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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

PETER STAVRIANOUDAKIS, ET AL., Plaintiffs, **v.** **U.S. DEPARTMENT OF FISH & WILDLIFE, ET AL.,** Defendants.	1:18-cv-01505-LJO-BAM **DIRECTOR OF CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT** Date: April 15, 2019 Time: 8:30 a.m. Courtroom: 4 Judge: The Honorable Lawrence J. O'Neill Trial Date: None Set Action Filed: 10/30/2018

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Defendant Charlton H. Bonham, in his official capacity as Director of California Department of Fish and Wildlife (Director), hereby moves to dismiss Counts I, II, and VI of the First Amended Complaint for Declaratory and Injunctive Relief (Complaint), pursuant to rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, as set forth below.

INTRODUCTION

Counts I, II, and VI of the Complaint (the only causes of action challenging California's falconry regulations) should be dismissed with prejudice. Counts I and II are facial challenges claiming California's falconry regulations violate the Fourth and Fourteenth Amendment because they authorize warrantless inspections of falconry raptors, facilities, equipment, and records. Both counts fail to state a claim against the Director because, as explained herein, in the context of the closely regulated sport of falconry, unannounced inspections are a reasonable, necessary compromise between the government's interest in protecting raptors and falconers' reasonable expectation of privacy.

The Fourth Amendment is ultimately about reasonableness; it only shields individuals from unreasonable intrusions, defined by reasonable expectations of privacy. Plaintiffs expectations are unreasonable here. There is no right to practice falconry. Falconry raptors are heavily protected and regulated under federal and state law. Indeed, the Migratory Bird Treaty Act makes falconry illegal altogether, unless done pursuant to comprehensive federal and state falconry regulations. Falconers know this regulatory reality going in.

The falconry regulations—including the certification a licensee must sign with their application—expressly notify a licensee that their falconry raptors, facilities, equipment, and records to are subject to unannounced inspections. With this in mind, a falconer chooses where to locate those items. If they choose to locate them in a part of their home, as plaintiffs do, they do so knowing that those locations may be subject to limited unannounced inspection.

In this regulatory context, it is unreasonable for falconers, such as plaintiffs, to nevertheless expect to circumvent the inspections they agreed to by simply choosing to locate their falconry raptors, facilities, equipment, and records in some portion of their home. That view is particularly unreasonable given the state's mandate to ensure the health and safety of these protected raptors

and the number of easily concealable violations under the falconry regulations that could remain undetected without unannounced inspections.

As set forth below, courts have held that in closely-regulated industries where there are easily concealable regulatory violations, such as in falconry, an exception to the Fourth Amendment's general warrant requirement exists, allowing for warrantless administrative inspections due to a reduced expectation of privacy. Thus, Counts I and II should be dismissed for failing to state a claim under the Fourth and Fourteenth Amendment. Additionally, as explained below, Counts I and II should be dismissed because they fail to meet the strict requirements of a facial challenge and to the extent they are as-applied challenges the counts are unripe and plaintiffs lack standing.[1]

Count VI of the Complaint should also be dismissed for failing to state a claim against the Director. Count VI alleges that the falconry regulations' limitations on the use of falconry raptors for commercial exhibiting is an unconstitutional restriction on plaintiffs' First Amendment rights. That count fails to state a claim against the Director because, as explained herein, the fact that the falconry regulations do not authorize commercial exhibition is not a limitation on speech. They are a limitation on activities authorized under a falconry license—a license only intended to authorize the sport of falconry. The falconry regulations do not bar plaintiffs from engaging in non-falconry activities such as commercial exhibition; plaintiffs simply need to get the appropriate permit(s) to engage in those activities. As such, Count VI should be dismissed for failing to state a claim under the First Amendment.

For all of these reasons, discussed in more detail below, Counts I, II, and VI of the Complaint fail to state a claim against the Director and should be dismissed with prejudice.

[1] As explained below, the Director also requests that Counts I and II of the Complaint be dismissed because they fail to meet the requirements of a facial challenge and, to the extent they are as-applied challenges, plaintiffs lack standing and those claims are unripe.

FACTUAL AND STATUTORY BACKGROUND

I. FALCONRY REGULATION IN THE UNITED STATES

This action challenges state and federal falconry regulations. Falconry is the sport of hunting wild prey using a trained raptor or bird of prey. Because falconry involves protected wildlife, it is highly regulated.

Raptors are protected by the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712. Under the Migratory Bird Treaty Act, no person can possess a raptor, except as permitted under the federal regulations that implement that Act. 16 U.S.C. § 703(a). The federal regulations implementing the Migratory Bird Treaty Act are set out in 50 C.F.R. § 21.29 (Section 21.29). Section 21.29 limits ownership of a bird for use in falconry to those persons who have met detailed requirements and obtained a permit from the appropriate local authority. Section 21.29 includes detailed requirements regarding the facilities in which falcons are kept and the equipment a falconer must maintain. 50 C.F.R. § 21.29(d)(1), (d)(3). Section 21.29 also requires falconers to report their acquisition or transfer of any falconry raptor. 50 C.F.R. § 21.29(t), (f)(4); *see also* 50 C.F.R. § 21.29(f)(13) (regulations governing disposition of dead raptors). Any person desiring a falconry license must also agree to unannounced inspection of their falconry raptors, facilities, and equipment. 50 C.F.R. § 21.29(d)(2)(ii), (9).

While Section 21.29's terms are limited to falconry standards and falconry permits, it also allows falconers to engage in limited activities associated with falconry. For example, under a falconry permit, falconers may use their falconry raptors in conservation or education programs regarding falconry and charge a fee for that program as long as the fee does not exceed the amount needed to recoup expenses. 50 C.F.R. § 21.29(f)(8). Additionally, under a falconry license, falconers may use their falconry raptors to make movies or to create other sources of information regarding the practice of falconry or the biological and ecological role of falcons. *Id.* § 21.29(f)(i). However, a falconry license alone is not sufficient to authorize commercial uses of falcons. *Id.* For example, falconers need to get a special purpose permit if they wish to use their

falconry raptors for abatement[2] or commercial exhibitions. 50 C.F.R. § 21.27; Final Permit Conditions for Abatement Activities Using Raptors, 72 Fed. Reg. 69705-01, 69705 (Dec. 10, 2007); *see also* Migratory Bird Permits; Changes in the Regulations Governing Falconry, 73 Fed. Reg. 59448-01, 59456 (Oct. 8, 2008).

While Section 21.29 sets out the comprehensive requirements for falconry permits, the federal government no longer issues those permits. Migratory Bird Permits, 73 Fed. Reg. at p. 59448. Instead, falconry permits are now issued by states, in accordance with that entity's own regulatory program.[3] While the state permitting program may be more restrictive than the federal standards, it may not be less restrictive. 50 C.F.R. § 21.29(b)(1)(ii). All permitting programs must be certified by the U.S. Fish and Wildlife Service as meeting federal standards. 50 C.F.R. § 21.29(b)(1)(i). Absent certification, there can be no state permitting program. And since it is unlawful to possess a falconry raptor unless that possession is authorized by the federal regulations, in the absence of a state permitting program, it is unlawful to practice falconry or possess a raptor for falconry purposes within a state. 50 C.F.R. § 21.29(a)(1).

II. FALCONRY REGULATION IN CALIFORNIA

California is one of the states that permits the sport of falconry. The regulations governing California's falconry licenses are at California Code of Regulations, title 14, section 670 (Section 670).[4] As required by federal law, Section 670 mirrors the requirements set out in the federal falconry regulations, including provisions authorizing unannounced inspections and educational falconry exhibiting. 50 C.F.R. § 21.29(b)(1)(ii); § 670(h)(13)(A), (j)(3)(A).

As required by federal law, California's regulations require a person applying for a falconry license to agree that the Department may conduct unannounced inspections of that person's falconry facilities. § 670(e)(2)(D); 50 C.F.R. § 21.29(d)(2)(ii). However, unannounced inspections are limited to falconry raptors, indoor or outdoor raptor housing facilities, equipment,

[2] In this context, abatement refers to the training and use of raptors "to flush, haze, or take birds…to mitigate depredation and nuisance problems…" Final Permit Conditions for Abatement Activities Using Raptors 72 Fed. Reg. 69705-01, 69705 (Dec. 10, 2007).

[3] Tribal authorities and territories may also have permitting programs for raptors. 50 C.F.R. § 21.29(1)(i).

[4] Unless otherwise indicated, all references herein shall be to Title 14 of the California Code of Regulations.

and records required to be kept by the licensee under the regulations. §670(e)(2)(D), (j)(3). Additionally, the unannounced inspections are further limited because they may only be conducted when the licensee is present and during a reasonable time of the day. §670(j)(3)(A). If the licensee refuses to be available to participate in an inspection or to allow an inspection, the Department may suspend the falconer's falconry license. *Id.* But such a suspension would be stayed pending appeal.[5] § 670(e)(9).

Since Section 670 is limited to licenses to engage in the sport of falconry, it does not address activities that may be conducted under other types of restricted species permits. Thus, as a general rule, if a falconer wants to use his raptor for a practice other than falconry, the falconer must get the appropriate permit for that activity. For example, if a falconer wants to use a falconry raptor for commercial exhibition in California, that falconer must first obtain a Restricted Species Permit for that activity. § 671.1(b)(6). And while Section 670 allows qualified falconers to receive payment for the use of their falconry raptors in commercial abatement activities, they must first obtain a federal Special Purpose Permit or Restricted Species Permit. § 670(h)(13)(C); *see also* 50 C.F.R. § 21.27; Final Permit Conditions, 72 Fed. Reg. at p. 69705.

Section 670 does authorize the use of falconry raptors in educational and media activities, as long as the licensee holds the appropriate federal permits, the raptor is primarily used for falconry, "the activity is related to the practice of falconry or biology, ecology or conservation of raptors and other migratory birds," and the activity is not done for profit. § 670(h)(13).

A. Amendment of California's Falconry Regulations

California's falconry regulations were last amended by the Fish and Game Commission in 2017. The purpose of these amendments was to clarify and update the regulations.

The unannounced inspection provision, § 670(j)(3)(A) (Unannounced Inspection Provision), was retained as being necessary to protect the health of the falconry raptors in captivity and California wildlife and because federal law requires that the Department have the

[5] The stay is automatic except where the violation relates to conduct that presents a threat to the state's public, wildlife, agriculture or the welfare of the falconry raptors, and the licensee is a repeat offender of the falconry laws. § 670(e)(9).

ability to conduct unannounced inspections. 50 C.F.R. § 21.29(b)(1)(i), (d)(2)(ii). California cannot have a falconry program unless that program is certified by the U.S. Fish and Wildlife Service as being at least as restrictive as the federal regulations. As a result, in the absence of the Unannounced Inspection Provision and a restriction on the commercial exhibiting of falcons, California could not issue falconry licenses and falconry would be illegal in this state. 50 C.F.R. § 21.29(a)(1), (b)(i)-(ii).

ARGUMENT

I. COUNTS I, II, AND VI OF THE COMPLAINT FAIL TO STATE A CLAIM AGAINST THE DIRECTOR AND SHOULD BE DISMISSED WITH PREJUDICE.

A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Procedure is proper when a complaint fails to state a claim – that is, fails to allege a "cognizable legal theory" or sufficient facts "to support a cognizable legal theory." *Caltex Plastics, Inc. v. Lockheed Martin Corp.*, 824 F. 3d 1156, 1159 (9th Cir. 2016). For purposes of Rule 12(b)(6), "claim" means a set of facts that, if established, entitle the pleader to relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While a Rule 12(b)(6) motion assumes the truth of the well pleaded allegations in the complaint, courts are not bound to accept legal conclusions as true, even if they are cast in the form of factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2017).

A. Counts I and II Fail to State a Claim Against the Director and Should be Dismissed With Prejudice.

Counts I and II of the First Amended Complaint (Counts I and II) appear[6] to be facial challenges to the Unannounced Inspection Provision (Cal. Code Regs., tit. 14, § 670(j)(3)(A)),

[6] The allegations supporting Counts I and II do not appear to be as-applied challenges as (1) they do not include an allegation that they are challenging the Unannounced Inspection Provision on its face and as applied as other Counts in the Complaint make clear and (2) because they do not contain any factual allegations that the Unannounced Inspection Provision was ever applied against plaintiffs. Rather, the only factual allegations regarding inspections are unsubstantiated allegations regarding inspections allegedly conducted years before the Unannounced Inspection Provision even existed. However, whether Counts I and II are only facial challenges is still somewhat unclear because plaintiffs' prayer for declaratory relief asks this Court to declare that the Unannounced Inspection Provision violates the Fourth and Fourteenth Amendment on its face and "as applied." Complaint at 21:4-6. Thus, to the extent Counts I and II of the Complaint are as applied challenges, the Department also asks the Court to dismiss both counts because Plaintiffs have not suffered an injury in fact and the claims are not ripe for adjudication. (See Part II.)

alleging the inspection provision violates the Fourth and Fourteenth Amendments of the U.S. Constitution on its face. Both of those counts fail to state a claim against DFW and should be dismissed because, as shown below, the Unannounced Inspection Provision does not violate the Fourth or Fourteenth Amendment; it is consistent with cases upholding warrantless administrative inspection programs when similar interests are involved.

The Fourth Amendment protects the right of the people to be secure in their "persons, houses, papers, and effects" against unreasonable searches and seizures. U.S. Const. amend. IV. The Fourth Amendment does not preclude all government intrusions; it only protects against unreasonable intrusions. *Donovan v. Dewey*, 452 U.S. 594, 599 (1981). The Fourth Amendment does not protect subjective expectations of privacy that are unreasonable or otherwise illegitimate. *New Jersey v. T.L.O*, 469 U.S. 325, 339 (1985). Thus, for the facial challenges in Counts I and II to state a claim, the allegations contained therein must demonstrate that the law authorizes unreasonable searches and seizures on its face. Neither count does that.

Rather, a legal analysis of the Unannounced Inspection Provision reveals that the provision is a reasonable and necessary compromise between the government's long-recognized substantial interest in protecting wildlife and a falconry licensee's reasonable expectation of privacy.

The Unannounced Inspection Provision, provides, in pertinent part:

> The department may conduct unannounced visits to inspect facilities, equipment, or raptors possessed by the licensee, and may enter the facilities of any licensee when the licensee is present during a reasonable time of the day and on any day of the week. The department may also inspect, audit, or copy any permit, license, book or other record required to be kept by the licensee under these regulations at any time.

As described below, the Unannounced Inspection Provision is consistent with other warrantless administrative inspection provisions that courts have found to be constitutional, including where the government's interest, as here, is to ensure the health of highly regulated animals. *See e.g., Lesser v. Espy*, 34 F. 3d 1301 (7th Cir. 1994).

While "[t]he Fourth Amendment generally requires [government agents] to secure a warrant before conducting a search," the Fourth Amendment's general warrant requirements is subject to a few exceptions. *Maryland v. Dyson*, 527 U.S. 465, 466 (1999). One such exception

is the "closely regulated industry" exception which the Supreme Court clarified in *New York v. Burger*, 482 U.S. 691 (1987).

In *Burger*, the Supreme Court reiterated what prior cases had found – due to the reduced expectation of privacy in a "closely regulated" industry, the Fourth Amendment's traditional standard of reasonableness allows for warrantless administrative inspections if four criteria are met. *Burger*, 482 U.S. at 700-02. The first criterion is that the government's regulation of the industry in question must be "pervasive." *Id.* at 700-02. Government regulation is considered "pervasive" if the regulatory presence is so comprehensive and defined that an individual in the industry cannot help but know that their property will be subject to inspections for specific purposes. *Id.* at 705, n. 16. This knowledge results in a reduced expectation of privacy which lessens what is required to meet the Fourth Amendment standard of reasonableness. *Id.* at 702. If the first criterion is met, a warrantless administrative search will be deemed reasonable if three other criteria are met. First, there must be a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made. *Id.* Second, the warrantless inspection must be necessary to further the regulatory scheme. *Id.* at 703. Third, the statute's inspection program must perform the two functions of a warrant: it must advise the owner of the premises that the search is being conducted pursuant to the law and within a properly defined scope; and it must limit the discretion of the inspecting officers. *Id.*

The Ninth Circuit has applied the closely regulated industry exception. *See e.g.*, *United States v. Orozco*, 858 F.3d 1204, 1210-1211 (9th Cir. 2017); *Rush v. Obledo*, 756 F.2d 713, 717-22 (9th Cir. 1985) (finding sufficiently limited warrantless administrative inspections in private residences engaged in closely regulated family day care do not violate the Fourth Amendment).

The Seventh Circuit's application of the exception to warrantless administrative inspections in *Lesser v. Espy*, 34 F.3d 1301 (1994) is particularly instructive because it involves closely regulated animals and similar governmental interests. In *Lesser*, the Court of Appeals applied the closely regulated industry exception to uphold the Animal and Plant Health Inspection Service's warrantless administrative inspections of rabbitries that breed and sell rabbits for use in scientific research under the Animal Welfare Act (7 U.S.C. §§ 2131-2159). In reaching that holding, the

court explained why each of the *Burger* exception's four criteria was satisfied. First, the court found that governmental regulation of rabbitries was pervasive because the Animal Welfare Act and its standards regulate many facets of rabbitry, including: (1) requiring a license and payment of a fee to engage in rabbitry; (2) precluding a rabbitry operator from transporting, purchasing, selling, housing, caring for, or handling rabbits without being subject to the Act; (3) requiring a rabbitry operator to make and maintain records concerning the purchase, sale, transportation, identification, and previous ownership of the rabbits; and (4) making a rabbitry operator subject to the loss of their license, civil penalties, and even criminal penalties for failure to comply with the Rabbitry Program. *Lesser*, F.3d at 1306-07. Second, the *Lesser* Court found the government had a substantial interest in regulating rabbitry because ensuring "clean" or healthy animals in scientific research would help advance "knowledge of cures and treatments for diseases and injuries that afflict both humans and animals across the nation." *Id.* at 1307-08. Third, the *Lesser* Court also found warrantless inspections were necessary to further the regulatory scheme. The court explained that if the government was to be successful in regulating the treatment of animals intended for use in research, it had to be allowed to inspect the facilities unannounced because "[i]n rabbit farming many of the potential deficiencies that would violate the Act can be quickly concealed." *Id.* at 1308. These easily concealable violations included: improper food storage, improper waste disposal, and unsanitary primary enclosures. *Id.* Finally, the *Lesser* Court also found that the fourth *Burger* criterion was met because the government's warrantless inspection scheme provided a constitutionally adequate substitute for a warrant and was limited in time, place, and scope. In making that finding, the court noted the inspection program alerted licensees that they would be subject to inspections, including warrantless ones; sufficiently defined the scope of inspections; and informed rabbitry dealers which government officials would conduct the inspections. *Id.* at 1308. The court also noted the warrantless inspection scheme limited inspections to "business hours" during the week and to subjects required by the Act and its regulations. *Id.* at 1308-09.

The above analysis from *Lesser* helps to demonstrate why the Unannounced Inspection Provision in this case satisfies *Burger*'s four-part closely regulated industry exception test.

1. The Unannounced Inspection Provision Satisfies the Closely Regulated Industry Exception.

a. Regulation of Falconry is Pervasive.

As in *Lesser*, the first *Burger* criterion, the pervasiveness of the regulation, is satisfied here. The Department's regulation of falconry is "pervasive" because falconry is subject to comprehensive state and federal regulation governing virtually every facet of falconry. For starters, as previously mentioned, the federal Migratory Bird Treaty Act bans falconry and the possession of falconry raptors unless its done pursuant to a state licensing program that is at least as restrictive as the federal falconry regulations. 50 C.F.R. § 21.29(a)(1), (b)(1)(ii). In order to get a falconry license, the falconry regulations require an individual to pass an exam; get a falconry license every 12 months; pay fees; and abide by all hunting laws and regulations to even engage in falconry (e.g., hunting licenses, seasons, bag limits, hunting hours). *See e.g.*, § 670(b)(12), (c), (e)(3), (e)(4)(A), (e)(7)(A)-(C). The regulations also require a falconer to keep a falconry license, a valid hunting license, and required stamps within their "immediate possession." § 670(a)(2). The falconry regulations also govern the transporting, purchasing, selling, housing, caring for, and handling of falconry raptors, and limit the number and type of falconry raptors a licensee can possess. *E.g.*, § 670(h), (e)(6)(A)(4), (e)(B)(2), (e)(C)(1)-(2), (g)(8)(A)-(J). The regulations also put falconers on notice that they are required to create and keep various types of falconry records and reports, which are also subject to inspection. § 670(e)(12) (general falconry record keeping), (f)(2) (hunting reports), (f)(3) (progress reports), (h)(7) (death and escape reports). And, as in *Lesser*, the falconry regulations also subject a falconry licensee to the loss of their license and civil and criminal penalties for failure to comply with the falconry scheme. § 670(e)(9); Fish and G. Code, § 12000.

The falconry regulations, including the falconry license application itself, expressly notify falconers that their falconry raptors, facilities, equipment, and records are subject to inspection, including possible warrantless administrative inspections under the Unannounced Inspection Provision. *E.g.*, § 670, (e)(6)(A)(5) (facility inspection after falconry exam passed); (j)(1) (facility inspection required prior to license issuing); (e)(7)(D) (facility re-inspection after

inspection failure); (j)(1)(E) (facility inspection if facility moved); (j)(3) (unannounced facility inspection of falconry raptors, facilities, equipment, and records); (e)(2)(D) (falconry application shall contain signed certification whereby applicant certifies they understand they are subject to the inspections, including unannounced inspections).

The above regulation is more than enough to establish that falconry regulation is "pervasive" under *Burger*.

2. The Government Has a Substantial Interest in Regulating These Protected Birds.

The second *Burger* criterion is also satisfied because the Department has a long-recognized substantial interest in protecting the state's wildlife, including the subject falconry raptors. The California Supreme Court has acknowledged the state's "great and compelling" interest in protecting and preserving the wildlife of the state for the benefit of all of the public and for future generations. *People v. Maikhio*, 51 Cal. 4th 1074, 1093-94 (2011). The *Maikhio* court found that the state has a compelling interest to regulate hunting or angling alone, even without the possession and use of restricted raptors that is involved in this case. *Id.* at 1093-94. The *Maikhio* court noted that the state's interest is longstanding and reflected in a number of constitutional and statutory provisions, as well as many judicial decisions. *Id.* at 1094, citing e.g., Cal. Const., art. I, § 25, art. IV, § 20, art. X B, §§ 1-16; Fish & G. Code §§ 1700, 1801; *Ex parte Maier*, 103 Cal. 476, 479-484 (1894); *Ex parte Kenneke,* 136 Cal. 527, 528-30 (1902); *In re Phoedovius,* 177 Cal. 238, 241-44 (1918).

Maikhio is not alone; the California Supreme Court has repeatedly recognized the importance of the state's goal of preserving and protecting its natural resources, such as falconry raptors possessed by licensed falconers. (*See e.g.*, *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 254 (1972); *see also National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 437 (1983) (the state, as trustee of the state's wildlife, has "duty to exercise continued supervision over the trust" to prevent parties from using the trust in a harmful matter). Indeed, "[i]t is beyond dispute that the State of California holds title to its tidelands and wildlife in public trust for the benefit of the people….[and] [t]he "'dominant theme'" of this state's obligation as trustee is its

"'duty to exercise continued supervision over the trust" to prevent parties from using the trust in a harmful matter. (*People v. Harbor Hut Restaurant,* 147 Cal. App. 3d 1151, 1154 (1983), quoting *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 437 (1983) (other citations omitted). The Legislature expressly recognized the need for DFW to regulate the importation, transportation, and possession of wild animals in section 2116.5 of the Cal. Fish and Game Code, in order to:

> Protect the health and welfare of wild animals captured, imported, transported, or possessed, to reduce the depletion of wildlife populations, to protect native wildlife and agricultural interests of this state against damage…and to protect the public health and safety in this state.

The falconry regulations, including the Unannounced Inspection Provision is one of the ways the Department carries out that legislative charge.

Indeed, because of this interest, the Department closely regulates falconry and its substantial governmental interest in doing so is not only embodied by the longstanding case law above, but by the comprehensiveness of the falconry regulations as well. Accordingly, the *Burger* exception's requirement for a substantial governmental interest is satisfied in this case.

3. Warrantless Administrative Inspections Are Necessary to Further the Regulatory Scheme.

Warrantless inspections under the Unannounced Inspection Provision are necessary to further the regulatory scheme because, as in *Lesser*, many violations of the falconry regulations are easily concealable. For example, falconry facilities are required to meet the housing standards in section 21, title 50 Code of Federal Regulations. § 670(j)(1). This includes several housing requirements that, just like in the case of rabbitry in *Lesser*, could be easily concealed without unannounced inspections. Specifically, some of the easily concealable violations include: improper waste disposal, unsanitary enclosures, no access to sunlight, no access to clean water, enclosure not large enough area for a raptor to fly and/or spread its wings, a lack of a suitable perch, failure to comply with tethering requirements, no bath container, no scales or balances to weigh raptors. 50 C.F.R. § 21.29(d) (setting forth a long, stringent, list of required housing requirements).

That is not all of the easily concealable violations. The regulations also limit the number and type of falconry raptors a falconer can possess. Such violations are also easily concealable. *See e.g.*, § 670 (e)(6)(A)(4), (B)(2), (C)(1)-(2), (8)(g)(A)-(J). If a falconer illegally possessed too many raptors or type(s) of raptor(s), they could quickly conceal those violations before any announced inspection took place (e.g., by moving illegally possessed raptors to a different location or even releasing them). While falcons are powerful, they are also very sensitive. As a result, it is vital that these housing requirements are complied with. The state's interest is not just limited to the captured falconry raptor, but also extends to wildlife to which an unhealthy escaped falconry raptor could spread disease. *See* Fish & G. Code § 2116.5. The need for unannounced inspections to enforce against such easily concealable violations is reflected by the Secretary of the Interior's promulgation of rules requiring unannounced inspections and decision to require states to include an unannounced inspection provision in their state falconry regulations. 50 C.F.R. § 21.29(a)(i)-(ii) (requiring state falconry licensing schemes to meet standards of federal falconry regulations and be at least as restrictive), (4)(i), (d)(2)(ii) (requiring unannounced inspection), (d)(9).

Given the state's strong interests, the needs of the falconry raptors, and all of the possible easily concealable violations, it is necessary for the Department to have the ability to conduct unannounced, warrantless inspections under the Unannounced Inspection Provision. At a minimum, the Department's authority to conduct the unannounced inspections serves as a necessary deterrent in situations involving easily concealable violations. Indeed, the Supreme Court acknowledged the need for surprise administrative inspections where, as here, the risk of easily concealable violations exists because of the deterrent effect the possibility of such inspections have. *United States v. Biswell*, 406 U.S. 311, 316 (1972). In *Biswell*, the high court observed that, in such cases, if inspection is to be effective and serve as a credible deterrent in such cases, unannounced inspections and the element of surprise are essential. "[T]he prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible." *Biswell*, 406 U.S. at 316.

4. The Inspection Program Provides a Constitutionally Adequate Substitute for a Warrant.

The fourth and final *Burger* criterion is also satisfied here because the falconry inspection program provides a constitutionally adequate substitute for a warrant. The program notifies licensees that they will be subject to inspections; sufficiently defines the scope of those inspections; and informs falconers which government officials were authorized to conduct the inspections. *Lesser*, 34 F.3d at 1308.

Just like the rabbitry inspection program in *Lesser*, the Unannounced Inspection Provision expressly notifies licensees that DFW may conduct unannounced inspections of their falconry raptors, facilities, equipment, and inspect, audit or copy any permit, license, book, or other record required to be kept under the falconry regulations wherever they are located. § 670(j)(3)(A).

The regulations are not the only form of notice licensees receive of possible unannounced inspections. The falconry license application itself also makes licensees aware that they are subject to unannounced inspections. Every falconry application requires licensees to sign the following certification that they understand that they are subject to the Unannounced Inspection Provision:

> I understand that my facilities, equipment, or raptors are subject to unannounced inspection pursuant to subsection 670(a), Title 14, of the California Code of Regulations.

§ 670(e)(2)(D). Thus, a licensed falconer has to know that they are subject to possible unannounced inspections as a result of their authority to possess a falconry raptor and the regulations that come with that.

As in *Lesser*, the falconry regulations also clearly define the scope of unannounced inspections. The Unannounced Inspection Provision, provides, in pertinent part:

> The department may conduct unannounced visits to inspect facilities, equipment, or raptors possessed by the licensee, and may enter the facilities of any licensee when the licensee is present during a reasonable time of the day and on any day of the week. The department may also inspect, audit, or copy any permit, license, book or other record required to be kept by the licensee under these regulations at any time.

§ 670 (j)(3)(A), emph. added. The regulations also notify a licensee that the unannounced inspections will be conducted by Department wildlife officers. Fish and G. Code § 37; § 670(j)(3).

As in *Lesser*, the Unannounced Inspection Provision reasonably limits the time, place, and scope of unannounced inspections. Specifically, the Unannounced Inspection Provision expressly limits the time, place, and scope of such inspections by (1) requiring the falconer to be present, (2) requiring the inspection to be "during a reasonable time of the day," (3) requiring the inspection to be conducted by Department wildlife officers; and (4) expressly delineating the scope of inspections to not be of the entire premises, but only of falconry raptors, facilities and equipment records, and records required to be kept under the regulations. § 670(j)(3)(A); Fish & G. Code § 37.

For all these reasons, the challenged Unannounced Inspection Provision satisfies each of the four criteria for the closely regulated industry exception set forth in *Burger*. Thus, the Unannounced Inspection Provision does not violate the Fourth and Fourteenth Amendment of the Constitution on its face. As a result, facial challenges Count I and II of the Complaint fail to state a claim against the Director and should be dismissed with prejudice.

5. The Unannounced Inspection Provision is Reasonable on its Face.

As established above, the Unannounced Inspection Provision satisfies the closely regulated industry exception to the Fourth Amendment's general warrant requirement and is therefore constitutional. However, even if it did not, the Unannounced Inspection Provision would still be constitutional under the Fourth Amendment's ultimate reasonableness standard, which largely depends upon an individual's reasonable expectation of privacy, the government's interest, and common sense. *Soldal v. Cook County*, 506 U.S. 56, 71 (1992) ("Reasonableness is still the ultimate standard under the Fourth Amendment."); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995) ("[T]he ultimate measure of the constitutionality of a governmental search is 'reasonableness.'"); (*People v. Maikhio*, 51 Cal. 4th 1074, 1093-94 (2011) (acknowledging state has compelling interest to regulate hunting or angling alone, even without the possession and use of restricted raptors as in this case). The Unannounced Inspection

Provision is a reasonable and necessary compromise between the government's long-recognized substantial interest in protecting wildlife and a falconry licensee's reasonable expectation of privacy.

Notably, though Count I and II of the Complaint are a facial challenge, they only focus on a single possible application of the Unannounced Inspection Provision to argue the Unannounced Inspection Provision constitutes an unreasonable intrusion. Specifically, plaintiffs' allegations focus on the application of the Unannounced Inspection Provision to falconry raptors, facilities, equipment, or records that a falconer knowingly chooses to locate in a part of their home or curtilage.

Though the question of whether the Unannounced Inspection Provision is constitutional on its face does not turn on one particular application, warrantless inspections of falconry raptors, facilities, equipment, and/or records that a falconer has knowingly decided to locate within an area of a home is reasonable in this context. It is reasonable to expect that when a person seeks and accepts a license to possess a protected raptor species, that is otherwise illegal to even possess, the licensee will be subject to pervasive regulation and, as a result, will have a reduced expectation of privacy. This is especially true where, as here, the licensing regulations and the license application the falconer signs expressly state that the licensee's falconry raptors, facilities, equipment, and records are subject to unannounced inspections of those things, regardless of where they choose to locate them. § 670(e)(2)(D), (j)(3). Indeed, in this situation, it is unreasonable for a person, who has notice and knowledge of this, to voluntarily accept a falconry license and then expect that they can avoid an unannounced inspection of them by locating them in an area of a home. *New Jersey v. T.L.O*, 469 U.S. 325, 339 (1985) (The Fourth Amendment does not protect subjective expectations of privacy that are unreasonable or otherwise illegitimate).

Moreover, while the home is subject to heighted protection it is not an absolute shield to reasonable inspections under the Fourth Amendment. In *Rush v. Obledo*, 756 F. 2d 713 (9th Cir. 1985), for example, the Ninth Circuit found that sufficiently limited warrantless administrative

searches in private residences engaged in closely regulated family day care do not violate the Fourth Amendment, where there are easily concealable regulatory violations. *Id.* at 717-22.

No one is required to have a falcon, be a falconer, or locate falconry raptors, facilities, equipment, or records in their home. Some falconers make an informed choice to do so, knowing the regulation that comes with it. Possible limited inspections under the Unannounced Inspection Provision are a reasonable, necessary compromise between the government's mandate to protect these raptors and a falconer's reduced expectation of privacy in the closely-regulated field of falconry.

The reasonableness of the Unannounced Inspection Provision and the falconry inspection program becomes even more apparent when one considers that if a particular application of the regulation is challenged, any suspension or revocation under the regulations is subject to an appeal provision that would stay any suspension or revocation of pending appeal. § 670(e)(11). Therefore, if the Unannounced Inspection Provision is actually applied to plaintiffs, and if they contend a specific application is unconstitutional under specific facts, they can appeal the inspection, before suffering any penalty.

In addition, a person subjected to a particular application of the regulation which they believe is unconstitutional as applied could challenge that inspection by bringing an as applied lawsuit. These plaintiffs have not done that here. That is because they do not and cannot allege the Unannounced Inspection Provision has even been applied to them. Rather, Counts I and II rely on unsubstantiated allegations about inspections that are alleged to have happened years before the subject Unannounced Inspection Provision even existed. *See e.g.*, Complaint at 7:12-14 (Plaintiff Peter Stavrianoudakis alleges he was subjected to unreasonable search in "approximately 1983," over three decades before the Unannounced Inspection Provision was adopted), 9:11-12 (Plaintiff Scott Timmons alleges Department officers approached him at his mother's property in "1992"—approximately 27 years before the Unannounced Inspection Provision was adopted—to inquire about a red-tailed hawk).

For all of these reasons, the Unannounced Inspection Provision does not violate the Fourth or Fourteenth Amendment and therefore the Court should dismiss Counts I and II of the Complaint with prejudice.

B. Counts I and II Should Be Dismissed Because They Do Not Satisfy the Requirements of a Facial Challenge.

A facial challenge is the most difficult challenge to mount successfully, since "[t]o bring a successful facial challenge outside of the First Amendment context, 'the challenger must establish that no set of circumstances exists under which the [regulation] would be valid.'" *U.S. v. Dang*, 488 F.3d 1135, 1142 (9th Cir. 2007), citing *U.S. v. Salerno*, 481 U.S. 739, 745 (1987); *see also Reno v. Flores*, 507 U.S. 292, 300-301 (1993). That a law or regulation might operate unconstitutionally under some circumstances is not enough to render it invalid against a facial challenge.

As set forth above, Count I and II of the Complaint fail to state a claim against the Director because the Unannounced Inspection Provision does not violate the Fourth or Fourteenth Amendment. However, even if that were not the case, Count I and II would still fail if there was even a single application of the Unannounced Inspection Provision that was constitutional. For example, this Court should still dismiss Counts I and II if it were to find that the Unannounced Inspection Provision could constitutionally be applied to falconry raptors, facilities, equipment, and records located at a school or on private property but not within a home or its curtilage. A decision on the constitutionality of those possible applications would not require a decision of the reasonable expectation of privacy when a falconer knowingly chooses to locate their falconry raptors, facilities, equipment, or records in a part of their home (despite the knowledge and expectation that those may be subject to unannounced inspections).

A finding that the Unannounced Inspection Provision could constitutionally be applied to any location would also require the dismissal of Counts I and II. In order for their facial challenge to survive, it is plaintiffs' burden, not the defendants', to establish that no set of circumstances or application exists under which the Unannounced Inspection Provision would be valid/constitutional. *U.S. v. Dang*, 488 F.3d 1135, 1142 (9th Cir. 2007). Therefore, the

Department alternatively requests that this Court dismiss Counts I and II with prejudice on the ground that they do not satisfy the requirements of a facial challenge.

C. Count VI Also Fails to State a Claim Against the Director and Should be Dismissed With Prejudice.

Count VI on page 19 of the Complaint fails to state a claim against the Director.[7] Count VI is a facial and as-applied challenge, alleging that Section 670 violates the First Amendment because it prohibits falconers from photographing or filming their birds unless the images will be used in a production related to falcons or falconry and the falconers do not profit from doing so. Complaint, at pp. 19-20. Count VI fails to state a claim under the First Amendment because it is based on a misinterpretation of the falconry regulations. Contrary to Plaintiffs' arguments, Section 670 does not ban any type of speech. Instead, it sets out the range of falconry activities that may be conducted under a recreational falconry license. If a falconer wants to engage in other types of activities, such as commercial exhibition of falconry raptors, then the falconer needs to get the appropriate permit.

By its plain language, Section 670 does not ban any speech. Instead, consistent with the federal regulations, it lays out the range of educational and exhibiting activities that falconry raptors can be used for under a recreational falconry license, stating:

> Education and Exhibiting. A licensee may use raptors in his or her possession for training purposes, education, field meets, and media (filming, photography, advertisements, etc.), as noted in 50 CFR 21, if the licensee possesses the appropriate valid federal permits, as long as the raptor is primarily used for falconry and the activity is related to the practice of falconry or biology, ecology or conservation of raptors and other migratory birds. Any fees charged, compensation, or pay received during the use of falconry raptors for these purposes may not exceed the amount required to recover costs. An Apprentice falconer may use the licensee's falconry raptor for education purposes only under the supervision of a General or Master falconer.

§ 670(h)(13); *see also* 50 C.F.R. § 21.29(f)(9). Thus Section 670 does not prohibit a falconer from exhibiting falconry raptors; it simply expands the types of activities that are authorized by a recreational falconry license. If a falconer wants to use falconry raptors for exhibiting or commercial uses other than those authorized by Section 670, the falconer needs to obtain an

[7] The Complaint erroneously contains two "Count VI"s, one on page 18 and one on page 19. This motion is aimed at the one on page 19, challenging Section 670(h)(13)(A).

appropriate permit for that activity, just like any other person who would like to use a raptor for exhibiting or commercial uses. § 671.1(b)(6).

The fact that state and federal regulations are not a ban on speech is illustrated by the U.S. Fish and Wildlife Service's regulatory notice regarding its 2008 amendments to its falconry regulations. At that time, some commenters objected that a falconry license should not be sufficient to permit a falconer to exhibit falconry raptors, even in the context of an educational presentation. These commenters explained that different permitting requirements are necessary to protect the safety of the birds and public when exhibiting falcons; therefore, all falconers should be required to get a special permit to exhibit falconry raptors, even when the exhibition relates to falconry. Migratory Bird Permits, 73 Fed. Reg. 59448-01, 59456 (Oct. 8, 2008). The federal Fish and Wildlife Service responded that falconers have been permitted to give educational presentations using their falconry raptors, as long as the falconry raptor is used primarily for falconry. Therefore, the Service did "not see that the requirements for another permit type are relevant here, because [the Service is] only allowing a secondary beneficial activity with falconry birds." *Id.*

Thus, Section 670 does not restrict speech. Instead, it expands the scope of activities that falconers can do with falconry raptors under a recreational falconry license. If a falconer wants to use falconry raptors in other types of activities, such as expanded educational or commercial activities, the Regulation does not prevent them from doing so; they just need to get the proper permit.

II. TO THE EXTENT COUNTS I OR II ARE AS APPLIED CHALLENGES, THEY SHOULD BE DISMISSED BECAUSE THIS COURT LACKS SUBJECT MATER JURISDICTION TO DECIDE THEM AND THEY ARE UNRIPE.

Under Article III of the United States Constitution, federal courts may only adjudicate actual cases or controversies; they may not issue advisory opinions. U.S. Const. art. III, § 2, cl. 1; *Rhoades v. Avon Products, Inc.*, 504 F.3d 1151, 1157 (9th Cir. 2007). Federal courts do not have the power to decide questions of law in a vacuum. *SEC v. Medical Committee for Human Rights*, 404 US 403, 407 (1972). To establish a "case or controversy," within the meaning of Article III, a plaintiff must show an "injury in fact" that is concrete and particularized, actual or imminent,

not conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 555-556 (1992). Article III standing requirements are "rigorous;" those who do not have Article III standing may not litigation in federal court. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475-476 (1982). Further, the Court's subject matter jurisdiction is limited to matters "ripe" for adjudication, and if a case is not ripe, it should be dismissed. Fed. R. Civ. P. 12(b)(1); *Chandler v. State Farm Mutual Automobile Insurance Co.*, 598 F.3d 1115, 1121, 1122 (9th Cir. 2010).

Because Article III's "standing" and "ripeness" requirements limit subject matter jurisdiction, they are properly challenged by a motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. *Lujan*, 504 U.S. at 555-556; *Chandler*, 598 F.3d at 1122. When a defendant brings a motion to dismiss pursuant Rule 12(b)(1), it is the plaintiff's burden to establish the federal court's jurisdiction. *Rattlesnake Coal v. U.S. EPA*, 509 F.3d 1095, 1102, n.1 (9th Cir. 2007); *Del Puerto Water Dist. v. U.S. Bureau of Reclamation*, 271 F. Supp. 2d 1224 (E.D. Cal. 2003). In fact, because federal courts have limited jurisdiction, the Court must presume lack of jurisdiction until the plaintiff proves otherwise. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 376-78 (1994).

Counts I and II of the Complaint do not appear to be as applied challenges because they do not include an allegation that they are challenging the Unannounced Inspection Provision both on its face and as applied as other Counts in the Complaint do. Further, they also do not contain allegations that the current Unannounced Inspection Provision was ever applied against plaintiffs, only allegations that the Department conducted inspections years before the Unannounced Inspection Provision even existed. *See e.g.*, Complaint, at 7:12-14 (Plaintiff Peter Stavrianoudakis alleges he was subjected to unreasonable search in "approximately 1983," over three decades before the Unannounced Inspection Provision was adopted), 9:11-12 (Plaintiff Scott Timmons alleges Department officers approached him at his mother's property in "1992"—approximately 27 years before the Unannounced Inspection Provision was adopted—to inquire about a red-tailed hawk). However, the question of whether Count I and II are as-applied challenges is still somewhat unclear because plaintiffs' prayer for declaratory relief asks this

Court to declare that the Unannounced Inspection Provision violates the Fourth and Fourteenth Amendment on its face and "as applied." Complaint, at 21:4-6.

Because Counts I and II of the Complaint do not contain any factual allegations that the Unannounced Inspection Provision has ever been applied to plaintiffs they have not suffered an "injury in fact" and, thus, there is no "case" or "controversy" under Article III. Further, there are no factual allegations upon which to base an as applied challenge on, and, as a result, the counts are unripe. Therefore, to the extent Counts I and II are as-applied challenges, they should be dismissed because plaintiffs lack standing and because the counts are not ripe for adjudication.

CONCLUSION

For all of these reasons, Counts I, II, and VI of the Complaint should be dismissed as to the Director with prejudice.

Dated: March 15, 2019

Respectfully Submitted,

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