

No. 23-7444

IN THE

SUPREME COURT OF THE UNITED STATES

In re:

CAROLYN J. FLORIMONTE,

Petitioner

v.

BOROUGH OF DALTON,

Respondent

***PETITION FOR AN EXTRAORDINARY WRIT OF MANDAMUS
TO THE SUPREME COURT OF PENNSYLVANIA***

PETITION FOR REHEARING

Carolyn J. Florimonte

Pro se Petitioner

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iii.

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PETITION FOR REHEARING

Petitioner, Carolyn J. Florimonte, hereby petitions for a rehearing of this Court's Order of October 7, 2024, denying her Petition for an Extraordinary Writ of Mandamus.

REASONS FOR GRANTING REHEARING

This Court's Rule 44.2 authorizes a petition for rehearing with the following provisions "its grounds shall be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented."

"The petition shall be presented together with certification of counsel (or of a party unrepresented by counsel) that it is restricted to the grounds specified in this paragraph and that it is presented in good faith and not for delay; one copy of the certificate shall bear the signature of counsel (or of a party unrepresented by counsel). The certificate shall be bound with each copy of the petition. The Clerk will not file a petition without a certificate. The petition is not subject to oral argument."

Florimonte petitions the Court for rehearing of her Petition for an Extraordinary Writ of Mandamus to prevent and end the continuing theft as well as the continuing, unrestrained flooding trespass on her property located at 219 Third Street, Dalton, PA, stemming from the defiance by Respondent, the Borough of Dalton, PA, of multiple Constitutional protections and ongoing, intentional, spiteful, malicious danger that such defiance poses to her health and safety, as well as causing a forced servitude and preventing her ability to sell her home.

Following the filing of a Petition for an Extraordinary Writ of Mandamus on May 9, 2024, three intervening factors have occurred which have an effect on this Court's previous denial of the Petition for an Extraordinary Writ of Mandamus:

I. The Injuries-intervening circumstance of controlling effect

Florimonte has been intentionally, maliciously harmed again and again by Respondent's confiscation and takeover of her property as well as physically injured twice by Respondent's actions. If this Court does not intercede, more injuries will certainly follow.

Florimonte informed Respondent of the latest injury on October 16, 2023, (*EXHIBIT A*). There was no response from Respondent or any attempt to install catch basins on the full length of Third Street, Dalton, PA, which would end all present and possible future flooding,

On September 9, 2023, a destructive storm, preceded by hail, in Dalton, PA, brought massive amounts of stormwater from Huntington Woods, Dalton, PA, to Third Street, which then collected on Third Street and forcefully entered Florimonte's entire property, surrounding her house and nearly entering her home, causing more emotional trauma, panic and fear.

On Sept 13, 2023, hail on the roof woke Florimonte at 4 AM. Panicked she entered the garage with the intention of pulling ever-present 60 lb. sandbags in front of the garage doors, which face the street, As the garage door opened, stormwater from the street rushed in causing her to lose her balance then fall backward. This fall ended abruptly when she landed in a sitting position atop her Jeep's trailer hitch. Stunned and unable to stop the momentum of the fall, Florimonte was pitched forward,

striking her right temple on the garage floor, resulting in a hematoma as well as imbedding road cinders in her face. The hematoma was still visible in November, 2023. (*EXHIBIT B – the first photo of September 17, 2023, was taken facing a mirror, so the image is reversed, second photo was taken without a mirror*).

The injury from the fall caused an enormous bruise in the left pelvic area, immediate back pain, digestive problems and an inability to stand upright because of back pain as well as problems with her right leg painfully moving out of joint.

The hematoma created problems forming words, thinking a word but saying a different word, searching for words, and an inability to hold onto thoughts. which persists. These are symptoms of aphasia,

This is no longer a matter of conjecture, Florimonte has been seriously injured. She must sell her home to live with relatives who can care for her, however, the relentless, supersaturating flooding which often remains on the property for months, has prevented a sale for years. Being held hostage and forced into years of servitude by Respondent has tested Florimonte both

emotionally as well as physically. The destruction of her home and property year after year has been devastating and costly. Because she was able to carefully stand after falling, the extent of her injuries was not realized for several days. Within days after the onset of severe indigestion, difficulty swallowing, the impulse to gag, pelvic pain and severe bruising, she sought her physician's help for an examination. Many medical procedures followed. Weight and height readings showed a loss in stature of one inch. After a year-long battery of testing, on September 25, 2024, an upper endoscopy detected a sliding hiatal hernia.

This injury which remained undiagnosed when the Petition for an Extraordinary Writ of Mandamus was filed earlier this year, proves the severity of the injury suffered on September 23, 2024. (*EXHIBIT D –Diagnosis of September 25,2024*). Hernias do not improve, therefore, surgery is necessary.

And, although Florimonte has never had scoliosis, her spinal cord, since the injury, is now twisted/curved to the left side.

A list of the procedure claims is included (*EXHIBIT C*).

Respondent has saved millions of dollars by stealing the

property and running a river through it every time it rains. For the first thirteen (13) years, two pipes were gushing water onto the property especially when it wasn't raining. (EXHIBIT E).

The first injury occurred in May, 2005, when a tree deadened by Respondent's unauthorized digging of a trench across the property, dropped a limb, striking Florimonte's head, while mowing. Respondent was informed in writing of the accident but did not respond. After continuing neck pain, a bone scan in 2007, revealed two compression fractures in her neck, which permanently restricts her ability to turn her head without pain.

II. *Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984)*, was rescinded by this Court on June 28, 2024, thus freeing lower federal courts from the compulsory deference given to government agencies when there is conflict between the parties to a complaint, regarding the meaning or interpretation of a law or statute.

The repeal of Chevron removes a hurdle for plaintiffs to

overcome when tangling with government not only on the federal level but the state court level as well.

Florimonte alleges and has long suspected that the state courts were guided by an undisclosed deference in providing opinions, which always protected Respondent, the Borough of Dalton. And alleges that even though Chevron was primarily a federal level requirement to protect government agencies, it has had a trickle-down effect on the state level as well.

As the injured party, Florimonte provided the support of direct quotes from Graybill v. Providence Township, 618 A.2d 392 (Pa. 1993) and Lake v. Hankin Grp., 79 A.3d 748 (Pa. Cmmw. Ct. 2013), regarding continuing trespass by flooding, both establishing her right to file multiple lawsuits for as long as the trespass continued. Again and again she was castigated with untrue accusations of being the instigator, claiming that she was misunderstanding or imaging things, or lying as she endured the total obliteration of her Constitutional rights, theft of her land, unending servitude, and a descent into bankruptcy. The constant danger from the repeated flooding has caused

PTSD, has led to serious injury, caused by Respondent's total disregard for her safety by continuing its deplorable flooding actions on her property.

In federal court and state court, Florimonte's complaints were summarily dismissed without an opportunity to amend.

For the first thirteen years of ownership, there were two pipes on her property (*Exhibit E - photos from 2004-2013*), discharging unrestrained stormwater, sump pump water and contractor effluent continuously onto the property at 219 Third Street, Dalton, PA, whether it was raining or not, often taking control of the entire property's one and one third (1 1/3) acres of land. Now in the twenty-fifth year of this taking, servitude, and suffering, Florimonte begs this Court to end the nightmare.

III. *Stravrianoudakis v. United States Fish and Wildlife Service*, 108 F.4th 1128 (2024), No. 22-16788 (9th Cir. Jul. 24, 2024) the Opinion by the Ninth Circuit on July 24, 2024, found for plaintiffs on the grounds that no person is required to give up a Constitutional right to gain a public benefit from government. This is known as the "doctrine of unconstitutional conditions."

Under 28 U. S. Code § 1738 – State and Territorial statutes and judicial proceedings; full faith and credit clause, the Court must see the importance of the Ninth Circuit's findings in *Stravrianoudakis* to this instant case, as it establishes that Respondent's demands for a free easement which was accompanied by a threat of continuing flooding of the property, if not provided, is a prime example of the "doctrine of unconstitutional conditions." Trying to extort an easement from Florimonte, while forcing her to give up her right to just compensation under the Fifth Amendment, was the same tactic used with the prior owners. Respondent has followed through on this threat for the last almost twenty-five years.

Findings in *Stravrianoudakis at 1136*:

We begin with injury. "Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right ... in exchange for a discretionary benefit...." *Dolan v. City of Tigard*, 512 U. S. 374, 385, 114 S.Ct. 2309, 129 L. Ed.2d 304 (1994). As the Supreme Court noted a century ago, the state may condition the benefits it bestows, but "the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights." *Frost*

v. Railroad Commission, 271 U. S. 583, 593-94, 46 S.Ct. 605, 70 L.Ed. 1101 (1925). This is so because "[i]f the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all." *Id.*

Further findings in Stravrianoudakis at 1137:

A plaintiff suffers a "constitutionally cognizable injury" whenever the government succeeds in pressuring the plaintiff into forfeiting a constitutional right in exchange for a benefit or the government *withholds a benefit based on the plaintiff's refusal to surrender a constitutional right*. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606-07, 133 S.Ct. 2586, 186 L.Ed.2d 697 (2013); *id.* at 607, 133 S.Ct. 2586 (holding that the plaintiff suffered a "constitutionally cognizable injury" where he refused to waive his constitutional rights and was therefore denied a discretionary benefit); *cf. Dolan*, 512 U.S. at 379, 114 S.Ct. 2309 (reversing lower court's rejection of an unconstitutional-conditions claim where the "government had granted [the] petitioner's permit application subject to conditions" requiring the petitioner to waive her Fifth Amendment rights). That is, "*regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them.*" *Koontz* 570 U. S. at 606, 133 S. Ct. 2586. (Emphasis added).

Florimonte stresses to the Court that Respondent demanded a free easement in 2001, as stated in every complaint that she

has filed over the years, or else there would be no containment of the constant influx of water and flooding, causing her home and property to be damaged repeatedly, year after year. `

Respondent's spiteful refusal to provide catch basins on Third Street, (evident in photos included in Exhibit E and Exhibit F), is verification of Florimonte's allegations of retaliation by Respondent, while those protections are freely provided to most other streets in Dalton, PA.

The Commonwealth Court of Pennsylvania, in its Opinion of 2013, found for Florimonte but just compensation for more than thirteen years of occupation by Respondent, on her property, was denied. The failure by the state to provide just compensation, resulted in special relief to Del Monte Dunes in City of Monterey v. Del Monte Dunes at Monterey, LTD., et al. 526 U.S. 687, 699 (1999), by this Court when it decided that Del Monte Dunes was not required to pursue relief in state court before proceeding in federal court:

The Court also found that because the State of California

had not provided a compensatory remedy for temporary regulatory takings when the city issued its final denial, see *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U. S. 304 (1987), Del Monte Dunes was not required to pursue relief in state court as a precondition to federal relief. See 920 F. 2d, at 1506-1507. (Emphasis added).

Special relief is also sought by Florimonte since Pennsylvania has failed to provide just compensation for the many years of Respondent's occupation and use of her property,

IV. This is an appropriate case for Rehearing

For the reasons stated above and in the Petition for an Extraordinary Writ of Mandamus, this Court should grant the Petition for Rehearing.

CONCLUSION

The combination of new events – the diagnosis of September 25, 2024, after a year of testing and severe illness as shown in photos of life-threatening injuries caused by Respondent's flooding of 219 Third Street, Dalton, PA, the repeal of *Chevron* which ended the requirement of judges to provide special considerations to government entities, as well as the Ninth Circuit's Opinion in *Stravrianoudakis v. United States Fish & Wildlife Serv.*, pertaining to the “doctrine of unconstitutional conditions” as well as the ongoing suffering, danger and calamities created in Florimonte's life by Respondent, cry out for this Court's rehearing to provide justice and fairness.

Due to the excessive circumstances of this taking, injuries and harms maliciously, spitefully created by Respondent, now in its twenty-fifth year, Florimonte requests these special considerations:

1. Remand to Civil Court of Lackawanna County, PA, instead of the Supreme Court of Pennsylvania which has denied other

requests for relief in the past.

2. Issuance of an Order to compel the Borough of Dalton to install catch basins along the entire length of Third Street, to protect Florimonte and her property, now and in the future.

3. An Order to require Respondent to immediately clear the dead trees, killed by the flooding in the Borough's right of way, which are collapsing onto Third Street.

4. An Order to re-instate her right to file pro se complaints under the protections of the First Amendment, which was banned by the judge in Civil Court of Lackawanna County, PA.

5. An Order to compel the judges of Lackawanna County, PA, to process any new complaints by Florimonte, especially the upcoming personal injury case, without prejudice, so that those complaints may proceed to a jury trial and just compensation.

6. An Order allowing Florimonte to directly file in the U. S. Supreme Court if Respondent continues to flood the property

7. An Order granting her Petition for an Extraordinary Writ of Mandamus, and remanding the 2022, Equity Complaint to Civil Court of Lackawanna County, Scranton, PA, for jury trial.

And any other considerations as this Court may deem
necessary and right.

Respectfully submitted,

Carolyn J. Florimonte, pro se
Carolyn J. Florimonte, pro se

**NOTE: *Attached to each copy of the Petition is the
Certification of Counsel***

CERTIFICATE OF COUNSEL

As a pro se litigant, I, Carolyn J. Florimonte, hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44. Rehearing.

Carolyn J. Florimonte, pro se
Carolyn J. Florimonte, pro se

APPENDIX

EXHIBIT A

October 16, 2023

Carolyn J. Florimonte
219 Third Street
P.O. Box 375
Dalton, PA 18414

Borough of Dalton
105 West Main Street
Dalton, PA 18414

Borough of Dalton:

This correspondence will serve to provide notice, which is required by law, of personal injury suffered during the recent September overwhelming flooding of my property and home. I have warned the Borough repeatedly of the ongoing dangers posed by the deliberate, continuing flooding of my home and property and now it has happened.

My physician has seen the injuries and afterwards, procedures followed. I will be hiring a law firm to file and litigate a personal injury complaint against the Borough of Dalton.


Carolyn J. Florimonte

EXHIBIT B

PROCEDURE NOTE

SCRANTON ENDOSCOPY CENTER

Patient Name: Carolyn Florimonte
Date: September 25, 2024
Date of Birth: 02/26/1945

Ref. Physicians: Michael Kondash, DO
Endoscopist: BHARAT K PATEL M.D.

PROCEDURE: Upper endoscopy.

INDICATION: Hx GERD, improved after starting omeprazole few weeks ago

POST PROCEDURE DX: SMALL HIATAL HERNIA

After informed consent was obtained, including risks of bleeding and bowel perforations, the patient was medicated as per the anesthesia record (conscious sedation record, if applicable).

FINDINGS: Endoscope was passed per os without difficulty. Esophagus was normal. Small sliding hiatal hernia noted. Stomach, both on direct vision and retroflexion was normal. Pylorus was intubated duodenal bulb and descending duodenum appear normal.

The patient tolerated the procedure well.

DISCUSSION/RECOMMENDATION: F/u w Dr Kondash. Continue symptomatic tx for GERD & reflux precautions.



Thank you for this referral. Electronically signed by Bharat K Patel M.D.



Gastro-esophageal reflux disease without esophagitis

EXHIBIT C

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Part B



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EXHIBIT D

**Additional material
from this filing is
available in the
Clerk's Office.**

EXHIBIT G

108 F.4th 1128 (2024)

Peter STAVRIANOUDAKIS; Katherine Stavrianoudakis; Scott Timmons; Eric Ariyoshi; American Falconry Conservancy, Plaintiffs-Appellants,

v.

UNITED STATES FISH AND WILDLIFE SERVICE; Charlton H. Bonham, in his official capacity as Director of California Department of Fish and Wildlife; Jim Kurth, in his official capacity as Deputy Director Exercising the Authority of the Director of California Department of Fish and Wildlife; Martha Williams, Defendants-Appellees.

No. 22-16788.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted November 13, 2023 San Francisco, California.

Filed July 24, 2024.

1132 Appeal from the United States District Court for the Eastern District of California; D.C. No. 1:18-cv-01505-JLT-BAM, Jennifer L. Thurston, District Judge, Presiding.

1133 Daniel T. Woislaw (argued), Pacific Legal Foundation, Arlington, Virginia; James M. Manley, Pacific Legal Foundation, Phoenix, Arizona; Lawrence G. Salzman, Pacific Legal Foundation, Sacramento, California; for Plaintiffs-Appellants.

John D. Butterfield (argued), Deputy Assistant Attorney General; Nhu Q. Nguyen and Courtney S. Covington, Deputy Attorneys General; Russell B. Hildreth, Supervising Deputy Attorney General; Robert W. Byrne, Senior Assistant Attorney General; Rob Bonta, Attorney General of California; Office of the California Attorney General, Sacramento, California; Michael T. Gray (argued) and Daniel Halainen, United States Department of Justice, Environment & Natural Resources Division, Todd Kim Assistant Attorney General; United States Department of Justice, Washington, D.C.; Philip Kline, United States Department of the Interior, Washington, D.C.; Brodie M. Butland, Assistant United States Attorney, Office of the United States Attorney, Fresno, California; for Defendants-Appellees.

Before: Sidney R. Thomas, Danielle J. Forrest, and Salvador Mendoza, Jr., Circuit Judges.

Opinion by Judge Forrest,

Partial Concurrence and Partial Dissent by Judge S.R. Thomas

OPINION

FORREST, Circuit Judge.

The question presented is whether individual falconers and the American Falcon Conservancy (AFC) have standing to challenge the constitutionality of the California Department of Fish and Wildlife's (CDFW) and United States Fish and Wildlife Service's (FWS) regulations authorizing unannounced, warrantless inspections of falconers' property and records and requiring falconers to agree to such inspections as a condition of obtaining a falconry license.

Plaintiffs assert that the challenged state and federal regulations impose unconstitutional conditions on their right to

obtain a falconry license and that the unannounced, warrantless inspections that they must consent to violate the Fourth Amendment and the Administrative Procedures Act (APA). The district court dismissed Plaintiffs' Fourth Amendment-based claims for lack of Article III standing, concluding that Plaintiffs failed to demonstrate injury in fact because they have not been subjected to a warrantless inspection under the challenged regulations and have not shown that future warrantless inspections are certainly impending. We reverse the district court's dismissal of Plaintiffs' unconstitutional-conditions claims brought against CDFW and affirm as to the dismissal of their remaining claims.

I. BACKGROUND

A. Falconry Regulation

"Falconry is caring for and training raptors for pursuit of wild game, and hunting wild game with raptors." 50 C.F.R. § 21.6. Falconry is governed by the federal Migratory Bird Treaty Act and its implementing regulations, which impose a detailed regulatory scheme that governs the possession and trade of certain birds of prey. 16 U.S.C. § 704(a); 50 C.F.R. § 10.13 (listing regulated species); 50 C.F.R. § 21.82(a)-(f). Under this scheme, falconers must obtain a permit to lawfully engage in falconry. 50 C.F.R. § 21.82(c).

Two provisions of the federal regulatory scheme are at issue here. The first authorizes regulators to conduct unannounced inspections of "[f]alconry equipment and records ... in the presence of the permittee during business hours on any day of the ¹¹³⁴ week by State, tribal, or territorial officials." *Id.* § 21.82(d)(9). The second requires falconry permit applicants to submit "a signed and dated statement showing that [they] agree that the falconry facilities and raptors may be inspected without advance notice by State, tribal (if applicable), or territorial authorities at any reasonable time of day" so long as the permittee is present. *Id.* § 21.82(d)(2)(ii).

Originally, there were parallel federal and state permitting systems. States could either elect to prohibit falconry or to allow it under regulations that met minimum federal standards. *Id.* § 21.82(b)(1). Once the federal government certified that a state's regulatory scheme satisfied federal standards, it "terminate[d] Federal falconry permitting" in that state. *Id.* § 21.82(b)(3). In 2008, FWS abandoned the parallel permitting system. Recognizing that "[e]very State government except that of Hawaii has now implemented regulations governing falconry," FWS discontinued federal permitting starting in 2014. Migratory Bird Permits, 73 Fed. Reg. 59,448, 59,448 (Oct. 8, 2008). Since 2014, "a State, tribal, or territorial falconry permit" is all that is required to lawfully practice falconry. *Id.*; see also Migratory Bird Permits; Delegating Falconry Permitting Authority to 17 States, 78 Fed. Reg. 72,830, 72,830-33 (Dec. 4, 2013) (delegating falconry permitting to California).

Also at issue in this case are California's falconry regulations. California has adopted a licensing scheme that requires falconers to renew their licenses annually. Cal. Code Regs. tit. 14, § 670(a)(1). Consistent with federal requirements, California authorizes unannounced inspections: CDFW "may conduct unannounced visits to inspect facilities, equipment, or raptors possessed by the licensee, and may enter the facilities of any licensee when the licensee is present during a reasonable time of the day and on any day of the week" and "may also inspect, audit, or copy any permit, license, book, or other record required to be kept by the licensee under these regulations at any time." Cal. Code Regs. tit. 14, § 670(j)(3)(A). To obtain a California falconry license, the applicant must certify in writing:

I understand that my facilities, equipment, or raptors are subject to unannounced inspection pursuant to subsection 670(j), Title 14, of the California Code of Regulations. I certify that I have read, understand, and agree to abide by, all conditions of this license, the applicable provisions of the Fish and Game Code, and the regulations promulgated thereto.

Id. § 670(e)(2)(D). The California regulations provide that CDFW "shall deny the issuance of a license or renewal of an

existing license if the applicant or licensee fails to submit all required items." *Id.* § 670(e)(8)(D); *see also id.* § 679(e)(8) (B).

B. Plaintiffs' Falconry Activities

Individual Plaintiffs Eric Ariyoshi, Scott Timmons, and Peter Stavrianoudakis (collectively, the Falconers) are California residents who have been licensed falconers for decades. Plaintiff Katherine Stavrianoudakis is not a falconer, but she is married to and lives with Peter Stavrianoudakis.

1135 Ariyoshi's falcon lives in an unrestricted mews^[1] 30 feet from his home. Timmons's three birds live in mews and other structures directly adjacent to his home. Peter Stavrianoudakis's falcon lives primarily in ¹¹³⁵ his and his wife's bedroom, although the bird occasionally is weathered in a protective enclosure approximately 20 feet from the home. The Falconers all comply with California's falconry regulations and renew their licenses annually.

AFC is an organization "dedicated to protecting and preserving the practice of falconry, and protecting falconers' rights." AFC has approximately 100 members nationwide, all of whom are subject to federal and state falconry regulations. The Falconers are AFC members.

In their joint complaint, the individual Plaintiffs and AFC describe six unannounced inspections that state and federal law enforcement agents have conducted. Timmons alleges that in 1992, when he was in college, CDFW officers approached him at his mother's property in Thousand Oaks, California to ask whether he possessed a particular red-tailed hawk. Timmons told them the hawk had flown away, which the officers already knew because they had the hawk in their possession. Peter Stavrianoudakis alleges that sometime around 1983, his home was searched, and he was arrested, all without a warrant, "by armed members of [CDFW] related to his lawful activities as a non-resident falconer in Nevada."

AFC alleges that armed FWS agents conducted warrantless searches of the homes and property of two of its Washington-state members—Stephen Layman and Lydia Ash (Washington members)—in 2004 and 2009, respectively. AFC also alleges that armed CDFW agents conducted warrantless searches of the homes and property of two of its California members—Fred Seaman and Leonardo Velazquez (California members)—in 2016 and 2017, respectively.

C. District Court Proceedings

Plaintiffs' first amended complaint alleged that federal and state falconry regulations violate the First, Fourth, and Fourteenth Amendments of the United States Constitution, as well as the APA. The district court dismissed with leave to amend the Fourth Amendment claims, and partially dismissed the APA claim, all for lack of standing.

Plaintiffs filed a second amended complaint, asserting four claims based on the Fourth Amendment. Count I alleges that California's requirement that license applicants agree to unannounced inspections is a facial and as-applied violation of the Fourth Amendment (unconstitutional-conditions claim). Count II alleges that California's regulation allowing unannounced inspections is a facial and as-applied violation of the Fourth Amendment because it authorizes warrantless searches of licensees' homes, curtilage, papers, and effects (unannounced-inspections claim). In Count III, Katherine Stavrianoudakis alleges that the unannounced-inspection regulations violate her Fourth Amendment rights as a co-habitant of a falconer. Finally, Count IX alleges that the federal unannounced-inspection regulations violate the APA.

The district court dismissed all the Fourth Amendment-based claims without leave to amend. The district court concluded that the individual Plaintiffs' alleged injury related to future inspections was too speculative because they

"have never been subjected to the unannounced inspections pursuant to the challenged regulations." Likewise, the district court found that AFC lacked associational standing because it did not allege that its members face immediate or threatened injury from unannounced, warrantless inspections. The district court dismissed the Fourth Amendment allegation in the APA claim because, without standing to bring their substantive claims, Plaintiffs lack standing to bring an APA-based challenge to the same regulations. ¹¹³⁶ A stipulated judgment was entered as to the remaining claims, and this appeal followed.

II. DISCUSSION

"We review de novo an order granting a motion to dismiss for lack of standing under Federal Rule of Civil Procedure 12(b)(1) and construe all material allegations of fact in the complaint in favor of the plaintiff." Southcentral Found. v. Alaska Native Tribal Health Consortium, 983 F.3d 411, 416-17 (9th Cir. 2020). "The party invoking federal jurisdiction bears the burden of establishing" the elements of standing, and "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." Lujan v. Defs. of Wildlife, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

A. Unconstitutional-Conditions Claim

The Falconers challenge the requirement, included in both the state and federal regulations, that they submit to unannounced, warrantless inspections as a condition of obtaining a falconry license. They claim that this requirement unconstitutionally conditions falconry licenses on waiver of "their Fourth Amendment rights to be free from unreasonable warrantless searches of their private homes, protected curtilage, and protected effects." The district court dismissed this claim, concluding that the Falconers lack standing and the claim is unripe because the Falconers failed to allege that they had been subjected to or imminently faced an unannounced inspection. We reverse as to the Falconers' claim against CDFW and affirm as to their claim against FWS.

1. CDFW

a. Standing

The Falconers must establish the three "irreducible" elements of Article III standing. Lujan, 504 U.S. at 560, 112 S.Ct. 2130. First, that they "suffered an injury in fact that is concrete, particularized, and actual or imminent." TransUnion LLC v. Ramirez, 594 U.S. 413, 423, 141 S.Ct. 2190, 210 L.Ed.2d 568 (2021). Second, that their "injury was likely caused by the defendant[s]." *Id.* And third, that their "injury would likely be redressed by judicial relief." *Id.*

We begin with injury. "Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right ... in exchange for a discretionary benefit...." Dolan v. City of Tigard, 512 U.S. 374, 385, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). As the Supreme Court noted a century ago, the state may condition the benefits it bestows, but "the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights." Frost v. Railroad Commission, 271 U.S. 583, 593-94, 46 S.Ct. 605, 70 L.Ed. 1101 (1925). This is so because "[i]f the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all." *Id.*

We have recognized that the unconstitutional-conditions "doctrine is especially important in the Fourth Amendment context" because, "[u]nder modern Fourth Amendment jurisprudence, whether a search has occurred depends on

whether a reasonable expectation of privacy has been violated." United States v. Scott, 450 F.3d 863, 867 (9th Cir. 2006) (citing Katz v. United States, 389 U.S. 347, 361, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring)). "Pervasively imposing an intrusive search regime as the price of [a discretionary government benefit], just like imposing such a regime outright, can contribute to the downward ratchet of privacy expectations." *Id.* Accordingly, the doctrine applies when the government attempts to "exact waivers of rights as a condition of benefits, even when those benefits are fully discretionary." *Id.* at 866-67.^[2]

A plaintiff suffers a "constitutionally cognizable injury" whenever the government succeeds in pressuring the plaintiff into forfeiting a constitutional right in exchange for a benefit or the government withholds a benefit based on the plaintiff's refusal to surrender a constitutional right. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 606-07, 133 S.Ct. 2586, 186 L.Ed.2d 697 (2013); *id.* at 607, 133 S.Ct. 2586 (holding that the plaintiff suffered a "constitutionally cognizable injury" where he refused to waive his constitutional rights and was therefore denied a discretionary benefit); *cf.* Dolan, 512 U.S. at 379, 114 S.Ct. 2309 (reversing lower court's rejection of an unconstitutional-conditions claim where the "government had granted [the] petitioner's permit application subject to conditions" requiring the petitioner to waive her Fifth Amendment rights). That is, "regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them." Koontz, 570 U.S. at 606, 133 S.Ct. 2586.

Here, California conditions falconry licenses on applicants' annual certification that they "understand, and agree to abide by, all conditions of this license, the applicable provisions of the Fish and Game Code, and the regulations promulgated thereto," including unannounced, warrantless inspections. Cal. Code Regs. tit. 14, § 670(e)(2)(D); *id.* § 670(e)(4)(A). At face value, having to agree to such inspections of their "facilities, equipment, or raptors"—which include their homes, curtilage, and papers—as a condition of obtaining a falconry license constitutes a surrender of their Fourth Amendment right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV; see also Carpenter v. United States, 585 U.S. 296, 304, 138 S.Ct. 2206, 201 L.Ed.2d 507 (2018) (explaining that, although "[f]or much of our history, Fourth Amendment search doctrine was 'tied to common-law trespass' and focused on whether the Government 'obtains information by physically intruding on a constitutionally protected area,'" it has also been "expanded ... to protect certain expectations of privacy as well" (citations omitted)).^[3]

The question presented here is whether simply agreeing to submit to those inspections, in the absence of an actual inspection—see Part II.B—amounts to the relinquishment of Fourth Amendment rights. We conclude that it does. By successfully applying for a falconry license, the Falconers certify that they will forego a claim to Fourth Amendment protections. An inspection may not occur or, if it does, it may not violate the Fourth Amendment because it is reasonable. But the idea that the Falconers surrender nothing unless and until an unlawful inspection occurs—that California extracts a blanket waiver that is, in fact, entirely superfluous—defies logic. Rather, we take the regulation to mean what it says, and agreeing to unannounced, warrantless inspections without any consideration of the reasonableness of such inspections implicates Fourth Amendment rights. See Johnson v. Smith, 104 F.4th 153 (10th Cir. 2024) (outlining Fourth Amendment precedent concerning regulatory inspections).

Therefore, the Falconers' alleged injury in fact is the forced choice: retention of their Fourth Amendment rights or receipt of a falconry license, which is required to lawfully practice falconry. Cal. Code Regs. tit. 14, § 670(a)(1); see Blackburn v. Snow, 771 F.2d 556, 568 (1st Cir. 1985) (rejecting prison regulation requiring visitors to choose between submitting to a strip search or forgoing entry because "it is the very choice to which the [plaintiff] was put that is constitutionally intolerable—and it was as intolerable the second and third times as the first"). And the Falconers suffer this injury every time they renew their licenses, whether or not they are actually subjected to any unlawful inspections. Koontz, 570 U.S. at 606, 133 S.Ct. 2586. The separate question of whether an unannounced, warrantless inspection by CDFW would violate the Fourth Amendment is not before us. See Benjamin v. Stemple, 915 F.3d 1066, 1068 (6th Cir. 2019) ("[T]he

unconstitutional conditions] argument works, or at least begins to work, only if the required consent surrenders cognizable Fourth Amendment rights."). Although undoubtedly the "government may sometimes condition benefits on waiver of Fourth Amendment rights," whether the conditions imposed in this case offend the Fourth Amendment goes to the merits of the Falconers' claim, not to whether they have sufficiently alleged injury for standing purposes. Scott, 450 F.3d at 867.

In addition to injury, the two remaining standing elements are also satisfied, which the parties seemingly concede. CDFW enforces California's falconry-license requirements, Cal. Code Regs. tit. 14, § 670, and the declaratory and injunctive relief that Falconers seek—preventing enforcement of the challenged condition—would redress their claimed injuries, see Epona, Ltd. Liab. Co. v. County of Ventura, 876 F.3d 1214, 1220 (9th Cir. 2017).

b. Ripeness

Article III also requires that a plaintiff's claim be ripe for adjudication. See Ass'n of Irrigated Residents v. EPA, 10 F.4th 937, 944 (9th Cir. 2021) ("The ripeness doctrine, which aims to avoid premature and potentially unnecessary adjudication, 'is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.'" (quoting Nat'l Park Hosp. Ass'n v. Dep't of Interior, 538 U.S. 803, 808, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003))). There are two ripeness considerations: constitutional and prudential.

Constitutional ripeness overlaps with the injury-in-fact element of Article III standing, and "therefore the inquiry is largely the same: whether the issues presented are definite and concrete, not hypothetical or abstract." *Id.* (internal quotation marks and citation omitted). Because the Falconers sufficiently allege an injury in fact, constitutional ripeness is satisfied.

Prudential ripeness concerns "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* (quoting Abbott Lab's v. Gardner, 387 U.S. 136, 149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)). "A claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." Stormans, Inc. v. Selecky, 586 F.3d 1109, 1126 (9th Cir. 2009) (quoting US W. Commc'ns v. MFS Intelenet, Inc., 193 F.3d 1112, 1118 (9th Cir. 1999)). In cases against a government agency, relevant considerations include "whether the administrative action is a definitive statement of an agency's position; whether the action has a direct and immediate effect on the complaining parties; whether the action has the status of law; and whether the action requires immediate compliance with its terms." *Id.* (quoting Ass'n of Am. Med. Colls. v. United States, 217 F.3d 770, 780 (9th Cir. 2000)).

Here, the challenged licensure condition is final and is imposed annually. While the record is "admittedly sparse," as in Stormans, the challenged circumstances "are not hypothetical"—when the Falconers apply for a license renewal, they must include the certification that they agree to submit to warrantless, unannounced inspections. *Id.* Whether that condition violates the Fourth Amendment is a "primarily legal" inquiry. *Id.* Accordingly, this issue is fit for judicial review.

As to hardship, "a litigant must show that withholding review would result in direct and immediate hardship and would entail more than possible financial loss." *Id.* (quoting US W. Commc'ns, 193 F.3d at 1118). Relevant considerations include "whether the regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance." *Id.* (quoting Ass'n of Am. Med. Colls., 217 F.3d at 783). The Falconers have shown hardship because, "unless [they] prevail in this litigation, they will suffer the very injury they assert"—waiving their Fourth Amendment rights as a condition of lawfully practicing falconry. *Id.*

For all these reasons, we reverse the district court's dismissal of the Falconers' unconstitutional-conditions claims against CDFW for lack of standing.

2. FWS

The Falconers' unconstitutional-conditions claim asserted against FWS is unripe. As just discussed, "[f]or a case to be ripe, it must present issues that are definite and concrete, not hypothetical or abstract." Clark v. City of Seattle, 899 F.3d 802, 809 (9th Cir. 2018) (citation omitted); see also Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc) (explaining that when "measuring whether the litigant has asserted an injury that is real and concrete rather than speculative and hypothetical, the ripeness inquiry merges almost completely with standing" (citation omitted)).

1140 Here, because FWS has delegated falconry licensing authority to California, a lengthy chain of events would have to take place before the Falconers could show a "1140 remediable impact traceable to FWS. First, on remand, the district court would have to enjoin the challenged aspects of California's licensing scheme as violative of the Falconers' Fourth Amendment rights. Second, the injunction would have to trigger a federal review and, ultimately, revocation of California's licensing scheme. See 50 C.F.R. § 21.82(b)(4)(vi), (5)(i) (authorizing FWS to review an approved State's program to determine whether the laws meet the minimum federal requirements and to "suspend[] the approval of a State... falconry program" that it determines "has deficiencies"). Third, FWS would have to reintroduce a federal licensing scheme with the same unconstitutional conditions, notwithstanding the district court's order that such conditions (as embodied in the California scheme) are unconstitutional.^[4] Finally, the Falconers would have to apply for a federal falconry license, at which time they would once again be forced to choose between a license and their Fourth Amendment rights.

The Falconers suggest that because California's challenged licensure requirement is imposed at the direction of a federal regulation, 50 C.F.R. § 21.82(d)(2)(ii), the responsibility for the unconstitutional conditional essentially passes through to FWS. While this reasoning has some intuitive appeal, it fails to account for the fact that FWS ceded its parallel licensing authority and delegated full falconry licensing authority within California to California. See Migratory Bird Permits, 73 Fed. Reg. 59,448, 59,448 (Oct. 8, 2008) ("[A] State, tribal, or territorial falconry permit" is all that is required to lawfully practice falconry.); Migratory Bird Permits; Delegating Falconry Permitting Authority to 17 States, 78 Fed. Reg. 72,830, 72,830-33 (Dec. 4, 2013) (delegating falconry permitting to California).

It may be that if California falls out of full compliance with federal regulations by not requiring license applicants to "agree that the[ir] falconry facilities and raptors may be inspected without advance notice," 50 C.F.R. § 21.82(d)(2)(ii), federal review would be triggered that could lead to revocation of California's licensing authority, 50 C.F.R. § 21.82(b)(4)(vi), (5)(i). But it is not certain this is what would happen in the face of an adverse judicial decision and injunction. FWS may respond differently to a state that simply stops enforcing a federal requirement of its own volition compared to a state that has been enjoined by a federal court from enforcing a regulation as a constitutional matter.^[5]

1141 1141 We conclude that the connection between the Falconers' asserted injury and FWS is too attenuated and hypothetical at this point to support federal jurisdiction over Falconers' unconstitutional-conditions claim asserted against FWS.

B. Unannounced-Inspections Claim

The Falconers also directly contend that the federal and California authorization of unannounced-inspections, 50 C.F.R. § 21.82(d)(9); Cal. Code Regs. tit. 14, § 670(j)(3)(A), violate the Fourth Amendment both facially and as-applied because they authorize "unreasonable warrantless searches of Falconers' private homes, protected curtilage, and other property." Again, the Falconers seek declaratory and injunctive relief. The district court also dismissed this claim on the basis that the Falconers failed to show sufficient injury to satisfy Article III standing. We agree.

The Falconers' direct challenge fails because they have not alleged that they were subjected to warrantless inspection under the challenged regulations. See Hotop v. City of San Jose, 982 F.3d 710, 716 n.4 (9th Cir. 2020) (concluding that plaintiffs' allegations "support[ed] only a facial challenge to the regulations" because the complaint did not allege that the regulations had been unlawfully applied to the plaintiffs in the past); cf. Potter v. City of Lacey, 46 F.4th 787, 801 (9th Cir. 2022) (Bennett, J., dissenting) ("Potter also argues that the RV Parking Ordinance violates the Fourth Amendment. Because police never seized Potter's RV, he can raise only a facial Fourth Amendment challenge to the ordinance."). At best, Timmons and Peter Stavrianoudakis alleged that they were subjected to warrantless inspections decades ago under a different regulatory scheme.^[6] Thus, we address only the Falconers' facial challenge. See City of Los Angeles v. Patel, 576 U.S. 409, 415, 135 S.Ct. 2443, 192 L.Ed.2d 435 (2015) (holding that "facial challenges under the Fourth Amendment are not categorically barred or especially disfavored").

The Falconers rely on Meland v. Weber, which held that when a party "is the actual object of the government's regulation, then there is ordinarily little question that the action or inaction has caused him injury." 2 F.4th 838, 845 (9th Cir. 2021) (quoting Lujan, 504 U.S. at 561-62, 112 S.Ct. 2130); see also Illinois v. Krull, 480 U.S. 340, 354, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987). They contend that because the unannounced-inspection requirement applies only to licensed falconers, they are the objects of this regulation. But plaintiffs have standing "as the objects of regulation" only when the challenged regulation imposes a "clear burden" on them. Cal. Sea Urchin Comm'n v. Bean, 883 F.3d 1173, 1181 (9th Cir. 2018), as amended (Apr. 18, 2018). A clear burden is established when, for example, the challenged regulation "is directed at [plaintiffs] in particular" and "requires them to make significant changes in their everyday business practices," Abbott Lab's, 387 U.S. at 154, 87 S.Ct. 1507, or when a law creates a "coercive effect" that "require[s] (or at least encourage[s])" plaintiffs to act in a manner that could amount to unconstitutional discrimination, Meland, 2 F.4th at 846-47.

Here, the Falconers failed to identify any comparable, concrete effects—such as self-censorship or any kind of behavioral change—prompted by the unannounced-inspections provisions that would amount to a clear burden. Rather, they essentially claim that they feel threatened by the possibility of a future inspection. No authority establishes that mere discomfort constitutes constitutional injury.

We also are not persuaded that the object-of-regulation analysis is the correct paradigm. Instead, because the Falconers seek declaratory and injunctive relief, we consider whether they have "Article III standing to seek prospective relief." Villa v. Maricopa County, 865 F.3d 1224, 1229 (9th Cir. 2017). In this context, a plaintiff "must allege either continuing, present adverse effects due to ... exposure to Defendants' past illegal conduct, or a sufficient likelihood that [plaintiff] will again be wronged in a similar way." *Id.* (internal quotation marks and citations omitted). The Falconers' allegations do not address the present-adverse-effect criterion in any way. Standing therefore depends on whether they have alleged a "sufficient likelihood" of a future wrong.

The Falconers acknowledge that they have not been inspected (at least not in several decades), but they contend that the "pattern or practice of unreasonable warrantless searches" authorized by the unannounced-inspection provisions create a likelihood of future individualized injury. This is insufficient to "show that the threat of future injury is actual and imminent, not conjectural or hypothetical." Bolden-Hardge v. Off. of the Cal. State Controller, 63 F.4th 1215, 1220 (9th Cir. 2023) (quoting Summers v. Earth Island Inst., 555 U.S. 488, 493, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009)).

The Falconers argue that it is impossible for them to identify with any certainty when *unannounced* inspections will occur. That may be, but the Falconers failed to allege any facts about the frequency or volume of unannounced inspections that California regulators undertake, which would inform the "likelihood" that the Falconers face a risk of such inspection. Cf. Susan B. Anthony List v. Driehaus, 573 U.S. 149, 164-65, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014) (holding that injury was imminent because plaintiffs demonstrated that enforcement actions took place 20 to 80 times each year and thus "are not a rare occurrence"). Rather, the Falconers rely primarily on the existence of the regulation authorizing unannounced inspections. While the regulation is of course material, mere speculation that regulators will

exercise their inspection authority is insufficient to establish standing for a claim seeking prospective relief. See, e.g., Cal. Tow Truck Ass'n v. City & County of San Francisco, 693 F.3d 847, 866 (9th Cir. 2012) ("[T]he mere existence of a statute, which may or may not ever be applied to plaintiffs, is not sufficient to create a case or controversy within the meaning of Article III." (quoting San Diego County Gun Rights Comm. v. Reno, 98 F.3d 1121, 1126 (9th Cir. 1996))).

1143 In sum, the Falconers have not sufficiently demonstrated injury in fact as "1143 to their unannounced-inspection claim.^[7] Based on the allegations presented, "[n]o violation of the laws is on the horizon and no enforcement action or prosecution is either threatened or imminent.... [A]t this stage the dispute is purely hypothetical and the injury is speculative. Whether viewed through the lens of standing or ripeness, resolution of the [Fourth] Amendment issues is premature." Thomas, 220 F.3d at 1137. Because the Falconers lack standing to directly challenge the authorization of unannounced inspections, they also lack standing to challenge this authorization under the APA.

C. AFC's Claims

AFC also asserts an unconstitutional-conditions claim and an unannounced-inspection claim on behalf of its members. AFC alleges that the inspection regulations injure its members, not the organization itself. See Columbia Basin Apartment Ass'n v. City of Pasco, 268 F.3d 791, 798 (9th Cir. 2001) ("[A]n organization may have standing to assert the claims of its members even where it has suffered no direct injury from a challenged activity."). To establish associational standing and bring suit on behalf of its members, AFC must establish that: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Cent. Sierra Env't Res. Ctr. v. Stanislaus Nat'l Forest, 30 F.4th 929, 937 (9th Cir. 2022) (quoting Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)). Like the individual Plaintiffs, we conclude that AFC has met these requirements for its unconstitutional-conditions claim but not for its unannounced-inspection claim.

Regarding the unconstitutional-conditions claim asserted against CDFW, the first requirement is satisfied because the Falconers are AFC members and they have individual standing to bring the unconstitutional-conditions claim. The second requirement is also met because AFC's interest in ensuring that its members are not subject to unconstitutional conditions in obtaining falconry licenses is germane to AFC's purpose of promoting "the broadest liberties possible" for falconers. And the third requirement is fulfilled because AFC requests only declaratory and injunctive relief, which "do not require individualized proof." Columbia Basin Apartment Ass'n, 268 F.3d at 799.

But as with the Falconers' claims, we affirm the district court's dismissal of AFC's unconstitutional-conditions claim as asserted against FWS and its unannounced-inspection claim. For the reasons discussed regarding the Falconers, AFC's unconstitutional-conditions claim against FWS is not ripe. As to AFC's unannounced-inspection claim, the first requirement of organizational standing is not met. The Falconers failed to establish sufficient injury to have standing to bring this claim. AFC points to four of its members who are not parties here and who have experienced unannounced 1144 inspections. Specifically, AFC alleges that FWS conducted "1144 warrantless inspections of the homes and property of the Washington members in 2004 and 2009, and that CDFW conducted warrantless inspections of the homes and property of the California members in 2016 and 2017. The question is whether these inspections caused an injury that establishes standing for those members and, in turn, AFC. They did not.

Even assuming that the alleged prior warrantless inspections demonstrate that AFC's non-party members suffered injury, such injury supports only a damages claim to remedy a past violation. Bolden-Hardge, 63 F.4th at 1221. Because AFC seeks prospective relief—and "at least one member" of an organization must have "standing to present, in his or her own right, the claim (or the type of claim) pleaded by the association"—more must be shown as relates to the California and Washington members. United Food & Com. Workers Union Loc. 751 v. Brown Grp., 517 U.S. 544, 555,

116 S.Ct. 1529, 134 L.Ed.2d 758 (1996) (emphasis added).

As previously discussed, "standing to seek prospective relief" exists where plaintiffs are suffering either "continuing, present adverse effects" from the defendants' past illegal conduct or "a sufficient likelihood" that they will be similarly wronged again in the future. Villa, 865 F.3d at 1229 (citations omitted). Just like the Falconers, AFC's allegations do not address the first criterion in any way. And as to the second criterion, the operative complaint merely sets out the general allegation that "[w]arrantless searches of American Falconry Conservancy members' private homes and other property by Defendants is widespread and on-going," without any specificity about the likelihood that the Washington and California AFC members will be inspected without a warrant again. It is also worth noting that each AFC member identified was subjected only to one past inspection that occurred several years ago. These allegations do not establish "that the threat of future injury is 'actual and imminent,'" as opposed to "conjectural or hypothetical." Bolden-Hardge, 63 F.4th at 1220 (quoting Summers, 555 U.S. at 493, 129 S.Ct. 1142). AFC therefore lacks standing to bring its unannounced-inspection claim based on its identified Washington and California members because, although "[p]ast wrongs may serve as evidence of a 'real and immediate threat of repeated injury,'... they are insufficient on their own to support standing for prospective relief." *Id.* (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 102-03, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983)).

AFFIRMED IN PART; REVERSED IN PART; REMANDED.^[8]

S.R. THOMAS, Circuit Judge, concurring in part and dissenting in part:

The question in this case is whether Plaintiff-Falconers have standing to challenge state and federal falconry regulations as violative of their Fourth Amendment rights. I agree that the district court properly dismissed Falconers' claim that the regulations violate the Fourth Amendment because they have not been subjected to an inspection under the current regulations and cannot establish that a future inspection is imminent. I respectfully disagree that Falconers have standing to challenge the state regulations under the unconstitutional-conditions doctrine instead. Because I would affirm the district court's dismissal of all of Falconers' remaining claims, I respectfully dissent in part.

The Fourth Amendment guarantees "the right of the people ... against unreasonable searches and seizures." U.S. Const. amend. IV. "[R]easonableness" is the "ultimate measure of ... constitutionality" and is judged by balancing the intrusion on the individual's reasonable expectation of privacy against the "promotion of legitimate government interests." Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995). In assessing whether a search was "reasonable," the fact that an individual consented to the search, and the conditions under which such consent was obtained, may be relevant. See United States v. Scott, 450 F.3d 863, 867-68 (9th Cir. 2006); Schneekloth v. Bustamonte, 412 U.S. 218, 228, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) ("the Fourth [A] Amendment[] require[s] that consent not be coerced"). However, the fact that an individual has consented to a search as a condition of obtaining some benefit "does not by itself make an otherwise unreasonable search reasonable." Scott, 450 F.3d at 871.

While most Fourth Amendment challenges concern the reasonableness of a particular search, the Supreme Court has clarified "facial challenges under the Fourth Amendment are not categorically barred." City of L.A., Calif. v. Patel, 576 U.S. 409, 415, 135 S.Ct. 2443, 192 L.Ed.2d 435 (2015). To mount a facial challenge, however, a plaintiff must still satisfy the requirements for Article III standing by pleading a concrete injury-in-fact in the same manner required for an as-applied challenge. See Clapper v. Amnesty Intern. USA, 568 U.S. 398, 409-14, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013). Where the plaintiff has already been subjected to a search or seizure, the past intrusion can satisfy the constitutional injury requirement. See, e.g., Patel, 576 U.S. at 413-14, 135 S.Ct. 2443; Garcia v. City of L.A., 11 F.4th 1113, 1117 (9th Cir. 2021). Where no search or seizure has yet occurred, a plaintiff only has standing if they can

establish that one is "certainly impending." Clapper, 568 U.S. at 409, 133 S.Ct. 1138; see also Columbia Basin Apartment Ass'n. v. City of Pasco, 268 F.3d 791, 797 (9th Cir. 2001).

Like all justiciability doctrines, the injury-in-fact requirement is designed to ensure that we "adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III." Thomas v. Anchorage Equal Rights Com'n, 220 F.3d 1134, 1138 (9th Cir. 2000). "By requiring the plaintiff to show an injury in fact, Article III standing screens out plaintiffs who might have only a general legal, moral, ideological, or policy objection to a particular government action." Food & Drug Admin. v. Alliance for Hippocratic Medicine, 602 U.S. 367, 381, 144 S.Ct. 1540, ___ L.Ed.2d ___ (2024).

As the majority opinion recounts, Falconers' operative complaint advances two alternative theories of Fourth Amendment injury. First, Falconers allege they are injured by the "ongoing threat" of future unreasonable searches. The majority properly affirmed dismissal of claims based on this theory because Falconers cannot demonstrate a "sufficient likelihood" that they will be subjected to a future search. City of L.A. v. Lyons, 461 U.S. 95, 111, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). Alternatively, Falconers allege they are injured by the act of giving consent to future inspection because they are forced to "waive" their the Fourth Amendment rights as a condition of licensure. In my view, this alternative "unconstitutional-conditions" theory fares no better because the act of giving consent, without more, is not a cognizable injury under our precedents.

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The unconstitutional-conditions doctrine prohibits "the government from coercing people into giving [] up [constitutional rights]" by withholding benefits "from those who exercise them." Koontz v. Johns Water Mgmt. Dist., 570 U.S. 595, 604, 133 S.Ct. 2586, 186 L.Ed.2d 697 (2013). The doctrine originates in the *Lochner* Era, where it was used to strike down restrictions on commercial activity imposed as a "condition" of doing business. See, e.g. Frost & Frost Trucking Co. v. RR Comm'n, 271 U.S. 583, 591-92, 46 S.Ct. 605, 70 L.Ed. 1101 (1926); W. Union Telegraph Co. v. State of Kansas ex rel. Coleman, 216 U.S. 1, 35, 30 S.Ct. 190, 54 L.Ed. 355 (1910); see also Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1416 (1989). The conflict in those cases arose after the government brought an enforcement against a business entity for failing to abide by the restriction. Frost, 271 U.S. at 590, 46 S.Ct. 605; W. Union Telegraph, 216 U.S. at 7, 30 S.Ct. 190. Later, the unconstitutional-conditions doctrine was extended to government policies requiring individuals to forgo—or retaliating against individuals for engaging in—protected expression as a condition of receiving some benefit. See, e.g., Bd. of Cnty. Com'rs, Wabaunsee Cnty., Kan. v. Umbehr, 518 U.S. 668, 674-75, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996); Speiser v. Randall, 357 U.S. 513, 529, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958). The plaintiffs in those cases were injured by the government's termination of employment or denial of some benefit based on the plaintiffs' "engaging in [protected] speech." Speiser, 357 U.S. at 518, 78 S.Ct. 1332; see also Umbehr, 518 at 617.

Today, the unconstitutional-conditions doctrine is most often litigated in the in the land use context, where it restricts local governments from "forc[ing]" a landowner to forego "her right under the Fifth Amendment to just compensation" in exchange for a land use permit. Dolan v. City of Tigard, 512 U.S. 374, 385-86, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). In land use cases, the injury that gives rise to constitutional standing is either the uncompensated appropriation of property rights, Nollan v. California Coastal Com'n, 483 U.S. 825, 831, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), or the "impermissible denial" of authorization to fully develop the landowner's property. Koontz, 570 at 607. These injuries occur at the time of the permitting decision, which effects a concrete change in the scope of the owner's property right.

In the Fourth Amendment context, we have recognized that the unconstitutional-conditions doctrine may be relevant in assessing whether a warrantless search or seizure was "reasonable." In *Scott*, for example, we considered whether defendant Scott's consent to the warrantless search of his home "as a condition to [pre-trial] release" made the state's subsequent search of his home reasonable. 450 F.3d at 865. We explained that the unconstitutional-conditions doctrine

prevents the government from making "end-runs" around constitutional protections by "attaching strings" to "conditional benefits." *Id.* at 866. We concluded that "Scott's assent to his release conditions does not by itself make an otherwise unreasonable search reasonable" and affirmed the district court's order granting Scott's motion to suppress the fruits of the search. *Id.* at 871, 875. Scott did not address the validity of Nevada's pretrial release regime under which Scott's consent was obtained in the first place.

The application of the unconstitutional-conditions doctrine to cases like this, where no search has occurred and the only alleged injury is the signing of a form, is far from "settled." Indeed no federal court has held that the act of giving consent itself constitutes injury absent an actual or imminently impending search. The majority's assertion that Falconers are injured "every time they renew their licenses," is unsupported by precedent.

The recognition of this new type of injury has the unfortunate effect of opening a loophole in our standing jurisprudence. By allowing Falconers to mount an "unconstitutional-conditions" challenge to a law that they do not have standing to challenge directly, the majority opinion undercuts the restriction of prospective relief to those cases where the plaintiff "has suffered or is threatened with a concrete and particularized legal harm[.]" *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 680 (9th Cir. 2023) (en banc).

III

Even if the imposition of an inspection requirement could by itself violate the unconstitutional-conditions doctrine, Falconers have not demonstrated that CDFW's regime actually burdens a protected right. That is because the Fourth Amendment protects only individual's right to be free from "unreasonable searches and seizures" —not the absolute right to deny all access to one's home. U.S. Const. amend. IV (emphasis added). Because Falconers have not pleaded any facts to demonstrate that they will be forced to endure "unreasonable" inspections, they have not demonstrated that they had to "give up" any constitutional right. *Dolan*, 512 U.S. at 385, 114 S.Ct. 2309.

Where the unconstitutional conditions doctrine applies, it bars the forced surrender of rights protected of the Constitution. *Koontz*, 570 U.S. at 606, 133 S.Ct. 2586. Neither Falconers nor the majority explain precisely which constitutional protections Falconers have been forced to forgo. Falconers' brief, for example, refers to the "right to demand a warrant," but that is not an accurate description of what the Fourth Amendment protects. See *United States v. Kincade*, 379 F.3d 813, 822-24 (9th Cir. 2004) (discussing exceptions to the warrant requirement). Falconers do not, for instance, have the right to demand a warrant prior to a valid administrative search, or a search justified by non-law enforcement "special needs." *Id.* at 823. Further, our precedent clearly establishes that the act of giving consent does not constitute a waiver of an individual's right to invoke the Fourth Amendment in the future. See *Scott*, 450 F.3d at 868 (discussing and rejecting "the waiver theory" of "Fourth Amendment rights").

The majority asserts that the substance of Fourth Amendment law is not relevant to standing because it goes to "the merits" of Falconers' claim. This statement reflects the familiar principle that "jurisdictional inquiry" is different from "merits inquiry." *Inland Empire Waterkeeper v. Corona Clay Co.*, 17 F.4th 825, 834 (9th Cir. 2021); see also *Rakas v. Illinois*, 439 U.S. 128, 138, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) (distinguishing between "standing to invoke the exclusionary rule" and the "substantive question" of whether the exclusionary rule applies.). However, this principle does not render the substance of Fourth Amendment law irrelevant to our standing analysis, especially in the context of the an unconstitutional-conditions claim, where the specification of a burdened right is an essential element Falconer's theory of Article III injury. If the signing of a form without more never amounts to a violation of the Fourth Amendment, that legal conclusion is certainly relevant to the jurisdictional inquiry. We should not credit Falconers' assertion that they "forego a claim to Fourth Amendment protections" by virtue of agreeing to future inspections when our Fourth Amendment case law clearly holds otherwise. See *Scott*, 450 F.3d at 868.

Finally, in addition to the legal infirmities addressed above, there are prudential reasons to doubt Falconers' demand for "robust constitutional scrutiny" of "warrantless search conditions ... on government benefits, licenses, and privileges." By delinking Article III injury analysis from the substance of Fourth Amendment law, Falconers' unconstitutional conditions theory effectively softens the standing requirements that guard against meritless challenges to manifold reasonable regulations.

The government regularly requires citizens to consent to search and seizure as a condition of receiving some benefit or participating in some activity. We have repeatedly confirmed the reasonableness of various types of routine "suspicionless search[]" under longstanding exceptions to the warrant requirement. *Kincade*, 379 F.3d at 823. Familiar examples of include physical pat-downs conducted by TSA agents as a condition of flying, see e.g., *Gilmore v. Gonzales*, 435 F.3d 1125, 1138 (9th Cir. 2006); *United States v. Marquez*, 410 F.3d 612, 616 (9th Cir. 2005); sobriety tests conducted by police officers as a condition of driving on public roads, see, e.g., *Demarest v. City of Vallejo, Cal.*, 44 F.4th 1209, 1212-20 (9th Cir. 2022); *Birchfield v. North Dakota*, 579 U.S. 438, 478, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016); building inspections conducted by city officials as a condition of receiving a rental or business license, see, e.g., *Killgore v. City of S. El Monte*, 3 F.4th 1186, 1190 (9th Cir. 2021); *Rush v. Obledo*, 756 F.2d 713, 720 (9th Cir. 1985); and searches conducted by probation and parole officers as a condition of supervised release, see e.g., *United States v. Betts*, 511 F.3d 872, 877 (9th Cir. 2007).

Under the majority's logic, a plaintiff would have standing to challenge the laws and regulations authorizing all of these practices at the moment they agree to the condition, either expressly by signing a form, or impliedly by participating in the regulated activity. This expansion in constitutional standing under the Fourth Amendment will lead to dramatic expansion in meritless facial challenges to all kinds of regulations adopted to protect public health, welfare, and safety. Allowing these kinds of Fourth Amendment claims to proceed with no allegation of an actual impending search "will subject government at every level to inappropriate judicial scrutiny of its actions...." *Hotop v. City of San Jose*, 982 F.3d 710, 723 (9th Cir. 2020) (Bennett, J., concurring).

In sum, Falconers' unconstitutional-conditions theory reflects an impermissible attempt to circumvent the Article III injury requirement in the context of the Fourth Amendment. I would affirm the district court dismissal of the Plaintiffs' claims in their entirety. Thus, I respectfully dissent, in part.

[1] A "mews" is an "indoor" facility for housing raptors. Cal. Code Regs. tit. 14, § 670(j)(1)(B).

[2] At issue in *Scott* was whether a pretrial detainee can be induced to categorically give up his Fourth Amendment right against unreasonable search and seizure as a condition of release. We answered no. Even if a detainee signs a release agreement conditioned on submitting to warrantless search, the Fourth Amendment is satisfied only if "the search in question (taking the fact of consent into account) was reasonable." *Id.* at 868.

[3] The dissent's citation to Judge Bennett's concurrence in *Hotop v. City of San Jose*, 982 F.3d 710, 723 (9th Cir. 2020), for the proposition that allowing the Falconers' claim to proceed "with no allegation of an actual impending search" will subject the government to "inappropriate judicial scrutiny" is puzzling. Dissent at 1148. Judge Bennett's point in *Hotop* was that the conduct at issue—requiring a regulated party to submit information to a government regulator on a required form—was not a search. *Hotop*, 982 F.3d at 720-21. Here, it cannot reasonably be disputed that CDFW entering the Falconers' property to inspect their falconry facilities and records would be a search as traditionally understood. See *United States v. Jones*, 565 U.S. 400, 408 n.5, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012).

[4] This step is particularly unlikely. Federal regulations provide that if FWS suspends a state's program, it "will honor all falconry permits in that jurisdiction for 2 years from the date of our final notification of suspension of certification." 50 C.F.R. § 21.82(b)(5)(v). After two years, all raptors held under permits from the suspended state must be transferred into "other States or territories, or to Federal raptor propagation or education permittees, institutions exempt from the Federal permit requirements, or permanently released to the wild (if it is allowed by the State, tribe, or territory and by this section), or euthanized." *Id.* It seems unlikely that FWS would deviate from this approach because during the rulemaking process ending parallel permitting, FWS received a comment requesting that FWS take over a suspended state program, rather than follow the process outlined above. In response, FWS said "[t]he elimination of the Federal permit was considered at the request of the States. We cannot afford to support permitting positions just for States that fail in their permitting programs." Migratory Bird Permits, Changes in the Regulations Governing Falconry, 73 Fed. Reg. 59,448, 59,452

(Oct. 8, 2008).

[5] See generally Aditya Bamzai, The Path of Administrative Law Remedies, 98 Notre Dame L. Rev. 2037, 2062-64 (2023) (discussing agencies' acquiescence to non-binding court decisions); Nicholas Parillo, The Endgame of Administrative Law and the Judicial Contempt Power, 131 Harv. L. Rev. 685, 691 n.15 (2018) (same); see also generally Benjamin M. Barczewski, Cong. Rsch. Serv., R47882, Agency Nonacquiescence: An Overview of Constitutional and Practical Considerations (2023).

[6] Timmons and Peter Stavrianoudakis allege that they were unconstitutionally searched by CDFW agents in 1992 and 1983, respectively. Those searches occurred many years before the federal government issued the current regulations, Migratory Bird Permits, Changes in the Regulations Governing Falconry, 73 Fed. Reg. 59,448, 59,448 (Oct. 8, 2008), and delegated falconry permitting to California, Migratory Bird Permits; Delegating Falconry Permitting Authority to 17 States, 78 Fed. Reg. 72,830, 72,830-33 (Dec. 4, 2013). Accordingly, to the extent these Plaintiffs bring an as-applied challenge based on searches that occurred under an outdated regulatory scheme, those searches have no bearing on the standing analysis.

[7] Katherine Stavrianoudakis is positioned differently than the other individual Plaintiffs because she is not a falconer. She alleges that the unannounced-inspection provisions violate her Fourth Amendment rights because she shares a home with a licensed falconer. The district court dismissed her claim because she did not show that she was subjected to an unannounced inspection. On appeal, the parties did not specifically address her standing arguments. We conclude that Katherine Stavrianoudakis does not have standing for the same reasons that the Falconers do not have standing.

[8] Each party shall bear its own costs.

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