TONY LOPRESTI, County Counsel (S.B. #289269)
ROBIN M. WALL, Lead Deputy County Counsel (S.B. #235690)
XAVIER M. BRANDWAJN, Deputy County Counsel (S.B. #246218)
OFFICE OF THE COUNTY COUNSEL
70 West Hedding Street, East Wing, Ninth Floor
San José, California 95110-1770
Telephone: (408) 299-5900
Facsimile: (408) 292-7240

Attorneys for Defendant
COUNTY OF SANTA CLARA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
(San Francisco Division)

CALVARY CHAPEL SAN JOSE; a California nonprofit corporation; PASTOR MIKE MCCLURE, an individual,

Plaintiffs,

v.

SANTA CLARA COUNTY; and SAFEGRAPH,

Defendants.

No. 23CV04277 VC

DEFENDANT COUNTY OF SANTA CLARA'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Date: December 7, 2023
Time: 10:00 a.m.
Crtrm.: 4, 17th Floor
Judge: The Honorable Vince Chhabria

NOTICE OF MOTION AND MOTION

TO PLAINTIFFS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on December 7, 2023 at 10:00 a.m., or as soon thereafter as the matter may be heard in Courtroom 4, 17th Floor of the U.S. District Courthouse, 450 Golden Gate Avenue, San Francisco, California, the Honorable Vince Chhabria presiding, Defendant County of Santa Clara (the "County") will and hereby does move this Court, pursuant to Federal Rule of Civil Procedure 12(b)(6), for an order dismissing this action with prejudice.

The County's motion is based on this Notice of Motion, Motion, the following Memorandum of Points and Authorities, the concurrently filed Request for Judicial Notice, the pleadings and other papers on file in this action; and on such oral argument as the Court may permit.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This action is but the latest chapter in a seemingly never-ending series of complaints by Calvary Chapel San Jose ("Calvary") and its Senior Pastor, Mike McClure (collectively, "Plaintiffs") about the County, its elected officials, and its legal and public health officers, arising from the County's enforcement of its (now long rescinded) COVID-19 related public health orders. Disappointed with the results of their prior state and federal lawsuits challenging the constitutionality of those public health orders and the County's enforcement of the same, Plaintiffs have now imagined and alleged an "Orwellian" world where the County supposedly targeted Plaintiffs by geofencing Calvary's campus and directed the collection of mobility data on Calvary's employees and congregants to "weaponize" such data in state court litigation against Plaintiffs. In fact, Plaintiffs' dystopian fantasy is based on the County's reliance on an expert, in current litigation against Plaintiffs, who utilized a *commercially available* set of aggregated and anonymized data sold by a private company, SafeGraph. The reasons for dismissing this case are several, but pursuant to Rule 12(b)(6) include the following independent grounds.

First, the comity principles of the first-to-file rule and the claim-splitting doctrine guide the Court to dismiss this action given the earlier and pending action styled *Calvary Chapel San Jose, et al. v. County of Santa Clara*, No. 5:20-cv-03794-BLF (N.D. Cal.) ("Freeman Action"), which involves substantially the same parties, claims, and issues. For more than three years in state and federal court, Plaintiffs argued at length—and with no success—that the County targeted churches and Calvary in its COVID-19 rules and their enforcement. This new lawsuit alleges the same, with one new factual allegation regarding purported surveillance through mobility data. Indeed, the central thrust of this case is ostensibly predicated on Plaintiffs' misunderstanding of an expert report, submitted in the Freeman Action, which relied on mobility data obtained from SafeGraph.

Second, Plaintiffs have not stated—and cannot plausibly allege—any basis for *Monell* liability by the County. They cannot plead a longstanding policy or practice of targeting churches, and their allegations that the supposed deep government surveillance operation was ratified by "final policymakers" at the County are conclusory and unsupported by local law.

Third, by repeatedly alleging that the County directed SafeGraph to collect mobility data on Calvary and its congregants for use in the County's state court action against Plaintiffs to enforce its public health orders, Plaintiffs have pled conduct that is facially incidental to litigation and, therefore, immune from liability under the *Noerr-Pennington* doctrine.

Fourth, the private search exception bars Plaintiffs' claim of an unreasonable search in violation of the Fourth Amendment. The Complaint and judicially noticeable materials establish that SafeGraph, a private data company, created a mobility data set that the County, according to Plaintiffs, then used without modification or addition.

II. BACKGROUND

A. Plaintiffs' Earlier-Filed Federal Case Against the County

On June 9, 2020, Plaintiffs, along with another church and its pastor, filed the Freeman Action in this District against the County's Public Health Officer and Board of Supervisors. County's Request for Judicial Notice ("RJN"), Ex. 1. In that action, Plaintiffs originally challenged the constitutionality of the County's COVID-19 stay-at-home order and restrictions on indoor gatherings. *Id.* Following amendments and extensive pleadings motion practice, the operative complaint alleges constitutional claims against the County related to the County's COVID-19 public health orders in 2020 and 2021. RJN, Ex. 2.

On November 10, 2022, the County served its expert disclosures, including a report by Stanford Law School's Professor Daniel Ho. RJN, Ex. 3. Ho provided a mobility analysis relying on aggregated and anonymized mobility data he obtained from SafeGraph (a co-defendant in the present case), who in turn "obtains this data from mobile applications when users have opted in to location tracking." *Id.* at p. 4. SafeGraph is a private company that "aggregates information from 47 million mobile devices across the United States." *Id.* "SafeGraph aggregates information about points-of-interest (POIs), including daily visit counts." *Id.* In Santa Clara County alone, "the data contains information about 25,765 POIs . . . ."[1] Ho's analysis rebutted Plaintiffs' contention that Calvary's in-person religious services held in defiance of the County's public health orders did not

[1] *See also generally* https://www.safegraph.com/.

present any risk of spreading COVID-19 during the pandemic. *See id.* at pp. 3-4. Tellingly, the Ho report includes a figure that is reproduced identically in Plaintiffs' complaint in this action. *Compare id.* at p. 5 *with* ECF 1, ¶ ¶27-29.

On March 10, 2023, Judge Freeman entered an order granting the County's motion for abstention under *Younger v. Harris*, 401 U.S. 37 (1971), dismissing Plaintiffs' claims for injunctive and declaratory relief and staying Plaintiffs' nominal damages claims until the final resolution of the County's state court enforcement action (discussed below). RJN, Ex. 4.

On March 22, 2023, Plaintiffs filed a notice of appeal of the *Younger* abstention order and a previous interlocutory order dismissing, on *Noerr-Pennington* immunity grounds, a single claim for First Amendment retaliation against the County's then-County Counsel, James Williams. RJN, Ex. 5. As of this filing, that appeal is fully briefed but not yet scheduled for oral argument.

B. The County's State Court Enforcement Action Against Plaintiffs

On October 27, 2020, the County and the People of the State of California sued Calvary and McClure in Santa Clara County Superior Court to enjoin their ongoing and pervasive violations of the County's COVID-19 public health orders. RJN, Exs. 6, 7.

On April 7, 2023, the Superior Court granted the County's and the People's motion for summary adjudication, rejecting Calvary's and McClure's constitutional defenses to the public health orders and awarding the County $1.2 million in fines for their public health order violations. RJN, Ex. 10. Neither the County's motion nor the court's order relied on any mobility data. RJN Exs. 8-9, 10.

C. This Action

Plaintiffs filed this case on August 22, 2023 against the County and SafeGraph. They allege violations of the First and Fourth Amendments to the U.S. Constitution arising from the County's alleged instruction to SafeGraph to collect—and, in its state court enforcement action against Plaintiffs, the County's subsequent (and hypothetical) use of—mobility data regarding Calvary employees, visitors, and congregants. *See generally* ECF 1.

III. LEGAL STANDARDS

To survive a Federal Rule of Civil Procedure Rule 12(b)(6) motion to dismiss, a complaint

must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when it "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court must accept all well-pleaded factual allegations as true, *Twombly*, 550 U.S. at 555-56, but need not accept as true conclusory statements or legal conclusions couched as factual assertions. *See Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

IV. ARGUMENT

A. This Case Is Duplicative of Plaintiffs' Pending Federal Case Against the County.

This case presents substantially similar parties, issues, and evidence as in Plaintiffs' prior and pending federal case. Under either the first-to-file rule or the claim-splitting doctrine, the Court should dismiss this duplicative case.

1. The "first-to-file rule" precludes this new action.

"A federal district court has discretion to dismiss, stay, or transfer a case to another district court under the first-to-file rule." *Wallerstein v. Dole Fresh Vegetables, Inc.*, 967 F. Supp. 2d 1289, 1292 (N.D. Cal. 2013) (citing *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 94-95 (9th Cir. 1982)). "The rule is primarily meant to alleviate the burden placed on the federal judiciary by duplicative litigation and to prevent the possibility of conflicting judgments" and "should not be disregarded lightly." *Id.* at 1292-93 (citations omitted). The rule considers three factors: "(1) chronology of the actions; (2) similarity of the parties; and (3) similarity of the issues." *Id.* at 1293 (citations omitted). "[T]he first-to-file rule is not limited to cases brought in different districts." *Id.* at 1294 (collecting cases); *see also Dolores Press, Inc. v. Robinson*, No. CV 16-01275-R, 2016 U.S. Dist. LEXIS 195184, **1-4 (C.D. Cal. July 28, 2016) (dismissing case where earlier case was filed in same district but pending before the Ninth Circuit). Each of these factors is met here.

First, the chronology factor is satisfied because the Freeman Action was filed on June 10, 2020, over three years before this action. RJN, Ex. 1.

Second, Calvary, McClure, and the County are parties in both actions. That SafeGraph is a new defendant in the present action is of no moment, for the first-to-file rule does not require exact

identity of the parties, but rather substantial similarity. *See Microchip Tech., Inc. v. United Module Corp.*, No. CV-10-04241-LHK, 2011 WL 2669627, *3 (N.D Cal. July 7, 2011); *Pac. Coast Breaker, Inc. v. Connecticut Elec., Inc.*, No. CIV 10-3134 KJM EFB, 2011 WL 2073796, *3 (E.D. Cal. May 24, 2011) ("The rule is satisfied if some [of] the parties in one matter are also in the other matter, regardless of whether there are additional, unmatched parties in one or both matters."). That requirement is met here, especially given Plaintiffs' allegations that SafeGraph acted "[a]t the behest of the County" and pursuant to "specific instructions" from the County. ECF 1, ¶¶ 25, 31.

Third, the issues in both cases are sufficiently similar, as exact identity is not required. *See Intersearch Worldwide, Ltd. v. Intersearch Grp., Inc.*, 544 F. Supp. 2d 949, 959 (N.D. Cal. 2008) (finding that "the 'first-to-file' rule is satisfied by a *sufficient* similarity of issues"); *Wallerstein*, 967 F. Supp. 2d at 1297 (finding that "the thrust of the lawsuits is identical" because both complained about deceptive labeling in salad products). The Complaint in this action reproduces images from—and is wholly based on an indefensible misconstruction of—a third party expert's report served on the behalf of the County in the Freeman Action (*compare* RJN, Ex. 3 *with* ECF 1, ¶¶ 23-38), making this case wholly derivative of *litigation conduct* in that earlier action. Further, the central thrust of both cases is that the County targeted Plaintiffs in its enforcement of public health orders because of an allegedly discriminatory animus against religion—through fines, surveillance, and other ways.[2] Indeed, Plaintiffs' theory here is that the supposed geofencing surveillance is yet another problem with the County's enforcement of COVID-19 restrictions—at issue in both the state and Freeman Action—and yet another example of "the County's history of discrimination against religion and

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[2] Some allegations are nearly identical in both cases. *Compare*, *e.g.*, ECF 1, ¶ 2 ("the County vigorously enforced its orders and adopted a system that authorized crippling fines on churches and other entities that did not comply"), ¶ 113 (alleging "the County's history of discrimination against religion and CCSJ during the COVID-19 pandemic" including by "consistently impos[ing] harsher restrictions on churches and fine[s] . . . while overlooking other large gatherings"), ¶ 114 ("Similarly, the Defendants imposed an expansive geofencing operation on CCSJ while overlooking other large gathering places like protests, weddings, and graduation parties.") *with* RJN, Ex. 2, ¶ 6 ("the County consistently imposed even harsher restrictions on churches and adopted a fine system that authorized crippling fines on churches and other organizations that did not comply with their COVID-19 orders"), ¶ 88 ("Several congregants have also expressed to Pastor McClure they felt intimidated by the County enforcement officers' persistent surveillance of church services"), ¶ 144 ("The Defendants' persistent surveillance, crippling fines and threatening letters to CCSJ's bank also interfered with the Plaintiffs' constitutional rights").

[Calvary] during the COVID-19 pandemic." (ECF 1, ¶ 113.) But this is little more than the same baseless legal theories asserted at some point in the Freeman Action, albeit now further buttressed by the additional factual allegation that the County collected and weaponized location data.[3] Not dismissing this case would invite inconsistent judgments on substantially similar issues arising from the same nucleus of facts—the County's enforcement of its COVID-19 public health orders.

2. The claim-splitting doctrine precludes this new action.

"Plaintiffs generally have no right to maintain two separate actions involving the same subject matter at the same time in the same court against the same defendant." *Adams v. California Dep't of Health Servs.*, 487 F.3d 684, 688 (9th Cir. 2007) (internal quotation marks and citation omitted), *abrogated on other grounds by Taylor v. Sturgell*, 553 U.S. 880 (2008). "The doctrine against claim splitting provides that a party is 'not at liberty to split up his demand, and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible.'" *Murphy v. Wells Fargo Home Mortg.*, No. C 12-6228 SI, 2013 U.S. Dist. LEXIS 118410, **14-15 (N.D. Cal. Aug. 19, 2013) (quoting *The Haytian Republic*, 154 U.S. 118, 125 (1894)). The main purpose behind the doctrine is "to protect the defendant from being harassed by repetitive actions based on the same claim." *Clements v. Airport Auth. of Washoe Cnty.*, 69 F.3d 321, 328 (9th Cir. 1995). The doctrine borrows from the test for claim preclusion and assesses "whether the causes of action and relief sought, as well as the parties or privies to the action, are the same." *Adams*, 487 F.3d at 689; *see also Anguiano-Tamayo v. Wal-Mart Assocs.*, No. 18-cv-04598-JSC, 2019 U.S. Dist. LEXIS 14229, **12-13 (N.D. Cal. Jan. 29, 2019) (staying the later-filed case). Where claim splitting exists, a district court has broad discretion to dismiss a duplicative later-filed action, to stay it pending resolution of the previously filed action, to enjoin the parties from proceeding with it, or to consolidate both actions. *See Adams*, 487 F.3d at 692. Here, the claim-splitting test is easily met, as discussed below, and justifies a dismissal.

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[3] *Compare, e.g.,* ECF 1, ¶¶ 97-108 (Establishment Clause violation) *with* RJN, Ex. 1, ¶¶ 135-144 (Establishment Clause violation); *compare* ECF 1, ¶¶ 109-116 (Free Exercise Clause violation) *with* RJN, Ex. 2, ¶¶ 95-104 (Free Exercise Clause violation).

a. Both actions involve the same causes of action and requested relief.

"To ascertain whether successive causes of action are the same, [courts] use the transaction test, developed in the context of claim preclusion." *Id.* at 689. "Whether two events are part of the same transaction or series depends on whether they are related to the same set of facts and whether they could conveniently be tried together." *Id.* Courts examine four criteria in applying the transaction test: "(1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts." *Id.* (quoting *Constantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1982)). "The last of these criteria is the most important." *Id.* (internal quotation marks and citation omitted).

Here, as shown above, both actions arise from the same transactional nucleus of facts—the County's investigation of and enforcement against violations of its COVID-19 public health orders. In the Freeman Action, Plaintiffs already alleged that Calvary and its "congregants . . . felt intimidated by the County enforcement officers' persistent surveillance of church services" (RJN, Ex. 2, ¶ 88); this action adds only that such alleged surveillance also included the collection of geofencing location data (ECF 1, ¶ 6). As a result, the evidence—about what the County did or did not do in investigating violations, and whether the County enforced its public health orders any differently against churches—will be substantially the same in both cases. Indeed, the Ho report that analyzed aggregated and anonymous mobility data, and which spurred this latest lawsuit, was submitted in the earlier-filed Freeman Action. As shown above, moreover, both actions involve alleged infringement of substantially the same constitutional rights. Further, to not dismiss this case would be tantamount to condoning an impermissible end-run around both Judge Freeman's order staying the Freeman Action under *Younger* and the Ninth Circuit's current review of that order.

b. Both actions involve the same parties.

In both actions, the plaintiffs are the same, and the County is a defendant. The addition of SafeGraph in this case does not change the analysis, as SafeGraph's only involvement in this case is as an alleged agent of the County. *See* ECF 1, ¶¶ 25, 26, 30, 31; *Adams*, 487 F.3d at 691-92 (privity

exists where agents and new defendants were "virtually represented" by common defendant).

In sum, the Court should not permit Plaintiffs to split their claim and harass the County with duplicative litigation. This case should thus be dismissed without leave to amend.

B. Plaintiffs Do Not Plead a Plausible Theory of *Monell* Liability.

Even if properly heard, Plaintiffs' claims do not plausibly allege liability by the County.

Local governments may not be sued under § 1983 for injuries inflicted solely by their employees or agents. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 894 (1978). Municipalities, however, may be held liable under § 1983 when an official policy or custom causes a constitutional tort. *Id.* at 690. To proceed with a *Monell* claim, a plaintiff must plausibly plead facts showing: "(1) that [he] possessed a constitutional right of which he was deprived; (2) that the municipality had a policy, custom, or practice; (3) that the policy, custom or practice amounted to deliberate indifference to [his] constitutional rights; and (4) that the policy, custom or practice was the moving force behind the constitutional violation." *Torres v. Saba*, No. 17-CV-06587-SI, 2019 WL 111039, at *6 (N.D. Cal. Jan. 4, 2019). A plaintiff must allege sufficient facts regarding the specific nature of the alleged policy, custom, or practice; merely alleging that a policy, custom, or practice existed is not enough. *See AE ex rel. Hernandez v. Cnty. of Tulare*, 666 F.3d 631, 636-68 (9th Cir. 2012).

"There are three ways to show a policy or custom of a municipality: (1) by showing a longstanding practice or custom which constitutes the 'standard operating procedure' of the local government entity; (2) by showing that the decision-making official was, as a matter of state law, a final policymaking authority whose edicts or acts may fairly be said to represent official policy in the area of decision; or (3) by showing that an official with final policymaking authority either delegated that authority to, or ratified the decision of, a subordinate." *Menotti v. City of Seattle*, 409 F.3d 1113, 1147 (9th Cir. 2005) (internal quotation marks omitted). Here, despite alleging that the County "is sued herein under *Monell*" (ECF 1, ¶ 16) and invoking section 1983 (*id.*, ¶ 19), Plaintiffs do not plausibly plead any theory of municipal liability against the County.

1. Plaintiffs do not plausibly plead a longstanding practice or custom.

For a practice or custom to function as an entity's standard operating procedure, it "must be so 'persistent and widespread' that it constitutes a 'permanent and well settled city policy.'" *Trevino*

v. Gates, 99 F.3d 911, 918 (9th Cir. 1996) (citing *Monell*, 436 U.S. at 691). "Liability for improper custom may not be predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient duration, frequency, and consistency that the conduct has become a traditional method of carrying out policy." *Id*. (citations omitted). Thus, "one or two incidents ordinarily cannot establish a policy or custom, while more incidents may permit the inference of a policy, taking into account their similarity, their timing, and subsequent actions by the municipality." *J.M. by & Through Rodriguez v. Cnty. of Stanislaus*, No. 118CV01034LJOSAB, 2018 WL 5879725, at *5 (E.D. Cal. Nov. 7, 2018); *see also Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443-44 (9th Cir. 1989) (holding that no policy or custom can be established by random or isolated events).

Plaintiffs here do not meet this pleading standard. At best, they allege only that the County's "targeting of CCSJ through their geofencing operation falls in line with the County's history of discrimination against religion and CCSJ during the COVID-19 pandemic." ECF 1, ¶ 113. The County, Plaintiffs allege, "consistently imposed harsher restrictions on churches and fined Calvary millions of dollars while overlooking other large gatherings" (*id.*) and "imposed an expansive geofencing operation on CCSJ while overlooking other large gathering places like protests, weddings, and graduation parties" (*id.*, ¶ 114). But these conclusory allegations do not establish a longstanding custom or practice—of collecting location data from only churches—for two reasons.

First, Plaintiffs inconsistently allege that the County collected location data from several types of businesses and entities in the county, not just religious organizations. *See id.*, ¶ 37 (alleging that the County "collected location data from CCSJ *and other business and organizations within the County* for over one year – as part of a well-orchestrated geofencing operation.") (emphasis added). Courts may dismiss a claim as not plausible where its supporting factual allegations are contradictory. *See Alatraqchi v. Uber Techs., Inc.*, No. C-13-03156 JSC, 2013 WL 4517756, at *5 (N.D. Cal. Aug. 22, 2013) (granting motion to dismiss claim for employment discrimination because the allegations were contradictory as to whether plaintiff was an employee or independent contractor); *Apple Inc. v. Psystar Corp.*, 586 F. Supp. 2d 1190, 1200 (N.D. Cal. 2008) (Alsup, J.) (granting motion to dismiss where antitrust claim did not plausibly allege an independent market because the allegations were internally contradictory).

Second, Plaintiffs have not pled a practice or custom of sufficient duration or similarity. They allege a "geofencing operation" lasting only a period of months and to address a unique situation—notably, while certain (now, long rescinded) public health orders, meant to curb a once-in-a-century global pandemic, were in effect. *See*, *e.g.*, ECF 1, ¶¶ 1, 2, 37. And because Plaintiffs' allegation that the County "imposed harsher restrictions on churches and fined Calvary millions of dollars while overlooking other large gatherings" (*id.*, ¶ 113) bears no similarity to an alleged practice of using location data, it cannot establish a longstanding custom or practice of targeting churches (or anyone) through geofencing. *See Castro v. Cnty. of Los Angeles*, 797 F.3d 654, 671 (9th Cir. 2015) ("[A] plaintiff . . . must show a pattern of similar incidents in order for the factfinder to conclude that the alleged informal policy was so permanent and well settled as to carry the force of law."); *Sweiha v. Cnty. of Alameda*, No. 19-CV-03098-LB, 2019 WL 4848227, *4-5 (N.D. Cal. Oct. 1, 2019) (granting motion to dismiss because allegations of five other incidents did not show a custom or policy where the incidents "have markedly different facts").

Therefore, Plaintiffs do not plead a custom or practice of sufficient length or similarity.

2. Williams and Cody are not final policymakers on surveillance operations.

"Whether an official has final policymaking authority is a question for the court to decide based on state law." *Christie v. Iopa*, 176 F.3d 1231, 1235 (9th Cir. 1999). The court must "identify the particular area or issue for which the official is alleged to be the final policymaker," *Cortez v. Cnty. of Los Angeles*, 294 F.3d 1186, 1189 (9th Cir. 2002), and then analyze state law to determine the character of an official's function, *Molex v. City & Cnty. of S.F.*, No. 11-cv-01282-YGR, 2012 U.S. Dist. LEXIS 103890, *43 (N.D. Cal. July 25, 2012). "Specifically, federal courts look to state laws, county charters and codes, and city charters to determine if a municipal employee has final policymaking authority in a particular domain . . . ." *Avenmarg v. Humboldt Cty.*, 19-cv-05891-RMI, 2020 U.S. Dist. LEXIS 138889, *22 (N.D. Cal. Aug. 4, 2020) (citations omitted). "[S]pecificity is key to determining where final policymaking authority lies." *Id.* at *24.

Importantly, "the authority to exercise discretion while performing certain functions does not make the official a final policymaker unless the decisions are final, unreviewable, and not constrained by the official policies of superiors." *Zografos v. City of S.F.*, No. C 05-3881 PJH, 2006

U.S. Dist. LEXIS 90101, *46 (N.D. Cal. Dec. 13, 2006); see also *Christie*, 176 F.3d at 1236-37 (in determining whether policymaking authority has been delegated to a municipal official, "courts consider whether the official's discretionary decision is constrained by policies not of that official's making and whether the official's decision is subject to review by the municipality's authorized policymakers"). Thus, municipal liability under *Monell* can be imposed "only if [the individual] was responsible for establishing [the municipality's] . . . policy." *Gillette v. Delmore*, 979 F.2d 1342, 1350 (9th Cir. 1992). In this case, any theory of *Monell* liability predicated on James Williams (the County Counsel at the time of the events alleged in the Complaint) or Dr. Sara Cody (the County's Public Health Officer) having final policymaking authority—over an alleged policy of geofencing surveillance of religious institutions—fails as a matter of both pleading and law.

First, as a matter of pleading, Plaintiffs allege only in conclusory terms that the "surveillance operation was ratified by County Counsel James Williams and County Health Officer Dr. Sara Cody – officials who are considered final policy makers in their respective departments." ECF 1, ¶ 32; *see also id.*, ¶ 37 (also alleging ratification in conclusory terms). But this is inadequate because pleading ratification requires facts showing "that the authorized policymakers approve a subordinate's decision *and the basis for it*." *Christie*, 176 F.3d at 1239 (emphasis added); *see also Gilette*, 979 F.2d at 1348 ("*Prapotnik* requires that a policymaker approve a subordinate's decision *and the basis for it* before the policymaker will be deemed to have ratified the subordinate's discretionary decision.") (emphasis in original; citation omitted). Plaintiffs' failure to plead facts about Williams' or Cody's decision, or the basis for it, warrants dismissal. *See Mondragon v. City of Fremont*, No. 18-CV-01605-NC, 2020 WL 1156953, at *4 (N.D. Cal. Mar. 10, 2020) (dismissing ratification claim where the "complaint contains vague conclusory statements rather than specific facts").

Second, as a matter of law, to the extent an alleged one-off, litigation-related geofencing or electronic surveillance operation could even qualify as a "policy" for purposes of *Monell*, Plaintiffs do not cite any legal basis to plausibly allege that Williams or Cody was a final policymaking authority as to that particular domain. Indeed, the Complaint—alleging only that Williams and Cody are final policymakers as to *different* areas—does not even purport to make that connection necessary for municipal liability. *See* ECF 1, ¶ 33 (alleging Cody's authority "regarding the

implementation of policies related to COVID-19, as well as research projects analyzing the effects of the County's orders"), ¶ 34 (alleging Williams' authority in "overs[eeing] the County's legal department and provid[ing] legal advice to the County throughout the COVID-19 pandemic"). Similarly, Plaintiffs do not cite—and cannot cite—any state law establishing either the County Counsel's or the Public Health Officer's *final policymaking authority* over litigation-related geofencing or electronic surveillance practices. To the extent Plaintiffs purport to invoke the County Counsel's authority over litigation matters generally or the Public Health Officer's authority over public health matters generally, that would also be legally insufficient because, again, "*specificity* is key to determining where final policymaking authority lies" and, thus, "courts look to state laws . . . to determine if a municipal employee has final policymaking authority in a *particular* domain . . . ." *Avenmarg*, 2020 U.S. Dist. LEXIS 138889 at *22-24 (emphasis added; citations omitted).

In sum, the Complaint should be dismissed because Plaintiffs cannot plead *Monell* liability.

C. The County is Immune from Liability Under the *Noerr-Pennington* Doctrine.

The Complaint plainly alleges conduct that is incidental to litigation and thus immunized.

The *Noerr-Pennington* doctrine immunizes parties from liability based on petitioning public authorities, which includes the pursuit and defense of lawsuits before the courts. *Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1007 (9th Cir. 2008). The doctrine also protects conduct "incidental to a lawsuit" or ancillary to litigation, and it applies to Section 1983 claims. *Id.*; *see also Empress LLC v. City and Cnty. of San Francisco*, 419 F.3d 1052, 1056 (9th Cir. 2005); *Redbox Automated Retail, LLC v. Buena Vista Home Ent., Inc.*, 399 F. Supp. 3d 1018 (C.D. Cal. 2019). *Noerr-Pennington* protection extends to government entities and officials. *Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 645 (9th Cir. 2009); *B&G Foods N. Am., Inc. v. Embry*, 29 F.4th 527, 537 (9th Cir. 2022).

Here, Plaintiffs repeatedly allege that the County initiated a geofencing surveillance operation of Calvary "because of the County's ongoing state enforcement action against Calvary" (ECF 1, ¶ 26)—i.e., developing evidence in service of litigation. *See also id.*, ¶ 38 ("The County sought to weaponize the location data against CCSJ *in its ongoing state enforcement action filed in the Santa Clara County Superior Court*."), ¶ 100 ("SafeGraph, at the behest of the County,

impermissibly targeted CCSJ, *so the County could obtain incriminating evidence against the church in their ongoing enforcement action . . . .*"), ¶ 112 ("Defendants specifically targeted CCSJ *because of the County's ongoing state enforcement action where it sought to weaponize potentially incriminating evidence against Calvary*.") (all emphasis added). If accepted as true for purposes of this Motion, these allegations—which underpin all of Plaintiffs' claims—establish conduct that is "incidental to litigation" and thus protected. As such, Plaintiffs' claims must fail. *See Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 932-34 (9th Cir. 2006) (to protect the First Amendment right to petition, courts must give "breathing space" to speech that is made outside of court but related to litigation); *McMillin v. Foster City*, No. C 11-03201 WHA, 2012 U.S. Dist. LEXIS 91538, *7-26 (N.D. Cal. July 2, 2012) (dismissing First, Fourth, and Fourteenth Amendment claims where, *inter alia*, a municipality's filing of a report with the state agency licensing plaintiff's business, after dismissal of state case by plaintiff, was activity protected under the *Noerr-Pennington* doctrine).[4]

There is a "sham" exception to *Noerr-Pennington* immunity, but Plaintiffs do not plead it—nor could they plausibly do so, given the record. *See*, *e.g.*, *Kottle v. Nw. Kidney Centers*, 146 F.3d 1056, 1060 (9th Cir. 1998). The exception is satisfied only if a plaintiff can show that a lawsuit is objectively baseless and conceals an attempt to use a government process, as opposed to the outcome of that process, to injure the plaintiff. *Theme Promotions*, 546 F.3d at 1007. An "objectively baseless" lawsuit is one in which "no reasonable litigant could realistically expect success on the merits." *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961). Here, the fact that the state court in that action granted the County summary adjudication—rejecting all of Plaintiffs' constitutional arguments—conclusively establishes that the state court case was not a sham. RJN, Ex.10.

Therefore, the *Noerr-Pennington* doctrine precludes Plaintiffs' claims against the County.

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[4] *See also Smith v. Combustion Engineering, Inc.*, 856 F.2d 196, 1988 WL 87703, * 3 (6th Cir. 1988) (Unpub. Disp.) (affirming district court's holding that defendant's entry into a contract with an investigative agency to develop information to present to prosecutors was within "the shield of the Noerr-Pennington doctrine" because "[t]he investigation, search and prosecution was a result of C-E Cast's desire to protect what it, rightly or wrongly, believed to be its own product or trade secret").

D. Plaintiffs Cannot Plausibly Plead a Fourth Amendment Violation.

Plaintiffs allege that the County violated the Fourth Amendment by obtaining, from SafeGraph, commercially available geofencing location data about Calvary and its congregants without a warrant. ECF 1, ¶¶ 6-7, 23-25, 35, 84-96. The Complaint fails to state an actionable, unconstitutional search.

"As the Fourth Amendment protects individuals from government actors, not private ones, a private party may conduct a search that would be unconstitutional if conducted by the government." *United States v. Wilson*, 13 F.4th 961, 967 (9th Cir. 2021) (internal citation omitted). "The private search doctrine concerns circumstances in which a private party's intrusions would have constituted a search had the government conducted it and the material discovered by the private party then comes into the government's possession." *Id.* Thus, "an antecedent private search excuses the government from obtaining a warrant to repeat the search but only when the government search does not exceed the scope of the private one." *United States v. Jacobsen*, 466 U.S. 109, 115 (1984).

But the exception will not apply if there is "some degree of governmental knowledge and acquiescence" in a private search, such that the private actor may be an "agent of the state." *United States v. Veatch*, 674 F.2d 1217, 1221-22 (9th Cir. 1981) (wishing to aid the government does not by itself suffice to convert a private actor into a government agent). Two factors are critical to decide if the person is a state agent: "(1) the government's knowledge and acquiescence, and (2) the intent of the party performing the search." *United States v. Walther*, 652 F.2d 788, 792 (9th Cir. 1981).

The private search exception precludes any plausible claim of Fourth Amendment violation against the County. Plaintiffs admit that SafeGraph is a private "data company that obtains and sells location data from the cell phones of millions of users." ECF 1, ¶ 17; *see also id.*, ¶¶ 53, 55, 58. Far from being a mere instrument of government searches, SafeGraph is alleged to be a private actor whose "clients include hedge funds, real-estate investors, advertisers, governments, and more." *Id.*, ¶ 17; *see also* RJN, Ex. 3 at p. 4. Further, the Complaint does not allege that the County searched for or collected any additional mobility data other than that provided by SafeGraph.

Plaintiffs attempt to plead around the private search doctrine by alleging that SafeGraph obtained the location data "[a]t the behest of the County" (ECF 1, ¶ 25), in surveillance "initiated by

the County" pursuant to "specific instructions to monitor the visit patterns of CCSJ congregants and employees" (*id.*, ¶ 31). But Plaintiffs bear the burden of plausibly alleging facts "establishing government involvement in a private search." *United States v. Cleaveland*, 38 F.3d 1092, 1093 (9th Cir. 1994). Here, the Complaint's threadbare, factually devoid allegations of "behest," initiation, and "specific instructions" do not satisfy the *Iqbal* and *Twombly* standard. Indeed, there are no facts regarding SafeGraph's intent in collecting aggregated, anonymized location data or how the County "ratified" SafeGraph's actions. *E.g.*, ECF 1, ¶¶ 32, 37.

Therefore, the private search doctrine precludes any plausible Fourth Amendment claim.

V. CONCLUSION

For the foregoing reasons, the County respectfully requests that the Court dismiss Plaintiffs' claims against the County with prejudice.

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Respectfully submitted,

TONY LOPRESTI
County Counsel

By: */s/ Xavier M. Brandwajn*
XAVIER M. BRANDWAJN
Deputy County Counsel

Attorneys for Defendant
COUNTY OF SANTA CLARA

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