.R. § 21.29. First, § 21.29(d)(2)(ii) requires each falconry license holder to agree to permit their falconry facilities to be inspected without advance notice but in their presence at any reasonable time of day. Specifically, it states: "You must submit to your State, tribal, or territorial agency that regulates falconry a signed and dated statement showing that you agree that the falconry facilities and raptors may be inspected without advance notice by State, tribal (if applicable), or territorial authorities at any reasonable time of day, but you must be present."[2] Similarly, in § 21.29(d)(9), the regulation states that "[f]alconry equipment and records may be inspected in the presence of the permittee during business hours on any day of the week by State, tribal, or territorial officials."[3] Plaintiffs assert that these reasonable administrative search requirements violate their Fourth Amendment right to be free from unreasonable searches.

Second, in § 21.29(f)(8) and (9), certain restrictions are placed on the types of activities for which raptors may be used. In general, falconry license holders are not permitted to use their licensed raptors in performances, including filming or photography for movies or commercial ventures, unless the performance, filming, or photography has a connection to falconry or conservation education. Specifically, General and Master Falconers (or Apprentice Falconers under the supervision of a General or Master Falconer) are permitted to use licensed raptors in "conservation education programs presented

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[2] For falconry facilities that are located on land that is not owned by the falconry license holder, a similar statement must be signed: "If your facilities are not on property that you own, you must submit a signed and dated statement showing that the property owner agrees that the falconry facilities and raptors may be inspected by State, tribal (if applicable), or territorial authorities at any reasonable time of day in the presence of the property owner; except that the authorities may not enter the facilities or disturb the raptors unless you are present." 50 C.F.R. § 21.29(d)(2)(ii).

[3] In addition, 50 C.F.R. § 21.29(b)(4) indicates that federal officials may conduct a review of a State's, tribe's, or territory's falconry program "if complaints from the public or law enforcement investigations indicate the need for a review or for revisions to the State's, tribe's, or territory's laws, or falconry examination." Subsection (i) of that section indicates that the review can include "[i]nspecting falconers' facilities to ensure that the facilities standards in this section are met." *Id.* § 21.29(b)(4)(i).

in public venues." 50 C.F.R. § 21.29(f)(8). Any licensed raptor used in such an education program must be primarily used in falconry. *Id.* § 21.29(f)(8)(iii). Falconry license holders are permitted to charge a fee for presenting such programs up to the amount necessary to recoup their costs. *Id.* § 21.29(f)(8)(iv). Conservation education programs that use falconry raptors must provide information about the biology, ecological roles, or conservation needs of raptors and other migratory birds. *Id.* § 21.29(f)(8)(v). Licensed raptors may not be used to give presentations that do not address falconry and conservation education. *Id.*

Similarly, the use of licensed raptors in movies, commercials, or commercial ventures unrelated to falconry is prohibited. *Id.* § 21.29(f)(9)(i). This includes the use of licensed raptors for commercial entertainment, advertisements, as a representation of a business, company, corporation, or other organization, or for promotion or endorsements of products, services, meetings, or fairs. *Id.* § 21.29(f)(9)(ii). However, licensed raptors may be photographed and filmed "to make movies or other sources of information on the practice of falconry or on the biology, ecological roles, and conservation needs of raptors and other migratory birds," but license holders may not be paid for such filming. *Id.* § 21.29(f)(9). They may also be used to "promote or endorse a nonprofit falconry organization or association," and to "promote or endorse products or endeavors related to falconry," such as hoods, telemetry equipment, perches, materials for raptor facilities, falconry training and education materials, and scientific research and publication. *Id.* § 21.29(f)(9)(ii)(A) and (B).

Plaintiffs assert that the prohibitions in 50 C.F.R. § 21.29(f)(8) and § 21.29(f)(9) on using licensed falconry raptors in non-educational presentations or in commercial ventures unrelated to falconry or conservation education violate their First Amendment rights to free speech.[4]

LEGAL STANDARDS

To survive a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), a complaint "must contain sufficient factual matter . . . to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotations omitted). The complaint

[4] Plaintiffs also challenge certain California falconry regulations as violating the First and Fourth Amendments. The Federal Defendants did not promulgate and are not responsible for enforcing the California regulations and therefore do not address those regulations in this brief.

1 "must include something more than 'an unadorned, the-defendant-unlawfully-harmed-me accusation' or
2 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action.'" *Mayes v.*
3 *Kaiser Found. Hosp.*, 917 F. Supp. 2d 1074, 1078 (E.D. Cal. 2013) (quoting *Iqbal*, 556 U.S. at 678
4 (internal quotations omitted)). Although the Court "must construe the complaint in the light most
5 favorable to the plaintiff and accept as true the factual allegations of the complaint," *id.* at 1078, the
6 Court need not give such deference to "a legal conclusion couched as a factual allegation." *Papasan v.*
7 *Allain*, 478 U.S. 265, 286 (1986). A motion to dismiss must be decided on the basis of the allegations in
8 the complaint; other matters, such as affidavits that are submitted outside the four corners of the
9 complaint, cannot form the basis for denying a motion to dismiss. *See Schneider v. Cal. Dep't of Corr.*,
10 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) ("In determining the propriety of a Rule 12(b)(6) dismissal, a
11 court *may not* look beyond the complaint to a plaintiff's moving papers, such as a memorandum in
12 opposition to a defendant's motion to dismiss.").

13 A constitutional challenge to a statute or regulation can be either facial or as-applied. Facial
14 challenges "are 'the most difficult . . . to mount successfully.'" *City of Los Angeles v. Patel*, 135 S. Ct.
15 2443, 2449 (2015) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). "Typically, to succeed
16 on a facial attack, a challenger would need 'to establish that no set of circumstances exists under which
17 [the statute] would be valid, or that the statute lacks any plainly legitimate sweep.'" *United States v.*
18 *Sineneng-Smith*, 910 F.3d 461, 470 (9th Cir. 2018) (quoting *United States v. Stevens*, 559 U.S. 460, 472
19 (2010)). For facial challenges under the Free Speech Clause of the First Amendment, "a law may be
20 invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in
21 relation to the statute's plainly legitimate sweep." *Stevens*, 559 U.S. at 473 (internal quotations and
22 citations omitted); *see also Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998) ("An
23 ordinance may be facially unconstitutional in one of two ways: either [] it is unconstitutional in every
24 conceivable application, or [] it seeks to prohibit such a broad range of protected conduct that it is
25 unconstitutionally overbroad." (internal quotations and citations omitted)).

26 In contrast to a facial challenge, "[a]n as-applied challenge contends that the law is
27 unconstitutional as applied to the litigant's particular" circumstances, "even though the law may be
28 capable of valid application to others." *Foti*, 146 F.3d at 635; *see also Fortune Players Group, Inc. v.*

1 *Quint*, 2016 WL 4091401, at *6 (N.D. Cal. Aug. 2, 2016) ("In an as-applied challenge, 'there is a
2 narrow focus on the particular plaintiff's behavior and whether the statute is constitutional as applied to
3 her.'" (quoting *Roulette v. City of Seattle*, 97 F.3d 300, 312 (9th Cir. 1996))).
4 It is unclear which type of challenge plaintiffs are bringing in the FAC against the Federal
5 Defendants. They claim to bring both, but, as explained above, the Federal Defendants have delegated
6 authority over the falconry program to California. Moreover, no facts alleged in the FAC suggest that
7 the federal regulations are being applied to plaintiffs in an unconstitutional way. The only searches of
8 plaintiffs' homes identified in the complaint occurred in 1983, *see* ECF 16 ¶ 51, and 1992, *see id.* ¶ 82.
9 Nor are there facts suggesting that federal officials are likely to search plaintiffs' homes at any time in
10 the near future. With respect to the First Amendment claims, the allegations are likewise thin or non-
11 existence. Plaintiff Eric Ariyoshi alleges he "has given uncompensated educational presentations about
12 falconry," ECF 16 ¶ 76, but not that he intends to do so in the future. Plaintiff Timmons alleges he "has
13 been asked to perform educational presentations, including conservation education presentations, at the
14 same time that he is flying his birds for abatement," *id.* ¶ 94, but does not include additional details
15 about his future plans for such presentations. Finally, plaintiff American Falconry Conservancy alleges
16 that "certain members" "have declined to create photographs, movies, commercials, and other
17 expression," "have modified the content of their educational presentations," and "have declined to
18 perform educational presentations and engage in other expression" on account of the challenged
19 regulations. *Id.* ¶¶ 107-109. But it does not allege facts describing any planned future presentations. In
20 light of this ambiguity in the complaint, to the extent the Court believes plaintiffs should be permitted to
21 assert an as-applied challenge, plaintiffs should first be required to amend their complaint to provide the
22 required factual detail to enable the Federal Defendants to determine what specific federal conduct
23 plaintiffs allege has been, or is likely to be, applied to them in violation of the First or Fourth
24 Amendments.
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ARGUMENT

A. Plaintiffs' Fourth Amendment Claims Must Be Dismissed.

1. Plaintiffs' Fourth Amendment Claims Against the Federal Defendants Are Not Ripe.

The Constitution limits federal courts' jurisdiction to cases and controversies, which means, among other things, that a dispute must be sufficiently ripe to confer jurisdiction. *See, e.g.*, *United States v. Braren*, 338 F.3d 971, 975 (9th Cir. 2003). In a declaratory judgment action, such as this, there are two components to ripeness: constitutional ripeness and prudential ripeness. *Id.* Plaintiffs fail to allege facts showing that their Fourth Amendment claim against the Federal Defendants satisfies the test for constitutional ripeness, and this Court therefore lacks jurisdiction.

"The constitutional ripeness of a declaratory judgment action depends upon 'whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *Id.* (quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). "A claim is not ripe if it involves 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *United States v. Streich*, 560 F.3d 926, 931 (9th Cir. 2009) (quoting *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 580-81 (1985)).

Here, no facts are alleged to show that there is any immediate controversy between the Federal Defendants and plaintiffs with respect to the search regulations. The only searches mentioned in the complaint occurred in 1983 and 1992, *see* ECF 16 ¶¶ 51, 82, were allegedly performed by the California Fish & Game Department, not the Federal Defendants, and would have been performed under a different set of regulations than those currently in effect. *See* Migratory Bird Permits; Changes in the Regulations Governing Falconry, 73 Fed. Reg. 59,448 (Oct. 8, 2008) (current regulatory framework became effective on November 7, 2008). Moreover, the only administrative search authority the Federal Defendants have retained under the regulations is to conduct a review of California's falconry program, which can only be undertaken "if complaints from the public or law enforcement investigations indicate the need for a review or for revisions to [California's] falconry examination." 50 C.F.R. § 21.29(b)(4). But there is no allegation that such a review has occurred, is likely to occur, or is otherwise planned.

Such hypothetical, contingent facts render the Fourth Amendment challenge unripe. *Accord 18 Unnamed John Smith Prisoners v. Meese*, 871 F.2d 881, 883 (9th Cir. 1989) (finding Eighth and Fifth Amendment challenges to hypothetical plan to "double bunk" prisoners to be unripe, notwithstanding that the Bureau of Prisons had informed the institution of the coming policy change). This is especially true of any as-applied Fourth Amendment challenge to the Federal Defendants. There are simply no facts alleged that demonstrate any impending search is ever likely to be conducted by any federal official.[5]

2. The Administrative Search Permitted Under § 21.29 Is Permissible Under the Fourth Amendment.

Counts I and II of the FAC assert that 50 C.F.R. §§ 21.29(d)(2), 21.29(d)(4), and 21.29(b)(4)(i) violate plaintiffs' Fourth Amendment rights to be free from unreasonable searches and seizures. ECF 16 ¶¶ 112-130. Even if the Court concludes that these claims are sufficiently ripe, they must be dismissed because the searches authorized are valid administrative searches in a pervasively regulated industry. *See Rush v. Obledo*, 756 F.2d 713 (9th Cir. 1985).

In a line of cases beginning with *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) and *United States v. Biswell*, 406 U.S. 311 (1972), and continuing through *New York v. Burger*, 482 U.S. 691 (1987), "the Supreme Court approved warrantless inspection of commercial enterprises engaged in businesses closely regulated and licensed by the government." *Rush*, 756 F.2d at 718. The Supreme Court thereby recognized that "an individual choosing to accept a license and engage in a pervasively regulated business did so with the knowledge that he would be subject to effective inspection." *Id.* (citing *Biswell*, 406 U.S. at 316); *see also Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978) ("The businessman in a regulated industry in effect consents to the restrictions placed upon him."); *Burger*, 482 U.S. at 702 (holding that, in a pervasively regulated industry, "a warrantless inspection of commercial premises may well be reasonable within the meaning of the Fourth Amendment").

In analyzing the *Colonnade Catering/Biswell* line of authority, the Ninth Circuit has held that an administrative search program "which applies only to a single pervasively regulated industry, where

[5] Because the Fourth Amendment challenges fail the constitutional ripeness test, the Court need not address the prudential ripeness test.

1 urgent governmental interests are furthered by such regulatory inspections, does not violate the Fourth
2 Amendment." *Rush*, 756 F.2d at 719. This is true even if the industry does "not have a long history of
3 regulation." *See id.* The critical question is whether the industry is pervasively regulated. *See id.* at
4 719-20; *see also Donovan v. Dewey*, 452 U.S. 594, 606 (1981) ("[I]t is the pervasiveness and regularity
5 of the federal regulation that ultimately determines whether a warrant is necessary to render an
6 inspection program reasonable under the Fourth Amendment.").
7 When analyzing warrantless inspections of family day care homes under California law, the
8 Ninth Circuit found the inspection of private residences used as day cares to be valid under the Fourth
9 Amendment. *Rush*, 756 F.2d at 720. The court reasoned that "[t]he Legislature demonstrated its
10 conclusion that a warrant requirement would significantly frustrate effective enforcement of the statutes
11 and regulations governing family day care by requiring all inspections to be unannounced." *Id.* Given
12 the important state interests in protecting children from unsafe conditions in day care homes, the Ninth
13 Circuit "'defer[red] to this legislative determination' of the necessity of unannounced inspection." *Id.*
14 (quoting *Donovan*, 452 U.S. at 603).
15 The Ninth Circuit then analyzed "whether the statute's inspection program, in terms of the
16 certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant."
17 *Donovan*, 452 U.S. at 603; *see Rush*, 756 F.2d at 720. The court found that because "[t]he regulations
18 promulgated by the [state agency] completely regulate the environment in which family day care is
19 provided," a licensee under that regime "cannot help but be aware that he or she will be subject to
20 effective inspection." *Rush*, 756 F.2d at 721 (internal quotations omitted). It then turned to whether the
21 particular statutes and regulations authorizing the warrantless searches of child care facilities were
22 overbroad under the Fourth Amendment. It found that one statute, which authorized any search of a
23 child care facility at any time, failed to provide any guidance or limitations on how the searches would
24 be conducted and was, therefore, overbroad. *Id.* at 721-22. Another statute, however, was subject to
25 regulations which "restricts the areas to be searched to those where the children have access and limits
26 the hours at which searches may be conducted to those during which family day care takes place." *Id.* at
27 722. Given those limitations, the court upheld the statute, limited by its regulations, as consistent with
28

1 the Fourth Amendment. The court found that it "is . . . sufficiently precise and restrictive so as to
2 preclude general searches by state officials." *Id.*
3 The Ninth Circuit's analysis in *Rush* previewed the Supreme Court's later decision in *Burger*.
4 *Burger* established that a warrantless inspection program in a pervasively regulated industry "will be
5 deemed reasonable" when three criteria are met: (1) "there must be a 'substantial' government interest
6 that informs the regulatory scheme pursuant to which the inspection is made"; (2) "the warrantless
7 inspections must be necessary to further the regulatory scheme"; and (3) the regulatory regime must
8 advise the property owner "that the search is being made pursuant to the law and has a properly defined
9 scope, and it must limit the discretion of the inspecting officers." *Burger*, 482 U.S. at 702-03 (internal
10 quotations, citations, and alterations omitted).
11 Applying this line of cases to plaintiffs' Fourth Amendment challenge, the administrative
12 searches allowed by § 21.29 pass muster under the Fourth Amendment. To begin, falconry is highly
13 regulated. As noted above, § 21.29 establishes detailed requirements that touch on virtually every facet
14 of the practice of falconry. To paraphrase the Supreme Court, when an individual chooses to engage in
15 falconry "and to accept a federal license, he does so with the knowledge" that his relevant records and
16 falconry facilities "will be subject to effective inspection." *Biswell*, 406 U.S. at 316.
17 The other criteria for evaluating a warrantless regulatory inspection scheme under the Fourth
18 Amendment are also satisfied. First, there is a substantial government interest in protecting the raptor
19 species covered by the MBTA. The MBTA represents Congress's implementation of the United States'
20 international obligations under several international treaties, which by itself is a substantial
21 governmental interest. *See* 16 U.S.C. § 703(a). In addition, the federal government has a substantial
22 preservation and conservation interest in native raptor species. The Supreme Court has described the
23 protection of migratory birds as "a national interest of very nearly the first magnitude." *Missouri v.*
24 *Holland*, 252 U.S. 416, 435 (1920). Other federal courts likewise have found that the federal
25 government has a *compelling* interest in regulating these species. *See, e.g.*, *United States v.*
26 *Tawahongva*, 456 F. Supp. 2d 1120, 1132-35 (D. Ariz. 2006) ("In the context of cases asserting a
27 defense of freedom of religious exercise by Native American individuals to a violation of the Bald and
28

Golden Eagle Protection Act or the MBTA, the federal courts have concluded the protection of bald and golden eagles is a compelling government interest." (citing cases)).

Second, the warrantless inspection regime is necessary to further the regulatory goals. As in *Rush*, "a warrant requirement would significantly frustrate effective enforcement of the [applicable] statutes and regulations. *Rush*, 756 F.2d at 720. Requiring a warrant would cause an unavoidable delay, which would "impede the 'specific enforcement needs' of the statutes and regulations governing" falconry. *Id.* (quoting *Donovan*, 452 US. at 603).

Finally, the regulatory regime advises the property owner that the search is being conducted pursuant to the regulations, has a properly defined scope, and limits the discretion of the inspecting officers. The regulation specifically requires each falconry license holder to sign a statement indicating that they "agree that the falconry facilities and raptors may be inspected without advance notice" by the appropriate state officials. 50 C.F.R. § 21.29(d)(2)(ii). If the falconry facilities are located on property that the license holder does not own, the property owner also is required to submit the signed statement. *See id.* These requirements place the relevant property owners and license holders on notice that the search is being conducted pursuant to the regulations and defines the scope of the search to include only "the falconry facilities and raptors." *Id.* The regulation also limits the discretion of the inspecting officers. It requires any searches to be conducted only at a "reasonable time of day" and does not permit inspection unless the license holder as well as the property owner (if different) are present. *See id.*

Similar limitations were upheld in *Rush*, where the implementing regulations limited searches of child care facilities to areas where the children were located and times of day when children were being cared for under the license, notwithstanding that the areas to be searched were located within a person's private residence. *See Rush*, 756 F.2d at 722.[6]

[6] Count I and Count II of the FAC both point to 50 C.F.R. § 21.29(b)(4)(i) as violating the Fourth Amendment. That section permits the federal government to review a State's falconry program "if complaints from the public or law enforcement investigations indicate the need for a review or for revisions to the State's" laws or falconry program. 50 C.F.R. § 21.29(b)(4). It then indicates that the review "may involve" a number of items, including "[i]nspecting falconers' facilities to ensure that the facilities standards in this section are met." *Id.* § 21.29(b)(4)(i). Although this section does not specifically include the reasonable time of day and presence of licensee and property owner restrictions that are explicit in § 21.29(d)(2)(ii), it is most properly read to include them. Authority under § 21.29(b)(4)(i) is a substitute for a State's enforcement of the regulations, which does include those restrictions. Moreover, there is no indication anywhere in this record that California's falconry program

For these reasons, Count I of the FAC should be dismissed as to the Federal Defendants.

3. Plaintiff Katherine Stavrianoudakis' Claim Must Be Dismissed.

Count II of the FAC is brought solely by Katherine Stavrianoudakis. *See* ECF 16 ¶¶ 122-130. Katherine is the spouse of plaintiff Peter Stavrianoudakis. *See id.* ¶ 23. Although Peter has a falconry license, Katherine does not and never has. *See id.* ¶ 126. She alleges that her own Fourth Amendment rights are violated by the administrative search procedures set forth in § 21.29.

This argument must be rejected. For the reasons explained above, the administrative search procedures do not violate the Fourth Amendment. Nothing in that analysis is affected by the fact that an individual who does not possess a falconry license also may live at the location where the falconry facilities are located. For example, the Ninth Circuit in *Rush* gave no indication that the reasonableness of the home child care administrative searches at issue there was affected by the fact that other individuals, who were not licensed child care providers, might also live at the residences. To the extent this factor plays a role in the reasonableness determination, it is most properly considered in connection with whether there are defined limitations on the scope of the search and the discretion of the searching officers. As noted above, § 21.29 does not permit officers to search at any time of day or in any part of plaintiffs' property. It permits searches only at a reasonable time of day, in the presence of the license holder and property owner, and of those areas that constitute falconry facilities as well as the raptors themselves. In the context of an administrative search where individuals who are otherwise not subject to the search share the property with an individual who is subject to it, these limitations reasonably confine the scope of any searches that might occur.

In addition, the Supreme Court has "firmly establish[ed] that police officers may search jointly occupied premises if one of the occupants consents." *Fernandez v. California*, 571 U.S. 292, 294 (footnote omitted). Here, Peter Stavrianoudakis has made the decision to participate in falconry, which carries with it the obligation to permit inspections of the falconry facilities and falconry raptors as set forth in § 21.29. Because it is permissible under the Fourth Amendment for the regulation to allow these searches, Peter's decision to obtain a falconry license, and his consent to the conditions of that license, is

is likely to be subjected to federal review under this subsection.

sufficient to allow the administrative searches notwithstanding that Katherine also lives at the location. *Cf. United States v. Matlock*, 415 U.S. 164, 170 (1974) ("[T]he consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared."). Count II of the FAC therefore must be dismissed as to the Federal Defendants.

B. The First Amendment Claims Should Be Dismissed.

In Counts III through VI.A[7] of the FAC, plaintiffs present First Amendment challenges to various portions of the federal falconry regulations. These claims, like the Fourth Amendment claims, are not ripe with respect to the Federal Defendants. But even if they are, the applicable regulations restrict only conduct that falconry license holders are permitted to undertake with the regulated raptors, not protected speech. And even assuming that the regulations do restrict protected speech, several of them restrict only commercial speech in a constitutionally permissible way.

1. Plaintiffs' First Amendment Challenge Is Not Ripe With Respect to the Federal Defendants.

As with their Fourth Amendment claims, no facts are alleged in the FAC to find that plaintiffs' First Amendment claims against the Federal Defendants are ripe. "Neither the 'mere existence of a proscriptive statute' nor a 'generalized threat of prosecution' satisfies the 'case or controversy' requirement" in the First Amendment context. *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010) (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc)). "[F]or a claim to be ripe, the plaintiff must be subject to a '*genuine* threat of *imminent* prosecution.'" *Id.* (quoting *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1124 (9th Cir. 1996)). The Court must consider three factors when deciding whether a threat of prosecution is genuine: "(1) whether the plaintiff has articulated a concrete plan to violate the law in question; (2) whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings; and (3) the history of past prosecution or enforcement under the challenged statute." *Id.*

The FAC contains virtually no factual allegations at all concerning these factors for any of the plaintiffs. It says nothing with respect to Peter Stavrianoudakis' plans to conduct any presentations or

[7] The FAC has two counts labeled as Count VI. *See* ECF 16 ¶¶ 165-175; *id.* ¶¶ 176-181. This motion refers to the first (¶¶ 165-175) as Count VI.A and the second (¶¶ 176-181) as Count VI.B. Count VI.B presents a challenge to one of the California state regulations and is not addressed in this motion.

other protected speech that might be covered by the challenged regulations. *See* ECF 16 ¶¶ 47-66.[8] Eric Ariyoshi alleges that he has "given uncompensated educational presentations about falconry" but does not describe any facts suggesting he might give presentations or take other actions that would violate the regulations. *Id.* ¶ 76. Scott Timmons alleges that he has declined to give "educational presentations" in the past "because of the regulations that prohibit compensation for speaking that exceeds the amount required to recoup his costs," *id.* ¶ 94, but the FAC contains no details about the content of those presentations or whether he has plans to engage in such demonstrations in the future. Finally, the American Falconry Conservancy alleges that some of its members have declined opportunities to use their raptors in photographs, movies, commercials, and presentations, or have modified the content of their presentations, "due to Defendants' active enforcement of the regulations complained of in this action." *Id.* ¶¶ 107-109. But it makes no factual allegations concerning plans for future presentations, how the Federal Defendants have allegedly actively enforced or threatened to enforce the challenged regulations, or the specific content of the allegedly protected speech activity they plan to engage in.

Without additional factual details showing (1) plaintiffs' plans to engage in the allegedly restricted speech activities, (2) the Federal Defendants' intention to take action against plaintiffs as a result, and (3) the Federal Defendants' history of enforcing the challenged regulations as they relate to the First Amendment claims, plaintiffs' First Amendment claims against the Federal Defendants should be dismissed as unripe.

2. The Challenged Regulations Do Not Restrict Protected Speech.

Even if the Court concludes that the First Amendment challenges are ripe, the federal regulations that plaintiffs challenge under the First Amendment regulate conduct – *i.e.*, the activity that falconry license holders are permitted to allow their licensed raptors to undertake – rather than protected speech. Specifically, plaintiffs challenge the following regulations: (i) 50 C.F.R. § 21.29(f)(9)(i), which prohibits plaintiffs from using "falconry raptors to make movies, commercials, or in other commercial ventures that are not related to falconry" (Count III); (ii) 50 C.F.R. § 21.29(f)(9)(ii), which prohibits using "falconry raptors for commercial entertainment; for advertisements; as a representation of any

[8] Katherine Stavrianoudakis does not have a falconry license, *see* ECF 16 ¶ 66, and therefore is not subject to the regulations that form the basis of the First Amendment challenge.

business, company, corporation, or other organization; or for promotion or endorsement of any products, merchandise, goods, services, meetings, or fairs," except for promotion or endorsement of "a nonprofit falconry organization or association" as well as "products or endeavors related to falconry" (Count IV); (iii) 50 C.F.R. § 21.29(f)(8)(v), which permits the use of falconry raptors in conservation education programs presented in public venues only if certain information "about the biology, ecological roles, and conservation needs of raptors and other migratory birds" is provided, and prohibits the use of falconry raptors in presentations that do not address these subjects (Count V); and (iv) 50 C.F.R. § 21.29(f)(8)(iv), which prohibits falconry license holders from charging a fee for conservation education programs permitted under the regulations that exceeds "the amount required to recoup [the license holder's] costs" (Count VI.A). These claims must be dismissed because the regulations restrict only what types of raptors may be used to engage in specified conduct, and the use of these specific types of raptors to perform those activities is not expressive conduct protected by the Free Speech Clause of the First Amendment.

Each of the regulations challenged in Counts III, IV, V, and VI.A apply only to raptor species native to the United States and subject to the MBTA's licensing regulations. But the decision to use licensed raptors – as opposed to raptors that are not subject to the MBTA – to engage in the activities listed in the regulations is conduct that does not rise to the level of protected speech under the First Amendment. The Supreme Court "has eschewed a rule that 'all conduct is presumptively expressive.'" *Knox v. Brnovich*, 907 F.3d 1167, 1181 (9th Cir. 2018) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984)). Instead, "individuals claiming the protection of the First Amendment must carry the burden of demonstrating that their nonverbal conduct meets the applicable standard." *Id.* at 1181. To qualify as communicative conduct, a message must "in context, . . . reasonably be understood by the viewer to be communicative." *Clark*, 468 U.S. at 294.

Here, the regulations prohibit only the use of licensed raptors in certain specified conduct. They do not prohibit plaintiffs from using other types of non-native raptors that are not subject to the MBTA to engage in those activities. The regulations are, therefore, at most a restriction on the non-communicative decision of which type of raptor to use to perform certain actions. To show that this decision falls within the ambit of the First Amendment, plaintiffs must establish not only that they

1 "intend[] to convey a particular message through [the] conduct" of using a licensed raptor in these
2 activities, but also that "there is a 'great' likelihood 'that the message would be understood by those who
3 viewed it.'" *Vivid Entertainment, LLC v. Fielding*, 774 F.3d 566, 579 (9th Cir. 2014) (quoting *Spence v.*
4 *Washington*, 418 U.S. 405, 410-11 (1974) (per curiam)). Nothing in plaintiffs' complaint or in their
5 motion for preliminary injunction is directed toward any such showing.

6 More specifically, § 21.29(f)(9)(i) prohibits the use of "falconry raptors to make movies,
7 commercials, or in other commercial ventures that are not related to falconry." Section 21.29(f)(9)(ii)
8 likewise prohibits the use of falconry raptors for commercial entertainment, advertisements, to represent
9 any organization, or to promote or endorse products, services, or meetings, except nonprofit falconry
10 organizations or falconry-related products and services. And § 21.29(f)(8)(iv) prohibits charging a fee
11 beyond costs for conservation education programs, which plaintiffs assert is an undue burden on
12 protected speech. Non-native raptors are not subject to any of these regulations, however, and there are
13 no facts alleged in the complaint that native raptors are necessary to communicate plaintiffs' intended
14 messages or that the likely recipients of the messages would understand that a native raptor was
15 necessary to communicate the intended message.

16 Similarly, § 21.29(f)(8)(v) permits the use of raptors in public conservation education programs
17 only if the program addresses the biology, ecological roles, and conservation needs of the protected
18 raptors. But plaintiffs are not prohibited from giving presentations addressing any topics that they
19 choose using species not protected under the MBTA or that do not use raptors at all.

20 Because these regulations apply only to conduct that is not protected speech – *i.e.*, the use of
21 protected native raptors in certain activities – the First Amendment is not implicated.

22 **3. Even If the Challenged Regulations Involve Protected Speech,**
23 **§§ 21.29(f)(9)(i) and (ii) Are Permissible Regulations of Commercial Speech.**

24 Assuming that §§ 21.29(f)(9)(i) and 21.29(f)(9)(ii) regulate protected speech, these regulations
25 are constitutional restrictions of commercial speech. "Commercial speech is that 'which does no more
26 than propose a commercial transaction.'" *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 818 (9th Cir.
27 2013) (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762
28 (1976) (additional internal quotations omitted)). Sections 21.29(f)(9)(i) and (ii) are limited to such

commercial speech. For example, § 21.29(f)(9)(i) prohibits the use of falconry raptors to make "movies, commercials, or in other commercial ventures." Likewise, § 21.29(f)(9)(ii) prohibits the use of falconry raptors "for commercial entertainment; for advertisements; as a representation of any business, company, corporation, or other organization; or for promotion or endorsement of any products, merchandise, goods, services, meetings, or fairs," except for falconry-related endeavors. The use of licensed raptors in commercials, advertisements, endorsements of products, and the other activities listed in these regulations is, at most, speech "which does no more than propose a commercial transaction." *Va. State Bd. of Pharmacy*, 425 U.S. at 762.

To determine their constitutionality, commercial speech restrictions are subject to a four-part analysis referred to as "intermediate scrutiny," as established in *Central Hudson Gas & Electric Corp. v Public Service Commission of New York*, 447 U.S. 557 (1980). *See Retail Digital Network, LLC v. Prieto*, 861 F.3d 839, 841-42 (9th Cir. 2017) (en banc) (reaffirming applicability of *Central Hudson* framework to commercial speech in light of *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011)). First, the Court "must determine whether the expression is protected by the First Amendment." *Central Hudson*, 447 U.S. at 566. Second, the Court must "ask whether the asserted governmental interest is substantial." *Id.* Third, the Court "must determine whether the regulation directly advances the government interest asserted." *Id.* And fourth, the Court must ask whether "the measure is drawn to achieve that interest." *Sorrell*, 564 U.S. at 572. At step one of this test, §§ 21.29(f)(9)(i) and (ii) do not regulate protected speech, as noted in the preceding section. But assuming they do implicate speech, the remaining steps of the *Central Hudson* test are satisfied.

At the second step, the federal government has a substantial interest in protecting native raptor species,[9] including to discourage development of a commercial market for native raptors. The interest is so substantial that the United States has entered into multiple international treaties for this purpose. Courts have repeatedly recognized in analogous contexts that the government has a "compelling interest" in protected species under the MBTA. *See, e.g.*, *Holland*, 252 U.S. at 435 (describing the

[9] Plaintiffs appear to concede the government's substantial interest in regulating falconry raptors in their motion for preliminary injunction. ECF 17-1 at 21 ("Falconers do not now dispute that the government has an interest in protecting migratory birds.").

1 interest in protecting the species under the MBTA as "of very nearly the first magnitude"); *United States*
2 *v. Vasquez-Ramos*, 531 F.3d 987, 991 (9th Cir. 2008) (finding compelling government interest under the
3 Religious Freedom Restoration Act in preserving eagles under the MBTA).

4 The third step of the *Central Hudson* test is also satisfied. The regulation discourages the use of
5 protected raptors for commercial purposes that could cause abuse or misuse of the raptors to occur, or
6 that could cause a commercial market to develop. Development of a commercial market, in turn, will
7 create additional pressure to capture wild raptors, placing further strain on the protected species.
8 Protecting native raptors from these types of pressures directly advances the protection and conservation
9 objectives that animate the regulations.

10 Finally, the regulations also pass the fourth step of the *Central Hudson* test. The Supreme Court
11 and the Ninth Circuit both have recognized that the fourth step does not require the least restrictive
12 means necessary to achieve the stated governmental interest. *See Bd. of Trs. of State Univ. of N.Y. v.*
13 *Fox*, 492 U.S. 469, 480 (1989) ("What our decisions require is a fit between the legislature's ends and
14 the means chosen to accomplish those ends, [] a fit that is not necessarily perfect, but reasonable; . . .
15 that employs not necessarily the least restrictive means . . . ."); *Retail Digital Network*, 861 F.3d at 848
16 n.10. Here, the regulations are directed specifically to commercial endeavors, with a limited carve-out
17 for falconry-related undertakings. The prohibition is thus tailored to the specific interest that the federal
18 government has in protecting raptors covered by the MBTA, including protection from commercial
19 exploitation.

20 For these reasons, even if the challenged regulations involve protected speech, the prohibitions in
21 §§ 21.29(f)(9)(i) and (ii) are constitutional restrictions of commercial speech.

22 **C. Count VII of the FAC Must Be Dismissed.**

23 In Count VII of the FAC, plaintiffs challenge the federal falconry regulations under the
24 Administrative Procedure Act, 5 U.S.C. § 706(2)(C), as having been promulgated in excess of statutory
25 jurisdiction, authority, or limitations. *See* ECF 16 ¶¶ 182-187. They allege that the MBTA only grants
26 "authority, with a search warrant, to search any place," 16 U.S.C. § 706, and therefore implies that *all*
27 searches conducted pursuant to the MBTA must require a warrant. ECF 16 ¶ 184. This claim must also
28 be dismissed.

First, to the extent plaintiffs are arguing in this claim that the regulations have been promulgated in excess of authority because they are unconstitutional under the First or Fourth Amendments, that claim should be dismissed for the reasons outlined above.

Second, to the extent plaintiffs are arguing that the regulations have been promulgated in excess of authority because the statute does not grant authority to promulgate them, that argument lacks merit. On the contrary, 16 U.S.C. § 704(a) specifically grants the Secretary of the Interior authority "to adopt suitable regulations permitting and governing" the "hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or egg thereof." That is precisely what each of these regulations do.

Plaintiffs note that the MBTA does not specifically grant authority to the Secretary of the Interior to regulate falconry licensees' speech, ECF 16 ¶ 186, and that a different section of the MBTA only grants authority to conduct searches with a warrant. *Id.* ¶ 185. But an agency's interpretation of a statute that defines the scope of its authority is subject to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 878 F.3d 725, 733 (9th Cir. 2017). At step one of the *Chevron* analysis, the Court first determines "whether Congress has 'directly spoken to the precise question at issue.'" *Id.* (quoting *Chevron*, 467 U.S. at 842). If the statute is silent or ambiguous on the question, then at step two of the *Chevron* analysis, the Court "must respect the agency's interpretation so long as it 'is based on a permissible construction of the statute.'" *Id.* (quoting *Chevron*, 467 U.S. at 843).

Here, the statute specifically grants authority to the Secretary of the Interior to regulate taking, capture, possession, sale, purchase, shipment, transportation, and carriage of the protected species. It nowhere prohibits the regulation of the types of activities, such as use of raptors in commercial contexts, at issue in §§ 21.29(f)(8) or (f)(9) that plaintiffs challenge here. And although the statute specifically grants authority to conduct searches pursuant to warrants, that does not imply that the statute prohibits other reasonable searches without a warrant, consistent with the Fourth Amendment.[10] The statute does

[10] Under plaintiffs' theory that the statute's mention of authority to search with a warrant excludes the authority to conduct any searches without a warrant, other recognized exceptions to the warrant requirement – such as exigent circumstances or plain view – also would not apply. This is an absurd result with no basis in the statutory text.

1 not prohibit regulations that provide for reasonable searches with the license holder present to ensure
2 compliance with the conditions under which regulated raptors may be possessed.
3 Because the statute does not prohibit the regulations, the Secretary of the Interior's decision that
4 it had authority to implement these regulations is entitled to deference under *Chevron*.
5 * * * *
6 For the reasons stated above, plaintiffs' Fourth and First Amendment claims against the Federal
7 Defendants should be dismissed as unripe or, in the alternative, for failing to state a claim. The APA
8 claim likewise should be dismissed because the relevant regulations do not violate the relevant
9 constitutional provisions and because the statute expressly authorizes the Secretary of the Interior to
10 promulgate regulations such as these.
11 Respectfully submitted,
12 Dated: March 15, 2019 McGREGOR W. SCOTT
13 United States Attorney
14 By: */s/ Philip A. Scarborough*
15 PHILIP A. SCARBOROUGH
Assistant United States Attorney
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