No. 24-1025

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSHUA SIMON, ET AL.,
Plaintiffs-Appellees

v.

CITY AND COUNTY OF SAN FRANCISCO, ET AL.,
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

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TABLE OF CONTENTS

INTRODUCTION **1**

JURISDICTIONAL STATEMENT **3**

ISSUES PRESENTED **4**

STATEMENT OF THE CASE **4**

I. The Sheriff administers EM for the superior court, which involves the tracking and retention of an individual's sensitive location data for months to years 4

II. The Sheriff unilaterally, and without court authorization, imposes surveillance conditions on EM releasees 6

III. The data-sharing condition authorizes indefinite disclosure of personal information to other law enforcement without a warrant 7

IV. Named Plaintiffs were harmed by the Sheriff's surveillance conditions 7

V. In response to this litigation, the Sheriff convinced the superior court to adopt new form EM orders and an oral advisal 10

VI. The district court preliminarily enjoined the Sheriff's extrajudicial surveillance conditions 12

VII. The superior court has repeatedly made clear post-injunction that the Sheriff imposes the challenged surveillance conditions 14

STANDARD OF REVIEW **17**

SUMMARY OF ARGUMENT **18**

ARGUMENT **22**

I. Plaintiffs are likely to succeed on the merits 22

A. The Sheriff unilaterally imposes the warrantless data-sharing condition on EM participants without court authorization 22

1. An order must be in writing under established law 23

2. The superior court has repeatedly stated that the challenged surveillance conditions belong to the Sheriff 27

B. Abstention is inappropriate....29

1. *Younger* is inapplicable.... 31

2. *O'Shea* is inapplicable....33

C. The Sheriff's warrantless location data-sharing violates California's separation-of-powers doctrine....34

D. The Sheriff's warrantless location data-sharing violates Plaintiffs' rights to be free of unreasonable searches....36

1. Plaintiffs have not consented to warrantless data-sharing....38

2. Warrantless location data-sharing is unreasonable under the totality of the circumstances.... 42

a) Plaintiffs have a significant privacy interest in their continuous location data.... 43

b) Warrantless location data-sharing does not serve a legitimate government interest....47

3. Administration of pretrial EM is not a special need justifying warrantless location data-sharing....49

E. The Sheriff's warrantless location data-sharing violates Plaintiffs' state constitutional right to privacy....50

II. Plaintiffs will suffer irreparable harm absent a preliminary injunction....54

III. The balance of equities favors Plaintiffs.... 57

CONCLUSION.... 59

TABLE OF AUTHORITIES

Page(s)

Cases

Arevalo v. Hennessy,
882 F.3d 763 (9th Cir. 2018)....................31, 55

Ariz. Dream Act. Coal. v. Brewer,
757 F.3d 1053 (9th Cir. 2014)....................17, 18

Baird v. Bonta,
81 F.4th 1036 (2023)....................21, 54, 55, 57

Blackburn v. Snow,
771 F.2d 556 (1st Cir. 1985)....................40

Bordenkircher v. Hayes,
434 U.S. 357 (1978)....................42

Brigham City, Utah v. Stuart,
547 U.S. 398 (2006)....................47, 58

In re Brown,
291 Cal. Rptr. 3d 461 (Ct. App. 2022)....................30

Carpenter v. United States,
585 U.S. 296 (2018)....................*passim*

Clark v. Coye,
60 F.3d 600 (9th Cir. 1995)....................34

Cohens v. Virginia,
6 Wheat. 264 (1821)....................31

Courthouse News Serv. v. Planet,
750 F.3d 776 (9th Cir. 2014)....................33

Cummings v. Husted,
795 F. Supp. 2d 677 (S.D. Ohio 2011)....................31

Duke v. Gastelo,
64 F.4th 1088 (9th Cir. 2023)....................32

Dolan v. City of Tigard,
512 U.S. 374 (1994)... 39

Earth Island Inst. v. U.S. Forest Serv.,
351 F.3d 1291 (9th Cir. 2003).. 17

Fellowship of Christian Athletes v. San Jose Unif. Sch. Dist. Bd. of Ed.,
82 F.4th 664 (9th Cir. 2023).. 18

Friedman v. Boucher,
580 F.3d 847 (9th Cir. 2009)... 48

Garcia v. Google, Inc.,
786 F.3d 733 (9th Cir. 2015) (en banc).. 18

Gerstein v. Pugh,
420 U.S. 103 (1975).. 31, 32

Goodman v. HTC Am., Inc.,
No. C11-1793MJP, 2012 WL 2412070 (W.D. Wash. June 26, 2012)........... 51

In re Google Location Hist. Litig.,
514 F. Supp. 3d 1147 (2021)... 51

Griffin v. Wisconsin,
483 U.S. 868 (1987)... 49

Guy v. Lorenzen,
547 F. Supp. 3d 927 (S.D. Cal. 2021).. 31

In re Harris,
71 Cal. App. 5th 1085 (2021)...30

Heien v. North Carolina,
574 U.S. 54 (2014)... 26

Herb Reed Enters., LLC v. Fla. Entm't Mgmt., Inc.,
736 F.3d 1239 (9th Cir. 2013).. 17

Hernandez v. Sessions,
872 F.3d 976 (9th Cir. 2017).. 17, 18, 55

Hill v. Nat. Collegiate Athletic Assn.,
7 Cal.4th 1 (1994)....51, 52, 53

Holland v. Rosen,
277 F. Supp. 3d 707 (D.N.J. 2017),
aff'd, 895 F.3d 272 (3d Cir. 2018)....32

Hughey v. Hayward,
24 Cal. App. 4th 206 (1994)....25

In re Humphrey,
11 Cal.5th 135 (2021)....35, 44

Ind. Towers of Wash. v. Washington,
350 F.3d 925 (9th Cir. 2003).... 22

Jackson v. Thompson,
43 Cal.App.2d 150 (1941)....24

Ketscher v. Sup. Ct.,
9 Cal. App. 3d 601 (Ct. App. 1970).... 23, 24

L.A. Cnty. Bar. Ass'n v. Eu,
979 F.2d 697 (9th Cir. 1992).... 33

Lapides v. Bd. of Regents of the Univ. Sys. of Ga.,
535 U.S. 613 (2002).... 30

Leaders of a Beautiful Struggle v. Balt. Police Dep't,
2 F.4th 330 (4th Cir. 2021).... 47

Lebron v. Sec'y of Fla. Dep't of Child. & Fams.,
772 F.3d 1352 (11th Cir. 2014)....40

Little v. Sup. Ct. for L.A. Cnty.,
260 Cal. App. 2d 311 (1968)....23

Loder v. City of Glendale,
14 Cal.4th 846 (1997)....53

Loder v. Mun. Ct.,
17 Cal.3d 859 (1976)....53

Katie A., ex rel. Ludin v. L.A. Cnty.,
481 F.3d 1150 (9th Cir. 2007)..34

In re Marcus,
138 Cal. App. 4th 1009 (2006)..24, 25

In re Marriage of Drake,
53 Cal. App. 4th 1139 (1997)..24, 26

Maryland v. King,
569 U.S. 435 (2013).. 45, 46

Melendres v. Arpaio,
695 F.3d 990 (9th Cir. 2012).. 54, 56, 58

Missouri v. McNeely,
569 U.S. 141 (2013).. 48

Montana v. Johnson,
738 F.2d 1074 (1984).. 38

Norris v. Premier Integrity Solutions, Inc.,
641 F.3d 695 (6th Cir. 2011)..38

Ohio Bureau of Emp. Servs. v. Hodory,
431 U.S. 471 (1977).. 30

O'Shea v. Littleton,
414 U.S. 488 (1974).. 33

People v. Alvarez,
98 Cal. App. 5th 531 (Cal. App. 2023)... 48

People v. Barbero,
2022 WL 5358642 (Cal. Ct. App. Oct. 6, 2022).. 48

People v. Black,
55 Cal.2d 275 (1961)..23

People v. Bunn,
27 Cal.4th 1 (2002)...35

People v. Buza,
4 Cal.5th 685 (2018)....47, 53

People v. Cervantes,
154 Cal. App. 3d 353 (1984)....35

People v. Eggers,
30 Cal.2d 676 (1947)....23

People v. McInnis,
6 Cal.3d 821 (1972)....53

People v. ONeil,
165 Cal. App. 4th 1351 (2008)....35

People v. Penoli,
46 Cal. App. 4th 298 (1996)....42

People v. Roberts,
68 Cal. App. 5th 64 (2021)....53

People v. Rosa,
50 Cal. App. 5th 17 (2020)....26

Perry v. Sindermann,
408 U.S. 593 (1972).... 40

People v. Smith,
79 Cal. App. 5th 897 (2022)....35

Pettus v. Cole,
49 Cal. App. 4th 402 (1996)....53

Pickering v. Bd. of Ed. of Township High Sch. Dist. 205, Will Cnty.,
391 U.S. 563 (1968).... 40

Redd v. Guerrero,
84 F.4th 874 (9th Cir. 2023).... 33

Riley's Am. Heritage Farms v. Elsasser,
32 F.4th 707 (9th Cir. 2022).... 57

Roraback v. Roraback,
38 Cal. App. 2d 592 (1940)....................27

Ryan v. State Bd. of Elections,
661 F.2d 1130 (7th Cir. 1981)....................30

Sanchez v. Cnty. of San Diego,
464 F.3d 916 (9th Cir. 2006).................... 36

Scilini v. Scilini,
214 Cal. 99 (1931)....................25

Simmons v. Super. Ct.,
52 Cal.2d 373 (1959)....................24

Sprint Commc'ns, Inc. v. Jacobs,
571 U.S. 69 (2013).................... 31

United States v. Baker,
221 F.3d 438 (3d. Cir. 2000).................... 41

United States v. Chan-Jimenez,
125 F.3d 1324 (9th Cir. 1997).................... 40

United States v. Consuelo-Gonzalez,
521 F.2d 259 (9th Cir. 1975).................... 39

United States v. Elder,
805 F. App'x 19 (2d Cir. 2020)....................41

United States v. Gerrish,
2024 WL 1131049 (1st Cir. Mar. 15, 2024).................... 38

United States v. Greger,
716 F.2d 1275 (9th Cir. 1983).................... 49

United States v. Hammond,
996 F.3d 374 (7th Cir. 2021).................... 47

United States v. Hasbajrami,
945 F.3d 641 (2d Cir. 2019).................... 46

United States v. Jones,
565 U.S. 400 (2012)..43, 51

United States v. Knights,
534 U.S. 112 (2001)..42, 44

United States v. Lara,
815 F.3d 605 (9th Cir. 2016)..39, 40, 44

United States v. Perez-Garcia,
96 F.4th 1166 (9th Cir. 2024)..39

United States v. Pool,
621 F.3d 1213 (9th Cir. 2010),
vacated for mootness, 659 F.3d 761 (9th Cir. 2011)......................................50

United States v. Salerno,
481 U.S. 739 (1987)...44

United States v. Scott,
450 F.3d 863 (9th Cir. 2006)..*passim*

United States v. Stephens,
424 F.3d 876 (9th Cir. 2005)...35

United States v. Wagner,
834 F.2d 1474 (9th Cir. 1987)...42

United States v. Wilson,
13 F.4th 961 (9th Cir. 2021)..46

United States v. Yeary,
740 F.3d 569 (11th Cir. 2014)...38

Vallindras v. Mass. Bonding & Ins. Co.,
42 Cal.2d 149 (1954)..35

Vernonia School Dist. 47J v. Acton,
515 U.S. 646 (1995)...48

Von Schmidt v. Widber,
99 Cal. 511 (1893)...24, 25, 26

Walker v. City of Calhoun,
901 F.3d 1245 (11th Cir. 2018)..32

Western Greyhound Lines v. Super. Ct. of L.A. Cnty.,
165 Cal. App. 2d 216 (Ct. App. 1958)... 24

White v. Davis,
13 Cal.3d 757 (1975)...52

In re York,
9 Cal.4th 1133 (1995)...35, 45

Younger v. Harris,
401 U.S. 37 (1971).. 31

Statutes

Cal. Code Civ. Proc. § 1003.. 19, 23

Cal. Pen. Code § 817(c)...48

Other Authorities

Cal. Const. art. III, § 3.. 35

Nicole Ozer, *Police Use of Social Media Surveillance Software Is Escalating, and Activists Are in the Digital Crosshairs*, Am. Civ. Liberties Union (Sept. 22, 2016),https://www.aclu.org/news/privacy-technology/police-use-social-media-surveillance-software...52

Johana Bhuiyan, *Muslims reel over a prayer app that sold user data: 'A betrayal from within our own community'*, L.A. Times (Nov. 23, 2020) https://www.latimes.com/business/technology/story/2020-11-23/muslim-pro-data-location-sales-military-contractors#:~:text=Muslim%20Pro%20is%20trying%20to,users%20to%20the%20US%20Military..............52

7 Witkin, Cal. Procedure (6th ed. 2024) § 54...23

INTRODUCTION

This case is about the San Francisco Sheriff's extrajudicial surveillance of people on electronic monitoring ("EM"). When a person is charged with a crime in San Francisco, the superior court can order their release before trial on the condition that they wear an ankle monitor to track the releasee's location at all times. The Sheriff administers this EM program. But he does far more than just administer. Until Plaintiffs filed this litigation, the Sheriff categorically imposed two invasive surveillance conditions on all EM releasees. The first, known as a "four-way search condition," authorized the Sheriff to conduct a warrantless search of an individual's person, property, home, or automobile at any time. The second condition allowed the Sheriff to share an individual's sensitive GPS location data with other law enforcement agencies indefinitely and without a warrant—or *any* level of suspicion.

No superior court ever ordered these conditions. In fact, the superior court never even *mentioned* the conditions in bond hearings. Instead, pretrial releasees learned about the conditions for the first time when, unaccompanied by counsel, they signed the contract to participate in EM. If they objected to the conditions, the Sheriff would return them to jail.

Plaintiffs brought this case to challenge the Sheriff's unilateral imposition of these surveillance conditions. The district court concluded that Plaintiffs were

likely to succeed in showing that the Sheriff's actions were unconstitutional under both the Federal and California constitutions. So it preliminarily enjoined the Sheriff from imposing his categorical requirements. The injunction in no way hinders the Sheriff from continuing to collect location data, nor does it prevent him from sharing that data based on a warrant or exception to the warrant requirement. It also does not affect the *superior court's* authority to impose a four-way search condition or location data-sharing condition in any individual case.

On appeal, the Sheriff's positions have shifted considerably. He no longer contends that his office can categorically impose warrantless location data sharing on EM releasees without an explicit court order. And he does not defend the four-way search condition at all. Instead, he argues that the superior court's oral description of the warrantless data-sharing condition as part of a new advisal given during bond hearings—adopted directly in response to this litigation—constitutes a court order. In the Sheriff's view, this new advisal transforms an unconstitutional blanket surveillance condition imposed by the Sheriff into an individualized determination authorized by the superior court.

This Court should reject this subterfuge. As the district court held, the superior court's advisal amounts to nothing more than "a description of Rules imposed on a blanket basis by the Sheriff." 1-ER-29. Indeed, in California, an order must be written, and the superior court has repeatedly made clear that it

issues the advisal at the Sheriff's insistence—not based on individualized findings. It thus remains the case that "[t]he Sheriff creates the Program Rules from whole cloth" and "disable[s] the Superior Court from making individualized determinations of the appropriate conditions of release." 1-ER-45-46.

The Sheriff's erroneous assertion that the superior court orders warrantless data sharing underlies every theory and argument in his brief. Without it, he has no defense. Plaintiffs are likely to succeed on the merits because their claims all invoke a basic constitutional principle: Only a court, as neutral arbiter, may determine from the particular facts that the public's safety requires encroaching on civil liberties. The Sheriff's unilateral and blanket imposition of serious privacy intrusions contravenes that principle in violation of multiple constitutional rights. In the absence of an injunction enjoining those intrusions, both Plaintiffs and the public interest will be irreparably harmed. Simply put, pretrial EM is not a license for wanton surveillance by the Sheriff for general law enforcement purposes. This Court should affirm.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1441(a). As explained below, the Sheriff's meritless abstention-based arguments do not bear on whether the district court properly exercised its

jurisdiction to resolve Plaintiffs' claims. *See infra*, at 29–33. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

ISSUES PRESENTED

1. Does the superior court's oral advisal concerning location data sharing constitute an order?

2. Does sharing an individual's location data over a period of months or years indefinitely and without a warrant intrude on a constitutionally protected privacy interest?

3. May the Sheriff unilaterally impose a condition of pretrial release?

STATEMENT OF THE CASE

I. The Sheriff administers EM for the superior court, which involves the tracking and retention of an individual's sensitive location data for months to years.

The San Francisco Superior Court determines whether individuals charged with criminal offenses will be released pretrial, and if so, under what conditions. 1-ER-10. Release conditions may include, among others, warrantless drug testing, warrantless searches, programming, home detention, or EM. 1-ER-10, 5-ER-789. If a superior court judge determines that EM is necessary to ensure a defendant's future appearance or protect the public, it makes individualized findings on the record in a bond hearing and enters a written order. 1-ER-10, 5-ER-789; *see*, *e.g.*, 2-ER-168-69; 4-ER-698. The superior court relies on pretrial EM

increasingly—1729 people were released on EM in 2021, compared to 701 in 2018. 4-ER-693, 696.

The Sheriff administers pretrial EM in San Francisco. 1-ER-10. Since August 1, 2019, the Sheriff has subcontracted with a private company, Sentinel Offender Services, LLC, for this purpose. 5-ER-792. Following a superior court order, releasees enroll at Sentinel's office by signing a set of program rules and participant contract; Sentinel then affixes an ankle cuff which releasees must wear at all times. 1-ER-11; 2-ER-115-16; 5-ER-790, 812-13, 815-18. Sentinel employees can program ankle monitors with case-specific information—*e.g.* a releasee's address, place of work, programming, or stay-away order—to alert the Sheriff of noncompliance. 5-ER-792. After enrollment, Sentinel or the Sheriff's deputies meet with releasees approximately twice per month to check that the ankle monitor is working and verify that past movements were authorized. 5-ER-793.

The ankle monitor transmits the wearer's GPS location coordinates 24 hours a day, seven days a week, for the duration of the releasee's time on EM. 5-ER-795. Releasees are typically on EM for several months, but it may last years. 4-ER-767. Sentinel saves releasee location data on its servers; it is stored until Sentinel's contract is terminated. 5-ER-796. Insofar as it reveals a releasee's comprehensive movements over months or years, potentially long after EM has ended, this data is "sensitive." 1-ER-47.

II. The Sheriff unilaterally, and without court authorization, imposes surveillance conditions on EM releasees.

At the time that Plaintiffs filed this lawsuit, the Sheriff required EM releasees to submit to two forms of surveillance: a four-way search condition, and the warrantless data-sharing condition. 1-ER-11; 4-ER-700-01; 5-ER-790-97. These conditions were part of the program rules and participant contract that releasees were required to initial and sign. 4-ER-700-01, 703-07. Releasees first learned of these conditions when a Sentinel employee provided the program rules and contract for signatures. 1-ER-11-12; 5-ER-790-92; 4-ER-770, 774-75, 780. Releasees were not provided counsel and understood that if they did not initial and sign, they would be returned to jail. 1-ER-11; 4-ER-770, 774-75, 780; 5-ER-791-92.

The superior court did not discuss these conditions in bond hearings or note them in the court's form EM order. 4-ER-698, 770, 774-75, 780. In particular cases, based on the specific facts, the superior court would impose its own four-way search condition (termed a "1035") as a condition of pretrial release, with or without imposing EM—in such cases, the condition was written in by hand on the form order. *See*, *e.g.*, 3-ER-382, 386-87, 509-10. Plaintiffs are not aware of any case in which the superior court imposed warrantless location data sharing. *See* 4-ER-765.

III. The data-sharing condition authorizes indefinite disclosure of personal information to other law enforcement without a warrant.

The Sheriff shares location data with members of law enforcement on request. 1-ER-13. A law enforcement agency may submit an "Electronic Monitoring Location Request" seeking either of two types of data over a specified period: an individual's coordinates, or the coordinates for all individuals on EM within 300 yards of a particular address. 5-ER-869. The requestor is required to tick a box indicating, "I am requesting this information as part of a current criminal investigation," but no affidavit, warrant, proof of probable cause, or articulable suspicion is required. 5-ER-869; *see* 1-ER-13. Law enforcement may request any data on Sentinel's servers; there is no limitation to individuals presently or recently on EM. 5-ER-869. The Sheriff makes increasing use of the data-sharing condition. In 2019, the Sheriff shared location coordinates for four individuals without a warrant; in 2021, the number was 179. 4-ER-694; *see* 1-ER-13.

IV. Named Plaintiffs were harmed by the Sheriff's surveillance conditions.

Named Plaintiffs David Barber, Josue Bonilla, and Joshua Simon were each charged with criminal offenses, determined appropriate for release on EM by the superior court, and required to submit to the Sheriff's surveillance conditions. Each was originally released on EM prior to May 8, 2023; each first learned of the Sheriff's surveillance conditions at Sentinel's office when they were required to

initial and sign the Sheriff's program rules and participant contract, absent counsel, or face return to jail. 4-ER-790-91.

Barber was released on EM on August 13, 2021. He recalled first seeing the Sheriff's surveillance conditions at Sentinel's office and feeling as though he "was being punished already, when [he hadn't] been convicted of anything." 4-ER-775. On August 30, 2022, Barber was pulled over by California Highway Patrol; officers discovered that he was subject to a four-way search condition, placed him in cuffs, and searched his person and vehicle for approximately two hours. 4-ER-775-76. Barber experienced anxiety and depression while on EM from the sense, compounded by the roadside search, of being constantly surveilled. 4-ER-776. Barber was removed from EM after approximately 14 months on October 31, 2022. 2-ER-167. His charges were dismissed on December 15, 2022. Ex. 6.[1] Over a year's worth of his continuous movements remain stored on Sentinel's servers indefinitely for possible distribution to law enforcement absent suspicion.

Bonilla was released on EM on May 31, 2022. He said of the Sheriff's surveillance conditions, "[i]t feels like I have lost my right to privacy even though I am supposed to be innocent until proven guilty." 4-ER-780. He worried that the surveillance conditions would make him vulnerable to police misconduct. *Id.* On

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[1] Citations to "Ex. __" refer to the exhibits to Plaintiffs' concurrently filed Motion for Judicial Notice.

December 2, 2022, the Sheriff shared Bonilla's location data with law enforcement in response to "a request for location data about a different individual." 1-ER-76. Bonilla was released from EM on March 1, 2023. 2-ER-167. At that time, several charges were dismissed and the remainder were reduced to misdemeanors. Ex. 7. Bonilla is currently in the community on his own recognizance. *Id.* Approximately nine months of his continuous location data remain stored on Sentinel's servers for prospective sharing without suspicion.

Simon was first ordered released on EM on May 27, 2022. 4-ER-770, 787. His EM release order contained a "1035," 4-ER-591, though this was not discussed in his bond hearing, 4-ER-770. Growing up, Simon was "stopped and searched by police for no apparent reason," and he feared that the Sheriff's surveillance conditions would enable further harassment. 4-ER-771. He would like his location data deleted "so that [he] can have privacy and peace of mind." 4-ER-771. Simon was ordered removed from EM on September 21, 2022. 4-ER-770. Subsequently, he was charged with separate offenses. 2-ER-112. He was ordered released on EM a second time on August 25, 2023—this time, he received the post-May 8 advisal and revised form order, discussed in the next section. 1-ER-68; 2-ER-181. The minute order for Simon's August 25, 2023 hearing states that Simon "is ordered to comply with all terms of release as stated on the record and by SFSO [San Francisco Sheriff's Office]." 2-ER-140. The superior court revoked Simon's

release on December 7, 2023. 1-ER-79. Between his two stints on EM, Simon has approximately seven months of continuous location data stored on Sentinel's servers.

V. In response to this litigation, the Sheriff convinced the superior court to adopt new form EM orders and an oral advisal.

Plaintiffs filed this lawsuit in California state court challenging the Sheriff's extrajudicial surveillance conditions under the federal and state constitutions. ECF No. 1-1. After Defendants removed the case, Plaintiffs moved for a preliminary injunction enjoining the Sheriff from imposing the conditions on EM releasees, and for class certification; Defendants moved to dismiss. ECF Nos. 22, 24, 30. The district court held a hearing on the motions on February 2, 2023. During the hearing, after stating it might decide the matter shortly, the district court cautioned, "If I decide to enjoin the application of this policy, the defendants should be aware that they're on notice today that that might happen. . . . [I]f I have concluded that, then I am going to want the remedy to be in place promptly." 2-ER-189.

Following this hearing, the Sheriff communicated with the superior court, and the court sent the Sheriff a new oral statement of the consequences of EM release ("advisal") to be given in bonding hearings and a revised form order for EM releases. 2-ER-178-79. The court implemented these changes on May 8, 2023. 1-ER-13-14; 2-ER-166. At the same time, the Sheriff alerted the district court to

these changes and argued that, coupled with the fact that the named Plaintiffs were not on EM by that time, the case was moot. ECF Nos. 53, 57.

The superior court's new advisal states that EM releasees "must give up certain rights and [] must agree to the following conditions" to be released on EM:

> Your person, residence, automobile, and any property . . . can be searched by any San Francisco Sheriff's Department peace officer any time of the day or night, with or without a warrant, with or without your consent, and with or without reasonable suspicion or probable cause. . . .
>
> Your 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.

2-ER-181.

The amended form order includes several revisions. It adds in bolded text a four-way search condition executable by the Sheriff in every monitoring case. 2-ER-169. It includes an alternative, discretionary option to impose a more expansive four-way search condition, executable "by any peace officer at anytime." *Id.* It adds a line for the defendant's signature. *Id*. And it adds, in italicized text: "*By signing here, the defendant agrees to enroll in the electronic monitoring program, follow the program rules, and have their movement tracked and recorded by the SFSO.*" *Id.*

The superior court made these changes at the Sheriff's direction. In a bail hearing in which counsel challenged the four-way search condition, the court stated:

> To be clear: it's a new sheriff's policy. It's not the Court that's imposing the 1035 [four-way search condition]. . . . [T]hey're requiring the 1035 on every case on GPS . . . . It's precisely because, I think, of the ACLU litigation I'm advising her now. . . . [T]hose are the conditions of the sheriff's program. It's the only way . . . that the sheriffs will accept anybody into their program, is if they're going to be under 1035; otherwise, they're not offering it.

2-ER-161-62. The court elaborated:

> I'm telling you for general purposes -- every defendant is going to be signing a 1035 waiver . . . . at this point, I've been asked to just orally advise folks that what's written on the form is that they are going to be subject to the search condition . . . . what the litigation is about, is that they're not noticed of the 1035.

2-ER-162.

VI. The district court preliminarily enjoined the Sheriff's extrajudicial surveillance conditions.

On February 13, 2024, the district court granted Plaintiffs' motion for a preliminary injunction and enjoined the Sheriff from imposing the warrantless data-sharing condition on all EM releasees.[2] The injunction also prohibits the

[2] In the same order, the district court denied the motion to dismiss and granted the motion for class certification, certifying two sub-classes for individuals released before and after the May 8 changes, respectively. *See* 1-ER-35.

Sheriff from imposing the four-way search conditions on any pre-May 8, 2023 releasees.

The district court first concluded it had jurisdiction. Pertinent here, the district court rejected the Sheriff's argument that Plaintiffs were required to raise their claims in their state criminal cases, noting that the argument reflected "fundamental misunderstandings about the nature of Plaintiffs' claims." 1-ER-27. Abstention concerns did not arise because Plaintiffs were not challenging their prosecutions or custody determinations; rather, they "challenge[d] only the Sheriff's actions and policies" and "the conditions of their pretrial release." 1-ER-27-28.

The district court then found that Plaintiffs were likely to succeed on their claims: separation of powers, the right to be free from unreasonable search and seizure under the federal and state constitutions, and the California constitutional right to privacy. The court rejected the Sheriff's central premise—that his conditions "explain rather than expand" the superior court's EM release orders—as "simply wrong on the facts." 1-ER 33. To the contrary, the court explained, the Sheriff "is instead creating from whole cloth conditions that intrude upon the releasee's constitutional rights," thereby usurping a core judicial function. *Id.*

The court also held, citing *Carpenter v. United States*, 585 U.S. 296 (2018), that Plaintiffs have a reasonable (and substantial) expectation of privacy in their

sensitive location data. 1-ER-29-32. The Sheriff's interest, meanwhile, was only the ordinary one of generalized law enforcement, as there was no showing of an "enhanced interest in surveillance and control" of pretrial releasees. 1-ER-32 (citing *United States v. Scott*, 450 F.3d 863, 872 (9th Cir. 2006)). Balancing these competing interests, the court concluded that warrantless location data sharing is likely unreasonable under the Fourth Amendment and likely violates Plaintiffs' right to privacy under Article 1, Section 1 of the California Constitution. 1-ER-29-33, 46-47.

Turning to the equities, the court found that Plaintiffs would suffer irreparable harm absent a preliminary injunction. 1-ER-48-49. Not only is the violation of constitutional rights itself irreparable harm, the court explained, but Plaintiffs would also suffer the "concrete" and "tangible" harms of "vulnerab[ility] to harassment, needless intrusions on [] privacy, [and] further criminal legal system involvement with its attendant consequences." *Id.* Finally, the court found that the balance of the hardships and public interest weighed strongly in favor of Plaintiffs.

VII. The superior court has repeatedly made clear post-injunction that the Sheriff imposes the challenged surveillance conditions.

Less than two weeks after the district court entered the preliminary injunction, the Sheriff wrote the superior court asking it to recall all pre-May 8 releasees without a court-imposed search condition so that one could be ordered.

Dkt. 8.2 Ex. A. Of the district court's prohibition of warrantless data-sharing, the Sheriff wrote:

> [U]ndoubtedly this will be another factor for the Court to examine in evaluating the totality of the circumstances in determining whether or not an order to place a defendant on pretrial release with electronic monitoring meets the purposes of the release.

Id. The next day, the court responded that it "was not a party to the [federal] litigation," had "re-admonish[ed] the vast majority" of pre-May 8 releasees "[p]er your office's request," and would not take any blanket action but would instead consider questions of pretrial release "on a case-by-case basis." Dkt. 8.2 Ex. B.

Since that time, the superior court has repeatedly found the Sheriff's conditions to be unwarranted in specific cases. In one, the court stated, "I'm not imposing some of the additional conditions that the sheriff's department wants in terms of sharing the location with other agencies[.]" Ex. 4 at 6:21–23. The court has said the same of the four-way search condition in several more. *Id.* at 7:7–16 ("I'm not imposing any additional search conditions . . . . I'd be happy to strike the language on the form if you want."; Ex. 3 at 3:18–20 ("[A]s I've offered in prior cases, I'm willing to release him on [] GPS and strike it."); Ex. 1 at 8:2–4 ("I'm willing to strike these types of conditions . . . . I don't need 1035[.]"); Ex. 5 at 23:8–9 ("I'm striking the 1035 order on the sheriff's sheet.")].

Where the court has ordered release on EM absent the four-way search condition, however, the Sheriff has refused to carry out the court's order and held the person in jail. *See*, *e.g.* Ex. 2 at 3:9–15 (eight days after EM release order, the court stated "I've had a subsequent conversation with the Sheriff's Department. My understanding is they have a position that they cannot . . . accept people without the 1035 condition[.]"); Ex. 3 at 4:3–12 ("[T]he Court has recently had another case involving GPS where the Court has stricken search conditions . . . . [T]he sheriff's department's position is that they will only accept GPS referrals with the search condition in place[.]").

Though this pretrial detention directly contravenes the superior court's orders, the superior court has expressed inability to hold the Sheriff accountable. *See* Ex. 3 at 7:1–2 ("I can't control what the Sheriff does with their program."); Ex. 2 at 3:23–4:2 ("I don't think the Sheriff is under the jurisdiction of the Court. . . . I don't think this Court has any authority to order the Sheriff[.]"); Ex. 4 at 7:10–16 (refusing to issue an order to show cause to the Sheriff)]. Accordingly, the superior court has offered defendants the choice between EM release with the Sheriff's conditions, or jail. *See*, *e.g.* Ex. 3 at 6:7–10 ("[T]he problem I have right now is that I don't want to force him to give up his 1035. If he doesn't want to do it, I'll refer him for an ICR [in-custody review]."); *see also* Ex. 4 at 6:4–7:22].

STANDARD OF REVIEW

To obtain a preliminary injunction, "a plaintiff must establish (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest." *Hernandez v. Sessions*, 872 F.3d 976, 989–90 (9th Cir. 2017).[3] This Court reviews a preliminary injunction for abuse of discretion. *Herb Reed Enters., LLC v. Fla. Entm't Mgmt., Inc.*, 736 F.3d 1239, 1247 (9th Cir. 2013). A district court abuses its discretion only where it applies the wrong legal standard or makes "a factual finding that [is] illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Id.* at 1247, 1250. If "the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case." *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1298 (9th Cir. 2003).

Contrary to the Sheriff's assertions, the heightened standard of review for mandatory injunctions does not apply here. *See* Opening Br. 20–21. "A mandatory injunction orders a responsible party to take action, while [a] prohibitory injunction prohibits a party from taking action and preserves the status quo pending a determination of the action on the merits." *Ariz. Dream Act. Coal. v. Brewer*, 757

[3] Unless otherwise indicated, all internal citations, quotation marks, and alterations are omitted.

F.3d 1053, 1060 (9th Cir. 2014). Injunctions that "prevent future constitutional violations"—like the district court's injunction here—are a "classic form of prohibitory injunction." *Hernandez*, 872 F.3d at 998. That is because, in the preliminary injunction context, the status quo is "the legally relevant relationship between the parties before the controversy arose." *Brewer*, 757 F.3d at 1061. And in a challenge to an allegedly unconstitutional policy, the challenged policy *is* "the controversy," so the status quo is the state of affairs preceding it. *See, e.g.*, *id.* at 1057–58, 1061; *Fellowship of Christian Athletes v. San Jose Unif. Sch. Dist. Bd. of Ed.*, 82 F.4th 664, 684–85 (9th Cir. 2023); *see also Garcia v. Google, Inc.*, 786 F.3d 733, 740 n.4 (9th Cir. 2015) (en banc) ("The status quo means the last, *uncontested* status which *preceded the pending controversy*." (emphasis added)). The ordinary standard for prohibitory injunctions thus applies.[4]

SUMMARY OF ARGUMENT

The district court properly enjoined the Sheriff's extrajudicial surveillance program because Plaintiffs readily met their burden below. First, Plaintiffs are likely to succeed on the merits. Each of the Sheriff's arguments and defenses rests on the premise that the superior court orders warrantless location data-sharing for

[4] In his Standard of Review, the Sheriff also discusses law concerning facial challenges and the proper scope of injunctive relief. Opening Br. 20–22. These suggest discrete arguments that the Sheriff does not ultimately make in his brief, not the presiding standard for this Court's review. Such arguments are waived and Plaintiffs decline to flesh them out for purposes of rebuttal.

all EM releasees. That premise is wrong. Under California law, a court order must be written, Cal. Code Civ. Proc. § 1003, and here there is no written order imposing warrantless data sharing. Furthermore, the superior court has repeatedly explained that its oral advisal merely describes the Sheriff's EM program rules; it is not an individualized determination that the warrantless data-sharing condition is necessary.

For that reason, the Sheriff's amorphous request for abstention should be rejected. *Younger* does not apply, because Plaintiffs challenge the constitutionality of the Sheriff's policies and actions—not any superior court order. This challenge will not and cannot interfere with Plaintiffs' underlying criminal prosecutions, and the superior court has made clear that Plaintiffs cannot raise their challenge in the state proceedings. Nor does *O'Shea* require abstention; the requested relief does not require federal courts to supervise the state judiciary. The district court thus properly exercised jurisdiction.

Next, the Sheriff's imposition of the data-sharing condition likely violates California's separation-of-powers doctrine. Under California law, only courts may determine a person's condition of release, which requires an individualized balancing of interests. The Sheriff has usurped that core judicial function here. Misstating the record, the Sheriff contends that he only "implements" the superior

court's ordered conditions. As the district court found, however, this contention is "simply wrong on the facts." 1-ER-33, 44-45.

Plaintiffs also are likely to show that the Sheriff has violated their rights under the Fourth Amendment and Article I, Section 13 of the California Constitution. This Court has squarely held that a warrantless search condition, like that here, is unconstitutional absent a judicial, "individualized determination" of necessity. *Scott*, 450 F.3d at 874. Because that does not occur here, *Scott* forecloses the Sheriff's counterarguments. Plaintiffs' purported consent does not cure the constitutional violations. Not only does the Sheriff fail to show that Plaintiffs' consent was unequivocal and knowing, but under *Scott*, consent standing alone cannot justify a serious privacy intrusion. Instead, the search condition must be reasonable on its own terms. The warrantless data-sharing condition is not reasonable under the circumstances. Plaintiffs have a reasonable and substantial expectation of privacy in their sensitive location data, which may cover a period of months or even years. *See Carpenter*, 585 U.S. 296. On the other side of the scale, the Sheriff fails to show that *warrantless* and *suspicionless* data sharing is necessary to advance legitimate government interests. Nor can the Sheriff identify any "special need" for the warrantless data-sharing condition; it merely serves ordinary law enforcement purposes.

Finally, Plaintiffs are likely to succeed on their state-constitutional privacy claim. They have shown that they have a legally recognized privacy interest in their location data, that their expectation of privacy is reasonable, and that the Sheriff's privacy invasion is serious. Indeed, Article 1, Section 1 was expressly intended to prevent the government from misusing private information that it gathered for one purpose to serve other purposes—precisely what the Sheriff is doing here.

As to the equities, Plaintiffs will be irreparably harmed absent the preliminary injunction. As this Court has repeatedly held, the deprivation of constitutional rights constitutes irreparable injury. That is particularly true here, where the constitutional violations affect a wide class of people with no temporal limitation. The district court also found that Plaintiffs—who have in fact had their location data shared—suffered additional injuries as a result of the Sheriff's violations, including vulnerability to harassment, privacy intrusions, and further involvement with the criminal-legal system. Because those findings are well-supported by the record, the district court did not abuse its discretion.

Finally, the balance of the equities and the public interest—which merge in cases against the government—favor Plaintiffs. Indeed, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Baird v. Bonta*, 81 F.4th 1036, 1042 (2023). The Sheriff cannot show that the preliminary

injunction harms public safety; law enforcement continues to have the ability to access Plaintiffs' location data with a warrant or under an exception to the warrant requirement. The Sheriff's contrary position has no limiting principle and would sanction *any* suspicionless searches. That is not—and cannot be—the law.

ARGUMENT

I. Plaintiffs are likely to succeed on the merits.

A. The Sheriff unilaterally imposes the warrantless data-sharing condition on EM participants without court authorization.

The Sheriff's arguments on appeal all hinge on the premise that the superior court orders warrantless location-data sharing for EM releasees. *See* Opening Br. 3, 23–24. In the Sheriff's view, the court's post-May 8 advisal is a formal court order on which "the Sheriff can constitutionally rely." *Id.* at 3. But, as the district court found, the advisal—a direct response to this litigation—is nothing of the sort. To the contrary, it "amounts to a [mere] *description* of Rules imposed on a blanket basis *by the Sheriff*." 1-ER-29 (emphasis added).

Preliminarily, because the Sheriff's defense is now entirely predicated on the post-May 8 advisal, any challenge to the injunction enjoining location data-sharing for pre-May 8 releasees is waived. *See Ind. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) ("[W]e will not consider any claims that were not actually argued in appellant's opening brief.").

As to the post-May 8 subclass, the district court was correct. *First*, under California law, a superior court order must be reduced to writing, and here there is no writing imposing warrantless location-data sharing. *Second*, the superior court has repeatedly explained that it issues the advisal at the Sheriff's insistence, not based on any individualized determination of necessity. In other words, both the law and the record confirm that the Sheriff—not the superior court—imposes the data-sharing condition. The Sheriff's central premise on appeal is thus unfounded.

1. An order must be in writing under established law.

California law is clear: an "order" is "[e]very direction of a court or judge, *made or entered in writing*," that is "not included in a judgment." Cal. Code Civ. Proc. § 1003 (emphasis added).[5] It is "implicit in this section that . . . an order . . . *must* be made and entered in the minutes or in a writing signed by the court and filed." *Little v. Sup. Ct. for L.A. Cnty.*, 260 Cal. App. 2d 311, 317 (1968) (emphasis added); *see also, e.g.*, *Ketscher v. Sup. Ct.*, 9 Cal. App. 3d 601, 604 (Ct. App. 1970) ("[I]t has been consistently stated that an order is ineffective unless it is either in writing filed with the clerk or entered in the minutes."); 7 Witkin, Cal. Procedure (6th ed. 2024) § 54.

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[5] The same rule applies in criminal matters. *See, e.g., People v. Black*, 55 Cal.2d 275 (1961) (citing Cal. Code Civ. Pro. § 1003); *People v. Eggers*, 30 Cal.2d 676, 692 (1947) (same).

As a result, an oral pronouncement not reduced to writing has no effect. "The crucial question . . . is whether a written record . . . is made by the court." *Simmons v. Super. Ct.*, 52 Cal.2d 373, 378–79 (1959); *see*, *e.g.*, *In re Marriage of Drake*, 53 Cal. App. 4th 1139, 1147 (1997) ("[O]ral ruling on a motion does not become effective until it is filed in writing with the clerk or entered in the minutes"); *Jackson v. Thompson,* 43 Cal. App. 2d 150, 152 (1941) ("[U]ntil such official entry has been made[, the court's oral ruling is] but a mere oral announcement."). Because "[a]n oral ruling is subject to varying memories and may not be clear or specific," *In re Marcus*, 138 Cal. App. 4th 1009, 1016 (2006), the writing requirement ensures there is "no uncertainty as to what [the court's] action has been[,]" *Von Schmidt v. Widber*, 99 Cal. 511, 515 (1893). A written order is thus "essential" to promote a common understanding among all parties and direct their conduct going forward. *Marcus*, 138 Cal. App. 4th at 1016.

For the same reasons, a written order must "be clear, specific, and unequivocal." *Id.* at 1014–15; *accord Ketscher*, 9 Cal. App. 3d at 604–05. This likewise ensures "the certainty required" for all parties to conduct themselves in accordance with the court's directives. *Ketscher*, 9 Cal. App. 3d at 604–05; *Western Greyhound Lines v. Super. Ct. of L.A. Cnty.*, 165 Cal. App. 2d 216, 219 (Ct. App. 1958).

Against this backdrop, there is no basis to hold that the superior court orders warrantless location data-sharing. The Sheriff falsely asserts that the superior court "memorializes [that] condition in its supervision orders." Opening Br. 3. But the court's only written order setting out conditions of release—the form EM order—is entirely silent as to location data-sharing. 2-ER-169.[6]

The Sheriff effectively concedes this, instead pointing to the court's minute orders. Opening Br. 8. But the minute orders do *not* impose warrantless location-data sharing; they state only that Plaintiffs "accept the conditions set forth on the record," 2-ER-140-42, making them insufficiently "clear, specific, and unequivocal" to order warrantless location data-sharing. *Marcus*, 138 Cal. App. 4th at 1014–15.

More importantly still, California courts squarely hold that a "minute order is superseded and . . . rendered ineffective by the formal written order." *Scilini v. Scilini*, 214 Cal. 99, 102 (1931); *see*, *e.g.*, *Hughey v. Hayward*, 24 Cal. App. 4th 206, 209 (1994). This is because minute orders are informal notes by the clerk "for the guidance of the court in its further action," whereas formal orders are written by the court to capture its precise intentions. *Von Schmidt*, 99 Cal. at 515.

[6] This is putting aside a difference in scope between location data sharing as discussed in the advisal and the condition imposed by the Sheriff: the advisal states that location data may be shared "during the pendency of the case," 2-ER-73, 111, but the Sheriff's condition has no such temporal limitation, *see* 5-ER-796 (Sentinel maintains data indefinitely); 5-ER-869 (data request form contains no time limit).

Moreover, the law is explicit that, "when the trial court's minute order expressly indicates that a written order will be filed, *only* the written order is the effective order." *Marriage of Drake*, 53 Cal. App. 4th at 1147 (emphasis added). Here, the minute orders so indicate. *See* 2-ER-140-42 (minute orders denote written orders to be filed under "Filings," including EM and other conditions, but not warrantless data sharing).

As a last resort, the Sheriff asserts that he should be permitted to "rely on" the superior court's oral advisal. Opening Br. 3. That is wrong. The Sheriff may not reasonably rely on the superior court's oral pronouncement when the law has required that an order be in writing since the 19th century. *See Von Schmidt*, 99 Cal. 511 (holding order must be written in 1893). Law enforcement "are presumed to know the law, particularly those laws that relate to the performance of their duties." *See People v. Rosa*, 50 Cal. App. 5th 17, 25 (2020); *see also Heien v. North Carolina*, 574 U.S. 54, 67 (2014) ("[A]n officer can gain no . . . advantage through a sloppy study of the laws he is duty-bound to enforce.") Indeed, the whole purpose of the writing requirement is to ensure that all parties rely on the same objective statement of the court's intention to prevent the sort of controversy the Sheriff perpetuates here.

In sum, under long-established California law, the superior court does not order the location data-sharing condition. The Sheriff may not reasonably presume otherwise.

2. The superior court has repeatedly stated that the challenged surveillance conditions belong to the Sheriff.

Though the court's form EM order is unambiguous, the surrounding context and the superior court's own express statements are all in accord: The court does not order warrantless location data-sharing. *See Roraback v. Roraback*, 38 Cal. App. 2d 592, 596 (1940) ("If the language of [an] order be in any degree uncertain, then reference may be had to the circumstances surrounding, and the court's intention in the making of the same.").

The context here is that the superior court began issuing the new advisal and revised form order at the Sheriff's urging in direct response to this litigation. In fact, the court has stated on the record that these changes reflect acquiescence to the Sheriff's demands:

> To be clear: It's a new sheriff's policy. It's not the Court . . . .
> . . . .
> It's precisely because . . . of the ACLU litigation I'm advising her now. . . .
> . . . .
> [T]hose are the conditions of the sheriff's program. . . . [O]therwise, they're not offering it.
> . . . .
> I've just been asked to orally advise folks.

2-ER-161:12-13, 27-28, 6:2-5, 12-14. As the district court found, this demonstrates that the Sheriff "exercise[s] an impermissible degree of control over the judicial function of setting conditions of pretrial release." 1-ER-46.

Following the district court's decision, the superior court has in some cases explicitly clarified that it is *not* ordering the Sheriff's conditions and would not find them appropriate on the facts of the case. On such occasions it has been unable to enforce these orders, and has stated this on the record, as well. *See*, *e.g.*, Ex. 3 at 6:22–7:2 ("I'm not imposing a search condition as a court order. I can't control what the sheriff does with their program."); Ex. 2 at 3:23–4:2 ("I don't think the Sheriff is under the jurisdiction of the Court. . . . The Sheriff's Department is an independent department that has the authority to set their own rules for their program. So I don't think this Court has any authority to order the Sheriff[.]"); Ex. 4 at 7:13–16 (court refused defense counsel's request for an order "[to] the sheriff's department to show cause for this program," stating "No. I'd be happy to strike the language on the form if you want."). These examples reinforce that inclusion of a condition in the advisal does not signify intent to order that condition, but rather, capitulation to the Sheriff under threat of discontinuing EM.[7]

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[7] As a result, the superior court has taken to putting the choice to defendants, between detention or EM with a four-way search condition imposed by the Sheriff. Ex. 3 at 3:18–22 ("[A]s I've offered in prior cases, I'm willing to release him on [] GPS and strike it. It would end up, I think, meaning he would stay in custody because the sheriffs won't accept him under the program."); Ex. 4 at

Finally, the superior court's recent correspondence with the Sheriff further confirms that it does not understand its advisal to be a court order. After the injunction was issued, the Sheriff implored the court to recall pre-May 8 releasees to be re-released subject to the new advisal and revised form order; the Sheriff also urged the court to "examine" whether the injunction against warrantless location data-sharing defeated the purpose of release on EM. Opening Br. 2–3. The superior court responded that the federal injunction was no impediment to its prerogatives, emphasizing that it "was not a party to the litigation," had only been delivering the new advisal to pre-May 8 releasees "[p]er your office's request," and would not take wholesale action but instead continue to determine conditions of pretrial release "on a case-by-case basis." Dkt. 8.2 Ex. B. Thus, the court made express that it issues the advisal at the Sheriff's request, and that it does not thereby order the four-way search and warrantless data-sharing conditions.

In short, the superior court's oral advisal is not a court order. And, as detailed below, the absence of a court order authorizing warrantless data-sharing is fatal to all of the Sheriff's arguments on appeal.

B. Abstention is inappropriate.

The Sheriff presents a mishmash of doctrines—bearing elements of *Younger* and *O'Shea* abstention—to argue that the district court improperly exercised

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5:28–6:1 ("[I]f he doesn't want to agree to the 1035 [search condition], the alternative is to order an ICR [in-custody review].)].

jurisdiction. Opening Br. 26–31.[8] These arguments reflect "fundamental misunderstandings about the nature of Plaintiffs' claims." 1-ER-28. As explained below, because the Sheriff, not the superior court, imposes warrantless location data-sharing, the Sheriff's arguments for abstention fall flat.

But this Court need not even entertain the Sheriff's abstention arguments because he waived them by removing this case to federal court. *See Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613, 624 (2002) ("[R]emoval is a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's otherwise valid objection to litigation of a matter ... in a federal forum"). As the Supreme Court explained, "[i]f the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system." *Ohio Bureau of Emp. Servs. v. Hodory*, 431 U.S. 471, 480 (1977). Accordingly, courts consistently hold that a defendant's "submission to a federal forum" renders abstention "inapplicable." *Ryan v. State Bd. of Elections*, 661 F.2d 1130, 1136 (7th Cir. 1981); *see, e.g.*, *Kenny A.*, 218

[8] The Sheriff also suggests that state habeas is the only vehicle for challenging court-ordered bail conditions. *See* Opening Br. 27–28 (citing *In re Brown*, 291 Cal. Rptr. 3d 461 (Ct. App. 2022)). But Plaintiffs do not challenge court-ordered conditions—they challenge the Sheriff's extrajudicial ones. Moreover, "[h]abeas corpus is *an* appropriate vehicle by which to raise questions concerning the legality of bail grants or deprivations"—not the only one. *See In re Harris*, 71 Cal. App. 5th 1085, 1094 (2021) (emphasis added). And in any event, the Sheriff identifies no state exhaustion requirement that would preclude federal review, and none exists.

F.R.D. at 285; *Guy v. Lorenzen*, 547 F. Supp. 3d 927, 951 (S.D. Cal. 2021); *Cummings v. Husted*, 795 F. Supp. 2d 677, 692 (S.D. Ohio 2011). This Court should do the same.

1. *Younger* is inapplicable.

"Federal courts, it was early and famously said, have 'no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (quoting *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821)). *Younger* abstention is a narrow exception to this basic rule. It applies only where parallel state proceedings present "an adequate opportunity . . . to raise constitutional challenges" and the requested relief would interfere with the state proceeding. *Arevalo v. Hennessy*, 882 F.3d 763, 765 (9th Cir. 2018) (citing *Younger v. Harris*, 401 U.S. 37, 43 (1971)).

Abstention is unwarranted here because Plaintiffs do not challenge any superior court decision. Plaintiffs challenge "only the Sheriff's actions and policies"; the relief requested therefore "will not affect the prosecution of [the plaintiffs] criminal charges." 1-ER-27-28. *See Arevalo*, 882 F.3d at 766 (*Younger* "not appropriate" in challenge to release conditions because issues were "distinct from the underlying criminal prosecution and would not interfere with it"); *Gerstein v. Pugh*, 420 U.S. 103, 108 n.9 (1975) (*Younger* not appropriate where "[t]he injunction [i]s not directed at the state prosecutions as such, but only at the

legality of pretrial [condition.]"); *see also, e.g.*, *Walker v. City of Calhoun*, 901 F.3d 1245, 1254 (11th Cir. 2018) (challenge to bail procedures did not seek "to enjoin any prosecution"); *Holland v. Rosen*, 277 F. Supp. 3d 707, 737 (D.N.J. 2017), *aff'd*, 895 F.3d 272 (3d Cir. 2018) (*Younger* inapplicable in challenge to pretrial release conditions).

The Sheriff's *Younger* argument also fails because Plaintiffs could not have raised their claims "in defense of the[ir] criminal prosecution[s]." *Gerstein*, 420 U.S. at 108 n.9; *accord Duke v. Gastelo*, 64 F.4th 1088, 1095 (9th Cir. 2023) (where "state proceeding affords no opportunity . . . to raise federal constitutional claims, *Younger*'s comity concerns do not come into play"). The superior court has repeatedly parried attacks on the contested conditions as "the conditions of *the sheriff's* program" without which EM would be unavailable. ER 162 (emphasis added); *see*, *e.g.*, Ex. 2 at 6:5–11 ("[T]his is a requirement under the Sheriff's program and so you have to agree to the search condition despite your legal objections if you want to participate in this program."). Indeed, the court has stated outright, "I can't control what the Sheriff does," Ex. 3 at 6:22–7:2, and "I don't

think the Sheriff is under the jurisdiction of the Court," Ex. 2 at 3:23–4:2.[9] Their claims therefore are not barred by *Younger*.

2. *O'Shea* is inapplicable.

The Sheriff's attempted invocation of *O'Shea* fails for the same reason: the remedy Plaintiffs seek will not interfere with any state judicial proceedings.

O'Shea requires abstention only where the relief sought would entail "nothing less than an ongoing federal audit of state criminal proceedings." *O'Shea v. Littleton*, 414 U.S. 488, 500 (1974); *accord Courthouse News Serv. v. Planet*, 750 F.3d 776, 783 (9th Cir. 2014); *see L.A. Cnty. Bar. Ass'n v. Eu*, 979 F.2d 697, 703 (9th Cir. 1992). *Redd v. Guerrero*, 84 F.4th 874, 887 (9th Cir. 2023) (holding, "*O'Shea* abstention has proved exceedingly rare" and noting that this Court has applied it only twice). Here, Plaintiffs seek, and the preliminary injunction provides, "only [a] bright-line finding that the defendant's action is unlawful"—a scenario in which "*O'Shea* is not implicated." *Redd*, 84 F.4th at 887; *accord Eu*, 979 F.2d at 703 (*O'Shea* inapplicable where remedy did "not directly require supervision of the state court system by federal judges"). In arguing otherwise, the Sheriff again "distorts Plaintiffs' claims as a challenge to court-ordered release

[9] Although the Sheriff holds up *In re Waer* as a counterexample, Opening Br. 29–30, that case concerned a challenge to a search condition expressly imposed *by the court*, not a blanket condition imposed by the Sheriff. *See* 2-ER-243; 3-ER-335-36. While, as in *Waer*, the superior court undoubtedly has authority to revisit *its own* orders, that court does not consider conditions imposed by the Sheriff to be subject to its jurisdiction or control.

conditions," when in fact, Plaintiffs challenge only the Sheriff's extrajudicial surveillance. 1-ER-28.[10]

C. The Sheriff's warrantless location data-sharing violates California's separation-of-powers doctrine.

The Sheriff erroneously argues that there is no separation-of-powers violation in light of "the Superior Court's admonitions and orders regarding location sharing." Opening Br. 32–33. But, as discussed, the superior cannot and does not impose warrantless location data-sharing by means of an oral advisal, and no written order contains this condition. *See supra*, at 23–27. Nor do the Sheriff's conditions merely "explain rather than expand" the court's release orders. 1-ER-33 (calling this contention "simply wrong on the facts"). Rather, as the district court found, "[t]he Sheriff creates the Program Rules from whole cloth"; moreover, the Sheriff's "process disabled the Superior Court from making individualized determinations of the appropriate conditions of release." 1-ER-45-46.

The California Constitution provides that "[t]he powers of state government are legislative, executive, and judicial," and that "[p]ersons charged with the

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[10] To the extent the Sheriff contends that comity requires more rigorous review, Opening Br. 21–22, he is also wrong. As his own case makes clear, there is no "heightened standard of appellate review" for "preliminary injunctions against state agencies." *Katie A., ex rel. Ludin v. L.A. Cnty.*, 481 F.3d 1150, 1155 n.12 (9th Cir. 2007). While injunctions against "state political bodies" should be "narrowly tailored," *see Clark v. Coye*, 60 F.3d 600, 603–04 (9th Cir. 1995), the Sheriff makes no argument about the scope of the injunction—and none would be persuasive. The district court enjoined only those surveillance conditions which the Sheriff imposes absent court authorization.

exercise of one power may not exercise either of the others." Cal. Const. art. III, § 3. "The separation of powers doctrine protects each branch's core constitutional functions from lateral attack by another branch." *People v. Bunn*, 27 Cal.4th 1, 16 (2002).

In unilaterally imposing serious privacy intrusions on EM releasees, the Sheriff has usurped a core judicial function. California courts have repeatedly held that the determination of release conditions (whether pretrial or on parole or probation) is an "essentially judicial function[]." *People v. Cervantes*, 154 Cal. App. 3d 353, 358 (1984); *see, e.g.*, *In re Humphrey*, 11 Cal.5th 135, 156 (2021); *In re York*, 9 Cal.4th 1133, 1149–50 (1995). That is because only courts have the constitutional authority to "balance the nature and quality of the intrusion on the individual's interests under [the] Fourth Amendment [] against the importance of the governmental interests alleged to justify the intrusion." *York*, 9 Cal.4th at 1136.

The Sheriff, as "a ministerial or executive, not a judicial, officer," *see Vallindras v. Mass. Bonding & Ins. Co.*, 42 Cal.2d 149, 154 (1954), may "properly specify the details necessary to effectuate the court's" release conditions, but it is solely "for the court to determine the *nature*" of those conditions. *People v. Smith*, 79 Cal. App. 5th 897, 902 (2022); *see also People v. ONeil*, 165 Cal. App. 4th 1351, 1358–1359 (2008); *cf. United States v. Stephens*, 424 F.3d 876, 880 (9th Cir. 2005) (holding, under federal separation-of-powers principles, that "the court

makes the determination of *whether* a defendant must abide by a condition, and *how*," but explaining that it is only "permissible to delegate to the probation officer the details of *where* and *when* the condition will be satisfied").

Here, as discussed, the Sheriff is unilaterally subjecting all EM releasees to serious privacy intrusions, blatantly encroaching on a core judicial function. Thus, Plaintiffs are likely to succeed on their separation of powers claim.

D. The Sheriff's warrantless location data-sharing violates Plaintiffs' rights to be free of unreasonable searches.

There can be no dispute that distribution of continuous, real-time location data is a serious privacy intrusion. *See Carpenter*, 585 U.S. at 320 ("[T]he progress of science has afforded law enforcement a powerful new tool . . . [a]t the same time, this tool risks Government encroachment"). And the Sheriff concedes that the government's sole purpose in sharing that data is merely the general law enforcement interest in crime control. *See* Opening Br. 44–45. Under these circumstances, warrantless location data-sharing is impermissible unless based on a judicial, "individualized determination" of necessity. *Scott*, 450 F.3d at 874. As explained, there is no such determination here. The district court thus properly found that Plaintiffs are likely to succeed on their Fourth Amendment and Article I, Section 13 claims.[11] 1-ER-46.

[11] Plaintiffs' arguments under the Fourth Amendment apply equally to their claim under Article I, Section 13 of the California Constitution. *See Sanchez v. Cnty. of San Diego*, 464 F.3d 916, 928–29 (9th Cir. 2006).

Nevertheless, the Sheriff argues that warrantless location data sharing is justified under three theories: (1) consent, (2) reasonableness under the "totality of the circumstances," and (3) the special needs doctrine. Opening Br. 34–47. But this Court's decision in *Scott* forecloses all three. In *Scott*, the district court ordered the defendant to consent to warrantless drug-testing and search of his home as a condition of pretrial release, but those conditions were not "the result of findings made after any sort of hearing; rather, . . . [they] were merely checked off by a judge from a standard list of pretrial release conditions." *Scott*, 450 F.3d at 865. In holding a subsequent search unconstitutional, *Scott* rejected the exact theories raised by the Sheriff.

First, consent could not uphold the search because the "unconstitutional conditions doctrine"—"especially important in the Fourth Amendment context"—"limits the government's ability to exact waivers of rights as a condition of benefits." *Id.* at 866. Thus, to be constitutional, the conditions needed to be reasonable on their own terms regardless of any purported consent. *Id. Second*, this Court held that reasonableness under the "totality of the circumstances" requires an "individualized determination" of necessity before imposing a condition of pretrial release. *Id.* at 873–74. *Third*, this Court rejected the government's assertion of a "special need" because the conditions served only a "*quintessential* general law enforcement purpose." *Id.* at 870.

The facts in *Scott* are directly analogous to those here—except that, in this case, Plaintiffs' conditions of release were imposed by the Sheriff, not a court. Thus, as explained below, *Scott* compels affirmance.

1. Plaintiffs have not consented to warrantless data-sharing.

Scott holds that even where an individual assents to a condition of release pretrial, that consent may not—on its own—justify an ensuing search. Rather, "taking the fact of the consent into account," any privacy intrusion must be independently "reasonable" under the totality of the circumstances. *See Scott*, 450 F.3d at 868. This is because the alternative would allow the government to wield the threat of detention coercively to impose "an intrusive search regime as the price of pretrial release." *Id.* at 867.

The Sheriff tries to avoid *Scott*'s holding, burying its response to that decision after citation to out-of-circuit decisions.[12] *See* Opening Br. 35–39. But

[12] Although this Court is "bound by the decisions of prior panels," *Montana v. Johnson*, 738 F.2d 1074, 1077 (1984), the cases cited by the Sheriff are also consistent with *Scott*, insofar as the release condition at issue was reasonable under the particular circumstances. *See United States v. Gerrish*, 2024 WL 1131049, at *71 (1st Cir. Mar. 15, 2024) (bail condition upheld, distinguishing *Scott*, because state law required the "least restrictive bail conditions . . . [tailored] to the defendant's individual circumstances") (cleaned up); *United States v. Yeary*, 740 F.3d 569, 583 (11th Cir. 2014) (condition authorizing warrantless search of residence held "entirely reasonable" "given [defendants] criminal history, his risk of flight, and his threat to kill"); *Norris v. Premier Integrity Solutions, Inc.*, 641 F.3d 695, 700 (6th Cir. 2011) (distinguishing *Scott* and holding "the search . . . that resulted from [consent to drug testing] was a reasonable one and therefore did not violate the Fourth Amendment").

Scott is settled law in this Circuit. Indeed, just two months ago, this Court relied on *Scott* to hold that a firearm restriction imposed as a condition of bail was not automatically constitutional, and instead required separate justification under the Second Amendment. *United States v. Perez-Garcia*, 96 F.4th 1166, 1176 (9th Cir. 2024) (citing *Scott* and noting, "criminal defendants released pending trial [do not] lose their right to challenge the constitutionality of pretrial release conditions simply because detention might otherwise be permitted"). Similarly, in *Lara*, the court cited *Scott* in holding that assent to a cell phone search as a condition of probation "does not by itself render lawful an otherwise unconstitutional search of a probationer's person or property"; the controlling issue was "whether the search . . . accepted was reasonable." *United States v. Lara,* 815 F.3d 605, 609 (9th Cir. 2016). *Scott* itself traced its holding to a 50-year-old decision of this Court holding that "any search made pursuant to the condition included in the terms of probation must necessarily meet the Fourth Amendment's standard of reasonableness." *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 262 (9th Cir. 1975).

Scott's holding is also correct. In *Dolan v. City of Tigard*, the Supreme Court held, "[u]nder the well-settled doctrine of unconstitutional conditions, the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit . . . [of] little or no relationship to the [requested waiver]." 512 U.S. 374, 385 (1994). The Supreme Court has repeatedly

upheld this principle. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Pickering v. Bd. of Ed. of Township High Sch. Dist. 205, Will Cnty*., 391 U.S. 563, 568 (1968). "Giving the government free rein to grant conditional benefits" would be particularly pernicious in the Fourth Amendment context, because "whether a search has occurred depends on whether a reasonable expectation of privacy has been violated," and the government could undercut the reasonableness of privacy expectations by requiring waivers in exchange for benefits. *Scott*, 450 F.3d at 866–67.[13] Thus, *Scott* safeguards against the "downward ratchet" of Fourth Amendment protections, and it compels the conclusion here that the Sheriff's warrantless location data-sharing condition cannot be justified by consent alone. *Id.* Though *Scott* is determinative, consent is also absent here because EM releasees are not adequately advised of the scope of the privacy intrusion. To be valid, consent must be "unequivocal and specific" and "intelligently given," *United States v. Chan-Jimenez*, 125 F.3d 1324, 1328 (9th Cir. 1997), and those from whom consent is sought must be "unambiguously informed" of the scope of intrusion at issue. *Lara*, 815 F.3d at 610. But here, neither Plaintiffs' in-court assent to the advisal nor their signing of the Sheriff's program rules satisfies these requirements.

[13] Other circuits have also applied the unconstitutional conditions doctrine to limit the government's ability to extract Fourth Amendment waivers. *See*, *e.g*., *Lebron v. Sec'y of Fla. Dep't of Child. & Fams*., 772 F.3d 1352, 1374 (11th Cir. 2014); *Blackburn v. Snow*, 771 F.2d 556, 568 (1st Cir. 1985).

The advisal states, "Your GPS location data can be shared with law enforcement agencies for criminal investigations during the pendency of the case and until the case is fully adjudicated," 2-ER-181, and the program rules provide only "[location] data may be shared with criminal justice partners." 2-ER-116; 4-ER-701. Neither informs prospective releasees that their location data may be distributed without a warrant or any degree of suspicion.[14] *See United States v. Baker*, 221 F.3d 438, 448–49 (3d. Cir. 2000) (consent to warrantless search does not permit suspicionless search); *United States v. Elder*, 805 F. App'x 19, 22 (2d Cir. 2020) (no consent to suspicionless search absent language "with or without cause"). Similarly, neither the advisal nor the program rules inform prospective releasees that their data may be shared and stored *in perpetuity*. To the contrary, the advisal incorrectly states that data-sharing is limited to the pre-adjudication period though the data request form contains no temporal limitation. *See* 4-ER-757; *see* 5-ER-796 (Sentinel's contract with the Sheriff was operational in 2019, and Sentinel destroys data only if contract is terminated). Indeed, the Sheriff admits that he shares location data for individuals previously on EM for investigations unrelated to the original criminal charges. 2-ER-111-12, 121. The district court was

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[14] In telling contrast, the advisal does caution that a four-way search may be conducted "with or without a warrant" and "with or without reasonable suspicion or probable cause." 2-ER-181.

thus correct in finding that releasees are not sufficiently notified of "the privacy [interest] at stake." 1-ER-31.

The Sheriff argues that deficiencies in the advisal or program rules are cured by the presence of counsel. Opening Br. 41. But no authority supports this, and for good reason. Counsel cannot be presumed to know, let alone instruct their clients, regarding the scope of requests for consent that remain unstated. The Sheriff's citations are inapposite.[15]

2. Warrantless location data-sharing is unreasonable under the totality of the circumstances.

The Sheriff is also wrong that location data-sharing is "reasonable." Opening Br. 34. Reasonableness requires balancing individual privacy interests against the government's legitimate interests. *United States v. Knights*, 534 U.S. 112, 118–19 (2001). As the Sheriff acknowledges, *Scott*'s "central holding" is that, to impose a condition of pretrial release implicating a person's privacy, a *court* must undertake this balancing on an "*individualized* basis." Opening Br. 38 (emphasis added). That does not happen here: As explained, the Sheriff unilaterally imposes warrantless

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[15] *See People v. Penoli*, 46 Cal. App. 4th 298 (1996) (condition of probation requiring drug programming was not overbroad or void where counsel knew and explicitly specified range of possible applications); *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("competent counsel" mitigates pressure in plea bargaining); *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.") (cleaned up).

location data-sharing without court authorization. *See* 1-ER-33. As a result, the data-sharing condition is necessarily unreasonable under *Scott*.

Regardless, even under an independent analysis of the totality of the circumstances, the Sheriff's argument is unsuccessful. The significant privacy interests in months or years of continuous location data are not outweighed by the Sheriff's general interest in crime control.

a) Plaintiffs have a significant privacy interest in their continuous location data.

As the district court observed, the Supreme Court's decision in *Carpenter* is "dispositive" on the privacy-interest question. 1-ER-32. The court there squarely recognized a significant privacy interest in continuous location data because it "provides an intimate window into a person's life, revealing not only his particular movements, but through them his familial, political, professional, religious, and sexual associations." *Carpenter*, 585 U.S. 296, 311 (2018) (citation omitted); *see also United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring) (GPS data reveals "trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on.") (citation omitted). Notably, *Carpenter* found a reasonable privacy interest in 127 days' worth of data, 585 U.S. at 311, while an individual may be on EM much longer, and their EM data stored even longer. 4-ER-767.

The Sheriff nevertheless argues that Plaintiffs' privacy interests are curtailed by consent, their status as pretrial releasees, and the very imposition of a GPS monitor. He is wrong on all counts.

To start, as explained above, Plaintiffs are not "unambiguously informed" of the scope of the Sheriff's surveillance condition. 1-ER-31 (quoting *Lara*, 815 F.3d at 610); *see supra* at 40. The condition is therefore imposed without "knowing consent." *Id.*; *cf. Knights*, 534 U.S. at 119–20 (where sentencing court "clearly expressed the search condition and [probationer] was unambiguously informed of it" the condition "significantly diminished" reasonable expectations in privacy). As in *Scott*, Plaintiffs' purported assent does not significantly diminish their reasonable expectations of privacy. 450 F.3d at 868.

Next, the Sheriff is wrong about the impact of Plaintiffs' criminal charges. While well-founded charges may diminish reasonable expectations of privacy, they do not do so automatically. To the contrary, criminal charges may justify encroachment on civil liberties only "[w]hen the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community," and "consistent with the Due Process Clause, a court [so orders]." *United States v. Salerno*, 481 U.S. 739, 751 (1987); *see also Humphrey*, 11 Cal.5th at 143 ("In order to detain … a court must first find by clear and convincing evidence that no condition short of detention could suffice"). Here,

as discussed, there is no such court determination that warrantless data-sharing is necessary.

For the same reason, the Sheriff's reliance on *York*, 9 Cal.4th 1133, is unfounded. *See* DE 23.1 at 42–43. *York* held that "a defendant who seeks OR release [does not have] the same reasonable expectation of privacy as that enjoyed by persons not charged with any crime" because the former "has no constitutional right to be free from confinement[.]" 9 Cal.4th at 1149. But Plaintiffs *do* have a right to release on EM after being so ordered by the superior court, and their expectation of privacy in not being subjected to additional surveillance conditions is reasonable. For this reason, the Sheriff's point that EM releasees "retain greater liberty than those in custody" is irrelevant. Opening Br. 42–43. Plaintiffs' reasonable expectations of privacy are diminished only by those specific conditions found necessary by the superior court.

Finally, the Sheriff answers that EM itself eliminates any reasonable expectation of privacy, citing *Maryland v. King*, 569 U.S. 435 (2013), to argue that personal information lawfully collected may be shared with "no further Fourth Amendment intrusion." Opening Br. 40. But *King* held that retention and continuous searching of DNA profiles did not implicate a privacy interest because (1) Maryland automatically destroyed the collected samples in the event arrest did not result in conviction; (2) the DNA profiles entered into a database could only

reveal identity and "not show more far-reaching and complex characteristics like genetic traits"; and (3) the governing statute contained safeguards against unauthorized use of samples or profiles. 569 U.S. at 443. None of those critical elements are present here: Plaintiffs' location data may be shared regardless of whether they are convicted; the data reveals far more than just their identity; and there are no safeguards concerning its handling. *King* is not on point.

Nor is the Sheriff correct that once lawfully collected, personal information may be used for any purpose. *See United States v. Hasbajrami*, 945 F.3d 641, 670 (2d Cir. 2019) ("[L]awful collection alone is not always enough to justify a future search."). Rather, where dissemination works an additional intrusion on the individual's privacy, the Fourth Amendment requires an independent justification. *See United States v. Wilson*, 13 F.4th 961, 971–72 (9th Cir. 2021) (refusing to apply private search exception to warrant requirement where government search "exceeded" and "expanded the scope" of initial search). That is the case here, where an individual's discrete location at a particular moment—collected to assure future appearances and compliance with stay-away orders—may be cumulatively disseminated to reveal "a detailed and comprehensive record of the person's movements." *Carpenter*, 585 U.S. at 309. Because "there is a world of difference between [such] limited types of personal information . . . and the exhaustive chronicle of location information casually collected by [modern technology],"

lawful collection does authorize distribution under the constitution. *Id.*; *see also Leaders of a Beautiful Struggle v. Balt. Police Dep't*, 2 F.4th 330, 341–42 (4th Cir. 2021) (collection of real-time surveillance data did not authorize retention for 45 days, which created a "detailed, encyclopedic" record exposing details "greater than the sum of the individual trips"); *United States v. Hammond*, 996 F.3d 374, 390 (7th Cir. 2021) (brief access to real-time location data implicated different privacy concerns than a historical record of individual's movements); *see also People v. Buza*, 4 Cal.5th 685, 659, 680–81 (2018) (noting that retention of lawfully collected DNA sample and expansion of available testing might implicate reasonable privacy interests). Plaintiffs reasonably expect, based on their EM release order, that their location will be monitored for limited purposes, and as a result, indefinite sharing of their comprehensive location data significantly intrudes on their privacy.

b) Warrantless location data-sharing does not serve a legitimate government interest.

The Sheriff has no sufficient interest in sharing Plaintiffs' continuous location data spanning months or years without a warrant or any suspicion. The Sheriff argues that he needs this condition to protect the public, but in so doing, he misrepresents the preliminary injunction as a blanket prohibition on location data-sharing. Opening Br. 44, 46. In reality, the Sheriff remains free to share location data in any individual case pursuant to a warrant or exigency. *See Brigham*

City, Utah v. Stuart, 547 U.S. 398, 403 (2006). And in two cases cited by the Sheriff where location data-sharing assisted criminal investigations, Opening Br. 44–45, law enforcement did in fact obtain a warrant. 4-ER-582-83.

The Sheriff's burden, in other words, is to demonstrate that *warrantless*, *suspicionless* location data-sharing is necessary to serve his interest in law enforcement, and that such interest is "important enough" to justify the privacy intrusion imposed here. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 660–61 (1995). This, he cannot do. *See Friedman v. Boucher*, 580 F.3d 847, 856–57 (9th Cir. 2009) ("[N]either the Supreme Court nor this Court has ever ruled that law enforcement officers may conduct suspicionless searches on pretrial detainees for reasons other than prison security."). The Sheriff presents no argument that the warrant requirement or exigency exception would frustrate ordinary law enforcement, and none would be credible. *See Missouri v. McNeely*, 569 U.S. 141, 142 (2013) (technology allows for "more expeditious processing of warrant applications"); *see* Cal. Pen. Code § 817(c) (permitting telephonic declaration), *see*, *e.g.*, *People v. Alvarez*, 98 Cal. App. 5th 531, 541 (Cal. App. 2023) (electronic warrant takes 30-45 minutes); *see*, *e.g.*, *People v. Barbero*, 2022 WL 5358642, at *8 (Cal. Ct. App. Oct. 6, 2022) (San Francisco police used "Consolidated Records Information Management System (CRIMS), a computerized warrant application system," which yields response from a magistrate "'within 5 or 10 minutes'").

In sum, no theory supports the Sheriff's blanket imposition of warrantless, suspicionless location data-sharing on EM releasees. Under *Scott* and other established precedent, Plaintiffs are likely to succeed on their claim that this condition violates their constitutional rights against unreasonable search.

3. Administration of pretrial EM is not a special need justifying warrantless location data-sharing.

The Sheriff's "special needs" argument is both waived and meritless. As a preliminary matter, the Sheriff never defended the data-sharing condition in the district court under a "special needs" analysis. *See* ECF No. 24 at 16–21; ECF No. 31 at 13–21 (discussing "special needs" solely with respect to the four-way search condition). That argument is therefore waived. *See United States v. Greger*, 716 F.2d 1275, 1277 (9th Cir. 1983) ("The rule is well settled that a reviewing court will not generally consider a matter not first raised in the trial court.").

In any event, the Sheriff cites no authority recognizing administration of pretrial release as a special need, and *Scott* is directly contrary. 450 F.3d at 874. All that the Sheriff can muster is a distorted quote from *Griffin*, which he alters by inserting "PTEM" in place of "probation system" to suggest that the Sheriff's administrative duties here rise above ordinary law enforcement. Opening Br. 47. But that distinction is critical: *Griffin* held that administration of probation was a special need because, as a "form of criminal sanction," it requires law enforcement to promote "a period of genuine rehabilitation." *Griffin v. Wisconsin,* 483 U.S. 868,

874–75 (1987). No such rationale applies to pretrial release. *See United States v. Pool*, 621 F.3d 1213, 1218 (9th Cir. 2010), *vacated for mootness*, 659 F.3d 761 (9th Cir. 2011) (noting that applying the special needs doctrine to pretrial release conditions would be "problematic").

The Sheriff's argument fails even on its own terms. To manufacture a special need, he lists the duties of addressing stay-away orders, promoting court attendance, and assuring compliance with other court-ordered restrictions. Opening Br. 47. Yet the record contains no evidence that warrantless location data-sharing is necessary to further these purposes.[16] More fundamentally, the listed interests reflect nothing more than implementation of court orders, collapsing into generalized law enforcement. There is no special need, for example, in serving a subpoena or enforcing a judgment. In sum, the Sheriff's interest is only "a quintessential general law enforcement purpose and therefore is the exact opposite of a special need." *Scott*, 450 F.3d at 870.

E. The Sheriff's warrantless location data-sharing violates Plaintiffs' state constitutional right to privacy.

To succeed on their privacy claim under Article I, section 1 of the California State Constitution, Plaintiffs must show (1) a legally protected privacy interest, (2)

[16] The Sheriff's brief cites two declarations discussing how a four-way search condition serves such needs, 4-ER-581 ¶ 6; 4-ER-583-84 ¶ 15, but this is a distinct condition from the data sharing at issue on appeal. Tellingly, the Sheriff does not mention any of these interests in discussing the totality of circumstances—there, he mentions only solving crime. *See* Opening Br. 44–45.

a reasonable expectation of privacy under the circumstances, and (3) a serious invasion of privacy. *See Hill v. Nat. Collegiate Athletic Assn.*, 7 Cal.4th 1, 35–37 (1994). They have shown all three.

First, as the Sheriff does not dispute, the privacy interest here is legally recognized. As discussed, the Supreme Court held in *Carpenter* and *Jones* that cumulative data showing one's physical movements provides "an intimate window into a person's life." *Carpenter*, 585 U.S. at 311; *accord Jones*, 565 U.S. at 415. And cases analyzing California's constitutional right to privacy have consistently recognized a legally protected privacy interest in one's location data. *See In re Google Location Hist. Litig*., 514 F.Supp.3d 1147, 1157 (2021) ("Plaintiffs had a reasonable expectation of privacy in the sum of [] data" showing a "detailed and comprehensive record of a users' individual movements over time"); *see also Goodman v. HTC Am., Inc*., No. C11-1793MJP, 2012 WL 2412070, at *14 (W.D. Wash. June 26, 2012) (finding a privacy interest in "fine location data and location history" where plaintiffs location was collected every three hours).

Second, Plaintiffs have a reasonable expectation of privacy under the circumstances. Absent a court order, Plaintiffs privacy expectations are the same as the public at large. *Scott*, 450 F.3d at 874. Arguing otherwise, the Sheriff rehashes arguments relative to Plaintiffs' supposed consent, their pending criminal charges,

and the fact of their release on EM. But none of these objections are persuasive. *See supra* at 37–47.

Third, the Sheriff's invasion of privacy here is serious. The California Supreme Court has expressly stated that the animating purpose of the constitutional right to privacy was to "prevent[] government and business interests from collecting and stockpiling unnecessary information about us *and from misusing information gathered for one purpose in order to serve other purposes* . . . ." *White v. Davis*, 13 Cal.3d 757, 774 (1975) (citing ballot materials) (emphasis added); *see also id.* ("Fundamental to our privacy is the ability to control circulation of personal information."); *accord Hill*, 7 Cal.4th at 35–36. The point is not theoretical; location data-sharing can cause significant harm to exercise of civil liberties, livelihoods, safety, and well-being, especially for communities already marginalized or targeted by law enforcement. For example, in 2020 the U.S. military purchased "location and movement data" from apps targeted at Muslim users.[17] Similarly, law enforcement agencies have purchased location information of Black Lives Matter protesters.[18]

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[17] Johana Bhuiyan, *Muslims reel over a prayer app that sold user data: 'A betrayal from within our own community'*, L.A. TIMES (Nov. 23, 2020) https://www.latimes.com/business/technology/story/2020-11-23/muslim-pro-data-location-sales-military-contractors#:~:text=Muslim%20Pro%20is%20trying%20to,users%20to%20the%20US%20Military.

[18] Nicole Ozer, *Police Use of Social Media Surveillance Software Is Escalating, and Activists Are in the Digital Crosshairs*, AM. CIV. LIBERTIES UNION (Sept. 22,

The Sheriff nonetheless argues that Plaintiff's privacy claim will fail because California courts have "approved" of "more significant privacy intrusions" than those at issue here. Opening Br. 48–49. But several cases cited by the Sheriff concerned personal information that could reveal only an individual's identity. *Id.* (citing *Buza*, 4 Cal. 5th (DNA profile); *People v. McInnis*, 6 Cal. 3d 821 (1972) (mugshot)). Continuous location reveals much more. The cases cited by the Sheriff concern only data *collection*. *See* Opening Br. 48–49 (citing *People v. Roberts*, 68 Cal. App. 5th 64, 109 (2021); *Loder v. Mun. Ct.*, 17 Cal. 3d 859 (1976); *McInnis*, 6 Cal.3d. These are inapposite. Here, it is the *misuse* of the collected information—*i.e.*, the Sheriff's *indefinite and warrantless* sharing—that Plaintiffs challenge under California's Constitution, not the initial collection. *See Pettus v. Cole*, 49 Cal. App. 4th 402, 458 (1996) (plaintiff had legally protected interest "in not having his confidential medical information *mis*used by his direct supervisors as the basis for discipline"); *accord Hill*, 7 Cal. 4th at 17 (emphasizing government "misusing information gathered for one purpose in order to serve other purposes").

Because Plaintiffs have demonstrated a "genuine, nontrivial invasion of a protected privacy interest," the burden shifts to the government to provide "justification for the conduct in question," *Loder v. City of Glendale*, 14 Cal.4th 846, 893 (1997). It has failed to do so here. Against Plaintiffs' significant privacy

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2016), https://www.aclu.org/news/privacy-technology/police-use-social-media-surveillance-software.

interests, the Sheriff can assert only a generalized interest in crime-solving. As the district court correctly found, that interest is insufficient to justify an intrusion of the scope the Sheriff perpetuates. 1-ER-47. Indeed, the Sheriff's position would authorize potentially limitless surveillance of EM releasees and eviscerate the constitutional right to privacy. This Court should reject that intolerable outcome.

II. Plaintiffs will suffer irreparable harm absent a preliminary injunction.

Plaintiffs have amply demonstrated that they will suffer irreparable harm absent injunctive relief. To start, this Court has squarely held "that the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *see Baird*, 81 F.4th at 1040. For that reason, the likelihood of success on the merits "is especially important when a plaintiff alleges a constitutional violation and injury." *Baird*, 81 F.4th at 1040. "If a plaintiff in such a case shows he is likely to prevail on the merits, that showing usually demonstrates he is suffering irreparable harm no matter how brief the violation." *Id.*

But here, the constitutional violations are far from limited or "brief." The number of people released on EM pretrial each year is approaching 2,000. 4-ER-693-95. Releasees are typically on EM for several months but sometimes years. 4-ER-767. Their location data is saved indefinitely, *id.*, and the Sheriff shares it upon request with any member of law enforcement, 5-ER-869. This data

"provides an all-encompassing record of the holder's whereabouts" and thus "an intimate window into a person's life." *Carpenter*, 585 U.S. at 311. The Sheriff makes increasing use of this purported authority and provides location data several hundred times per year. 4-ER-694. Absent injunctive relief, hundreds of individuals will have their intimate data shared, and hundreds more will experience violation of their privacy as a result of the Sheriff's claimed authority. Such widespread, unfettered, and warrantless surveillance easily constitutes irreparable harm.

The Sheriff argues that a likely constitutional violation demonstrates irreparable harm only in the First Amendment context. The law holds otherwise. Time and again, this Court has held that the deprivation of constitutional rights—in diverse contexts—constitutes irreparable injury. *See, e.g.*, *Baird*, 81 F.4th at 1042 (Second Amendment violation); *Hernandez*, 872 F.3d at 994–95 (9th Cir. 2017) (violations under Due Process, Equal Protection, and Excessive Bail Clauses); *Arevalo*, 882 F.3d at 767 (unconstitutional "deprivation of physical liberty").

The district court also found that Named Plaintiffs suffered additional irreparable injuries beyond the constitutional violations themselves, including "vulnerability to harassment, needless intrusions on their privacy, further criminal legal system involvement with its attendant consequences, and feelings of exposure, violation, and anxiety." 1-ER-48. Contrary to the Sheriff's assertion,

Opening Br. 53–54, this finding is well-supported by the record. Named Plaintiffs attested to the psychological toll that knowledge of the Sheriff's surveillance conditions exacts. 4-ER-771, 775–76, 780. They describe anxiety, depression, a sense of being targeted and treated unfairly, and confusion that the Sheriff seemed to be punishing them before they had been convicted. *Id.*

The Sheriff's dismissal of these harms as "speculative" is unfounded. Opening Br. 54. As the district court explained, the record shows that many people, including Plaintiff Bonilla, in fact have had their location data shared without a warrant or any degree of suspicion. 1-ER-48. Moreover, these harms are not speculative because there is no dispute that "the Sheriff's Office has given itself the *right* to share that data"—and that it is increasingly doing so every year. *See id.*; *see*, *e.g.*, *Melendres*, 695 F.3d at 1002 (finding irreparable harm where Sheriff "operated under the impression that they have authority" to violate constitutional rights, creating a "real possibility" of future constitutional violations). And the Sheriff's suggestion (Opening Br. 54–55) that Plaintiffs have nothing to fear but accountability for future crimes is both offensive and wrong. *Carpenter* "is dispositive" that warrantless location data-sharing may reveal an enormous quantum of sensitive information. 1-ER-32.

Finally, the Sheriff argues that the preliminary injunction is likely more harmful than the alternative because the superior court may determine "that

criminal defendants charged with serious offenses cannot safely be released" without warrantless location data-sharing and impose jail instead. 2-ER-55. The claim is brazen. The superior court does not order warrantless location data-sharing *at all* and only discusses this condition at the Sheriff's insistence as a result of this lawsuit. *See* DE 8.3 at 2–3 (court wrote Sheriff that it issues the advisal "[per] your office's request"); 2-ER-161:27-28 ("It's precisely because . . . of the ACLU litigation I'm advising her now[.]"). And as the Sheriff well knows, it is the *Sheriff* that has refused release absent his surveillance conditions, a fact he uses to leverage the superior court to impose such conditions even against the court's will. *See*, *e.g.*, Ex. 2 at 6:5–11 (after defendant detained one week by Sheriff despite EM order of release, court stated "I am now imposing the search condition I had previously said that I would not impose . . . . [T]his is a requirement under the Sheriff's program."). It is precisely because the Sheriff thus unilaterally imposes his surveillance conditions in every case that Plaintiffs would suffer irreparable harm absent a preliminary injunction. If the Sheriff is genuinely concerned about the liberty interests of EM releasees, he should release them in accordance with the superior court's orders.

III. The balance of equities favors Plaintiffs.

This Court has repeatedly made clear that "it is *always* in the public interest to prevent the violation of a party's constitutional rights." *Baird*, 81 F.4th at 1042

(emphasis added); *see, e.g.*, *Riley's Am. Heritage Farms v. Elsasser*, 32 F.4th 707, 731 (9th Cir. 2022); *Melendres*, 695 F.3d at 1002. The district court rightly relied on this line of cases to conclude that the balance of equities favors Plaintiffs. 1-ER-48.

The Sheriff resists this conclusion, arguing that the public interest lies in solving crimes and protecting victims. Opening Br. 57–59. But even if such interests could trump the interest in preventing constitutional violations (and they do not), the Sheriff does not—and cannot—show that advancing these interests require *warrantless* location data-sharing.

To the extent that the Sheriff contends that warrants are impractical given the "fast pace" of certain incidents, Opening Br. 57, he is wrong. *See supra* at 47–49. Indeed, as noted, in two of the Sheriff's own examples, law enforcement procured a warrant. 4-ER-580-83. And where a genuine public safety emergency requires location data-sharing before a warrant may be obtained, the exigency exception pertains. *Stuart*, 547 U.S. at 403.[19]

In sum, the Sheriff's argument—that warrantless location data-sharing is in the public interest because it may help solve crime—has no logical endpoint. It could be equally advanced in support of suspicionless searches of the general

[19] The Sheriff's argument regarding stay-away orders is equally flawed. Opening Br. 58. There is simply neither evidence nor reason to believe that *warrantless* location data-sharing is any way necessary to enforcement of stay-away orders.

public, mass detentions, or really any means of investigation. The public interest does not support such police-state tactics, and neither does it favor the Sheriff's unauthorized surveillance here. Rather, the public interest is served by protecting civil liberties against unlawful encroachment, and the balance of equities thus favors a preliminary injunction.

CONCLUSION

The district court's order should be affirmed.

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Respectfully submitted,

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FOR THE NINTH CIRCUIT

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