CARA GAGLIANO (SBN 308639)
AARON MACKEY (SBN 286647)
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Tel.: (415) 436-9333
Fax: (415) 436-9993
Email: cara@eff.org

SCOTT WILKENS (SBN 226259)
STEPHANIE KRENT (*Pro Hac Vice* pending)
JENNIFER JONES (*Pro Hac Vice* pending)
MAYZE TEITLER (*Pro Hac Vice* pending)
KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY
475 Riverside Drive, Suite 302
New York, NY 10115
Tel.: (646) 745-8500
Email: scott.wilkens@knightcolumbia.org

SHUBHRA SHIVPURI (SBN 295543)
SARA HAJI (SBN 330834)
SOCIAL JUSTICE LEGAL FOUNDATION
523 West 6th Street, Suite 450
Los Angeles, CA 90014
Tel.: (213) 973-4063
Fax: (213) 973-4063
Email: sshivpuri@socialjusticelaw.org

Attorneys for Plaintiffs ABO Comix, Kenneth Roberts Zachary Greenberg, Ruben Gonzalez-Magallanes, Domingo Aguilar, Kevin Prasad, Malti Prasad and Wumi Oladipo

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' OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

Judge: Hon. V. Raymond Swope
Hearing: December 4, 2023
Time: 2:00 pm
Dept.: 23

Action Filed: March 9, 2023
Trial Date: None Set

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

San Mateo County's jail mail policy—which digitizes and destroys mail and subjects correspondents to long-term, technology-enabled surveillance—violates the expressive and privacy rights guaranteed under the California Constitution to both incarcerated and nonincarcerated Californians.

People in the County's jails are categorically banned from receiving non-legal physical mail. Instead, they may access only digital copies of their mail by using shared tablets available during limited recreation time in public spaces. The County also retains these digital copies and makes them available to law enforcement throughout the County at any time, for any reason or no reason at all. The County's claim that it adopted the policy to limit the introduction of drugs into its facilities is unsupported; banning mail does not reduce the prevalence of drugs behind bars.

The constitutionality of the County's mail policy is an issue of great public significance, and the County's attempts to end this lawsuit at the pleadings stage—without ever justifying the policy through evidence—are meritless. First, the County argues that Plaintiffs' claims are not justiciable, but Plaintiffs are the right parties to bring this suit, and they have done so at the right time. In any event, because the County has not challenged Malti Prasad's standing or the ripeness of her claims, dismissal would be inappropriate. Second, the County argues that it is entitled to judgment as a matter of law on Plaintiffs' Article I, Section 2 claim under *Turner v. Safley*, but *Turner* does not account for the broader free speech protections the California Constitution provides. Instead, the more exacting intermediate scrutiny standard applies, given the nature of the constitutional violations at issue. Even under *Turner*, as a matter of law the Court cannot ignore Plaintiffs' well-supported allegations and rely instead on unproven assertions outside the pleadings regarding fentanyl and drug smuggling. Third, the County's challenge to Plaintiffs' Article I, Section 13 claim relies on decades-old cases involving short-term, conventional search techniques, ignoring the growing body of law recognizing the differences between analog-era and digital surveillance. Both incarcerated and nonincarcerated Plaintiffs have a reasonable expectation that they will not be subject to the County's long-term, pervasive digital surveillance. Moreover, Plaintiffs have also alleged that the mail policy involves trespassory searches and seizures—two

additional bases for allowing Plaintiffs' Section 13 claim to proceed.

The Court should deny the County's motion for judgment on the pleadings.

BACKGROUND

Until April 2021, anyone wishing to communicate with someone incarcerated in the County's jails could send physical mail to the facility, where corrections officers would inspect it for contraband and then deliver it to the intended recipient, who could read the mail at any time and keep it with their belongings. (AC ¶ 31.)[1] That month, however, the County banned physical mail from its jails and later contracted with for-profit company Smart Communications to digitize mail through a service called MailGuard. (*Id*. ¶¶ 29, 31–34.) All non-legal mail must now be sent to Florida, where Smart Communications scans it, uploads digital copies into a database, and destroys the originals. (*Id*. ¶ 26.)

Unbeknownst to many families, friends, and others sending mail to someone incarcerated in the County's jails, the County's use of MailGuard subjects them and their correspondence to long-term, technology-enabled surveillance. Smart Communications and the County retain digital copies of their mail for at least seven years "from the date of the inmate's release from the County's facility"—and Smart Communications has stated that it has *never* deleted scanned mail. (AC ¶ 29.) Smart Communications also gathers sensitive and previously uncollected information about the senders of mail, including "phone numbers, physical addresses, IP addresses, email addresses, credit card and banking information, and GPS locations." (*Ibid*.) The company aggregates these records and correspondence and makes them accessible to the County through a keyword-searchable dashboard. (*Ibid.*) The County, in turn, makes this dashboard available to corrections officers, investigators from the sheriff's office, the district attorney's office, and other municipalities in the County. (*Id*. ¶ 45.) Both law enforcement and Smart Communications personnel can search the dashboard without limitation. (*Id*. ¶ 46–47.)

[1] As used herein, "AC," refers to Plaintiffs' Amended Complaint filed in federal court on May 24, 2023, included as Exhibit A to Defendants' Request for Judicial Notice ("Defs.' RJN"), filed in this court on September 8, 2023. "Defs.' Mem" refers to Defendants' Notice of Motion and Motion for Judgment on the Pleadings, filed in this Court on September 8, 2023.

The County's mail policy has caused tremendous expressive and privacy-related harms. First, the County's elimination of physical mail deprives those in jail and their loved ones of a unique form of expression and emotional connection. Correspondents could once exchange carefully handwritten letters, children's drawings, and photographs with inscriptions on the back. (AC ¶¶ 36, 65.) Now they cannot, and scanned copies cannot replace the emotional connection correspondents had to physical mail. Physical mail allowed incarcerated people time to reflect on letters in the relative privacy of their jail cells, giving them the contemplative space necessary to strengthen relationships with their loved ones, religious advisors, and communities, all of which are crucial for successful reentry. (*Id*. ¶¶ 37, 56–57.) But the County does not provide adequate time to read, reflect on, and respond to scanned mail. (*Id*. ¶ 40.) Physical mail was also a critical tool for participation in religious, educational, occupational, and community-based learning, and many of these opportunities have now been lost. (*Id.* ¶¶ 37, 66, 70, 77.) Other options, like phone calls, email messaging, and video and in-person visitation are logistically challenging and expensive, and they also lack the intimacy, privacy, and reliability of physical mail. (*Id*. ¶ 41.) Second, the County's mail policy subjects writers and recipients of mail to long-term, technology-enabled surveillance that chills their expression. (*Id.* ¶ 48.) Some of those affected are so troubled by the County's collection and long-term retention of information through MailGuard that they have stopped corresponding by mail altogether—yet San Mateo County and Smart Communications continue to store their previously scanned mail. (*Id.* ¶¶ 72, 75, 79, 81, 86.) Others have been deterred from writing as frequently or about certain topics. (*Id*. ¶¶ 62, 64, 68.)

These harms have been caused by a policy that lacks a penological justification. San Mateo County has never publicly stated that fentanyl was a significant problem in its facilities, that the presence of fentanyl was increasing, or that mail was a significant source of fentanyl. Nor is there public evidence that would support those claims. (AC ¶¶ 50–51.) To the contrary, as the Amended Complaint explains, mail is not a significant source of fentanyl or other drugs in the County's jails. (*Id*. ¶ 9.) Even outside the county, mail-related drug trafficking is rare, and multiple court records, federal investigations, and public statements from corrections officials indicate that the primary way drugs enter jails and prisons across the nation is through staff smuggling. (*Id*. ¶¶ 51–52.) For

these reasons, it is unsurprising that drug test positivity and overdose rates did not decrease in several states where physical mail was banned. (*Id*. ¶ 53.) Despite this, the County eliminated physical mail without explaining why less restrictive methods—including its prior use of drug-sniffing dogs and Raman spectroscopy devices, or better staff security measures—were insufficient. (*Id*. ¶ 55.)

ARGUMENT

I. The County's justiciability arguments are meritless.

The County raises three justiciability arguments, none of which has merit. They would not result in dismissal of the case in any event, because the County has not challenged Mrs. Prasad's ability to bring suit.

First, A.B.O. Comix has standing to sue to enforce both its own rights and the rights of its members. Contrary to the County's arguments, even unincorporated associations may sue when they have "suffered an 'invasion of legally protected interests.'" (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 175 (quoting 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 862, p. 320); *see also Save the Plastic Bag Coal. v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 170 [finding unincorporated association had standing in its own right]; Code Civ. Proc. § 369.5(a).)[2] That is precisely the case here: A.B.O. Comix is injured because its communications with individuals in the County's jails are digitized, destroyed, and subjected to long-term, technology-enabled surveillance. (AC ¶¶ 59–62.) It also has associational standing on behalf of its members, including its member incarcerated in San Mateo County whose mail from the organization has been digitized and destroyed. (*Id*.) The County's claim that A.B.O. Comix must name its injured member and plead in greater detail its organizational structure, purpose, and funding are incorrect: there is

---

[2] The County misleadingly cites *Made in the USA Found. v. General Motors Corp.* (D.D.C., Mar. 31, 2005) 2005 WL 3676030, at *2 and *Creed-21 v. City of Wildomar* (2017) 18 Cal.App.5th 690, 692 in support of the proposition that A.B.O. Comix "must plead facts" showing a particular corporate form. Defs.' Mem. 9–10. But the cited portion of *Made in the USA Foundation* merely summarized the defendant's arguments before explaining the court's conclusion that the key question was whether the plaintiff organization had members for purposes of associational standing. *See Made in the USA*, *supra*, 2005 WL 3676030, at *2–3. The cited portion of *Creed-21* was similarly irrelevant to the court's standing determination. *See* 18 Cal.App.5th at p. 692.

no requirement that an injured member be named at the pleading stage, *see Nat. Council of La Raza v. Cegavske* (9th Cir. 2015) 800 F.3d 1032, 1041, and where an organization represents affected members in good faith, "further scrutiny into how the organization operates" is not required. (*Students for Fair Admission, Inc. v. President & Fellows of Harvard College* (2023) 600 U.S. ___ [143 S.Ct. 2141, 2158].).[3]

Second, neither Zachary Greenberg's nor Wumi Oladipo's claims are moot. Mr. Greenberg and Ms. Oladipo are still suffering ongoing harm as a result of the mail policy because they exchanged correspondence that was digitized and remains in the County's possession to this day, (*e.g.*, AC ¶¶ 7, 81–88), and the Amended Complaint seeks injunctive relief against this ongoing harm, (*id.* at 30, ¶¶ D–F). Their claims therefore remain live. (*See In re D.P.* (2023) 14 Cal.5th 266, 277 [explaining that "a case is not moot where a court can provide the plaintiff with 'effect[ive] relief'" (quoting *Consol. Vultee Air. Corp. v. United Auto.* (1946) 27 Cal.2d 859, 863)]).[4]

Third, the incarcerated Plaintiffs were not required to file grievances or exhaust administrative remedies. (*See Anton v. San Antonio Cmty. Hosp.* (1977) 19 Cal.3d 802, 829 [exhaustion requirement does not apply "where an administrative remedy is unavailable or inadequate"].) The incarcerated Plaintiffs alleged—and the County's submission of its grievance policy confirms—that the County prohibits grievances addressing "the rules and policies themselves." (Defs.' RJN, Ex. B at § 612.2.) Further demonstrating this point, Mr. Greenberg's "formal grievances protesting the mail policy" were never acknowledged. (AC ¶ 82.) An administrative remedy is therefore unavailable. (*Fuqua v. Ryan* (9th Cir. 2018) 890 F.3d 838, 849–850 [procedures unavailable if "policy is absolutely clear that grievances may not be used"]; *Pugh v. Caruso* (W.D.Mich., Apr. 24, 2008) 2008 WL 1868990, at *7 [procedures that explicitly forbade policy-based challenges "unavailable"]; *see also Foster v. Sexton* (2021) 61 Cal.App.5th 998, 1026–1027 [looking to federal precedent where federal and state exhaustion exceptions serve the

---

[3] California courts apply the associational standing test developed in federal courts. (*See United Farmers Agents Assn., Inc. v. Farmers Grp., Inc.* (2019) 244 Cal.Rptr.3d 27, 36.)

[4] The case on which the County relies is inapposite, because the plaintiff in that case had no continuing injury after her release from custody. (*Giraldo v. Dept. of Corr. & Rehab.* (2008) 168 Cal.App.4th 231.)

same purposes].)

II. Plaintiffs have stated an Article I, Section 2 claim.

A. Intermediate scrutiny applies to the County's mail policy.

The County's mail policy is subject to intermediate scrutiny under California's Liberty of Speech Clause, Article I, Section 2 of its Constitution, which protects the right to "freely speak, write and publish . . . on all subjects." (Cal. Const., art. I, § 2.) California's free speech protections "are even broader and greater [than the First Amendment's]." (*Gerawan Farming Inc. v. Lyons* (2000) 24 Cal.4th 468, 489–449; *see also Wilson v. Super. Ct.* (1972) 13 Cal.3d 652, 658.) This stronger protection applies with just as much force to cases involving jail administration and the criminal justice system. (*See Prisoners Union v. Dept. of Corr.* (1982) 135 Cal.App.3d, 930, 938, 941–942; *Keenan v. Super. Ct.* (2002) 27 Cal.4th 413, 436.) Moreover, this policy is not the type of run-of-the-mill prison regulation ordinarily subject to *Turner* review. The County's sweeping policy eliminates an entire medium of communication for nonincarcerated Californians, while subjecting their writings and other personal information to long-term, technology-enabled surveillance.

California courts have applied more searching scrutiny in constitutional challenges to expansive speech restrictions that burden the rights of nonincarcerated individuals communicating with incarcerated individuals. For example, in *Prisoners Union*, *supra*, 135 Cal.App.3d at pp. 940–941, the Court of Appeal held that a policy prohibiting nonincarcerated individuals from pamphleteering in a prison parking lot could survive only if it were a "time, place, and manner" restriction "required by security or other legitimate governmental interests," even though the prison raised internal security concerns to justify its conduct. The court explained that "the fact that a prison is involved is highly relevant, but not determinative" to the constitutional analysis. (*Id.* at 938.) And in *People v. Martinez*, the California Supreme Court expressed doubt that *Turner* "supplie[d] the right lens" to analyze regulations limiting bail agents' ability to enter business arrangements with incarcerated people, even though the state argued that the practice threatened jail security. (*People v. Martinez* (2023) 15 Cal.5th 326 [312 Cal.Rptr.3d 340, 349–350].) It applied intermediate scrutiny instead. (*Id.*; *see also People v. Dolezal* (2013) 221 Cal.App.4th 167, 173–

174 [similar].)[5] Even the Ninth Circuit has questioned *Turner*'s application "where the regulation promulgated by prison officials is centrally concerned with restricting the rights of outsiders rather than prisoners." (*Cal. First Amend. Coal. v. Woodford* (9th Cir. 2002) 299 F.3d 868, 878.)

Contrary to the County's arguments, *see* Defs.' Mem. 16–17, legislative protections enshrined in California Penal Code § 2600 do not supplant the constitutional standard of review in this case. Section 2600 provides statutory protections for incarcerated individuals; it does not—and could not—replace the independent protections of California's Constitution. (*See Payne v. Super. Ct.* (1976) 17 Cal.3d 908, 912–913 (en banc) ["[T]he force of petitioner's contentions is in no way affected by [§ 2600], once known as a 'civil death' statute."].) The cases upon which the County relies are thus largely irrelevant because they interpret § 2600 but do not purport to impose limitations on the independent *constitutional* guarantees. (*See In re Qawi* (2004) 32 Cal.4th 1, 21; *Thompson v. Dept. of Corr.* (2001) 25 Cal.4th 117, 134 fn.6; *Cnty. of Nev. v. Super. Ct.* (2015) 236 Cal.App.4th 1001, 1009 fn.2; *Snow v. Woodford* (2005) 128 Cal.App.4th 383, 390 fn.3.)

B. Even under the *Turner v. Safley* test, Plaintiffs have stated an Article I, Section 2 claim.

Plaintiffs have sufficiently alleged that the County's mail policy fails even under *Turner*. *Turner*'s reasonableness standard "is not toothless." (*Thornburgh v. Abbott* (1989) 490 U.S. 401, 414.) The government must "show that the regulation is rationally related to a legitimate penological objective," (*Hrdlicka v. Reniff* (9th Cir. 2011) 631 F.3d 1044, 1051), through "more than a formalistic logical connection." (*Beard v. Banks* (2006) 548 U.S. 521, 535.) If it does, the burden shifts to the plaintiff to refute the "common-sense connection," then back to the government to prove that the connection "is not so 'remote as to render the policy arbitrary or irrational.'" (*Mauro v. Arpaio* (9th Cir. 1999) 188 F.3d 1054, 1060 (quoting *Turner v. Safley* (1987) 482 U.S. 78, 89–90).)

---

[5] Although the *Martinez* court questioned the applicability of *Turner* in part because the regulations at issue were promulgated by the Insurance Commissioner rather than a jail or prison administrator, the court also focused on the fact that the regulations targeted nonincarcerated persons seeking to communicate with those behind bars. *Martinez*, *supra*, 312 Cal.Rptr.3d at pp. 349–350.

1. The County has not shown that the mail policy is rationally related to any legitimate penological goals.

The County falters at step one. The facts alleged in the Amended Complaint show that there is no rational relationship between the mail policy and the County's asserted interest in limiting the introduction of drugs. Plaintiffs have alleged that only a small proportion of mail in correctional facilities contains any contraband whatsoever, that drugs primarily enter correctional facilities via staff members, that there is no evidence the County's prior inspection policies were insufficient, and that physical mail bans like the County's have been ineffective at reducing drug use and overdoses in other facilities. (AC ¶¶ 51–53, 55.) (*See Ashker v. Dept. of Corr.* (9th Cir. 2003) 350 F.3d 917, 923 [finding no rational connection where "common sense would dictate that [the jail's] concerns would extend" beyond mail]; *Prison Legal News v. Columbia Cnty.* (D.Or. 2013) 942 F.Supp.2d 1068, 1083 (*Columbia Cnty.*); *Prison Legal News v. Cnty. of Ventura* (C.D.Cal., June 16, 2014) 2014 WL 2736103, at *4–5 (*Cnty. of Ventura*). Plaintiffs also allege that, outside of a Facebook comment mentioning concerns about "fentanyl exposures," the County has not attempted to defend the mail policy. It has never publicly explained, in the past or in connection with this case, whether mail is a source of fentanyl in its jails, whether fentanyl smuggling is a prevalent problem in its jails, or why it adopted the mail policy. (AC ¶ 49.) Finally, Plaintiffs have alleged that the mail policy involves long-term, technology-enabled surveillance that has no connection whatsoever to the County's purported interest in preventing the entry of drugs into its jails, (AC ¶ 8), and the County has not even attempted to justify its retention and surveillance of mail. The factual allegations in the Amended Complaint undercut any possible common-sense connection between the County's apparent goals and its conduct.

The County's effort to rebut Plaintiffs' allegations by presenting extrinsic evidence is plainly improper on a motion for judgment on the pleadings. (*Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 999.) Indeed, the *Turner* test is a fact-bound inquiry that generally cannot be satisfied at the pleadings stage before jail administrators introduce competent evidence of their own. (*See, e.g.*, *White v. Pazin* (E.D.Cal., Oct. 19, 2016) 2016 WL 6124234, at *13 [describing the *Turner* test as "heavily fact-based"], *R&R adopted* (E.D.Cal., Feb. 16, 2017) 2017

WL 661928; *see also Heyer v. U.S. Bureau of Prisons* (4th Cir. 2021) 984 F.3d 347, 356.)

In any event, the material outside of the pleadings that the County relies on—including conclusions reached after discovery in other cases, (*see* Defs.' Mem. 18–19)—does not meet the County's burden. The County relies primarily on *Human Rights Defense Center v. Board of County Commissioners for Strafford County* (*HRDC*), which gives the County no help. The plaintiff there did not allege that the jail's policy chilled expression or that the policy would be ineffective at reducing drug use. (*HRDC* (D.N.H., Feb. 2, 2023) 2023 WL 1473863, at *1–2.) And the district court ruled only after an evidentiary hearing at which the jail demonstrated it had "discovered narcotics" on letter paper and books, "explored alternatives," and then decided to ban incoming mail.

2. The remaining Turner factors all weigh in Plaintiffs' favor.

Because the mail policy fails *Turner*'s first factor, the Court need not consider the remaining factors and should deny the County's motion. (*See Prison Legal News v. Cook* (9th Cir. 2001) 238 F.3d 1145, 1151.) Nevertheless, the other *Turner* factors also weigh in Plaintiffs' favor.

First, there are no adequate substitutes for physical mail. Physical mail is uniquely expressive. (*See* AC ¶¶ 2, 35–39, 56–57.) Even if other forms of communication could substitute for physical mail, those means are all "logistically challenging [and] expensive," while lacking the privacy, intimacy, and reliability of physical mail. (AC ¶¶ 40–41, 57; *see Cnty. of Ventura*, *supra*, 2014 WL 2736103, at *6; *Columbia Cnty.*, *supra*, 942 F.Supp.2d at p. 1085.) The County points to *HRDC* and *Honea*, (Defs.' Mem. 19–20), but those cases involved claims regarding paperback books and periodicals, not personal mail, religious material, and interactive art projects, and there were no allegations that the correspondents were subjected to surveillance that chilled expression. (*See HRDC*, *supra*, 2023 WL 1473863, at *1; *Crime Just. & Am., Inc. v. Honea* (9th Cir. 2017) 876 F.3d 966, 970.) Each case also involved greater access to the publications than is available to physical mail in the County. (*HRDC*, *supra*, 2023 WL 1473863, at *8; *Crime, Just. & Am., Inc. v. Honea* (E.D.Cal. 2015) 110 F.Supp.3d 1027, 1038–1039; *Crime Just. & Am., Inc. v. Honea*, *supra*, 876 F.3d at p. 976.)

Second, because the policy does not accomplish the County's asserted goals, ending it

would not endanger jail staff or populations. (*See Cal. First Amend. Coal.*, *supra*, 299 F.3d at p. 884; *Columbia Cnty.*, *supra*, 942 F.Supp.2d at p. 1086). The long-standing history in correctional facilities of relying on visual inspection of mail to identify contraband, AC ¶ 28, supports Plaintiffs' arguments. (*See Cnty. of Nev.*, *supra*, 236 Cal.App.4th at p. 1011 [finding third factor favored contact visits where "the evidence indicate[d] that nonpartitioned attorney visits are common in most institutions, both in this state and elsewhere"]; *Ashker*, *supra*, 350 F.3d at p. 923 fn.4.) The County's only arguments to the contrary, (Defs.' Mem. 20–21), rely on factual assertions that are inappropriate for the Court to consider at this juncture, and are contradicted by the overwhelming scientific consensus that brief exposure to fentanyl cannot harm corrections officers, (AC ¶ 54).

Finally, Plaintiffs have sufficiently alleged that the County's policy "is an exaggerated response to county concerns." (*Cnty. of Nev.*, *supra*, 236 Cal.App.4th at p. 1011.) As the Amended Complaint explains, the County already has Raman spectroscopy devices and drug-sniffing dogs that it can use to identify contraband coming in through the mail. (AC ¶ 55.) The County could also increase staff security measures and improve drug treatment programs to limit drug use behind bars. (*Id.*) The County argues that its mail policy is not an exaggerated response because of the severity of the opioid epidemic, (Defs.' Mem. 21–22), ignoring both the lack of evidence that there is a fentanyl problem in the County's jails specifically, (AC ¶ 50), and the fact that the alternatives Plaintiffs put forward would address those concerns, (*id.* ¶ 55).

III. Plaintiffs have stated an Article I, Section 13 claim.

The County's mail policy subjects Plaintiffs' private communications to unreasonable searches and seizures within the meaning of Section 13. Just as the U.S. Supreme Court has in the Fourth Amendment context, the California Supreme Court has acknowledged that "technological change might alter the privacy interests at stake" in cases brought under Section 13, "requiring a new constitutional analysis." (*See People v. Buza* (2018) 4 Cal.5th 658, 690; *see also, e.g., Carpenter v. United States* (2018) 138 S.Ct. 2206, 2219, 2222 ["When confronting new concerns wrought by digital technology, this Court has been careful not to uncritically extend existing precedents."]; *Riley v. California* (2014) 573 U.S. 373, 393–394; *United States v. Jones* (2012) 565

U.S. 400, 415–416 (Sotomayor, J., concurring).)[6] This principle applies both to the question of whether a search has occurred and to the question of whether that search was reasonable. (*See, e.g.*, *Carpenter*, *supra*, 138 S.Ct. at pp. 2218–2219 [considering effect of technological advancement on expectations of privacy]; *Riley*, 573 U.S. at pp. 385–386 [considering relevance of technological advancement to reasonableness inquiry].)

A. Plaintiffs have adequately alleged that the County is searching and seizing their mail.

The County's mail policy triggers Article I, Section 13 of the California Constitution for three reasons: it violates Plaintiffs' subjective and reasonable expectations of privacy, it physically trespasses on the incarcerated Plaintiffs' property, and it meaningfully interferes with the nonincarcerated Plaintiffs' possessory interest in the mail they send.

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 People v. Camacho* (2000) 23 Cal.4th 824, 830–831.) Incarcerated people and those who write to them have a reasonable expectation that their mail will not be stored for years in a database that can be freely accessed by County employees and anyone else issued credentials. (AC ¶¶ 29, 44–46.)

Over the past decade, courts have begun to recognize the constitutional significance of advances in surveillance technology. (*See, e.g.*, *Carpenter*, *supra*, 138 S.Ct. at pp. 2216–2219; *Jones*, *supra*, 565 U.S. at pp. 415–416, 430 (concurrences of Sotomayor, J., and Alito, J.); *Leaders of a Beautiful Struggle v. Balt. Police Dept.* (4th Cir. 2021) 2 F.4th 330, 341 (*Leaders*).) In particular, they have recognized that new forms of surveillance may violate societal expectations of privacy by enabling easy, invasive, and long-lasting surveillance. (*See Carpenter*, 138 S.Ct. at pp. 2217–2218; *Leaders*, *supra*, 2 F.4th at p. 345).

As was true in cases like *Carpenter* and *Jones*, the invasive surveillance here was previously

---

[6] Fourth Amendment case law informs (but does not dictate) the analysis of Section 13 claims. (*People v. Brisendine* (1975) 13 Cal.3d 528, 548–559 (en banc); *see also Craft v. Cnty. of San Bernardino* (C.D.Cal. 2006) 468 F.Supp.2d 1172, 1180.)

impossible—because of cost, personnel needs, or lack of access to the data. Consequently, the public's understanding that mail sent into jails may be reviewed by staff does not equate to an expectation that sending mail to or receiving mail within a jail would subject them to the type of long-term, technology-enabled surveillance at issue here. Five aspects of the County's mail policy are particularly relevant to this conclusion. **First**, the scope of the policy is sweeping, extending to every piece of incoming non-legal mail sent to anyone incarcerated in the County's jails. (*See* AC ¶¶ 28, 44.) The policy also enables the collection of additional information about senders of mail, sweeping up their phone numbers, physical addresses, IP addresses, email addresses, financial information, and GPS locations. (AC ¶ 29(c).) **Second**, the information obtained under the policy is deeply personal and "reflects a wealth of detail about [correspondents'] familial, political, professional, religious, and sexual associations." (*Jones*, *supra*, 565 U.S. at p. 415 (Sotomayor, J., concurring); *see also Leaders*, *supra*, 2 F.4th at pp. 330, 342 [considering that surveillance program "open[ed] 'an intimate window' into a person's associations and activities"]; *Zurcher v. Stanford Daily* (1978) 436 U.S. 547, 564 [requiring "scrupulous exactitude" for searches involving expressive materials].) **Third**, this information is stored and made available to law enforcement for years, if not indefinitely. (AC ¶ 29(a); *see Jones*, 565 U.S. at p. 415 (Sotomayor, J., concurring) [describing risk that "the government can store such records and efficiently mine them for information for years into the future"].) **Fourth**, the County has unrestricted use of the information it obtains under the policy, and anyone with access can read and run searches on mail at any time. (AC ¶¶ 29(b), 45, 46; *cf. Buza*, *supra*, 4 Cal.5th at p. 690 [noting "safeguards against the wrongful use or disclosure of sensitive information may minimize the privacy intrusion"].) **Finally**, the County's use of MailGuard makes expansive and complex surveillance effortless. Smart Communications digitizes the mail, stores the data, and provides software with powerful search capabilities. (AC ¶¶ 26, 29, 44.) Any user can easily single out individuals complaining about jail policies or criticizing the Sheriff, or identify everyone who has corresponded with an incarcerated person. (*Ibid*.; *see Carpenter*, *supra*, 138 S.Ct. at pp. 2217–2218; *Jones* 565 U.S. at pp. 415–416, 429–430 (concurrences of Sotomayor, J., and Alito, J.).) There is little incentive *not* to perform intrusive database searches, as there are no safeguards to limit the use of this information. (AC

¶ 45.)

These aspects of the County's mail surveillance make it fundamentally different from the surveillance considered in the cases the County cites. (*See* Defs.' Mem. 15–16.) *People v. Loyd* is illustrative: it involved conventional tape recordings of an individual's conversations over a relatively short period of time. (*People v. Loyd* (2002) 27 Cal.4th 997, 999.) Notably, *Loyd* was decided a decade before *Jones*, with no apparent consideration of potential technological advances like MailGuard. (*Cf. Carpenter*, *supra*, 138 S.Ct. at pp. 2218–2219 [rules adopted for surveillance technologies must take further technological advancement into account]). Moreover, while the defendant in *Loyd* claimed a right to be free of any communications surveillance except as needed for security, (27 Cal.4th at pp. 999–1000), Plaintiffs here assert more narrowly that they have a reasonable expectation that their mail will not be subjected to long-term surveillance aided by high-tech analytical tools.[7]

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

The County's surveillance of Plaintiffs' mail also qualifies as a search because it involves a physical trespass into Plaintiffs' personal papers for the purpose of gathering information. (*Jones*, *supra*, 565 U.S. at pp. 404–405, 407.)[8] 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; *see also Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1352 [defining trespass as "injury to the personal property or the possessor's interest"].)

The County's conduct is a trespass as to both the incarcerated and nonincarcerated

---

[7] The other cases the County cites are distinguishable for the same reasons. (*Sac. Cnty. Deputy Sheriffs' Assn. v. Cnty. of Sac.* (1996) 51 Cal.App.4th 1468, 1472 [video surveillance of release office in county jail]; *People v. Garvey* (1979) 99 Cal.App.3d 320, 322 [single intercepted letter sent from one jail to another].)

[8] Because California's Section 13 provides protection greater than the Fourth Amendment, (*see People v. Brisendine*, (1975) 13 Cal.3d 528, 545, 551 (en banc)), trespass analysis applies to claims under Section 13 as well. (*Cf. People v. Cook* (1985) 41 Cal.3d 373, 379 [stating Section 13 analysis "has come to encompass an assessment of the reasonableness of the individual's expectation of privacy in a particular situation, wherever he is, and whether or not government agents trespassed physically on his property interests"].)

Plaintiffs. Incarcerated people retain some property rights in their mail. (*See In re Dohner* (2022) 79 Cal.App.5th 590, 596 [acknowledging "inmates retain some property rights in prison"], review den. Sep. 14, 2022; *see also Orozco v. Dart* (7th Cir. 2023) 64 F.4th 806, 815 [recognizing incarcerated person retained property interest in personal property for which he lacked possessory interest].) As to the nonincarcerated Plaintiffs, a sender of mail retains a possessory interest in the property until it reaches the intended recipient. (*United States v. Hernandez* (9th Cir. 2002) 313 F.3d 1206, 1209; *see also Ex parte Jackson* (1877) 96 U.S. 727, 733.) Consequently, the County's interdiction and destruction of mail for investigatory use is an injury that constitutes common-law trespass and a Section 13 search. (*See Jones*, *supra*, 565 U.S. at p. 411.)

3. The County is seizing the nonincarcerated Plaintiffs' mail.

The nonincarcerated Plaintiffs also adequately alleged that the County is seizing their mail. 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.) A sender's possessory interests in sent mail can form the basis for finding 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.).) Even a delivery delay may rise to the level of a seizure. (*See ibid.*; *cf. United States v. England* (9th Cir. 1992) 971 F.2d 419, 421 [finding no seizure because no delay].) Here, Plaintiffs have alleged that their mail is outright destroyed and replaced with inferior digital substitutes—a far more meaningful interference with their possessory interests.[9] (*See, e.g.*, AC ¶¶ 26, 35–40.) Thus, the mail policy involves seizures within the meaning of Section 13.

B. The County's search and seizure of Plaintiffs' mail is unreasonable.

Rather than reflecting a reasonable attempt to achieve a legitimate government interest, the mail policy reflects the County's belief that Section 13 places no limits at all on what it can do with Plaintiffs' correspondence. (*See* Defs.' Mem. 15–16.) The County does not even argue that its mail policy complies with Section 13's reasonableness standard, nor could it.

[9] The Amended Complaint also alleges substantial delivery delays under the County's mail policy. (AC ¶ 84.)

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 less intrusive but equally effective alternatives are available. (*See* Section II.B *supra*; *People v. Lopez* (2019) 8 Cal.5th 353, 374–375; *Delaware v. Prouse* (1979) 440 U.S. 648, 659–660; *Birchfield v. N. Dakota* (2016) 579 U.S. 438, 474.)

Regardless, the County's mail policy is unreasonable due to its invasiveness, duration, and lack of safeguards, as balanced against any potential needs the County may assert. (*See Buza*, *supra*, 4 Cal.5th at p. 684 [courts should weigh "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"]; *Byrd v. Maricopa Cnty. Bd. of Supervisors* (9th Cir. 2017) 845 F.3d 919, 922.) Courts recognize a heightened need for limits on intrusions into materials implicating freedom of expression or association, like the mail at issue here. (*Zurcher*, *supra*, 436 U.S. at p. 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; *see Carpenter*, *supra*, 138 S.Ct. at p. 2218.) 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); *see Jones*, *supra*, 565 U.S. at p. 415 (Sotomayor, J., concurring).) 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*;* *see Buza*, *supra*, 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.

CONCLUSION

The Court should deny the County's motion for judgment on the pleadings.

DATED: September 29, 2023

Respectfully submitted,

/s/ Cara Gagliano
Cara Gagliano (SBN 308639)

Aaron Mackey (SBN 286647)
Electronic Frontier Foundation
815 Eddy Street
San Francisco, CA 94109
Tel.: (415) 436-9333
cara@eff.org

Scott Wilkens (SBN 226259)
Stephanie Krent (*Pro Hac Vice pending*)
Jennifer Jones (*Pro Hac Vice pending*)
Mayze Teitler (*Pro Hac Vice pending*)
Knight First Amendment Institute at Columbia University
475 Riverside Drive, Suite 302
New York, NY 10115
Tel.: (646) 745-8500
scott.wilkens@knightcolumbia.org

Shubhra Shivpuri (SBN 295543)
Sara Haji (SBN 330834)
Social Justice Legal Foundation
523 West 6th Street, Suite 450
Los Angeles, CA 90014
Tel.: (213) 973-4063
sshivpuri@socialjusticelaw.org

Counsel for Plaintiffs