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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

RESPONSE TO NORTH AMERICAN FALCONERS' BRIEF *AMICUS CURIAE*

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INTRODUCTION

Amicus Curiae North American Falconers Association (NAFA), supports "the proper practice of the sport of falconry and the wise use and conservation of birds of prey." Amicus Brief of the North American Falconers Association, ECF No. 33 at 1. Plaintiffs Peter Stavrianoudakis, Katherine Stavrianoudakis, Eric Ariyoshi, Scott Timmons, and American Falconry Conservancy (Plaintiffs) also care about the proper practice of the sport of falconry and conservation of falconry birds. *See, e.g.*, AFC Mission Statement.[1] The critical difference being that NAFA's amicus brief gives no consideration to the Constitution, *see, e.g.*, ECF No. 33 at 7 (NAFA "support[s] regulations designed to protect individual raptors possessed, *at the expense of the sport and even of the falconers*") (emphasis added), while Plaintiffs are concerned with both.

Despite apparent confusion as to Plaintiffs' claims, *see, e.g.*, *id.* at 7:11–12 ("NAFA supports the current legal framework which allows only duly licensed persons to possess raptors."), Plaintiffs do not challenge those regulations generally governing the practice of falconry, the necessity of falconry licensing, or the government's interest in protecting falconry birds. *See* First Amended Complaint (FAC), ECF No. 16. Instead, Plaintiffs simply ask this Court to enforce the constitutional and statutory limits on Defendants' regulatory authority as to warrantless searches and speech restrictions. This relief is warranted.

ARGUMENT

A. Falconry and the Constitution Can Coexist

NAFA's apparent concerns that falconry and the Constitution cannot coexist are without merit. As Plaintiffs have explained, Opp'n to Mot. to Dismiss, ECF No. 38 at 3:13–25, the assertion that injunctive relief in this case would lead to "an immediate and complete termination of the right to practice falconry in the State of California," ECF No. 33 at 9:14–15, is incorrect.

Plaintiffs challenge both the offending state search and speech regulations and the corresponding federal regulations, ECF No. 16 at 12–20, and seek to preliminarily, Plaintiffs' Notice of Motion and Motion for Preliminary Injunction, ECF No. 17, and permanently enjoin both

[1] https://www.falconryconservancy.org/index.php.

sets of regulations, ECF No. 16 at 21:9–11. Enjoining the challenged federal regulations along with the challenged California regulations will leave the California falconry licensing program in compliance with all federal requirements in force, and foreclose the decertification scenario put forward by NAFA. With this regulatory worry out of the way—and putting aside NAFA's questionable decision to endorse wholesale Defendant Bonham's unsupported constitutional arguments and the federal Defendants' cursory statutory arguments—there is much agreement between NAFA and the Plaintiffs that bears highlighting.[2]

B. NAFA's Brief Supports Plaintiffs' Contention That Falconry Is Not a "Heavily Regulated Industry"

NAFA agrees with Plaintiffs: the practice of falconry is not a business or industry. *See, e.g.*, ECF No. 33 at 8:10–11 ("Nor does the definition of falconry permit the use of raptors for commercial purposes."); *id*. at 8:13–15 (alleging that a falconry permit "prohibits the commercial use of 'falconry' raptors"); *id* at 3:14–22 (discussing the difference between abatement (a commercial activity), and falconry (a non-commercial activity)).

Rather, the practice of falconry is, as NAFA states repeatedly, a non-commercial pastime. *See, e.g., id.* at 2:6 ("Falconry is the 'taking [of] wild quarry in its natural state with a trained raptor.'"); *id.* at 2:16 (falconry is an "intangible cultural heritage."); *id.* at 2:22 (falconry is a "living cultural heritage"); *id*. at 1:3 (falconry is a "sport"); *id.* at 6:11–12 (the very definition of falconry is the "ability to pursue wild quarry in its natural habitat with a trained raptor."); *id.* at 2:18–19 ("falconry is 'a practice, a craft, and a way of life'").

All agree that falconry is not a business or industry; NAFA's brief, perhaps inadvertently, undercuts Defendants' reliance on the "heavily regulated *industry*" exception to the Fourth Amendment's privacy protections. *See* ECF No. 38 at 17–21.

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[2] NAFA asks this Court to take judicial notice of a great many "articles and other documents." ECF No. 33 at 1:19–2:1–3. To the extent NAFA "requests judicial notice of the existence of certain statements, and not the accuracy of such statements, judicial notice of the statements' existence is appropriate." *Palma v. Select Portfolio Servicing, Inc.*, 2017 WL 1364667, at *3 (E.D. Cal. Apr. 14, 2017). If, however, NAFA seeks "judicial notice of the veracity or authenticity of any arguments or conclusions of fact or law contained in documents, the request should be denied." *Id*.

C. NAFA's Brief Shows That Warrantless Searches Are Unnecessary

NAFA does not dispute that the challenged regulations authorize the warrantless search of plaintiffs' homes and curtilage, instead attempting to justify this trespass by incorporating the Department's arguments. ECF No. 33 at 1:14–18. NAFA then appears to contradict itself, first by claiming that the searches of falconers' homes and curtilage are sometimes necessary in order to ensure the health and safety of falconry birds, *id.* at 6–7, but then by acknowledging that Plaintiffs, and all licensed falconers, are *experts* in maintaining the health and safety of falconry birds, *id.* at 3:11–12 ("Falconers possess expertise in preventative care and the physical conditioning of raptors, as well as skills in advanced husbandry and raptor behavior."). *See also* Declaration of Cari Battistone, ECF No. 26-2 at 4:8.[3]

NAFA and the Plaintiffs are in agreement: one of the top priorities of licensed falconers like Plaintiffs is the welfare of the birds they own. ECF No. 33 at 3:2; *id.* at 3:8–10 ("[W]ell-being of raptor[s] ... remains at the heart of the falconry community. … [T]he falconry community's priority [is] on the welfare and safety of the birds in their possession …."). But *warrantless* searches to protect the health and safety of falconry birds are unnecessary and neither NAFA nor the Defendants explain why obtaining a warrant as required by the Fourth Amendment is incompatible with the interest in protecting falconry birds. As Plaintiffs have explained, the requirement to secure a warrant before a search is compatible with the regulatory scheme. ECF No. 38 at 22–23.

D. Engaging in Falconry While Speaking About Falconry Is Still Falconry

NAFA asserts that talking about falconry is inconsistent with its understanding of "the true activity of 'falconry.'" ECF No. 33 at 3:15. But Plaintiffs and NAFA agree that falconry is "the art of housing, tending, training, flying, and hunting with birds of prey …." ECF No. 16 ¶ 6. *Compare id*. with ECF No. 33 at 3:18 ("Falconry is the art of training and using a raptor to hunt quarry for

[3] Falconry birds, once legally taken from the wild, become private property, just like any other animal legally 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".). NAFA is in agreement with this fundamental principle. ECF No. 33 at 9:6–7 ("NAFA is a strong supporter of private ownership rights of captive-bred falconry raptors....").

sport"); *id*. at 2:18–20 ("[F]alconry is "a practice, a craft … [and] demonstrate[s] the extraordinary creativity of humanity."). NAFA does not explain how the underlying activity becomes something other than falconry just because a falconer speaks or an onlooker snaps a picture. The FAC alleges that certain state and federal falconry regulations limit what licensed falconers can say about their birds, prevent them from photographing or filming their birds, prohibit creating movies, commercials, or 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).

Plaintiffs have not argued that falconry itself is protected expression, ECF No. 17 at 19:1–3, but rather that the speech regulations govern what falconers can say and what pictures and videos they can take in the presence of their birds. ECF No. 38 at 24–30. What Falconers seek to do here is "falconry" by NAFA's definition—"training and using a raptor to hunt quarry for sport"—they simply wish to talk about it or have pictures and video taken while they do it. Opp'n to Mot. to Dismiss at 24–25.

CONCLUSION

NAFA is not the sole representative of the falconry community in North America. *Contra* ECF No. 33 at 1:4–6. Plaintiffs, including the American Falconry Conservancy, are also passionate spokespeople for their sport—and they hope to share the sport they love even more broadly once the fear imposed by the warrantless search regulations and the limits on expression imposed by the speech regulations are both lifted. In this case, Plaintiffs do not question the government's authority to generally regulate falconry, the need for falconry licensing, or the interest Defendants have in protecting falconry birds. ECF No. 16. They simply ask that their constitutional rights as Americans—rights that NAFA never acknowledges or addresses in its brief—be recognized and protected along with their falconry birds.

NAFA wants the falconry regulations enforced "in a courteous, respectful manner and confined to a legitimate regulatory need." ECF No. 33 at 7:4-5. Adding only the word "constitutional," that is the exact relief that Plaintiffs request in this case.

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DATED: April 2, 2019.

Respectfully submitted,

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