PACIFIC LEGAL FOUNDATION

October 14, 2020

Mr. Mark Davidson
Acting Administrator, Animal and Plant Health Inspection Service
United States Department of Agriculture
4700 River Road
Riverdale, MD 20737

Dear Mr. Davidson,

This letter is in response to the Animal and Plant Health Inspection Service's request for public input on the development of regulations regarding the welfare of birds not bred for use in research under the Animal Welfare Act (APHIS-2020-0068).

Under the Animal Welfare Act (AWA),[1] the U.S. Department of Agriculture, Animal and Plant Health Inspection Service enforces regulations regarding certain animals that are exhibited to the public, sold for use as pets, used in research, or transported commercially. While the Animal Welfare Act authorizes the regulation of birds not bred for use in research, your agency has not yet done so, and has now called for public comment to aid in developing these regulations. Specifically, the scope of federal licensing and operation of inspections to ensure the health and safety of birds.

Pacific Legal Foundation (PLF) submits that any proposed rule allowing for warrantless government searches of private homes to investigate the welfare of birds would be unreasonable under the Fourth Amendment to the United States Constitution. Further, a waiver of Fourth Amendment rights cannot be required as a condition of securing a federal license to breed or keep birds. For these reasons, any proposed rule regulating the welfare of birds not bred for use in research should neither authorize warrantless searches nor require a waiver of the right to refuse them. Any such scheme would violate clearly established constitutional law.

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PLF is one of the nation's most preeminent public interest law firms. Since 1973, PLF has advocated for individual rights and limited government in state and federal courts across the United States. Specifically, PLF is known for its robust defense of

[1] 7 U.S.C. § 2131, *et seq.*

property rights,[2] and advocacy for Fourth Amendment guarantees against unreasonable warrantless searches of private property.[3]

The Fourth Amendment Provides Heightened Protection for Homes

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, *houses*, papers, and effects, against unreasonable searches and seizures..."[4] Not only are homes explicitly included in the Amendment,[5] homes are singled out for heightened protection.[6] One of the primary bases for its inclusion in the Bill of Rights was the practice of general, suspicion-less searches of homes conducted by agents of the British Crown.[7] It is thus "axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'"[8] "[W]hen it comes to the Fourth Amendment, the home is first among equals,"[9] and "a firm line [is drawn] at the entrance to the house" which government agents cannot cross without sufficient cause and judicial approval.[10]

A Rule Authorizing Government Trespass into Private Homes and Curtilage Would Be Actionable Under the Fourth Amendment

A rule authorizing the trespass into private homes and their curtilage by federal agents to secure the welfare of birds would be vulnerable to a Fourth Amendment challenge for two reasons.

First, an individual's Fourth Amendment rights are violated when the government conducts a warrantless search of a place or object in which the individual has (1) manifested a subjective expectation of privacy, and (2) where the expectation is

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[2] *See, e.g.*, *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019); *United States Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016); *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595 (2013); *Sackett v. E.P.A.*, 566 U.S. 120 (2012).

[3] *See, e.g., Stavrianoudakis, et al., v. United States Fish & Wildlife Service, et al.*, No. 1:18-cv-01505 (E.D. Cal. filed Oct 30, 2018); *Hotop v. City of San Jose*, 2019 WL 1580736 (9th Cir. 2019) (*amicus curiae*) (motion for leave to file pending); *LMP Services, Inc. v. City of Chicago*, 2019 WL 2218923 (Ill. 2019) (*amicus curiae*); *United States v. Spivey*, 870 F.3d 1297 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 2620 (2018) (*amicus curiae*).

[4] U.S. Const. amend. IV (emphasis added).

[5] *United States v. Jones*, 565 U.S. 400, 407 (2012) ("[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.").

[6] *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984) (citation omitted).

[7] *Boyd v. United States*, 116 U.S. 616, 625 (1886).

[8] *Welsh*, 466 U.S. at 748.

[9] *Florida v. Jardines*, 569 U.S. 1, 6 (2013).

[10] *Payton v. New York*, 445 U.S. 573, 590 (1980).

one that society is prepared to recognize as reasonable.[11] Homes enjoy a heightened presumption of privacy.[12] "[A] man's home is, for most purposes, a place where he expects privacy," and "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*."[13] This expectation extends to a home's curtilage, which is "intimately linked to the home, both physically and psychologically," and where "privacy expectations are most heightened."[14]

Second, individuals possess an independent property-based protection from warrantless government trespass. The government trespasses when it physically enters, interferes with, or searches private property without a warrant in a manner that does not fit within one of the limited warrantless law-enforcement actions that the common law deemed reasonable at the time of the Founding.[15] "[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."[16]

Under this approach, privacy concerns are irrelevant to establishing whether a violation has occurred.[17] All that is necessary is evidence of a warrantless trespass upon a protected object or area.[18] This includes the curtilage surrounding a home,[19] and animals acquired and possessed through the American common law of capture.[20] The trespass approach thus "keeps easy cases easy."[21] The essence of Fourth Amendment is not the "breaking of [] doors" or "the rummaging of [] drawers," but the "invasion of [the] indefeasible right of personal security, personal liberty, and *private property*."[22]

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[11] *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).
[12] *See, e.g., id.*
[13] *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (emphasis in original).
[14] *California v. Ciraolo*, 476 U.S. 207, 213 (1986).
[15] *See, e.g.*, Thomas K. Clancy, *The Fourth Amendment: Its History and* Interpretation 24-25, § 2.2 (2009) (discussing hot pursuit); *United States v. Robinson*, 414 U.S. 218, 224-29 (1973) (search incident to arrest doctrine); *Carroll v. United States*, 267 U.S. 132, 153-54 (1925) (automobile exception).
[16] *Jones*, 565 U.S. at 406.
[17] *See id.* at 409.
[18] *Id.* at 413.
[19] *Jardines*, 569 U.S. at 11 (2013). *See also See Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018) ("When a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred.").
[20] *Pierson v. Post*, 3 Cai. R. 175 (N.Y. 1805) (seminal American case on the acquisition of private property rights in wild animals).
[21] *Jardines*, 569 U.S. at 11.
[22] *Boyd*, 116 U.S. at 630 (1886) (emphasis added).

No Warrant Clause Exception Would Render Government Trespass into Private Homes Reasonable

The "ultimate touchstone" of the Fourth Amendment is "reasonableness."[23] Whether a given search is reasonable is most readily determined by the issuance of a warrant by an impartial judicial officer supported by sufficient cause.[24] All warrantless government searches conducted outside this judicial process "are per se unreasonable . . . subject only to a few specifically established and well delineated exceptions.'"[25] Both "administrative" exceptions to the Warrant Clause are exclusively reliant on privacy analysis, rendering them inapplicable to property-based trespass claims.[26] Even when considering individual privacy expectations regarding regulations meant to secure the health and safety of birds, neither exception is sufficient to render searches of private homes reasonable under the Fourth Amendment.

This is true of the so-called "special needs" test, which balances individual privacy expectations with the asserted need of the government to conduct warrantless searches.[27] Unlike every major special needs case at the Supreme Court in which alleged administrative searches were found to be reasonable,[28] individuals do not have reduced expectation of privacy in their own homes. On the contrary, and as noted above, homes enjoy a heightened presumption of privacy.[29] Additionally, there is no special need to conduct warrantless searches of the private homes and curtilage of bird owners, as evidence of misconduct would supply sufficient cause to secure an administrative warrant.[30] Nor does the element of surprise bolster the case for

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[23] *Riley v. California*, 573 U.S. 373, 381–82 (2014) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)).

[24] *Donovan v. Dewey*, 452 U.S. 594, 598 (1981).

[25] *City of Los Angeles v. Patel*, 576 U.S. 409, 419 (2015) (quoting *Arizona v. Gant*, 556 U.S. 332, 338, 173 L. Ed. 2d 485 (2009)).

[26] *Jones*, 565 U.S. 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.").

[27] *See, e.g., New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (warrantless search of high school student's purse reasonable because of reduced expectation of privacy).

[28] *T.L.O.*, 469 U.S. at 325; *O'Connor v. Ortega*, 480 U.S. 709 (1987) (warrantless search of government office space was reasonable); *Griffin v. Wisconsin*, 483 U.S. 868 (1987); *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989) (warrantless drug and alcohol tests of public employees reasonable); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (warrantless drug and alcohol tests of public employees seeking promotion reasonable); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (random urinalysis requirement for participation in interscholastic athletics reasonable); *Samson v. California*, 547 U.S. 843 (2006) (suspicionless search of parolee was reasonable).

[29] *Kyllo*, 533 U.S. at 34.

[30] *Animal Welfare Complaint*, Animal and Plant Health Inspection Service, https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/complaint-form

warrantless searches, since nothing "precludes an officer from conducting a surprise inspection by obtaining an *ex parte* warrant."[31]

The so-called "heavily regulated industry" exception is even less sufficient. Under this exception, certain industries are held to have no reasonable expectation of privacy over their *stock* due to the historical operation of pervasive regulation.[32] But not only is this exception extremely narrow,[33] having only been recognized by the Supreme Court in four instances,[34] but it is only applicable to *industries* presenting an inherent danger to public health and safety.[35] The keeping or breeding of birds for non-commercial purposes does not meet this standard.

The Doctrine of Unconstitutional Conditions Bars Requiring a Waiver of Fourth Amendment Rights

Finally, "the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the federal Constitution."[36] This kind of government coercion has been prohibited in the United States for close to 150 years.[37]

If the government could require waiver of a constitutional right as a condition of receiving a public benefit, then "constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect, but no less effective, process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion."[38] "Giving the government free rein to grant conditional benefits creates the risk that the government will abuse its power by attaching strings strategically, striking lopsided deals and gradually eroding constitutional protections."[39]

While many recent landmark unconstitutional conditions cases arose in the context of Fifth Amendment takings claims,[40] two of which we litigated by Pacific Legal

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[31] *Patel*, 576 U.S. at 427.
[32] *Patel*, 135 S. Ct. at 2454 (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978)).
[33] *Id.* at 2455.
[34] *See Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (liquor licensee); *United States v. Biswell*, 406 U.S. 311 (1972) (gun dealer); *Donovan v. Dewey*, 452 U.S. 594, 598 (1981) (underground mines); *New York v. Burger*, 482 U.S. 691 (1987) (auto junkyard).
[35] *Patel*, 135 S. Ct. at 2454 (quoting *Barlow's, Inc.*, 436 U.S. at 313).
[36] *United States v. Chicago, M., St. P. & P. Railway Co.*, 282 U.S. 311, 328–29 (1931). *See also* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1989).
[37] *See Home Ins. Co. of New York v. Morse*, 87 U.S. 445, 451 (1874).
[38] *Frost v. Railroad Commission*, 271 U.S. 583, 593–94 (1926).
[39] *United States v. Scott*, 450 F.3d 863, 866 (9th Cir. 2006).
[40] *See Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595, 606–07 (2013).

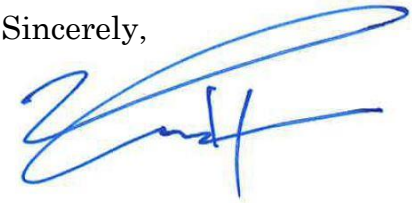
Foundation, the doctrine's application is not so limited.[41] Unconstitutional conditions claims are recognized in many other constitutional contexts,[42] including the Fourth Amendment.[43]

Any Proposed Rule Should Account
For the Protections of the Fourth Amendment

The Fourth Amendment does more than protect a substantive right; it embodies a separation of power principle requiring neutral judges, not officers in the field, to determine the justification and proper scope of a search by the government. Authorizing the warrantless search of private homes in order to secure the health and safety of birds, or requiring a Fourth Amendment waiver as the cost of securing a federal license, might be the most efficient option for the Animal and Plant Health Inspection Service. But it would not be a constitutional one.[44]

For these reasons, any proposed rule regulating the welfare of birds not bred for use in research should neither authorize unreasonable searches nor require waivers of the right to be free from them.

Sincerely,



TIMOTHY R. SNOWBALL
Attorney

[41] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 530 (2005) (discussing the "special application" of unconstitutional conditions in the takings context).
[42] *See, e.g., FCC v. League of Women Voters of California*, 468 U.S. 364 (1984) (Free Speech Clause); *Pickering v. Board of Educ. of Tp. High School Dist.* 205, 391 U.S. 563, 568 (1968) (same); *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (same); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (Free Exercise Clause); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (procedural due process); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 251 (1974) (interstate travel).
[43] *See, e.g.*, *Bourgeois v. Peters*, 387 F.3d 1303, 1325 (11th Cir. 2004); *Bertrand v. United States*, 467 F.2d 901, 902 (5th Cir. 1972).
[44] *See Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000); *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.").