

1 Robert Tyler, Esq. CA Bar No. 179572  
btyler@faith-freedom.com  
2 Mariah Gondeiro, Esq. CA Bar No. 323683  
mgondeiro@faith-freedom.com  
3 Julianne Fleischer, Esq. CA Bar No. 337006  
jfleischer@faith-freedom.com  
4 ADVOCATES FOR FAITH & FREEDOM  
25026 Las Brisas Road  
5 Murrieta, California 92562  
Telephone: (951) 600-2733  
6 Facsimile: (951) 600-4996

7 Attorneys for Plaintiffs **Calvary Chapel San Jose**  
and **Pastor Mike McClure**

8  
9  
10 **IN THE UNITED STATES DISTRICT COURT**  
11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

12 **CALVARY CHAPEL SAN JOSE**, a  
13 California Non-Profit Corporation; **PASTOR**  
**MIKE MCCLURE**, an individual;

14 Plaintiffs,

15 vs.

16 **SANTA CLARA COUNTY**; and  
17 **SAFEGRAPH**;

18 Defendants.

Case No.: 3:23-cv-04277-VC

**RESPONSE TO DEFENDANT**  
**SAFEGRAPH’S MOTION TO**  
**DISMISS THE FIRST AMENDED**  
**COMPLAINT PURSUANT TO**  
**FEDERAL RULE 12(b)(1) AND (6)**

**Hearing Date: February 15, 2024**  
**Time: 10:00 AM**  
**Judge: Hon. Vince Chhabria**  
**Courtroom: Courtroom 4-17th Floor**

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

- I. INTRODUCTION..... 1
- II. BACKGROUND ..... 2
  - A. SAFEGRAPH TRACKED CCSJ CONGREGANTS’ PRIVATE, SENSITIVE LOCATION HISTORY AT THE BEHEST OF THE COUNTY ..... 2
  - B. SAFEGRAPH GATHERS ITS LOCATION DATA THROUGH VARIOUS MEANS ..... 5
    - 1. SafeGraph’s software development kit (“SDK”)..... 5
    - 2. Google’s real-time bidding auctioning process and location history..... 5
- III. LEGAL STANDARDS ..... 7
- IV. ARGUMENT ..... 8
  - A. PLAINTIFFS HAVE STANDING TO BRING THEIR CLAIMS ..... 8
    - 1. Plaintiffs allege a concrete injury ..... 9
    - 2. Plaintiffs’ First and Fourth Amendment claims are traceable to SafeGraph..... 10
    - 3. Defendants are not immune from liability under the *Noerr-Pennington* doctrine ..... 11
    - 4. The interests at stake in this lawsuit are germane to CCSJ’s purpose ..... 12
    - 5. Plaintiffs’ claims do not require the participation of individual CCSJ members ..... 13
  - B. PLAINTIFFS’ CLAIMS ARE TIMELY RAISED ..... 13
  - C. PLAINTIFFS ALLEGE FACTS SUFFICIENT TO STATE A PLAUSIBLE SECTION 1983 CLAIM AGAINST SAFEGRAPH..... 14
    - 1. Plaintiffs allege facts that show Safegraph is a state actor subject to section 1983 liability ..... 14
      - a. Safegraph acted pursuant to the County's policies and directives..... 15
      - b. Joint Action/Government Nexus Test..... 16
    - 2. Plaintiffs allege facts that show Safegraph violated their Fourth Amendment rights ..... 18
    - 3. Plaintiffs allege facts that show Safegraph violated their First Amendment rights ..... 19
- V. CONCLUSION..... 20

**TABLE OF AUTHORITIES**

Page(s)

Cases

*Am. Mfrs. Mut. Ins. Co. v. Sullivan*,  
526 U.S. 40 (1999)..... 15, 17

*Bayer v. Neiman Marcus Grp., Inc.*,  
861 F.3d 853 (9th Cir. 2017) ..... 13

*Bennet v. Spear*,  
520 U.S. 154 (1997)..... 11

*Blum v. Yaretsky*,  
457 U.S. 991 (1982)..... 15

*Calvary Chapel Dayton Valley v. Sisolak*,  
982 F.3d 1288 (9th Cir. 2021) ..... 19

*Camara v. Municipal Court of City and County of San Francisco*,  
387 U.S. 523 (1967)..... 18

*Carpenter v. United States*,  
138 S. Ct. 2206 (2018)..... 18

*Comm. to Protect our Agric. Water v. Occidental Oil & Gas Corp.*,  
235 F. Supp. 3d 1132 (E.D. Cal. 2017) ..... 11

*Cummings v. Connell*,  
402 F.3d 936 (9th Cir. 2005) ..... 13

*De Anza Properties X, Ltd. V. County of Santa Cruz*,  
936 F.2d 1084 (9th Cir. 1991) ..... 13

*Dennis v. Sparks*,  
449 U.S. 24 (1980)..... 16

*Fulton v. City of Phila.*,  
141 S. Ct. 1868 (2021)..... 20

*Garcia v. City of Los Angeles*,  
No. CV196182DSFPLAX, 2020 WL 6586303 (C.D. Cal. Sept. 15, 2020).....9, 10

*Harvest Rock Church, Inc. v. Newsom*,  
985 F.3d. 711 (9th Cir. 2020) ..... 20

*Heartland Acad. Cmty. Church v. Waddle*,  
427 F.3d 525 (8th Cir. 2005) ..... 9

*Howerton v. Gabica*,  
708 F.2d 380 (9th Cir. 1983) ..... 15

*Hunt v. Wash. State Apple Adver. Comm’n*,  
432 U.S. 333 (1977)..... 9

*In re Facebook, Inc v. Internet Tracking Litigation*,  
956 F.3d 589 (9th Cir. 2020) ..... 10

*In re Google Inc. Cookie Placement Consumer Privacy Litig.*,  
934 F.3d 316 (3rd Cir. 2019) ..... 10

1 *In re Med. Cap. Sec. Litig.*,  
842 F. Supp. 2d 1208 (C.D. Cal. 2012) ..... 8

2 *Jackson v. Metro. Edison Co.*,  
419 U.S. 345 (1974)..... 16

3 *Jensen v. Lane County*,  
4 222 F.3d 570 (9th Cir. 2000) ..... 16

5 *Kirtley v. Rainey*,  
326 F.3d 1088 (9th Cir. 2003) ..... 16

6 *Lee v. Katz*,  
276 F.3d 550 (9th Cir. 2002) ..... 16

7 *Leite v. Crane Co.*,  
8 749 F.3d 1117 (9th Cir. 2014) ..... 7, 8

9 *Lugar v. Edmondson Oil Co.*,  
457 U.S. 922 (1982)..... 15

10 *Lujan v. Defenders of Wildlife*,  
504 U.S. 555 (1992)..... 8, 9

11 *Mathis v. Pacific Gas & Electric Co.*,  
75 F.3d 498 (9th Cir. 1996) ..... 15

12 *Mills v. City of Covina*,  
13 921 F.3d 1161 (9th Cir. 2019) ..... 14

14 *O’Handley v. Weber*,  
62 F.4th 1145 (9th Cir. 2023) ..... 17

15 *Pasadena Republican Club v. W. Just. Ctr.*,  
985 F.3d 1161 (9th Cir. 2021) ..... 15, 16

16 *Patel v. Facebook, Inc.*,  
932 F.3d 1264 (9th Cir. 2019) ..... 10

17 *Profl Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*,  
508 U.S. 49 (1993)..... 12

18 *Rawson v. Rec. Innov., Inc.*,  
19 975 F.3d 742 (9th Cir. 2020) ..... 18

20 *Riley v. California*,  
573 U.S. 372 (2014)..... 18

21 *Roberts v. Corrothers*,  
812 F.2d 1173 (9th Cir. 1987) ..... 8

22 *Roman Catholic Diocese of Brooklyn, v. Cuomo*,  
23 141 S. Ct. 63 (2020)..... 19, 20

24 *S. Bay United Pentecostal Church v. Newsom*,  
985 F.3d 1128 (9th Cir. 2021) ..... 19

25 *Smith v. Maryland*,  
442 U.S. 735 (1979)..... 18

26 *Sosa v. DIRECTV, Inc.*,  
437 F.3d 923 (9th Cir. 2006) ..... 11, 12

27 *Tandon v. Newsom*,  
593 U.S. 61 (2021)..... 20

28

1 *Theofel v. Farey-Jones*,  
 359 F.3d 1066 (9th Cir. 2004) ..... 12

2 *Thornhill Pub. Co. v. Gen. Tel. & Elecs. Corp.*,  
 594 F.2d 730 (9th Cir. 1979) ..... 7

3 *Tsao v. Desert Palace*,  
 4 698 F.3d 1128 (9th Cir. 2012) ..... 17

5 *U.S.A. v. Meese*,  
 666 F.Supp. (N. D. Cal. 1987) ..... 13

6 *United States v. Chatrie*,  
 590 F. Supp. 3d 901 (E.D. Va. 2022) ..... 4, 6

7 *United States v. Corinthian Colleges*,  
 8 655 F.3d 984 (9th Cir. 2011) ..... 14, 19

9 *Warren v. Fox Family Worldwide, Inc.*,  
 328 F.3d 1136 (9th Cir. 2003) ..... 8

10 *Westways World Travel v. AMR Corp.*,  
 182 F. Supp. 2d 952 (C.D. Cal. 2001) ..... 8

11 *Wyler Summit P’ship v. Turner Broad. Sys., Inc.*,  
 135 F.3d 658 (9th Cir. 1998) ..... 8

12 Statutes

13 Cal. Civ. Proc. Code § 335.1 ..... 13

14 Rules

15 Federal Rules of Civil Procedure 12(b)(1) ..... 7

16 Federal Rules of Civil Procedure 12(b)(6) ..... 8

17

18

19

20

21

22

23

24

25

26

27

28

## I. INTRODUCTION

1  
2 In early 2020, Defendant Santa Clara County (“County”) draconianly implemented an  
3 onslaught of COVID-19 health orders which dictated when, how, and where individuals could  
4 go. The County vigorously enforced its orders and adopted a system that authorized crippling  
5 fines on churches and other entities that did not comply. Unbeknownst to the public and  
6 Plaintiffs, the County and Defendant SafeGraph (“Defendant” or “SafeGraph”) embarked on  
7 an invasive and warrantless geofencing operation to track county residents for research  
8 purposes. For over a year, the County engaged in a warrantless fishing expedition monitoring  
9 the visit patterns of different points of interest in the County.

10 Included as a target in this illegal operation was Plaintiff Calvary Chapel San Jose  
11 (“CCSJ”). Defendants specifically targeted CCSJ using the geofencing tool without a warrant.  
12 Defendants put multiple geofences around the Church’s property so they could track when and  
13 where individuals were on the premises. This operation took place over a year with seemingly  
14 no oversight, boundaries, or limitations – meaning Defendants could track churchgoers in the  
15 sanctuary, prayer room, or bathroom. Left unaddressed, the County’s conduct could set a  
16 terrifying precedent – allowing the government to target and spy on any individual or group at  
17 any time for any duration or reason.

18 Defendant SafeGraph attempts to dismiss CCSJ and Plaintiff Pastor Mike McClure’s  
19 (collectively, Plaintiffs) lawsuit, claiming they do not have standing, their claims are time-  
20 barred, and they fail to state a claim for relief. *See* Defendant SafeGraph’s Motion to Dismiss  
21 Plaintiffs’ First Amended Complaint (“Mot.”), ECF 34. The Court should deny the motion for  
22 three reasons.

23 First, Plaintiffs have standing to pursue their claims. Plaintiffs have alleged concrete  
24 injuries traceable to SafeGraph. SafeGraph, at the direction of Defendant County of Santa Clara  
25 (“County”), illegally surveilled CCSJ, and embarked on an invasive and warrantless geofencing  
26 operation of Plaintiffs. Defendants are not immune from liability under the *Noerr-Pennington*  
27 doctrine because Defendants’ geofencing operation is not incidental to litigation, nor is it related  
28 to the County’s enforcement of COVID-19 fines. The County directed and ratified the

1 geofencing operation to help it understand the effects of its COVID-19 orders.

2 Second, Plaintiffs timely bring their claims. Defendant attempts to cherry-pick dates  
3 from a single expert report to allege that Plaintiffs' claims are time-barred. However, Plaintiffs  
4 claims are based upon a period spanning the course of the COVID-19 pandemic, not a limited  
5 time identified in a single report.

6 Third, Plaintiffs allege facts sufficient to state their claims. SafeGraph, though a private  
7 entity, performed its surveillance and monitoring of Plaintiffs at the direction of the County. As  
8 such, SafeGraph is a state actor subject to section 1983 liability. Plaintiffs also adequately state  
9 claims for relief under the First Amendment and Fourth Amendment.

10 Accordingly, this Court should deny SafeGraph's motion to dismiss.

## 11 II. BACKGROUND

### 12 A. SafeGraph Tracked CCSJ Congregants' Private, Sensitive Location History At 13 The Behest Of The County

14 Throughout the COVID-19 pandemic, SafeGraph worked with government entities like  
15 the Center for Disease Control and Prevention ("CDC"), San Francisco, San Jose, and Santa  
16 Clara County to surveil the visit patterns at various businesses and organizations. FAC, ¶ 23.  
17 SafeGraph's research and data was derived from cell phone users' location data. *Id.*, ¶ 24.

18 At the behest of the County, SafeGraph put two geofences around CCSJ and surveilled  
19 the churchgoers within the church premises for over a year during the COVID-19 pandemic.  
20 *Id.*, ¶ 25. Defendants specifically targeted CCSJ. Defendants did not surveil all businesses and  
21 entities in the County during the COVID-19 pandemic. *Id.*, ¶ 26. The first geofence surrounded  
22 the parcel of CCSJ, including the lawn and parking lots and extended to the adjacent streets. *Id.*,  
23 ¶ 27. The second geofence surrounded the buildings within the parcel of land, including the  
24 sanctuary, Calvary Christian, Academy (i.e., church school), and ministry housing. *Id.*, ¶ 28.

25 The County did not simply approve or acquiesce to SafeGraph's surveillance of CCSJ.  
26 *Id.*, ¶ 30. The surveillance was initiated by the County, and the County requested this  
27 information to monitor visit patterns at different points of interest in the County for a over year.  
28 *Id.*, ¶ 31. In other words, SafeGraph was acting as an instrument of the County to assist the

1 County in understanding the effects of its COVID-19 orders. *Id.*

2 The surveillance operation was ratified by County Counsel James Williams and County  
3 Health Officer Dr. Sara Cody – officials who are considered final policy makers in their  
4 respective departments. *Id.*, ¶ 32. Dr. Sara Cody oversees the County’s health department and  
5 had final authority regarding the implementation of policies related to COVID-19, as well as  
6 research projects analyzing the effects of the County’s orders. *Id.*, ¶ 33. Specifically, during  
7 COVID-19, she was responsible for using data to help shape public health strategy and policy.  
8 *Id.* Researching data derived from geofencing or electronic surveillance practices comes under  
9 the umbrella of Dr. Cody’s duties. *Id.*

10 James Williams oversaw the County’s legal department and provided legal advice to the  
11 County throughout the COVID-19 pandemic. *Id.*, ¶ 34. Specifically, he was required to approve  
12 of Defendants’ geofencing operation to ensure it complied with the law. *Id.* In his role as chief  
13 legal advisor, he oversaw the county elected officials, the Board of Supervisors, and the  
14 department heads, including Dr. Sara Cody. *Id.* James Williams also served as a director for the  
15 Emergency Operations Center. *Id.*, ¶ 35. In that role, he helped inform the COVID-19 pandemic  
16 response, including analyzing and reviewing data related to the County’s COVID-19 orders. *Id.*  
17 Such data would have included information derived from location data. *Id.*

18 Daniel Ho also acted as an agent of the County. *Id.*, ¶ 36. He led a research team to assist  
19 the County in understanding the data derived from the geofencing operation, including the  
20 geofences surrounding CCSJ. *Id.* He provided insights to the County to help inform it of the  
21 pandemic response. *Id.* Specifically, the County contracted with Daniel Ho to help it analyze  
22 the location data derived from the electronic surveillance of CCSJ. *Id.*

23 Defendants gathered location information of all individuals who entered the geofences  
24 established around CCSJ. *Id.*, ¶ 37. Defendants did not narrow the search parameters of their  
25 geofencing operation. *Id.*, ¶ 38. In other words, Defendants were able to gather location data  
26 from congregants from anywhere within the bounds of the geofences, including the nursery,  
27 prayer room, offices, classrooms, sanctuary, and bathroom. *Id.*

28 As ratified by Dr. Cody and James Williams, Defendants collected location data from



1 CCSJ and other businesses and organizations within the County for over one year – as part of a  
2 well-orchestrated geofencing operation. *Id.*, ¶ 39. The County sought to weaponize the location  
3 data against CCSJ in its ongoing state enforcement action filed in the Santa Clara County  
4 Superior Court, where they seek to collect millions from the church for violating COVID-19  
5 public health orders. *Id.*, ¶ 40.

6 Geofencing is a location-based tool that tracks individuals through their cell phone data.  
7 *Id.*, ¶ 41. Geofencing involves constructing a virtual boundary around a geographic area using  
8 machine learning and identifying all users present within that area during a given time window.  
9 *Id.* Geofences are created using mapping software and rely on location data. *Id.*, ¶ 42. Location  
10 data consists of data indicating the geographical position of a device, including data relating to  
11 the latitude, longitude, and altitude of the device, the direction of travel of the user, and the time  
12 the location information was recorded. *Id.*

13 The Defendants did not acquire a warrant prior to putting a geofence around CCSJ. *Id.* ¶  
14 44. Even though geofences generally derive from anonymized data, the privacy of users within  
15 the geofence is still at issue. *Id.*, ¶ 45. Location data is more precise and revealing than cell-site  
16 location information, as it shows a person’s pattern of life. *Id.*, ¶ 46. Geofences reveal sensitive,  
17 private information about where people travelled and can create inferences about what a person  
18 might have been doing. *Id.*, ¶ 47. These tools provide a story about where and with whom people  
19 socialize, visit, worship, and much more. *Id.*

20 As the court in *United States v. Chatrue* astutely observed, “[e]ven anonymized location  
21 data – from innocent people – can reveal astonishing glimpses into individuals’ private lives  
22 when the Government collects data across even a one or- two-hour period.” 590 F. Supp. 3d  
23 901, 931 n. 39 (E.D. Va. 2022). *Id.*, ¶ 48. Researchers have repeatedly demonstrated cross-  
24 referencing datasets can reveal the identifying information of nearly every anonymized user.  
25 *Id.*, ¶ 49.

26 Data scientists from Imperial College London and UC Louvain found that it was not  
27 particularly hard for companies to identify the person behind “anonymized” data using other  
28 data sets. *Id.*, ¶ 50. The researchers developed a machine learning model that was able to

1 correctly re-identify 99.98% of Americans in any anonymized dataset using just 15  
2 characteristics including age, gender, and marital status. *Id.* In another study that investigated  
3 smartphone location data, researchers were able to uniquely identify 95% of the individuals in  
4 a data set with just four spatial-temporal points. *Id.*, ¶ 51.

5 The County was also able to acquire private, sensitive information of CCSJ congregants  
6 through its geofencing operation because of its prior knowledge of CCSJ's operations. *Id.*, ¶ 52.  
7 For instance, during its ongoing state enforcement action against Calvary, the County took the  
8 depositions of numerous CCSJ employees and congregants where it gleaned information such  
9 as when and where individuals worked at CCSJ and where congregants prayed privately. *Id.*, ¶  
10 53. Thus, even if SafeGraph says its data is anonymized, it can still identify the identities of  
11 CCSJ churchgoers within the geofences, including individuals praying in private, intimate  
12 settings. *Id.*, ¶ 54.

## 13 **B. SafeGraph Gathers Its Location Data Through Various Means**

### 14 **1. SafeGraph's software development kit ("SDK")**

15 SafeGraph harvests its user location data from apps that use its SDK. *Id.*, ¶ 55.  
16 SafeGraph's SDK gathers information from any geo-tracking feature in cell-phone apps. *Id.*  
17 Thus, if an app acquires a user's location data, SafeGraph could also receive that data. *Id.*  
18 Among the top apps that contain SafeGraph are a basketball forum (RealGM Forum), a forum  
19 for firearms enthusiasts (Ruger Forum), an off-road travel forum (SA 4x4 Community Forum),  
20 and an Apple products discussion forum (iMore Forums). *Id.*, ¶ 56.

21 Indeed, SafeGraph and its subsidiary, Veraset, have touted the fact that it sources from  
22 thousands of apps and SDKs to avoid a biased sample. *Id.*, ¶ 57. Smartphone users who  
23 download these apps are not informed that SafeGraph has access to their location data. *Id.*, ¶  
24 58. The apps do not inform smartphone users that their location data is being disclosed to third-  
25 party data companies like SafeGraph. *Id.*, ¶ 59.

### 26 **2. Google's real-time bidding auctioning process and location history**

27 SafeGraph also gathers location data through Google's real-time bidding ("RTB")  
28 auction process. *Id.*, ¶ 60. Google customers are not informed that their personal information is

1 sold in Google’s RTB process. *Id.* RTB is the process by which internet publishers auction off  
2 ad space in their apps or on their websites. *Id.*, ¶ 61. In doing so, they share sensitive user data  
3 – including geolocation, device IDs, and browsing history with dozens of different data  
4 companies and data brokers like SafeGraph. *Id.*

5 Each RTB auction typically sees user data passing through various layers of companies  
6 on its way from a device to an advertiser. *Id.*, ¶ 62. This convoluted system of data collection  
7 enables surveillance by advertisers and data brokers like SafeGraph. *Id.* SafeGraph, therefore,  
8 can acquire data from Google’s location history database. *Id.*

9 In 2009, Google introduced location history, a feature that allows Google to track users’  
10 location. *Id.*, ¶ 63. Location history is collected from users of both Android devices and Apple  
11 iPhones. *Id.*, ¶ 64. Google’s location history database contains information about hundreds of  
12 millions of devices around the world. *Id.*, ¶ 65. Google’s location history is generated from  
13 search queries, users’ IP addresses, device sensors, Global Positioning Systems (GPS),  
14 information from nearby Wi-Fi networks, and information from nearby Bluetooth devices *Id.*,  
15 ¶ 66; *See Chatrue*, 590 F. Supp. 3d at 908. This allows Google to determine where a user is at a  
16 given date and time. *Id.*

17 Google captures location data from different services like the Android operating system,  
18 Google-owned mobile applications, and in-browser mobile searches via Google. *Id.*, ¶ 67. 85%  
19 of Americans currently own a smartphone with mobile internet. *Id.*, ¶ 68. Approximately 46.8%  
20 of these smartphone users operate on Google’s Android operating system. *Id.*

21 Google owns three of the five most popular smartphone applications in the United States,  
22 including Gmail, Google Maps, and Google Search. *Id.*, ¶ 69. Google controls about 62% of  
23 mobile browsers, 69% of desktop browsers, and the operating systems of 71% of mobile  
24 devices. *Id.*, ¶ 70. 92% of internet searches go through Google. *Id.*

25 Any smartphone user can opt into Google’s location history when they create a Google  
26 account. *Id.*, ¶ 71. However, Google does not provide clear directions on how to opt out and  
27 into Google’s location history. *Id.*, ¶ 72. On Google Maps, a user can inadvertently opt into  
28 location history by clicking on “YES I’M IN” in response to the prompt, “Get the most from

1 Google Maps.” *Id.*, ¶ 73. The prompt makes no mention of location history. *Id.*

2 Within Google Maps, the “LEARN MORE” option does not direct the user to any  
3 specific language concerning location data or location history. *Id.*, ¶ 74. Google’s Terms of  
4 Service does not mention location history, and Google’s Privacy Policy, which is 27 pages, only  
5 mentions location history twice. *Id.*, ¶ 75.

6 Opting into location history may be automatic on mobile devices running the android  
7 operating system. *Id.*, ¶ 76. Users are not notified how frequently Google collects their data and  
8 the amount of data Google collects. *Id.*, ¶ 77. Google does not inform users that location history  
9 is collected regardless of whether users are actively engaging with Google apps and even when  
10 users have their phones in airplane mode. *Id.*, ¶ 78. A user must also navigate a confusing maze  
11 to pause and delete location history. *Id.*, ¶ 79.

12 Internal communications among Google employees reveals that the company’s own  
13 engineers are not even sure how to delete location history. *Id.*, ¶ 80. Even if a user figures out  
14 how to delete his or her location history, that information is still available to Google. *Id.*, ¶ 81.  
15 Google does not inform users that their data is being sold among hundreds of unseen parties.  
16 *Id.*, ¶ 82.

17 SafeGraph acquires location data from smartphones, including Android and iPhone users  
18 whose data is stored in Google’s location history database. *Id.*, ¶ 83. Plaintiffs are made up of  
19 Android and iPhone users whose location data was derived through either Google’s RTB  
20 process or SafeGraph’s SDKs. *Id.*, ¶ 84. Plaintiffs never consented to SafeGraph or the County  
21 obtaining their location data from their Smartphones. *Id.*, ¶ 85.

### 22 III. LEGAL STANDARDS

23 A Federal Rules of Civil Procedure 12(b)(1) motion challenges a court’s subject matter  
24 jurisdiction either facially, claiming that the facts accepted as true do not establish jurisdiction,  
25 or factual, claiming that the facts establishing jurisdiction are not true. *Thornhill Pub. Co. v.*  
26 *Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). In determining a facial attack, a  
27 court must accept the allegations in the complaint as true. *Leite v. Crane Co.*, 749 F.3d 1117,  
28 1121 (9th Cir. 2014). Likewise, in determining a factual attack, “when the issue of subject-

1 matter jurisdiction is intertwined with an element of the merits of the plaintiff's claim” (*id.* at  
2 1122 n.3), the court “must ‘assume [ ] the truth of the allegations in a complaint ... unless  
3 controverted by undisputed facts in the record.’ ” *Warren v. Fox Family Worldwide, Inc.*, 328  
4 F.3d 1136, 1139 (9th Cir. 2003) (quoting *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir.  
5 1987)).

6 In considering a motion to dismiss filed under Rule 12(b)(6) of the Federal Rules of Civil  
7 Procedure, “all well-pleaded allegations of material fact are taken as true and construed in a  
8 light most favorable to the non-moving party.” *Wylar Summit P’ship v. Turner Broad. Sys., Inc.*,  
9 135 F.3d 658, 661 (9th Cir. 1998). This is a very liberal standard. “In order for a complaint to  
10 survive a 12(b)(6) motion, it must state a claim for relief that is plausible on its face.” *In re Med.*  
11 *Cap. Sec. Litig.*, 842 F. Supp. 2d 1208, 1210 (C.D. Cal. 2012). “A claim for relief is facially  
12 plausible when the plaintiff pleads enough facts, taken as true, to allow a court to draw a  
13 reasonable inference that the defendant is liable for the alleged conduct.” *Id.*

14 This standard is especially liberal when applied to the constitutional claims alleged in  
15 this action, which are governed by Rule 8. Rule 8’s burden is “minimal,” and requires only that  
16 the plaintiff provide “a short and plain statement of the claim showing that the pleader is entitled  
17 to relief.” *Westways World Travel v. AMR Corp.*, 182 F. Supp. 2d 952, 955 (C.D. Cal. 2001)  
18 (quotations omitted). “It is the burden of the party bringing a motion to dismiss for failure to  
19 state a claim to demonstrate that the requirements of Rule 8(a)(2) have not been met.” *Id.*

#### 20 IV. ARGUMENT

##### 21 A. Plaintiffs Have Standing To Bring Their Claims

22 Article III standing requires a plaintiff to demonstrate: (1) an injury in fact; (2) a causal  
23 connection; and (3) redressability. “First, the plaintiff must have suffered an ‘injury in fact’—  
24 an invasion of a legally protected interest which is (a) concrete and particularized, and (b)  
25 ‘actual or imminent, not conjectural or hypothetical.’ ” *Lujan v. Defenders of Wildlife*, 504 U.S.  
26 555, 560 (1992) (citations omitted). “Second, there must be a causal connection between the  
27 injury and the conduct complained of—the injury has to be ‘fairly traceable to the challenged  
28 action of the defendant, and not th[e] result [of] the independent action of some third party not

1 before the court.” *Id.* “Third, it must be ‘likely,’ as opposed to merely ‘speculative,’ that the  
2 injury will be redressed by a favorable decision.” *Id.* at 561 (citations omitted).

3 Moreover, the Supreme Court has held that an association has standing to bring suit on  
4 behalf of its own members when:

5 (a) its members would have standing to sue in their own right; (b) the interests it  
6 seeks to protect are germane to the organization’s purpose; and (c) neither the claim  
7 asserted nor the relief requested requires the participation of individual members  
8 in the lawsuit.

9 *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977).

10 Plaintiff CCSJ has asserted associational standing because its members have alleged a  
11 concrete injury traceable to SafeGraph. CCSJ satisfies the other factors because it seeks nominal  
12 damages and the individual interests in this lawsuit are aligned with CCSJ’s purpose. Plaintiff  
13 McClure also has individually satisfied the standing requirements outlined in *Lujan*.

14 **1. Plaintiffs allege a concrete injury**

15 Plaintiff CCSJ brings its claims on behalf of its church members whose privacy interests  
16 were invaded by the Defendants. SafeGraph improperly claims that CCSJ lacks standing to  
17 bring claims on behalf of its members because the Fourth Amendment is a personal right. Mot.  
18 at 11-12. Despite the personal interests of the Fourth Amendment, an organization may still  
19 bring Fourth Amendment claims on behalf of its members. *See Garcia v. City of Los Angeles*,  
20 No. CV196182DSFPLAX, 2020 WL 6586303, at \*2 (C.D. Cal. Sept. 15, 2020); *see also*  
21 *Heartland Acad. Cmty. Church v. Waddle*, 427 F.3d 525, 532 (8th Cir. 2005) (“The Supreme  
22 Court has never held (and neither have we) that associational standing is not available to § 1983  
23 plaintiffs alleging Fourth Amendment violations.”). In *Garcia*, the court noted that “[n]either  
24 the Supreme Court nor the Ninth Circuit has directly addressed whether organizations can bring  
25 section 1983 claims based on the Fourth Amendment rights of its members.” 2020 WL  
26 6586303, at \*2. The court concluded, however, that an unincorporated organization that brought  
27 claims on behalf of its unhoused members may bring a section 1983 claim asserting violation  
28 of its members’ Fourth Amendment rights. *Id.* In reaching this conclusion, the court

1 distinguished a line of cases, recognizing that there are instances where the invasion of personal  
2 rights under the Fourth Amendment may be asserted by others. *Id.* at \*3.

3 In *In re Facebook, Inc. Internet Tracking Litigation*, the Ninth Circuit found that the  
4 plaintiffs had alleged a clear invasion of the right to privacy because “Facebook’s tracking and  
5 collection practices would cause harm or a material risk of harm to their interest in controlling  
6 their personal information.” 956 F.3d 589, 599 (9th Cir. 2020) (“Facebook”). The Ninth Circuit  
7 has noted that “advances in technology can increase the potential for unreasonable intrusions  
8 into personal privacy.” *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1272 (9th Cir. 2019). The Third  
9 Circuit has also emphasized that, “[i]n an era where millions of Americans conduct their affairs  
10 increasingly through electronic devices, the assertion...that federal courts are powerless to  
11 provide a remedy when an internet company surreptitiously collects private data...is untenable.  
12 Nothing in *Spokeo* or any Supreme Court decision suggests otherwise.” *In re Google Inc.*  
13 *Cookie Placement Consumer Privacy Litig.*, 934 F.3d 316, 325 (3rd Cir. 2019).

14 Like Facebook’s tracking practices, SafeGraph’s practices “allow it to amass a great  
15 degree of personalized information.” *Facebook*, 932 F.3d at 1272. Plaintiffs allege that  
16 SafeGraph collects data from thousands of apps and SDKs, as well as Google’s RTB. FAC, ¶¶  
17 57, 60-66. Users are not informed that their location data is being disclosed to third parties. *Id.*,  
18 ¶¶ 58-60. Google also makes it nearly impossible for a user to turn off their location, and even  
19 if a user figures out how to delete his or her location history, that information is still available  
20 to Google. *Id.*, ¶¶ 72-81. Thus, like *Facebook*, Plaintiffs have alleged an injury because they do  
21 not have “a meaningful opportunity to control or prevent the unauthorized exploration of their  
22 private lives.” 932 F.3d at 1272.

## 23 2. Plaintiffs’ First and Fourth Amendment claims are traceable to SafeGraph

24 Defendant asserts that Plaintiffs “fail to allege SafeGraph caused any invasion of  
25 privacy” (Mot. at 12) and that Plaintiffs’ “alleged First Amendment injuries are not traceable to  
26 SafeGraph” (Mot. at 14). Specifically, SafeGraph claims they should be immune from any  
27 liability because other third parties collected the data and SafeGraph had no role in the County’s  
28 decision to collect and use location data. Mot. at 13-14. However, it is immaterial where

1 SafeGraph falls in the “chain of causation.” *Bennet v. Spear*, 520 U.S. 154, 169 (1997).

2 Plaintiffs assert several claims throughout the FAC identifying Defendant SafeGraph’s  
3 involvement and contribution to Plaintiffs’ alleged injuries. Plaintiffs allege that at the behest  
4 of the County, SafeGraph put two geofences around CCSJ and surveilled CCSJ (FAC, ¶ 25);  
5 SafeGraph acted as an instrument of the County to assist the County in understanding the effects  
6 of its COVID-19 orders (*id.*, ¶ 31); County officials ratified SafeGraph’s surveillance (*id.*, ¶  
7 32); and SafeGraph collected location data from CCSJ (*id.*, ¶ 39). These allegations sufficiently  
8 establish causation.

9 **3. Defendants are not immune from liability under the *Noerr-Pennington***  
10 **doctrine**

11 Defendant SafeGraph provides no basis or analysis for its conclusion that Defendants  
12 are immune from monetary liability under the *Noerr-Pennington* doctrine. Mot. at 14. The  
13 *Noerr-Pennington* doctrine provides that “those who petition any department of the  
14 government for redress are generally immune from statutory liability for their petitioning  
15 conduct.” *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006). The Ninth Circuit has  
16 made clear that “government actors are only protected by *Noerr-Pennington* if they engage in  
17 activity that is properly considered petitioning or sufficiently related to petitioning activity.”  
18 *Comm. to Protect our Agric. Water v. Occidental Oil & Gas Corp.*, 235 F. Supp. 3d 1132, 1159  
19 (E.D. Cal. 2017) (quotations omitted). And “[t]he Ninth Circuit has generally not interpreted  
20 *Noerr-Pennington* to extend immunity to state actors engaging with private entities who are  
21 themselves exercising petitioning rights.” *Id.*

22 Here, Plaintiffs allege that Defendants’ geofencing operation was agreed upon outside  
23 of litigation. FAC, ¶¶ 4, 23. The County agreed to surveil many entities to understand the effects  
24 of the COVID-19 orders and social distancing. *Id.* Indeed, the FAC alleges that the “geofencing  
25 operation was separate from the County’s enforcement of the COVID-19 fines.” *Id.*, ¶ 4.  
26 Invasive and warrantless geofencing operations bear little resemblance to the sort of  
27 governmental petitioning the doctrine is designed to protect. Accordingly, the geofencing  
28 operation was not conduct incidental to litigation, and *Noerr-Pennington* immunity does not



1 extend to this “separate and distinct activity.” *Sosa*, 437 F.3d at 935.

2       However, even assuming *arguendo* that the County and SafeGraph’s surveillance can be  
3 attributed as incidental to litigation, on at least two occasions, the Ninth Circuit has stated that  
4 objectively baseless discovery conduct, undertaken with an improper motive, can constitute  
5 sham litigation activity, even if it occurs in the context of a lawsuit that is otherwise protected  
6 by *Noerr-Pennington*. *See, e.g., id.* at 938 (“[W]e have observed that private discovery conduct,  
7 not itself a petition, may fall within the sham exception where *either* the conduct itself, *or* the  
8 underlying petition, meets [the] sham litigation test.” (emphases added) (citations omitted));  
9 *Theofel v. Farey-Jones*, 359 F.3d 1066, 1079 (9th Cir. 2004) (“Defendants urge us to look only  
10 at the merits of the underlying litigation, not at the subpoena. They apparently think a litigant  
11 should have immunity for any and all discovery abuses so long as his lawsuit has some merit.  
12 Not surprisingly, they offer no authority for that implausible proposition... [W]e hold that  
13 [Noerr-Pennington] is no bar where the challenged discovery conduct is itself objectively  
14 baseless.”).

15       *Theofel’s* reasoning applies here. Like the defendants in *Theofel* who urged the court to  
16 “look only at the merits of the underlying litigation”, rather than the challenged conduct, here,  
17 Defendants contend that they should have immunity for any and all discovery abuses in  
18 “meritorious litigation.” *Id.* This is an “implausible position”, and *Noerr-Pennington* does not  
19 bar “objectively baseless” discovery conduct like an invasive and warrantless search. *Id.*<sup>1</sup>

20       **4. The interests at stake in this lawsuit are germane to CCSJ’s purpose**

21       SafeGraph claims Plaintiffs cannot satisfy the second prong of associational standing  
22 because “individual data privacy interests under the terms of service of online providers that a  
23 person utilizes for their own recreational or entertainment reasons are not germane to a non-  
24 profit corporation organized exclusively for religious purposes.” Mot. at 12 (internal quotations  
25

26       <sup>1</sup> *Noerr-Pennington’s* sham litigation exception also requires proof of subjective intent  
27 to use legal process to achieve the evil prohibited by the statute from which exemption is  
28 claimed. *See Prof’l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49,  
60-61 (1993). That prong of the test is also satisfied here. Presumably, the purpose of *any*  
objectively baseless and warrantless search is to uncover private information.

1 and citations omitted). This argument misconstrues Plaintiffs’ allegations.

2 Through this lawsuit, Plaintiffs seek to hold Defendants accountable for surveilling them  
3 during intimate, religious gatherings. FAC, ¶¶ 86-125. Plaintiffs’ goals are aligned with the  
4 goals of CCSJ. CCSJ is comprised of churchgoers whose religious beliefs require they gather  
5 for the teaching of God’s Word, worship, prayer, and fellowship. *Id.*, ¶ 13. CCSJ believes its  
6 church and sanctuary is a sacred place that should be free from government entanglement. *Id.*  
7 Plaintiffs have therefore demonstrated that the individual interests in this case are “directly  
8 related” to CCSJ’s purpose because “[t]he plaintiffs have asserted that their individual members  
9 participate in the sanctuary movement as a matter of religious faith and practice.” *Am. Baptist*  
10 *Churches in the U.S.A. v. Meese*, 666 F.Supp. 138, 1364 (N. D. Cal. 1987) (internal quotations  
11 and citations omitted).

12 **5. Plaintiffs’ claims do not require the participation of individual CCSJ**  
13 **members**

14 SafeGraph argues Plaintiffs’ claims require individualized participation because “the  
15 requested monetary relief requires the participation of individual CCSJ members.” Mot. at 12.  
16 But Plaintiffs request nominal damages. FAC, ¶¶ 98, 110, 118, 125. “[N]ominal damages are  
17 divorced from any compensatory purpose.” *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853,  
18 872 (9th Cir. 2017). “[N]ominal damages are awarded to vindicate rights, the infringement of  
19 which has not caused actual, provable injury.” *Cummings v. Connell*, 402 F.3d 936, 943 (9th  
20 Cir. 2005). Thus, “a plaintiff might seek vindication of a right which is not economic in  
21 character and for which no substantial non-pecuniary award is available.” 1 Dobs, Law of  
22 Remedies § 3.3(2), at 295–96.

23 **B. Plaintiffs’ Claims Are Timely Raised**

24 SafeGraph wrongly asserts that Plaintiffs’ claims are time-barred by California’s two-  
25 year statute of limitations. Mot. at 15; Cal. Civ. Proc. Code § 335.1. “Generally, the statute of  
26 limitations begins to run when a potential plaintiff knows or has reason to know of the asserted  
27 injury.” *De Anza Properties X, Ltd. V. County of Santa Cruz*, 936 F.2d 1084, 1086 (9th Cir.  
28 1991). SafeGraph improperly focuses on the period when Defendants surveilled CCSJ, instead

1 of the date when Plaintiffs became aware of the surveillance. Plaintiffs found out about the  
2 surveillance during discovery in or around November 2022. Gondeiro Decl., ¶ 2. The County’s  
3 surveillance was covert and unknown to the public. Thus, the proper date for this Court to  
4 consider is November 2022.

5 *Mills v. City of Covina*, does not support a different conclusion. 921 F.3d 1161 (9th Cir.  
6 2019). There, plaintiff alleged he was unlawfully arrested and searched and brought a section  
7 1983 claim over three years after the search and arrest occurred. *Id.* at 1166-67. *Mills* is  
8 distinguishable because the plaintiff knew or had reason to know of his claims when he was  
9 searched or arrested, unlike this case, where Defendants were surreptitiously surveilling  
10 Plaintiffs for at least over a year.

11 Even if this Court considers the date the alleged unlawful searches occurred as the proper  
12 date, Plaintiffs are still not time barred. Instead of focusing on the entirety of Plaintiffs’ FAC,  
13 Defendant cherry-picks a particular period referenced in a report not mentioned in the FAC.  
14 Mot. at 15. For one, it is improper for SafeGraph to rely on this report at this stage because it  
15 conflicts with Plaintiffs’ allegations. *See United States v. Corinthian Colleges*, 655 F.3d 984,  
16 999 (9th Cir. 2011) (“More specifically, we may not, on the basis of evidence outside of the  
17 Complaint, take judicial notice of facts favorable to Defendants that could reasonably be  
18 disputed.”)

19 Moreover, Plaintiffs allege numerous violations of their constitutional rights throughout  
20 the COVID-19 pandemic, a period spanning from 2020 through 2022. *See* FAC ¶¶ 4, 10, 23,  
21 25, 35. Defendants surveyed CCSJ to understand the effects of the COVID-19 orders. *Id.* ¶ 31.  
22 Plaintiffs, at no time, limit the period of wrongdoing to the data sample analyzed in the Ho  
23 Report. Thus, Plaintiffs’ claims are not time-barred.

24 **C. Plaintiffs Allege Facts Sufficient To State A Plausible Section 1983 Claim Against**  
25 **SafeGraph**

26 1. **Plaintiffs allege facts that show Safegraph is a state actor subject to section**  
27 **1983 liability**

28 Defendant SafeGraph incorrectly asserts that it is free of constitutional constraints and

1 cannot be subject to any section 1983 claim. Mot. at 15. While private conduct does not  
2 generally constitute government action, SafeGraph can be liable under section 1983 if it acted  
3 pursuant to a right, privilege, or rule of conduct imposed by the state, and it is a state actor.  
4 *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). “The Supreme Court has developed  
5 four different tests that aid us in identifying state action: (1) public function; (2) joint action;  
6 (3) governmental compulsion or coercion; and (4) governmental nexus.” *Pasadena Republican*  
7 *Club v. W. Just. Ctr.*, 985 F.3d 1161, 1167 (9th Cir. 2021) (cleaned up). The Ninth Circuit does  
8 not apply the two-step framework rigidly and has found the first step unnecessary in certain  
9 contexts. *See Mathis v. Pacific Gas & Electric Co.*, 75 F.3d 498, 503 n.3 (9th Cir. 1996)  
10 (evaluating only the second step of the *Lugar* framework to determine whether a private party  
11 operated as a state actor).

12 (a) *SafeGraph acted pursuant to the County’s policies and directives*

13 Defendant argues that Plaintiffs “make no reference to any sovereign state authority and  
14 allows for no reasonable inference that SCC somehow deputized SafeGraph, vested it with law  
15 enforcement powers, or afforded it special privileges.” Mot. at 16. However, “there is no  
16 specific formula for defining state action.” *Howerton v. Gabica*, 708 F.2d 380, 383 (9th Cir.  
17 1983). Determining whether a private entity is acting through the state is “necessarily fact-  
18 bound.” *Lugar*, 457 U.S. at 939. The analysis of whether “state actor/color-of-state-law” exists  
19 begins by identifying the gravamen of the complaint – the specific conduct of which the plaintiff  
20 complains. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999) (quoting *Blum v.*  
21 *Yaretsky*, 457 U.S. 991, 1004 (1982)).

22 Here, Plaintiffs’ injuries stem from the County’s policies and directives. Plaintiffs claim  
23 (1) SafeGraph, as ratified by Dr. Cody and James Williams, collected data from CCSJ and other  
24 businesses as part of a well-orchestrated geofencing operation (FAC, ¶ 39); (2) SafeGraph, at  
25 the direction of the County, put two geofences around CCSJ and surveilled church members  
26 during the COVID-19 pandemic (*id.*, ¶ 25); and (3) the County did not simply approve or  
27 acquiesce to SafeGraph’s surveillance of CCSJ (*id.*, ¶ 30), but rather, SafeGraph acted as an  
28 instrument of the County to assist the County in understanding the effects of its COVID-19

1 orders (*id.*, ¶ 31). The data assisted Dr. Sara Cody in shaping public health strategy and policy.  
2 *Id.*, ¶ 31. These allegations demonstrate that SafeGraph acted pursuant to the County’s policies  
3 and directives.

4 (b) *Joint Action/Government Nexus Test*

5 Defendant repeatedly asserts that SafeGraph is not a state actor because it followed its  
6 “technical capabilities” and that there is “no plausible suggestion that SafeGraph ceded control  
7 over its internal operations....” Mot. at 16-17. These arguments are red herrings and  
8 misconstrue the requirements for state action.

9 The Ninth Circuit has considered the “joint action” and “nexus” tests both individually  
10 and in combination. *Kirtley v. Rainey*, 326 F.3d 1088, 1093-94 (9th Cir. 2003) (using the tests  
11 separately); *Jensen v. Lane County*, 222 F.3d 570, 575-76 (9th Cir. 2000) (using a combined  
12 “close nexus/joint action test”). Private entities can be state actors if they are “willful  
13 participant[s] in joint action with the state or its agents.” *Dennis v. Sparks*, 449 U.S. 24, 27  
14 (1980). “The [joint action] test asks whether the government has so far insinuated itself into a  
15 position of interdependence with a private entity that the private entity must be recognized as a  
16 joint participant in the challenged activity.” *Pasadena Republican Club*, 985 F.3d at 1167  
17 (internal quotations and citation omitted). Under the “close nexus” test,<sup>2</sup> the “inquiry must be  
18 whether there is a sufficiently close nexus between the State and the challenged action of the  
19 regulated entity so that the action of the latter may be fairly treated as that of the State itself.”  
20 *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974). The existence of the “close nexus” depends  
21 on whether the State has “exercised coercive power or has provided such significant  
22 encouragement . . . that the choice must in law be deemed to be that of the State.” *Sullivan*, 526  
23 U.S. at 52 (quotations omitted).

24 Here, Plaintiffs have alleged facts establishing that SafeGraph was a willful participant  
25

---

26 <sup>2</sup> The Ninth Circuit has noted that the Supreme Court may consider the “nexus” not as  
27 a separate test but as a status found in all cases where the private conduct is attributable to the  
28 State. *Lee v. Katz*, 276 F.3d 550, 554 n. 4 (9th Cir. 2002) (positing that *Brentwood* and *Blum*  
may stand for the proposition that a “nexus” results from the existence of “entwinement” or a  
“public function”).

1 acting jointly with the County to surveil CCSJ and other entities throughout the COVID-19  
2 pandemic. Plaintiffs allege that SafeGraph acted “as an instrument of the County to assist the  
3 County in understanding the effects of its COVID-19 orders.” FAC, ¶ 31. The County simply  
4 did not approve or acquiesce to SafeGraph’s surveillance of CCSJ. *Id.*, ¶¶ 25, 30. The  
5 surveillance was initiated by the County, and the County requested this information as part of a  
6 well-orchestrated geofencing operation. *Id.*, ¶¶ 31, 39. These allegations demonstrate that the  
7 County had “so far insinuated itself into a position of interdependence with [SafeGraph] that it  
8 must be recognized as a joint participant in the challenged activity.” *Tsao v. Desert Palace*, 698  
9 F.3d 1128, 1140 (9th Cir. 2012).

10 Defendant’s reliance on *O’Handley v. Weber*, 62 F.4th 1145 (9th Cir. 2023) is misplaced.  
11 Mot. at 18-19. There, O’Handley sued Twitter (now known as X) and California’s Secretary of  
12 State alleging various constitutional violations for Twitter’s decision to limit his social media  
13 posts and then suspend his account. 62 F.4th at 1156. The Ninth Circuit held that Twitter was  
14 not a state actor because O’Handley did not allege any facts plausibly suggesting that the  
15 government was involved in the company’s internal decisions to limit access to his tweets and  
16 suspend his account “or that the State played any role in drafting Twitter’s Civic Integrity  
17 Policy.” *Id.* at 1160.

18 In *O’Handley*, Twitter exercised its own discretion when moderating content and its  
19 users, whereas, here, SafeGraph specifically created and established two separate geofences  
20 around CCSJ at the direction and request of the County. *Id.* at 1156-60; FAC, ¶ 31. Twitter also  
21 had a policy in place before the government got involved. Here, SafeGraph did not have a policy  
22 that directed it to surveil the visit patterns of entities in the County. SafeGraph acted pursuant  
23 to the County’s policies and directives. *Id.*, ¶¶ 25, 30-31, 39. SafeGraph surveilled CCSJ  
24 because of the County’s “heav[y] involve[ment] in the decisionmaking process.” *Rawson v.*  
25 *Rec. Innov., Inc.*, 975 F.3d 742, 754 (9th Cir. 2020). Thus, Plaintiffs have alleged facts that, if  
26 proven, demonstrate SafeGraph is a state actor.  
27  
28

1           **2. Plaintiffs allege facts that show Safegraph violated their Fourth Amendment**  
2           **rights**

3           The Fourth Amendment protects “[t]he right of the people to be secure in their persons,  
4 houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. Amend.  
5 IV. “The ‘basic purpose of this Amendment,’ our cases have recognized, ‘is to safeguard the  
6 privacy and security of individuals against arbitrary invasions by governmental officials.’”  
7 *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018) (citing *Camara v. Municipal Court of*  
8 *City and County of San Francisco*, 387 U.S. 523, 528 (1967)).

9           “‘When an individual ‘seeks to preserve something as private,’ and his expectation of  
10 privacy is ‘one that society is prepared to recognize as reasonable,’ ...official intrusion into that  
11 private sphere generally qualifies as a search and requires a warrant supported by probable  
12 cause.” *Carpenter*, 138 S. Ct. at 2213 (quoting *Smith v. Maryland*, 442 U.S. 735, 740 (1979)).  
13 The Supreme Court has affirmed that individuals have a “reasonable expectation of privacy in  
14 the whole of [their] physical movements.” *Carpenter*, 138 S. Ct. at 2217.

15           Here, Defendants’ acquisition of location data through a geofence intruded upon the  
16 Plaintiffs’ reasonable expectation of privacy because it disclosed private, sensitive information  
17 about the Plaintiffs engaged in private worship and religious practice. FAC, ¶ 90. Plaintiffs do  
18 not attend church with the expectation that they will be covertly surveilled by the government.  
19 *Id.*, ¶ 92. By obtaining historical location data generated by cell phone holders, the Defendants  
20 could obtain “an all-encompassing record of the holder’s whereabouts,” thus “revealing not  
21 only his particular movements” but the most intimate details of his or her life. *Carpenter*, 138  
22 S. Ct. at 2217-18; *see also Riley v. California*, 573 U.S. 372, 403 (2014) (“With all [modern  
23 cell phones] contain and all they may reveal, they hold for many Americans ‘the privacies of  
24 life.’”).

25           SafeGraph erroneously relies on Professor Ho’s Report to claim that no private  
26 information was disclosed to Defendants. Mot. at 20. Again, SafeGraph cannot rely on judicially  
27 noticed facts “that could reasonably be disputed.” *United States*, 655 F.3d at 999. Plaintiffs  
28 allege that geofences can reveal sensitive, private information about individuals, and that

1 researchers have repeatedly demonstrated that cross-referencing datasets can reveal the  
2 identifying information of nearly ever anonymized user. FAC, ¶¶ 46-49. These allegations must  
3 be accepted as true at this stage, and all inferences must be construed in Plaintiffs' favor.

4 In sum, Plaintiffs had a reasonable expectation of privacy in their physical location and  
5 movements at church, and the Defendants were required to obtain a warrant prior to putting a  
6 geofence around CCSJ's property. Defendants did not do so, in violation of the Fourth  
7 Amendment. *Id.*, ¶ 94.

8 **3. Plaintiffs allege facts that show Safegraph violated their First Amendment**  
9 **rights**

10 Plaintiffs state a claim for relief under the framework outlined in *Roman Catholic*  
11 *Diocese of Brooklyn, v. Cuomo*, 141 S. Ct. 63 (2020) ("Brooklyn Diocese"), wherein the  
12 Supreme Court fundamentally altered Free Exercise jurisprudence. There, the Court enjoined  
13 enforcement of Governor Cuomo's Cluster Action Initiative – an order that restricted indoor  
14 worship during the COVID-19 pandemic. *Id.* at 64. The Court held the order was not neutral  
15 and generally applicable because it treated churches harsher than secular entities and activities  
16 like acupuncture facilities, bike shops, and liquor stores. *Id.* at 66-67.

17 Notably, Justice Kavanaugh, in his concurrence, rejected New York's argument that it  
18 did not discriminate against religion because some secular businesses like movie theaters were  
19 treated equally or more harshly.

20  
21 "[U]nder this Court's precedents, it does not suffice for a State to point out that, as  
22 compared to houses of worship, *some* secular businesses are subject to similarly  
23 severe or even more severe restrictions .... Rather, once a State creates a favored  
class of business, as New York has done in this case, the State must justify why  
houses of worship are excluded from that favored class."

24 *Id.* at 73 (emphasis in original).

25 The Ninth Circuit has noted *Brooklyn Diocese's* "seismic shift in Free Exercise law."  
26 *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1288, 1233 (9th Cir. 2021). On January 22,  
27 2021, the Ninth Circuit granted an injunction against California's COVID-19 restrictions on  
28 indoor religious gatherings. *S. Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128, 1151-



1 52 (9th Cir. 2021). The Ninth Circuit also granted a similar injunction in *Harvest Rock Church,*  
2 *Inc. v. Newsom*, 985 F.3d. 711 (9th Cir. 2020).

3 Defendants' geofencing operation fails both the neutrality and general applicability tests  
4 under *Brooklyn Diocese* and *Tandon*. The Supreme Court in *Tandon* affirmed that a regulation  
5 is not neutral and generally applicable where it "treat[s] any comparable secular activity more  
6 favorably than religious exercise." *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (emphasis in  
7 original) (citing *Brooklyn Diocese*, 141 S. Ct. at 67-68). And "whether two activities are  
8 comparable for purposes of the Free Exercise Clause must be judged against the asserted  
9 government interest that justifies the regulation at issue." *Tandon*, 593 U.S. at 62 (citing  
10 *Brooklyn Diocese*, 141 S. Ct. at 67). Moreover, a law lacks general applicability when "it  
11 prohibits religious conduct while permitting secular conduct that undermines the government's  
12 asserted interests in a similar way." *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1877 (2021).

13 Plaintiffs allege that Defendants' geofencing operation was not neutral and generally  
14 applicable because not all businesses and entities were subject to surveillance. FAC, ¶ 113. The  
15 Defendants imposed an expansive geofencing operation on CCSJ while overlooking other large  
16 gathering places like protests, weddings, and graduation parties. *Id.*, ¶ 116. Plaintiffs have no  
17 compelling justification for surveilling CCSJ but not other similar gatherings. At this stage,  
18 Defendants cannot demonstrate that their surveillance was narrowly tailored. Indeed, the FAC  
19 alleges that Defendants' geofencing operation had no limitations or boundaries. *Id.*, ¶¶ 6, 39.  
20 Thus, Plaintiffs easily satisfy Rule 8's liberal pleading standard in stating a claim for relief  
21 under the First Amendment.

## 22 V. CONCLUSION

23 For the foregoing reasons, this Court should deny Defendant SafeGraph's motion to  
24 dismiss. In the alternative, this Court should grant Plaintiffs leave to amend.

25 Respectfully submitted,

26 Dated: January 16, 2024

27 /s/ Mariah Gondeiro, Esq.

28 Mariah Gondeiro

Attorney for Plaintiffs