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IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

PETER STAVRIANOUDAKIS, et al. Plaintiffs, v. UNITED STATES FISH & WILDLIFE SERVICE, et al., Defendants.	CASE NO. 1:18-CV-01505-LJO-BAM FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION 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

Defendants the United States Fish & Wildlife Service ("USFWS") and Margaret Everson, in her official capacity as the Principal Deputy Director Exercising the Authority of the Director of the USFWS, collectively the "Federal Defendants," respectfully submit this opposition to Plaintiffs' Motion for Preliminary Injunction (ECF 17). The motion must be denied because plaintiffs have failed to establish a substantial likelihood of success on the merits with respect to either their Fourth Amendment or First Amendment claims, there is no irreparable harm, and the balance of equities favors denial of the motion.

BACKGROUND

The Federal Defendants have provided a detailed background of the relevant regulatory framework in their memorandum in support of the motion to dismiss, filed concurrently with this brief.

Rather than repeat that information here, the Federal Defendants briefly summarize it and refer the Court to motion to dismiss for a more detailed description of the regulations. *See* ECF 24-1 at 1-5.

The Migratory Bird Treaty Act ("MBTA") implements the provisions of several treaties designed to conserve and protect migratory bird species in the United States. *See* 16 U.S.C. § 703(a). The MBTA applies only to bird species that are native to the United States. *Id.* § 703(b). As relevant to this action, the MBTA protects native Falconiforme species, a category that includes falcons, vultures, kites, eagles, and hawks, as well as native Strigiformes, which includes owls. *See* 50 C.F.R. § 10.13; *id.* § 21.29(a)(1)(i). These types of birds are referred to herein as "raptors."

The MBTA generally prohibits any kind of possession or taking of any protected bird species unless permitted by regulations promulgated by the Secretary of the Interior, which the Secretary is specifically authorized to issue. 16 U.S.C. §§ 703(a), 704(a). The Secretary has published detailed regulations on these points as they relate to the practice of falconry, most relevantly 50 C.F.R. § 21.29. That regulation delegates to state governments the responsibility for issuing falconry licenses and enforcing the applicable falconry standards pursuant to their own state regulations. 50 C.F.R. § 21.29(b)(1)(i) and (b)(3). California has been certified as complying with the federal standards, and it therefore is responsible for issuing falconry licenses and enforcing compliance with its falconry standards. *See* 78 Fed. Reg. 72,830, 72,830-33 (Dec. 4, 2013) (delegating falconry licensing authority to California).

Only individuals who possess a valid falconry license are permitted to possess a protected raptor for falconry. *See* 50 C.F.R. § 21.29(c)(1). The federal regulations are highly detailed and cover virtually every aspect of falconry. At issue in this case, however, are two general types of regulations: those that permit searches of falconry facilities at a reasonable time of day and in the presence of the property owner and falconry licensee, and those that place restrictions on the types of activities in which a licensed falcon may be used, including a general prohibition on using falcons for commercial activities. Plaintiffs characterize these as violations of, respectively, the Fourth Amendment's

prohibition against unreasonable searches and the First Amendment's guarantee of free speech. They seek to enjoin enforcement of the federal regulations, as well as certain similar state regulations.[1]

LEGAL STANDARDS

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008). "[T]he moving party has the burden of proving the propriety of such a remedy by clear and convincing evidence." *Jameson Beach Property Owners Ass'n v. United States*, 2014 WL 4377905, at *3 (E.D. Cal. Sep. 4, 2014). A party seeking a preliminary injunction "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 21; *see also Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 997 (9th Cir. 2011) ("[P]laintiff must satisfy the four-factor [*Winter*] test in order to obtain equitable injunctive relief, even if that relief is preliminary."). The Court must "balance the competing claims of injury" and "consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24 (quoting *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987)). The public interest may preclude an injunction even if the other requirements are satisfied. *Id.* An order enjoining the enforcement of law is a mandatory injunction, which imposes a heightened burden on the party seeking it. *See United States v. California*, 314 F. Supp. 3d 1077, 1086 (E.D. Cal. 2018).

As discussed below, plaintiffs cannot establish that they satisfy any of the four elements necessary for an injunction.

ARGUMENT

A. Plaintiffs Are Not Likely to Succeed on the Merits.

The Federal Defendants have explained in detail in their motion to dismiss, filed concurrently with this opposition, the reasons that plaintiffs are not likely to succeed on the merits of their claims. To

[1] The specific federal regulations sought to be enjoined are: 50 C.F.R. §§ 21.29(b)(4)(i), 21.29(d)(2) and (9), 21.29(f)(9)(i) and (ii), 21.29(f)(8)(iv) and (v). The Federal Defendants have no role in promulgating or enforcing the California regulations, and an injunction with respect to the California regulations plainly would not be properly directed to the Federal Defendants. The Federal Defendants therefore do not address the California regulations in this opposition.

avoid repetition, those arguments are incorporated here by reference. In addition, two points bear emphasis.

First, plaintiffs cannot show that their claims are ripe as to the Federal Defendants. With respect to the Fourth Amendment claims, as explained in the declaration of Daniel Crum, USFWS does not conduct any administrative searches. Decl. of Daniel Crum ("Crum Decl.") ¶ 4. That authority now rests with the appropriate California state agency. *See id.* ¶ 3; 78 Fed. Reg. 72,830, 72,830-33 (Dec. 4, 2013). As a result of this delegation, USFWS has not conducted any administrative search of falconry locations in California for at least five years (and likely much longer), and it has no plans to conduct any such administrative search in the imminent future. *See* Crum Decl. ¶ 4. The situation is the same with respect to the First Amendment claims. *See id.* ¶ 5. Put simply, there is nothing for the Court to order the Federal Defendants to refrain from doing with respect to either the Fourth Amendment or the First Amendment claims. Although it is possible that the Federal Defendants at some time in the future may again administer a falconry licensing program in California, at present they do not. This therefore is a classic example of an unripe claim. The injunction therefore should be denied because the Court lacks jurisdiction where there is no real case or controversy. *See United States v. Streich*, 560 F.3d 926, 931 (9th Cir. 2009) ("A claim is not ripe is if involves 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" (quoting *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 580-81 (1985))).

If there were any question about whether plaintiffs' claims were not yet ripe with respect to the Federal Defendants, they are put to rest after reviewing the declarations plaintiffs submitted in support of their motion for a preliminary injunction. The declarations point to no searches conducted by federal officials in California at any point after California assumed responsibility for administering the falconry licensing program. Indeed, federal officials are only specifically identified with respect to three alleged searches: an operation in conjunction with Canadian and U.S. authorities that occurred 27 years ago, *see* ECF 17-6 (Decl. of Bridget Rocheford-Kearney) ¶ 10; ECF 17-5 (Decl. of Ron Kearney) ¶¶ 10-11; a search alleged to have taken place in Washington state in 2004, *see* ECF 17-5 ¶ 9; and a search that allegedly occurred in 2009, although the location of that search is not revealed, *see* ECF 17-6 ¶ 9. The remaining alleged searches all are alleged to have been conducted by state officials, to have occurred

many decades ago, to have been conducted by unidentified officers, to have occurred in some other state or in an unidentified location, or some combination of these. *See, e.g.*, ECF 17-2 (Decl. of Peter Stavrianoudakis) ¶¶ 7-10 (alleged search by state official in 1983); *id.* ¶ 25 (alleged search in 2016 by state officials); ECF 17-3 (Decl. of Katherine Stavrianoudakis) ¶ 6 (alleged search in 1983); *id.* (alleged search of Fred Seaman in 2017 by unidentified agents in unidentified location); ECF 17-4 (Decl. of Scott Timmons) ¶ 3 (alleged search by California officials in 1992); ECF 17-5 ¶ 8 (alleged search in Colorado in 2004); ECF 17-6 ¶ 8 (alleged search in 2004 in Colorado). Plaintiffs lack any evidence at all showing that any searches have been conducted by federal officials after 2008, when the current regulations came into effect, or after 2014, when California state officials assumed authority over falconry licenses in California.

The evidence is similarly defective for many of the plaintiffs with respect to the Free Speech claims. Peter Stavrianoudakis states only that he has been asked to do demonstrations with his birds, but he does not explain how the demonstrations he might have given would have conflicted with the federal regulations, or that he has any plans to give demonstrations at all. *See* ECF 17-2 ¶¶ 36-37. Nor does he or anyone else identify any communication from a federal official indicating that they intend to take enforcement action for any planned demonstrations, films, or other such activities. Scott Timmons does identify a number of activities that he would like to do with his licensed raptors, *see* ECF 17-4 ¶¶ 10-24, but he does not identify the desired message he wishes to communicate by using licensed raptors or provide any evidence that any such messages require the use of a licensed native raptor, or that he could not use a non-native raptor to convey that message. He also does not identify how his planned communications violate the federal regulations, any concrete plans to undertake such protected communications, or any communications with federal officials suggesting imminent action the Federal Defendants intend to take if he engages in the planned activities. The declarations of Ron Kearney and Bridget Rocheford-Kearney are largely based on hearsay and, in any event, do not fill these gaps.

Given plaintiffs' lack of evidence concerning the Federal Defendants, it is not clear exactly what the plaintiffs want the Court to enjoin the Federal Defendants from doing. Although it is possible that the Federal Defendants will assume authority over the falconry licensing program at some point in the future, that is a hypothetical occurrence that "involves contingent future events that may not occur as

anticipated, or indeed may not occur at all." *Streich*, 560 F.3d at 931 (internal quotations omitted). The injunction can be denied for this reason alone.

Second, as the discussion above reveals, the declarations submitted in support of the preliminary injunction motion are largely based on hearsay and irrelevant events. There is no obvious connection between searches that occurred two or three decades ago in the 1980s or the 1990s, and the current regulatory regime, which was put in place in 2008 (when the federal regulations were adopted) and 2014 (when California assumed responsibility for falconry licensing in California). Many of the examples are based on obviously inadmissible hearsay or events that have no apparent connection to falconry licensing in California now. *See, e.g.*, ECF 17-3 ¶ 6 ("Especially after hearing what happened to Peter in 1983, to Fred Seaman in 2017, and to other falconers who I have met and spoken to on several occasions."); ECF 17-5 ¶ 8 ("Examples include the home of the Brunottes' being searched in Colorado in 2004."); *id.* ¶ 9 ("Then there was the search of my good friend Stephen Layman's home up on Whidbey Island by Federal and Washington State Fish and Wildlife officers in approximately 2004."); ECF 17-6 ¶ 9 (relating example from one Lydia Ash, who, in an unidentified location in 2009, allegedly experienced a search by federal Fish and Wildlife agents); *id.* ¶ 8 (relating experience of Richard and Becky Brunotte in Colorado who reportedly sent emails to an email list describing an alleged search).

In some circumstances, it may be permissible for the court to give some weight to inadmissible evidence such as hearsay when deciding a motion for a preliminary injunction. *See Flynt Distrib. Co., Inc. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984) ("The 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."). But it is improper to give weight to the multiple hearsay and irrelevant statements in plaintiffs' declarations in this case. Plaintiffs fail to explain why it was necessary for them to submit this evidence as hearsay, rather than obtaining it directly from the many individuals named in the declarations, particularly given that they filed this suit on October 30, 2018 but did not file their motion for a preliminary injunction until much later. Indeed, it is not apparent whether any of the individuals named in the declarations, other than plaintiffs, are actually members of plaintiff American Falconry Conservancy. The Court accordingly should disregard

the declarations to the extent they proffer hearsay, irrelevant, and otherwise objectionable evidence, including the paragraphs set out in the margin.[2] The lack of competent evidence supporting plaintiffs' motion for a preliminary injunction is another reason for the Court to deny the request for preliminary relief.

For the additional reasons noted in the Federal Defendants' motion to dismiss, *see* ECF 24-1 at 8-21, plaintiffs are not likely to prevail on the merits of either their Fourth Amendment or their First Amendment claims. The injunction should be denied on this basis as well.

B. Plaintiffs Are Not Likely to Suffer Irreparable Harm.

A court cannot grant preliminary relief unless it first finds that there is irreparable harm to the plaintiffs. *Winter*, 555 U.S. at 20, 22-24. The only irreparable harm that plaintiffs identify in their motion is the alleged violation of their Fourth and First Amendment rights. *See* ECF 17-1 at 24-25. This response fails for two reasons. First, as discussed above, plaintiffs have not submitted any evidence demonstrating that the Federal Defendants are likely to conduct any administrative searches at any point in the near future, or that they have done so at any point in the recent past. There is, therefore, no evidence suggesting any potential violation of the Fourth Amendment by the Federal Defendants. Nor is there evidence of any imminent First Amendment violation by the Federal Defendants. Second, as discussed in the Federal Defendants' motion to dismiss, *see* ECF 24-1 at 8-21, plaintiffs' claims are defective on the merits.

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[2] The following paragraphs of the declarations submitted in support of plaintiffs' motion for preliminary injunction are inadmissible, and the Federal Defendants object to their consideration in connection with the motion for a preliminary injunction: (i) Peter Stavrianoudakis Decl. (ECF 17-2) ¶ 10 (hearsay), ¶ 12 (hearsay, improper opinion, legal conclusion), ¶ 13 (hearsay, lack of foundation, speculation), ¶ 15 (lack of foundation, speculation, hearsay), ¶¶ 20-21 (hearsay), ¶ 23 (lack of foundation, speculation, hearsay), ¶ 24 (hearsay), ¶ 25 (hearsay, lack of foundation, speculation), ¶ 29 (hearsay, lack of foundation, irrelevant), ¶ 40 (hearsay, lack of foundation); (ii) Katherine Stavrianoudakis Decl. (ECF 17-3) ¶ 3 (improper opinion and legal conclusions), ¶ 6 (hearsay, lack of foundation), ¶ 9 (improper opinion and legal conclusions); (iii) Scott Timmons Decl. (ECF 17-4) ¶ 3 (irrelevant), ¶ 5 (hearsay, speculation), ¶ 7 (speculation, lacks foundation, irrelevant), ¶ 14 (hearsay, lacks foundation as to time, irrelevant); (iv) Ron Kearney Decl. (ECF 17-5) ¶ 6 (hearsay, lacks foundation), ¶ 7 (hearsay), ¶ 8 (hearsay, lacks foundation, irrelevant), ¶ 10 (hearsay, lacks foundation, irrelevant), ¶ 12 (lacks foundation, hearsay) ¶ 15 (hearsay, improper legal conclusion), ¶ 16 (hearsay), ¶ 17 (lacks foundation, irrelevant), ¶ 19 (hearsay, lacks foundation); (v) Bridget Rocheford-Kearney Decl. (ECF 17-6) ¶ 3 (speculation, hearsay), ¶ 4 (improper legal conclusion), ¶ 5 (improper legal conclusion), ¶ 8 (hearsay, irrelevant), ¶ 9 (hearsay, irrelevant, lacks foundation), ¶ 10 (hearsay, irrelevant, lacks foundation), ¶ 11 (hearsay), ¶ 13 (speculation, hearsay), ¶ 14 (hearsay); ¶ 15 (lacks foundation, speculation, hearsay), ¶ 16 (lacks foundation, hearsay), ¶ 17 (improper legal conclusion).

Plaintiffs' claims of irreparable harm are also undermined by its delay in seeking preliminary relief. A "long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm." *Oakland Tribune, Inc. v. Chronicle Pub. Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985). Even a delay as short as two months before seeking preliminary relief has been found to weigh against the granting of a preliminary injunction. *See Givemepower Corp. v. Pace Compumetrics, Inc.*, 2007 WL 951350, at *7 (S.D. Cal. Mar. 23, 2007) (delay of two months in circumstances of case weighed against finding of irreparable harm); *Hansen Beverage Co. v. Vital Pharmaceutical, Inc.*, 2008 WL 5427601, at *6 (S.D. Cal. Dec. 30, 2008) ("Delays in requesting an injunction, whether for months or years, tend to negate a claim of irreparable harm.").

Plaintiffs delayed seeking preliminary relief in this lawsuit for approximately two months until December 21, 2018.[3] The suit was filed on October 30, 2018, *see* ECF 1, and plaintiffs could have sought preliminary relief at any time during the period from October 30, 2018, until December 21, 2018. Instead, they waited nearly a month before perfecting service on the Federal Defendants. *See* ECF 8 (U.S. Attorney's Office served on November 29, 2018). After serving the Federal Defendants, plaintiffs could have sought preliminary relief at any time until December 21, but they did not. This lack of urgency contradicts any argument that they will be irreparably harmed if an injunction does not issue.

C. The Equities Favor Denying the Requested Injunction.

A court must also find that "the balance of equities tips in . . . favor" of a party seeking preliminary relief. *Winter*, 555 U.S. at 20. Plaintiffs argue that the equities tip in their favor because their constitutional rights outweigh whatever interest the government has in the challenged regulations, such as the government's "inconvenience." *See* ECF 17-1 at 25-26. As with the other elements, the lack of evidence showing any imminent search or enforcement action by the Federal Defendants is dispositive of this issue. In addition, the regulations themselves are constitutional. *See* ECF 24-1 at 8-21. But setting that aside, it is also not true that the regulations exist solely for the government's "convenience." The Supreme Court has recognized that the interest in protecting native raptors under

[3] For purposes of this argument, the Federal Defendants rely only on the delay between the filing of the suit until the lapse of federal appropriations on December 21, 2018. Plaintiffs' preliminary injunction motion was filed on January 28, 2019. The delay between December 21, 2018, and January 28, 2019, was reasonable in light of the federal government's appropriations lapse.

the MBTA is unusually high. *Missouri v. Holland*, 252 U.S. 416, 435 (1920) (protection of migratory birds is "a national interest of very nearly the first magnitude"). The challenged administrative searches are intended to ensure a safe and healthy environment for protected raptors in plaintiffs' possession. And the federal regulations challenged under the First Amendment are intended to prevent a market for the protected raptors from developing. Crum Decl. ¶ 6. Permitting protected raptors to be commercialized in the manner that plaintiffs advocate would result in negative effects on the protected species, including undermining the preservation goal and causing detrimental effects on the well-being of raptors held in captivity. *Id.* These national preservation interests, recognized in the United States' international treaties, its statutes, and regulations outweigh whatever hypothetical harms plaintiffs might suffer from a lawful administrative search or permissible restrictions against using protected raptors for commercial purposes.

D. A Preliminary Injunction Is Not in the Public Interest.

Plaintiffs are also required to demonstrate "that an injunction is in the public interest." *Winter*, 555 U.S. at 20. Although compliance with the First and Fourth Amendments is a matter of great public interest, those interests are not implicated here, where the Federal Defendants are not responsible for, and have no plans to conduct, any administrative searches or other enforcement actions, the regulations satisfy the requirements of both the First and Fourth Amendments, and any injury to the plaintiffs from the Federal Defendants is entirely hypothetical. The injunction should be denied on this basis as well.[4]

Respectfully submitted,

Dated: March 15, 2019

McGREGOR W. SCOTT
United States Attorney

By: */s/ Philip A. Scarborough*
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[4] Because a preliminary injunction cannot issue under these circumstances, the Court need not decide whether a bond should issue. If the Court does issue a preliminary injunction, the Federal Defendants agree that no bond is necessary at this time.