ANTHONY L. FRANÇOIS, Cal. Bar No. 184100
Email: TFrancois@pacificlegal.org
TIMOTHY R. SNOWBALL, Cal. Bar No. 317379
Email: TSnowball@pacificlegal.org
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

JAMES M. MANLEY, Ariz. Bar No. 031820* (*Pro Hac Vice*)
Email: JManley@pacificlegal.org
Pacific Legal Foundation
3217 E. Shea Blvd., # 108
Phoenix, Arizona 85028
Telephone: (916) 288-1405
Facsimile: (916) 419-7747

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

PETER STAVRIANOUDAKIS, et al.,

Plaintiffs,

v.

UNITED STATES FISH & WILDLIFE SERVICE, et al.,

Defendants.

No. 1:18-cv-01505-LJO-BAM

OPPOSITION TO MOTIONS TO DISMISS

DATE: April 11, 2019
TIME: 9:00 a.m.
COURT: Courtroom 4, 7th Floor
2500 Tulare Street
Fresno, CA 93721
JUDGE: Hon. Lawrence J. O'Neill

*Licensed to practice law in Arizona and Colorado. Not licensed to practice law in California.

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INTRODUCTION

Plaintiffs Peter Stavrianoudakis, Eric Ariyoshi, Scott Timmons, and American Falconry Conservancy (Falconers) and Katherine Stavrianoudakis (*in toto* Plaintiffs) allege in their First Amended Complaint (FAC), ECF No. 16, that state and federal falconry regulations authorizing warrantless searches of their homes and curtilage[1] violate both their property and privacy rights under the Fourth Amendment. *See, e.g.*, *id*. ¶¶ 32–33, 116–117, 126. The FAC also alleges that the regulations' content-based restrictions on expressive activities Falconers can engage in while flying or holding their birds violate their rights to free speech under the First Amendment. See, *e.g.*, *id*. ¶¶ 39–41, 134–139. Additionally, the FAC alleges that the promulgation of the federal rules exceeded the authority of the Secretary of the U.S. Fish and Wildlife Service under § 706 of the Administrative Procedure Act. *Id.* ¶¶ 8, 184–86.

Plaintiffs seek a preliminary injunction on their constitutional claims. ECF No. 17. Defendants United States Fish and Wildlife Service and its Principal Deputy Director Margaret Everson (Service) and the Director of the California Department of Fish and Wildlife Charlton H. Bonham (Department) moved to dismiss the FAC for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim under Rule 12(b)(6). *See* Service's Motion to Dismiss, ECF No. 24; Department's Motion to Dismiss, ECF No. 25.

I. Motion to Dismiss Standard

A motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) will only be granted if a complaint fails to allege facts sufficient to establish subject matter jurisdiction. *See Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003). Standing under Article III of the U.S. Constitution is a prerequisite to subject matter jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02, (1998). The related doctrine of ripeness allows federal courts to dispose of matters involving injuries that are too speculative and may never occur.

[1] A home's curtilage, the area "immediately surrounding and associated with the home," is "part of [the] home itself for Fourth Amendment purposes." *Oliver v. United States*, 466 U.S. 170, 180 (1984).

Dismissal under Rule 12(b)(6) for failure to state a claim is only proper where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1988).

When reviewing Defendants' motions to dismiss under Rules 12(b)(6) and (b)(1), this Court must "accept all well-pleaded allegations of material fact as true and construe them in the light most favorable to the nonmoving party." *Sateriale v. R.J. Reynolds Tobacco Co.*, 697 F.3d 777, 783 (9th Cir. 2012); *Cervantez v. Sullivan*, 719 F. Supp. 899, 903 (E.D. Cal. 1989), *rev'd on other grounds*, 963 F.2d 229 (9th Cir. 1992) ("If the challenge to jurisdiction is a facial attack, i.e., the defendant contends that the allegations of jurisdiction contained in the complaint are insufficient on their face to demonstrate the existence of jurisdiction, the plaintiff is entitled to safeguards similar to those applicable when a Rule 12(b)(6) motion is made."). Plaintiffs have the burden of proving jurisdiction. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010); *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989).

Ultimately, Defendants bear the burden of proving that the challenged regulations do not violate the Constitution. *See, e.g., Destination Ventures, Ltd. v. FCC*, 46 F.3d 54, 55–56 (9th Cir. 1995) (finding that the government held the burden of demonstrating the "reasonable fit" and thus the constitutionality of a regulation on commercial speech). Plaintiffs must rebut any evidence offered by Defendants, but at the motion to dismiss stage, this Court "must assume that [Plaintiffs] can, even if it strikes [this Court] 'that a recovery is very remote and unlikely.'" *Dias v. City and County of Denver*, 567 F.3d 1169, 1184 (10th Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009) (quotation omitted); *Neilson v. Union Bank of California*, 290 F. Supp. 2d 1101, 1151 (C.D. Cal. 2003) (same).

Accepting the truth of the allegations in the FAC, and drawing all inferences in the light most favorable to Plaintiffs, this Court should deny Defendants' motions to dismiss.

II. All of Plaintiffs' Claims are Justiciable

By omitting and misconstruing relevant facts, Defendants attempt to raise ripeness arguments. Service's Memo. in Support of Mot. to Dismiss, ECF No. 24-1 at 8–9, 14–15; Department's Memo. in Support of Mot. to Dismiss, ECF No. 25-1 at 20–22. Both Defendants argue that the regulations have not been applied to Plaintiffs, and the Service argues that it does not enforce any regulations at all. ECF No. 24-1 at 8–9; ECF No. 25-1 at 20–22. As explained in the following subsections, Plaintiffs who hold falconry licenses suffer constitutional injury continuously because they are required to waive their Fourth Amendment rights as a condition of falconry licensure. *See Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595, 607 (2013). Additionally, all Plaintiffs—regardless of licensure status—suffer a continuous constitutional injury because of the open-ended threat of unreasonable warrantless searches of their homes and curtilage. *See Melendres v. Arpaio*, 695 F.3d 990, 998–999 (9th Cir. 2012).

As for the Service's argument that it has nothing to do with enforcement of federal falconry regulations, ECF No. 24-1 at 8:17–19, the Department and *amicus* North American Falconry Association (NAFA), ECF No. 33 at 9:13–19, helpfully explain why this is not the case. Put simply, any enforcement of the state regulations is required by the federal regulations. This is because the state falconry regulations challenged herein were passed to mirror the federal regulations, and the Department zealously enforces the state regulations because "federal law requires that the Department have the ability to conduct unannounced inspections" and to enforce the speech restrictions. ECF No. 25-1 at 5:26–6:1. But the Department need not—indeed, must not—follow the federal regulations if they are enjoined as unconstitutional. The Department's and NAFA's fears that falconry might be thrust into legal limbo in California, *id*. at 6:3–6, ignore the relief requested by Plaintiffs, which does not risk that result. Enjoining enforcement of the offending provisions of both sets of regulations prevents regulatory inconsistency—and frees Plaintiffs from this double regulatory burden.

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A. Fourth Amendment Claims

Plaintiffs plead cognizable facial and as-applied Fourth Amendment challenges to the defendants' purported authority to conduct warrantless searches of their homes and curtilage. The Supreme Court has clarified that "facial challenges under the Fourth Amendment are not categorically barred or especially disfavored." *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 2449 (2015). The Court has entertained facial challenges under the Fourth Amendment to warrantless search provisions, *see, e.g.*, *Vernonia School District 47J v. Acton*, 515 U.S. 646, 648 (1995), and, where appropriate, declared provisions facially invalid under the Fourth Amendment, *see, e.g., Chandler v. Miller*, 520 U.S. 305, 308–09 (1997).

An argument "that facial challenges to statutes authorizing warrantless searches must fail because such searches will never be unconstitutional in all applications" is foreclosed by *Patel*, 135 S. Ct. at 2450. Such a categorical approach would "preclude facial relief in every Fourth Amendment challenge to a statute authorizing warrantless searches," which would run directly counter to precedent demonstrating that "facial challenges to statutes authorizing warrantless searches can be brought, [and] that they can succeed." *Id.* at 2451. *See also Airbnb, Inc., v. City of New York*, 2019 WL 91990, at *1 (S.D.N.Y. 2019), *appeal docketed*, No. 19-288 (2nd Cir. 2019); *MS Rentals, LLC v. City of Detroit*, 2019 WL 962130, at *1 (E.D. Mich. 2019). "[W]hen addressing a facial challenge to a statute authorizing warrantless searches, the proper focus of the constitutional inquiry is searches that the law actually authorizes, not those for which it is irrelevant." *Patel*, 135 S. Ct. at 2451. *See also Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 894 (1992) ("The proper focus of the constitutional inquiry is the group for whom the law is a restriction …."). Claims for facial relief under the Fourth Amendment are only unlikely to succeed "when there is substantial ambiguity as to what conduct a statute authorizes," *Patel*, 135 S. Ct. at 2450 (citing *Sibron v. New York*, 392 U.S. 40, 59–61 (1968)).

There is no such ambiguity here. The warrantless search regulations challenged by Plaintiffs authorize the warrantless search of the homes and curtilage of all falconry license holders, as well as non-license holders sharing the same home and curtilage, 50 C.F.R. § 21.29(b)(4)(i), 14 C.C.R. § 670(j)(3)(A), in addition to authorizing the warrantless search of all license holders' papers

related to their falconry licenses, and their personal effects (their birds), 50 C.F.R. § 21.29(d)(2) and (d)(9). This fact is undisputed. Defendants admit—and indeed attempt to justify—their purported authority to conduct warrantless searches of all licensees' homes in which falconry birds are housed. *See* ECF No. 24-1 at 9:13 ("[T]he searches authorized are valid administrative searches in a pervasively regulated industry …."); ECF No. 25-1 at 1:23–24 ("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" warrantless searches). *See also* ECF No. 16 ¶ 6 (noting the common practice of housing falconry birds in and around the home). Plaintiffs' "houses, papers, and effects," are all specifically protected by the Fourth Amendment, and claims for relief are available to falconry license holders and non-license holders under both the property-based approach to the Fourth Amendment, *see, e.g.*, *United States v. Jones*, 565 U.S. 400 (2012), and the privacy-based approach, *see, e.g.*, *Patel*, 135 S. Ct. at 2443.

Defendants' argument that the warrantless search provisions might constitutionally be applied to other locations outside the home and protected curtilage is "irrelevant." *See Patel*, 135 S. Ct. at 2451. It makes no legally significant difference that the warrantless search provisions could be constitutionally applied in the context of "a school or on private property but not within a home or its curtilage." ECF No. 25-1 at 18. Plaintiffs bring a facial challenge to the warrantless search regulations in the context of *private homes and curtilage*, not in any other irrelevant context.

Plaintiffs, both as licensed falconers and non-licensees whose Fourth Amendment rights are nonetheless threatened, plead cognizable as-applied Fourth Amendment challenges to the defendants' purported authority to conduct warrantless searches. The plaintiffs who are licensed falconers all house their birds within their own homes or curtilage which, contrary to the Department's assertions, *see, e.g.*, ECF No. 25-1 at 16:19–22, is the common practice in the falconry community, *see* ECF No. 16 ¶¶ 61–62, 74, 90.

Examples of past warrantless searches, ECF No. 16 ¶¶ 12–14, 82, provide helpful context but are not directly relevant to Plaintiffs' ongoing injuries, which flow from the application of the warrantless search regulations themselves. As the Ninth Circuit recognized in *Melendres*, 695 F.3d at 998–99, the Defendants' pattern or practice of conducting warrantless searches under these rules,

combined with their claimed authority to do so as to the Plaintiffs, *see* ECF No. 25-1 at 10; ECF No. 24-1 at 9, creates a sufficient likelihood of individualized injury to sustain their claims for equitable relief under the Fourth Amendment. *See Melendres*, 695 F.3d at 998–99.

In addition, Falconers are subjected to an unconstitutional exercise of government power as a condition of licensure, and this coerced consent is itself a constitutional injury. *See* ECF No. 16 ¶ 18; *Koontz*, 570 U.S. at 607 ("[When] someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury."); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 & n.3 (1989). The unconstitutional conditions doctrine holds that a government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold the benefit altogether. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). "The doctrine [of unconstitutional conditions] is especially important in the Fourth Amendment context." *United States v. Scott*, 450 F.3d 863, 867 (9th Cir. 2006). Since warrantless searches are a condition of issuing falconry licenses, that condition inflicts a fresh injury each year Falconers renew their licenses. *See* ECF No. 16 ¶¶ 101–02 (discussing the unconstitutional condition applied to all members of Plaintiff American Falconry Conservancy).

The Service's argument as to the alleged consent of Plaintiff Katherine Stavrianoudakis is equally without avail. *See* ECF No. 24-1 at 13–14:26, 1 ("Peter's [Katherine's husband] decision to obtain a falconry license, and his consent to the conditions of that license, is sufficient to allow the administrative searches notwithstanding that Katherine also lives at the location."). The unconstitutional conditions doctrine hinges on the impermissibility of government coercion to achieve "consent." *Perry*, 408 U.S. at 597. Since Katherine's husband Peter is being coerced to give up his Fourth Amendment rights, he cannot validly give consent, and hence cannot consent on behalf of his non-falconry-licensed spouse, who simply wishes to live without fear of her rights being violated by virtue of her marriage to a licensed falconer. Absence of free consent is the most basic principle of the unconstitutional conditions doctrine.

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For all of the above reasons, Plaintiffs allege both cognizable and ripe as-applied and facial challenges to Defendants' purported authority to conduct warrantless searches of their homes and curtilage in violation of their Fourth Amendment property and privacy rights.

B. First Amendment Claims

Plaintiff Falconers plead cognizable facial and as-applied First Amendment challenges to the Defendants' purported authority to restrict their speech regarding a sport they love. The Department does not argue that Falconers lack standing to bring their First Amendment claims; the Service argues that Falconers have failed to allege "factual details showing [] plaintiffs' plans to engage in the allegedly restricted speech activities." ECF No. 24-1 at 15:14–15. But the FAC shows this is not so. As detailed below, Falconers allege that they have refrained from engaging in speech activities governed by the challenged regulations, which they otherwise would engage in absent the regulations. ECF No. 16 ¶¶ 76, 94, 107–09.

The Ninth Circuit has held on many occasions that "First Amendment cases raise 'unique standing considerations,' that 'tilt[] dramatically toward a finding of standing.'" *Lopez v. Candaele*, 630 F.3d 775, 781 (9th Cir. 2010) (citations omitted). In the First Amendment context, "an individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court." *Hunt v. City of Los Angeles*, 638 F.3d 703, 710 (9th Cir. 2011). That sort of facial challenge "may be paired with the more common as-applied challenge, where a plaintiff argues that the law is unconstitutional as applied to his own speech or expressive conduct." *Santa Monica Food Not Bombs v. City of Santa Monica (Food Not Bombs)*, 450 F.3d 1022, 1033–34 (9th Cir. 2006) (citations omitted). *See also Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998). Such is the case here.

It is unnecessary for a plaintiff to violate a speech restriction in order to challenge it; indeed, "it would turn respect for the law on its head for us to conclude that [a plaintiff] lacks standing to challenge the provision merely because [a plaintiff] chose to comply with the statute and challenge its constitutionality." *Ariz. Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1007 (9th Cir. 2003). Rather than requiring lawlessness, the Ninth Circuit has held that standing for First

Amendment claims exists where a pre-enforcement plaintiff shows that he altered his expressive activities to comply with the laws at issue and alleges reasonable apprehension that those laws would be enforced against him. *Santa Monica Food Not Bombs*, 450 F.3d at 1034; *Bayless*, 320 F.3d at 1006; *Lopez*, 630 F.3d at 790. Both factors are satisfied here. There is no question that the Department zealously enforces the falconry regulations, at the behest of the Service. Plaintiffs' FAC alleges enforcement, ECF No. 16 ¶¶ 20, 27–29, 107–09, which is all that is needed at the motion to dismiss stage. *See Sateriale*, 697 F.3d at 783. But the Department also boasts that it enforces the regulations. ECF No. 25-1 at 3–6.

There is also no question that Defendants' zealous enforcement of the falconry regulations has caused Falconers to refrain from speaking, and that lifting the regulations would free them to speak. The Service acknowledges that Plaintiffs Eric Ariyoshi, Scott Timmons, and members of the American Falconry Conservancy have all engaged in "educational presentations about falconry" and "declined to create photographs, movies, commercials, and other expression," as alleged in the FAC, ECF No. 16 ¶¶ 76, 94, 107–09. While the Service feigns confusion about the content of that speech, *see* ECF No. 24-1 at 15:6–7, 13, the FAC's allegations make clear it is speech uttered *while engaging in falconry*, which brings it within the regulations. *See* 50 C.F.R. § 21.29(f)(8)–(9); 14 C.C.R § 670(h)(13)(A). The Service also overlooks that all the Falconers have alleged that they would engage in speech governed by the regulations, "but for the regulations complained of in this action." ECF No. 16 ¶¶ 132, 139, 143, 150, 154, 162, 166, 173, 179.

There is nothing stopping Falconers from speaking in the presence of and about their birds or allowing their birds to be photographed and filmed—except the regulations challenged herein. Absent the regulations, Falconers would immediately make plans to have their birds photographed and filmed and to speak about falconry for compensation while flying their birds—as they have done in the past to the limited extent allowed by the regulations. ECF No. 16 ¶¶ 76, 94, 107–09. But so long as the regulations are in place, any plans to engage in speech regulated by Defendants would subject Falconers to the loss of their birds and other civil and criminal penalties. *See* 16 U.S.C. § 707; 14 C.C.R. § 747. They have therefore been understandably reluctant to violate the speech restrictions, or even to risk speaking in the regulated context. ECF No. 16 ¶¶ 76, 94, 107–

09. This is more than sufficient to establish standing in the Ninth Circuit. *See Clark v. City of Lakewood*, 259 F.3d 996, 1006–08 (9th Cir. 2001) (owner of businesses shutdown by cabaret ordinance established standing through declaration that "if the Ordinance is declared unconstitutional, it is my intent to reopen my business," even though business license had expired).

Also, as with their Fourth Amendment injuries, Falconers must surrender their First Amendment rights as an unconstitutional condition of licensure, which is itself a constitutional injury. *See Perry*, 408 U.S. at 597.

Plaintiffs' injuries are caused by the speech regulations that are preventing them from speaking while flying their birds. That injury will be remedied if the regulations are declared unconstitutional. Plaintiffs do not need to go through the futile process of making arrangements to violate the regulations—it suffices that they plan to speak as soon as the regulations are struck down. *See Clark*, 259 F.3d at 1008.

III. Plaintiffs Plead Valid Property-based and Privacy-based Fourth Amendment Claims

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, *houses*, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV (emphasis added). "As the text [of the Fourth Amendment] makes clear, 'the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Riley v. California*, 573 U.S. 373, 381–82 (2014) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)). Reasonableness is generally satisfied by securing a search warrant from a neutral magistrate. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995).

The Supreme Court has repeatedly held that "[i]t is a 'basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.'" *Brigham City v. Stuart*, 547 U.S. 398, 403, (2006) (quoting *Groh v. Ramirez*, 540 U.S. 551, 559 (2004)). Indeed, all "'searches conducted outside the judicial process, without prior approval by [a] judge or [a] magistrate [judge], are *per se* unreasonable ... subject only to a few specifically established and well-delineated exceptions.'" *Patel*, 135 S.Ct. at 2452; *Riley*, 573 U.S. at 382.

Plaintiffs allege facial and as-applied challenges to the Defendants' asserted authority to conduct warrantless searches of their homes, curtilage, papers, and effects under the Fourth

Amendment as unconstitutional violations of their protected property rights, *see, e.g.*, 565 U.S. 400, and privacy rights, *see, e.g., Kyllo v. United States*, 533 U.S. 27, 34 (2001). *See, e.g.*, ECF No. 16 ¶¶ 32–33, 116–17, 126. But Defendants completely ignore Plaintiffs' property-based claims, and attempt to diminish their privacy-based claims by arguing for the extension of an "administrative" search exception to the Fourth Amendment's warrant requirement that is not justified by facts or law. Even if the warrantless searches at issue here could qualify for an administrative search exception, Plaintiffs still plead cognizable privacy-based Fourth Amendment claims.

A. Plaintiffs' Well-Pled Property-based Fourth Amendment Claims

Defendants' motions to dismiss disregard one of the primary claims in Plaintiffs' FAC: protection for their property rights under the Fourth Amendment. Long before the Supreme Court articulated the privacy-based approach to unreasonable searches, *see Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring), it recognized the original grounding of the Fourth Amendment in property rights, *Jones*, 565 U.S. at 406 ("[F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates."); *Boyd v. United States*, 116 U.S. 616, 630 (1886) (Fourth Amendment protects "the sanctity of a man's home.").

Although there was a short period of time in which the Court disregarded the protection for property under the Fourth Amendment, *see, e.g., Warden v. Hayden*, 387 U.S. 294, 304 (1967), these cases represent an aberration that the Court recently corrected. This correction began with *Jones*, 565 U.S. at 413, in which the Court held that the attachment of a GPS tracking device to a vehicle by government agents to monitor the vehicle occupant's movements constituted a Fourth Amendment search. In *Jones*, the Court reiterated that individuals possess property rights under the Fourth Amendment, independent of privacy interests. *Id.* at 405 ("The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to 'the right of the people to be secure against unreasonable searches and seizures.'"). Thus, the *Katz* privacy test "has been *added to*, not *substituted* for," the traditional property-based understanding of the Fourth Amendment. *Jones*, 565 U.S. at 409.

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The property-based approach to the Fourth Amendment was further solidified in *Florida v. Jardines*, 569 U.S. 1 (2013). Relying upon *Jones*, the Court held that use of a drug-sniffing police dog on the front porch of a home was a trespassory invasion of the home's curtilage that constituted a Fourth Amendment search, the same is if the dog had entered the home. *Jardines*, 569 U.S. at 11. The holding was based exclusively on property rights, not privacy. *See id* at 6. ("[W]hen it comes to the Fourth Amendment, the home is first among equals."). And in three cases since *Jardines* the Court has either relied upon or discussed this property-based Fourth Amendment approach. *See Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018); *Byrd v. United States*, 138 S. Ct. 1518, 1526 (2018); *Carpenter v. United States*, 138 S. Ct. 2206, 2235 (2018) (Thomas, J., dissenting); *id.* at 2267–68 (Gorsuch, J., dissenting).

Lower federal courts recognized *Jones* as a "sea change" in Fourth Amendment jurisprudence. *United States v. Richmond*, 915 F.3d 352, 357 (5th Cir. 2019). *See also United States v. Ackerman*, 831 F.3d 1292, 1307 (10th Cir. 2016) (Gorsuch, J.) ("*Jones* held that the *Katz* formula is but one way to determine if a … 'search' has taken place".); *United States v. Sweeney*, 821 F.3d 893, 899 (7th Cir. 2016) ("[T]he Supreme Court has revived a 'property-based approach' to identify unconstitutional searches."); *United States v. Katzin*, 769 F.3d 163, 181 (3d Cir. 2014) (en banc) ("*Jones* fundamentally altered [the] legal landscape by reviving—after a forty-five year hibernation—the Supreme Court's prior trespass theory."). This shift was also widely noted across legal academia. *See, e.g.*, Nancy Foster, *Back to the Future: United States v. Jones Resuscitates Property Law Concepts in Fourth American Jurisprudence*, 42 U. Balt. L. Rev. 445 (2013).

Here, Plaintiffs' facial and as-applied property rights claims under the Fourth Amendment are clear from the face of the FAC. *See, e.g.*, ECF No. 16 ¶ 33 ("*Property rights* also provide an independent basis for requiring a warrant under the Fourth Amendment.") (emphasis added) (citing *Collins*, 138 S. Ct. at 1663; *Jardines*, 569 U.S. at 1; and *Jones*, 565 U.S. at 400); ECF No. 16 ¶¶ 18, 28. Yet, Defendants completely ignore Plaintiffs' well-pled claims regarding their Fourth Amendment property rights in their homes and curtilage. *See, e.g.*, ECF No. 24-1 at 9–12; ECF No. 25-1 at 1:14–15 ("The Fourth Amendment … only shields individuals from unreasonable intrusions, defined by reasonable expectations of privacy."). Defendants do not even dispute that

warrantless searches of homes and property are authorized by the challenged regulations, maintaining instead that they are justified. *See, e.g.*, ECF No. 24-1 at 9:13 ("[T]he searches authorized are valid administrative searches in a pervasively regulated industry …."); ECF No. 25-1 at 1:23–24 ("If they choose to locate [their birds] in a part of their home, as plaintiffs do, they do so knowing that those locations may be subject to" warrantless searches.).

"[T]respass analysis might seem simplistic. But proponents of the property-based approach view its bright line as a virtue over the less predictable expectation-of-privacy inquiry." *Richmond*, 915 F.3d at 358–59 (citing *Jones*, 565 U.S. at 412); Erica Goldberg, *How* United States v. Jones *Can Restore Our Faith in the Fourth Amendment*, 110 Mich. L. Rev. First Impressions 62, 68–69 (2011) (same). In cases like the present, "the Fourth Amendment's property-rights baseline [] keeps easy cases easy." *See Jardines*, 569 U.S. at 11.

Further, Defendants' arguments that the authorized searches of Plaintiffs' homes and curtilage are "administrative" searches rely on a doctrine that is *inapplicable* to Plaintiffs' property-based Fourth Amendment claims. Modern courts evaluating alleged administrative searches balance the government's interest, or "special needs," in conducting warrantless searches, which are alleged to make it impracticable or unreasonable to require the government to demonstrate individualized suspicion to a neutral decision-maker before conducting the search, against the degree of intrusion on an affected individual's *privacy* to determine whether the search is reasonable. *See, e.g., Illinois v. Lidster*, 540 U.S. 419, 424–25 (2004).

But unlike every single case in which the Supreme Court has considered an alleged administrative search,[2] Plaintiffs in this case *do not* rely exclusively on the *Katz*-style privacy

[2] *See Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970); *United States v. Biswell*, 406 U.S. 311 (1972); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *United States v. Ortiz*, 422 U.S. 891, 896 (1975); *United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323–24 (1978); *Donovan v. Dewey*, 452 U.S. 594 (1981); *New York v. Burger*, 482 U.S. 691 (1987); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985); *O'Connor v. Ortega*, 480 U.S. 709 (1987); *Griffin v. Wisconsin*, 483 U.S. 868 (1987); *Skinner v. Railway Labor Executives Association*, 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); *United States v. Knights*, 534 U.S. 112 (2001);

approach to the Fourth Amendment. All of the Supreme Court's administrative search cases pre-date *Jones*, and a consideration of property rights forms no part of the test for administrative searches. The law has changed since these cases were decided. *See generally* Foster, *supra*. Applying Defendants' privacy-based arguments for administrative searches to Plaintiffs property-based Fourth Amendment claims ignores both the well-plead allegations of the FAC and the Supreme Court's guidance in *Jones* and its progeny. The Defendants' motions to dismiss the Fourth Amendment property claims should be denied on this basis alone.

B. Plaintiffs' Well-Pled Privacy-based Fourth Amendment Claims

In addition to failure to even address Plaintiffs' well-pled property rights claims under the Fourth Amendment, Defendants also ignore plainly applicable principles governing the privacy-based administrative search exceptions upon which they rely. Even if the Defendants' warrantless search authority qualified for this administrative search exception (which the Plaintiffs do not concede), the challenged regulations lack the "precompliance review" necessary to be constitutional. *See Patel*, 135 S. Ct. at 2452. And even considered under the general administrative search test, Plaintiffs still plead cognizable privacy-based Fourth Amendment claims, because of the high degree of privacy inherent in private homes and curtilage. *See Kyllo*, 533 U.S. at 34.

Strangely, Defendants primarily argue for the reasonableness of the challenged search regulations on the notion that the practice of falconry is a "heavily regulated industry." *See, e.g.*, ECF No. 24-1 at 9; ECF No. 25-1 at 7–9. As discussed below, the sport of falconry is not a business, let alone an industry. The Service concedes as much, since licensed falconers are expressly prohibited from selling, trading, or bartering either wild or captive bred falconry birds without supplemental permitting. *See* ECF No. 24-1 at 3:24–25 (citing 50 C.F.R § 21.29(f)(4)–(5)). Yet, even applying the privacy-based "heavily regulated *industry*" exception, Plaintiffs state cognizable Fourth Amendment claims.[3]

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Samson v. California, 547 U.S. 843 (2006).

[3] Defendants do not argue that any other exception to the Fourth Amendment's warrant requirement applies, nor do Plaintiffs dispute that exceptions like exigent circumstances could apply if warranted by specific facts not present in this case.

1. The challenged search regulations lack the constitutionally necessary precompliance review

In *Patel*, 135 S. Ct. 2443, the Court found that "absent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker." *Id.* at 2452. This opportunity must occur before an individual "faces penalties for failing to comply." *Id.* at 2453. "Absent the opportunity for precompliance review, there exists an "intolerable risk" that searches authorized by an ordinance will exceed statutory limits or be used as pretext to harass." *Id.* at 2452–53. The city did not "even attempt to argue" that its administrative search ordinance afforded "any opportunity whatsoever" for precompliance review, so the ordinance was held to be facially unconstitutional. *Id.* at 2452.[4] The same is true here.

Although the Supreme Court "has never attempted to prescribe the exact form an opportunity for precompliance review must take," *Patel*, 135 S. Ct. at 2452, the review scheme at a minimum must give the property owner a meaningful chance to contest a warrantless administrative-search request in front of a neutral party before the search occurs. This vital requirement is totally absent from the warrantless search regimes challenged in this case. And contrary to what the Department might contend, ECF No. 25-1 at 17:9–15, the requirement of precompliance review is not satisfied by an appeal regarding falconry license revocation for refusal to allow a search. Under both *Camara*, 387 U.S. at 525–27, and *Patel*, 135 S. Ct. at 2456, Plaintiffs must be given an opportunity to secure precompliance review *before* they can be sanctioned with the revocation of their licenses, or the loss of their birds. Nor is precompliance review satisfied by this judicial proceeding. *See Airbnb, Inc., v. City of New York*, 2019 WL 91990 at *18–20 (applying *Patel* to preliminarily enjoin ordinance because it lacked "a mechanism for pre-compliance review."); *MS Rentals, LLC*, 2019 WL 962130, at *11 (applying *Patel* to hold ordinance

[4] *Patel*'s precompliance review requirement finds its origins in *Camara*, 387 U.S. 523, in which the Supreme Court found that individuals faced with a warrantless search of their homes have "a constitutional right to insist that the inspectors obtain a warrant to search and [an individual] may not constitutionally be convicted for refusing to consent to the inspection." *Id*. at 540. *See also See*, 387 U.S. at 545 (defendant could not be prosecuted for exercising his constitutional right to insist that fire inspector obtain warrant).

"unconstitutional under the Fourth Amendment because it authorized warrantless, nonconsensual inspections of rental properties without allowing the landlord an opportunity to seek a precompliance review"). *See also Benjamin as Trustee of Rebekah C. Benjamin Trust v. Stemple*, 915 F.3d 1066, 1069 (6th Cir. 2019) (precompliance review required under *Patel*). The warrantless search provisions in this case suffer from the same constitutional defect as the ordinance in *Patel* and laws struck down in its wake, and are subject to the same fate. Accordingly, Defendants' resort to the privacy-based administrative search exception fails at the outset and the Plaintiffs' Fourth Amendment claims cannot be dismissed.

2. Plaintiffs' claims are not overcome by the administrative search exception to the Fourth Amendment's warrant requirement

Even assuming Plaintiffs' *property*-based Fourth Amendment claims were susceptible to *privacy*-based administrative search rules, or that the complete lack of any precompliance review could be excused, Plaintiffs still plead cognizable privacy claims under the general privacy-based administrative search balancing test. *See, e.g., Lidster*, 540 U.S. at 424–25.

Under the *Katz* Fourth Amendment privacy test, whether a search requiring a warrant has occurred depends on: (1) Whether a person has exhibited an actual (subjective) expectation of privacy; and (2) whether the expectation is one that society is prepared to recognize as reasonable. *See Katz*, 389 U.S. at, 361 (Harlan, J., concurring). Generally speaking, the government's asserted special needs in conducting warrantless administrative searches only trump individual privacy interests when individuals have reduced expectations of privacy. *See, e.g., New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (search of student's purse was reasonable under Fourth Amendment due to reduced expectation of privacy).

But Plaintiffs have a *heightened expectation of privacy* within the walls of their private homes and curtilage, which are explicitly protected by the Fourth Amendment, as was recognized in *Katz* itself. *Katz*, 389 U.S. at 361 (Harlan, J., concurring) ("Thus a man's home is, for most purposes, a place where he expects privacy …."). The Department admits this is true. ECF No. 25-1 at 16:25 (acknowledging that the home is subject to heightened Fourth Amendment protection). In cases involving the authorized or attempted warrantless search of private homes, "there is a ready

criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*." *Kyllo*, 533 U.S. at 34. "It is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984) (citation omitted). "[W]hen it comes to the Fourth Amendment, the home is first among equals. At the Fourth Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Jardines*, 569 U.S.at 6 (emphasis added) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

Warrantless searches of private homes "generally must be conducted pursuant to a warrant in order to be reasonable under the Fourth Amendment," *Donovan v. Dewey*, 452 U.S. 594, 598 (1981), because the Fourth Amendment draws "a firm line at the entrance to the house." *See Kyllo*, 533 U.S. at 40 (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)). This line also extends to a home's curtilage, which is "intimately linked to the home, both physically and psychologically," in which "privacy expectations are most heightened." *California v. Ciraolo*, 476 U.S. 207, 213 (1986). A home's curtilage is "part of [the] home itself for Fourth Amendment purposes." *Oliver v. United States*, 466 U.S. 170, 180 (1984).

Defendants assert various general interests in falconry bird preservation, ECF No. 24-1 at 11:18–22; ECF No. 25-1 at 11–12, but whether these interests are reasonable in light of Plaintiffs' high expectations of privacy in their homes is a factual inquiry inappropriate at this stage. *See, e.g.*, *C.R. ex rel. Reilly v. Boy Scouts of America*, 280 Fed. Appx. 669 (9th Cir. 2008) ("The resolution of this sort of factually intensive inquiry is inappropriate on a motion to dismiss for failure to state a claim where facts have not yet been presented to the court."). The Service asserts without support that the government's interest in conducting warrantless searches of Plaintiffs' homes and curtilage derives from "protecting the raptor species covered by the [Migratory Bird Treaty Act]." ECF No. 24-1 at 11:18–19. Further, they assert that "the federal government has a substantial preservation and conservation interest in native raptor species," as recognized by the Supreme Court. *Id.* The Department similarly asserts that warrantless inspections of falconers' homes and curtilage are "necessary to protect the health of the falconry raptors in captivity and California wildlife," as

required by federal law. ECF No. 25-1 at 5–6.

Perhaps realizing the inappropriate factual nature of the *Katz* reasonableness inquiry, the Department falls back on arguments regarding the state's interest in regulatory efficiency and crime control. *See, e.g.*, ECF No. 25-1 at 12:18–20 ("Warrantless inspections under the Unannounced Inspection Provision are necessary to further the regulatory scheme because … many violations of the falconry regulations are easily concealable."); *id.* at 13:18–20 ("At a minimum, the Department's authority to conduct the unannounced inspections serves as a necessary deterrent in situations involving easily concealable violations.").

Unfortunately for the Department, the primary purpose of administrative searches must be "[d]istinguishable from the general interest in crime control." *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000). And as the Supreme Court has repeatedly emphasized, the test of Fourth Amendment reasonableness is *not* whether an investigative practice maximizes law enforcement efficacy. Strong privacy interests, like those possessed by Plaintiffs in their private homes and curtilage, can weigh decisively against law enforcement efficiency. *See, e.g.*, *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) ("The mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment."). Plaintiffs' heightened expectation of privacy in their homes is undisputed and any balancing of that privacy interest against Defendants' interests must await fact-finding. The motions to dismiss Plaintiffs' privacy claims should be denied.

3. Falconry is not a "heavily regulated industry"

Defendants' motions to dismiss rely almost entirely on inapplicable arguments regarding the heavily regulated industry variety of administrative searches. But Plaintiffs' practice of recreational falconry is not an "industry," nor is falconry of any kind among the explicitly limited industries subject to this exception.

In the past 49 years, the Supreme Court has recognized only four specific industries that "have such a history of government oversight that no reasonable expectation of *privacy* ... could exist for a proprietor over the stock of such an enterprise." *Patel*, 135 S. Ct. at 2454 (quoting *Barlow's, Inc.*, 436 U.S. at 313) (emphasis added). But "[s]imply listing these industries refutes [Defendants'] argument that" the private homes of Plaintiffs should be counted among them. *See*

Patel, 135 S. Ct. at 2454. The only industries recognized under the heavily regulated industry exception are liquor sales, *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), firearms dealing, *United States v. Biswell*, 406 U.S. 311, 311–12 (1972), mining, *Donovan*, 452 U.S. 594, and automobile junkyards, *New York v. Burger*, 482 U.S. 691 (1987). That is it.

In *Patel* the Court specifically declined to extend the heavily regulated business exception to hotels, simply because they are a regulated industry. *Patel*, 135 S. Ct. at 2455 ("If such general regulations were sufficient to invoke the closely regulated industry exception, it would be hard to imagine a type of business that would not qualify."); *Airbnb, Inc.*, 2019 WL 91990 at *12 (discussing the Supreme Court's reluctance to expand the exception to any regulated business); *MS Rentals, LLC*, 2019 WL 962130 at *9 ("The Supreme Court has cautioned that this is a 'narrow exception' and has identified only four closely regulated industries that satisfy these criteria."). "Rental properties do not fall within the set of industries identified by the Supreme Court" as heavily regulated, because "[i]t would be remarkable to apply this exception to searches of … residential properties, since 'the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" *Id.* (quoting *Payton*, 445 U.S. at 585–86).

Contrary to Defendants' assertions, pervasiveness of regulation is beside the point, because it ignores the threshold inquiry: falconry is not a business, let alone an entire industry. As noted by the Service, licensed falconry activities consist only of taking, possessing, or transporting "raptors for falconry, or to hunt with them." ECF No. 24-1 at 3:6. The definition embraced by the Department is even narrower, describing falconry as "the sport of hunting wild prey using a trained raptor or bird of prey." ECF No. 25-1 at 3:3–4. According to Plaintiffs' FAC, "[f]alconry is the art of housing, tending, training, flying, and hunting with birds of prey, such as falcons, hawks, and eagles." ECF No. 16 ¶ 6. None of this describes a business or industry akin to those the Supreme Court has swept within the "heavily regulated industry" exception. Under the federal falconry regulations, licensed falconers are expressly prohibited from selling, trading, or bartering either wild or captive bred falconry birds without supplemental permitting. 50 C.F.R. § 21.29(f)(4)–(5). The Service even justifies the operation of the falconry speech prohibitions also challenged by Plaintiffs (discussed below) as necessary to prevent the development of a commercial market for

wild falconry birds. ECF No. 24-1 at 18–19. But if a commercial market does not yet exist, as the Service's motion assumes, then falconry cannot also be considered a current commercial enterprise.

Even were falconry an industry, all of the industries recognized in the heavily regulated industry exception share a commonality: they all have something inherent in their operation that "poses a clear and significant risk to the public welfare." *Patel*, 135 S. Ct. at 2454.[5] This element is absent from the practice of falconry. There is nothing inherently dangerous in the practice of falconry. As noted by the Defendants, Plaintiffs who are licensed falconers are required to spend years becoming experts in the care of falconry birds and general practices in order to maintain their licenses. *See, e.g.* ECF No. 24-1 at 3:18–19 (citing § 21.29(c)(3)) (requiring tests with 80% score prior to allowing issuance of Apprentice level falconry permit); ECF No. 25-1 at 3 (discussing "detailed requirements" in federal regulations necessary to become a licensed falconer). Captive and well-trained falconry birds pose no more, and arguable even less, danger to falconers or members of the general public than do wild birds wheeling overhead. The Department's contention that escaped falconry birds pose a risk of spreading disease to other wildlife, ECF No. 25-1 at 13:7–9, relies upon a provision that does not support their position. *See* CA Fish & G. Code § 2116.5 (focusing on general threats *from* wild animals, not the spread of disease by domesticated animals). Defendants' arguments that private homes, wherein no business is actually transacted, are the basis for a heavily regulated industry "would permit what has always been a narrow exception to swallow the rule." *Patel*, 135 S. Ct. at 2455. Defendants' failure to address *Patel* forecloses their "heavily regulated industry" arguments, but they get no more help from the cases they do discuss.

Defendants' reliance on *Rush v. Obledo*, 756 F.2d 713 (9th Cir. 1985), is inapposite for at least three reasons. First, *Rush* concerned the warrantless search of businesses operated from private residences. *Id.* at 714. But as noted, the sport of falconry is inherently noncommercial. Plaintiffs are not engaged in a business by housing their birds with their homes or curtilage. Second, in *Rush* the Ninth Circuit found that the state possessed an important interest in protecting children from

[5] History is also relevant when considering whether an industry is closely regulated. *Patel*, 135 S. Ct. at 2455 (citing *Burger*, 482 U.S. at 707). Again, it is not enough for an industry to have been subject to some regulation. *Id.* (discussing distinction between basic regulations in historical practice versus allowing for warrantless searches).

unsafe conditions that was sufficient to overcome the homeowners' *privacy* rights. *Id.* at 720. Again, the test for heavily regulated industries that applied in *Rush*—and all previous administrative search cases—does not account for the Plaintiffs' property claims. *Rush* is distinguishable for that reason alone. Finally, even if Plaintiffs only brought privacy-based claims, *Rush* would still be distinguishable. As noted, Defendants do not articulate an interest in public health and safety similar to *Rush*. *See* ECF 24-1 at 11:21–22; ECF 25-1 at 5–6. Defendants assert an interest in the preservation of protected falconry bird species, not the "clear and significant risk to the public welfare" inherent in heavily regulated industries. *Patel*, 135 S.Ct. at 2454.

The Department, on the other hand, invites this Court to create an entirely new category of "closely regulated sports," ECF 25-1 at 1:11, "closely regulated fields," *id.* 17:7–8, or a category of "highly regulated animals," *id.* at 7:23, none of which have been previously recognized by the Supreme Court or within this circuit under the heavily regulated industry exception. This Court should decline these invitations. In addition to being non-binding, *Lesser v. Espy*, 34 F.3d 1301 (7th Cir. 1994), is even more inapposite than *Rush*. First, *Lesser* concerned the warrantless search of rabbitries that bred and sold rabbits for use in scientific research, ECF 25-1 at 8:25–28, and did not concern private homes or curtilage in which no commercial activity occurs. *See* 50 C.F.R. § 21.29(f)(4)–(5) (expressly prohibiting Falconers from selling, trading, or bartering either wild or captive bred falconry birds without supplemental permitting). Second, to restate, the test for heavily regulated industries applied in *Lesser*, and all previous administrative search cases, does not account for Plaintiffs' property-based claims. *Lesser* is also distinguishable for that reason alone.

The Department's citation of *People v. Maikhio*, 51 Cal. 4th 1074 (2011), is even less applicable to the current case. *Maikhio* concerns the standard required of a game warden to search an angler's car when the warden has observed the angler poaching on a public pier, *id.* at 1078-81, under a game code section that expressly excludes the search of "dwellings," *id.* at 1086.

The state may be the trustee of the state's wildlife with a "duty to exercise continued supervision over the trust" to prevent parties from using the trust in a harmful manner, *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 437 (1983), ECF No. 25-1 at 11, but Plaintiffs' falconry birds are their private property, just like any other animal taken from the wild under the

American common law of capture. *See Pierson v. Post*, 3 Cai. R. 175 (N.Y. 1805) (seminal American case on the acquisition of private property rights in wild animals). *See also* Cal. Civ. Code § 656 ("Animals wild by nature are the subjects of ownership … when tamed, or taken and held in possession"). The sport of falconry is not a heavily regulated industry that could excuse Defendants' disregard for the Fourth Amendment.

4. Even if falconry were a heavily regulated industry, Plaintiffs allege cognizable claims

As noted repeatedly above, both the general test for administrative searches and the heavily regulated industry exception balance individual privacy against asserted special needs of the government, and therefore do not account for Plaintiffs' Fourth Amendment property claims. While the above analysis also makes clear that falconry is not a heavily regulated industry, even if it were, Plaintiffs still allege cognizable privacy-based claims.

New York v. Burger established that a warrantless inspection program in a heavily regulated industry "will be deemed reasonable" when three criteria are met: (1) "there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made"; (2) "the warrantless inspections must be necessary to further the regulatory scheme"; and (3) the regulatory regime must advise the property owner "that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." *Burger*, 482 U.S. at 702–03 (internal quotations, citations, and alterations omitted). Defendants' warrantless search regimes fail all three requirements.

Under *Burger*'s first prong, "there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made." *Id.* The standard of what qualifies as sufficiently substantial varies between general administrative warrantless searches and warrantless searches of heavily regulated industries. The warrantless search provisions promulgated by Defendants are not justified by a substantial government interest in the context of alleging that falconry is a heavily regulated industry. For general administrative searches, Defendants can allege general government interests, like preserving the health and safety of falconry birds, *see, e.g., Burger*, 482 U.S. at 702 but, as noted above, heavily regulated industries

all have something inherent in their operation that "poses a clear and significant risk to the public welfare" that is conspicuously absent here. *See Patel*, 135 S. Ct. at 2454. There is no such inherent risk to public welfare through the practice of falconry. *See, e.g.*, ECF 25-1 at 3:10–15 (discussing "detailed requirements" in federal regulations necessary to become a licensed falconer).

Under *Burger*'s second prong, "the warrantless inspections must be necessary to further the regulatory scheme." *Burger*, 482 U.S. at 702–03. Even if justified by a substantial government interest, the warrantless searches authorized by the challenged regulations are not necessary to further the regulatory scheme. Defendants allege facts,[6] asserting that "a warrant requirement would significantly frustrate effective enforcement of the [applicable] statutes and regulations." ECF No. 24-1 at 12:3–5 (quoting *Rush*, 756 F.2d at 720). *See also* ECF No. 25-1 at 13:25–26 ("[T]he prerequisite of a warrant could easily frustrate inspection ….") (quoting *Biswell*, 406 U.S. at 316). But "in the case of most routine area inspections," like the warrantless search of Plaintiffs' private homes authorized by the search regulations, "there is no compelling urgency to inspect at a particular time or on a particular day." *Camara*, 387 U.S. at 539. As such, "[i]f a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." *Id*.

Further, there is no reason to think that the requirement to secure a warrant before a search would in any way impede the effectiveness of the regulatory scheme. First, compliance with falconry facilities' standards has already been confirmed before a falconer obtains his or her first falconry bird, in an initial licensing inspection (which Plaintiffs do not challenge). 50 C.F.R. § 21.29(c)(2)(i)(J). There is also no reason to think that the requirement to secure a warrant before conducting a necessary search would prevent that search from being unannounced. Whether for general search warrants, *see* Cal. Penal Code § 1523 ("A search warrant is an order in writing, in the name of the people, signed by a magistrate"), or for administrative warrants, *see* 13 C.C.P. § 1822.50 ("An inspection warrant is an order, in writing, in the name of the people, signed by a judge of a court of record"), law enforcement officers seeking a warrant to conduct a search are not

[6] Defendants' factual assertions on this point preclude dismissal at the pleading stage in any event.

required to provide notice to the subject of the search. Rather, they are required to provide some constitutionally minimal justification to a neutral party. Second, "the element of surprise," ECF No. 25-1 at 13, is already non-existent in this case, as the typical approach as alleged by Plaintiffs—and confirmed by Defendants in response to the motion for preliminary injunction—is for wardens to prearrange their warrantless searches. *See* Tognazzini Dec., ECF No. 26-1 ¶¶ 11–17. Given that the applicable state regulations require searches occur "when the licensee is present during a reasonable time of the day," this typical practice of prearrangement makes sense—and eviscerates any excuse to avoid the Fourth Amendment's warrant requirement. *See* 14 C.C.R. § 670(j)(3)(A).

Finally, under *Burger*'s third and last prong, the regulatory regime must advise the property owner "that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." *Burger*, 482 U.S. at 702–03. Defendants assert that Plaintiffs' falconry licensure qualifies as a valid substitute for a warrant as required by *Burger*, because Plaintiffs' implicit consent to the warrantless searches puts them on notice of the time, place, and scope of the searches, analogous to what is achieved by a warrant. ECF No. 24-1 at 12; ECF No. 25-1 at 14–15. There is no consent. As alleged in Plaintiffs' FAC, all falconry license holders are unconstitutionally coerced into waiving their Fourth Amendment rights as a condition of licensure. *See* ECF No. 16 ¶ 118. Coercion under the doctrine of unconstitutional conditions as alleged by Plaintiffs, *see, e.g.*, *Koontz*, 570 U.S. at 607; *Scott*, 450 F.3d at 867, is the opposite of the alleged consent Defendants posit.

Last, Defendants cannot simultaneously claim that it is essential that warrantless searches be conducted on a surprise basis (which does not occur in actual practice), while also claiming that the regulations comply with *Burger*'s requirement that administrative searches of heavily regulated industries be performed on a regular basis in order to provide adequate notice to the property owner. In *Burger*, New York's statute provided a constitutionally adequate substitute for a warrant because it informed a business operator that *regular* inspections would be made. *Burger*, 482 U.S. at 692. *See also Donovan*, 452 U.S. 605–06 ("[I]t is the [] regularity of the federal regulation that ultimately determines whether a warrant is necessary to render an inspection program reasonable under the Fourth Amendment."). Taken at face value, Defendants assertions that these warrantless searches

are infrequent, ECF No. 24-1 at 8–9; ECF No. 25-1 at 16, undermines their simultaneous assertion that frequency provides notice sufficient to satisfy *Burger*'s third requirement. Without the requirement to obtain a warrant, "there exists an 'intolerable risk' that searches authorized by an ordinance will exceed statutory limits or be used as pretext to harass." *Patel* at 2452–2453.

For all of the above reasons, the Court should reject Defendants' motions to dismiss Plaintiffs' Fourth Amendment claims.

IV. Plaintiffs Plead Valid First Amendment Claims

Plaintiff Falconers allege that certain state and federal falconry regulations impose content-based limits on speech that prevent falconers from photographing or filming their birds to make movies, commercials, or in other commercial ventures unrelated to falconry, limit compensation for falcon-related educational speech, and dictate the content of conservation education programs. *See* ECF No. 16 ¶ 10 ; 50 C.F.R. § 21.29(f)(8)–(9); 14 C.C.R § 670(h)(13)(A). Defendants respond that these content-based speech regulations really govern the conduct of falconry, not speech, but this ignores the text and function of the regulations. This threshold error leads Defendants to apply the wrong level of constitutional scrutiny, or none at all. Yet even when Defendants do apply scrutiny, they fail to extinguish Falconers' speech claims.

A. The Only "Conduct" That the Speech Regulations Govern Is Speech

Defendants maintain that the challenged speech regulations actually "regulate conduct—*i.e.*, the activity that falconry license holders are permitted to allow their licensed birds to undertake—rather than protected speech." ECF No. 24-1 at 15:21–22; ECF No. 25-1 at 19–20. But the speech regulations have nothing to do with how falconers use their birds—instead they focus on what falconers may say and why they may say it while flying their falconry birds.

Consider a licensed falconer like Plaintiff Peter Stravrianoudakis flying his four-year-old aplomado falcon "Ares" in an open field, ECF No. 16 ¶ 57, perhaps in front of a group that came to view Ares in action. The speech regulations are irrelevant in that setting—unless Peter speaks, or a viewer snaps a photo. The trigger for these regulations is speech and its content, not falconry.

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See Holder v. Humanitarian Law Project, 561 U.S. 1, 28 (2010) ("[C]onduct triggering coverage under the statute consists of communicating a message.").

If Peter begins a lecture on falconry while holding his bird, the content of his speech triggers the regulations. 50 C.F.R. § 21.29(f)(8). He must be very careful about both the content of his presentation—ensuring that it covers *only* "the biology, ecological roles, and conservation needs of raptors and other migratory birds," *id*. § 21.29(f)(8)(v)—and he must be sure that any compensation his audience pays him does "not exceed the amount required to recoup … costs," *id.* § 21.29(f)(8)(iv). *See also* 14 C.C.R. § 670(h)(13)(A). If his speech about falconry while he is flying or holding Ares delves into history or practice or even the emotional attachment he feels to his bird, ECF No. 16 ¶ 59, his speech subjects him to civil and criminal penalties. *See* 16 U.S.C. § 707; 14 C.C.R. § 747. How he is using his bird has no bearing on this potential liability—all that matters is what he says.

The same risks arise if an observer snaps a photo or takes a video. The regulations prohibit licensed falconers from photographing or filming their birds or allowing others to do so—but only if the images will be used in a production that is not about falcons or falconry. 50 C.F.R. §21.29(f)(9)(i); 14 C.C.R. § 670(h)(13)(A). Falconers must ensure that any pictures or movies that someone takes of their bird are used only in productions that are about "the practice of falconry or on the biology, ecological roles, and conservation needs of raptors and other migratory birds." 50 C.F.R. § 21.29(f)(9). What Peter and the other Plaintiff Falconers (or any licensed falconers) do with their birds is irrelevant; the regulations are triggered solely by the creation of protected expression like movies, photos, and commercials—based solely on their communicative content. *See Western Watersheds Project v. Michael*, 869 F.3d 1189, 1196 (10th Cir. 2017) ("An individual who photographs animals or takes notes about habitat conditions is creating speech in the same manner as an individual who records a police encounter.").

Also irrelevant is what someone else might do with some other birds. The Service argues that the speech claims should be dismissed because speech involving non-native falconry birds is unregulated. ECF No. 24-1 at 17:12–15. But the Plaintiffs' expressive activities like lecturing and photo taking here *are* regulated and their speech is stymied when they are holding or flying their

birds. ECF No. 16 ¶¶ 76, 94, 107–09. What *other* parties not before the Court might be able to say or what pictures they might be able to take while flying *other* birds has no bearing on Plaintiffs' claims that *they* are muzzled while flying *their* birds.

Defendants' argument that the speech regulations control the use of falconry birds, rather than falcon-related speech, is belied by the regulations' textual focus on speech and the common sense illustrations above about how the regulations are triggered. Plaintiffs' challenge to the speech regulations cannot be dismissed. Instead, Defendants must proceed to fact-finding and prove that the regulations survive the appropriate level of constitutional scrutiny.

B. The Speech Regulations Fail Under Either Strict or Intermediate Scrutiny

Preventing Falconers from photographing their falconry birds stymies the creation of speech based on its content, both because the speech features falcons and because it is not about falcons or falconry. 50 C.F.R. § 21.29(f)(9). Likewise, controlling the content of educational presentations and limiting compensation for speaking about falconry are content-based restrictions on falconers' speech. *Id*. § 21.29(f)(8). Regulations that police expression based on its content are "'presumptively invalid,' and the Government bears the burden to rebut that presumption." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *United States v. Playboy*, 529 U.S. 803, 817 (2000)).

The government's burden varies based on the nature of the speech: content-based regulation of most speech must meet strict scrutiny, *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015), and content-based regulation of speech that "does no more than propose a commercial transaction" must meet the four-factor test set out in *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980).

Defendants make no attempt to carry their First Amendment burden under *Reed*. Only the Service addresses the speech regulations under a constitutional standard, and they make two critical errors in their application of the standard they apply.

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1. Content-based speech restrictions not proposing a commercial transaction are subject to strict scrutiny

The Service's first error is to apply commercial speech scrutiny to all the speech restrictions in 50 C.F.R. § 21.29(f)(9)(i), which governs speech that both does and does not "propose a commercial transaction." ECF No. 24-1 at 17:24–25 (quotation omitted); 19:20–21. The first subsection of speech regulations applies to "photography, filming, or other such uses" and "movies, commercials, or in other commercial ventures that are not related to falconry." 50 C.F.R. § 21.29(f)(9) and (9)(i). This is a broader prohibition than the subsequent subsection, which applies specifically to "advertisements; as a representation of any business, company, corporation, or other organization; or for promotion or endorsement of any products." *Id*. § 21.29(f)(9)(ii). The Service is correct that *Central Hudson* applies to the regulation of "commercials, advertisements, [and] endorsements of products." ECF No. 24-1 at 18:6. But strict scrutiny applies to the regulation of "photography, filming, or other such uses," "movies," and "other commercial ventures" based on their falconry content and message.

The Service applies *Central Hudson* to all the speech restrictions, seeming to misunderstand that speech is not "commercial speech"—and thus subject only to *Central Hudson* review—simply because it is compensated as part of a "commercial venture." *See* ECF No. 24-1 at 17:24–25. *Contra* Plaintiffs' Motion for Preliminary Injunction, ECF No. 17-1 at 23:6–28 and cases discussed therein, *e.g., Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988) ("It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak.").

Defendants must therefore satisfy the requirements of strict scrutiny by proving that these restrictions "further[] a compelling interest and [are] narrowly tailored to achieve that interest." *Reed*, 135 S. Ct. at 2231 (quote omitted). Defendants cannot make this showing at the motion to dismiss stage. *Frudden v. Pilling*, 742 F.3d 1199, 1207–08 (9th Cir. 2014); *see also Perez v. Pers. Bd. of City of Chicago*, 690 F. Supp. 670, 677 n.6 (N.D. Ill. 1988) ("A motion to dismiss is not the appropriate avenue for defendants … [to establish] that the policy is necessary to serve a compelling

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state interest."). Nor do Defendants make any effort to address strict scrutiny in response to either the FAC or Plaintiffs' motion for preliminary injunction.

2. Commercial speech restrictions must directly advance a substantial government interest

The Service's second error is failing to satisfy *Central Hudson* intermediate scrutiny when applying that test to the genuine commercial speech restrictions in Section 21.29(f)(9)(ii) and Section 21.29(f)(9)(i)'s reference to "commercials." Again, Defendants cannot meet this test at the motion to dismiss stage, *Frudden*, 742 F.3d at 1207–08, but their effort to do so fails nonetheless. As explained above, and in Plaintiffs' motion for preliminary injunction, ECF No. 17-1 at 21–22, *Central Hudson* requires the government to make four showings, the third and fourth of which the government fails to demonstrate here: the speech regulations must directly advance a substantial government interest; and the regulation may not be more extensive than necessary to achieve the interest. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 561.

Under the third prong of *Central Hudson*, the speech regulations must *"directly and materially* advance[] the asserted governmental interest*"* in protecting the health of migratory birds. *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999) (emphasis added). The Service speculates that banning commercial speech featuring falcons, but that is not about falcons or falconry, "could" advance two interests: preventing abuse or misuse of falconry birds, or preventing development of a commercial market. ECF No. 24-1 at 19:5–6. On its face, this is not an argument that the regulations on commercial speech *directly and materially* advance these interests. They "could" prevent abuse—but Defendants do not explain how an image of a bird in a commercial for a car engenders abuse, but an image of a bird in a commercial for, *e.g.*, "telemetry equipment, giant hoods, [or] perches" does not. 50 C.F.R. § 21.29(f)(9)(ii)(B). The exact same image could be used for both advertisements—but a falconer would lose his bird if it appeared in the former commercial solely because of the content of the advertisement.

Nor do Defendants' responses to the motion for preliminary injunction offer any evidence that supports the pure speculation that the use of an image in certain kinds of advertising will lead

to abuse of a falconry bird. This is a classic example of an underinclusive commercial speech restriction. *See City of Cincinnati v. Discovery Network*, 507 U.S. 410, 412 (1993) (striking down ban on commercial, but not noncommercial, handbills in news racks). An underinclusive regulation "raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 802 (2011). The attempt here to restrict falcon-containing speech to falcon-related advertisements evinces an impermissible intent to stymie broader public interest in falconry.

The truth of that intent is reflected in the Service's worry that "[d]evelopment of a commercial market, *in turn*, will create additional *pressure* to capture wild raptors." ECF No. 24-1 at 19:6–9. The supposed connection between commercial speech and falcon welfare is at least three steps removed: first, a commercial market might develop; second that "in turn" might "create additional pressure;" third, that "pressure" might lead "to [illegal] capture [of] wild raptors." Only at this third step, after some unknown third persons violate other regulations against capturing falconry birds without a license, 50 C.F.R. § 21.29(e)(1), is there some connection between Falconers' commercial speech and bird welfare. This meandering trail of speculation is not the direct link *Central Hudson* intermediate scrutiny requires. Banning certain types of falcon-containing advertisements, but not others, "has absolutely no bearing on the interests" the Service has asserted. *Discovery Network*, 507 U.S. at 428.

Although the Department does not apply any form of constitutional scrutiny, its argument that falconers "just need to get the proper permit" fits nicely—and fails—under the third prong of *Central Hudson*. ECF No. 25-1 at 20:19–20. The Department is referring to the generic restricted species exhibiting permit described at 14 C.C.R. § 671.1(b)(6). ECF No. 25-1 at 20:2. There are myriad problems with this answer to the free speech claims. Under either *Central Hudson* or *Reed*, there must be a substantial connection between the permit and the problem it seeks to solve—the Department does not even suggest that such a connection exists. Indeed, the Department does not explain what regulatory oversight an exhibiting permit adds, most likely because it in fact adds none. The state and federal falconry regulations already provide all the protection falconry birds might conceivably need—an exhibiting permit at best duplicates the existing regulatory regime.

See 14 C.C.R. § 671.1(c)(1) (listing requirements for exhibiting permits that pale in comparison to the falconry regulations). But an exhibiting permit would add significantly to Falconers' cost to speak: exhibiting permit fees for a falconer would total roughly $666 per year ($445.50 permit fee, plus $221.27 inspection fee). 14 C.C.R. § 703(a)(10), (19). This regulatory disconnect is sufficient under the Constitution to answer the Department, but the exhibiting regulations themselves create another problem for the State: none of the Plaintiff Falconers is eligible for an exhibiting permit because none "is in the business of exhibiting animals at least half-time …." 14 C.C.R. § 671.1(b)(6). This is not a permit designed—or even available—to falconers whose primary interest in their birds is and must be recreational. *See* ECF No. 16 ¶ 6 (describing the sport of falconry).

If Defendants' arguments did not fail under prong three of *Central Hudson*, we would proceed to the fourth prong where they would fare no better. The final prong runs to the "fit between the legislature's ends and the means chosen to accomplish those ends." *Lorillard Tobacco v. Reilly*, 533 U.S. 525, 556 (2001) (quoting *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 632 (1995)). The means must be "narrowly tailored to achieve the desired objective." *Id*. The government bears the burden to "affirmatively establish the reasonable fit," including identifying a substantial goal and carefully calculating the costs. *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989).

The Service nods toward "protection from commercial exploitation," ECF No. 24-1 at 19:18–19, but what that means and how it relates to the welfare of birds is left as an exercise for the reader. Left unsaid, too, is how that interest in "commercial exploitation" is any different "whether images of the birds are being shown to sell perches (allowed) or washing machines (not allowed)." ECF No. 17-1 at 22:18–19. Most critically, the Service does not address why regulatory measures actually tailored to the health and welfare of the birds, not based on the content of speech, would be inadequate. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 362 (2010) ("[T]he remedy is not to restrict speech but to consider and explore other regulatory mechanisms. The regulatory mechanism here, based on speech, contravenes the First Amendment.").

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Strict scrutiny applies to the regulation of "photography, filming, or other such uses," "movies," and "other commercial ventures" based on their falconry content and message. Neither Defendant even attempts to meet that burden. The Service is correct that *Central Hudson* intermediate scrutiny applies to the regulation of "commercials, advertisements, [and] endorsements of products," ECF No. 24-1 at 18:6, but it utterly fails to meet that standard.

V. The Service's Motion to Dismiss Plaintiffs' Claim VII Under *Chevron* Must Be Denied

The Service moves to dismiss Plaintiffs' claims against the federal regulations under Count VII, ECF No. 16 ¶¶ 182–87, ECF 16 at 21, based on *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The Service argues that the Migratory Bird Treaty Act (MBTA), which authorizes the Service to "search any place" "*with* a search warrant," 16 U.S.C. § 706 (emphasis added), does not speak directly to the precise question of whether it may search any place *without* a search warrant. ECF 24-1 at 27. Therefore, the argument goes, this Court must defer under *Chevron* to the Service's interpretation of its authority under 16 U.S.C. § 704(a) to adopt "suitable regulations" as allowing it to "[i]nspect falconers' facilities" without a warrant.

In *Aiuppa v. United States*, 338 F.2d 146 (10th Cir. 1964), the Tenth Circuit rejected this exact argument. In *Aiuppa*, the defendant was convicted at trial of two counts of violating 16 U.S.C. § 703's prohibition on unpermitted possession and transport of mourning doves. 338 F.2d at 147. At trial, *Aiuppa* moved to suppress the birds on the ground that they were seized from his automobile at his home without a warrant in violation of the Fourth Amendment. *Id.* at 147–48. The court confirmed that the only issue in the case was whether 16 U.S.C. § 706 authorized the search in question without a warrant. 338 F.2d at 148. The court concluded that Section 706 does not authorize warrantless searches but rather prohibits them, based both on the implicit rejection of warrantless inspections by the explicit authorization of searches with warrants, and the express provision for judges and others to issue warrants on probable cause. *Id*.

And, the court held that the statute is clear on this question. *Id*. ("It is thus manifestly clear, we think, that Congress deliberately withheld from these Agents the province of determining for themselves the existence of probable cause and the exceptional circumstances which would justify

an expeditious warrantless search."). Since Section 706 is clear on this question, the Service's argument fails at *Chevron* Step One. *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 815 (9th Cir. 2016) (citing *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 471 (2001)).

The Service's only authority in support of its *Chevron* argument is *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 878 F.3d 725, 733 (9th Cir. 2017). But *Turtle Island* does no more than generally describe how *Chevron* works. *Id*. And it is unclear why *Turtle Island* even includes this generic discussion of *Chevron*, since it does not appear to even apply it to any provision of the MBTA or any other statute. It says nothing about whether Section 706 is clear, or whether it would be reasonable to interpret a statute that permits searches *with* a warrant and issuance of warrants on probable cause, as allowing searches *without* a warrant and on no probable cause. *Turtle Island* does not disagree with *Aiuppa*. The Service's motion to dismiss Count VII as to warrantless searches of Plaintiffs' homes and curtilage must be denied.

The Service also argues that since the MBTA is silent on regulation of speech; the agency is free to interpret it as allowing the regulation of Plaintiffs' speech. ECF 24-1 at 20. The Service offers no authority for this proposition. To the contrary, "an administrative agency's power to regulate … must always be grounded in a valid grant of authority from Congress." *FDA v. Brown and Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000); *accord Mexichem Fluor, Inc., v. EPA*, 866 F.3d 451, 461 (D.C. Cir. 2017) ("However much we might sympathize or agree with [the agency]'s policy objectives, [the agency] may only act within the boundaries of its statutory authority."). In considering the availability of *Chevron* deference, the Supreme Court has said that "the rule must be promulgated pursuant to authority Congress has delegated to the official." *Gonzalez v. Oregon*, 546 U.S. 243, 258 (2006).

Nor does the Service offer any argument that the multiple and detailed restrictions on falconers' speech are a reasonable interpretation of the MBTA's "silence" on speech restrictions. Such an unsupported argument cannot provide a basis to dismiss Plaintiffs' Claim VII against the federal speech restrictions. "[P]erfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived …." *United States v. Hook*, 471 F.3d 766, 775

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(7th Cir. 2006) (quoting *United States v. Lanzotti*, 205 F.3d 951, 957 (7th Cir. 2000)). The Service's motion to dismiss Plaintiffs' Count VII as to its content-based speech regulations must be denied.

CONCLUSION

Alleged "administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, [] such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual." *Camara*, 387 U.S. at 534. Plaintiffs ask for nothing more than for this Court to allow them the traditional safeguards that the Fourth Amendment requires; the ability to be safe and secure from unwarranted government intrusion in the comfort of their own homes. Likewise, Falconers' First Amendment claims address the bedrock principle that the government may not regulate speech based solely on its communicative content. *Reed*, 135 S. Ct. 2228–30.

For all of the above reasons, Defendants' motions to dismiss should be denied.

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Respectfully submitted,

TIMOTHY R. SNOWBALL
ANTHONY L. FRANÇOIS
JAMES M. MANLEY (*Pro Hac Vice*)

By: s/Timothy R. Snowball
TIMOTHY R. SNOWBALL

Attorneys for Plaintiffs