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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

A.B.O. COMIX, KENNETH ROBERTS, ZACHARY GREENBERG, RUBEN GONZALEZ-MAGALLANES, DOMINGO AGUILAR, KEVIN PRASAD, MALTI PRASAD, and WUMI OLADIPO,

Plaintiffs,

v.

COUNTY OF SAN MATEO and CHRISTINA CORPUS, in her official capacity as Sheriff of San Mateo County,

Defendants.

Case No.: 23-CIV-01075

**PLAINTIFFS' SUPPLEMENTAL BRIEF RE SECTION 13 ANALYSIS**

Judge: Hon. V. Raymond Swope
Hearing: April 10, 2024
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## I. Introduction

This is not just a case about jailhouse monitoring. It is a case about mass surveillance that is virtually effortless and previously impossible, implemented by the County to capitalize on the promise of a "massive increase in investigative intelligence gained on both inmate and public users." (AC ¶¶ 29(c), 30.) Plaintiffs submit this supplemental brief to provide further discussion of the analytical framework for claims under Article I, Section 13 of the California Constitution, as requested by the Court at the January 31 hearing on Defendants' Motion for Judgment on the Pleadings. The brief first details the two-stage process for analyzing Section 13 claims. It then applies that framework to Plaintiffs' Section 13 claim, demonstrating that Plaintiffs have alleged unreasonable searches and seizures by the County and should be permitted to proceed to discovery.

## II. The Court's Analysis Under Art. I, Sec. 13

A claim under Article I, Section 13 of the California Constitution has two elements: (1) There must be a government action that triggers Section 13's protections (i.e., a search and/or seizure), and (2) that government action must be unreasonable. (*United States v. Dupree* (3d Cir. 2010) 617 F.3d 724, 730; *see also Carpenter v. United States* (2018) 585 U.S. 296, 307 n.2 [distinguishing "the threshold question whether a 'search' has occurred" from "the separate matter of whether the search was reasonable"].)[1] Whether a search or seizure has occurred and whether it was unreasonable depend on the specific contours and circumstances of the challenged government action. In particular, trial courts should follow the guidance of the U.S. Supreme Court and consider at both stages of the analysis whether the technology used enables a government intrusion that is fundamentally different in nature or scope than those considered in prior cases. (*See, e.g.*, *Carpenter*, 585 U.S. at p. 318; *Riley v. California* (2014) 573 U.S. 373, 393–394; *United States v. Jones* (2012) 565 U.S. 400, 415–416 (Sotomayor, J., concurring).)

### A. The Search/Seizure (or Section 13 "Trigger") Analysis

At the threshold, a Section 13 claim requires either a search or a seizure that triggers the

[1] California courts generally "apply federal legal standards when analyzing the reasonableness of a search or seizure under California constitutional law." (*Coal. on Homelessness v. City & Cnty. of San Francisco* (2023) 93 Cal.App.5th 928, 935 n.1.)

provision's protections; such a search or seizure might also be termed a "Section 13 event."[2] (*See* Wayne LaFave (2022) 1 *Search & Seizure* § 2.1.) The definition of "search" for Section 13 purposes differs from the word's common usage. A Section 13 search can be established either of two ways: based on a violation of a reasonable expectation of privacy or based on a trespass into an enumerated area. A Section 13 seizure, on the other hand, occurs when the government meaningfully interferes with a person's possessory interest. Accordingly, there are three types of Section 13 event: a search under a reasonable expectation of privacy theory, a search under a trespass theory, and a seizure.

**1. Searches that violate a reasonable expectation of privacy (the *Katz* test)**

If a government action infringes on a subjective expectation of privacy that society recognizes as objectively reasonable, the action constitutes a Section 13 search. (*People v. Camacho* (2000) 23 Cal.4th 824, 830–831.) This is sometimes referred to as the "*Katz* test," after *Katz v. United States* (1967) 389 U.S. 347 (Harlan, J., concurring). Whether a reasonable expectation of privacy exists must be determined in relation to the specific factual situation. For example, a court should consider how practical constraints on surveillance have shaped societal expectations, particularly in cases involving recent technology. (*Carpenter,* 585 U.S. at pp. 310–311; *Jones*, 565 U.S. at pp. 415–416, 429–430 (concurrences of Sotomayor, J. & Alito, J.).) Cases decided over the past decade have recognized that certain aspects of technology-enabled surveillance—including extended time ranges, the aggregation of personal information, and the relatively minimal amount of effort required—add up to an intrusion that differs not only in degree from conventional surveillance methods but also in kind, changing the calculus for what an individual should reasonably expect. (*See, e.g., ibid.*; *Leaders of a Beautiful Struggle v. Balt. Police Dept.* (4th Cir. 2021) 2 F.4th 330, 345.)

**2. Searches based on a trespass (the *Jones* test)**

The government also triggers Section 13 when it trespasses into a "constitutionally protected area" with the purpose of gathering information or finding something. (*Jones,* 565 U.S.

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[2] *Cf. Dupree,* 617 F.3d at p. 730 [using term "Fourth Amendment event"].

at pp. 404–405, 408 n.5.) This is sometimes referred to as the *Jones* test, and a search established under this theory is sometimes called a "trespassory search." At common law, a trespass is an injury to personal property or the possessor's interest. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1352.) "Constitutionally protected area" simply means any of the four areas enumerated in Section 13: "persons, houses, places, and effects." (*Jones*, 565 U.S. at p. 411 n.8; *see also id.* at p. 406.) A trespassory search under the *Jones* test **does *not* require a reasonable expectation of privacy**. (*Id.* at p. 406; *Grady v. North Carolina* (2015) 575 U.S. 306, 308–309; *Whalen v. McMullen* (2018) 907 F.3d 1139, 1146–1147.) In fact, the trespass theory of searches predates the *Katz* test, going back to our earliest constitutional history. (*Jones*, 565 U.S. at p. 406.) The *Katz* test became the dominant standard applied by courts, but the majority opinion in *Jones* explained that it was an addition rather than a substitution; both tests remained valid. (*Id.* at pp. 406–407.)

Defendants are incorrect that the *Jones* test does not apply to claims brought under Section 13. (MJP Reply at p. 9.) It is well established that the Fourth Amendment represents the *minimum* degree of protection that Section 13 affords. (*People v. Brisendine*, (1975) 13 Cal.3d 528, 545, 551 (en banc).) To rule that the definition of a search is broader under the Fourth Amendment than under Section 13 would contravene that long-standing precedent.[3]

**3. Seizures (the *Jacobsen* test)**

For Section 13 purposes, the government seizes property when its actions cause "some meaningful interference with an individual's possessory interests in that property." (*United States v. Jacobsen* (1984) 466 U.S. 109, 113.) In the context of mail or packages, even a significant delivery delay may qualify as a seizure. (*See United States v. Valenzuela-Varela* (D.Mont. 1997) 972 F.Supp. 1308, 1311–1312, affd., (9th Cir. 1998) 165 F.3d 920 (Mem); *cf. United States v. England* (9th Cir. 1992) 971 F.2d 419, 421 [finding no seizure because no delay].)

[3] Defendants' citation to *Cowing v. City of Torrance* is inapposite. (MJP Reply at p. 9.) Decided almost 40 years before *Jones*, that case addressed the Fourth Amendment and did not even involve the trespassory search test—the plaintiff argued he had a reasonable expectation of privacy. (*Cowing v. City of Torrance* (1976) 60 Cal.App.3d 757, 762–763.)

### B. The Reasonableness Analysis

If a court finds a Section 13 event has occurred, it must then determine whether the search or seizure was unreasonable and thus a constitutional violation. (*Delaware v. Prouse* (1979) 440 U.S. 648, 653–54.) By default, Section 13 searches and seizures require a warrant supported by probable cause. (*People v. Buza* (2018) 4 Cal.5th 658, 671; *Riley*, 573 U.S. at p. 382) Where there is no warrant, the government bears the burden of proving "by a preponderance of the evidence that the search falls within an exception" to the warrant requirement. (*People v. Marquez* (2019) 31 Cal.App.5th 402, 409.) Such exceptions are "few in number and carefully delineated." (*United States v. U.S. Dist. Ct.* (1972) 407 U.S. 297, 318.) Even if an exception to the warrant requirement applies, however, the "search is not beyond Fourth Amendment scrutiny; for it must be reasonable in its scope and manner of execution." (*Maryland v. King* (2013) 569 U.S. 435, 448.) Accordingly, the court must then balance "the gravity of the governmental interest or public concern served and the degree to which [the search] advances that concern against the intrusiveness of the interference with individual liberty." (*Buza*, 4 Cal.5th at p. 684; *see also King*, 569 U.S. at p. 448; *United States v. Place* (1983) 462 U.S. 696, 701, 703.) At the balancing stage, too, the government bears the burden of showing the reasonableness of a warrantless search. (*See*

## III. Plaintiffs Have Stated an Article I, Section 13 Claim.

### A. Plaintiffs Have Sufficiently Alleged Three Different Forms of Section 13 Event.

Plaintiffs have alleged facts establishing a Section 13 event under all three tests: the *Katz* reasonable expectation of privacy test, the *Jones* trespass test, and the *Jacobsen* seizure test. Any one of these is sufficient to trigger Section 13's reasonableness requirement.

#### 1. The County is violating Plaintiffs' reasonable expectations of privacy.

The County's use of MailGuard to surveil Plaintiffs' correspondence constitutes a search because it violates Plaintiffs' subjective and reasonable expectations of privacy. (*See Camacho*, 23 Cal.4th at 830–831.) Incarcerated people and those who write to them have a reasonable expectation that their personal correspondence will not be scanned into an online database, aggregated with other personal information, destroyed without delivery, and retained indefinitely by a private company for unrestricted government use.

*Carpenter* establishes that the *Katz* test requires consideration of the search method, not only the target—especially where technology is involved. (*See Carpenter*, 585 U.S. at p. 310 [finding reasonable expectation of privacy in "the record of [one's] physical movements *as captured through CSLI*" (emphasis added)].) As set forth in fuller detail in Plaintiffs' opposition brief (MJP Opp. at pp. 17–18), key aspects of the mail policy relevant to the *Katz* analysis include the broad scope of information obtained and people affected, the sensitivity of the material, the lack of effort required, the lack of restrictions on use, and the long-term retention policy. Taken together, these elements add up to a reasonable expectation of privacy against such surveillance.

Making such a finding does not require this Court to contravene *People v. Loyd* or any other binding precedent. *Loyd* does not stand for the broad proposition that incarcerated people have no reasonable expectation of privacy—which the opinion even acknowledged was a general rule subject to exceptions. (*Loyd* (2002) 27 Cal.4th 997, 1002–1003.) Instead, it more narrowly held that it is lawful to monitor and record jailhouse communications for evidence-gathering purposes.[4] (*Id.* at p. 1010.) What the County is doing goes far beyond monitoring and recording conversations on cassette tapes: It is using sophisticated software to aggregate every piece of non-legal mail sent to its jails in a database with other sensitive information about the non-incarcerated senders and to search that data without restriction or effort. (*See* MJP Opp. at pp. 17–18.) Here, the scope of what and how much information is collected, and how it is and can be used, are unlike the conventional tape recording involved in *Loyd*—or anything else that jails were doing when that case was decided 21 years ago. That is especially important here because *Loyd* based its decision on the facts that (a) pre-1982 California law allowed monitoring and recording jailhouse conversations for investigative purposes and (b) other jurisdictions allowed the same. (27 Cal.4th at p. 1009.) This is a case of first impression, and this Court should not extend *Loyd* beyond its current scope to reach these very different facts.

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[4] While *Loyd* at times used broad language, the full opinion made clear that the analysis was specific to the specific factual context before the Court. For example, the Court discounted a Second Circuit opinion cited by Loyd as "factually distinguishable" in part because "the evidence seized was paperwork located in the inmate's cell, rather than statements made during conversations with visitors." (*Loyd*, 27 Cal.4th at p. 1009 n.16.)

**2. The County is conducting trespassory searches of Plaintiffs' mail.**

Section 13's protections are also implicated for both groups of Plaintiffs because the County is physically trespassing into Plaintiffs' personal papers for the purpose of gathering information. (*Jones*, 565 U.S. at pp. 404–405, 408 n.5.) When the County intercepts mail intended for an incarcerated person, scans it, adds the scanned copy to an investigatory database, delivers a digital substitute, and destroys the original, it conducts "a classic trespassory search." (*Jones*, 565 U.S. at p. 412.)

First, the County's destruction of Plaintiffs' mail is a trespass to chattels that causes injury to the incarcerated Plaintiffs' property rights and the nonincarcerated Plaintiffs' possessory interests in their mail. (*See In re Dohner* (2022) 79 Cal.App.5th 590, 596 [incarcerated people have property rights in their belongings]; *Valenzuela-Varela*, 972 F.Supp. at pp. 1311–1312 [senders of mail retain a possessory interest until delivery].) No matter the precise scope of the property interests involved, they are extinguished entirely by the County's destruction policy; that is the ultimate interference with property interests. When the County sends a crayon drawing from Kenneth Roberts's daughter through the shredder and replaces it with a digital photo that he can never hold or hang up, and whose texture he can never touch, that is a trespass under any interpretation.

Second, the trespass is into a constitutionally protected area: Plaintiffs' papers and effects. (*See Jones*, 565 U.S. at 411 n.8.)

Third, Plaintiffs have alleged throughout the Amended Complaint that the mail policy's purpose is to gather information. (*E.g.*, AC ¶¶ 8, 30, 45, 89.) To the extent there is any dispute about this, it must be resolved through discovery, not on the pleadings.

**3. The County is seizing Plaintiffs' mail.**

In addition to both kinds of search, the nonincarcerated Plaintiffs have also alleged that the County is seizing their mail. As discussed in the preceding section, the nonincarcerated Plaintiffs have pleaded a meaningful interference with the possessory interest they hold in their undelivered mail. In *Valenzuela-Varela*, a court found that a delivery delay was a meaningful enough interference with a package sender's possessory interest to constitute a seizure. (972 F.Supp. at

pp. 1311–1312.) Here the County has gone further, outright destroying the sent mail and thus seizing it.

### B. Plaintiffs Have Sufficiently Alleged the County's Searches and Seizures of Their Mail Are Unreasonable.

Defendants have not identified an applicable exception to the warrant requirement, despite their burden to do so.[5] (*Marquez*, 31 Cal.App.5th at p. 409.) Even if an exception does apply here, however, the Court must still balance the intrusion on the Plaintiffs' liberties against the government's interest justifying the exception. (*See Place*, 462 U.S. at p. 703; *King*, 569 U.S at p. 448; *see also People v. West* (1985) 170 Cal.App.3d 326, 331 [searches and seizures of prisoners "must be reasonable under all the facts and circumstances in which they are performed"].) The County's mail policy is unreasonable under that balancing test because its invasiveness, duration, and lack of safeguards far outweigh any benefit to a legitimate government interest.

Courts recognize a heightened need for limits on intrusions into materials implicating freedom of expression or association, like the mail at issue here. (*Zurcher v. Stanford Daily* (1978) 436 U.S. 547, 564.) The County has set no such limits, but instead goes further, combining the scanned mail with other information to capitalize on the promise of a "massive increase in investigative intelligence gained on both inmate and public users." (AC ¶¶ 29(c), 30) Rather than limiting the retention of the digitized mail, the County entered a contract requiring Smart Communications to keep it for at least seven years *after* the recipient leaves the County's jails—with no promise that it will be deleted even then. (AC ¶ 29(a); *cf. Jones*, 565 U.S. at p. 415 (Sotomayor, J., concurring) [noting concern raised by ability to store GPS records "and efficiently mine them for years into the future"].) And rather than putting limits on how, when, or why law enforcement may use this data, the County has imposed none. (AC ¶¶ 29(b), 45–46*; cf. Prouse*, 440 U.S. at pp. 654–655 [stressing importance of constraints on discretion in context of warrantless

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[5] Although Defendants cite *Loyd* for the proposition that jail searches are always reasonable (MJP Reply at p. 9), *Loyd* in fact never addressed the reasonableness prong of the analysis. Instead, the Court based its decision on pre-1982 precedent, which in turn was decided at the first stage of the constitutional analysis—*i.e.*, by concluding that jailhouse monitoring and recording did not violate a reasonable expectation of privacy. (*See* 27 Cal.4th at pp. 1002–1003, 1009.)

searches]; *Buza*, 4 Cal.5th at pp. 667, 690 [describing safeguards in DNA Act].) In sum, the County's failure to even *attempt* to limit the impact of its intrusions into Plaintiffs' personal papers cannot be found reasonable.

To the extent the County asserts an interest in preventing fentanyl exposures, the poor fit between that purpose and the County's long-term, technology-enabled surveillance dooms the policy's constitutionality, especially because Plaintiffs have alleged less intrusive but equally effective alternatives are available (AC ¶ 55). (*See People v. Lopez* (2019) 8 Cal.5th 353, 374–375; *Prouse*, 440 U.S. at 659–660; *Birchfield v. N. Dakota* (2016) 579 U.S. 438, 474.) At a minimum, that goal has no relationship to the County's decision to build a searchable database of Plaintiffs' correspondence and retain it for years. The County has therefore failed to meet its burden of establishing that the mail policy is reasonable. (*See West*, 170 Cal.App.3d at p. 331 ["The more intrusive the search, the heavier the government's burden of proving the search was reasonable."].)

## IV. Conclusion

For the foregoing reasons, and those set forth in Plaintiffs' opposition brief and at oral argument, Defendants' motion should be denied as to Plaintiffs' claim under Article I, Section 13.

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Respectfully submitted,

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