No. 24-1025

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSHUA SIMON, DAVID BARBER, AND JOSUE BONILLA, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, DIANA BLOCK AN INDIVIDUAL AND COMMUNITY RESOURCE INITIATIVE, AN ORGANIZATION,

Plaintiffs-Appellees

v.

CITY AND COUNTY OF SAN FRANCISCO, PAUL MIYAMOTO, IN HIS OFFICIAL CAPACITY AS SAN FRANCISCO SHERIFF,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California
No. 4:22-cv-05541 JST
Hon. Jon S. Tigar

APPELLANTS' OPENING BRIEF (PRELIMINARY INJUNCTION APPEAL)

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INTRODUCTION

The San Francisco Superior Court ("Superior Court") determines whether to release criminal defendants on their own recognizance pending trial, whether to condition defendants' release on conditions, or whether defendants must remain in custody pending trial. Among the options available to the Superior Court for pretrial supervision is the Pretrial Electronic Monitoring ("PTEM") Program operated by Defendant-Appellant San Francisco Sheriff Paul Miyamoto (together with Defendant-Appellant the City and County of San Francisco, "Sheriff").[1] The PTEM Program provides intensive supervision for defendants the Superior Court finds on an individual basis require that supervision to be released from custody pretrial. Joshua Simon, David Barber, and Josue Bonilla—criminal defendants charged with violent assault and domestic violence—were released from custody after agreeing to participate in the PTEM Program and then brought class-wide constitutional challenges to aspects of the PTEM Program.

In releasing defendants from custody subject to participation in the PTEM Program, the Superior Court informs defendants that, among other conditions of

[1] This brief refers to Defendants-Appellants collectively as the "Sheriff" to distinguish them from pretrial criminal defendants released from custody by the Superior Court, while maintaining the position that the City and County of San Francisco is not an appropriate party because it is not involved in running the PTEM Program, which Sheriff Miyamoto administers for the Superior Court in his capacity as a state officer.

release, their "GPS location dat[a] can be shared with law enforcement agencies for criminal investigations during the pendency of the [criminal] case." 2-ER-181. Despite this admonition—on top of other admonitions to and agreements by criminal defendants released subject to participation in the PTEM Program—the district court has preliminarily enjoined the Sheriff from sharing location information for Program participants with other law enforcement agencies. No constitutional principle justifies the district court's unprecedented order enjoining the Sheriff on a class-wide basis from enforcing the Superior Court's direction.

Like other sheriffs, probation officers, and law enforcement officials across the country who implement court-mandated supervision, the Sheriff relies on the validity of orders entered by state courts. He is not—and constitutionally cannot be—in the position of second-guessing these orders. To the extent criminal defendants wish to challenge the validity of any terms of supervision, they need to do so in their criminal proceedings in the Superior Court. Yet, Plaintiffs never did that with respect to the conditions they challenge now. Instead, they agreed to the terms before the Superior Court in their criminal cases, obtained release from custody, and then filed a civil class action against the Sheriff without naming the Superior Court or People of the State of California as parties.

The district court's preliminary injunction order credited Plaintiffs' separation of powers, Fourth Amendment, and California right to privacy claims.

For all three claims, the district court's determination of the Plaintiffs' likelihood of success depended on its conclusion that the Superior Court did not validly order conditions in the PTEM Program rules. But that conclusion is wrong. There is no factual dispute that the Superior Court advises defendants that their location information can be shared during their pretrial release and memorializes that condition in its supervision orders. The only question is whether the Sheriff can constitutionally rely on that advisement and court orders memorializing it. He can.

There is also no irreparable harm to Plaintiffs supporting the district court's preliminary injunction. Initially, there is no constitutional violation because Plaintiffs were specifically admonished by the Superior Court about their conditions of release. And even if any condition is unconstitutional, Plaintiffs had a clear and certain remedy, namely making that challenge to the Superior Court that imposed the condition and that has the power to lift it. In reality, criminal defendants are more likely to be harmed than helped by the injunction, when Superior Court judges decide that some defendants must continue to be detained based on the Sheriff's inability to implement court orders for supervision.

Finally, the balance of equities and public interest strongly support the Sheriff, given the powerful interests in public safety, federalism, comity, and adherence to court orders. The district court's reasoning divests criminal defendants, state courts, and the Sheriff, of their respective authorities and

responsibilities in the context of pretrial criminal release and supervision.

The Court should reverse the preliminary injunction.

JURISDICTIONAL STATEMENT

The Sheriff contends that the district court lacked jurisdiction to adjudicate Plaintiffs' claims, which challenge the implementation of conditions of pretrial release entered by the Superior Court. *See infra* at 26–31.[2]

On February 17, 2024, the district court entered a preliminary injunction enjoining a warrantless search condition as to certain PTEM Program participants and prohibiting sharing of location data for all PTEM Program participants. 1-ER-49. The Sheriff filed a timely notice of appeal. 5-ER-876; see Fed. R. App. P. 4(a)(1)(A). Assuming the district court had jurisdiction to enter the preliminary injunction, this Court has jurisdiction over the appeal of the district court's preliminary injunction under 28 U.S.C. § 1292(a)(1).

[2] The Sheriff assumes here that Plaintiffs face a concrete injury from a policy allowing location data sharing, even though they presented no evidence their location information was shared with any law enforcement agency before they filed suit. *Cf. City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (rejecting standing to seek injunctive relief despite a past allegedly unconstitutional use of force on top of the plaintiff's expressions of concern and anticipation); *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1042 (9th Cir. 1999) (en banc) (finding no standing for injunctive relief despite each plaintiff alleging a previous, illegal stop). If the Court disagrees with the district court's conclusion that Plaintiffs had standing to sue separate from any pre-filing sharing of their location data, that would form an additional basis on which to vacate the preliminary injunction.

ISSUES PRESENTED

This appeal presents the following issues:

1. Can the Sheriff enforce conditions of pretrial release entered on the record by the Superior Court, including the condition allowing for sharing of GPS location data with other law enforcement agencies, for criminal defendants released from custody by the Superior Court subject to participation in the PTEM Program?

2. To the extent there is doubt about the effect of orders the Superior Court entered with respect to pretrial release conditions or whether the court sufficiently considered a defendant's individualized circumstances, is the criminal court in an individual defendant's case the appropriate venue to consider those issues in the first instance rather than a civil class action?

STATEMENT OF THE CASE

I. The Pretrial Electronic Monitoring Program

Judges on the Superior Court determine the level of restrictions on a criminal defendant awaiting trial in light of the relevant circumstances—and rely on the Sheriff to carry out their orders. 5-ER-786 ¶ 2. This process is governed by the California Constitution. "When making any bail determination, a superior court must undertake an individualized consideration of the relevant factors. These factors include the protection of the public as well as the victim, the seriousness of

the charged offense, the arrestee's previous criminal record and history of compliance with court orders, and the likelihood that the arrestee will appear at future court proceedings." *In re Humphrey*, 482 P.3d 1008, 1019 (Cal. 2021) (citations omitted); 5-ER-789 ¶ 15 (allegation by Plaintiffs that judges set conditions of release following *Humphrey*). The court may impose only the "least restrictive, nonmonetary conditions of release necessary to protect public safety." *Humphrey*, 482 P.3d at 1015. The Superior Court releases some defendants on their own recognizance ("OR"), requires some defendants to remain in jail pending trial, and as an alternative to jail, releases others with specific conditions. These conditions include, in a subset of cases, participation in the PTEM Program. 5-ER-789 ¶ 17; Johanna Lacoe, Alissa Skog & Mia Bird, *Bail Reform in San Francisco: Pretrial Release and Intensive Supervision Increased After Humphrey* at 3, California Policy Lab (May 25, 2021), https://www.capolicylab.org/wp-content/uploads/2021/05/Bail-Reform-in-San-Francisco-Pretrial-Release-and-Intensive-Supervision-Increased-after-Humphrey.pdf (reflecting only approximately 4.75% of defendants were released subject to participation in the PTEM Program during the survey period).

When a defendant's release is conditioned on participation in the PTEM Program, the Superior Court enters an order titled Pre-Sentenced Defendant Electronic Monitoring - Court Order ("EM Order") at a hearing—typically a bail

hearing, arraignment, or hearing on a motion to detain the defendant without bail—at which the defendant is represented by counsel. 5-ER-789 ¶ 19; 4-ER-554; 4-ER-558; 4-ER-564; 2-ER-168. At all times relevant to this case, the EM Order has stated that "the Court indicates that the defendant has waived their 4th Amendment rights and understands the restrictions ordered by the Court." 4-ER-698 (EM Order template as of when case was filed); 2-ER-169 (current Superior Court EM Order template).

In September 2022, when Plaintiffs filed this case, the Superior Court did not uniformly tell defendants on the record specific details about the conditions of pretrial release or extent of the Fourth Amendment waiver set forth in their EM Order. *But see* 4-ER-591 (specifically identifying a "10-35" warrantless search condition in the signed release order for Plaintiff Simon); 3-ER-382; 3-ER-400. But starting in May 2023, the Superior Court adopted a revised, more detailed EM Order, 2-ER-169, and delivered revised oral admonitions that resolved any uncertainty about the orders that the Superior Court intended to enter. *See* 2-ER-178; 2-ER-166. The Superior Court's current EM Order identifies a specific warrantless search condition to which the defendant will be subject. 2-ER-169. Criminal defendants released conditional on participation in the PTEM Program sign the EM Order, acknowledging that they "agree[] to enroll in the electronic monitoring program, follow the program rules, and have their movement tracked

and recorded by the SFSO [*i.e.*, Sheriff].” *Id.* And the Superior Court states on the record in each defendant’s case that the defendant’s “movements while on EM will be continuously tracked and recorded, and that information will be preserved and maintained,” and that their “GPS location dat[a] can be shared with law enforcement agencies for criminal investigations during the pendency of the case.” 2-ER-181. Before entering the EM Order, the court asks the defendant: “Do you understand the admonishment I have just read to you? Have you had the opportunity to consult with your attorney about these conditions? Do you agree to these conditions?” 2-ER-181–182. The vast majority of current PTEM Program participants have received this express admonition given in cases after May 2023 that their location data can be shared with other law enforcement agencies. 2-ER-73 ¶ 3; 2-ER-111 ¶ 3. The Sheriff updated the Program rules and official policies to match the revisions by the Superior Court. 2-ER-115; 2-ER-121.

In addition to the EM Order and defendants’ signed acknowledgment of their Fourth Amendment waiver in which defendants state that they “understand the restrictions ordered and stated by the Court,” and “agree to . . . follow the program rules,” 2-ER-169, the Superior Court memorializes the conditions of release in minute orders following the hearings. *E.g.*, 2-ER-140 (“Upon questioning by the Court, [Plaintiff Simon] state[d] they have had an opportunity to

consult with their counsel and that they accept the conditions set forth on the record.").

At the Sheriff's Office, PTEM Program participants then initial and sign Program rules and sign a participant contract. As relevant to the PTEM Program participants subject to this appeal, Program Rule 11 states, "The participant acknowledges that tracking data may be shared with other criminal justice partners." 2-ER-116. Many program participants—including Simon—have been placed in the PTEM Program several times, have received multiple EM Orders and admonishments, and have agreed each time. *See, e.g.*, 3-ER-456 ¶ 4; 2-ER-140.

The Sheriff administers the PTEM Program. 5-ER-788 ¶ 12. Consistent with the Superior Court's orders for electronic monitoring, the Sheriff has for many years shared PTEM Program participants' location data with other law enforcement agencies to respond to often active crimes including burglaries, robberies, and assaults. 4-ER-581–584 ¶¶ 3–11, 17. "Law enforcement typically shares data for legitimate law enforcement purposes across agencies and jurisdictions." 4-ER-583 ¶ 11. As Sheriff's Lieutenant Philip Judson explained in the district court, "a limitation on law enforcement sharing of data outside of the agency . . . would be unprecedented." *Id.* The Sheriff has prevented crimes in progress and helped solve recently committed crimes by sharing location data under this provision. 4-ER-581–582 ¶ 10; 3-ER-455–456 ¶ 3.

II. Plaintiffs and Class Representatives Simon, Barber, and Bonilla

A. Joshua Simon

When he filed this lawsuit, Simon was charged in San Francisco Superior Court with felony domestic violence, assault with a deadly weapon, and vandalism. 4-ER-554. The underlying Incident Report indicates he threatened to beat a family member. 6-ER-947 (SEALED). Approximately four months later, a second Incident Report indicates he assaulted his girlfriend while trying to convince her to give him money and then balled up his fists at San Francisco Police Department officers who arrived to intervene. 6-ER-954–955 (SEALED).

Simon was represented by counsel at his criminal court hearing on May 25, 2022, at which the Superior Court ruled he could be released from custody subject to participation in the PTEM Program and home detention. 4-ER-554. He was "ordered to comply with all terms of release as set forth on the record and by the SFSO." 4-ER-556. The court prohibited him from possessing any deadly weapon, going to certain locations, or having any contact with certain individuals. *Id.* The court issued the EM Order, 4-ER-589, and Simon signed a copy of the release order. 4-ER-591. The judge who placed Simon on PTEM specifically called out the warrantless search condition in the release order, entering a "10-35" condition, which refers to a warrantless search condition allowing a search by any peace officer (not just searches by the Sheriff). *Id.*

Simon enrolled in the PTEM Program on May 28, 2022, 4-ER-602, and signed the Program rules and contract, 4-ER-594; 4-ER-599. During this first time Simon was on PTEM, he had five notices of non-compliance with the Program rules for violating his "stay away" order three times, leaving the 50-mile radius set by the court, and cutting off his ankle monitor. 4-ER-603 (compiling notices). Simon was no longer on the PTEM Program when Plaintiffs filed their preliminary injunction motion. 4-ER-770 ¶ 7.

In May 2023, Simon was arrested again in connection with several new charges including felony domestic violence and assault with force likely to produce great bodily injury. 2-ER-112 ¶ 6. The Superior Court initially ordered that Simon be detained in custody, *i.e.*, jailed. On August 25, 2023, the Superior Court ordered Simon released with conditions including his participation in the PTEM Program and placement on home detention. 2-ER-140. The Superior Court admonished Simon on the record about his conditions of release including sharing of location data with other law enforcement officers. 2-ER-181; 2-ER-68. The minute orders in Simon's pending cases for his August 25, 2023, hearing state:

> Defendant is ordered to adhere to the Court-ordered conditions of electronic monitoring. As a condition of release, the defendant shall be placed on pre-trial monitoring by the San Francisco Sheriffs Office (SFSO). Defendant shall be fitted with a GPS device and is ordered to comply with all terms of release as stated on the record and by SFSO. Defendant shall be released after a

> coordinated pick-up with SFSO Community Programs is in place. Order is signed.
>
> The defendant is advised of the search condition they will be subject to while on electronic monitoring. Upon questioning by the Court, they state that they have had an opportunity to consult with their counsel and that they accept the conditions set forth on the record.

2-ER-140. At his August 25, 2023, hearing, Simon signed the EM Order. 2-ER-144. By signing the order, Simon "agree[d] to enroll in the electronic monitoring program, follow the program rules, and have their movement tracked and recorded by the SFSO." *Id.* The order reflects that, among other conditions, the Superior Court decided to condition Simon's release from custody on his agreement to "[s]ubmit to a warrantless search by any peace officer at anytime." *Id.*

On August 30, 2023, Simon completed the PTEM Program enrollment process at the Sheriff's Community Programs Office. When enrolling, Simon executed a copy of the Program rules, initialing after each rule including the rules reflecting the search condition and potential sharing of location data with other law enforcement agencies. 2-ER-146–147.

On December 7, 2023, the Superior Court issued a warrant revoking Simon's release status. 2-ER-79. During the approximately three months he had been on electronic monitoring, Simon had violated his stay away condition, traveled more than 50 miles away, and violated his home detention and curfew conditions 34 times. 2-ER-78.

B. David Barber

When he filed this case, Barber was charged with felony domestic violence, assault with a deadly weapon, and criminal threats. 4-ER-558. The Incident Report indicates he punched and choked his victim to the point that she lost a tooth, lost her voice, and was transported to the hospital. 6-ER-974–975 (SEALED).

Barber was represented by counsel at his criminal court hearing on the People's motion to detain him without bail on August 13, 2021. 4-ER-558. While the Superior Court denied the People's motion, it conditioned Barber's release on his participation in the PTEM Program and "compl[iance] with all terms of release as set forth on the record and by the SFSO." 4-ER-558. The Superior Court also ordered that he remain on home detention, confined within his Fremont residence, unless authorized to leave by the Sheriff, and forfeit any deadly weapons. *Id.* The court issued an EM Order, 4-ER-610. Although Barber says he "did not review or sign any papers when [he] went before the judge," 4-ER-774 ¶ 7, the court's August 13, 2021, release order bears his signature, 4-ER-612. Barber also initialed and signed the Program rules, enrolled in the PTEM Program on August 18, 2021, and signed the Program contract. 4-ER-615; 4-ER-620; 4-ER-623.

Approximately seven months later, in response to a motion by Barber, the Superior Court modified his pretrial release conditions so that he could check in with his case officer via telephone rather than in person. 4-ER-560.

Barber again moved the Superior Court to modify his conditions of release on August 24, 2022. 4-ER-562. The court granted his motion and ordered that he was relieved of home detention but was required to remain on GPS monitoring. *Id.* Barber never requested the Superior Court reconsider its order as to the Program rules he challenges in this lawsuit.

At the time the Sheriff filed his opposition to the preliminary injunction motion, Barber's file contained at least 11 notices of non-compliance for curfew violations. 4-ER-624 (collecting notices). Barber was no longer on the PTEM Program when the district court entered the preliminary injunction. 2-ER-167 ¶ 9.

C. Josue Bonilla

At the time he filed this lawsuit, Bonilla was charged with felony domestic violence, assault with a deadly weapon, and criminal threats. 4-ER-563. An Incident Report from September 20, 2020, states Bonilla punched his victim several times. 6-ER-986 (SEALED). A subsequent Incident Report from April 18, 2022, indicates Bonilla came to his victim's home while drunk, yelling he "would make her disappear," and that she "would be the perfect victim because no one would look for her." 6-ER-995 (SEALED).

On May 31, 2022, Bonilla waived arraignment and was released subject to the condition that he "be placed on pre-trial monitoring by the Sheriff's Office," fitted with a GPS monitor, and "ordered to comply with all terms of release as set

forth on the record and by the SFSO." 4-ER-564; 4-ER-566. The Superior Court also ordered him to forfeit any deadly weapons, not to threaten certain individuals, and to stay away from certain individuals and locations. 4-ER-564. The hearing transcript shows the Superior Court considered argument with respect to Bonilla's custodial status and held, in light of his threatening statements: "I definitely think an electronic monitor is warranted." 4-ER-573 at 7:15–21; *see* 4-ER-570–71 at 4:10–5:10 (court addressing evidence on release). The Superior Court issued an EM Order, 4-ER-640, and Bonilla signed a copy of the release order. 4-ER-642. Bonilla enrolled in the PTEM Program on June 1, 2022, 4-ER-653, and signed the Program rules and contract on the same day. 4-ER-644–645; 4-ER-647–51.

On June 2, 2022—just a day after enrolling in the PTEM Program—Bonilla was involved in a further incident. 6-ER-999 (SEALED). Despite having been ordered just two days earlier to stay away from the victim, the Incident Report indicates Bonilla approached the victim's car on the street and began to hit it, stating in Spanish, "You are going to pay, bitch." 6-ER-1001 (SEALED).

Bonilla was no longer on the PTEM Program when the district court entered the preliminary injunction. 2-ER-167 ¶ 9.

PROCEDURAL HISTORY

Plaintiffs filed this civil lawsuit in San Francisco Superior Court on September 8, 2022. 5-ER-785. On September 28, 2022, the Sheriff removed the

case to federal court based on federal question jurisdiction. On October 7, 2022, Plaintiffs moved for a preliminary injunction against the Sheriff, seeking to enjoin PTEM Program rules 5 and 13 (now 11). 4-ER-654. Plaintiffs' Motion for a Preliminary Injunction sought, among other relief, to enjoin the Sheriff from sharing location data (under Program Rule 11) on grounds it violated separation of powers, the Fourth Amendment, and right to privacy.

On October 17, 2022, the Sheriff moved to dismiss the lawsuit, on the federal and state constitutional merits and on the grounds that Plaintiffs were required to make their challenges in the first instance before the state criminal courts that entered their conditions of release. On October 28, 2022, the day that the Sheriff's opposition to Plaintiffs' preliminary injunction motion was due, Plaintiffs filed a motion for class certification. Following briefing, the district court heard argument on the three motions on February 2, 2023. 2-ER-235. While the motions were pending, the Superior Court implemented its current admonitions about sharing of location information in May 2023, and the parties submitted several updates to the court about the factual developments reflected above.

On February 13, 2024, the district court issued an order granting in part and denying in part the Sheriff's motion to dismiss, granting class certification, and granting a preliminary injunction. 1-ER-9. The order enjoined the Program rule describing sharing of location data with other law enforcement agencies as to all

PTEM Program participants and enjoined a warrantless search condition as to a smaller group of individuals. 1-ER-49.[3] While the district court limited its injunction against the warrantless search condition to those pre-May 2023 PTEM Program participants for whom the Superior Court's order did not specifically state a warrantless search condition on the record, the court enjoined the Sheriff from sharing location data as to all Program participants including those the Superior Court specifically advised would be subject to sharing of their location data, with their agreement given on the record. *Id.* The order certified two subclasses, one for participants subject to Program rules in place when this lawsuit was filed, and the other for those who signed the revised rules after May 2023. 1-ER-35.

The district court issued its injunction after finding a probability of success on Plaintiffs' separation of powers, Fourth Amendment, and California right to privacy claims. 1-ER-44–47. The portion of the district court's order addressing the preliminary injunction motion did not discuss the colloquy between the

[3] The Sheriff focuses in this brief on the condition allowing sharing of location data with other law enforcement agencies and do not seek review of the portion of the district court's order enjoining enforcement of a warrantless search condition as to certain individuals. The Sheriff expects that aspect of the case and injunction to become moot shortly as the relatively few individuals at issue receive renewed consideration from the Superior Court of their conditions of release. For the vast majority of PTEM Program participants, the Superior Court has entered a specific warrantless search condition that appropriately remains enforceable under the district court's injunction.

Superior Court and defendants about the conditions of release, but the court elsewhere (in analyzing the motion to dismiss) ruled that the Superior Court's "order does not detail the infringement on criminal defendants' privacy at stake," therefore rendering it plausible that these defendants' on-the-record consent to those conditions was invalid. 1-ER-31. The district court directed the Sheriff to stop enforcing the specified rules within 14 days, by February 27, 2024. 1-ER-49.

On February 16, 2024, the Sheriff moved to modify or stay pending appeal the portion of the preliminary injunction preventing the SFSO from sharing with other law enforcement agencies electronic monitoring location information for PTEM Program participants subject to the express admonition by the Superior Court that their location data could be shared in that way. The district court denied the motion on February 23, 2024. 1-ER-2.

On February 27, 2024, the Sheriff filed a timely notice of appeal. 5-ER-876. The next day, the Sheriff moved for an emergency stay of the preliminary injunction to the extent it prevents his officers from sharing location data of PTEM Program participants subject to a specific order and in-court agreement allowing that sharing with other law enforcement agencies. ECF No. 4.1. The Court granted an administrative stay on February 29, 2024. ECF No. 5.1. On March 11, 2024, the Court denied a stay pending appeal, with one judge concurring to state "[w]hile the

appellants have made a strong argument as to their ability to prevail on the merits, they have not shown any irreparable harm." ECF No. 12.1.

STANDARD OF REVIEW

This Court reviews "the legal premises underlying a preliminary injunction" de novo. *Federal Trade Comm'n v. Enforma Nat. Prods.*, 362 F.3d 1204, 1211 (9th Cir. 2004). Otherwise, an order granting a preliminary injunction is reviewed for abuse of discretion. *Id*. Thus, an appellate court should vacate a preliminary injunction if the district court failed to apply the correct legal standard, rested the decision "on a clearly erroneous finding of fact that is material to the decision," or applied "an acceptable preliminary injunction standard in a manner that results in an abuse of discretion." *Zepeda v. U.S. I.N.S.*, 753 F.2d 719, 724 (9th Cir. 1983). A district court "abuses its discretion by fashioning an injunction which is overly broad." *United States v. AMC Ent., Inc.*, 549 F.3d 760, 768 (9th Cir. 2008). Preliminary injunctions are "an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citation omitted). The remedy requires "the exercise of a very far reaching power" that should not be "indulged in except in a case clearly warranting it." *Dymo Indus. v. Tapeprinter, Inc.*, 326 F.2d 141, 143 (9th Cir. 1964) (citation omitted). A preliminary injunction is inappropriate unless a plaintiff establishes that the law and facts "clearly favor" their position, namely that: (1) the plaintiff is likely to succeed on the merits;

(2) the plaintiff is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in the plaintiff's favor; and (4) the injunction is in the public interest. *Winter*, 555 U.S. at 20.

The preliminary injunction here is subject to enhanced scrutiny for three independent reasons: (1) because it is a mandatory rather than a prohibitory injunction, (2) because it is an injunction against a state or local agency rather than a federal agency, and (3) because it has been entered in a facial challenge rather than an as-applied challenge to the Program rules.

In evaluating the preliminary injunction entered by the district court, the Court should apply the standard applicable to mandatory injunctions, because the district court's injunction overturns the status quo. It requires the Sheriff to void a condition entered on the record by the Superior Court, and refuse to share data for law enforcement purposes, in contrast to years of accepted practice. *See Martin v. Int'l Olympic Comm.*, 740 F.2d 670, 675 (9th Cir. 1984) ("In cases such as the one before us in which a party seeks mandatory preliminary relief that goes well beyond maintaining the status quo pendente lite, courts should be extremely cautious about issuing a preliminary injunction."). Because mandatory injunctions upset the status quo, they are "particularly disfavored" compared to prohibitory injunctions. *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009). "In plain terms, mandatory injunctions should not issue in

'doubtful cases.'" *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc) (citation omitted). Courts deny requests for mandatory injunctions "unless the facts and law clearly favor the moving party." *Stanley v. USC*, 13 F.3d 1313, 1320 (9th Cir. 1994) (citation omitted).

Because the Sheriff is a state or local officer, any injunction must be narrowly tailored.[4] "Due to concerns of comity and federalism, the scope of federal injunctive relief against an agency of state government must always be narrowly tailored to enforce federal constitutional and statutory law only. This is critical because 'a federal district court's exercise of discretion to enjoin state political bodies raises serious questions regarding the legitimacy of its authority.'" *Clark v. Coye*, 60 F.3d 600, 603–04 (9th Cir. 1995) (citations omitted). This Court must therefore "scrutinize the injunction closely to make sure that the remedy protects the plaintiffs' federal constitutional and statutory rights but does not require more of state officials than is necessary to assure their compliance with federal law." *Id.* at 604. This requirement for narrow tailoring applies even if the Sheriff is considered a local officer. *E.g., Beauchamp v. Los Angeles Cnty. Metro. Transp. Auth.*, 191 F.3d 459 (9th Cir. 1999); *Katie A., ex rel. Ludin v. Los Angeles Cnty.*,

[4] Sheriff Miyamoto is a state actor for purposes of implementing the Superior Court's pretrial release orders, *Buffin v. California*, 23 F.4th 951, 962 (9th Cir. 2022), but the distinction between his state and local roles does not affect the analysis for this appeal.

481 F.3d 1150, 1155 (9th Cir. 2007); *Thomas v. Cnty. of Los Angeles*, 978 F.2d 504, 508 (9th Cir. 1992), *as amended* (Feb. 12, 1993).

Finally, because this is a facial challenge, *see* ECF No. 39 at 19–20 ("Named Plaintiffs bring facial challenges to the Sheriff's EM Program Rules 5 and 13"), an injunction should not issue without a showing that the challenged conditions are inappropriate for all PTEM Program participants. *Haskell v. Harris*, 745 F.3d 1269, 1271 (9th Cir. 2014) (en banc) (affirming denial of preliminary injunction). An injunction must be warranted for *all* members of each of the two subclasses. *See* Fed. R. Civ. P. 23(b)(2) (requiring "that final injunctive relief or corresponding declaratory relief [be] appropriate respecting *the class as a whole*" (emphasis added)); *see also Jennings v. Rodriguez*, 138 S. Ct. 830, 852 (2018) (holding if "some members of the certified class may not be entitled to bond hearings as a constitutional matter" then "it may no longer be true that the complained-of conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them" (citation and internal quotation marks omitted)). That includes defendants like Simon who have been released from custody by the Superior Court subject to participation in the PTEM Program multiple times and consented each time to the challenged rules.

SUMMARY OF ARGUMENT

Plaintiffs brought the wrong type of lawsuit against the wrong parties to obtain the injunction awarded by the district court. If Simon believed the Superior Court should not impose a location data sharing condition because that condition was unconstitutional, he needed to raise that issue in his criminal case. He cannot agree to that condition in the Superior Court, invite the Superior Court to release him from custody based on that commitment, and then sideline the Superior Court by filing this civil class action lawsuit against the Sheriff. Plaintiffs expressly disclaimed any challenge to the Superior Court's orders in the district court. Yet the preliminary injunction invalidates the location data sharing condition imposed by the Superior Court. Bedrock comity and federalism principles from decisions such as *O'Shea v. Littleton*, 414 U.S. 488 (1974), *Stack v. Boyle*, 342 U.S. 1 (1951), and *L.A. County Bar Association v. Eu*, 979 F.2d 697 (9th Cir. 1992), require federal courts to avoid enmeshing themselves in issues of state judicial process including the interpretation of Superior Court orders. No decision cited by Plaintiffs, identified by the district court, or known to the Sheriff has sustained an injunction like the one imposed here.

Even if the district court properly reached Plaintiffs' California separation of powers, Fourth Amendment, and California right to privacy claims, Plaintiffs are unlikely to succeed on the merits of those claims. Plaintiffs' claims all founder on

the same shoals—the Superior Court enters pretrial release orders in criminal defendants' cases, per *Humphrey*, 482 P.3d at 1020, and the Sheriff carries out these orders.

Plaintiffs cannot satisfy the high standard for a separation of powers claim in California, which allows one branch to take actions that "significantly affect those of another branch," so long as they do not "defeat or materially impair" the powers of that other branch of government. *Carmel Valley Fire Prot. Dist. v. State*, 20 P.3d 533, 538 (Cal. 2001) (citation omitted). Especially given the Superior Court's clear admonition to defendants about sharing of location data, the Sheriff's policy and Program rule do not come close to constituting a separation of powers violation.

On the Fourth Amendment claim, the sharing of location data in appropriate circumstances with other law enforcement agencies satisfies both a traditional "totality of the circumstances" and a "special needs" analysis. *See United States v. Knights*, 534 U.S. 112, 118–20 (2001); *Griffin v. Wisconsin*, 483 U.S. 868, 873–74 (1987). Criminal defendants do not have a reasonable expectation of privacy against sharing of location data with other law enforcement agencies where they have agreed to enroll in the PTEM Program under a court-enunciated condition set at an individualized bail hearing, on evidence, that the Sheriff can share their location information with other law enforcement agencies. The Sheriff submitted

robust evidence in the district court supporting the vital government interests in sharing location data for individuals on the PTEM Program with other law enforcement agencies for public protection. *See, e.g.*, 4-ER-581 ¶ 6; 4-ER-581–583 ¶¶ 10–11; 3-ER-455–456 ¶ 3.

Plaintiffs are even less likely to succeed on their California Right to Privacy claim. As with the Fourth Amendment claim, any expectation of privacy is negated by the Superior Court's orders allowing sharing of location data with other law enforcement agencies and PTEM Program participants' repeated consents. *In re York*, 892 P.2d 804, 813 (Cal. 1995). California courts have repeatedly approved more serious privacy intrusions with less particularized identification of the necessity of any intrusion. *See id.*; *see also People v. Buza*, 413 P.3d 1132, 1155 (Cal. 2018).

Plaintiffs face no irreparable harm in the absence of an injunction. In concluding otherwise, the district court improperly collapsed the question of harm entirely into the merits of Plaintiffs' claims, which this Court's case law cautions against. *Dish Network Corp. v. FCC*, 653 F.3d 771, 776 (9th Cir. 2011). The district court also disregarded the existing, adequate remedy of challenging conditions of release in the Superior Court. Plaintiffs did not present any evidence supporting their assertions of harm.

Meanwhile, the balance of equities and public interest decisively undermine the injunction, given the paramount public safety, federalism, and comity interests at issue here. The Court should reverse.

ARGUMENT

I. Plaintiffs are Unlikely to Prevail on the Merits of Their Claims.

A. The District Court Improperly Awarded Plaintiffs Relief from Superior Court Orders in Their Criminal Cases Via Civil Litigation Against the Sheriff in Federal Court.

Plaintiffs purported to ground this lawsuit—and their request for a preliminary injunction—on an alleged mismatch between the Superior Court's orders and the rules implemented by the Sheriff. 5-ER-786 ¶ 1; 5-ER-789 ¶ 17; 4-ER-659–661. But at least for individuals subject to the Superior Court's current admonitions about the sharing of location information (the vast majority of current PTEM Program participants), no such mismatch exists. The Superior Court informed the defendants that, among other conditions of release, their "GPS location dat[a] can be shared with law enforcement agencies for criminal investigations during the pendency of the [criminal] case." 2-ER-181. That is fully consistent with the PTEM Program rules, under which "[t]he participant acknowledges that tracking data may be shared with other criminal justice partners." 2-ER-116. And it matches the Sheriff's policy on sharing of location data that was in place when the district court entered the injunction. *See* 2-ER-121.

Plaintiffs have no evidence that their location data has been shared beyond the end of their criminal cases or of a cognizable likelihood that it would be.

Plaintiffs disclaimed any challenge to the constitutionality of the Superior Court's orders in the district court, presumably to avoid a ruling that the Sheriff and City are not proper defendants for their claims. 2-ER-174 n.1 (Plaintiffs stating that they "do not address such constitutional deficiencies in the superior court's orders at this time"); 4-ER-536 ("Plaintiffs do not in this case take issue with the Superior Court's process"); 4-ER-541 ("nor do they take issue with any part of the Superior Court's orders").

Notwithstanding these disclaimers, Plaintiffs collaterally attack the Superior Court's admonitions and orders about sharing of location data with this civil class action against the Sheriff and City, rather than forthrightly making these challenges to the Superior Court that entered the subject orders. *See Daves v. Dallas Cnty.*, 64 F.4th 616, 631 (5th Cir. 2023) (en banc) (holding case about pretrial bail determinations including county and sheriff as defendants should not "have been adjudicated in federal court"), *cert. denied*, 144 S. Ct. 548 (2024). If Simon (the only class representative who has been on the PTEM Program since May 2023) had a problem with the location information sharing condition or any other condition of release, he needed to say something to the Superior Court. *See In re Brown*, 291 Cal. Rptr. 3d 461, 465 (Ct. App. 2022) ("habeas corpus . . . is the

appropriate vehicle for raising questions concerning the legality of a grant or denial of bail"), *review denied* (June 22, 2022); Cal. Super. Ct., S.F. Cnty., Local Rules, rule 16.12(A) (habeas corpus "[m]atters relating to all criminal proceedings must be presented to the Supervising Judge"); *see also Stack*, 342 U.S. at 6 (ordering dismissal of a federal habeas petition challenging bail as unconstitutionally set because "[t]he proper procedure for challenging bail as unlawfully fixed is by motion for reduction of bail and appeal to the Court of Appeals from an order denying such motion" and this "adequate remedy available in the criminal proceeding ha[d] not been exhausted"). Simon never sought to address the conditions he challenges, including the sharing of location data, with the Superior Court. 2-ER-140; *see also* 2-ER-68 at 14:3–17. Indeed, no Plaintiff raised any of the challenges they bring in this lawsuit with the Superior Court.

Plaintiffs and class members could have raised concerns with pretrial release conditions, including any discrepancy they perceived between the PTEM Program rules and the Superior Court's orders, with the Superior Court. Plaintiff Barber successfully moved the Superior Court to change the way he was required to check in with Pretrial Services for Assertive Case Monitoring and to relieve him from home detention. 4-ER-560; 4-ER-562. And, at various points, each Plaintiff convinced the Superior Court to remove participation in the PTEM Program as a condition of his release from custody. *See, e.g.*, 2-ER-241. Many Program

participants—including Simon—have been placed in the PTEM Program several times, have received multiple EM Orders and admonishments, and each time they have agreed. *See, e.g.*, 3-ER-456 ¶ 4; 2-ER-140. They should not now be allowed to attack the Superior Court's orders and implementing Program rules in a civil class action rather than raising any concerns with the Superior Court.

Although Simon, Barber, and Bonilla did not do so, some class members have contested the conditions Plaintiffs challenge here, and the Superior Court has addressed those objections. For example, the Superior Court considered and overruled Ryan Waer's challenges to the imposition of a warrantless search condition with the PTEM Program. 2-ER-243; 3-ER-258 ("Over Waer's objection [Pet. Exh. D, 7:17-20, PE0050], respondent court ordered Waer released with a warrantless search clause of his home and vehicle."); 3-ER-314 (briefing objecting to four-way search); 3-ER-332 at 4:1–5, 17–20. Waer then challenged the criminal court's order regarding the search condition by bringing a petition for habeas corpus challenging the holding. 3-ER-248 (listing unconstitutionality of search condition and unconstitutional conditions doctrine among issues presented). When the Court of Appeal rejected that petition, Waer filed an unsuccessful petition for review in the California Supreme Court. *See* Order Denying Petition for Review, *In re Ryan Waer*, No. S269188 (Cal. S. Ct. July 21, 2021). Waer's case and other similar decisions show both that criminal defendants can raise their challenges in

the Superior Court and that the injunction here was not narrowly tailored or properly entered on Plaintiffs' facial challenge given that criminal defendants' situations, arguments, and interactions with the Superior Court differ. *See Haskell*, 745 F.3d at 1271; *Clark*, 60 F.3d at 603–04.

The district court correctly declined to enjoin enforcement by the Sheriff of warrantless search conditions entered on the record by the Superior Court. 1-ER-49. But the district court nonetheless improperly abrogated the Superior Court's orders about sharing of location data with other law enforcement agencies for everyone placed on the PTEM Program with its preliminary injunction and undermined the Sheriff's ability to address public safety.

Adjudication of Plaintiffs' challenges to the Superior Court's orders and the Sheriff's implementation violates the principle that federal courts "should be very reluctant to grant relief that would entail heavy federal interference in such sensitive state activities as administration of the judicial system." *L.A. Cnty. Bar Ass'n*, 979 F.2d at 703. In *O'Shea v. Littleton*, a case alleging illegal bond, jury fee, and sentencing practices, the Supreme Court held that equitable relief was not appropriate because it would constitute "a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings [] in sharp conflict with the principles of equitable restraint." 414 U.S. at 502. The "recognition of the need for a proper balance in the concurrent

operation of federal and state courts counsels restraint against the issuance of injunctions against state officers engaged in the administration of the State's criminal laws in the absence of a showing of irreparable injury which is 'both great and immediate.'" *Id.* at 499 (citation omitted).

To distinguish *O'Shea*, *Stack*, and *L.A. County Bar Association*, the district court stated that "this case is unrelated to the merits of . . . any other state court ruling." 1-ER-27 (citing *Arevalo v. Hennessy*, 882 F.3d 763, 767 (9th Cir. 2018)). But at least as to the Superior Court's revised procedures, including express admonitions about the sharing of location data which are memorialized in court orders, this is incorrect as a matter of law. *Compare Hennessy*, 882 F.3d at 767 (holding petitioner had "properly exhausted his state remedies as to his bail hearing" having "filed two motions with the superior court, a habeas petition with the California Court of Appeal, and a petition for a writ of habeas corpus with the California Supreme Court"). This Court should therefore reverse the district court's injunction because it improperly interferes in state criminal court proceedings. Plaintiffs cannot prevail on the merits of their claims, which all depend on their having sued the right parties in the right proceeding.

B. Plaintiffs Are Unlikely to Prevail on Their Separation of Powers Claim.

If the Court reaches the substantive merits of Plaintiffs' claims, Plaintiffs come nowhere close to satisfying the demanding standard for their separation of

powers challenge. Because "the three branches of government are interdependent," one branch can take actions "that may 'significantly affect those of another branch,'" as long as they do not "defeat or materially impair" the powers of the other branch. *Carmel Valley Fire Prot. Dist.*, 20 P.3d at 538 (citation omitted).

Courts constitutionally may, and typically do, delegate implementation of supervision to executive law enforcement departments charged with overseeing those released from custody. *See People v. O'Neil*, 81 Cal. Rptr. 3d 878, 883 (Ct. App. 2008) (holding a "court may leave to the discretion of the probation officer the specification of the many details that invariably are necessary to implement the terms of probation"); *People v. Penoli*, 53 Cal. Rptr. 2d 825, 830 (Ct. App. 1996) (holding delegation to "probation department to unilaterally select a residential drug rehabilitation program" was consistent with separation of powers even through programs varied in intensity of treatment); *see also United States v. Wells*, 29 F.4th 580, 592–93 (9th Cir. 2022) (reflecting permissible delegation of authority for supervision programs under federal separation of powers).

The district court's preliminary injunction order did not discuss the Superior Court's admonitions and orders about data sharing with respect to separation of powers. Instead, it concluded generally with respect to Plaintiffs' challenges that the Sheriff "creates the Program Rules 'from whole cloth,'" and has "disabled the Superior Court from making individualized determinations of the appropriate

conditions of release" without accounting for the admonitions or memorializing orders, without discussing location data sharing in particular, and without reference to the standards the Superior Court applies in setting defendants' conditions of release, *see Humphrey*, 482 P.3d at 1020. *See* 1-ER-45-46 (citations omitted). Given the Superior Court's admonitions and orders regarding location sharing, the Sheriff's corresponding Program rule does not violate separation of powers. *Compare* 2-ER-181 (court admonition that "[y]our GPS location dat[a] can be shared with law enforcement agencies for criminal investigations during the pendency of the case and until the case is fully adjudicated"), *with* 2-ER-116 (Program rule that "The participant acknowledges that tracking data may be shared with other criminal justice partners"). By releasing defendants conditional on their participation in the PTEM Program, with an admonition about data sharing, the Superior Court sensibly intends the Sheriff to be able to share location data with other law enforcement agencies where participants may be committing crimes or otherwise violating their release conditions. No decision cited by Plaintiffs or known to the Sheriff has found a supervision program liable for following a releasing court's directions. The district court's astonishing, contrary conclusion would vitiate interbranch cooperation and collaboration that is itself vital to the separation of powers generally and pretrial supervision specifically.

C. Plaintiffs Are Unlikely to Prevail on Their Fourth Amendment Claim.

"The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy'" evaluated in terms of the individual's "reasonable expectation of privacy," "and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Knights*, 534 U.S. at 118–20 (citation omitted) (upholding probation search condition). Plaintiffs' Fourth Amendment challenge fails because sharing of location data by the Sheriff is reasonable for individuals released from custody subject to participation in the PTEM Program, admonished by the Superior Court that their location will be tracked and can be shared, who have agreed to that sharing.

1. PTEM Program Participants Have Sharply Reduced Reasonable Expectations of Privacy Against Sharing of Location Information with Law Enforcement.

Where PTEM Program participants are admonished by the Superior Court that their location data may be shared with other law enforcement agencies during the pendency of their cases, and then acknowledge the corresponding program rule with the Sheriff, they have no reasonable expectations of privacy to prevent that data sharing. *See Knights*, 534 U.S. at 113 ("Knights was unambiguously informed of the search condition. Thus, Knights' reasonable expectation of privacy was

significantly diminished."). Here, for example, Simon signed the EM Order including its Fourth Amendment waiver and agreed to the admonitions provided by the state court while represented by counsel. *See* 2-ER-140; 2-ER-144. That is more than enough: A pretrial detainee is subject to a restriction on their Fourth Amendment rights "if he or she consents to their imposition, in exchange for obtaining OR release." *York*, 892 P.2d at 804, 814.

As several circuits have recognized, such consent is dispositive in the circumstances here. In *United States v. Gates*, 709 F.3d 58 (1st Cir. 2013), the First Circuit explained that "the defendant had agreed, as part of his bail conditions incident to the charges of disorderly conduct and resisting arrest, to submit to searches of his person and residence at any time, even in the absence of articulable suspicion." *Id.* at 64. The court saw "no reason why [it] should not give the plain language of such a bail condition force and effect." *Id.* The court recently reaffirmed the holding of *Gates* in *United States v. Gerrish*, --- F.4th ---, 2024 WL 1131049 (1st Cir. Mar. 15. 2024). *Gerrish* upheld a warrantless search of a pretrial releasee based on the bail conditions requiring the defendant to "submit to searches without suspicion." *Id.* at *2. The decision analogized pretrial release conditions to the uniform warrantless searches of parolees approved in *Samson v. California*, 547 U.S. 843 (2006). *Gerrish*, --- F.4th at ---, 2024 WL 1131049 at *3. As *Gerrish* explained, "[b]ecause bail provides a similar mechanism [to parole] for a defendant

to avoid custody while the criminal legal process unfolds, one who is on pretrial release likewise faces a diminished expectation of privacy. And a state maintains legitimate interests – such as ensuring the integrity of the criminal legal process – in supervising persons on pretrial release." *Id.*

In *United States v. Yeary*, 740 F.3d 569 (11th Cir. 2024), the Eleventh Circuit upheld a warrantless search condition based solely on consent the defendant provided in signing an agreement with the Palm Beach Sheriff's Office's Alternative Custody Unit ("ACU") allowing warrantless searches of his residence. *Id.* at 576, 581–82. By signing the agreement, the defendant "acknowledged that he understood and agreed to abide by its terms." *Id.* at 582. The defendant "was hardly faced with the Hobson's choice he present[ed]. He was not entitled to release on bail; given his criminal history, his risk of flight, and his threat to kill [another person], the court had more than ample grounds to detain him pending trial. Viewed in this light, [the Eleventh Circuit found] entirely reasonable the court's requirement that, if he desired in-house arrest rather than detention in jail, [the defendant] would have to consent to warrantless searches of his residence." *Id.* at 583. *Yeary* also rejected the defendant's argument that the absence of his counsel rendered the search condition invalid. *Id.* at 582 n.27. Here, defense counsel are present in court for the EM Order and admonitions, affording additional safeguards that *Yeary* held were unnecessary.

And in *Norris v. Premier Integrity Solutions, Inc*, 641 F.3d 695 (6th Cir. 2011), the Sixth Circuit reasoned that pretrial releasees had a diminished privacy interest based on (1) their agreement and (2) participation in the "Pretrial Release Program," and accordingly rejected a constitutional challenge to direct observation of urine testing. *Id.* at 699. Both grounds for reduced privacy interests are present here and support the less intrusive conditions entered by the Superior Court.

Similarly, in *United States v. Barnett*, 415 F.3d 690 (7th Cir. 2005), the Seventh Circuit held an agreement to a probation condition was dispositive. The court focused on the contractual nature of the defendant's waiver, rather than any distinction between pretrial release and probation. *Id.* at 691–92. The "blanket waiver of Fourth Amendment rights" was valid because "imprisonment is a *greater* invasion of personal privacy than being exposed to searches of one's home on demand." *Id.* (emphasis in original). "Nothing is more common than an individual's consenting to a search that would otherwise violate the Fourth Amendment, thinking that he will be better off than he would be standing on his rights." *Id.* at 692.

As these decisions highlight, Fourth Amendment rights may be waived. Courts routinely recognize Fourth Amendment waivers under more ambiguous circumstances than those present here. *See Florida v. Bostick*, 501 U.S. 429, 439 (1991) (explaining in the context of consent to search requested on board a bus

scheduled to depart that "[t]he Fourth Amendment proscribes unreasonable searches and seizures; it does not proscribe voluntary cooperation"); *Schneckloth v. Bustamonte*, 412 U.S. 218, 249 (1973) (holding knowledge of right to refuse consent not a prerequisite to finding a valid Fourth Amendment waiver); *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971) (approving third-party consent); *Segurola v. United States*, 275 U.S. 106, 111 (1927) (holding failure to object constitutes waiver of Fourth Amendment right against unlawful search and seizure). "No procedural principle is more familiar to [the Supreme] Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus v. United States*, 321 U.S. 414, 444 (1944).

Plaintiffs and the district court relied on *United States v. Scott*, 450 F.3d 863 (9th Cir. 2006), to conclude that the "unconstitutional conditions" doctrine renders criminal defendants' consent ineffective, but that decision is inapposite. The decision's central holding is that the need for a Fourth Amendment waiver pretrial must be individualized, as it is when Superior Court judges make pretrial release determinations here. *See id.* at 872 & n.12. In *Scott*, the random drug testing condition was imposed without evidence about the particular defendant. *Id.* at 865, 874 (framing issue as whether "arrest itself is sufficient to establish that the [testing] conditions are required" without "findings made after any sort of

hearing"). Here, whether conditions associated with the PTEM Program are necessary to pretrial release from custody is determined by the Superior Court at a hearing on evidence. *See, e.g.*, 4-ER-566–579 (transcript of hearing ordering PTEM as condition of release for Plaintiff Bonilla); *Humphrey*, 482 P.3d at 1020. The First Circuit emphasized this distinction in *Gerrish*, finding no conflict between *Scott* and its decision because Maine—like California—requires a judicial officer imposing bail conditions to base them on individualized circumstances. *See Gerrish*, --- F.4th at ---, 2024 WL 1131049, at *3. As in *Gerrish*, "[b]ecause [California] law requires that a judicial officer impose the 'least restrictive' bail conditions and tailor these conditions to the defendant's individual circumstances, the Ninth Circuit's concerns [from *Scott*] about a defendant's mandatory waiver of rights as a condition for pretrial release vanish." *Id.* at *3 (citation omitted). The concerns in *Scott* about "free rein" for the government to "abuse its power" and force "lopsided deals" are not present here. 450 F.3d at 866. While *Scott* declined to find special needs justified a blanket drug testing condition, the case involved a search (drug testing) that *Scott* concluded was "*not* designed to ensure [the defendant's] appearance in court." 450 F.3d at 872, n.11 (emphasis in original). By contrast, Plaintiffs have not even attempted to argue that the conditions they challenge, including sharing of location data with other law enforcement agencies, are unrelated to legitimate purposes of the PTEM Program. And *Scott* involved a

challenge to a search condition made in the proper proceeding: a criminal case based on evidence obtained from a search, not a collateral civil case against the agency implementing the court order containing the challenged condition.

This Court should not extend *Scott* to the context of this case, given these clear distinctions and the conflict between *Scott* and decisions from other circuits that take a consent-based approach to waivers of Fourth Amendment rights. *See, e.g.*, *Gerrish*, --- F.4th at ---, 2024 WL 1131049, at *3; *Yeary*, 740 F.3d at 583; *Gates*, 709 F.3d at 64; *Norris*, 641 F.3d at 699; *Barnett*, 415 F.3d at 691–92.

Even absent specific consent to the Sheriff sharing location information with other law enforcement agencies, criminal defendants enrolled in the PTEM Program by definition have their location continuously tracked—that is the nature of electronic monitoring—and this tracking eliminates any additional expectation of privacy in that information. In analyzing a Fourth Amendment challenge to a DNA sampling requirement in *Maryland v. King*, 569 U.S. 435 (2013), the Supreme Court focused on the intrusion associated with the taking of the sample by law enforcement. *See id.* at 446, 461. In upholding the requirement, the Court ascribed no further Fourth Amendment intrusion to the *sharing* of the DNA identification information with other law enforcement agencies through statewide and national databases of DNA identifications. *See id.* at 441 (“King’s DNA record was uploaded to the Maryland DNA database”); *id.* at 445 (explaining the Federal

Bureau of Investigation's "CODIS collects DNA profiles provided by local laboratories taken from arrestees, convicted offenders, and forensic evidence found at crime scenes"). Other decisions, consistent with *King*, hold that once the data is properly obtained, subsequent sharing is not a distinct search. *See, e.g.*, *Buza*, 413 P.3d at 1143–44. Similarly, here there is no further intrusion into a defendant's privacy interests when their location information is shared by the Sheriff with other law enforcement agencies. Plaintiffs do not challenge the fundamental release condition of electronic monitoring, which is the relevant search for Fourth Amendment purposes. Even if they did, they plainly lack a legitimate privacy interest against electronic monitoring when a judge has ordered them to participate in electronic monitoring as a condition of their release from custody.

On top of all of these shortcomings in Plaintiffs' Fourth Amendment claim, Plaintiffs also improperly minimize their representation by defense counsel in their criminal cases. Thus, they cannot complain of an unknowing or unadvised waiver. *See Penoli*, 53 Cal. Rptr. 2d at 832 (rejecting challenge to condition as too vague because "it appears that defense counsel here was amply familiar with the range of possibilities to which defendant was exposed"). In the context of plea bargaining, the Supreme Court has explained, "[d]efendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false

self-condemnation." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978); *see United States v. Wagner*, 834 F.2d 1474, 1483 (9th Cir. 1987) ("'It is primarily the responsibility of the defendant's counsel, not the trial judge, to advise the defendant on whether or not to testify and to explain the tactical advantages and disadvantages of doing so.'" (citation omitted)). This is another reason why, as demonstrated above, the Superior Court is the proper forum to raise these challenges, through able defense counsel.

Beyond criminal defendants' in-court, counseled consent and the court orders, Plaintiffs' reasonable expectations of privacy were further diminished by their status as criminal defendants subject to heightened restrictions on release based on their serious charges. Cal. Penal Code § 1192.7(c)(31) (listing "assault with a deadly weapon" as a "'serious felony'"); *id.* § 1270.1(a) (setting heightened restrictions on release for defendants charged with "[a] serious felony"). The California Supreme Court in *York* rejected "the flawed premise that a defendant who seeks OR release has the same reasonable expectation of privacy as that enjoyed by persons not charged with any crime." 892 P.2d at 813. It would be unreasonable for criminal defendants on pretrial release subject to PTEM Program participation to believe they maintained the same expectation of privacy in their location data that they had prior to their arrest and charges. Whatever restrictions criminal defendants face in participating in the PTEM Program, they retain greater

liberty than those in custody. *See id.* (holding "the [four-way search condition] do[es] not place greater restrictions upon an OR releasee's privacy rights than the releasee would have experienced had he or she not secured OR release"). It was legal error for the district court to conclude otherwise, rendering Plaintiffs' Fourth Amendment waiver and on-the-record agreement to this condition meaningless.

Although pretrial criminal defendants have only been charged with crimes, and have not been convicted, the Supreme Court has rejected the view that the presumption of innocence negates the constitutionality of conditions like those at issue here, at least when tied to court consideration of individual circumstances as occurs with EM Order and admonitions. *See United States v. Salerno*, 481 U.S. 739, 749 (1987) (explaining "respondents concede and the Court of Appeals noted that an arrestee may be incarcerated until trial if he presents a risk of flight, or a danger to witnesses" (citation omitted)). The presumption of innocence "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun." *Bell v. Wolfish*, 441 U.S. 520, 540, 533 (1979) (upholding restrictions on constitutional rights of a class of pretrial detainees); *see also Albright v. Oliver*, 510 U.S. 266, 278 (1994) (Ginsburg, J., concurring) (observing a pretrial releasee must "seek formal permission from the

court . . . before exercising what would otherwise be his unquestioned right to travel outside the jurisdiction").[5]

2. Strong Government Interests Favor the Sheriff's Ability to Share PTEM Participants' Location Information with Law Enforcement.

Meanwhile, strong government interests favor the Sheriff's ability to share location information for PTEM Program participants with other law enforcement agencies. *See United States v. Hensley*, 469 U.S. 221, 232 (1985) (emphasizing the legitimacy of law enforcement agencies sharing information to respond to crimes). The district court's limitation on law enforcement sharing of information outside of the agency here is unprecedented and harmful to the government interest in public protection. 4-ER-583 ¶ 11. Sharing:

- allowed the Sheriff to assist the South San Francisco Police Department in identifying an armed robber and in locating him for arrest, 4-ER-582 ¶ 10a;
- facilitated the identification of another prolific burglar known to have firearms at the scene of multiple burglaries and allowed police to locate him after a federal warrant was issued, *id.* ¶ 10b;

[5] The district court's injunction ironically prohibits exactly the type of individualized, totality of the circumstances Fourth Amendment analysis that Plaintiffs contend is lacking by creating a blanket rule that a location sharing condition is never individually appropriate for defendants released subject to participation in the PTEM Program.

- facilitated the identification of a third individual who had kidnapped a child, *id.* ¶ 10c; and
- resulted in the discovery that a fourth criminal had committed a string of robberies across the Bay Area, 4-ER-583 ¶ 10f.

In these and many other incidents, sharing of EM data has been critical to public protection. *See also, e.g.*, 3-ER-455 ¶ 3b.

The government interest is reinforced by the Superior Court's findings about the defendants placed on PTEM. The Superior Court determined after hearing evidence to condition each affected defendant's release on the sharing of location information with other law enforcement agencies and a Fourth Amendment waiver, concluding these were among the "least restrictive, nonmonetary conditions of release necessary to protect public safety" as to these defendants. *Humphrey*, 482 P.3d at 1015; *see* 2-ER-139; 2-ER-144. For example, the Superior Court explained that Bonilla's threat to make his victim disappear was a death threat warranting imposition of the terms of the PTEM Program. 4-ER-573 at 7:17-20. Bonilla also told his victim she "would be the perfect victim because no one would look for her." 6-ER-995 (SEALED). His later threat after he was put on PTEM—yelling in Spanish, "You are going to pay, bitch," while striking his victim's car in a crosswalk—reflects the ongoing importance of conditions of the PTEM Program

including sharing of location data to address these kinds of assaults. 6-ER-1001 (SEALED).

The distinct roles the San Francisco Charter creates for the Sheriff and Police Department, with the police department responsible for patrol functions and responding to crimes in progress in San Francisco, further underscores how location data sharing is essential to public safety. *See* S.F. Charter § 4.127 (directing the Police Department to "preserve the public peace, prevent and detect crime, and protect the rights of persons and property by enforcing the laws of the United States, the State of California, and the City and County"); *id*. § 6.105 (listing the Sheriff's responsibilities, not including patrol functions). The district court's order prevents the Sheriff from sharing location data with any other law enforcement agency, which means the Sheriff cannot even share location data with San Francisco Police Department patrol units in a position to respond to violations of stay-away orders or other conditions of release. *See* 1-ER-49 (enjoining the Sheriff from "imposing and enforcing the Program Rules' data sharing provision").

The same governmental interests strongly support sharing location data with other agencies outside of the county such as the Fremont Police Department (where Barber was placed in home detention). Balancing the Program participants' minimal reasonable expectation of privacy against the government's compelling interests in public safety, the Sheriff should be allowed to share location data as

agreed to by Program participants in Superior Court and again when enrolling in the PTEM Program.

3. A Special Needs Analysis Independently Undermines Plaintiffs' Fourth Amendment Claim.

Independent of the totality of the circumstances analysis, the sharing of location information with other law enforcement agencies is also justified under a "special needs" analysis. The Sheriff's "operation of a [PTEM Program], like [] operation of a school, government office or prison, or [] supervision of a regulated industry, [] presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." *Griffin*, 483 U.S. at 873–74; *see id.* at 875 ("Supervision, then, is a 'special need' of the State permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large."). Those needs include addressing violations of the Program Rules including stay-away orders; promoting attendance at hearings; and assuring compliance with court-ordered restrictions on firearms, alcohol, or drugs. 4-ER-581 ¶ 6; 4-ER-583–584 ¶ 15; 2-ER-103.

D. Plaintiffs Are Unlikely to Prevail on Their California Right of Privacy Claim.

Plaintiffs' right to privacy claim under the California Constitution is even less likely to succeed than their Fourth Amendment claim under the conditions here, where the location information has been validly and knowingly *collected* by law enforcement as part of a pretrial supervision program. This is particularly true

because the Superior Court's admonitions make clear that the state court intends to allow sharing of their location data for law enforcement purposes, and the criminal defendant agrees to that sharing. 2-ER-181–182. This fact alone means these PTEM Program participants have not shown the required "objective entitlement founded on broadly based and widely accepted community norms" to non-sharing of their location information and have "manifested by [their] conduct a voluntary consent to the invasive actions of defendant," each of which dooms their privacy claim. *Hill v. NCAA*, 865 P.2d 633, 648, 655 (Cal. 1994). Pretrial criminal defendants have a sharply limited expectation of privacy. *York*, 892 P.2d at 813 (rejecting "the flawed premise" defendant "has the same reasonable expectation of privacy as that enjoyed by persons not charged with any crime"). Meanwhile, the government and public interests served by the Sheriff being able to share validly collected EM data with other law enforcement agencies greatly outweigh any cognizable privacy limitation Plaintiffs face.

California courts have approved more significant privacy intrusions than the sharing of location data—whether contemporaneous or historical—and with fewer guardrails on the necessity of the intrusion than those present here. For example, the California Supreme Court rejected privacy challenges to DNA records and samples in *Buza*, 413 P.3d at 1146, and mugshots in *People v. McInnis*, 494 P.2d 690 (Cal. 1972). Given the immutable nature of one's DNA and the staying power

of a mugshot did not trigger privacy protections, historical location data that does not guide where defendants will be located in the future after they leave the PTEM Program cannot do so. *See also Loder v. Mun. Ct.*, 553 P.2d 624, 630 (Cal. 1976) (holding that balance of substantial government interest in police, prosecutors, courts, and probation and parole authorities' ability to "consult records of arrests not resulting in conviction" outweighed risks to individuals). Further, the DNA samples in *Buza* were taken from all felony arrestees and mugshots in *McInnis* were taken during the booking process, whereas the need for a condition allowing sharing of location information with other law enforcement agencies is determined on an individualized basis by the Superior Court at a hearing. *See Humphrey*, 482 P.3d at 1015; *see also People v. Roberts*, 68 Cal. App. 5th 64, 109 (2021) (rejecting California privacy claim—along with all other challenges—about collection of DNA from arrestees even when no charges filed).

Although the district court relied on *Carpenter v. United States*, 585 U.S. 296 (2018), that decision was a "narrow one" addressing the privacy rights of members of the general public—not selected criminal defendants on pretrial release subject to specific conditions explained to them on the record by the Superior Court about sharing of location data. *Id.* at 316 ("We do not express a view on matters not before us: real-time CSLI or 'tower dumps' (a download of information on all the devices that connected to a particular cell site during a

particular interval).”). Further, *Carpenter* solely held that the third-party doctrine did not preclude a Fourth Amendment challenge. *Id.* at 316–19 (“We hold only that a warrant is required in the rare case where the suspect has a legitimate privacy interest in records held by a third party.”). Because the Sheriff will likely prevail in showing the asserted claims do not support enjoining the Sheriff’s sharing of location data with law enforcement agencies for PTEM participants subject to the Superior Court’s admonitions, the Court should reverse at least that portion of the district court’s injunction.

II. Plaintiffs Did Not Establish Irreparable Harm.

Parties seeking injunctive relief must establish that irreparable harm will befall them absent such relief. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). Irreparable harm is harm that is immediate, not remote or speculative. *See Lyons*, 461 U.S. at 111. “Speculative injury does not constitute irreparable injury.” *Goldie’s Bookstore, Inc. v. Super. Ct.*, 739 F.2d 466, 472 (9th Cir. 1984).

The district court erred in concluding that Plaintiffs established irreparable harm. Initially, the district court ruled that “[b]ecause Plaintiffs have shown a likelihood of success on their claims that the Program Rules violate their constitutional rights, they have established the likelihood of irreparable harm.” 1-ER-48. As explained above, however, the district court erred in concluding that

Plaintiffs' claims are likely to succeed. *See supra* at 26–50. Plaintiffs' "constitutional claim[s] [are] too tenuous" to support injunctive relief. *Goldie's Bookstore*, 739 F.2d at 472; *see also Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1214 (9th Cir. 1984) ("Because we disagree with the [district] court's conclusion that Lydo has made a showing that First Amendment freedoms are in fact violated by the ordinance, we cannot affirm a finding of irreparable injury on this basis.").

Moreover, to warrant the "extraordinary remedy" of an injunction, a party must do more than allege that it will likely succeed on the merits. *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 997 (9th Cir. 2011) (citing *Winter*, 555 U.S. at 24). Decisions in the First Amendment context have sometimes stated that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976). And the district court relied on *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012), which applied *Elrod* outside the First Amendment context. ECF No. 77 at 40. But *Melendres* involved prospective racially motivated traffic enforcement, not preventative conditions of pretrial release to which the plaintiffs agreed in open court. 695 F.3d at 994–95. The record reflects that class members have been admonished by the Superior Court that their location data may be shared, a fact that was not and could not have been present in *Melendres*. 2-ER-

183. The Superior Court issues orders reflecting its direction. *See* 2-ER-140; 2-ER-144. And defendants agree to these conditions to obtain pretrial release. Further, a party with a constitutional claim—First Amendment or otherwise—must still "demonstrate that he is likely to suffer irreparable injury in the absence of a preliminary injunction, and that the balance of equities and the public interest tip in his favor." *Klein v. City of San Clemente*, 584 F.3d 1196, 1207 (9th Cir. 2009); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009) (same). The discretionary factors do not "merely 'collapse into the merits'" of the constitutional claim. *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1128 (9th Cir. 2011), *overruled on other grounds by Bd. of Trustees of Glazing Health & Welf. Trust v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019); *Dish Network Corp.*, 653 F.3d at 776 (rejecting argument that "all four of the *Winter* factors collapse into the merits" of a First Amendment claim). The district court erred in collapsing the irreparable harm inquiry into the merits.

In particular, Plaintiffs did not establish the inadequacy of the available legal remedies. *Stanley*, 13 F.3d at 1320 ("To obtain a preliminary injunction, [plaintiff] was required to demonstrate that her remedy at law was inadequate"); *Herb Reed Enters., LLC v. Fla. Ent. Mgmt., Inc.*, 736 F.3d 1239, 1249 (9th Cir. 2013). Here, every class member has adequate alternative remedies. They remain free to seek clarification or modification of their conditions of release in the proper forum—the

Superior Court handling their criminal cases, and the California Court of Appeal if they are not satisfied. *See, e.g.*, 4-ER-559; 4-ER-562; 4-ER-564. *In re Heincy*, 858 F.2d 548, 549 (9th Cir. 1988), reversed a bankruptcy court order enjoining a state court from enforcing a criminal restitution order, noting that plaintiffs "had adequate legal remedies," and did not "explain why [these options] would not have provided an adequate legal remedy." *Id.* at 549–50. Plaintiffs therefore cannot establish irreparable harm because a challenge to the PTEM Program conditions in the Superior Court would have provided them an adequate legal remedy. Indeed, the only arguable harm from GPS location data sharing is that individuals in the PTEM Program may be caught committing a crime. *Cf.* 3-ER-456 ¶ 5 (Lt. Judson declaring that, to the best of his knowledge, no PTEM Program participant has been "wrongly accused of committing a crime simply because he was near a crime while on PTEM"). This is not a protected interest.

The district court also reasoned that Plaintiffs articulated "tangible harms," including "vulnerab[ility] to harassment," "needless intrusions on their privacy," further criminal system involvement, and "feelings of exposure, violation, and anxiety." 1-ER-48, citing 4-ER-675. These allegations are not supported by competent evidence—the document cited by the district court is Plaintiffs' *brief* seeking injunctive relief, bereft of supporting evidence. *See* 4-ER-675. It is axiomatic that "the district court must make a finding of irreparable harm that is

based on *evidence* in the record." *Hooks ex rel. NLRB v. Nexstar Broad., Inc.*, 54 F.4th 1101, 1117 (9th Cir. 2022) (emphasis added); *see also Goldie's Bookstore, Inc.*, 739 F.2d at 472 ("This finding, not based on any factual allegations, appears to be speculative.").

In any event, these speculative harms do not suffice for injunctive relief. "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *O'Shea*, 414 U.S. at 495–96. The district court concluded, based on *Cobine v. City of Eureka*, 250 F. Supp. 3d 423 (N.D. Cal. 2017), that Plaintiffs established irreparable harm because "there is a 'real and immediate threat' of constitutional injury." 1-ER-48. But *Cobine* did not involve the question of irreparable harm for purposes of preliminary injunctive relief, instead addressing ripeness of a Fourth Amendment claim on a motion to dismiss. 250 F. Supp. 3d at 434. Moreover, any allegation that Plaintiffs might suffer "harassment," privacy intrusions, or further criminal justice involvement presupposes that Plaintiffs will engage in activities warranting the involvement of law enforcement, like being near crime scenes. Such speculation does not constitute evidence of "immediate" irreparable harm. *O'Shea*, 414 U.S. at 497 ("We assume that respondents will conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct said to be followed by

petitioners."); *see also Lyons*, 461 U.S. at 102–03. To the extent Plaintiffs premise their request for relief on alleged "feelings of exposure, violation, and anxiety," 1-ER-48, the case law is clear that "[s]peculative injury does not constitute irreparable injury." *Goldie's Bookstore, Inc.*, 739 F.2d at 472; *cf. Eccles v. Peoples Bank of Lakewood Village, Cal.*, 333 U.S. 426, 431 (1948) ("Especially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative.").

On the other hand, as a practical matter, criminal defendants are more likely to be harmed by the district court's injunction against sharing of location data. For example, if the Superior Court concludes that criminal defendants charged with serious offenses cannot safely be released without allowing location data sharing by the Sheriff with other law enforcement agencies, the alternative for those defendants is jail, not release without the location data sharing condition. 4-ER-581 ¶ 6 ("The SFSO relies on other peace officers to assist the SFSO in its supervision duties for PTEM because PTEM participants are in the community where other law enforcement agencies have primary jurisdiction."); 2-ER-103 (describing purposes of sharing of location information with other law enforcement agencies).

III. The Public Interest and Balance of the Equities Favor the Sheriff.

The district court also erred in assessing the public interest and balance of equities. *Winter*, 555 U.S. at 26 ("Despite the importance of assessing the balance

of equities and the public interest in determining whether to grant a preliminary injunction, the District Court addressed these considerations in only a cursory fashion."). Where, as here, the government is a party, the balance of equities and the public interest merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

The district court held Plaintiffs' likelihood of succeeding on the merits "tips the public interest sharply" in Plaintiffs' favor just because the public interest weighs in favor of preventing the violation of a party's constitutional rights. 1-ER-49. This conclusory analysis ignored the substantial threat to public safety and comity with the state courts that the preliminary injunction causes. The district court erred as a matter of law. *Stormans, Inc.*, 586 F.3d at 1140 (concluding that the district court "clearly erred by failing to consider the public interest at stake"). The district court did not consider the public impact of its order. ER-49. "In cases where the public interest is involved, the district court must also examine whether the public interest favors the plaintiff." *Fund for Animals v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992). "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). When balancing the putative private harms Plaintiffs assert and the public interest, "the public interest should receive greater weight." *No on E v. Chiu*, 85 F.4th 493,

511 (9th Cir. 2023) (citation omitted); *see also Stormans*, 586 F.3d at 1139 ("If . . . the impact of an injunction reaches beyond the parties, carrying with it a potential for public consequences, the public interest will be relevant to whether the district court grants the preliminary injunction.").

Here, the public interest and balance of equities weigh decisively against enjoining the PTEM Program conditions. "The public has a compelling interest in promoting public safety," which also weighs strongly against the injunction. *Duncan v. Bonta*, 83 F.4th 803, 807 (9th Cir. 2023) (en banc); *see Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 768 (1994) (crediting Florida's "strong interest in ensuring the public safety and order"); *Am. C.L. Union of Nev. v. Masto*, 670 F.3d 1046, 1061 (9th Cir. 2012) ("Nevada's police power to promote public safety is entitled to respect."). GPS location data has been used to stop crimes in progress and catch individuals who have committed crimes. 4-ER-580–583 ¶¶ 7, 9–10; 3-ER-455–456 ¶ 3. Because of the fast pace of these incidents, it is not feasible to require a warrant to permit cooperation among the law enforcement agencies involved, as the district court's order requires. *See id.* The Sheriff faces a corresponding harm to its public protection mission if it is unable to share location data, particularly given the division in law enforcement duties between the Sheriff and the San Francisco Police Department. *See* 4-ER-583 ¶ 11 (describing as "unprecedented" this kind of limitation "on law enforcement sharing of data

outside of the agency"). The district court committed legal error in giving no consideration to these concerns in granting preliminary injunctive relief. 1-ER-49; *Dahl v. HEM Pharms. Corp.*, 7 F.3d 1399, 1404 (9th Cir. 1993) ("Public safety should be considered by a court when granting equitable relief.").

An inability to share location data with other law enforcement agencies also reduces the protections that the PTEM Program provides to crime victims. Victims—including the domestic violence victims in Plaintiffs' cases—rely on the Sheriff's ability to share location data as a deterrent against defendants violating stay-away orders. A government-sponsored report found that "[m]ore than two-thirds of the restraining orders obtained by women against intimates who raped or stalked them were violated." Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Justice, *Extent, Nature, and Consequences of Intimate Partner Violence: Findings from The National Violence Against Women Survey*, 53 (July 2000), https://www.ojp.gov/pdffiles1/nij/181867.pdf. "GPS programs can provide victims peace of mind and relief from harassment and abuse, such that the resumption of a normal life seems more tenable." Edna Erez, *et al.*, *GPS Monitoring Technologies & Domestic Violence: An Evaluation Study*, xvii (June 2012), https://www.ojp.gov/pdffiles1/nij/grants/238910.pdf. "GPS technologies have an impact in the short term (during the pretrial period): GPS is effective in preventing defendants from (physically) contacting victims, suggesting that GPS 'puts teeth'

into restraining orders." *Id.* at xvi. These concerns strongly weigh against preliminary injunctive relief.

As required by law, the Superior Court in each affected class member's case already determined at an individual hearing that a condition allowing the Sheriff to share GPS location information with other law enforcement agencies was necessary to "protect the public and the victim or reasonably assure the arrestee's presence at trial." *Humphrey*, 482 P.3d at 1020. The public interest and equities support allowing the Superior Court to manage its criminal cases both as a matter of comity and the Superior Court's superior knowledge of the conditions in San Francisco and options for pretrial release. The injunction prohibiting Sheriff from sharing GPS data with other law enforcement agencies for valid law enforcement purposes puts the general public and crime victims at risk and upsets a balance among the competing factors the criminal court already struck. *See O'Shea*, 414 U.S. at 502 (reflecting strong public interest and equitable considerations opposing federal court involvement in state criminal proceedings).

CONCLUSION

For the foregoing reasons, the Sheriff respectfully asks the Court to reverse the district court's injunction as applied to individuals subject to specific orders and admonishments by the Superior Court about conditions of release and vacate the preliminary injunction.

Dated: March 29, 2024

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Dated: March 29, 2024

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CITY AND COUNTY OF SAN FRANCISCO, PAUL MIYAMOTO, IN HIS OFFICIAL CAPACITY AS SAN FRANCISCO SHERIFF

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
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I am the attorney or self-represented party.

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/s/ Annamarie Davis
ANNAMARIE DAVIS