EXHIBIT F

Shilpi Agarwal (SBN 270749)
sagarwal@aclunc.org
Avram D. Frey (MJP 804789)
afrey@aclunc.org
Emi Young (SBN 311238)
eyoung@aclunc.org
Hannah Kieschnick (SBN 319011)
hkieschnick@aclunc.org
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NORTHERN CALIFORNIA, INC.
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 621-2493
Facsimile: (415) 255-1478

Justina Sessions (SBN 270914)
jsessions@wsgr.com
John P. Flynn (SBN 141094)
jflynn@wsgr.com
Colleen Bal (SBN 167637)
cbal@wsgr.com
Dylan G. Savage (SBN 310452)
dsavage@wsgr.com
Malavika F. Lobo (SBN 317635)
mlobo@wsgr.com
WILSON, SONSINI, GOODRICH & ROSATI
One Market Plaza
Spear Tower, Suite 3300
San Francisco, CA 94105
Telephone: (415) 947-2197
Facsimile: (415) 947-2000

Attorneys for Plaintiffs

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

JOSHUA SIMON, DAVID BARBER, AND JOSUE BONILLA, individually and on behalf of all others similarly situated, DIANA BLOCK, an individual, and COMMUNITY RESOURCE INITIATIVE, an organization, Plaintiffs, v. CITY AND COUNTY OF SAN FRANCISCO, PAUL MIYAMOTO, IN HIS OFFICIAL CAPACITY AS SAN FRANCISCO SHERIFF, Defendants.	CASE NO.: CGC-22-601686 **MEMORANDUM IN SUPPORT OF *EX PARTE* APPLICATION FOR ORDER TO SHOW CAUSE REGARDING PRELIMINARY INJUNCTION** Date: September 29, 2022 Time: 11:00 a.m. Dept: 302 Before: Honorable Richard B. Ulmer, Jr.

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I. INTRODUCTION

This action challenges the San Francisco Sheriff's Office's ("Sheriff" or "SFSO") systematic intrusions on the privacy of individuals released pretrial on electronic monitoring ("EM") in San Francisco.[1] After the Superior Court orders individuals released on EM, the Sheriff requires them to agree to a set of "Program Rules," several of which are not authorized by the Court's release order. In particular, Program Rule 5 purports to authorize the Sheriff to conduct warrantless, suspicionless searches of an individual's person, property, home, and automobile at any time ("four-way search clause"). Rule 13 purports to authorize the Sheriff to share participant GPS location data with any law enforcement agency upon request and in perpetuity—an ongoing encroachment given that the Sheriff's EM Program seemingly allows GPS data to be retained indefinitely.

Plaintiffs move for a preliminary injunction prohibiting SFSO from imposing or enforcing Rules 5 and 13. Plaintiffs are likely to succeed on the merits of their claims under the Separation of Powers Clause, Article III, section 3 of the California Constitution; the prohibitions against unreasonable searches and seizures under the Fourth Amendment to the U.S. Constitution and Article I, section 13 of the California Constitution; and the right to privacy under Article I, section 1 of the California Constitution. Further, the balance of harms weighs in favor of Plaintiffs, as the Sheriff's ongoing violations of constitutional law are *per se* injurious to Plaintiffs, and the Sheriff will suffer no harm if the injunction is granted. The Court should preliminarily enjoin the Sheriff's unauthorized and illegal surveillance of individuals released on EM pending trial.

II. BACKGROUND

A. Court-Ordered Electronic Monitoring

The Superior Court of San Francisco may order an individual facing criminal charges released on EM, but the Court does not authorize the Sheriff's rules challenged here. After the

[1] Plaintiffs' federal constitutional claims are brought pursuant to 42 U.S.C. § 1983, which requires showing that the defendant acted under color of law. The Sheriff acts under color of law because he is a governmental actor. *See Venegas v. County of Los Angeles*, 32 Cal. 4th 820, 829 (2004) (holding that a sheriff is a state actor).

filing of criminal charges, a Superior Court judge may order release with varying degrees of supervision, set bail in accordance with *In re Humphrey*, 11 Cal. 5th 135 (2021), or, in limited circumstances, order detention. Kim Decl. ¶ 4. For individuals released pretrial, the Court may impose EM—purportedly to ensure future court appearances and to protect public safety—under any level of supervision. *Id.* ¶ 6.

The Superior Court typically orders EM following a hearing. *Id.* During these hearings, the Court does not mention the Sheriff's EM Program Rules in form or substance. *Id.*; *see also* Simon Decl. ¶ 3; Bonilla Decl. ¶ 3; Barber Decl. ¶ 5. There is no colloquy on the record concerning the scope of any privacy intrusions imposed by the Sheriff in its administration of EM, no discussion of any four-way search condition or indefinite retention and sharing of GPS location data, and no general waiver of Fourth Amendment rights. Kim Decl. ¶ 6; Simon Decl. ¶ 3; Bonilla Decl. ¶ 3; Barber Decl. ¶ 5.

When the Court orders release on EM, it executes a pretrial form order labeled "County of San Francisco Sheriff's Office / Superior Court Pre-Sentenced Defendant Electronic Monitoring – Court Order." *See* Kieschnick Decl. Ex. 4 (hereinafter "Court Form Order"). The form requires those released on EM to obey all orders given by any SFSO employee or service provider and to live within 50 driving miles of the Sheriff's EM office. *Id.* The form also lists other "court-ordered monitoring conditions" that the Court may check off in its discretion. *Id.* Near the top, the form provides, "the Court indicates that the defendant has waived their 4th Amendment rights and understands the restrictions ordered by the Court." *Id.* Releasees have no opportunity to view this form order before the Court signs it, and they do not sign it themselves thereafter. *See* Barber Decl. ¶ 7.

B. The Sheriff's Program Rules

Separately, the Sheriff requires EM releasees to sign the Sheriff's own EM Program Rules. Following a Court order, EM releasees are outfitted with an ankle monitor and enrolled in the EM Program at the office of SFSO's private contractor, Sentinel Offender Services, LLC ("Sentinel"), located within the Sheriff's Community Programs building. Kim Decl. ¶ 7; Simon Decl. ¶ 4; Bonilla Decl. ¶¶ 4-5; Barber Decl. ¶ 8.

At Sentinel's office, individuals are first informed of the Sheriff's "Electronic Monitoring Program Rules [for] Pre-Sentenced Participants." *See* Kieschnick Decl. Ex. 5 (hereinafter "Program Rules" or "Rules"). A Sentinel employee provides the Rules to releasees and instructs them to initial each rule and sign and date at the bottom. *See* Simon Decl. ¶ 6; Bonilla Decl. ¶ 7; Barber Decl. ¶ 9. No one explains the Program Rules to EM releasees, and releasees are not provided access to counsel while at Sentinel's office. *See* Simon Decl. ¶ 6; Barber Decl. ¶ 9; Kim Decl. ¶ 8. In all cases, releasees understand from the circumstances that they must initial, sign, and date the Program Rules or face return to jail. *See* Simon Decl. ¶ 6; Bonilla Decl. ¶ 7; Barber Decl. ¶ 10.

Among the rules that EM releasees must assent to are Rules 5 and 13. Rule 5 states, "I shall submit to a search of my person, residence, automobile or property by any peace officer at any time." Kieschnick Decl. Ex. 5, Program Rules at 1. Rule 13 states "I acknowledge that my EM data may be shared with other criminal justice partners." *Id.*[2] No provision of the Program Rules, or any other policy or agreement, provides for the destruction or expungement of releasees' GPS location data after their participation in the EM Program.

EM releasees initial and sign the Program Rules and Participant Contract requirements to avoid the threat of continued detention pending trial. *See* Simon Decl. ¶ 6; Bonilla Decl. ¶ 7; Barber Decl. ¶ 10. Many do not comprehend the forms or the conditions imposed, and virtually all need to avoid further pre-trial detention, whether to care for elderly, sick, or child dependents, to retain employment, housing, or child custody, or for a litany of other personal reasons. *See* Simon Decl. ¶¶ 5-6; Bonilla Decl. ¶¶ 6-7; Barber Decl. ¶ 3. On information and belief, no prospective EM releasee has ever refused to initial and sign the Program Rules or Participant Contract. *See* Kim Decl. ¶ 9.

[2] EM releasees must also separately initial, acknowledge, and agree to rules contained in a "San Francisco Sheriff's Dept. Electronic Monitoring Program Participant Contract: Pre-Sentenced Individuals," which contain provisions substantively equivalent to Rules 5 and 13. *See* Kieschnick Decl. Ex. 6 (hereinafter "Participant Contract") at 3, 4.

C. Program Rules 5 and 13 and the Sheriff's Indefinite Retention of GPS Location Data

Program Rules 5 and 13, in concert with the Sheriff's indefinite retention of participant location data, subject some of San Francisco's most vulnerable residents to enormous privacy intrusions. Once an individual is enrolled in the EM Program, notice of the four-way search condition described in Rule 5 is entered into the California Law Enforcement Telecommunications System ("CLETS"), a database to which all members of law enforcement in the state have access. *See* Kieschnick Decl. Ex. 9 ("General Search Condition Request" form that SFSO uses to enter search conditions "into the criminal justice system (CLETS)"); Ex. 10 at 2 (instruction SFSO employees and/or contractors to submit "General Search Condition Request" form and enter search conditions into CLETS as part of EM enrollment). Whenever any member of law enforcement in California runs a check on an individual released pretrial on EM, CLETS notifies the officer of the four-way search condition, purportedly authorizing expansive searches without a warrant or any degree of articulable suspicion. Plaintiff Barber was subjected to a search of his person and vehicle in precisely this manner. On August 30, 2022, Barber was pulled over by California Highway Patrol for speeding. *See* Barber Decl. ¶ 13. After running a check on his driver's license, the officers presumably learned of the existence of the four-way search condition from CLETS—they told him they were authorized to search his person and his vehicle, placed him in handcuffs, patted him down and searched his pockets, and then searched his car for an extended period of time. *Id.* ¶¶ 13-15.

No data is publicly available regarding the frequency of warrantless searches conducted pursuant to Rule 5. Such searches are publicly visible only in the unusual circumstance where evidence gathered thereby is challenged in court. On information and belief, there have been two such cases in San Francisco. *See* Kim Decl. ¶¶ 10-12. In one, the Court suppressed the evidence, finding that Rule 5 was not a legally valid search condition as the defendant had not waived his rights. *See id.* ¶ 11.

The data-sharing condition of Rule 13—which "acknowledge[s]" the Sheriff's sharing of GPS data with "criminal justice partners"—is arguably more intrusive still. A functioning

ankle monitor gives SFSO and Sentinel continuous GPS location coordinates 24 hours a day, 7 days a week. *See* Kieschnick Decl. Ex. 7 at Appendix A, Part I(E)(6) (hereinafter "Sheriff-Sentinel Contract"). A participant's GPS information can be viewed contemporaneously to track real-time location and movements. Sentinel also saves this data on its servers, permitting historical tracking. *Id.* at Appendix A, Part I(E)(6)(iv). The volume and scope of this data is immense. Program participation typically lasts at least several months but can span multiple years, particularly given the backlog in San Francisco's Superior Court criminal docket, which has been greatly exacerbated by COVID-19. *See* Kim Decl. ¶ 13.[3]

Pursuant to Program Rule 13, SFSO routinely shares participant GPS location data with other law enforcement agencies. To acquire the data, a requesting officer need only submit a form titled "Electronic Monitoring Location Request" to the Sheriff representing that they are "requesting this information as part of a current criminal investigation"—no warrant or articulable suspicion is required. *See* Kieschnick Decl. Ex. 8 ("Electronic Monitoring Location Request" form); *see also* Kieschnick Decl. ¶ 11 & Ex. 2 (SFSO's July 1, 2022 written response labeled "ii"). The requesting agency may obtain either the GPS location data of a specific individual on EM across a period of time, or the GPS location data "of anyone on GPS tracking" in a specific location. Kieschnick Decl. Ex. 8. Requesting agencies may obtain this data in perpetuity; because Sentinel may retain the complete GPS location data of all current and historical EM releasees unless or until Sentinel's contract is terminated, location data is available to be shared indefinitely. *See* Kieschnick Decl. ¶ 10 & Ex. 2 (SFSO's July 1, 2022 written response labeled "ix"); *see also* Kieschnick Decl. Ex. 7, Sheriff-Sentinel Contract at 13.4.3 (covering "Disposition of Confidential Information").

Use of Rule 13 to obtain GPS data without court oversight is on the rise. In 2019, the Sheriff shared GPS location data of four individuals on pretrial EM; in 2021, that number

[3] *See also* Bob Egelko, "S.F. courts won't be forced to lift COVID restrictions despite hundreds of backlogged criminal trials," S.F. CHRONICLE (May 12, 2022), https://www.sfchronicle.com/bayarea/article/S-F-courts-won-t-be-forced-to-lift-COVID-17169273.php.

swelled to 179. *See* Kieschnick Decl. ¶ 12 & Ex. 2 (SFSO's July 1, 2022 written response labeled "viii").

III. ARGUMENT

A. Legal Standard.

In determining whether to order a preliminary injunction, courts balance (1) the likelihood that plaintiffs will prevail on the merits at trial; and (2) the "interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued." *IT Corp. v. County of Imperial*, 35 Cal. 3d 63, 69-70 (1983). These factors are weighed on a sliding scale, such that "the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction." *O'Connell v. Superior Court*, 141 Cal. App. 4th 1452, 1463 (2006) (citation omitted). Here, both factors weigh in Plaintiffs' favor.

B. Plaintiffs are Reasonably Likely to Prevail on the Merits of Their Claims.

Plaintiffs are reasonably likely to prevail on their claims that Program Rules 5 and 13, together with the Sheriff's indefinite retention of GPS location data, collectively violate the separation of powers, CAL. CONST. art. III, § 3, the prohibition on unreasonable search and seizure, U.S. CONST. amend. IV; CAL. CONST. art. I, § 13, and the right to privacy, CAL. CONST. art. I, § 1.

1. Sheriff's Program Rules 5 and 13 Violate the Separation of Powers.

Imposing conditions of pretrial release is a judicial function such that the Sheriff's usurping of that function violates the separation of powers. Article III, section 3 of the California Constitution states, "[t]he powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others . . . ." CAL. CONST. art. III, § 3.

A branch of government violates the separation of powers when it wrests "complete" control of a power charged to another branch. *Laisne v. State Bd. of Optometry*, 19 Cal. 2d 831, 835 (1942). To determine when this happens, courts first analyze which branch "properly exercise[s]" the power in question, *i.e.*, to which branch is "the function . . . primary." *In re*

Walter E., 13 Cal. App. 4th 125, 136 (1992); *accord People v. Bunn*, 27 Cal. 4th 1, 14 (2002) ("[T]he Constitution . . . vest[s] each branch with certain 'core' or 'essential' functions that may not be usurped by another branch.") (citation omitted). Where one branch exercises a power entrusted to another, courts then examine whether:

> (1) the exercise . . . is incidental or subsidiary to a function or power otherwise properly exercised by such department or agency, and (2) the department to which the function so exercised is primary retains some sort of ultimate control over its exercise . . . .

In re Danielle W., 207 Cal. App. 3d 1227, 1236 (1989) (citation omitted); *accord Younger v. Superior Court*, 21 Cal. 3d 102, 117 (1978).

Unquestionably, the judiciary is charged with imposing conditions of pretrial release. In the seminal case authorizing imposition of conditions on OR releasees, *In re York*, 9 Cal. 4th 1133 (1995), the California Supreme Court held that to determine what conditions are "reasonable," "*a court* must balance 'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *Id.* at 1149 (citation omitted) (emphasis added).[4] Indeed, as a matter of due process, such balancing must be the exclusive domain of the judiciary. Weighing privacy rights against law enforcement objectives cannot be entrusted to the executive, an interested party, but instead calls for a neutral, detached decisionmaker. *See Gerstein v. Pugh*, 420 U.S. 103, 112-13 (1975) ("[T]he Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible."); *Johnson v. United States*, 333 U.S. 10, 13-14 (1948) ("The point of the Fourth Amendment . . . consists in requiring that [privacy

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[4] Such constitutional balancing is understood to be a judicial function in the related contexts of setting bail and imposing conditions of release on parole and probation, as well. *See Humphrey*, 11 Cal. 5th at 156 ("[a] *court's* procedures for entering an order resulting in pretrial detention must [] comport with [] traditional notions of due process") (emphasis added); *Wyo. v. Houghton*, 526 U.S. 295, 300 (1999) (holding in the parole context, "*we* must evaluate . . . reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests") (emphasis added); *see also People v. Cervantes*, 154 Cal. App. 3d 353, 358 (1984) (holding that determination of probation conditions is an "essentially judicial function[]" given the "close questions" requiring individualized analysis and the taking and weighing of conflicting evidence).

intrusions] be drawn by a neutral and detached magistrate instead of being judged by the officer . . . .").[5]

Thus, curtailment of individuals' rights as a condition of pretrial release is fundamentally a judicial function. That concludes the separation of powers inquiry, as imposition of Rules 5 and 13 is neither (1) "incidental or subsidiary" to the Sheriff's authority to administer EM, nor (2) subject to the Court's "ultimate control . . . ." *Danielle W.*, 207 Cal. App. 3d at 1236 (citation omitted). First, the Sheriff's role with regard to individuals released pretrial on EM is to *administer* the conditions determined by the Court, not to unilaterally impose new conditions that present additional burdens on constitutional rights. *See Vallindras v. Mass. Bonding & Ins. Co.*, 42 Cal. 2d 149, 154 (1954) (holding in the context of a court's detention order, "a judgment of commitment . . . is ultimately for the courts, not the sheriff, to decide. A sheriff is a ministerial or executive, not a judicial, officer") (citations omitted). Second, there is no mechanism for EM releasees to appeal the Sheriff's Program Rules to the Superior Court in their criminal cases.[6] For these reasons, Plaintiffs are likely to succeed on the merits of their Separation of powers claim.

2. Sheriff's Program Rules 5 and 13 Violate the Prohibition on Unreasonable Searches and Seizures.

Individuals released pretrial on EM retain rights against unreasonable search and seizure under the Fourth Amendment of the U.S. Constitution and Article I, Section 13 of the California Constitution. *See* U.S. CONST., amend. IV; CAL. CONST. art. 1, § 13; *see People v.*

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[5] *See also United States v. Jones*, 565 U.S. 400, 416-17 (2012) (Sotomayor, J., concurring) (questioning, in the context of GPS monitoring, "the appropriateness of entrusting to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable to misuse, especially in light of the Fourth Amendment's goal to curb arbitrary exercises of police power and prevent 'a too permeating police surveillance'") (citation omitted).

[6] EM releasees can challenge Rules 5 and 13 only by filing a petition or civil action, as Plaintiffs have done here. This possibility of an ancillary civil action is insufficient to cure the separation of powers violation. *See, e.g.*, *Danielle W.*, 207 Cal. App. 3d at 1237 (Department of Children's Services exercise of judicial function of determining child visitation violates separation of powers even though subject to judicial review); *United States v. Stephens*, 424 F.3d 876, 880 n.2 (9th Cir. 2005) (citing cases holding that Executive's determination of post-sentencing release conditions concerning drug testing, mental health treatment, and restitution payments, violated separation of powers even though judicially reviewable).

Buza, 4 Cal. 5th 658, 686 (2018) (California courts "constru[e] the Fourth Amendment and article I, section 13 in tandem."). Program Rules 5 and 13 violate both rights.

Under *York*, pretrial releasees retain the right to an individualized determination before a court imposes a search or seizure condition. In *York*, the Court emphasized that intrusions on the privacy of pretrial releasees cannot be "of an unlimited nature," as "Fourth Amendment considerations place constraints upon the circumstances under which . . . warrantless search and seizure conditions may be imposed." 9 Cal. 4th at 1150. To comply with the Fourth Amendment, *York* clarified, courts must assess "the reasonableness of a condition . . . [based] upon the relationship of the condition to the crime or crimes with which the defendant is charged and to the defendant's background, including his or her prior criminal conduct." *Id.* at 1151 n.10. Before intruding on protected privacy interests, a court must undertake an *individualized* determination of reasonableness; blanket conditions are impermissible. *Id.*; *see also United States v. Scott*, 450 F.3d 863, 874 (9th Cir. 2006) (holding that blanket pretrial release conditions violated the Fourth Amendment, because "conditions must be justified by a showing that *defendant* poses a heightened risk") (emphasis added); *accord United States v. Martinez-Fuentes*, 428 U.S. 543, 560 (1976) ("some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure") (citation omitted).

Against this legal backdrop, Rules 5 and 13 violate the rights of pretrial releasees under the Fourth Amendment and Article I, section 13. These rules purport to authorize enormous intrusions on constitutionally protected privacy interests in *every* case, for *every* EM releasee, without any individualized determination of reasonableness by a court.

Rules 5 and 13 plainly implicate protected privacy interests. Rule 5 authorizes warrantless, suspicionless searches, including of the most constitutionally sacrosanct areas. *See, e.g.*, *People v. Camacho*, 23 Cal. 4th 824, 831 (2000) ("[T]he 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'") (citation omitted). Moreover, because notice of this "four-way search condition" is entered into CLETS, search "by any peace officer at any time," without any articulable degree of suspicion, portends

a truly vast intrusion untethered to any reasonableness determination. *See* Kieschnick Decl. Ex. 9 & Ex. 10 at 2.

Location data shared pursuant to Rule 13 likewise implicates constitutional privacy interests. In *Carpenter v. United States*, 138 S. Ct. 2206 (2018), the U.S. Supreme Court held that government collection of location data (there, from cell phone towers) is an insidious affront to privacy because it provides a "detailed, encyclopedic" and "intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" *Id.* at 2217 (citation omitted); *see also Jones*, 565 U.S. at 415 (Sotomayor, J., concurring) ("'Disclosed in [GPS] data . . . will be . . . 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). Rule 13 directly invokes the privacy interests articulated in these cases because it threatens to provide any member of law enforcement with a complete record of a releasee's movements over a period of months or years without a warrant or even articulable suspicion. And because the Sheriff's policies permit indefinite retention of GPS location data, *see* Kieschnick Decl. ¶ 10 & Ex. 2 (SFSO's July 1, 2022 written response labeled "ix"); *see also* Kieschnick Decl. Ex. 7, Sheriff-Sentinel Contract at 13.4.3 (covering "Disposition of Confidential Information"), releasees are subject to this invasion of privacy in perpetuity—a continuing intrusion of unprecedented scope.

Neither the Superior Court's form order nor an EM releasee's signature on the Sheriff's Program Rules constitutes consent to these encroachments or voluntary waiver of Fourth Amendment rights. Preliminarily, whatever is intended by the statement on the Superior Court's form order that "the defendant has waived their 4th Amendment rights," *see* Kieschnick Decl. Ex. 4, Court Form Order, it cannot constitute a waiver of rights with respect to Rules 5 and 13. Consent entails some action or expression of agreement. *See People v. Reyes*, 19 Cal. 4th 743, 749 (1998) (consent to a search condition in parole context was lacking because parolee had taken no action to elect it). Here, individuals released on EM make no

election before the Superior Court relative to Rules 5 and 13: they make no statement of waiver as part of any colloquy with the Court, and they do not sign the Court's form order. *See* Kim Decl. ¶ 6; Simon Decl. ¶ 3; Bonilla Decl. ¶ 3; Barber Decl. ¶¶ 5, 7. Further, a releasee cannot voluntarily consent to something of which they have no knowledge. *See People v. Bravo*, 43 Cal. 3d 600, 607 (1987) (consent to a search condition was valid because it was knowing). Here, releasees have no knowledge that either Rule 5 or 13 will be imposed at the time the Superior Court orders their release on EM because neither the Court, nor the district attorney, provides any notice of those conditions. *See* Simon Decl. ¶ 3; Bonilla Decl. ¶¶ 3-4; Barber Decl. ¶¶ 5, 10.

Nor does the Sheriff extract voluntary consent to the Program Rules. EM releasees initial and sign Rules 5 and 13 because the Sheriff's private contractor tells them they must do so, under implicit threat of return to jail despite a court order authorizing their release. *See* Simon Decl. ¶ 6; Bonilla Decl. ¶ 7; Barber Decl. ¶ 10. These circumstances defeat voluntary consent as a matter of law. *See People v. Fields*, 95 Cal. App. 3d 972, 977 (1979) ("Consent, in law, means a voluntary agreement by a person in the possession and exercise of sufficient mentality to make an intelligent choice, to do something proposed by another. . . . [Assent] means mere passivity or submission, which does not include consent . . . .") (citation omitted); *Bumper v. North Carolina*, 391 U.S. 543, 549 n.14 (1968) ("Orderly submission to law-enforcement officers . . . was not [valid] consent . . . .") (citation omitted); *Johnson*, 333 U.S. at 13 (1948) (acquiescence "granted in submission to authority" does not constitute "an understanding and intentional waiver of a constitutional right").

For these reasons, Plaintiffs are likely to succeed on the merits of their claims under the Fourth Amendment and Article I, section 13.

3. The Sheriff's Indefinite Retention and Sharing of GPS Location Data Pursuant to Program Rule 13 Violates the Right to Privacy.

The Sheriff's handling of GPS location data violates the right to privacy under the California Constitution. CAL. CONST. art. 1, § 1. Under Article I, section 1, Plaintiffs have the initial burden of showing (1) a legally protected privacy interest, (2) a reasonable expectation

of privacy under the circumstances, and (3) a serious invasion of privacy by the Sheriff. *See Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 35-37 (1994). These threshold requirements do not pose a high bar. Demonstration of any "genuine, nontrivial invasion of a protected privacy interest" shifts the burden to the government to provide "justification for the conduct in question," *Loder v. City of Glendale*, 14 Cal. 4th 846, 893-94 (1997), which the plaintiff may then rebut with proof of "feasible and effective alternatives to defendant's conduct which have a lesser impact on privacy interests," *Hill*, 7 Cal. 4th at 40. Ultimately, the Court balances the severity of the privacy intrusion against the government's legitimate interests. *Loder*, 14 Cal. 4th at 894. Here, the balance weighs decidedly against Rule 13.

Plaintiffs easily meet their initial burden. First, the indefinite retention and sharing of GPS location data impacts recognized privacy interests. As discussed, *supra*, *Carpenter* held that individuals have a privacy interest in their GPS location data.

Second, Plaintiffs' expectation of privacy is objectively reasonable under the circumstances. *Hill*, 7 Cal. 4th at 36-37. Plaintiffs retain an expectation of privacy despite their pending criminal cases. As pretrial releasees, they have not been adjudicated guilty and instead "retain[] a fundamental constitutional right to liberty." *Humphrey*, 11 Cal. 5th at 150 (citing *United States v. Salerno*, 481 U.S. 739, 750 (1987)). Moreover, for an individual to be released pretrial, a court must necessarily determine that they are safe for release under certain conditions, setting pretrial releasees apart from those still detained. *See id.* at 154.[7] Thus, the only reduction in Plaintiffs' privacy is that commensurate with the purposes of the EM condition itself: to assure future court appearances and compliance with the court-ordered conditions of release via real-time location tracking. Plaintiffs reasonably expect, therefore, that their sensitive location data will not be handled in a manner beyond these purposes. *See Pettus*

[7] As the *Humphrey* Court emphasized, in "our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Id.* at 155 (quoting *Salerno*, 481 U.S. at 751). Any suggestion in *York* that pretrial detainees and releasees share the same, diminished expectations of privacy does not, therefore, appear to remain good law. In fact, a decade after *York*, the Ninth Circuit rejected the validity of that comparison when determining the constitutionality of pretrial search conditions. *See Scott*, 450 F.3d at 871, 872 ("pretrial releasees are ordinary people who have been accused of a crime but are presumed innocent" and "have suffered no judicial abridgement of their constitutional rights").

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") (citation omitted); *accord Hill*, 7 Cal. 4th at 27 (emphasizing government "misusing information gathered for one purpose in order to serve other purpose"). And for the same reasons that Plaintiffs do not legally waive their Fourth Amendment rights before the Court or by signing the Sheriff's Program Rules, Plaintiffs' reasonable expectations of privacy are not diminished by any purported consent.

Third, the invasion of privacy wrought by Rule 13 is "serious." *See id.* at 37 (defining "serious" as anything more than "slight or trivial"); *see also Cnty. of Los Angeles v. Los Angeles Cnty. Emp. Relations Comm'n*, 56 Cal. 4th 905, 929 (2013) (because the "disclosure contemplated . . . was more than trivial[,] . . . [i]t rose to the level of a 'serious' invasion of privacy under *Hill*"). To determine whether an invasion is more than trivial, courts consider its "nature, scope, and actual or potential impact . . . ." *Hill*, 7 Cal. 4th at 37. The Sheriff may retain program participants' GPS location data in perpetuity, long after their pending criminal charges are resolved and their participation in the program is complete. At a minimum, therefore, Rule 13 portends that an enormous quantum of "sensitive confidential information," *Carpenter*, 138 S. Ct. at 2217-18—months or years' worth of data documenting an individual's every movement—can be accessed by any member of law enforcement after a cursory say-so. *See Hill*, 7 Cal. 4th at 27 (Article I, section 1 passed to prevent government "stockpiling" of sensitive information). Worse, this data may be used to implicate class members in a crime. If they are innocent but happen to have been in the wrong place at the wrong time, *see* Simon Decl. ¶ 9, the consequences are necessarily severe: putting aside the catastrophic prospect of wrongful conviction, the lesser harms of wrongful arrest and prosecution carry enormous, negative consequences. *See, e.g.*, Samantha K. Brooks & Neil Greenberg, *Psychological Impacts of Being Wrongfully Accused of Criminal Offences: A Systematic Literature Review*, Medicine, Science, and the Law (2021) (detailing "severe" consequences of wrongful accusations, including reputational harm, traumatic experiences in custody, loss of employment, and psychological and somatic symptoms). But even for those who commit the

offenses for which they are prosecuted by virtue of Rule 13's data sharing, the harm to privacy is significant insofar as incriminating evidence was obtained in violation of their constitutional rights. *See Mathews v. Becerra*, 8 Cal. 5th 756, 779 (2019) (unauthorized data sharing was serious invasion of privacy in part because it exposed individuals to potential criminal liability). In sum, Plaintiffs are likely to surpass the threshold privacy inquiries.

The Sheriff, by contrast, has no particularized interest in indefinitely storing and dispersing class members' GPS location data to any member of law enforcement. First, the Sheriff's interest in retaining such data for contemporaneous location tracking endures only as long as a pretrial releasee is on EM. Once they are not on EM, the Sheriff is no longer charged with ensuring their future appearance in court or compliance with the conditions of their release. Second, the only interest served by a data-sharing policy is the general law enforcement interest in solving crime. But this interest would equally justify GPS surveillance of every person in San Francisco, making it "too simplistic and sweeping in its implications" to justify any intrusion on privacy rights. *See Pettus*, 49 Cal. App. 4th at 446; *see also City of Indianapolis v. Edmond*, 531 U.S. 32, 41-41 (2000); *see also Ferguson v. City of Charleston*, 532 U.S. 67, 79-80 (2001) ("justification for the absence of a warrant or individualized suspicion" must be "one divorced from the State's general interest in law enforcement"). Moreover, there is a "feasible and effective alternative[]" that would allow the Sheriff to turn over data in appropriate circumstances while imposing "a lesser impact on privacy interests" than Rule 13's engenders. *See Hill*, 7 Cal. 4th at 40. Consistent with the Fourth Amendment, the Sheriff could turn over data only when the requesting agency obtained a warrant or demonstrated an exception to the warrant requirement.

As a result, balancing the parties' interests weighs decisively in favor of the Plaintiff class and Plaintiffs are likely to succeed on the merits of their claim under Article I, section 1.

C. The Balance of Harms Weighs in Favor of a Preliminary Injunction.

Where, as here, Plaintiffs are likely to succeed on the merits of constitutional claims, the status quo constitutes a significant interim harm. *Robbins v. Superior Court*, 38 Cal. 3d 199, 207 (1985). Absent injunctive relief, Plaintiffs will be left with the choice of giving up

supposedly inalienable rights or foregoing the possibility of pretrial release. *Id.* Plaintiffs and others similarly situated would also suffer tangible harms. If SFSO continues to conduct warrantless searches and retain and share GPS data, EM releasees are vulnerable to harassment, needless intrusions on their privacy, and further criminal legal system involvement with its attendant consequences. And even the knowledge of the Sheriff's purported authority presently harms Plaintiffs, causing feelings of exposure, violation, and anxiety.

In comparison, SFSO is not likely to suffer any harm if the preliminary injunction is granted. Where probable cause supports a search or the sharing of targeted GPS location data for general law enforcement purposes, any law enforcement agency investigating crime in San Francisco retains the ability to seek a warrant or act within a designated exception. The Sheriff cannot be harmed by having to rely on the orginary, constitutionally permissible tools of criminal investigation, as the Sheriff has no right to target a vulnerable subsection of individuals for heightened, extra-legal surveillance. *See id.* (harm to defendant "minimal and speculative" where alternatives to the public benefits program were available). Moreover, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citation omitted); *see also Legend Night Club v. Miller*, 637 F.3d 291, 302-03 (4th Cir. 2011) (holding that government was "in no way harmed by the issuance of an injunction that prevents [it] from enforcing unconstitutional restrictions"). The balance of harms thus requires preliminary injunctive relief.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their preliminary injunction motion and enjoin the imposition and enforcement of Rules 5 and 13.

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Respectfully submitted,

By: _____

Shilpi Agarwal (SBN 270749)
sagarwal@aclunc.org
Avram D. Frey (MJP 804789)
afrey@aclunc.org
Emi Young (SBN 311238)

eyoung@aclunc.org
Hannah Kieschnick (SBN 319011)
hkieschnick@aclunc.org
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NORTHERN CALIFORNIA, INC.
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 621-2493
Facsimile: (415) 255-1478

Justina Sessions (SBN 270914)
jsessions@wsgr.com
John P. Flynn (SBN 141094)
jflynn@wsgr.com
Colleen Bal (SBN 167637)
cbal@wsgr.com
Dylan G. Savage (SBN 310452)
dsavage@wsgr.com
Malavika F. Lobo (SBN 317635)
mlobo@wsgr.com
WILSON, SONSINI, GOODRICH & ROSATI
One Market Plaza
Spear Tower, Suite 3300
San Francisco, CA 94105
Telephone: (415) 947-2197
Facsimile: (415) 947-2000

Attorneys for Plaintiffs