

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
Case No. 4:22-cv-05541 JST
The Honorable Jon S. Tigar

**BRIEF OF AMICI CURIAE ELECTRONIC FRONTIER
FOUNDATION, PROFESSOR KATE WEISBURD, AND THE CATO
INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLEES
AND AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amici state that they do not have a parent corporation and that no publicly held corporation owns 10% or more of their stock.

Dated: May 17, 2024

By: /s/ *Hannah Zhao*
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STATEMENT OF INTEREST OF AMICI¹

The Electronic Frontier Foundation (“EFF”) is a non-profit civil liberties organization with more than 30,000 active donors that has worked for over 30 years to ensure that technology supports freedom, justice, and innovation for all people of the world. EFF has written extensively on carceral surveillance in general² and electronic monitoring (“EM”)³ in particular.

Kate Weisburd is a tenured professor of law at George Washington University School of Law, in Washington D.C. Her research focuses on the Fourth Amendment, civil rights, and the use of surveillance technology in the criminal justice system. In particular, Professor Weisburd is a recognized expert on electronic ankle monitoring and has authored several articles and reports on the topic. Professor Weisburd often consults with other researchers, policy makers, government bodies and agencies on the use of ankle monitors and related technology, as well as policies and procedures governing various forms of court

¹ Pursuant to Federal Rule of Appellate Procedure Rule 29(a)(4)(E), amici certify that no person or entity, other than amici curiae, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part. The parties have consented to the filing of this brief.

² See, e.g., *A.B.O Comix, et al, v. San Mateo County*, EFF, <https://www.eff.org/cases/abo-comix-et-al-v-county-san-mateo-and-christina-corporus>.

³ See, e.g., *Street Level Surveillance: Electronic Monitoring*, EFF <https://sls.eff.org/technologies/electronic-monitoring>.

supervision.

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Toward that end, Cato's Robert A. Levy Center for Constitutional Studies publishes books and studies about legal issues, conducts conferences, issues the annual Cato Supreme Court Review, and files amicus briefs in cases involving civil liberties.

INTRODUCTION

The San Francisco County Sheriff indefinitely retains geolocation data obtained from GPS ankle monitors from people on pretrial release and turns it over to other law enforcement entities without suspicion or a warrant. This constitutes a serious privacy intrusion that does not pass constitutional muster.

Geolocation data is highly revealing, and the Sheriff's sharing and retaining that data without suspicion or a warrant is a serious privacy intrusion. The Sheriff's sharing of data is problematic in two distinct ways. First, the Sheriff shares comprehensive geolocation data collected from individuals subject to ankle monitoring. Second, it also performs, and shares the results of, reverse location searches that reveal who was in a particular location at a particular time. Each is aided by the Sheriff's indefinite retention of this data. Comprehensive geolocation data can reveal nearly every aspect of an individual's life and routines, while

reverse location searches can reveal associations between people and act as an attendance list at sensitive locations—whether it be a doctor’s office, church, protest, or the home. In most other situations, this privacy invasion would require a warrant.

People on pretrial release maintain a substantial amount of privacy and liberty interest. The Sherriff’s unreasonably intrusive retention and sharing conditions cannot be justified by a person’s pretrial release status, nor by notice or purported consent to the condition.

Nor can the Sherriff’s retention and sharing conditions be justified by the purported government interest of ensuring court appearances or public safety. Studies have shown there are less invasive methods to accomplish these goals. And the government cannot justify a search condition based solely on aiding the investigations of separate crimes by separate law enforcement agencies of which a person is not suspected.

ARGUMENT

I. THE SHERIFF’S ELECTRONIC MONITORING PROGRAM IS INVASIVE, INEFFECTIVE, AND RESTRICTIVE.

A. GPS location data reveals incredibly sensitive information.

Comprehensive location data can reveal sensitive and private information about an individual, such as their movement within the home or visits to a doctor’s office, union hall, or house of worship. Location data “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 v. United States*, 585 U.S. 296, 311 (2018) (quoting *United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring)). Even approximate location data can be revealing enough to trigger Fourth Amendment concern. *See Leaders of a Beautiful Struggle v. Baltimore Police Dep’t*, 2 F.4th 330, 342 (4th Cir. 2021). Separately, by revealing people’s proximity to one another, reverse location searches, also known as “geofence” searches or area searches,⁴ in particular can tell a story about where and with whom people live, socialize, visit, vacation, worship, and other “glimpses into individuals’ private lives.” *United States v. Chatrie*, 590 F. Supp. 3d 901, 931 n.39 (E.D. Va. 2022).

The Global Positioning System (GPS) data at issue in this case is especially revealing due to its high degree of accuracy and precision, as courts have

⁴ Reverse location searches involve a provider searching its entire reserve of location data to identify all people or devices located within a geographic area during a time period. They have been most widely discussed in search warrants served to the company Google for users’ location data. *See Jennifer Lynch, Is This the End of Geofence Warrants?*, EFF (Dec. 2023), <https://www.eff.org/deeplinks/2023/12/end-geofence-warrants>.

recognized.⁵ GPS devices can determine one’s location within meters,⁶ with vendors of some commercially available GPS devices claiming their devices provide centimeter-level accuracy.⁷ Thus, when someone’s location is tracked via GPS coordinates, there is more certainty that they are at a reproductive health services provider rather than a grocery store next door.

⁵ See, e.g., *United States v. Beverly*, 943 F.3d 225, 230 n.2 (5th Cir. 2019) (GPS data is “far more precise location information” than cell-site location information); *United States v. Diggs*, 385 F. Supp. 3d 648, 652 (N.D. Ill. 2019) (long-term, historical vehicle GPS data “fits squarely within the scope of the reasonable expectation of privacy identified by the *Jones* concurrences and reaffirmed in *Carpenter*”); *United States v. Maynard*, 615 F.3d 544, 562–63 (D.C. Cir. 2010), aff’d in part sub nom. *Jones*, 565 U.S. 400 (“[P]rolonged GPS monitoring reveals an intimate picture of the subject’s life that he expects no one to have—short perhaps of his spouse.”); *People v. Weaver*, 909 N.E.2d 1195, 1199–1200 (2009) (GPS data provides “with breathtaking quality and quantity” a “highly detailed profile, not simply of where we go, but by easy inference, of our associations—political, religious, amicable and amorous, to name only a few—and of the pattern of our professional and avocational pursuits.”); *State v. Jackson*, 76 P.3d 217, 224 (Wash. 2003) (“use of GPS tracking devices is a particularly intrusive method of surveillance, making it possible to acquire an enormous amount of personal information”).

⁶ See Matthew Blaze, *Testimony before the U.S. House Subcommittee on Crime, Terrorism, Homeland Security, and Investigations* (Apr. 25, 2012), available at 2013 WL 1771788 (GPS accuracy is “typically within ten meters”); see also Federal Aviation Administration, *FAA GPS Performance Analysis Report* (July 31, 2014) at 22, https://www.nstb.tc.faa.gov/reports/PAN86_0714.pdf (concluding that 95% of GPS measurements have a horizontal error of less than 4 meters); U.S. Geological Survey, *USGS Global Positioning Application and Practice*, <https://water.usgs.gov/osw/gps/> (last visited May 13, 2024) (concluding that handheld commercial grade GPS devices are accurate within three to ten meters).

⁷ See, e.g., NS-HP-GN5, *Nav Spark Store*, <https://navspark.mybigcommerce.com/ns-hp-gn5-px1125r-11-15-rtk-breakout-board/> (last visited May 10, 2024).

Historical location data can be used to “reconstruct someone’s specific movements down to the minute, not only around town but also within a particular building.” *Riley v. California*, 573 U.S. 373, 396 (2014). Whereas “[i]n the past, attempts to reconstruct a person’s movements were limited by a dearth of records and the frailties of recollection,” a person’s historical location data permits the government to “travel back in time to retrace [their] whereabouts.” *Carpenter*, 585 U.S. at 312. *See also id.* at 310 (quoting *Jones*, 565 U.S. at 429 (Alito, J., concurring in the judgment) (“Prior to the digital age, law enforcement might have pursued a suspect for a brief stretch, but doing so ‘for any extended period of time was difficult and costly and therefore rarely undertaken.’”)). With historical location data, “police need not even know in advance whether they want to follow a particular individual, or when.” *Id.* at 312. The data is already stored and accessible for them at a moment’s notice.

B. The San Francisco Sheriff Office’s sharing and retention of location data is especially invasive.

Like the defendant in *Carpenter*, individuals participating in the EM program in this case have “effectively been tailed every moment of every day” from their enrollment in the program until EM’s termination. 585 U.S. at 312. But, unlike *Carpenter*, the Sherriff can retain plaintiffs’ location data indefinitely and share it with other law enforcement agencies without suspicion or warrant.

The San Francisco Sheriff’s Office—and Sentinel Offender Services, LLC

hired to run the program—receive every EM program participant’s “continuous GPS location coordinates 24 hours a day, 7 days a week,” for the duration of their participation in the EM program. 5-ER-795. Sentinel’s monitors can track people “indoors and outdoors” within “a number of feet” every “30 seconds.” 4-ER-749–50. The Sheriff and Sentinel can also reconstruct people’s historical movements from GPS data Sentinel stores on its servers—which Sentinel is contractually permitted to retain regardless of whether an individual is actively participating in the EM program. 5-ER-795–96.

Sentinel’s contract also permits invasive reverse location searches of EM program participants’ GPS data, which the contract describes as an “advanced reporting feature[.]” *See* 5-ER-796. One “crime scene location correlation” feature appears to allow the Sheriff to search all EM participants’ locations to see whether they were near a specified location at a specified time. *See id.* A separate “zone activity” report feature appears to let the Sheriff “see which individuals on EM were in certain geographic zones,” such as “known drug zones.” *Id.* This is not only invasive, but also likely to suffer from the due process and bias issues inherent to all “predictive policing” technologies. *See generally* EFF, *Street Level Surveillance: Predictive Policing*, <https://sls.eff.org/technologies/predictive-policing>.

Along with these invasive searches, the Sheriff’s policy authorizes sharing

EM participants’ continuously collected and indefinitely retained GPS coordinates with any law enforcement agency—without particularized suspicion or a warrant. *See* 1-ER-13 (quoting 5-ER-791 (program rule requires EM participants to “acknowledge that [their] EM data may be shared with other criminal justice partners.”)). Without any judicial oversight, other law enforcement agencies are free to obtain either “an individuals’ location information” or “the location of anyone on GPS tracking (within 300 yards)” of a particular place at a particular time, so long as it is requested as part of a criminal investigation. 2-ER-138. (Electronic Monitoring Location Request form).

There appears to be no limit on the time period of GPS data the Sheriff may share with other law enforcement agencies, nor the type of law enforcement agencies that can request it. The vast area searches may also be near and encompass sensitive locations, like a private residence, church, or treatment center. The number of requests the Sheriff received for EM participants’ GPS data under this policy grew from four in 2019, to 41 in 2020, all the way to 179 in 2021. *See* 5-ER-797. Given that there is no judicial oversight over individual law enforcement request, there is no evidence that a request has ever been denied. *See* 4-ER-681 ¶ 12.

C. There are less invasive methods of ensuring court appearances and protecting public safety.

Studies have found no significant relationship between court appearance

rates and either EM or sobriety monitoring.⁸ Nor is there compelling evidence that monitoring people on pre-trial release prevents crime, as compared to less invasive alternatives: one study of 3,200 people, using the rate of arrest while on pre-trial release as a proxy and controlling for other factors, found an equal likelihood of arrest for those that *were* subject to pretrial release monitoring and those that were *not*.⁹ One judge has noted that EM does not “serve as an actual preventative measure” and is more likely to be used as a modern day “Scarlet letter.” *Doe v. Bredesen*, 507 F.3d 998, 1012 (6th Cir. 2007) (Keith, J., dissenting).

Moreover, EM can lead to incarceration for inadvertent violations. Those subject to electronic monitoring often experience technological problems with EM devices, such as losing battery power or a GPS signal,¹⁰ that lead to long-term

⁸ Chloe Anderson Golub et al., MDRC, *Effectiveness of Pretrial Special Conditions* (Jan. 2023), <https://www.mdrc.org/work/publications/effectiveness-pretrial-special-conditions>. See also Kate Weisburd, *Rights Violations as Punishment*, 111 Cal. L. Rev. 1305, 1359–60 (2023) (“there is little empirical evidence” that electronic monitoring promotes government interests in “rehabilitation, public safety, and improved court appearance rates.”).

⁹ John Goldkamp & Michael White, *Restoring Accountability in Pretrial Release: The Philadelphia Pretrial Release Supervision Experiments*, 2 J. Experimental Criminology 143 (2006), available at https://www.researchgate.net/publication/225135854_Restoring_Accountability_in_Pretrial_Release_The_Philadelphia_Pretrial_Release_Supervision_Experiments.

¹⁰ See Chaz Arnett, *From Decarceration to E-Carceration*, 41 Cardozo L. Rev. 641, 715–16 (2019); Jenifer B. McKim, *‘Electronic Shackles’: Use Of GPS Monitors Skyrockets In Massachusetts Justice System*, WGBH (Aug. 10, 2020), <https://www.wgbh.org/news/local-news/2020/08/10/electronic-shackles-use-of->

reincarceration for minor, unintended violations.¹¹ When these malfunctions occur, the individuals who suffer their consequences are often without recourse. This case is illustrative: to participate in the EM program, individuals must acknowledge that “[a]t any given time” Sentinel’s EM devices or the accompanying software may malfunction or experience a service failure. 5-ER-816. Individuals participating in the EM program must also acknowledge that Sentinel is not liable for any consequent “incarceration or arrest,” “loss of privacy,” or “any special, incidental, director, or consequential damages whatsoever” that “aris[e] out of or [are] in any way related to” Sentinel’s service. 5-ER-817.

D. EM is additional government surveillance, not an alternative to detention.

Contrary to its portrayal as a detention alternative, evidence indicates that

gps-monitors-skyrockets-in-massachusetts-justice-system; Leor Galil, *On House Arrest with Mohawk Johnson*, Chicago Reader (Mar. 31, 2021), <https://perma.cc/J6V7-82J2>; Monitored by Cook, YouTube, <https://www.youtube.com/channel/UCTvnhaiU11AVetrH-UEmQ8g/featured> (account documenting false alarms that one individual on pretrial release has experienced with their EM); Matt Chapman & Natalie Frazier, *False Alarms*, The TRiiBE (June 9, 2022), <https://perma.cc/2UTL-ZBDW>.

¹¹ American Civil Liberties Union (“ACLU”), *Rethinking Electronic Monitoring: A Harm Reduction Guide*, 7 (2022) <https://perma.cc/2CJL-D7NU>; Yazmine Nichols, *Jailed for a Faulty Battery and Left to Catch COVID-19*, ACLU (June 25, 2021), <https://perma.cc/TE3Z-CUNX>s. See also Kate Weisburd, *Sentenced to Surveillance: Fourth Amendment Limits on Electronic Monitoring*, 98 N.C. L. Rev. 717, 768 (2020) (explaining that “emerging research conclude[es] that electronic monitoring leads to worse outcomes”).

law enforcement is using EM to surveil and constrain the liberty of those who wouldn't otherwise be detained.

In recent years, use of EM has exploded.¹² If EM were a detention alternative, the number of people on pre-trial detention should decrease proportionate to this increased use of EM. This hasn't happened: increased EM has not led to a decrease in incarceration.¹³ The numbers simply do not show that EM is being used in cases where, without EM, the individual would have been put in jail. In many cases, the alternative to EM is not detention, but a different release program.

With the development of EM, “the carceral experience is no longer defined by physical walls and prison bars.” Kate Weisburd, *Punitive Surveillance*, 108 Va. L. Rev. 148, 152 (2022). EM transforms homes, workplaces, and neighborhoods into digital prisons, in which devices physically attached to participants surveil the

¹² See, e.g., Emmett Sanders, *Watching the Watchers: Vera releases national census on electronic monitoring*, Prison Policy Initiative, (Feb. 8, 2024), <https://www.prisonpolicy.org/blog/2024/02/08/vera/> (“EM usage in the criminal legal system is up significantly, with more than 150,000 people on EM at any given time in state and local monitoring systems.”).

¹³ See Jess Zhang et al., *People on Electronic Monitoring*, Vera Institute of Justice (Jan. 2024), <https://www.vera.org/downloads/publications/Vera-People-on-Electronic-Monitoring.pdf>. While an increase in EM is not generally paired with a drop in incarceration, a few such exceptions have been observed with specific jurisdictions, such as Portland, Oregon. See *id.*

sum of their public and private lives and movements.¹⁴ “There [i]s no lull in the intrusion.” Ben A. McJunkin & J.J. Prescott, *Fourth Amendment Constraints on the Technological Monitoring of Convicted Sex Offenders*, 21 *New Crim. L. Rev.* 379, 399–400 (2018). *See also* Kate Weisburd, *The Carceral Home*, 103 *B.U. L. Rev.* 1879 (2023).

While many would prefer EM to physical incarceration, EM programs impose serious constraints upon participants’ liberties.¹⁵ Some experience EM as a “ball and chain” from which they “could never be free.” McJunkin & Prescott, *supra* at 399–400.¹⁶ Others, including a federal district court judge, liken EM to being “caged” or “on a leash like an animal.” Weisburd, *Punitive Surveillance*, *supra* at 181. *See also* *United States v. Polouizzi*, 697 F. Supp. 2d 381, 389 (E.D.N.Y. 2010) (characterizing the government’s constant tracking of a person on EM as treating the individual “as if he were a feral animal.”). And like

¹⁴ *See* Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010). *See also* Olivia Thompson, *Shackled: The Realities of Home Imprisonment*, *Equal Justice Under Law* (June 14, 2018), <https://equaljusticeunderlaw.org/thejusticereport/2018/6/12/electronic-monitoring> (“[L]iving with an ankle monitor is its own brand of imprisonment.”).

¹⁵ *See, e.g.*, Michelle Alexander, *The Newest Jim Crow*, *N.Y. Times* (Nov. 8, 2019), <https://www.nytimes.com/2018/11/08/opinion/sunday/criminal-justice-reforms-race-technology.html>; McJunkin & Prescott, *supra*.

¹⁶ *See also* Olivia Solon, ‘Digital Shackles’: *The Unexpected Cruelty of Ankle Monitors*, *The Guardian* (Aug. 28, 2018), <https://www.theguardian.com/technology/2018/aug/28/digital-shackles-the-unexpected-cruelty-of-ankle-monitors>.

incarceration itself, EM reproduces racial, economic, and societal inequities and prevents participants from becoming full members of society.¹⁷

II. THE SAN FRANCISCO SHERIFF’S ELECTRONIC MONITORING PROGRAM VIOLATES THE CONSTITUTIONAL RIGHTS OF PEOPLE ON PRE-TRIAL RELEASE.

A. People on pre-trial release do not relinquish their reasonable expectation of privacy.

People on pre-trial release maintain a reasonable expectation of privacy and are constitutionally entitled to the least restrictive conditions of release that satisfy the state’s interest. *In re Humphrey*, 11 Cal. 5th 135, 150–52 (2021) (noting that “the accused retains a fundamental constitutional right to liberty”).

While a person’s expectation of privacy may be slightly diminished following arrest but before trial, the Fourth Amendment does not fall entirely out of the picture. Their “privacy and liberty interests” are, for instance, “far greater” than a person who has been convicted and is on probation or parole. *United States v. Scott*, 450 F.3d 863, 873 (9th Cir. 2006). And even people on probation have a “substantial” privacy interest. *United States v. Lara*, 815 F.3d 605, 610 (9th Cir. 2016).

Similarly, the government cannot eliminate the privacy interests of those on

¹⁷ See generally Sandra Susan Smith, *How Pretrial Incarceration Diminishes Individuals’ Employment Prospects* (Dec. 2022), https://www.uscourts.gov/sites/default/files/86_3_3_0.pdf.

pretrial release by vaguely informing them of the government’s intent to intrude. Instead, courts conduct a normative inquiry to decide whether the government has intruded upon one’s expectation of privacy, regardless of what the person has been told: the government cannot skirt the Fourth Amendment by merely deciding “suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry.” *Smith v. Maryland*, 442 U.S. 735, 741 n.5 (1979). *See also Scott*, 450 F.3d at 867 (“Pervasively imposing an intrusive search regime as the price of pretrial release, just like imposing such a regime outright, can contribute to the downward ratchet of privacy expectations.”).

Nor can purported consent alone justify the invasive surveillance those participating in the EM program experience. *See Lara*, 815 F.3d at 609 (noting that a probationer’s “agreement does not by itself render lawful an otherwise unconstitutional search”); *United States v. Jarrad*, 754 F.2d 1451, 1454 (9th Cir. 1985) (noting that “Fourth Amendment protections afforded to parolees in their relationship with parole officials is not based on consent”). That is especially true here: as a practical reality, it is “sophistry” to conclude that those seeking—and entitled to—pretrial release can ever voluntarily consent to the conditions of EM when their only alternative is jail. *Samson v. California*, 547 U.S. 843, 863 n.4 (2006) (Stevens, J., dissenting). *See also* Wayne R. LaFare, *Search and Seizure: A Treatise On The Fourth Amendment*, § 10.10(b) (6th ed.) (noting it is “doubtful

that any waiver of Fourth Amendment rights obtained as the quid pro quo of a grant of probation or parole could pass muster” under the test for voluntary consent).

California’s constitution goes even further than the federal constitution in protecting people’s privacy rights, including those on pretrial release.¹⁸ California explicitly enshrined the right to privacy in its constitution in 1972, in response to the alarming danger to individual privacy raised by advances in surveillance capabilities. *White v. Davis*, 13 Cal. 3d 757, 775 (1975). The Sheriff’s EM program poses the exact same threats that drove the state to amend its constitution, namely the government’s overbroad “retention” of unnecessary personal information and the “disclosure of it to some third party.” *Id.*

B. People have a reasonable expectation of privacy in their location and movements.

People have a reasonable expectation of privacy in their location data—whether it is comprehensive historical data that reveals their movement on the streets and within their home, real-time location data, or data obtained from reverse location searches that reveal who was in a particular location at a particular time.

¹⁸ See *People v. Blair*, 25 Cal. 3d 640, 654–55 (1979) (distinguishing between Article 1, Section 13 of California’s Constitution and the Fourth Amendment); *White v. Davis*, 13 Cal. 3d 757, 775 (1975) (distinguishing between Article 1, Section 1 of California’s Constitution and the Fourth Amendment’s search and seizure clauses).

The Sheriff's monitoring program, data sharing, and retention reveals it all.

The Fourth Amendment protects a person's reasonable expectation of privacy in their historical location and movements. *Carpenter*, 585 U.S. at 309–10. In fact, Chief Justice John Roberts compared the “near perfect surveillance” of the cellphone tracking in *Carpenter* to the invasiveness of law enforcement attaching “an ankle monitor to the phone's user”—the exact type of surveillance at issue in the case. *Id.* at 311–12. This type of tracking, accurate to within feet, follows people on the streets, inside their home, and even from room to room. *See Kylllo v. United States*, 533 U.S. 27, 31 (2001) (“At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”) (internal quotations omitted).

In *Jones*, five Supreme Court Justices also held that comprehensive tracking of a person's real-time location violates their reasonable expectation of privacy. 565 U.S. at 430 (Alito, J., concurring in the judgment); *id.* at 415 (Sotomayor, J., concurring). Moreover, before and after *Carpenter*, courts held that the Fourth Amendment and its analogs in state constitutions protect a person's reasonable expectation of privacy in their real-time location information.¹⁹ On top of this,

¹⁹ For courts holding the Fourth Amendment protects one's reasonable expectation of privacy in their real-time location before *Carpenter*, see *United States v. Ellis*, 270 F. Supp. 3d 1134, 1141–42 (N.D. Cal. 2017); *Com. v. Augustine*, 4 N.E.3d 846, 863–66 (Mass. 2014); *Tracey v. State*, 152 So. 3d 504 (Fla. 2014). *See also*

many statutes place heightened burdens to obtain real-time data—signifying its sensitivity. *See e.g.*, Cal. Penal Code §1534(b) (limiting the time period of real-time tracking in the separate warrant context).

Finally, sharing data from reverse location searches is constitutionally deficient, because the shared data is overbroad and not particularized. Reverse location searches are the modern general warrant. Just as British officials in the Revolutionary Era used general warrants and “writs of assistance” to go house to house, searching for smuggled goods and evidence of seditious libel, *see Stanford v. Texas*, 379 U.S. 476, 481–82 (1965), the reverse location searches at issue in this case allow law enforcement to search the location data of all individuals participating in the Sheriff’s EM program for evidence of a crime, without individualized suspicion.²⁰ This data shared with other law enforcement entities can identify people in the area of multiple dense city blocks and does not appear constrained by time period. The Fourth Amendment’s familiar demands of particularity and probable cause were designed to prevent precisely this type of

Maynard, 615 F.3d at 536 (defendant had reasonable expectation of privacy in their vehicle’s movements over the course of a month). For examples of courts relying on *Carpenter* in holding the Fourth Amendment protects one’s real-time expectation of privacy, *see State v. Muhammad*, 451 P.3d 1060, 1073–74 (Wash. 2019); *Commonwealth v. Almonor*, 120 N.E.3d 1183, 1194–96 (Mass. 2019).

²⁰ At least in other cases, each reverse location search is typically accompanied by a warrant approved by a judge.

search and disclosure. *See Chatrie*, 590 F. Supp. 3d at 929 (evaluating geofence with analogous radius of 300 meters).

Indeed, both federal and California courts have found reverse location searches to violate the Fourth Amendment’s particularity requirement. *See id*; *People v. Meza*, 312 Cal. Rptr. 3d 1, 16 (Ct. App. 2023). Further, four of the six federal courts to consider geofence warrants prior to their execution denied their applications.²¹

CONCLUSION

For the reasons stated above, this Court should affirm the district court’s decision granting Plaintiffs’ preliminary injunction.

Dated: May 17, 2024

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²¹ *See Matter of Search of Information Stored at Premises Controlled by Google*, 2020 WL 5491763 (N.D. Ill., July 8, 2020, No. 20 M 297) (denying); *Matter of Search of Information Stored at Premises Controlled by Google*, ECF No. 5 (N.D. Ill. July 24, 2020 No. 20-mc-392) (same); *Matter of Search of Information Stored at Premises Controlled by Google*, 481 F.Supp.3d 730 (N.D. Ill. 2020) (same); *Matter of Search of Information that is Stored at Premises Controlled by Google, LLC*, 542 F.Supp.3d 1153 (D. Kan. 2021) (same). *But see Matter of Search Warrant Application for Geofence Location Data Stored at Google Concerning an Arson Investigation*, 497 F.Supp.3d 345 (N.D. Ill. 2020) (approving application); *Matter of Search of Information that is Stored at Premises Controlled by Google LLC*, 579 F.Supp.3d 62 (D.D.C. 2021) (same).

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify as follows:

1. This Brief of Amici Curiae the Electronic Frontier Foundation, Professor Kate Weisburd, and The Cato Institute in Support of Plaintiffs-Appellees and Affirmance with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,275 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365, the word processing system used to prepare the brief, in 14 point font in Times New Roman font.

Dated: May 17, 2024

By: /s/ Hannah Zhao
Hannah Zhao

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 17, 2024.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: May 17, 2024

By: /s/ Hannah Zhao
Hannah Zhao