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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

REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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Plaintiffs Peter Stavrianoudakis, Eric Ariyoshi, Scott Timmons, and American Falconry Conservancy (Falconers) and Katherine Stavrianoudakis (*in toto* Plaintiffs) respectfully reply in support of their motion for preliminary injunction, ECF No. 17, to the responses filed by Defendants United States Fish and Wildlife Service and its Principal Deputy Director Margaret Everson (Service), ECF No. 27, and the Director of California Department of Fish and Wildlife Charlton H. Bonham (Department), ECF No. 26.

I. PLAINTIFFS SEEK A PROHIBITORY INJUNCTION

Plaintiffs challenge the constitutionality of certain falconry regulations, both facially and as-applied. They seek a preliminary injunction prohibiting Defendants from enforcing unreasonable warrantless search and content-based speech regulations; they are not, as the Service suggests, seeking a mandatory injunction. ECF No. 27 at 3:16–18.

Winter v. National Resources Defense Council, Inc., 555 U.S. 7, 20 (2009), sets out the test for prohibitory injunctions, like the one Plaintiffs seek here. In *Farris v. Seabrook*, 677 F.3d 858, 861 (9th Cir. 2012), the Ninth Circuit applied *Winter* to uphold a preliminary injunction prohibiting enforcement of a campaign finance regulation that burdened First Amendment rights. *See also Melendres v. Arpaio*, 695 F.3d 990, 998–99 (9th Cir. 2012) (applying *Winter* to preliminarily enjoin unreasonable search and seizure policy). Plaintiffs seek precisely the same sort of prohibitory relief granted in *Farris* and *Melendres*: prohibiting Defendants from enforcing the challenged regulations. *See* ECF No. 17-1 at 27:15–20. Accordingly, Plaintiffs are entitled to a preliminary injunction because the *Winter* factors are met, as explained in their Memorandum in Support of their Motion for Preliminary Injunction, their Response to Defendants' Motions to Dismiss, and herein.

The Service's argument that Plaintiffs seek "a mandatory injunction, which imposes a heightened burden on the party seeking it," is incorrect. *See* ECF No. 27 at 3:16–18. "A mandatory injunction commands performance of certain acts whereas a prohibitory injunction prohibits the performance of certain acts." *Legal Aid Soc. of Hawaii v. Legal Services Corp.*, 961 F. Supp. 1402, 1408 (D. Haw. 1997) (citing *Anderson v. United States*, 612 F.2d 1112, 1114–15 (9th Cir. 1979)). *See also Am. Freedom Def. Initiative v. King Cty.*, 796 F.3d 1165, 1173 (9th Cir. 2015) (holding

"an order requiring Metro to publish an ad previously unpublished" is a "mandatory injunction"). Plaintiffs do not ask this Court to compel Defendants to take any action. Plaintiffs seek an injunction to *stop* Defendants from enforcing their unreasonable warrantless search and content-based speech restriction regulations.

The Service's argument relies on *United States v. California*, 314 F. Supp. 3d 1077, 1086 (E.D. Cal. 2018), which in turn relies on *Tracy Rifle & Pistol LLC v. Harris*, 118 F. Supp. 3d 1182, 1195 (E.D. Cal. 2015). ECF No. 27 at 3:17–18. The court in *Tracy Rifle & Pistol* acknowledged difficulty distinguishing mandatory from prohibitory injunctions and, without considering the binding precedent cited above, mistakenly determined that an injunction seeking to stop the government from acting was a mandatory injunction. 118 F. Supp. 3d at 1195. This was error, as explained above, and this Court should not repeat it. Plaintiffs seek a prohibitory injunction, the same as the plaintiffs in *Farris* and *Melendres*.

Even if Plaintiffs had requested equitable relief in the form of a mandatory injunction, it would be appropriate in this case, where the constitutional injuries alleged are not "capable of compensation in damages." *Anderson*, 612 F.2d at 1115 (quoting *Clune v Publisher's Ass'n of N.Y.C.*, 214 F. Supp. 520, 531 (S.D.N.Y. 1963)). Nevertheless, the *Winter* test is appropriate for the prohibitory injunction Plaintiffs request, and they meet that test.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

Plaintiffs are likely to succeed on the merits of both their Fourth Amendment challenge to the Defendants' unreasonable warrantless search regulations, *see Melendres*, 695 F.3d at 1002 (Plaintiffs faced irreparable harm in the form of a deprivation of Fourth Amendment rights absent a preliminary injunction.), and in their challenge to the Defendants' content-based speech restrictions, *see Sanders County Republican Cent. Committee v. Bullock*, 698 F.3d 741, 744 (9th Cir. 2012) ("When seeking a preliminary injunction 'in the First Amendment context, the moving party bears the initial burden of making a colorable claim that its First Amendment rights have been infringed, or are threatened with infringement, at which point the burden shifts to the government to justify the restriction.").

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Plaintiffs' combined response in opposition to Defendants' motions to dismiss comprehensively explains why Plaintiffs meet this standard. In the interests of economy, Plaintiffs incorporate those legal arguments here to show their likelihood of success on the merits. Moreover, the declarations filed both in support and in opposition to the motion for preliminary injunction contain evidence that supports Plaintiffs' likelihood of success.

A. Plaintiffs Are Likely to Succeed on Their Fourth Amendment Claims

The Service's argument that it plays no part of the regulation of falconry in California, ECF No. 27 at 4:3–12, is disposed of at length in Plaintiffs' opposition to their motion to dismiss, Opp'n to Mot. to Dismiss at 3, by the Department, ECF No. 25-1 at 5–6, by the Department's declarants, ECF No. 26-2 ¶¶ 4, 7, 12, and by amicus North American Falconry Association, ECF No. 33 at 9:13–19. Any enforcement of the challenged state regulations is required by the federal regulations, and a challenge to the constitutionality of one requires challenging the other. In turn, enjoining the offending federal regulations along with the offending California regulations will leave the California falconry licensing program in compliance with federal requirements and foreclose the decertification scenario put forward by the Department.

Those regulations work a continuous injury on Plaintiff Falconers by imposing an unconstitutional condition that requires them to waive their Fourth Amendment rights in exchange for their licenses every year. ECF No. 17-2, Peter Stavrianoudakis decl. ¶ 42; ECF No. 17-4, Scott Timmons decl. ¶ 27; and ECF No. 17-5, Ron Kearney decl. ¶ 21 ("I last renewed my license in June 2018, and will next be renewing it in June 2019."); *id.* ¶ 5 ("All Regular Members of the American Falconry Conservancy must hold a valid falconry license, which exposes all members to the unconstitutional conditions at the heart of this case.").

The consequences of that unconstitutional condition—stress, fear, and anxiety—are felt daily by licensed falconers and non-falconers alike. *See, e.g.*, ECF No. 17-3, Katherine Stavrianoudakis decl. ¶¶ 8–9 ("Will they knock down my door, pin me down, and put me in handcuffs because I do not want to cooperate with my rights being violated? All because I love and am married to a falconer? I suffer with anxiety often as a result of this situation."); Peter Stavrianoudakis decl. ¶¶ 33–34 ("I live in constant anxiety of retribution; that armed officers will

show up at my home when I am not present, and my wife will be forced to both give up her constitutional rights and let them in, or face the loss of Ares and possible violence. A day does not go by where I am not anxious about these possibilities."); Scott Timmons decl. ¶ 8; Ron Kearney decl. ¶ 15; ECF No. 17-6, Bridget Rocheford-Kearney decl. ¶ 3.

It is undisputed that it is the "norm within the falconry community" for licensed falconers to house their falconry birds within their homes or curtilage just like any other pet. *See, e.g.*, Peter Stavrianoudakis decl. ¶ 14; Ron Kearney decl. ¶ 12 ("In my extensive experience I can attest that either keeping falconry birds within one's home, or in mews built very near the home, is the common practice. Almost every falconer I know houses their birds this way."); Bridget Rocheford-Kearney decl. ¶ 13.

The overt abuse of Falconers' Fourth Amendment rights by the Department, as authorized and required by the Service, has been a pervasive problem for decades, and continues unabated. *See, e.g.*, Peter Stavrianoudakis decl. ¶¶ 21–23; Ron Kearney decl. ¶ 6; Bridget Rocheford-Kearney decl. ¶ 15; Scott Timmons decl. ¶ 8. Contrary to the assertions of the Defendants, warrantless searches of private homes pursuant to the challenged regulations are a widespread occurrence. *See, e.g.*, Bridget Rocheford-Kearney decl. ¶ 16 ("Everyone [in the falconry community] knows someone who has gotten a visit from Fish and Wildlife demanding entry into their home."); Peter Stavrianoudakis decl. ¶ 13; Ron Kearney decl. ¶ 7.

The Department's own declarants undermine their argument that it would be unreasonable to obtain warrants to search Plaintiffs' homes. Mr. Tognazzini emphasizes the function of the warrantless search provisions for crime control, *see* ECF No. 26-1, Tognazzini decl. at 3:6–10, which is a prohibited justification under the privacy-based doctrine applicable to administrative searches, *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000). Mr. Tognazzini also contradicts himself by simultaneously declaring the supposed need for surprise searches, Tognazzini decl. at 3:13–26, while the primary example he provides is of a search the Department *prearranged* with a licensed falconer, *id.* at 4:6–8, in a situation in which the Department had ample time and evidence to support the issuance of a warrant, *id*. at 4:3–5. Additionally, Mr. Tognazzini's declaration also supports

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Plaintiffs' reasonable fears, ECF 17-1 at 14:15–21, that warrantless searches of homes and curtilage are common occurrences under the challenged regulations. *See* ECF No. 26-1 at 5:12–20.

Ms. Battistone's declaration similarly supports Plaintiffs' contention that the requirement to secure a warrant before a search is compatible with the regulatory scheme. Given that falconry birds require expert care, ECF 26-2, Carie Battistone decl. at 4:9, and Ms. Battistone does not dispute the efficacy of falconry licensure generally, *id.* 3:13–15, she also implicitly supports Plaintiffs' contention that falconry birds pose no danger to the public while under the care of licensed falconers, Opp'n to Mot. to Dismiss at 19:12–17. Finally, she supports Plaintiffs' argument that falconry is not a heavily regulated industry, because protecting "the health and safety of falconry raptors," does not rise to the level of justification required of this privacy-based exception to the Fourth Amendment's warrant requirement. *See, e.g.*, Opp'n to Mot. to Dismiss at 19:7–11 (citing *City of Los Angeles v. Patel*, 135 S.Ct. 2443, 2454 (2015)).[1]

The Service further asserts that it would be "improper" to give weight to some statements offered by Plaintiffs' declarants. ECF No. 27 at 6:22–23. But hearsay evidence is generally admissible in declarations or affidavits offered in support of a preliminary injunction motion. *Flynt Distrib. Co., Inc. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984). *See also Levi Strauss & Co. v. Sunrise Int'l Trading, Inc.*, 51 F.3d 982, 985 (11th Cir. 1995); *Federal Sav. & Loan Ins. Corp. v. Dixon*, 835 F.2d 554, 558 (5th Cir. 1987); *Asseo v. Pan American Grain Co., Inc.*, 805 F.2d 23 (1st Cir. 1986). Indeed, as the Service notes, under *Flynt*, "[t]he urgency of obtaining a preliminary injunction necessitates a prompt determination and makes it difficult to obtain affidavits from persons who would be competent to testify at trial. The trial court may give even inadmissible evidence some weight, when to do so serves the purpose of preventing irreparable harm before trial." 734 F.2d at 1394. Such irreparable harm is occurring here.

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[1] The statements offered by Mr. Crum, ECF No. 27-1, in support of the Service's opposition to Plaintiffs' motion are practically and legally irrelevant to Plaintiffs' Fourth and First Amendment claims because they ignore the state/federal regulatory structure addressed at the outset of this discussion. *See* FRE 401.

As discussed above, Defendants' own declarants corroborate the background facts contained in Plaintiffs' declarations, and Defendants have not disputed any of the injuries Plaintiffs are currently suffering, as substantiated by the declarations.

B. Plaintiffs Are Likely to Succeed on the Merits of Their First Amendment Claims

But for the content-based speech regulations challenged by Falconers, they would engage in currently prohibited speech using their falconry birds. *See, e.g.*, Scott Timmons decl. ¶¶ 21–22 ("I enjoy sharing my experiences with falconry and information about the practice with the public. … I have had specific conversations … about bringing in my birds for presentations or demonstrations. Right now that would be illegal."); Peter Stavrianoudakis decl. ¶ 38 ("If I had the chance to earn money with Ares and take him out onto a movie set for a shoot, I would absolutely do it. I have appeared in movies, and I have friends and family in the movie industry, but I have not pursued opportunities for Ares because of the speech restrictions."); Ron Kearney decl. ¶ 18 ("But for the speech rules, I would allow my birds to be filmed and photographed for non-falconry related speech and I would pursue opportunities to speak about falconry, including speaking for pay."); *id*. ¶ 16 ("Several American Falconry Conservancy members, including the other Plaintiffs in this case, have been silenced by the speech regulations challenged in this case.").

Under either strict or intermediate scrutiny, it is Defendants' burden to show that the speech restrictions are tailored to achieve the government's asserted interest. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980). Defendants' declarants do not carry either burden. The Department's declarants do not address Falconers' First Amendment claims at all. *See* ECF Nos. 26-1; 26-2. The Service's declarant makes an unsupported assertion about the connection between the speech regulations and a commercial market for raptors, ECF 27-1 ¶ 6, but this is purely speculative opinion, contradicted by law and fact, *see* Opp'n to Mot. to Dismiss at 28:6–29:9; 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).

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III. PLAINTIFFS SUFFER CONTINUAL IRREPARABLE HARM

In addition to repeating its merits argument, the Service also argues that irreparable harm is not present because "Plaintiffs delayed seeking preliminary relief in this lawsuit for approximately two months." ECF No. 27 at 8:10. This is factually incorrect and legally irrelevant. *See Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211, 1214 (9th Cir. 1984). The Service itself acknowledges that the actual "delay" was a mere 22 calendar days (15 working days) between the time service of process was perfected and the federal government shutdown due to a lapse in appropriations. ECF No. 27 at 8:14–15. The parties then agreed to a short delay in the proceedings to accommodate that temporary situation. ECF No. 15.

Moreover, there is no bright line rule that delay of any length precludes a finding of irreparable injury. *Lydo*, 745 F.2d at 1214 ("We would be loath to withhold relief solely" because of delay and holding injunction unwarranted on the merits.). The Service relies on inapposite cases to make hay of the brief delay here. In the Service's primary case, delay was not a dispositive factor. *Oakland Tribune, Inc. v. Chronicle Pub. Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (denying injunction because loss of reputation not shown to be result of defendant's actions). Nor is the short 22-day delay here even close to longer delays that courts have found problematic. *Hansen Beverage Co. v. Vital Pharm., Inc.*, 2008 WL 5427601, at *6 (S.D. Cal. Dec. 30, 2008) (noting delay of "several months before taking legal action" but denying injunction on other factors). *See also Lisa Frank, Inc. v. Impact Int'l., Inc.*, 799 F. Supp. 980, 1000 (D. Ariz. 1992) (six-month delay).

The Service's reliance on *Givemepower Corp. v. Pace Compumetrics, Inc.*, is even farther afield, since the plaintiff there primarily sought compensation for lost profits. 2007 WL 951350, at *7 (S.D. Cal. Mar. 23, 2007) ("[T]he procedural history of this action weighs against Plaintiff's argument that money damages would be inadequate to compensate Plaintiff."). Accordingly, the only cases the Service cites in support of its delay argument are inapposite.

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IV. THE EQUITIES WEIGH IN PLAINTIFFS' FAVOR

Defendants argue that the balance of the equities weighs against an injunction. ECF No. 27 at 8; ECF No. 26 at 22. But neither Defendant actually *balances* the equities—they simply assert the government interest in protecting migratory birds from speculative injuries. ECF No. 27 at 8–9; ECF No. 26 at 22–23. Similar to their merits discussions, Defendants do not explain why complying with the Fourth Amendment's warrant requirement or the First Amendment's speech protections would frustrate these interests. Defendants do not dispute Plaintiffs' contention that "[a]ny harms Defendants might imagine are 'entirely speculative and in any event may be addressed by more closely tailored regulatory measures.'" ECF No. 17-1 at 26:8–10 (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 710 (7th Cir. 2011)). The balance of equities favors Plaintiffs.

Defendants put great weight on the value of "unannounced searches," but ignore the fact that a warrant need not come with a warning. *See* Opp'n to Mot. to Dismiss at 22–23 (citing CA Penal Code § 1523 (criminal warrants); 13 C.C.P. § 1822.50 (administrative warrants)). Plaintiffs' demand for a warrant, to which they are entitled under the Fourth Amendment, would have no bearing on this asserted interest in surprise. And this interest in surprise can only be credited by ignoring evidence that shows Defendants routinely *do not* make use of unannounced inspections, *see* Tognazzini Dec., ECF No. 26-1 ¶¶ 11–17.

Nor do Defendants explain how regulating speech has any bearing on how falconry birds are treated. As explained in Plaintiffs' response to the motions to dismiss, the speech regulations have nothing at all to do with how falconry birds are treated—they only govern what expressive activities licensed falconers can engage in while the birds are present. Opp'n to Mot. to Dismiss at 24–26. The Service vaguely worries about "prevent[ing] a market for the protected raptors from developing" and "[p]ermitting protected raptors to be commercialized," ECF No. 27 at 9:4–6, but it also acknowledges that more specific regulations already address this interest without raising constitutional issues. *See* ECF 24-1 at 3:24–25 (citing 50 C.F.R. § 21.29(f)(4)–(5) (licensed falconers are expressly prohibited from selling, trading, or bartering either wild or captive bred falconry birds without supplemental permitting)). Falconry, the Migratory Bird Treaty Act, and the Constitution can peacefully coexist.

V. GRANTING THE INJUNCTION IS IN THE PUBLIC INTEREST

The parties appear to agree "it is always in the public interest to prevent the violation of a party's constitutional rights." *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002) (citation omitted); ECF No. 17-1 at 26:13–14; ECF No. 27 at 9:14–15; ECF No. 26 at 23:5–6. Defendants just disagree on the merits. The Department also worries without justification that holding the state regulations unconstitutional would imperil the public interest in preserving falconry in the state by taking California out of compliance with federal regulations. ECF No. 26 at 23:24. As discussed above, this is a peculiar argument, since Plaintiffs challenge both the state regulations and corresponding federal regulations—if one set is unconstitutional so is the other and the Department need not worry about complying with unconstitutional federal regulations.

VI. WAIVER OF BOND IS APPROPRIATE

The Service concedes that waiver of bond is appropriate, and the Department does not address this issue. ECF No. 27 at 9 n.4. Accordingly, no bond should be required to secure Plaintiffs' constitutional rights. *Baca v. Moreno Valley Unified Sch. Dist.*, 936 F. Supp. 719, 738 (C.D. Cal. 1996).

DATED: March 29, 2019.

Respectfully submitted,

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