
No. 22-16788

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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; MARTHA WILLIAMS, in her official capacity as Principal Deputy Director of United States Fish and Wildlife Service,

Defendants – Appellees.

On Appeal from the United States District Court
for the Eastern District of California, Fresno
Jennifer L. Thurston, District Judge

APPELLANTS' OPENING BRIEF

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DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, American Falconry Conservancy, a corporation organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

Date: February 24, 2023

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

U.S. Constution

Court Rule

Miscellaneous

INTRODUCTION

Few rights are more fundamental to a free society than the security of the home against government intrusion. But falconers must forfeit this security right because they own a bird. Every year when they renew their falconry licenses, they must expressly grant the government an affirmative right to enter their homes, and any other location where their birds and falconry records or supplies are kept. Falconry is not merely a hobby but a lifelong investment and fulfilling relationship between man and bird. It is an ancient tradition preceding this nation's founding by several millennia. By tethering this practice to a license, the government has given itself the power to exact concessions. Among them is the right to enter any falconer's home upon demand. And punish refusal. This right-of-entry condition flies in the face of the Fourth Amendment, which guarantees "[t]he right of the people to be secure in their … houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Appellants filed this lawsuit and pursue this appeal to excise the unconstitutional terms of their lopsided "bargain" with the state. How, they ask, can their homes be "secure" when armed conservation police may enter them on a mere whim? The injury they assert is one that cuts to the very heart of Anglo-American liberty: "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365

U.S. 505, 511 (1961) (citing *Entick v. Carrington*, 19 Howell's State Trials 1029, 1066 (1765)).

Despite the clear restraint on liberty, property, and privacy that the right-of-entry condition imposes on Appellants, the District Court dismissed their Fourth Amendment claims for lack of Article III standing, reasoning that their injuries were too speculative. ER-033−37, 45. This ruling misapprehended Appellants' injuries by focusing only on their "fear of being the target of future searches," while ignoring that they suffer an injury every time they renew their licenses and are forced to transfer of a right-of-access to the government in exchange for their licenses. ER-033 Transactions of this nature are barred by the unconstitutional conditions doctrine. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 608 (2013) (collecting cases). If the government may evade judicial scrutiny of the demands it makes on the property owners it regulates as easily as the District Court's ruling allows, then there is no end to the concessions regulators may exact from the American people with impunity. Accordingly, the District Court's ruling that Appellants cannot challenge the conditions attached to their licenses and the ongoing warrantless searches that result from those conditions must be reversed.

JURISDICTIONAL STATEMENT

Appellants brought this lawsuit in the District Court pursuant to 42 U.S.C. § 1983, the Administrative Procedure Act ("A.P.A."), 5 U.S.C. § 706, and the Fourth and Fourteenth Amendments to the United States Constitution. This appeal arises from the District Court's order dismissing Appellants' Fourth Amendment and A.P.A. claims pursuant to Fed. R. Civ. P. 12(b)(1). ER-018–059; ER-002–005. The District Court entered its final judgment on November 10, 2022, ER-002–005, and Appellant filed a timely notice of appeal on November 16, 2022. ER-301–303. The District Court possessed jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C § 1343, and this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.[1]

STATEMENT OF ISSUES

1. Whether licensed falconers have standing to challenge the annual requirement that they "agree" in writing to spontaneous, unannounced, warrantless searches of their houses, papers, and effects.

2. Whether licensed falconers and their families have standing to challenge the laws that authorize and result in warrantless searches of their properties.

[1] Appellants also brought First Amendment claims below against other aspects of the falconry licensing scheme. ER-174–81. Those claims were resolved in Appellants' favor by a stipulated judgment and are not part of this appeal. ER-002.

STATEMENT OF THE CASE

Peter Stavrianoudakis, Eric Ariyoshi, and Scott Timmons are falconers licensed by the California Department of Fish and Wildlife ("CDFW"). Together with the American Falconry Conservancy ("AFC"), an organization that promotes the interests and liberties of its falconer members across the country, and Katherine Stavrianoudakis, Peter's wife who resides with him in their private home, they filed suit on October 30, 2018, seeking declaratory and injunctive relief against a condition on state falconry licenses that allows for state and federal conservation police officers to enter their homes, curtilages, and other properties armed with guns but without notice, warrants, or cause. Appellants seek relief not only against future intrusions on their properties authorized by the laws they challenge, but to enjoin the CDFW and U.S. Fish & Wildlife Service ("USFWS") from falconers to "agree" each year in writing to the condition on their licenses that grants to Defendants the power to enter their properties.

Assigning this right-of-entry is a condition precedent to license issuance and renewal under the federal and state laws administered and enforced by CDFW and USFWS. *See* 50 C.F.R. § 21.82(d)(2)(ii), (c)(2); 14 C.C.R. § 670(e)(2)(D). In their Second Amended Complaint, Appellants alleged that these warrantless searches of falconers' homes and other properties are "widespread and on-going." ER-156, 167,

171. In addition, they cited several examples of Defendants executing searches of Appellants' properties:

- In 2017, armed agents of CDFW warrantlessly searched the private home and curtilage of Leonardo Velazquez, a licensed falconer in California and member of AFC. ER-168.
- In 2016, armed agents of CDFW warrantlessly searched the private home and curtilage of Fred Seaman, a licensed falconer in California and member of AFC. ER-167.
- In 2009, armed federal fish and wildlife agents warrantlessly searched the private home and curtilage of Lydia Ash, a licensed falconer in Washington State and member of AFC. ER-167.
- In 2004, armed federal fish and wildlife agents warrantlessly searched the private home and curtilage of Stephen Layman, a licensed falconer in Washington State and member of AFC. ER-168; ER-148–152.
- In 1992, armed agents of CDFW warrantlessly searched the private home of Scott Timmons' mother, where he resided while attending college. Scott Timmons was and remains a licensed falconer in California. ER-165.
- In approximately 1983, Peter Stavrianoudakis, a licensed master falconer in California, was subject to an unreasonable warrantless arrest and

search of his home by armed CDFW agents related to lawful falconry activities he conducted in Nevada. No criminal charges were filed against him. ER-163; ER-127-135.

Appellants asserted in their Second Amended Complaint that the demand for a warrantless right-of-entry to Appellants' private homes and properties compelled by federal and state law is an unconstitutional condition under the Fourth Amendment. ER-169 ("Count I")]. Likewise, Appellants asserted that the laws authorizing and resulting in warrantless searches of falconers' homes are unconstitutional under the Fourth Amendment. ER-171 ("Count II")]. Appellant Katherine Stavrianoudakis sought relief in her own right as a non-falconer and resident of a home subject to these warrantless invasions by operation of the Defendants' warrantless search practices and administration of falconry regulations. ER-172 ("Count III"); ER-136–39. And finally, Appellants sought relief under the Administrative Procedure Act, 5 U.S.C. § 706, against USFWS, asserting that the federal regulation requiring that falconers surrender a right-of-entry to the government, and which authorizes warrantless searches of falconers' properties, is in excess of statutory jurisdiction, authority, or limitations because its enabling legislation, *see* 16 U.S.C. § 706, only provides for the "authority, *with a search warrant*, to search any place" and therefore denies the power to do so *without* a

warrant. ER-180 (emphasis added). All Appellants seek declaratory and injunctive relief, asserting both facial and as-applied claims.

The Falconry Regulations

USFWS began regulating falconry in 1972 pursuant to the Migratory Bird Treaty Act, 16 U.S.C. § 703, *et seq.*, and Bald and Golden Eagle Protection Act, 16 U.S.C. § 668, *et seq*; 37 Fed. Reg. 22,633 (Oct. 20, 1972). The warrantless search powers and right-of-entry conditions that Appellants challenge took root in 1972 federal regulations. *See* 50 C.F.R. § 16.5(e) (1972). In 2008, USFWS substantially revised these regulations and granted authority to states to administer falconry permits and regulations so long as the state regulations are "at least as restrictive as these Federal standards." 50 C.F.R. § 21.82(c)(2).[2] Those standards retained the warrantless search powers and continued to require that falconers:

> must submit to your State … agency a signed and dated statement showing that ***you 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[.]

[2] Appellants' Second Amended Complaint references these regulations as being located in 50 C.F.R. § 21.29, but this section in its entirety was relocated to 50 C.F.R. §21.82. Migratory Bird Permits; Administrative Updates to 50 C.F.R. Parts 21 and 22, 87 Fed. Reg. 876-01.

50 C.F.R. § 21.82 (emphasis added). California forces falconers to "agree" to these searches as a condition on falconers' applications for licensure and renewal. "Each application shall contain a certification worded as follows:"

> "I certify that I have read and am familiar with both the California and U.S. Fish and Wildlife Service falconry regulation … and that the information I am submitting is complete and accurate to the best of my knowledge and belief. I understand that any false statement herein may subject me to cancellation of the application, suspension or revocation of a license, and/or administrative, civil, or criminal penalties. ***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.***"

14 C.C.R. § 670(e)(2)(D) (emphasis added). In addition to this concession of a right-of-entry, the state and federal regulations each provide for a separate and direct authorization to search the properties of licensed falconers. The broad "certification" language above compels obeisance to these independent powers as well. The Federal Code provides that "[f]alconry equipment and records may be inspected in the presence of the permittee during business hours on any day of the week by State, tribal, or territorial officials." 50 C.F.R. § 21.82(d)(9). The California Code likewise provides:

> The department 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. The department

> 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.

14 C.C.R. § 670(j)(3)(A).

Under California law, failure to comply with an attempted search or the compelled "certification" statement is grounds for the denial of an applicant's license (or license renewal) or the "immediate" suspension of an already granted license. 14 C.C.R. § 670(j)(3)(A). The practice of falconry is illegal under California and federal law without a license. 16 U.S.C. § 703; 50 C.F.R. § 21.82; 14 C.C.R. § 670(a). Thus, licensees and license applicants who refuse to allow or "certify" their acceptance of warrantless searches risk forfeiture of their birds. Falconers must waive their Fourth Amendment rights every year when they renew their licenses. *See* ER-159; 14 C.C.R. § 670(a)(1); 14 C.C.R. § 670(e)(4); 50 C.F.R. § 21.82(c)(1)(i).

The breadth of the state and federal search powers encompassed by the terms "facilities," "equipment," "raptors," "book," and "records" is striking given that falconers regularly keep these items inside their private homes and curtilage. ER-153.

Procedural History

Appellants filed their initial complaint on October 30, 2018, and First Amended Complaint on January 17, 2019, both of which stated claims against

USFWS and CDFW based on the First and Fourth Amendments and Administrative Procedure Act. Appellants filed their first motion for preliminary injunction on January 28, 2019, ER-240, and on January 24, 2020, the District Court dismissed Appellants' Fourth Amendment claims on the ground that their injuries were too speculative to create a case or controversy under Article III. ER-197–20. Yet, even while dismissing Appellants' Fourth Amendment claims, the court noted that "[t]he State Defendants acknowledge that DFW does conduct these warrantless searches." ER-198. The court ordered supplemental briefing on Appellants' motion for preliminary injunction regarding the First Amendment claims. ER-236.

Appellants filed their Second Amended Complaint—the operative complaint—on February 24, 2020. The complaint asserted Fourth Amendment claims in three counts and a claim under the Administrative Procedure Act. "Count I" sought injunctive and declaratory relief against the requirement that Appellants transfer to Defendants a right-of-entry to their properties that waives their right to demand a warrant for searches of their houses, curtilage, papers, and effects. ER-169–70. "Count II" sought declaratory and injunctive relief against Defendants' authorization and practice of unreasonable searches of the houses, papers, and effects of licensed falconers. ER-171–72. "Count III" sought injunctive and declaratory relief against the warrantless searches of non-falconry license holders on behalf of Katherine Stavrianoudakis. ER-172–73. "Count IX" sought declaratory

and injunctive relief against the Defendants pursuant to the Administrative Procedure Act, asserting that the federal warrantless search regulations contained in 50 C.F.R. § 21.82 are in excess of statutory jurisdiction, authority, or limitations. ER-180. Each of these counts is asserted as-applied and facially. The Second Amended Complaint continued to assert Appellants' related First Amendment claims.

Appellants filed another motion for preliminary injunction against Defendants' enforcement of the right-of-entry condition and falconry search regulations on March 23, 2020. ER-094. On January 14, 2022, the District Court dismissed Appellants' Fourth Amendment claims on the ground that they again did not sufficiently allege a jurisdictional injury in fact. ER-035. With respect to Eric Ariyoshi, Scott Timmons, and Peter and Katherine Stavrianoudakis, the District Court found that the searches they identified of Peter's and Scott's properties in 1983 and 1992 were an insufficient basis for asserting that "defendants routinely conduct unannounced searches under the challenged regulations" or that there was an existing threat of imminent searches of licensed falconers' or their families' properties. ER-034. This ignored Appellants' pleaded allegation that these warrantless searches are in fact routinely conducted by Defendants, *see* ER-156, 167, 171, that the search regulations have existed since 1972, and CDFW's admission that it regularly executes warrantless searches under the challenged laws, *see* ER-

198–99. With respect to AFC's standing, it dismissed the searches of AFC members' properties as, again, an insufficient basis for establishing a sufficiently imminent threat of future enforcement, holding that AFC also lacked standing. ER-035–37. Again, the District Court ignored Appellants' allegation that such searches were widespread and ongoing, *see* ER-153, 167, 171, 140–47, and CDFW's prior admission that it regularly conducts them, *see* ER-198–99. The court's only analysis of whether Appellants had standing to assert their unconstitutional-conditions-doctrine claim appeared in a footnote wherein it reasoned that "such an argument goes to the substance of the plaintiffs' Fourth Amendment claim but is irrelevant to the initial determinations of standing or ripeness." ER-034 n.9. The only authority it cited in support of this was a 1983 opinion of the Supreme Court ruling that a person lacked standing to seek prospective relief against the City of Los Angeles after being placed in a dangerous chokehold. ER-034 n.9 (citing *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983)). In total, the court's consideration of Appellants' standing under the unconstitutional conditions doctrine comprised 15 words. ER-034 n.9. The District Court spent little more ink on Appellants' Administrative Procedure Act claim that the federal warrantless search powers were in excess of statutory authority

and dismissed this also for lack of a jurisdictional injury on the same basis as Appellants' other claims. ER-045.

In that same order, the District Court found that Appellants were likely to succeed on the merits of their First Amendment claims, involving licensing conditions imposing restrictions on speech, but denied their request for a preliminary injunction because it found the balance-of-equities and public-interest factor weighed in favor of Defendants. ER-58.

The parties then negotiated a settlement of the First Amendment claims. ER-006. On November 14, 2022, the District Court entered a stipulated judgment and order finally resolving all the claims, ER-002, and Appellants timely noticed and filed this appeal of the dismissal of their Fourth Amendment claims. ER 301.

STANDARD OF REVIEW

A district court's determination whether a party has standing is reviewed *de novo*. *See Meland v. Weber*, 2 F.4th 838, 843 (9th Cir. 2021) (*de novo* review of dismissal for lack of standing). On appeal from a dismissal on the basis of standing, this Court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Meland*, 2 F.4th at 846 n.2 (quoting same). "The basic inquiry is whether the 'conflicting contentions of the parties … present a real, substantial controversy between parties having adverse legal interests, a dispute definite and

concrete, not hypothetical or abstract." *Babbit v. UFW Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93 (1945)). "A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Id.* (citing *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)). "But '[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.'" *Id.* (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)) (alteration in original). In establishing Article III standing, "First, the plaintiff must have suffered an 'injury in fact' … Second, there must be a causal connection between the injury and the conduct complained of[,] … and [t]hird, it must be likely … that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560−61 (1992) (quotation marks and citations omitted). When "the plaintiff is himself an object of [government] action … there is ordinarily little question that the action … has caused him injury, and that a judgment preventing … the action will redress it." *Id.* at 561−62.

SUMMARY OF ARGUMENT

State and federal laws confer on Defendants sweeping search powers over the "facilities" of licensed falconers, requiring neither warrants nor cause before searching those falconers' houses, papers, and effects in violation of their Fourth Amendment rights. Appellants alleged in their complaint both specific instances

during which their own properties were searched and that these searches of falconers' properties were "widespread and on-going." ER-156, 167, 171. The District Court even noted that CDFW admitted it *does* use this power. ER-198–99. Despite these specific allegations and admissions of past and present conduct, and despite the standard of review that required the District Court to "accept as true all material allegations of [Appellants'] complaint" while "construe[ing]" the facts in their favor, *Warth*, 422 U.S. at 501, it held that Appellants failed to allege a jurisdictional injury in fact that was ripe for judicial review. ER-033–37. This ruling was error and must be reversed because Appellants have alleged ongoing, reoccurring, and concrete injuries that are traceable to Defendants and ripe for resolution. Declaratory and injunctive relief against Defendants' warrantless searches, the laws that authorize them, and the right-of-entry condition that licensed falconers are forced to grant each year will fully redress their injuries.

First, Appellants are directly injured by Defendants when they are compelled each year to "certify" their acceptance of warrantless searches of their "facilities" and other properties, which include their houses, papers, and effects. This grant of a right-of-entry is exacted from falconers as a condition of licensure. Since the exaction of this right and the enforcement of Defendants' warrantless search powers directly target licensed falconers in their homes and other properties, Appellants (as

licensed falconers and their families) have standing to seek relief against it. *See Lujan*, 504 U.S. at 561−62; *Meland*, 2 F.4th at 845.

The demand that falconers transfer to the government a right-of-access to their properties constitutes a direct injury to their Fourth Amendment rights in violation of the unconstitutional conditions doctrine, which bars government from attaching conditions to permits or licenses that require the surrender of a constitutional right. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 608 (2013) (collecting cases). The demand for a right-of-entry by Defendants, and their concomitant power to punish refusal of the searches they attempt, additionally render Appellants' and all licensed falconers' homes "unsecure" against unreasonable searches within the meaning of the Fourth Amendment. This results not only in an injury to licensed falconers every year at license renewal, but a continuing injury to the constitutional right to be secure in their houses, papers, and effects against unreasonable searches. Furthermore, Appellants meet the injury-in-fact standard for "imminent" harm not only because they suffer an injury each year when they are compelled to sign over their Fourth Amendment rights, but also because, as they pled in their Second Amended Complaint, Defendants *continue* to engage in warrantless searches of licensed falconers' properties. The District Court erred by not taking this allegation of Appellants as true. It likewise erred in finding that Appellants had alleged no injury in fact, as they have sufficiently pled actual,

ongoing, *and* imminent injuries to the security of their properties and the right not to be coerced to surrender the fundamental constitutional protections of the Fourth Amendment.

Second, the extorted access right compelled by federal and state law is directly imposed by Defendants. Likewise, Defendants are responsible for the warrantless searches of licensed falconers' properties. Thus, the causation element of Article III standing is easily satisfied. *See Lujan*, 504 U.S. at 559−60.

Third, Appellants' claims are ripe because they have *already* been searched, *already* forced to grant a right of entry to the state and give up their right to exclude, and *continually* remain subject to the threat of warrantless searches of their properties. *Meland*, 2 F.4th at 849. Furthermore, Appellants' requested declaratory and injunctive relief against the warrantless search powers and licensing conditions would afford them full relief by restoring the security of their homes and other properties against unreasonable searches and prevent Defendants from demanding an annually-renewed right-of-entry to their properties. *Lujan*, 504 U.S. at 561−62.

Fourth, Appellant AFC satisfies the requirements for associational standing because (1) its members, including other named Appellants, have been subject to warrantless searches by Defendants, (2) one of its interests is promoting the liberties of falconers—with includes their Fourth Amendment rights, and (3) the assertion of

its members' interests does not require the participation of each member. *See Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

Appellants have asserted far more than necessary to satisfy Article III standing and invoke the jurisdiction of the federal court system. At the very least, the licensing conditions Defendants impose each year at license renewal repeatedly and continually abrogate Appellants' property and privacy rights under the Fourth Amendment. The District Court therefore erred in ruling that Appellants did not assert a ripe injury sufficient for standing. Accordingly, this Court should reverse the District Court's dismissal of Appellants' Fourth Amendment and A.P.A. claims for lack of standing and remand this case for further proceedings.

ARGUMENT

I. The forced transfer of a right-of-entry to Defendants, as well as the continued use of that access right to execute warrantless searches against licensed falconers, injures Appellants' Fourth Amendment rights.

The right to be secure in houses, papers, and effects against unreasonable searches is a fundamental constitutional liberty protected by the Fourth Amendment. U.S. Const. amend. IV; *Wolf v. Colorado*, 338 U.S. 25, 27−28 (1949). Warrantless searches are *per se* unreasonable and unconstitutional unless the government can discharge its heavy burden of proving that a warrant exception applies and is satisfied. *Coolidge v. New Hampshire*, 403 U.S. 443, 454−55 (1971). In defense of this right, "a person subject to a statute authorizing searches without a warrant or

probable cause may bring an action seeking a declaration that the statute is unconstitutional and an injunction barring its implementation." *Illinois v. Krull*, 480 U.S. 340, 355 (1987). Indeed, Appellants pled below not only that they are "subject to" the statutes, regulations, and practices that authorize Defendants' unconstitutional search powers, but that they have in fact had their properties invaded and are forced to waive their Fourth Amendment rights on a yearly basis. 14 C.C.R. § 670(a)(1); 14 C.C.R. § 670(e)(4); 50 C.F.R. § 21.29(c)(1)(i).

Appellants assert two independent grounds for Article III injury. First, Appellants are the object of the state and federal regulations they challenge, which subject their houses, papers, and effects to the omnipresent threat that they will be warrantlessly searched. Because falconers alone are targeted for these searches, they are the laws' objects and the threat is real and credible that they will be subject to such searches again. Refusal is punishable by criminal and civil sanctions, including the forfeiture of falconers' birds. *See* 16 U.S.C. § 703; 50 C.F.R. § 21.82; 14 C.C.R. § 670(a). The ongoing threat of warrantless searches is independently supported by (1) completed warrantless searches of their properties, (2) the credible threat of future searches, and (3) the continuing injury to the security and privacy of their properties.

Second, the compelled transfer of a right-of-entry in exchange for their falconry licenses directly burdens their Fourth Amendment rights and constitutes an injury itself.

The District Court erred in insisting that Appellants must allege *additional* government intrusions of their private homes before a court will hear their complaint for relief against (1) the laws that specifically target their homes for warrantless searches without cause, or (2) the right of entry exacted as a condition of licensure.

A. Since falconers are the direct object of unconstitutional state and federal warrantless search practices and laws, they have standing to challenge them.

When "the plaintiff is himself an object of [government] action … there is ordinarily little question that the action … has caused him injury, and that a judgment preventing … the action will redress it." *Lujan*, 504 U.S. at 561−62. As Appellants alleged in their Second Amendment Complaint, they are compelled by law every year to sign over their constitutional right to the security of their houses, papers, and effects in exchange for Defendants' issuing or renewing their licenses to practice falconry. ER-159. Insisting on a warrant for searches of their properties by Defendants is punishable by fines, criminal sanctions, license revocation, and the forfeiture of their falcons. *See* 16 U.S.C. § 703; 50 C.F.R. § 21.82; 14 C.C.R. § 670(a).

This Court recently considered the question of Article III's injury-in-fact requirement in *Meland v. Weber*, 2 F.4th 838 (9th Cir. 2021). There, it found a constitutional injury sufficient for standing where a shareholder's right to vote for the candidate of their choice was restricted by a state law mandating a gender-based quota on corporate boards of directors. *Id.* at 843−47. Despite the unavailability of criminal or civil sanctions against the plaintiffs, it found an injury "because shareholders [were] one of the objects of [the law] and therefore ha[d] standing to challenge it." *Id.* at 845. Under the object-based standing inquiry, a court "determin[es] whether a plaintiff is the object of a government enactment [by] consider[ing] the purpose of the government enactment and its practical effect." *Id.* at 845. Even though the gender-quota law was enforceable against corporations rather than their shareholders, this Court found that shareholders were nonetheless the law's *objects* since it was their behavior it sought to influence. *Id.* at 846 ("Accordingly, the California Legislature necessarily intended for SB 826 to require (or at least encourage) shareholders to vote in a manner that would achieve [its] goal.").

Just like the *Meland* shareholders, it is the Appellant falconers' behavior that Defendants seek to influence. Instead of being influenced to vote in a particular way, however, Appellants are influenced to refrain from exercising their constitutional right to demand a warrant before admitting law enforcement officers to search their

properties. Further, they are influenced to sign over this right, in writing, every year. And if this surety were not enough for Defendants, Appellants are additionally subject to criminal and civil penalties for refusing the warrantless searches authorized by the laws they challenge. In these latter two respects, Appellants' claims are even more "concrete and particularized" than the shareholders in *Meland* because the falconry regulations *compel* specific conduct (signing the right-of-entry waiver) in addition to influencing conduct (allowing warrantless searches on the spot), *see Lujan*, 504 U.S. at 560−61, and punishes falconers *directly* for noncompliance. *See Meland*, 2 F.4th at 846−47 (finding injury in fact where law "at least encouraged" shareholders to vote in a particular way and did not apply sanctions directly to those shareholders).

In support of its conclusion that the objects of regulation have standing to challenge those regulations, this Court in *Meland* cited favorably to the Seventh Circuit opinion in *Owner-Operator Independent Drivers Association, Inc. v. Federal Motor Carrier Safety Administration*, 656 F.3d 580 (7th Cir. 2011) (hereinafter "*OOIDA*"), which held that truck drivers had standing to challenge a federal regulation that would require them to install logging devices in their cabs if they were under a "remedial order" as a result of violating trucking regulations a certain number of times. *Meland*, 2 F.4th at 845 (citing *OOIDA*, 656 F.3d at 585−86). None of the trucker plaintiffs in *OOIDA* were under a remedial order nor were they yet

required to install any devices in their cabs. *OOIDA*, F.3d at 585−86. In fact, the rule they challenged had not yet gone into effect. *Id.* at 586−87. Thus, multiple triggering conditions stood between them and the enforcement of the new rule against them. Yet, they were the "object" of the regulation and nonetheless had standing to challenge its constitutionality under the Fourth Amendment. *Id.* at 585−87. Just as the truckers in *OOIDA* were not required to wait for the installation of tracking devices in their cabs, Appellants should not be required to wait until armed fish and game officers are inside their houses (again) before asking the courts for relief against the challenged regulations.

Accordingly, Appellants have asserted a more than sufficient basis for establishing Article III injury as the objects of the state and federal laws and policies they challenge.

Despite the clear applicability of *Meland* to Appellants' claims, the District Court cited repeatedly to *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), in support of its finding that Appellants' injuries were too speculative. ER-031–32, 034, 036. Merely reciting the facts of *Lyons*, however, disposes of its relevance here. A man stopped for a traffic violation and placed in a chokehold sought to enjoin the City's officers from using this chokehold in the future. *Id.* at 97−98. Nothing supported the idea that he was any more likely than any other resident of the City to be placed in a chokehold again. *Id.* at 105−06. In other words, he was not the *object* of the law. Nor

was he ensnared in any continuing legal relationship with the City that affected his rights or obligations—unlike Appellants. In holding that the plaintiff in *Lyons* could not assert an injury sufficient for prospective relief, the Supreme Court identified that he would have needed to prove either (1) "that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter … or (2) that the City ordered or authorized police officers to act in such a manner." *Id.* at 106.

Appellants easily satisfy the second *Lyons* standard since federal and state falconry regulations expressly authorize law enforcement officers to warrantlessly search their properties without cause and likewise compel the concession of the right-of-access condition Appellants challenge. *See* 50 C.F.R. § 21.82; 14 C.C.R. § 670. As to the first standard, subsequent precedent has rejected such a restrictive reading of standing in the Fourth Amendment context.

It is true that to prevail in a facial challenge to the constitutionality of a law, a plaintiff must prove it is unconstitutional in all relevant applications. *Patel*, 576 U.S. at 417. But "the proper focus of the constitutional inquiry" in the Fourth Amendment context "is searches that the law actually authorizes, not those for which it is irrelevant." *Id.* at 418. Facial standing for prospective relief against a law that authorizes warrantless searches therefore depends only on proving the illegality of the conduct "it actually authorizes or prohibits." *Patel*, 576 U.S. at 418. Since the laws Appellants challenge compel obedience to warrantless searches, and it remains

the government's burden to prove that such searches are otherwise reasonable as a matter of *substantive* Fourth Amendment law,[3] Appellants have more than discharged their burden of establishing a jurisdictional injury sufficient to reach the merits of their facial claims in addition to their as-applied claim.

B. The demand to surrender a constitutional right as a licensing condition is an actual injury.

The unconstitutional conditions doctrine bars the government from demanding that applicants for licenses, permits, or even entirely gratuitous benefits, surrender the protections of the Constitution. 450 F.3d at 866 (citing *Dolan v. City*

[3] The Supreme Court has long identified jurisdictional standing and substantive Fourth Amendment standing as separate inquiries, though they bear a close relation. *Rakas v. Illinois*, 439 U.S. 128, 138−40 (1978). One determines whether a federal court has jurisdiction over an alleged injury and the other determines whether the injury violates the Fourth Amendment. The Court in *Rakas v. Illinois* recognized that Article III standing in the Fourth Amendment context asks first whether there is an injury in fact, and second "whether the proponent is asserting his own legal rights and interests" rather than someone else's. *Id.* at 138. But the question of whether those "legal rights and interests" being asserted are protected by the Fourth Amendment is a question of substantive law—not jurisdictional injury. *Id.* ("[W]e think that definition of those rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing."). And the Fourth Amendment *presumes* that warrantless searches are unreasonable. *Kentucky v. King*, 563 U.S. 452, 459 (2011) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)) ("It is a basic principle of Fourth Amendment law, we have often said, that searches and seizures inside a home without a warrant are presumptively unreasonable.") (quotation marks omitted). The burden therefore falls on the government to prove that one of the "few specifically established and well-delineated exceptions" to the warrant requirement applies. *Patel*, 576 U.S. at 420 (quoting *Arizona v. Gant*, 556 U.S. 332, 338 (2009)).

of Tigard, 512 U.S. at 385). Since it is the demand itself that works an injury to applicants, Appellants easily satisfy Article III standing. *Lujan*, 504 U.S. at 560−61 (requiring "*actual* or imminent" injury) (emphasis added). Since licensed falconers would retain the right to demand a warrant in the absence of Defendants' exacted right-of-entry condition, the transaction requires the surrender of a right protected by the Fourth Amendment. The District Court erred in ruling that the doctrine is irrelevant to the standing analysis and in assuming that Appellants' asserted injuries to their Fourth Amendment rights were coterminous with the probability that their homes would be searched. Appellants need not rely on "imminent" injury alone because the licensing scheme they challenge results in repeated *actual* injuries to their Fourth Amendment rights through compelled waivers—every year. *See Lujan*, 555 U.S. 560−61. Appellants are injured by annually surrendering their right against warrantless searches in exchange for the issuance or renewal of their falconry licenses. The search conditions Appellants challenge, and the laws authorizing them, rearrange the legal rights, duties, and liabilities of the parties to this lawsuit in a manner injurious to Appellants' Fourth Amendment rights. The District Court erred in ruling that these forced transactions compelled by law do not give rise to an injury sufficient for Appellants to seek redress in a federal court.

Under the unconstitutional conditions doctrine, there is an immediate injury whenever the government demands the surrender of a constitutional right in

exchange for a license or benefit. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604, 607 (2013) (demand for surrender of a constitutional right in exchange for a permit was an "impermissibl[e] burden" on that right). Though government may withhold a privilege or benefit outright, it "may not impose conditions" on those privileges or benefits "which require the relinquishment of constitutional rights." *Frost v. Railroad Comm'n of California*, 271 U.S. 583, 594 (1926). This Court articulated the reason for this rule in *United States v. Scott*:

> Government is a monopoly provider of countless services, notably law enforcement, and we live in an age when government influence and control are pervasive in many aspects of our daily lives. Giving the government free rein to grant conditional benefits creates the risk that the government will abuse its power by attaching strings strategically, striking lopsided deals and gradually eroding constitutional protections.

450 F.3d at 866. Falconry is not an exception to this important rule, which is designed to prevent the erosion of fundamental liberties in an increasingly regulated America. *Frost v. Railroad Comm'n of Calif.*, 271 U.S. 583, 594 (1926) ("If 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. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."); Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 16−19 (1988) (describing the monopoly

rents exacted by governments through their licensing and permitting powers as a justification for the unconstitutional conditions doctrine).

It is firmly settled that a constitutional injury occurs when the government induces people to bargain away their constitutional rights in exchange for a government benefit. *See, e.g.*, *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013); *Chandler v. Miller*, 520 U.S. 305 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Speiser v. Randall*, 357 U.S. 513 (1958); *Frost v. Railroad Comm'n of Calif.*, 271 U.S. 583 (1926); *United States v. Scott*, 450 F.3d 863 (9th Cir. 2006). And as this Court has recognized, it is "especially important in the Fourth Amendment context" to enforce this limit on the government's power. *Scott*, 450 F.3d at 867. Put simply by this Court in *Scott*, the "doctrine limits the government's ability to exact waivers of rights as a condition of benefits, even when those benefits are fully discretionary." 450 F.3d at 866 (citing *Dolan v. City of Tigard*, 512 U.S. at 385).

The government's superior bargaining position and the existence of the challenged falconry regulations created the search conditions Appellants challenge. Yet, the District Court claimed it was powerless to even consider this unconstitutional condition, much less remove it from their licenses, declare it unlawful, or enjoin its enforcement, until they suffered some *additional* harm—aside

from the already completed searches, threat of future searches, annual transfer of a right-of-entry and their confirmed allegation that Defendants do in fact continue to execute these searches against licensed falconers. *See* ER-058–59 (dismissing Appellants' Fourth Amendment claims for lack of jurisdictional standing). Neither the Supreme Court nor this Court have been so demanding.

The District Court's insistence that Appellants first suffer a physical invasion of their properties before pursuing their claims is a misunderstanding of the unconstitutional conditions doctrine. Setting aside for a moment the fact that Appellants properties have already been searched, Appellants do not complain only that their houses, papers, and effects are threatened with warrantless searches in the future, but that the right-of-entry condition itself injures their right to be secure by forcing them to choose between the license and their Fourth Amendment rights. In a two-sentence footnote, the court addressed this argument only in passing by suggesting that Appellants' "arguments go to the substance of [their] Fourth Amendment claim but is irrelevant to standing or ripeness." ER-34 n.9. But the Supreme Court has held that the government inflicts a "constitutionally cognizable injury" when "someone refuses to cede a constitutional right in the face of coercive pressure." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 607 (2013). If the Court had stopped there, the District Court's ruling might have been able to distinguish this rule. But the Supreme Court has clarified that "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." *Id.* at 606. Thus, it is the *coercive pressure* that inflicts injury, not merely any attendant consequences, *e.g.*, having property taken without compensation or searched without a warrant.

Thus, extortionate demands in the licensing context *are injurious themselves* when they mandate the surrender of constitutional liberties. *See, e.g.*, *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013) (demand for land or fee in-lieu from building permit applicant violated Fifth Amendment); *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013) (demand that funding recipients espouse a government policy view violated First Amendment); *Ferguson v. City of Charleston*, 532 U.S. 67, 83−84 (2001) (demand that pregnant women admitted to public hospital submit to drug testing violated Fourth Amendment); *Chandler v. Miller*, 520 U.S. 305 (1997) (demand that candidates for public office submit to drug testing violated Fourth Amendment); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (demand for property in exchange for building permit subject to constitutional scrutiny); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (demand for public easement in exchange for building permit violated Just Compensation Clause of Fifth Amendment); *Speiser v. Randall*, 357 U.S. 513 (1958)

(demand that tax benefit recipients sign loyalty oath violated First Amendment); *Frost v. Railroad Comm'n of Calif.*, 271 U.S. 583 (1926) (demand that trucking company agree to be classified as common carrier to operate in foreign state violated Due Process Clause); *United States v. Scott*, 450 F.3d 863 (9th Cir. 2006) (consent to warrantless searches as condition of pretrial release violated Fourth Amendment). To suggest that a licensing condition could violate an applicant's constitutional rights as a matter of substantive law while simultaneously failing to work a constitutional injury sufficient to invoke the jurisdiction of the federal courts misses the forest for the trees.

The Supreme Court most recently considered whether a government violates the Constitution by placing conditions on a license or permit applicant in *Koontz v. St. Johns River Water Management District*, 570 U.S. at 604. While that case found a permit condition violated the Fifth Amendment rather than the Fourth, the Court identified that the doctrine applies in "a wide variety of contexts." *Id.* at 604 (collecting precedents). And this Court has held the doctrine is "especially important in the Fourth Amendment context." *Scott*, 450 F.3d at 867. In *Koontz*, a government authority conditioned Coy Koontz' building permit on the dedication of a swath of

his private land for conservation,[4] which the Court held violated his rights under the Just Compensation Clause of the Fifth Amendment. *Koontz*, 570 U.S. at 619. But it was not the ultimate *physical* taking of the land or money that violated the Constitution—it was the "demand" itself. *Id.* at 606. The Court's precedents have also "refused to attach significance" to whether a forced surrender of constitutional rights is a condition precedent or subsequent to the issuance of a permit, license or benefit. *Id.* at 607. Such a demand, the Court held, must run the constitutional gauntlet in either event. *Id.* at 619. Its reasoning stressed the importance not merely of the consequential injury to property rights occasioned by the transfer of money or land, but the impermissibility of *burdening* the right at issue by placing a permit applicant in the position to choose between the permit or a constitutional right. "Extortionate demands for property in the land-use permitting context," reasoned the Court, "run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation." *Id.* at 607. Likewise, extortionate demands for warrantless rights-of-entry to private homes by the government do not run afoul of the Fourth Amendment only because they authorize warrantless searches of homes, but because they also

[4] The permitting authority also allowed for the payment of a fee in lieu of the dedication, which the Court held did not immunize its extortionate demands from violating the Just Compensation Clause. *Id.* at 619.

impermissibly burden the right of license applicants to retain the constitutionally guaranteed security of their homes against these searches.

While *Koontz* represents the most recent expression of the unconstitutional conditions doctrine by the Supreme Court, the rule applies in other areas of law, including as this Court has noted, the Fourth Amendment. *See Scott*, 450 F.3d at 867. While few Fourth Amendment decisions reference the unconstitutional conditions doctrine by name, courts have nonetheless applied robust constitutional scrutiny to warrantless search conditions placed on government benefits, licenses, and privileges. In *Chandler v. Miller*, 520 U.S. 305 (1997), for example, it struck down warrantless drug urinalysis conditions placed on candidacy for public office. *Id.* at 318.

The District Court improperly focused only on whether Appellants' properties had been searched when it should have focused also on the extortionate transactions that formed the basis for their as-applied Fourth Amendment claims. In *Koontz*, the permitting authority never actually *took* land or money—it denied the application because the applicant would not agree to waive his constitutional rights. *Koontz*, 570 U.S. at 603. The Court took pains to specify that Mr. Koontz would have had a case whether the permit were issued or denied. *Id.* at 606 ("The principles that undergird our decisions … do not change depending on whether the government approves a permit on the condition that the applicant turn over property or denies a permit

because the applicant refuses to do so."). The demand for a waiver of the right against uncompensated takings—not the taking—was the injury. Appellants are in a similar position to Mr. Koontz: The demand for a waiver of the right against warrantless searches is an injury in its own right in addition to the completed searches and threat of future ones. Thus, by being placed in the same extortionate bargaining position of being made to choose between a government benefit and a fundamental constitutional right, Appellants have suffered a cognizable constitutional injury.

C. The right-of-entry condition and threat of future searches injure Appellants' constitutionally protected reasonable expectations of privacy and right to be secure in their properties.

The right exacted by Defendants' licensing condition and inspection scheme is clearly defined by the Fourth Amendment to the U.S. Constitution: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated[.]" U.S. Const. amend. IV. As this Court has previously identified, "[o]ne of the main rights attaching to property is the right to exclude others, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." *Patel*, 738 F.3d at 1061 (quoting *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978)) (internal quotation marks omitted). This right to be secure is a core concept in American society and "fundamental in the concept of

ordered liberty." *Wolf v. Colorado*, 338 U.S. 25, 27−28 (1949). Since Defendants' right-of-entry condition and warrantless search practices render falconers' properties subject to arbitrary intrusion, Appellants' constitutional "right to be secure" is injured—their houses, papers, and effects are no longer "secure" against "unreasonable searches and seizures." U.S. Const. amend. IV. It is this "right to be secure" that the Fourth Amendment protects—not just the consequential damages that attend successfully completed invasions by the government.

The Supreme Court has recognized two independent grounds for asserting a Fourth Amendment claim. One is for trespassory searches, and the other for invasion-of-privacy searches. *See United States v. Jones*, 565 U.S. 400, 405, 411 (2012) (plurality opinion) (holding investigative trespasses to Amendment's enumerated property interests is a search); *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (holding Amendment protects an objectively reasonable expectation of privacy). While a trespassory search typically results in an invasion of privacy, an invasion-of-privacy search need not include a physical trespass against a person, house, paper, or effect. *See Carpenter v. United States*, 138 S.Ct. 2206, 2217−28 (2018) (recognizing expectation of privacy in cell-site-location information). Appellants assert that Defendants' warrantless search practices and the right-of-entry condition violate both their right to security against physical, trespassory searches of their houses, papers, and effects *and* their

objectively reasonable expectations of privacy against searches of their homes and other properties. ER-160–61. Because "in the home, *all* details are intimate details," the relationship between property and privacy is particularly strong. *Kyllo v. United States*, 533 U.S. 27, 37 (2001) (emphasis in original).

The Fourth Amendment protects privacy by "securing" property—persons, houses, papers, and effects—from trespassory invasions by the state. *See United States v. Jones*, 565 U.S. 400, 405, 411 (2012) (plurality) ("[t]he text of the Fourth Amendment reflects its close connection to property"). The Supreme Court's decision in *United States v. Jones* forcefully reaffirmed that the Fourth Amendment's protections against government trespasses should be examined first through the lens of property law. *See id.* at 411−12 (finding placement of GPS device on car a trespass to an effect). There, it held that the mere attachment of a GPS device to a vehicle was a presumptively unreasonable search regardless of whether a person retains an objectively reasonable expectation of privacy in the places they travel—it was a trespassory invasion of an "effect." *Id.* The Court in *Florida v. Jardines*, 569 U.S. 1 (2013), likewise evaluated whether a police officer violated the Fourth Amendment when he led a dog to a suspect's front door to sniff for drugs by examining whether he was operating within an implied common-law license for solicitation. *Id.* at 8−10. "[A] police officer not armed with a warrant," reasoned the Court, "may approach a home and knock, precisely because that is 'no more than

any private citizen might do.'" *Id.* at 8 (quoting *Kentucky v. King*, 563 U.S. 452, 469 (2011)). But when he deployed a K-9 unit to investigate, he violated the residents' property right to exclude trespassers from the curtilage and therefore violated the Fourth Amendment. *Id.* at 9 ("An invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker."). It is the right to exclude government from property that is operative in both *Jones* and *Jardines*, and in Appellants' claims here. And it is this right that Defendants expropriate from falconers in exchange for their licenses. Likewise, it is this right that was invaded when Defendants searched the properties of Appellants in 1983, 1992, 2004, 2009, 2016, and 2017. ER-163-68. And it is this right that is continually endangered by Defendants' continued exercise of its right-of-entry and the annual re-attachment of that right-of-entry to Appellants' falconry licenses.

It would be antithetical to the plain meaning of language to consider Appellants' homes still "secure" in light of their forced bargain with the state. Prior to licensure, Appellants retained their right to demand a warrant before admitting agents of the government into their homes. Now, they must allow the government access upon demand or risk criminal prosecution, civil penalties, and the forfeiture of their birds, along with their licenses. Their right to exclude is taken when their licenses are granted and continually threatened by Defendants' ongoing warrantless search practices.

The word "secure" has changed little since the time of the Founding. Since that time, dictionaries have defined it to mean "free from fear," "sure, not doubting," "free from danger," "to make certain," "to put out of hazard," "to make safe," or "to insure." Thomas Clancy, *The Fourth Amendment: Its History and Interpretation* § 3.1, 47−48 (2008) (collecting sources). Indeed, the word "was not an innovation of the Framers … and it was not used by accident." *Id.* Instead, it reflects that the "Framers valued security and intimately associated it with the ability to exclude government." *Id.* The Supreme Court has repeatedly emphasized this exclusionary aspect of ownership as "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2072 (2021) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). This right is no *less* important when it is *the government* that a property owner wishes to exclude; indeed, many Supreme Court precedents identify the right to exclude as a fundamental attribute of property in both the Fifth and Fourth Amendment contexts. *See Cedar Point Nursery*, 141 S.Ct. at 2072 ("The right to exclude is 'one of the most treasured' rights of property ownership.") (Fifth Amendment) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982); *Byrd v. United States*, 138 S.Ct. 1518, 1527−31 (2018) (finding that an "expectation of privacy … comes with the right to exclude") (Fourth Amendment); *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994) (citing right to

exclude as "essential") (Fifth Amendment); *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980) (determining substantive Fourth Amendment standing based, in part, on whether criminal defendant had right to exclude others from the property searched) (Fourth Amendment); *Kaiser Aetna*, 444 U.S. at 179−80 (holding "right to exclude" "a fundamental element of the property right"); *Rakas v. Illinois*, 439 U.S. 128 (1978) ("One of the main rights attaching to property is the right to exclude others, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.") (Fourth Amendment) (citing Sir William Blackstone, *Commentaries*, Book 2, ch. 1).

More recent Supreme Court precedents have likewise reflected the exclusionary nature of the Fourth Amendment's protections. In *Byrd v. United States*, 138 S.Ct. 1518 (2018), for example, the Court recognized the importance of a possessory interest and its attendant right to exclude others (including the government) in generating a protected Fourth Amendment liberty interest in a rental car despite the present possessor not being named on the rental agreement. *Id.* at 1528−29. It is this exclusionary property right, and the attendant "security" it provides to property owners and lawful possessors against the government, that is defended by the Fourth Amendment. Thus, Appellants' "right to be secure in their … houses" is directly injured by the search condition they are compelled to accept in exchange for their falconry licenses every year. And it is continually

injured and threatened by the laws Appellants challenge and the searches Defendants execute pursuant to them.

II. Appellants' injuries are caused by Defendants.

The District Court did not reach the second prong of Article III standing after ruling that Appellants failed to assert an injury in fact. Nonetheless, Appellants' injury to their Fourth Amendment right to security in their homes and the exclusion of the government therefrom flows directly from and is therefore "fairly … traceable to" the state and federal laws they challenge. *See Lujan*, 504 U.S. at 559−60. But for the warrantless search authorizations found in the state and federal laws administered by Defendants and CDFW's and their right-of-entry condition, Appellants would have retained their Fourth Amendment rights to be secure in their properties against unreasonable searches and their reasonable expectation that their homes would not be invaded without cause or a warrant.

III. Appellants' claims are ripe and redressable.

Declaratory and injunctive relief in favor of Appellants would restore their right to the security of their houses, papers, and effects against unreasonable searches and seizures by rendering the exacted search power unenforceable. "'[T]he causation and redressability requirements are relaxed' once a plaintiff has established a procedural injury," *California v. Azar*, 911 F.3d 558, 573 (9th Cir. 2018) (quoting *Citizens for Better Forestry v. USDA*, 341 F.3d 961, 975 (9th Cir. 2003)).

Likewise, "[t]here is no ripeness or mootness issue here, because" Appellants' "injuries [are] not 'conjectural or hypothetical,' and a ruling in [their] favor can give [them] meaningful relief." *Meland*, 2 F.4th at 849. That is because the law affirmatively compels them to sign over their right to exclude the government from their properties each year and also encourages them to submit to warrantless searches of those properties or else face criminal and civil consequences. Appellants will "suffer hardship" by "contin[ing] to be required or encouraged to" surrender their right to the security of their houses, papers, and effects against unreasonable searches unless the laws and practices that compel Appellants' obeisance to the unconstitutional terms of their falconry licenses are enjoined. *Id.* Appellants alleged in their Second Amended Complaint that "[u]nreasonable warrantless searches of Falconers' private homes and curtilage by Defendants is widespread and on-going." ER-171. At the motion-to-dismiss stage, the District Court was bound to take this allegation as true. *Warth v. Seldin*, 422 U.S. at 501; *Meland*, 2 F.4th at 846 n.2. It erred in assuming without the benefit of discovery that Appellants' assertion of ongoing searches of licensed falconers without warrants or cause was unfounded. Indeed, the District Court even noted early in this litigation that CDFW admitted such searches *were* ongoing. ER-198–99.

IV. AFC satisfies the requirements for associational standing.

To prove associational standing, an organization must have at least one member who could assert standing in their own right. *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Additionally, "the interests it seeks to protect" must be "germane to the organization's purpose." *Id.* And finally, "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.*

First, Appellants Peter Stavrianoudakis, Eric Ariyoshi, and Scott Timmons are all named plaintiffs in this lawsuit *and* members of AFC. ER-162–69. At the time of Appellants' Second Amendment Complaint, Peter was AFC's President and Eric was its Secretary. Likewise, Fred Seaman, Leonardo Velazquez, Lydia Ash, and Stephen Layman are each licensed falconers and members of AFC. Because each of these falconers has been forced to surrender their Fourth Amendment rights in exchange for their licenses, including each year at license renewal, AFC has members who have suffered an Article III injury in fact. These plaintiffs likewise trace the violation of their Fourth Amendment rights directly back to Defendants' unconstitutional licensing scheme. Declaratory and injunctive relief would remedy their injuries by striking down the unconstitutional conditions attached to their licenses and enjoining both the further enforcement of those conditions or attachment of new warrantless search powers at license renewal.

As further evidence of the injury to AFC's members' Fourth Amendment rights, the properties of Peter Stavrianoudakis, Scott Timmons, Fred Seaman, Leonardo Velazquez, Lydia Ash, and Stephen Layman have each been searched without a warrant by either CDFW or USFWS between the years of 1983 and 2017, ER-166–69, pursuant to the warrantless search powers that trace back to the original 1972 regulation. *See* 50 C.F.R. § 16.5(e) (1972).

Second, AFC's purpose is germane to this lawsuit because one of its objects is to protect the legal rights of its members. Its "stated purpose is to promote 'the broadest liberties possible that are not in conflict with legitimate conservation efforts based upon sound biological and legal reasoning,' and 'promote knowledge of quality falconry, as well as to instill pride in falconers for the cultural heritage of the sport, and its place in world history.'" ER-166. Seeking to enjoin the attachment of unconstitutional search terms to its members' licenses falls squarely within the AFC's core mission.

Third, the participation of each of AFC's members is not necessary to the disposition of this case. If "the individual participation of each injured party" is not "indispensable to proper resolution of the cause," then an association has standing to bring suit on behalf of its members. *Hunt*, 432 U.S. at 342−43. AFC has several additional members whose rights are and have previously been violated by Defendants' imposition of search conditions on falconry licenses. ER-166–69. As

set out in the Second Amended Complaint, Fred Seaman, Leonardo Velazquez, Lydia Ash, and Stephen Layman are each falconers in either California or Washington state who have each had their property searched as a result of search conditions attached to their licenses. ER-167–68. Just like Peter, Eric, Scott, and every other falconer in these states, federal and state regulations require them to annually "agree" to the right-of-entry condition to renew their licenses. Since declaratory and injunctive relief will prohibit Defendants from employing their unconstitutional search powers and exacting the right-of-entry licensing condition from all falconers' prospectively, it is not necessary for each member of AFC to join this matter individually.

CONCLUSION

State and federal falconry regulations mandate that licensees grant the government a right to access their properties that disturbs their right to be secure in their houses, papers, and effects against unreasonable searches and seizures under the Fourth Amendment. Since this waiver is a legal requirement of their licensure and creates rights on the part of Defendants and obligations and liabilities on the part of Appellants, it constitutes an injury sufficient to invoke federal jurisdiction. Bird law, as administered by Defendants, is not governed by reason, but it *must* be governed by the Constitution. Appellants ask for their day in court to prove that the extortionate terms of their forced bargains with the state not only accord them

standing but strips them of a fundamental liberty that only declaratory and injunctive relief will remedy. Therefore, Appellants ask this Court to reverse the District Court's order dismissing their Fourth Amendment and A.P.A. claims for lack of Article III standing and remand for further proceedings on the merits of those claims.

DATED: February 24, 2023.

Respectfully submitted,

Pacific Legal Foundation
JAMES M. MANLEY
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By /s/ Daniel T. Woislaw
DANIEL T. WOISLAW

Counsel for Plaintiffs-Appellants

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

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The undersigned attorney or self-represented party states the following:

_X__ I am unaware of any related cases currently pending in this court.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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[ ] it is a joint brief submitted by separately represented parties;

[ ] a party or parties are filing a single brief in response to multiple briefs; or

[ ] a party or parties are filing a single brief in response to a longer joint brief.

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[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/ Daniel T. Woislaw **Date** February 24, 2023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 15. Certificate of Service for Electronic Filing

9th Cir. Case Number(s) 22-16788

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Appellants' Opening Brief

_____

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Notice of Docket Activity

The following transaction was entered on 02/24/2023 at 3:24:22 PM Pacific Standard Time and filed on 02/24/2023

Case Name: Peter Stavrianoudakis, et al v. USFWS, et al
Case Number: 22-16788
Document(s): Document(s)

Docket Text:
Submitted (ECF) Opening Brief for review. Submitted by Appellants American Falconry Conservancy, Scott Timmons, Eric Ariyoshi, Katherine Stavrianoudakis and Peter Stavrianoudakis. Date of service: 02/24/2023. [12661330] [22-16788] (Woislaw, Daniel)

Notice will be electronically mailed to:

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