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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

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

Plaintiffs,

vs.

SANTA CLARA COUNTY; and **SAFEGRAPH;**

Defendants.

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

RESPONSE TO DEFENDANT SANTA CLARA COUNTY'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT PURSUANT TO FEDERAL RULE 12(b)(6)

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

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I. INTRODUCTION

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

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

The County attempts to dismiss Plaintiffs' lawsuit, claiming they fail to state a claim for relief. *See* Defendant County of Santa Clara's Motion to Dismiss Plaintiffs' First Amended Complaint ("Mot."), ECF 33. The Court should deny the motion for three reasons.

First, this action is distinct from any prior actions between CCSJ and the County, rendering the first-to-file rule and claim splitting doctrine inapplicable. Application of the first-to-file rule is inappropriate because the factual allegations and the central theories of liability in this action are entirely distinct from those asserted in prior actions between the parties. Specifically, this action addresses whether the County's warrantless geofencing operation violated the Fourth Amendment while the parties' prior actions focused on whether the County's COVID-19 health orders violated the First Amendment. Application of the claim-splitting doctrine is similarly barred because the claims in this action accrued after the filing of

the operative complaint in the parties' prior federal court action. *See Rimini St., Inc. v. Oracle Int'l Corp.*, 473 F. Supp. 3d 1158, 1191 (D. Nev. 2020) (citing *Howard v. City of Coos Bay*, 871 F.3d 1032, 1040 (9th Cir. 2017)).

Second, the County is not entitled to immunity under the *Noerr-Pennington* doctrine because the County's invasive and warrantless geofencing operation bears little resemblance to the sort of governmental petitioning the doctrine is designed to protect. The doctrine does not serve to protect conduct that is "separate and distinct" from petitioning activities. *See Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006). Additionally, the doctrine does not protect "objectively baseless" discovery conduct like an invasive and warrantless search. *Theofel v. Farey-Jones*, 359 F.3d 1066, 1079 (9th Cir. 2004).

Third, Plaintiffs allege cognizable claims for relief under *Monell* and the Fourth Amendment. Plaintiffs allege *Monell* liability by showing that Defendants had a longstanding custom and practice of warrantless surveillance of County entities. Plaintiffs additionally allege that Defendants had final policymaking authority to orchestrate and ratify the geofencing operation.

Plaintiffs also allege a cognizable Fourth Amendment claim because Plaintiffs had a reasonable expectation of privacy in their physical location and movements at church, requiring the County to obtain a warrant prior to putting a geofence around CCSJ's property to track the church congregants. Defendants did not do so. The private search doctrine does not excuse the County's conduct because the County "affirmatively compelled" SafeGraph to create geofences around CCSJ's property. *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

Accordingly, this Court should deny the County's motion to dismiss.

II. BACKGROUND

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

Throughout the COVID-19 pandemic, SafeGraph worked with government entities like the Center for Disease Control and Prevention ("CDC"), San Francisco, San Jose, and Santa Clara County to surveil the visit patterns at various businesses and organizations. First Amended

Complaint ("FAC"), ECF 027, ¶ 23. SafeGraph's research and data was derived from cell phone users' location data. *Id.*, ¶ 24.

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

The County did not simply approve or acquiesce to SafeGraph's surveillance of CCSJ. *Id.*, ¶ 30. The surveillance was initiated by the County, and the County requested this information to monitor visit patterns at different points of interest in the County for a over year. *Id.*, ¶ 31. In other words, SafeGraph was acting as an instrument of the County to assist the County in understanding the effects of its COVID-19 orders. *Id.*

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

James Williams oversaw the County's legal department and provided legal advice to the County throughout the COVID-19 pandemic. *Id.*, ¶ 34. Specifically, he was required to approve of Defendants' geofencing operation to ensure it complied with the law. *Id.* In his role as chief legal advisor, he oversaw the county elected officials, the Board of Supervisors, and the department heads, including Dr. Sara Cody. *Id.* James Williams also served as a director for the Emergency Operations Center. *Id.*, ¶ 35. In that role, he helped inform the COVID-19 pandemic

response, including analyzing and reviewing data related to the County's COVID-19 orders. *Id.* Such data would have included information derived from location data. *Id.*

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

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

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

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

The Defendants did not acquire a warrant prior to putting a geofence around CCSJ. *Id.* ¶ 44. Even though geofences generally derive from anonymized data, the privacy of users within the geofence is still at issue. *Id.*, ¶ 45. Location data is more precise and revealing than cell-site

location information, as it shows a person's pattern of life. *Id.*, ¶ 46. Geofences reveal sensitive, private information about where people travelled and can create inferences about what a person might have been doing. *Id.*, ¶ 47. These tools provide a story about where and with whom people socialize, visit, worship, and much more. *Id.*

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

Data scientists from Imperial College London and UC Louvain found that it was not particularly hard for companies to identify the person behind "anonymized" data using other data sets. *Id.*, ¶ 50. The researchers developed a machine learning model that was able to correctly re-identify 99.98% of Americans in any anonymized dataset using just 15 characteristics including age, gender, and marital status. *Id.* In another study that investigated smartphone location data, researchers were able to uniquely identify 95% of the individuals in a data set with just four spatial-temporal points. *Id.*, ¶ 51.

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

B. SafeGraph Gathers Its Location Data Through Various Means

1. **SafeGraph's Software Development Kit ("SDK")**

SafeGraph harvests its user location data from apps that use its SDK. *Id.*, ¶ 55. SafeGraph's SDK gathers information from any geo-tracking feature in cell-phone apps. *Id.*

Thus, if an app acquires a user's location data, SafeGraph could also receive that data. *Id.* Among the top apps that contain SafeGraph are a basketball forum (RealGM Forum), a forum for firearms enthusiasts (Ruger Forum), an off-road travel forum (SA 4x4 Community Forum), and an Apple products discussion forum (iMore Forums). *Id.*, ¶ 56.

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

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

SafeGraph also gathers location data through Google's real-time bidding ("RTB") auction process. *Id.*, ¶ 60. Google customers are not informed that their personal information is sold in Google's RTB process. *Id.* RTB is the process by which internet publishers auction off ad space in their apps or on their websites. *Id.*, ¶ 61. In doing so, they share sensitive user data – including geolocation, device IDs, and browsing history with dozens of different data companies and data brokers like SafeGraph. *Id.*

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

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

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

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

Any smartphone user can opt into Google's location history when they create a Google account. *Id.*, ¶ 71. However, Google does not provide clear directions on how to opt out and into Google's location history. *Id.*, ¶ 72. On Google Maps, a user can inadvertently opt into location history by clicking on "YES I'M IN" in response to the prompt, "Get the most from Google Maps." *Id.*, ¶ 73. The prompt makes no mention of location history. *Id.*

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

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

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

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

III. RELEVANT PROCEDURAL HISTORY

On June 9, 2020, Plaintiffs, alongside another church and its pastor, filed a lawsuit in federal court ("Freeman Action") challenging the constitutionality of the County's COVID-19 public health orders as applied against churches. Defendants Request for Judicial Notice ("Def. RJN") Ex. 1, ECF 33.1. The operative complaint was filed on April 15, 2022, which also included a challenge against the County's fines levied against the church. *Id.* at Ex. 2. On March 10, 2023, Judge Freeman abstained from hearing the case until the final resolution of the County's state court enforcement action. *Id.* at Ex. 4. Plaintiffs appealed this decision and are awaiting a hearing date at the Ninth Circuit. *Id.* at Ex. 5.

On October 27, 2020, the County sued Plaintiffs in state court to enjoin Plaintiffs from holding indoor worship services or services in violation of the COVID-19 orders. *Id.* at Ex. 6. In July 2021, the County amended its action to collect approximately $4 million in fines from Plaintiffs. *Id.* at Ex. 7. On April 7, 2023, the Superior Court granted the County's motion for summary adjudication, reducing Calvary's fines to $1.2 million in fines. *Id.* at Ex. 10.

Plaintiffs filed this action on August 22, 2023 against the County and SafeGraph challenging the constitutionality of the County's geofencing surveillance operation. *See* ECF 001. On October 27, 2023, Plaintiffs filed their First Amended Complaint naming Professor Ho as an additional defendant. *See* ECF No. 27.

IV. LEGAL STANDARDS

In considering a motion to dismiss filed under Rule 12(b)(6) of the Federal Rules of Civil Procedure, "all well-pleaded allegations of material fact are taken as true and construed in a light most favorable to the non-moving party." *Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). This is a very liberal standard. "In order for a complaint to

survive a 12(b)(6) motion, it must state a claim for relief that is plausible on its face." *In re Med. Cap. Sec. Litig.*, 842 F. Supp. 2d 1208, 1210 (C.D. Cal. 2012). "A claim for relief is facially plausible when the plaintiff pleads enough facts, taken as true, to allow a court to draw a reasonable inference that the defendant is liable for the alleged conduct." *Id.*

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

V. ARGUMENT

The Court should deny Defendant's motion to dismiss because Plaintiffs' suit is not barred by the first-to-file rule, claim splitting doctrine, or *Noerr-Pennington* doctrine. Additionally, accepting its allegations as true, the Complaint adequately alleges a *Monell* and Fourth Amendment claim against the County.

A. This Action Is Distinct From Any Prior Actions Between CCSJ And Santa Clara County

1. The first-to-file rule is inapplicable

Defendant's reliance on the first-to-file rule is misplaced. Mot. at 4-5. In deciding whether the first-to-file rule applies, a district court must "analyze[ ] three factors: chronology of the lawsuits, similarity of the parties, and similarity of the issues." *Alltrade, Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622, 625 (9th Cir. 1991). Notably, application of the rule is "discretionary." *Alltrade*, 946 F.2d at 628. Application of the first-to-file rule is inappropriate here because the parties and issues in the present case are distinct from those of the Freeman Action.

Similarity of Parties. The first-to-file rule only requires the parties to be "substantial[ly] similar," rather than identical. *Inherent.com v. Martindale–Hubbell*, 420 F.Supp.2d 1093, 1097 (N.D. Cal. 2006). Here, the real parties in interest are different than those in the Freeman Action.

While the County and CCSJ are parties in both actions, this action adds as Defendants SafeGraph and Professor Ho.

Similarity of issues. When courts consider the similarity of issues between two actions, they address whether there is substantial similarity or overlap of the claims and issues. *Kohn L. Grp., Inc. v. Auto Parts Mfg. Mississippi, Inc.*, 787 F.3d 1237, 1241 (9th Cir. 2015). This factor does not require total uniformity of claims but rather focuses on the underlying factual allegations. *Red v. Unilever United States, Inc.*, No. 09-07855 MMM (AGRX), 2010 WL 11515197, at *5–6 (C.D. Cal. Jan. 25, 2010); *Bashiri v. Sadler*, No. CV 07–2268–PHX–JAT, 2008 WL 2561910, at *2 (D. Ariz. June 25, 2008) ("While the specific legal issues vary across the litigations, the discovery and evidence necessary to litigate each is substantially similar"); *PETA, Inc. v. Beyond the Frame, Ltd.*, No. CV 10–07576 MMM (SSx), 2011 WL 686158, at *2 (C.D. Cal. Feb. 16, 2011) (stating that the actions present similar issues if they present "'closely related questions or common subject matter'").

Here, the factual allegations and the central theories of liability are entirely distinct from those asserted in the Freeman Action. The ultimate issue in the Freeman Action was whether the County's COVID-19 health orders violated the First Amendment. RJN at Ex. 1. The ultimate issue in this case is whether the County's invasive and warrantless geofencing operation violated the First and Fourth Amendments. None of the County's COVID-19 health orders are at issue in this action. The FAC is clear that the County's geofencing operation was agreed upon outside of litigation and independent of the County's COVID-19 health orders. FAC, ¶¶ 4, 23. Furthermore, the claims in this action will rely on separate discovery and evidence than that of the Freeman Action. *See Bashiri*, 2008 WL 2561910, at *2.

Additionally, any remedy afforded in the Freeman Action would not be sufficient to redress Plaintiffs in this action. A determination on the constitutionality of the County's COVID-19 health orders would not address whether the County violated the Fourth Amendment through its surveillance operation of CCSJ. As such, the cases are not "duplicative" and/or competing and do not risk "conflicting judgments". *Church of Scientology of Cal. v. U.S. Dep't of Army,* 611 F.2d 738, 750 (9th Cir.1979) ("The [first-to-file] rule is primarily meant to

alleviate the burden placed on the federal judiciary by duplicative litigation and to prevent the possibility of conflicting judgments.") Accordingly, dismissal is not warranted.

2. **Claim-splitting doctrine is inapplicable**

Defendant's reliance on the claim-splitting doctrine is similarly misplaced. Mot. 5-8. The Ninth Circuit has explicitly established that there "is a bright line rule prohibiting the application of the doctrine of claim preclusion (and, by extension, claim-splitting) to 'claims that accrue after the filing of the operative complaint.'" *Rimini St., Inc. v. Oracle Int'l Corp.*, 473 F. Supp. 3d 1158, 1191 (D. Nev. 2020) (citing *Howard v. City of Coos Bay*, 871 F.3d 1032, 1040 (9th Cir. 2017)).

In *Howard*, the Ninth Circuit held that the district court erred by applying the doctrine of claim preclusion because the plaintiff's second case only accrued around the time her first case went to trial. *Id*. at 1040. The main concern of the Ninth Circuit was that absent such a rule, a plaintiff would be barred from asserting a claim that arose during a lawsuit unless the district court allowed the plaintiff to amend her complaint. *Id.* "This can often be an issue because a plaintiff is only allowed one amended complaint early in a case, and like in *Howard*, a new claim might not accrue until late in a lawsuit." *Rimini St., Inc.*, 473 F. Supp. 3d at 1191.

The Ninth Circuit has since determined that "claim preclusion does not apply to claims that were not in existence and could not have been sued upon—i.e., were not legally cognizable—when the allegedly preclusive action was initiated." *Media Rights Technologies, Inc. v. Microsoft Corp.*, 922 F.3d 1014, 1021 (9th Cir. 2019).

Here, the Freeman Action was filed in June 2020, and then the operating complaint was filed in April 2022. RJN at Ex. 1. Per the County's own admission, Plaintiffs were not served, and had no knowledge of, Professor Ho's report until November 10, 2022. Mot. at 2. Accordingly, Plaintiffs claims accrued after the filing of the operative complaint, rendering the claim-splitting doctrine inapplicable.

Moreover, the doctrine relies on the test for claim preclusion and assesses "whether the causes of action and relief sought, as well as the parties or privies to the action, are the same." *Adams v. California Dep't of Health Services*, 487 F.3d 684, 688 (9th Cir. 2007). "Whether two

events are part of the same transaction or series depends on whether they are related to the same set of facts and whether they could conveniently be tried together." *Western Sys., Inc. v. Ulloa*, 958 F.2d 864, 871 (9th Cir. 1992).

The County disingenuously claims "both actions arise from the same transactional nucleus of facts – the County's investigation of and enforcement against violations of its COVID-19 public health orders." Mot. at 7. This assertion contradicts the allegations in the FAC, where Plaintiffs allege the County worked with SafeGraph to surveil the visit patterns of various businesses and organizations to help it understand the effects of its COVID-19 orders. FAC, ¶¶ 4, 23. Plaintiffs allege the geofencing operation was separate from the County's enforcement of the COVID-19 fines. *Id.*, ¶ 4. The Freeman Action is predicated upon the constitutionality of the COVID-19 orders, while this action is predicated upon a geofencing operation that involves different parties, facts, and issues. RJN at Ex. 1. Thus, the claim-spitting doctrine is inapplicable.

B. The County is not immune under the *Noerr-Pennington* Doctrine

The County erroneously claims it is immune from liability under the *Noerr-Pennington* doctrine. Mot. at 8-9. The *Noerr–Pennington* doctrine provides that "those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct." *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006). The Ninth Circuit has made clear that "government actors are only protected by *Noerr–Pennington* if they engage in activity that is properly considered petitioning or sufficiently related to petitioning activity." *Comm. to Protect our Agric. Water v. Occidental Oil & Gas Corp.*, 235 F. Supp. 3d 1132, 1159 (E.D. Cal. 2017) (quotations omitted). "The Ninth Circuit has generally not interpreted *Noerr–Pennington* to extend immunity to state actors engaging with private entities who are themselves exercising petitioning rights." *Id.*

The doctrine is typically invoked "to immunize the act of petitioning itself—i.e., the filing of the lawsuit." *Theofel v. Farey-Jones*, 359 F.3d 1066, 1078 (9th Cir. 2004). But courts have also extended the doctrine to certain conduct "incidental to the prosecution of the suit," for example, deciding whether to settle a claim. *See Columbia Pictures Indus., Inc. v. Prof'l*

Real Estate Investors, Inc., 944 F.2d 1525, 1528–29 (9th Cir.1991), *aff'd,* 508 U.S. 49 (1993). The protection does not extend to "separate and distinct activity which might form the basis for… liability." *Sosa*, 437 F.3d at 935 (citations omitted). No case cited by Defendant supports the proposition that *Noerr-Pennington* immunity extends to conduct that is separate and distinct from petitioning activities.

It is disingenuous for the County to claim it initiated a geofencing operation "because of the County's state litigation against Plaintiffs." Mot. at 8. It is immaterial whether the County decided to use the evidence it obtained through its geofencing operation against CCSJ in its state enforcement action. The FAC is clear that the County's geofencing operation was agreed upon outside of litigation and independent of the County's COVID-19 health orders. FAC, ¶¶ 4, 23. The County agreed to surveil many entities to understand the effects of the COVID-19 orders and social distancing. *Id.*, ¶¶ 4, 23. Indeed, the Complaint alleges that the "geofencing operation was separate from the County's enforcement of the COVID-19 fines." *Id.*, ¶ 4.

It is also misleading for the County to argue Plaintiffs' claims were derived from Professor Ho's 2022 Expert Report in the Freeman Action. Mot. at 9. The County intended to use the report Professor Ho compiled of CCSJ's surveillance data in the state enforcement action. However, Plaintiffs do not allege that is the source of their harm. The Defendants' surveillance operation – agreed upon outside of litigation – was the source of their harm. FAC, ¶¶ 4, 23. This Court cannot rely on Defendants' judicially noticed facts regarding the geofencing operation because they conflict with Plaintiffs' allegations. *See United States v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011) ("More specifically, we may not, on the basis of evidence outside of the Complaint, take judicial notice of facts favorable to Defendants that could reasonably be disputed.")

Invasive and warrantless geofencing operations bear little resemblance to the sort of governmental petitioning the doctrine is designed to protect. Accordingly, the geofencing operation was not conduct incidental to litigation, and *Noerr-Pennington* immunity does not extend to this "separate and distinct activity." *Sosa*, 437 F.3d at 935.

However, even assuming arguendo that the County's surveillance can be attributed as

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

Theofel's reasoning applies here. Like the Defendants in *Theofel* who urged the court to "look only at the merits of the underlying litigation", rather than the challenged conduct, here, the County contends that they should have immunity for any and all discovery abuses because their state court action had some merit. *Id.*; Mot. at 10. This is an "implausible position", and *Noerr-Pennington* does not protect "objectively baseless" discovery conduct like an invasive and warrantless search. *Theofel,* 359 F.3d at 1079.[1]

C. Plaintiffs Allege Cognizable Claims For Relief

Plaintiffs allege cognizable claims for relief under *Monell* and the Fourth Amendment.

1. **Defendants are liable under *Monell***

Plaintiffs adequately allege facts to support a *Monell* claim. Defendant argues that Plaintiffs do not allege a *Monell* claim because they do not plead a singular custom or practice of sufficient duration or similarity. Mot. at 10-11. The Ninth Circuit has applied the following two-part rule for determining whether factual allegations are properly pled for a *Monell* claim:

[1] *Noerr–Pennington's* sham litigation exception also requires proof of subjective intent to use legal process to achieve the evil prohibited by the statute from which exemption is 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.

> "First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation."

AE ex rel. Hernandez v. County of Tulare, 666 F.3d 631, 637 (9th Cir. 2012) (quoting *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011)).

Applying the first part of Ninth Circuit's rule, the FAC alleges sufficient allegations to provide Defendant fair notice. The FAC states the specific customs or policies that allegedly caused plaintiff's constitutional violation. FAC, ¶¶ 31-35. The alleged customs or policies include a "well-orchestrated geo-fencing operation" that was "initiated by the County" wherein the County "monitor[ed] visit patterns at different points of interest in the County for a year" without a warrant. *Id.*, ¶¶ 31, 39, 44. The FAC also alleges that Mr. Williams and Dr. Cody orchestrated and ratified this unlawful geofencing operation in their capacities as final public health policymakers for the County. FAC, ¶¶ 32-35. These allegations put Defendant on fair notice of Plaintiffs' *Monell* claim under Rule 8's low pleading standard. *See Mateos–Sandoval v. Cty. of Sonoma*, 942 F.Supp.2d 890, 899 (N.D. Cal. 2013) (concluding allegations that "specify the content of the policies ... are sufficient to 'give fair notice and to enable the opposing party to defend itself effectively,' particularly since information relating to the policies, customs, and practices of County Defendants ... [are] likely to be easily available to them").

Regarding the second part of the Ninth Circuit's rule, taking Plaintiffs' factual allegations as true, the FAC suggests an entitlement to relief. In *Twombly*, the Supreme Court stated that there is no "probability requirement at the pleading stage ... [pleading] simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence to support the allegations." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). In *Starr*, the Ninth Circuit explained that the standard at the motion to dismiss stage of litigation "is not that plaintiff's explanation must be true or even probable. The factual allegations of the complaint need only

'plausibly suggest an entitlement to relief.'" *Starr v. Baca*, 652 F.3d 1202, 1216-17 (9th Cir. 2011).

Plaintiffs FAC adequately alleges that Plaintiffs are entitled to relief under *Monell*. A plaintiff may establish *Monell* municipal liability under § 1983 even where the municipality does not expressly adopt an alleged policy. *See Webb v. Sloan*, 330 F.3d 1158, 1164 (9th Cir. 2003). Alternative ways such liability can attach include (1) "if an employee commits a constitutional violation pursuant to a longstanding practice or custom" and (2) "when the person causing the violation has final policymaking authority". *Id.*

Plaintiffs FAC alleges facts that the County's surveillance operation was both a long-standing practice or custom and ratified by final policymakers within the County.

a) Defendant's surveillance operation was a longstanding practice or custom

To establish a longstanding practice or custom, the complaint need only allege "the policy or custom itself ... in general terms[,]" as "[i]t is a rare plaintiff who will have access to the precise contours of a policy or custom prior to having engaged in discovery, and requiring a plaintiff to plead its existence in detail is likely to be no more than an exercise in educated guesswork." *Estate of Osuna v. Cty. of Stanislaus*, 392 F. Supp. 3d 1162, 1174 (E.D. Cal. 2019). There is no bright line rule as to "'the quantum of allegations needed to survive a motion to dismiss a pattern and practice claim,'" however, "'where more than a few incidents are alleged, the determination appears to require a fully-developed factual record.'" *Id.* at 1173 (citations omitted).

Plaintiffs' *Monell* claim does not rest solely on the County's targeting of churches and religious organizations. Mot. at 10-11. Rather, Plaintiffs' *Monell* claim rests on the County's widespread practice of surveilling specific points of interest within the County, including CCSJ, without a warrant to ascertain residents' visit patterns for research purposes. FAC, ¶¶ 4, 39, 31. These incidents were not "isolated or sporadic". Mot. at 10 (citing *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996)). Rather, for a period of at least more than one year, the County conducted warrantless surveillance on various entities around the County in deliberate indifference to the constitutional rights of these entities. FAC, ¶¶ 4, 39, 31. It is of no

consequence that these violations occurred during a pandemic. Mot. at 11. Nor does the County have to surveil all businesses and entities in the County for its surveillance operation to be considered a longstanding policy or practice. Mot. at 10-11.

The Ninth Circuit has held that "a custom or practice can be supported by evidence of repeated constitutional violations which went uninvestigated and for which the errant municipal officers went unpunished." *Hunter v. County of Sacramento*, 652 F.3d 1225, 1236 (9th Cir. 2011). The other businesses and entities surveilled by the County were (and still are) likely unaware, as Calvary was, that they were being watched. This warrantless invasion of privacy has gone uninvestigated and unpunished – until this action.

b) Defendant's surveillance operation was ratified by final policymakers

The FAC also alleges sufficient facts to show that the County's warrantless geofencing operation was ratified by final policymakers – James Williams and Dr. Sara Cody. FAC, ¶ 31-35. To adequately plead *Monell* liability, Plaintiff must allege that Williams and Cody were final policymakers and that they ratified the surveillance operation. *See Hopper v. City of Pasco*, 241 F.3d 1067, 1083 (9th Cir. 2001).

"Whether an official is a policymaker for *Monell* purposes is a question governed by state law." *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1066 (9th Cir. 2013); *see also City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988) (same). "Depending on the circumstances, however, [the Court] may also look to the way a local government entity operates in practice" to determine if an individual possessed final policymaking authority. *Lytle v. Carl*, 382 F.3d 978, 983 (9th Cir. 2004). Thus, "[t]he final policymaker is the individual who had authority in the particular area where the constitutional violation occurred." *Barone v. City of Springfield, Oregon*, 902 F.3d 1091, 1108 (9th Cir. 2018).

"For a person to be a final policymaker, he or she must be in a position of authority such that a final decision by that person may appropriately be attributed to the District." *Lytle*, 382 F.3d at 983. "Authority to make municipal policy may be granted directly by a legislative enactment" or "delegated by an official who possesses such authority . . . ." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986). Moreover, it does not matter that "the final policymaker

may have subjected only one person to only one unconstitutional action." *Lytle,* 382 F.3d at 983. A single action can constitute an official policy if that action is made or ratified by the final policymaker. *Id*.

To plead ratification, a plaintiff must show that "an official with final policy-making authority 'delegated that authority to, or ratified the decision of, a subordinate.'" *Price v. Sery*, 513 F.3d 962, 966 (9th Cir. 2008) (quoting *Ulrich v. City & County of San Francisco*, 308 F.3d 968, 984–85 (9th Cir. 2002)). Liability based on a ratification theory may be based on a single incident "causally related to the constitutional deprivation." *Trevino v. Gates*, 99 F.3d 911, 918 n.2 (9th Cir. 1996).

Defendant argues that Plaintiffs' allegations are insufficient because they do not show (1) ratification by Williams and/or Cody, (2) that Williams and or Cody were final policymakers of the particular area at issue, and (3) that their authority was "final, unreviewable, and not constrained by the official policies of superiors." Mot. at 12-13. These arguments are smoke in mirrors.

Here, the FAC alleges that the surveillance operation was ratified by County Counsel James William and County Health Officer Dr. Sara Cody. FAC, ¶ 32. Dr. Sara Cody was the senior official in the County's health department and had final authority regarding the implementation of policies related to COVID-19, as well as geofencing projects analyzing the effects of the County's orders. *Id.*, ¶ 33. James Williams was the senior official in the County's legal department and served as the director for the Emergency Operations Center. *Id.*, ¶¶ 34-35. In these roles, he was required to approve of Defendants' geofencing operation to ensure it complied with the law and analyze and review data related to COVID-19 in the County. *Id.*

Additionally, Defendants cannot use requests for judicial notice to refute Plaintiffs' allegations. *See United States*, 655 F.3d at 999; Mot. at 14 (citing Santa Clara Ord. Code §§ A18-27, A22-12). Even if Williams and Cody have superiors above them within the County, they can still have final policymaking authority under *Monell*, as decision making authority can be delegated. *See Price*, 513 F.3d at 966.

At this stage, Plaintiffs can overcome dismissal by including "facts about specific named

supervisors and their titles, roles, observations, and actions" – which Plaintiffs have done. *Mondragon v. City of Fremont*, No. 18-CV-01605-NC, 2020 WL 1156953, at *5 (N.D. Cal. Mar. 10, 2020) (internal citation omitted); *see also Duenez v. City of Manteca*, No. CIV. S-11-1820 LKK, 2012 WL 4359229, at *9 (E.D. Cal. Feb. 23, 2012) ("Plaintiffs need not articulate the intricacies of the alleged policy further at the pleading stage."). This is particularly true where defendants have "possession of discovery that plaintiffs need[] to state detailed factual allegations." *Id.* The FAC makes clear that Cody and Williams sat at the tops of their Departments with authority to make decisions regarding the geofence operation. FAC, ¶¶ 32-35. The FAC even alleges that Dr. Cody had "final authority" regarding the implementation of policies and practices related to COVID-19. *Id.*, ¶ 33. The FAC also alleges that Defendants collected location data from CCSJ and other business "[a]s ratified by Dr. Cody and James Williams…." *Id.*, ¶ 33. Accepted as true, these allegations establish that Williams and Cody were final policy makers within the County. *See Estate of Duran v. Chavez*, 2015 WL 8011685, at *9 (E.D. Cal. Dec. 7, 2015) (denying motion to dismiss *Monell* claim where Plaintiff included facts about specific named supervisors and their titles, roles, observations, and actions).

2. **Plaintiffs sufficiently plead a Fourth Amendment violation**

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

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

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

Because Plaintiffs had a reasonable expectation of privacy in their physical location and movements at church, Defendants was required to obtain a warrant prior to putting a geofence around CCSJ's property to track the church congregants. Defendants did not do so, in violation of the Fourth Amendment FAC, ¶ 94.

The County does not dispute that its geofence around CCSJ was a search within the meaning of the Fourth Amendment. Instead, Defendant claims they did not need to obtain a warrant pursuant to the private search exception. Mot. at 14-15. They are wrong.

The "most basic constitutional rule" in the Fourth Amendment arena is that warrantless searches are per se unreasonable, subject to few exceptions that are "jealously and carefully drawn." *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971). The private search doctrine is one of these few exceptions, and it was "carefully drawn", *id.*, to be a "narrow doctrine with limited applications." *United States v. Wilson*, 13 F.4th 961, 968 (9th Cir. 2021).

The doctrine concerns circumstances in which "a private party's intrusions would have constituted a search had the government conducted it and the material discovered by the private party then comes into the government's possession." *Id.* at 967. The doctrine invokes the precept that when private parties provide evidence to the government "on [their] own accord[,] ... it [i]s not incumbent on the police to ... avert their eyes…." *Coolidge*, 403 U.S. at 489. The Supreme Court formalized the private search doctrine in a pair of decisions about four decades ago:

Walter v. United States, 447 U.S. 649 (1980) and *United States v. Jacobsen*, 466 U.S. 109 (1984).

However, the private search doctrine does not apply if the government instigates or participates in the search, or if the only purpose of a private search is to further a government investigation. *Burdeau v. McDowell*, 256 U.S. 465 (1921); *Byars v. United States,* 273 U.S. 28 (1927); *Lustig v. United States*, 338 U.S. 74 (1949); *Gambino v. United States*, 275 U.S. 310 (1927); *Corngold v. United States*, 367 F.2d 1 (9th Cir. 1966). Courts consider two factors when determining whether a person is a state agent: "(1) the government's knowledge and acquiescence, and (2) the intent of the party performing the search." *United States v. Walther*, 652 F.2d 788, 792 (9th Cir. 1981).

Defendant claims that the private search exception precludes Plaintiffs' Fourth Amendment claim because SafeGraph is a private data company. Mot. at 14. However, this argument dismisses the facts and allegations in the FAC. SafeGraph put two geofences around CCSJ at the behest of the County. FAC, ¶ 25. The Count also worked with SafeGraph to surveil the visit patterns of other businesses and organizations to understand the effects of their COVID-19 orders. *Id.*, ¶¶ 4, 23.

This case is governed by *Carpenter*. In *Carpenter*, the Court addressed a case in which the government affirmatively directed third-party wireless carriers to produce a person's location information, concluding that "[b]efore compelling a wireless carrier to turn over a subscriber's CSLI, the Government's obligation is a familiar one – get a warrant." *Carpenter,* 138 S. Ct. at 2221. In contrast, the private search doctrine is implicated where a private party obtains "a person's location information through a private search and then voluntarily and without demand g[ives] the Government such information." *Kleiser v. Chavez*, No. 3:20-CV-6079-BJR, 2021 WL 5761644, at *10 (W.D. Wash. Dec. 3, 2021), aff'd, No. 21-36029, 2022 WL 17550475 (9th Cir. Dec. 9, 2022), and aff'd, 55 F.4th 782 (9th Cir. 2022). Here, SafeGraph did not "voluntarily and without demand from the Government" supply the County with this information, as necessary for application of the private search doctrine. *Id.* Rather, the surveillance was initiated by the County, and the County requested this information from

SafeGraph. FAC, ¶ 31. In other words, SafeGraph was acting as an instrument of the County, rendering SafeGraph's conduct a government search.

Even if the Court finds that SafeGraph and Professor Ho were not state agents, under the private search doctrine, the government's search cannot exceed the scope of the private search. *Wilson*, 13 F.4th at 968. The government's search of a digital device or data cannot reveal more than the private search had already revealed. *United States v. Phillips*, 32 F.4th 865, 868-69 (9th Cir. 2022), cert. denied, 143 S. Ct. 467 (2022).

Here, the FAC adequately alleges that the County's search exceeded the scope of SafeGraph's initial, private search. SafeGraph collected data through various apps and Google's RTB process. FAC, ¶¶ 55-57, 60. The County then used SafeGraph's data to specifically target CCSJ through various geofences. *Id.*, ¶¶ 27-28, 44. The County's search did not "mimic the earlier private search", but rather exceeded the scope of the prior search. *United States v. Bowman*, 215 F.3d 951, 956, 963 (9th Cir. 2000). Accordingly, the private search doctrine does not apply.

VI. CONCLUSION

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

Respectfully submitted,

Dated: January 16, 2023

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