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14 UNITED STATES DISTRICT COURT  
15 CENTRAL DISTRICT OF CALIFORNIA

16 JUSTIN SANCHEZ, *et al.*,

17 Plaintiff,

18 v.

19 CITY OF LOS ANGELES, *et al.*,

20 Defendants.

No. 2:20-cv-05044-DMG (AFMx)

*The Hon. Dolly M. Gee*

**DEFENDANTS CITY OF LOS ANGELES  
AND LOS ANGELES DEPARTMENT OF  
TRANSPORTATION’S NOTICE OF  
MOTION AND MOTION TO DISMISS  
PURSUANT TO FED. R. CIV. PROC.  
12(b)(6); MEMORANDUM OF POINTS  
AND AUTHORITIES**

Complaint filed: June 8, 2020

**[Request for Judicial Notice; Declaration  
of Jeffrey L. Goss; and [Proposed] Order  
filed Concurrently herewith]**

**Hearing**

Date: August 28, 2020  
Time: 9:30 a.m.  
Location: Courtroom 8C  
350 W. 1st Street  
Los Angeles, CA 90012

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE** that on Friday, August 28, 2020 at 8:30 a.m., or as soon thereafter as the matter may be heard in Courtroom 8C of the above titled Court, located at 350 West 1st Street, Los Angeles, California, 90012, Defendants City of Los Angeles (“the City”) and the Los Angeles Department of Transportation<sup>1</sup> (collectively “Defendants”) will and hereby do move to dismiss Plaintiffs Justin Sanchez and Eric Alejo’s (“Plaintiffs”) Complaint (“Complaint”) pursuant to Federal Rule of Civil Procedure 12(b)(6). Defendants’ Motion is brought on the grounds that the action should be dismissed as each of the claims asserted in the Complaint should be dismissed because the Complaint fails to adequately state any such claim.

The Defendants’ Motion is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Request for Judicial Notice, Declaration of Jeffrey L. Goss, upon all the pleadings and papers that are on file in this action, and upon all oral and documentary evidence that may be presented at the time of the hearing on this Motion. This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on July 23, 2020.

Dated: July 31, 2020

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\_\_\_\_\_  
/s/ Jeffrey L. Goss

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<sup>1</sup> As addressed in its memorandum of points and authorities, the City contends its Department of Transportation is erroneously named in this action.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Justin Sanchez and Eric Alejo (“Plaintiffs”) allege they rent and ride  
4 dockless electric scooters – owned by various third parties – on the public streets in Los  
5 Angeles. As a condition of their temporary use of these electric scooters, Plaintiffs allow  
6 the scooter operators to collect and use reams of data, granting the operators permission  
7 to share Plaintiffs’ data with third parties, including with the “government” for  
8 regulatory and other purposes. In 2018, faced with what Plaintiffs admit was an  
9 “invasion” of a new, micro-mobility platform that Plaintiffs allege “cluttered city  
10 sidewalks, lacked safety features, and interfered with disabled access to city streets,” the  
11 City of Los Angeles (“the City”) directed its Department of Transportation to create a  
12 Shared Mobility Device Pilot Program in an effort to regulate the new platform. One  
13 component of the Pilot Program, the Mobility Data Specification (“MDS”), consists of a  
14 data sharing structure in which scooter operators share *anonymized* data with the City  
15 regarding scooter start and stop times, routes taken, and other data (with reporting time  
16 delays applied to address purported privacy concerns), all of which is critical to the  
17 City’s regulatory efforts. Notwithstanding Plaintiffs voluntary agreement to allow the  
18 scooter operators to collect and share detailed information about each of them –  
19 including with the government – Plaintiffs now claim the data sharing requirements  
20 included in the City’s Pilot Program amount to (1) an unreasonable search that violates  
21 the U.S. and California Constitutions, and (2) a violation California Penal Code §1546.1,  
22 *et seq.*, (California’s Electronic Communications Privacy Act (CalECPA)).

23 Plaintiffs’ allegations of constitutional and criminal violations ring hollow for  
24 numerous reasons. To begin with, the City’s effort to regulate the public right of way  
25 falls squarely within its police powers, and is expressly sanctioned by state law. More  
26 importantly, Plaintiffs simply have no valid expectation of privacy with respect to their  
27 scooter use on the public right of way, particularly given their voluntary agreement to  
28 allow the scooter operators to share their data with third parties. Finally, Plaintiffs

1 cannot seek to enforce CalECPA, a state statute found within Criminal Procedure Part of  
2 the Penal Code, and one whose available remedies consist of exclusionary orders in  
3 criminal proceedings.

4 In light of the above, Defendant City of Los Angeles (and its erroneously named  
5 Department of Transportation) respectfully request that this Court dismiss Plaintiffs’  
6 complaint.

7 **II. STATEMENT OF RELEVANT FACTS**

8 **A. The Invasion Of Dockless Mobility Devices**

9 In or about 2017, the City of Los Angeles (“City”), like many cities throughout the  
10 state, experienced an “invasion of motorized electric scooters on city sidewalks.”<sup>2</sup>  
11 Complaint (“Cmplt.”), ¶1. These dockless scooters are owned and maintained by private  
12 companies, and individual customers *rent* the dockless scooters via smartphone  
13 applications. Cmplt., ¶17 (emphasis added). These rental customers, like Plaintiffs,  
14 begin rides wherever a dockless scooter is located (and end their ride where they desire)  
15 by using the dockless scooter companies’ mobile application to terminate the rental.  
16 Cmplt. ¶17. Plaintiffs concede that upon their “invasion” the dockless scooters  
17 “cluttered city sidewalks, lacked safety features, and interfered with disabled access to  
18 city streets.” Cmplt., ¶2. The dockless scooter companies did little to address the  
19 complaints, and instead “aggressively [pushed] back against [the “City’s] attempts to  
20 regulate the vehicles.” Cmplt., ¶2.

21 **B. The Need To Regulate The New Mobility Device Platform**

22 Like many cities across the country attempting to address the dockless scooter  
23 invasion, the City took steps to properly regulate this new shared mobility platform. On  
24 September 28, 2018, the Los Angeles City Council passed an ordinance requiring the  
25 Los Angeles Department of Transportation (“LADOT”) to implement a “Shared  
26 Mobility Device Pilot Program” that would, among other things, establish an application  
27 process for the approval of City-issued permits to operators or dockless bicycles, electric

28 <sup>2</sup> The “motorized electric scooters” are hereinafter referred to as “dockless scooters.”



1 bicycles, motorized scooters, and electric scooters.” Cmplt., ¶19; Request for Judicial  
 2 Notice (“RFN”), Exh. “A” (Los Angeles Ordinance No. 185785 adding section 71.29 to  
 3 the Los Angeles Municipal Code, Added by Ord. No. 185,785, Eff. 10/5/18). The  
 4 ordinance required that “an operator of a shared mobility device shall obtain a permit  
 5 from [LADOT] and comply with all Department permit rules, regulations,  
 6 indemnification, insurance and fee requirements.” Cmplt., ¶19.

7 **C. LADOT’s Shared Mobility Device Pilot Program**

8 Acting in compliance with Ordinance No. 185785, LADOT created a permitting  
 9 program via an application and review process. Cmplt., ¶ 19; RJN, Exh. “B” (LADOT  
 10 Dockless On-Demand Personal Mobility One-Year Permit). The permit application  
 11 requires the applicant companies to detail their intended dockless scooter deployment  
 12 and agree to a number of regulatory requirements. Cmplt. ¶20; RJN, Exh. “B” at p. 12.  
 13 Central to Plaintiffs’ complaint here, LADOT also sought to address this new mobility  
 14 technology – and its effect on the public right of way – with technology itself. Cmplt.,  
 15 ¶3. As a part of its effort, LADOT developed an information sharing system known as  
 16 Mobility Data Specification (“MDS”); a tool that allows LADOT to receive data from  
 17 permitted dockless scooter companies to enable LADOT to actively manage private  
 18 mobility providers and the public right of way. Cmplt., ¶23.

19 MDS requires scooter operators wishing to engage in business in Los Angeles to  
 20 provide anonymized data about each vehicle and trip taken in Los Angeles. Cmplt., ¶3.  
 21 MDS’s purpose is “to accelerate information collection by cities and counties facing an  
 22 increase in the volume of permitting associated with dockless scooters.” Cmplt., ¶24.  
 23 MDS’s goal is “to provide a standardized way for municipalities of other *regulatory*  
 24 agencies to ingest, compare and analyze data from *mobility* service providers, and to give  
 25 municipalities the ability to express *regulation* in machine-readable formats ... MDS is a  
 26 key piece of digital infrastructure that supports the effective implementation of mobility  
 27 policies in cities around the world.” Cmplt., ¶24 (emphasis added). Critically important  
 28 here, MDS does not collect any information directly identifying the rider of a particular

1 vehicle. Cmplt., ¶¶4, 26. As a result, Plaintiffs’ complaint centers on the mere  
 2 possibility that they might be identified based on some coupling of the admittedly  
 3 anonymized MDS data with “just one other dataset” including “physical observation of a  
 4 rider.” Cmplt., ¶¶4, 26. To be clear, Plaintiff alleges that such identification could take  
 5 place, but only if coupled with public or otherwise available data. Cmplt., ¶¶4, 26.

6 **D. LADOT Creates Data Protection Principles To Safeguard Data Shared**  
 7 **By Dockless Scooter Operators**

8 In their complaint, Plaintiffs’ reference Motion No. 19-1355 (November 1, 2019)  
 9 regarding the Los Angeles City Council’s instructions to LADOT to report back to City  
 10 Council with respect to the collection and use of data required by MDS, as well as  
 11 certain other data-related issues. RJN, Exh. “C,” “D,” “E,” and “F” (Council File No.  
 12 19-1355 includes, among other things, Councilmember Ryu’s Motion (Motion No. 19-  
 13 1355 [RJN Exh. “C”]), the June 14, 2020 LADOT Report [RJN Exh. “D”], the  
 14 Transportation Committee’s June 24, 2020 Report to Council,<sup>3</sup> [RJN, Exh. “E”], and  
 15 Council’s July 1, 2020 approval of the Transportation Committee’s Report to Council  
 16 [RJN Exh. “F”]).

17 Important here, Motion No. 19-1355 references LADOT’s Data Protection  
 18 Principles, which are themselves included in Council File No. 17-1125-S8. RJN, Exh.  
 19 “G” (Council File No. 17-1125-S8 – August 15, 2019 Los Angeles Department of  
 20 Transportation Memorandum to City Council attaching April 12, 2019 Data Protection  
 21 Principles). The Data Protection Principles were developed to safeguard individual  
 22 privacy while supporting the City’s efforts to promote a transportation system free from  
 23 discrimination and the exploitation of personal mobility data. RJN, Exh. “G” at pp. 123-  
 24 125. These Principles confirm that MDS process *vehicle* data, not *individual* data, and  
 25 further, that the City (1) categorizes MDS data as “Confidential Information” such that it  
 26 is exempt from release under the California Public Records Act; (2) minimizes data sets  
 27 solely to meet operational and safety needs; and (3) prohibits sharing data with law

28 <sup>3</sup> The Committee’s Report incorrectly references “June 12, 2020,” rather than “June 14, 2020” as the date of LADOT’s Report.

1 enforcement. RJN, Exh. “G” (April 12, 2019 LADOT Memorandum) at pp. 123-124, §§  
2 1, 2, and 3.

3 To be clear, the City’s Data Protection Principles confirm that law enforcement  
4 agencies are not permitted access to MDS data through the following language:

5 Law enforcement and other government agencies, whether local, state, or  
6 federal will not have access to raw trip data other than as required by law,  
7 such as a court order, subpoena, or other legal process. To be clear, the City  
8 will make no data available to law enforcement agencies through this  
9 process that is not already available to them from Operators now. RJN,  
10 Exh. “G” (April 12, 2019 LADOT Memorandum) at p. 124, §3(a).

11 Thus, not only is Plaintiffs’ personal information not shared through MDS, the  
12 anonymized data that is shared with LADOT is safeguarded from disclosure to third  
13 parties, including law enforcement agencies.

### 14 **III. LEGAL STANDARD**

15 A complaint may be dismissed for failure to state a claim under Rule 12(b)(6)  
16 where the factual allegations do not raise the right to relief above a speculative level.  
17 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007); *see also Moss v. United*  
18 *States Secret Serv.*, 572 F.3d 962 (9th Cir. 2009) (“for a complaint to survive a motion to  
19 dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that  
20 content, must be plausibly suggestive of a claim entitling the plaintiff to relief.”). While  
21 the court assumes that well-pleaded factual allegations are true, the court need not accept  
22 as true “allegations that are merely conclusory, unwarranted deductions of fact, or  
23 unreasonable inferences.” *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir.  
24 2004) (citation omitted).

### 25 **IV. LEGAL ARGUMENT**

#### 26 **A. Dockless Scooter Regulations Fall Under The City’s Police Powers**

27 The Tenth Amendment of the United States Constitution and California  
28 Constitution art. XI, §7 confers upon all cities the power to make/enforce within their

1 limits all local, police, sanitary, and other ordinances not in conflict with general laws.  
2 *Birkenfeld v. City of Berkeley*, 17 Cal.3d 129, 140 (1976). Charter cities, like the City,  
3 have even greater authority: they have exclusive power to legislate over “municipal  
4 affairs.” Cal. Const., art. XI, § 5, subd. (a); *City and County of San Francisco v. Regents*  
5 *of University of California*, 7 Cal. 5th 536, 544-545 (2019); *State Building &*  
6 *Construction Trades Council of California v. City of Vista*, 54 Cal. 4th 547, 555-556  
7 (2012).

8 A municipality like the City of Los Angeles, therefore, has general police powers  
9 to regulate local transportation matters involving the public right of way, including novel  
10 platforms like dockless scooters. Moreover, California Vehicle Code section 21225  
11 expressly allows the City to regulate the registration, parking, and operation of  
12 motorized scooters on pedestrian and bicycle facilities as well as local streets and  
13 highways:

14 This article does not prevent a local authority, by ordinance, from regulating  
15 the registration of motorized scooters and the parking and operation of  
16 motorized scooters on pedestrian or bicycle facilities and local streets and  
17 highways, if that regulation is not in conflict with this code. RJN, Exh. “H”  
18 (Cal. Veh. Code §21225).

19 The dockless scooters at issue in this case fall squarely within the Vehicle Code’s  
20 definition of “motorized scooters” for which local authorities are expressly permitted to  
21 regulate:

22 (a) A “motorized scooter” is any two-wheeled device that has handlebars,  
23 has a floorboard that is designed to be stood upon when riding, and is  
24 powered by an electric motor. This device may also have a driver seat that  
25 does not interfere with the ability of the rider to stand and ride and may also  
26 be designed to be powered by human propulsion. For purposes of this  
27 section, a motorcycle, as defined in Section 400, a motor-driven cycle, as  
28 defined in Section 405, or a motorized bicycle or moped, as defined in

1 Section 406, is not a motorized scooter. RJN, Exh. “I” (Cal. Veh. Code  
2 §407.5).

3 As Plaintiffs readily admit, the City has taken steps to address the “invasion” of  
4 dockless scooters, and the complaints that followed soon after the dockless scooters  
5 appeared. Cmpl. ¶¶1, 2, 3. In its effort to “regulat[e] the registration of motorized  
6 scooters and the parking and operation of motorized scooters on pedestrian or bicycle  
7 facilities and local streets and highways,” the City amended its municipal code, adding  
8 LAMC §71.29, which relates to the Regulation of Shared Mobility Devices, and reads as  
9 follows:

10 The Department shall implement a Shared Mobility Device Pilot Program,  
11 and issue a permit to qualified pilot program operator, as defined in the  
12 Department’s Rules and Guidelines, including, but not limited to, an  
13 operator of a dockless bicycle, electric bicycle, motorized scooter and  
14 electric scooter. Under the Pilot Program, an operator of a shared mobility  
15 device shall obtain a permit from the Department and comply with all  
16 Department permit rules, regulations, indemnification, insurance and fee  
17 requirements set forth in the Department’s Rules and Guidelines. Failure to  
18 comply with the Department’s Rules and Guidelines may result in the  
19 suspension, revocation, or a reduction of the number of permits issued by  
20 the Department to an operator. The Department may amend its Rules and  
21 Guidelines as necessary during the life of the Pilot Program. RJN, Exh. “J”  
22 (LAMC §71.29).

23 Judicial notice is requested under Fed. R. Evid. 201(b) that (1) the City of Los  
24 Angeles is a charter city operating under the laws of the state of California, (2) Cal. Veh.  
25 Code §21225 expressly allows for local authority regulation of motorized scooters with  
26 respect to the parking and operation of the devices as well as their use on pedestrian or  
27 bicycle facilities and local streets and highways, and (3) LAMC §71.29 addresses the  
28 regulation of dockless scooters with the City’s limits.

**B. Plaintiffs’ First And Second Claims Fail Because The City’s Mobility Data Specification Does Not Violate Constitutional Rights**

**1. This dispute is analyzed under Expectation of Privacy**

Plaintiffs’ first and second claims should be dismissed because Plaintiffs cannot plausibly allege a deprivation of their Fourth Amendment rights (or analogous rights found in the California Constitution) based on the City’s requirement that dockless scooter operators share certain anonymized location data pursuant to the City’s permitting requirements.<sup>4</sup> *See Capp v. City of San Diego*, 940 F.3d 1046, 1061 (9th Cir. 2019) (affirming dismissal of *Monell* claim where plaintiffs failed to plausibly plead a Fourth Amendment violation).

Although the Fourth Amendment’s prohibition against unreasonable searches applies to the states through the Fourteenth Amendment, *Soldal v. Cook Cnty.* 506 U.S. 56, 61 (1992) (citation omitted), the Fourth Amendment does not proscribe all state-initiated searches and seizures; only those that are unreasonable. *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). A search within the meaning of the Fourth Amendment occurs when the government trespasses on private property for the purpose of obtaining information, *United States v. Jones*, 565 U.S. 400, 404, (2012), or when it infringes on an individual’s “reasonable expectation of privacy.” *See Katz v. United States*, 389 U.S. 347, 351 (1967); *Maryland v. Macon*, 472 U.S. 463, 469 (1985); *see also Jones*, 565 U.S. 400, 409 (“the Katz reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test”).<sup>5</sup>

As demonstrated by the above authority, the touchstone of the Fourth Amendment

<sup>4</sup> The Fourth Amendment to the United States Constitution and article I, section 13, of the California Constitution extend similar protection against “unreasonable searches and seizures” and are therefore treated collectively in the instant motion. *In re Lance W.*, 37 Cal. 3d 873, 881 (1985).

<sup>5</sup> Plaintiffs make no allegation of the City “touching” their property, nor do they allege – because they cannot – that MDS has anything to do with law enforcement. Given these pleading admissions by omission, Plaintiffs’ citation to *Jones* and *Carpenter*, both dealing with law enforcement efforts falling under a trespass analytical framework, are inapposite. Cmplt., ¶¶ 7, 9. This data sharing matter is more in alignment with *Apt. Assoc. of Greater L.A. v. City of Los Angeles*, 2019 U.S. Dist. LEXIS 191234 (C.D. Cal. 2019).

1 analysis is whether a person has a constitutionally protected reasonable expectation of  
2 privacy.” *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (quoting *Katz v. United*  
3 *States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)). To show a reasonable  
4 expectation of privacy, a court must inquire (1) whether a person has a “subjective  
5 expectation of privacy in the object of the challenged search,” and (2) whether that  
6 expectation is recognized as reasonable by society. *Id.*

7 Notably, when analyzing a facial challenge alleging unlawful searches/seizures,  
8 “[t]he cardinal principle of statutory construction is to save and not to destroy.” *NRLB v.*  
9 *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 20 (1937). The United States Supreme Court  
10 has long recognized the validity of “suspicionless searches where the program was  
11 designed to serve ‘special needs, beyond the normal need for law enforcement.’” *City of*  
12 *Indianapolis v. Edmond*, 513 U.S. 32, 37 (2000); *see also New York v. Burger*, 482 U.S.  
13 691, 702-704 (1987) (upholding administrative inspections of ‘closely regulated’  
14 business as an exception to the warrant requirement)).

15 Although the disruptive mobility platform at issue in this case, i.e., dockless  
16 scooters, has been examined by few courts to date, authority developed in closely related  
17 business areas is instructive. One such example of a ‘closely regulated business’ is the  
18 taxi industry, which like dockless scooters, provides customers with transportation  
19 services on the public right of way.

20 Approximately thirteen years ago, the New York City Taxi and Limousine  
21 Commission (“TLC”) implemented regulations requiring all taxi cabs in the city to  
22 install a “technology systems” that collects and transmits “Trip Data” and requires that  
23 data to be shared with the TLC. (RJN, Exh. “K” (35 Rules of the City of New York  
24 (“RCNY”), §66-19). Specifically, TLC regulations obligate taxis to “transmit Trip Data  
25 to the [TLC] using the frequency, method, and naming convention defined by the  
26 Commission.” *Id.* The regulations require more than one dozen data points to be shared,  
27 including the “date, time, and location (latitude, longitude, and human-readable street  
28 address) of then pick-up and drop off.” *Id.*; RJN, Exh. “L” (35 RCNY §66-24). The

1 main distinguishing factor between the TLC's taxi data-sharing and the City's dockless  
2 data-sharing is that the TLC's requirements were imposed via regulation, while the  
3 City's requirements are conditions of a voluntary permit process.

4 On multiple occasions, both before the TLC regulations took effect in 2007 and in  
5 years thereafter, classes of taxi medallion owners and individual drivers have challenged  
6 these data sharing regulations as being violative of the Fourth Amendment. *See Bulgaria*  
7 *v. New York City Taxi Limousine Comm'n*, 2007 U.S. Dist. LEXIS 94024 (S.D.N.Y.  
8 2007); *Alexandre v. N.Y. City Taxi Limousine Comm'n*, 2007 U.S. Dist. LEXIS 73642  
9 (S.D.N.Y. 2007); *El-Nahal v. Yassky*, 993 F. Supp. 2d 460 (S.D.N.Y. 2014); *Matter of*  
10 *Carniol v. New York City Taxi Limousine Comm'n*, 975 N.Y.S.2d 842 (2017). In each  
11 case, the courts have ruled in favor of the TLC, upholding the data sharing program and  
12 concluding that those who choose to participate in a heavily regulated industry, such as  
13 the taxicab industry, have a diminished expectation of privacy, particularly in  
14 information related to the goals of industry regulation. *See Matter of Carniol*, 975  
15 N.Y.S.2d at p. 848. To be sure, this outcome is not limited to cases involving New York  
16 or its Taxi & Limousine Commission. *See Azam v. D.C. Taxicab Comm'n*, 46 F. Supp.  
17 3d 38, 50-51 (D.D.C. 2014). In *Azam*, the court rejected plaintiffs' Fourth Amendment  
18 violation claims, finding taxi drivers were aware of the GPS system, the system was  
19 installed pursuant to regulations, and the taxicabs in which the system was installed were  
20 not truly private vehicles. *Azam*, 46 F.Supp.3d at 50

21 Notably, the above referenced courts went a step further, concluding that, even if  
22 the taxi driver could show a legitimate expectation of privacy in trip data gathered by the  
23 GPS device, which a driver cannot, any Fourth Amendment claim of privacy would be  
24 outweighed by the governmental interests articulated by the TCL. *See Alexandre*, 2007  
25 U.S. Dist. LEXIS 73642, \*33-35; *Matter of Carniol*, 975 N.Y.S.2d at 848. In short,  
26 Courts have repeatedly held the City of New York (acting through the TLC) has a  
27 substantial interest in promoting taxi customer service, taxicab ridership, and passenger  
28 and driver safety. *See Alexandre*, 2007 U.S. Dist. LEXIS 73642, \*34. Here, the City has



1 similar legitimate interests in promoting public safety and ensuring efficient use of  
 2 dockless devices operating in Los Angeles through the data-sharing about which  
 3 Plaintiffs complain.

4 **2. Plaintiffs have no expectation of privacy with respect to the**  
 5 **anonymized data at issue**

6 Here, Plaintiffs allege a single section 1983 claim based on the following  
 7 violations: (1) Defendants' deployment of MDS violates Plaintiffs' right to be free from  
 8 unreasonable search and seizure, as protected by the Fourth Amendment to the United  
 9 States Constitution (Cmplt., ¶ 43); (2) Defendants' collection of vehicle and mobility  
 10 location data is unreasonable, unconnected to any legitimate government interest, and  
 11 occurs without any opportunity for administrative or judicial review pre-collection  
 12 (Cmplt. ¶44); (3) Defendants unreasonably condition Plaintiffs' ability to ride dockless  
 13 scooters on the disgorgement of otherwise protected location information (Cmplt. ¶45);  
 14 and (4) Defendants retention of Plaintiffs' precise location data concerning movements  
 15 constitutes a warrantless search under the Fourth Amendment. Cmplt. ¶ 46.

16 Plaintiffs concede the data required by MDS is anonymized, but allege in  
 17 conclusory fashion that the data "likely allows riders to be identified." Cmplt., ¶4.  
 18 Although not stated directly in their complaint, Plaintiffs expressly authorize, as a  
 19 condition of using the dockless scooters, the sharing of data collected by the dockless  
 20 scooter operators, including sharing with government entities for regulatory and other  
 21 purposes. RJN, Exh. "M" (Bird Rides, Inc. ("Bird") Privacy Policy); Exh. "N" (Neutron  
 22 Holdings, Inc., doing business as Lime ("Lime") Privacy Policy), and "O" (Lyft, Inc.  
 23 ("Lyft") Privacy Policy).<sup>6</sup>

24 Plaintiffs concede through their complaint that they are customers of and riders of

25  
 26 <sup>6</sup> The Court may and should incorporate these exhibits by reference. *Khoja v. Orexigen*  
 27 *Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018); *Tellabs, Inc. v. Makor Issues &*  
 28 *Rights, Ltd.* 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007) (court must  
 consider documents incorporated into the complaint by reference)). Here, Plaintiffs  
 allege that they "rent" the scooters from the operators; an activity governed by the Terms  
 of Use and Privacy Policies to which the operators' customers must agree. The terms  
 governing Plaintiffs' rental are therefore subject to incorporation by reference.

1 the dockless scooters offered by the above referenced operators. Cmplt., ¶¶ 13, 14.  
2 Plaintiffs likewise acknowledge that dockless scooter riders must rent the scooters in or  
3 der to use them. Cmplt. ¶ 17. Plaintiffs contract with the operators for the right to use  
4 the dockless scooters, and Plaintiffs’ agreements with the operators demonstrate beyond  
5 question that Plaintiffs have no reasonable expectation of privacy with respect to the data  
6 captures and shared by the operators. RJN, Exhs. “M” through “O.” By way of  
7 example, the following excerpts are taken from Lyft’s Privacy Policy (RJN, Exh. “O”):

8 **Lyft, Inc., Privacy Policy:**

9 At Lyft our mission is to improve people’s lives with the world’s best  
10 transportation, providing a platform to help you get from point A to point  
11 B. To do that, we need to collect, use, and share some of your personal  
12 information. This Privacy Policy is meant to help you understand how Lyft  
13 does that and how to exercise the choices and rights you have in your  
14 information.

15 \* \* \*

16 **2. The Information We Collect**

17 When you use the Lyft Platform, we collect the information you provide, usage  
18 information, and information about your device. We also collect information about  
19 you from other sources like third party services, and optional programs in which  
20 you participate, which we may combine with other information we have about  
21 you. Here are the types of information we collect about you:

22 \* \* \*

23 **B. Information We Collect When You Use the Lyft Platform**

24 **Location Information.** Great rides start with an easy and accurate pickup. The  
25 Lyft Platform collects location information (including GPS and WiFi data)  
26 differently depending on your Lyft app settings and device permissions as well as  
27 whether you are using the platform as a Rider or Driver:

- 28
  - Riders: We collect your device’s precise location when you open and use the

1 Lyft app, including while the app is running in the background from the time  
2 you request a ride until it ends. Lyft also tracks the precise location of scooters  
3 and e-bikes at all times.

4 \* \* \*

5 **Usage Information.** We collect information about your use of the Lyft Platform,  
6 including ride information like the date, time, destination, distance, route,  
7 payment, and whether you used a promotional or referral code. We also collect  
8 information about your interactions with the Lyft Platform like our apps and  
9 websites, including the pages and content you view and the dates and times of  
10 your use.

11 \* \* \*

### 12 **3. How We Use Your Information**

13 We use your personal information to:

14 \* \* \*

15 **Responding to Legal Proceedings and Requirements.** Sometimes the law,  
16 government entities, or other regulatory bodies impose demands and obligations  
17 on us with respect to the services we seek to provide. In such a circumstance, we  
18 may use your personal information to respond to those demands or obligations.

19 \* \* \*

### 20 **4. How We Share Your Information**

21 We do not sell your personal information. To make the Lyft Platform work, we  
22 may need to share your personal information with other users, third parties, and  
23 service providers. This section explains when and why we share your information.

24 \* \* \*

### 25 **C. For Legal Reasons and to Protect the Lyft Platform**

26 We may share your personal information in response to a legal obligation, or if we  
27 have determined that sharing your personal information is reasonably necessary or  
28 appropriate to:

- Comply with any applicable federal, state, or local law or regulation, civil, criminal or regulatory inquiry, investigation or legal process, or enforceable governmental request. RJN, Exh. “O” at 182-187 (Lyft Privacy Policy).

Although the above referenced Privacy Policy terms are specific to Lyft, Bird and Lime also require their customers, like Plaintiffs, to agree to analogous privacy policy terms as a condition of renting Bird and Lime’s dockless scooters. RJN, Exh. “M” at 151, 157 (Bird Privacy Policy), and Exh. “N” at 173-175 (Lime Privacy Policy).

As such, Plaintiffs cannot validly allege an expectation of privacy necessary to pursue their claims based on violations of the U.S. and California Constitutions (i.e., their first and second claims for relief). Stated differently, Plaintiffs have not, and cannot, plausibly allege a deprivation of constitutional rights – federal or state – a based on the anonymized data the scooter companies agreed to provide to LADOT. Any suggestion of an expectation of privacy is vitiated by Plaintiffs’ acknowledgment of, and agreement with, the scooter companies’ own data capture and sharing practices (including for government *regulatory* purposes). Plaintiffs affirmatively chose to rent dockless scooters and affirmatively allowed the operators to share data to comply with, among other things, local regulation. When they chose to rent dockless scooters, they agreed with these sharing protocols.

**C. Plaintiffs Third Claim Fails Because The California Electronic Communications Privacy Act Applies To Law Enforcement Activities And Plaintiffs Lack Standing To Pursue A Civil Action**

**1. CalECPA is a criminal statute with its primary remedies related to the exclusion of evidence in criminal matters**

The California Electronic Communications Privacy Act (“CalECPA”) is codified in sections 1546 to 1546.4, within Title 12 (“Special Proceedings of a Criminal Nature”)

1 of Part 2 (“Of Criminal Procedure”) of the Penal Code. Cal. Penal Code §1546. Due to  
2 this textual placement in the Criminal Procedure Part of the Penal Code, the scope of  
3 CalECPA is controlled by Penal Code section 690, which provides:

4 The provisions of Part 2 ... shall apply to all criminal actions and  
5 proceedings in all courts, except where jurisdictional limitations or the  
6 nature of specific provisions prevent, or special provision is made for  
7 particular courts or proceedings. Cal. Penal Code §690.

8 The plain language of section 690 makes clear that CalECPA, as a provision of  
9 Part 2 of the Penal Code, is limited in its application to “criminal actions and  
10 proceedings,” and therefore subject to enforcement in this civil action. *See People v.*  
11 *Smith*, 133 Cal.App.2d 777, 779-80 (stating that Penal Code Section 1004, specifying  
12 grounds for demurrer in criminal action, “is made applicable to municipal courts by  
13 section 690, Penal Code”); *Ex Parte Shaw*, 115 Cal.App. 753, 756-57 (stating section  
14 690 does not confer jurisdiction on municipal court to conduct civil sanity proceedings  
15 because it is “not part of the criminal prosecution” for which section 690 “provides for  
16 uniformity of procedure in the several courts”). A dockless mobility permitting program  
17 with no criminal enforcement mechanism is not such a criminal action or proceeding to  
18 which CalECPA can or should apply.

19 Reading section 690 to limit CalECPA’s application to criminal actions and  
20 proceedings also allows CalECPA to coexist harmoniously with administrative programs  
21 that involve the collection of “electronic device information” from private transportation  
22 companies.<sup>7</sup> Courts presume the legislature is aware of administrative activity, and  
23 when the Legislature takes no action to correct such activity, courts take that silence as  
24 legislative acquiescence to the administrative action. *See United States v. Rutherford*,  
25 442 U.S. 544, 554 (1979) (in federal context expressing reluctance to disturb  
26 longstanding administrative policy that comports with the plain language, history, and

27 <sup>7</sup> For example, the California Public Utilities Commission collects “electronic device  
28 information” from ride sharing companies Uber and Lyft, as a condition of those  
companies operations on streets and highways in California. See  
<https://www.cpuc.ca.gov/General.aspx?id=3989>.

1 prophylactic purpose of challenged act).

2 The plain language of CalECPA likewise demonstrates its inapplicability outside  
3 of the criminal context. Penal Code §1546.4 clearly outlines remedies only available in  
4 a criminal proceeding: (a) a motion to “suppress any electronic information obtained or  
5 retained,” made in accordance with Cal. Penal Code. §1538.5, which applies only in  
6 criminal proceedings; and (c) authorization for an “individual whose information is  
7 targeted by a warrant, order, or other legal process that is inconsistent with this chapter,”  
8 to “petition the issuing court to void or modify the warrant, order, or process, or to order  
9 the destruction of any information obtained in violation of [CalECPA].” These remedial  
10 provisions are clearly geared toward protecting defendants in criminal prosecutions, and  
11 are entirely inapplicable to the permit program at issue in the instant litigation.

12 **2. The plain language of CalECPA demonstrates that the**  
13 **Legislature intended there be no private right of action**

14 Even more telling, section 1546.4(b) make it abundantly clear that Plaintiffs lack  
15 standing to bring a claim asserting violation of CalECPA in that it expressly limits who  
16 may bring a civil claim: The *Attorney General* may commence a civil action to compel  
17 any government entity to comply with the provisions of this chapter. Cal. Penal Code  
18 §1546.4(b) (emphasis added).

19 *Animal Legal Defense Fund v. Mendes*, 160 Cal. App. 4th 136 (2008) is  
20 instructional on this point. In *Mendes*, the court examined whether private groups,  
21 “however well-intentioned,” could enforce Cal. Penal Code §597t. The court held as  
22 follows:

23 The issue in a case such as this is primarily one of legislative intent. If the  
24 Legislature intended a private right of action, that usually ends the inquiry.  
25 If the Legislature intended there be no private right of action, that usually  
26 ends the inquiry. If we determine the Legislature expressed no intent on the  
27 matter either way, directly or impliedly, there is no private right of action  
28 (*Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287,

1 305 [250 Cal. Rptr. 116, 758 P.2d 58] (Moradi-Shalal)), with the possible  
 2 exception that compelling reasons of public policy might require judicial  
 3 recognition of such a right. (See *id.* at pp. 304–305; see also *Katzberg v.*  
 4 *Regents of University of California* (2002) 29 Cal.4th 300, 317 [127 Cal.  
 5 Rptr. 2d 482, 58 P.3d 339] [considerations for judicial recognition of  
 6 private right of action for constitutional violations].) *Mendes*, 160  
 7 Cal.App.4th at 142

8 Here, CalECPA expressly limits authority to bringing a civil action compelling  
 9 compliance to the California Attorney General, and nothing in the statute evidences an  
 10 intent to create a private right of action. As such, Plaintiffs’ attempt to enforce CalECPA  
 11 is simply improper.

12 **D. Plaintiffs Improperly Name The Los Angeles Department Of**  
 13 **Transportation As A Defendant In Their Action**

14 As part of their complaint, Plaintiffs name the Los Angeles Department of  
 15 Transportation as a Party-Defendant to the action. 42 U.S.C. § 1983 permits suit against  
 16 a “person” acting under the color of law, but while local governmental units such as  
 17 cities or municipalities are considered “persons,” municipal departments and sub-units  
 18 are not. *Compare Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70 (1989), with  
 19 *United States v. Kama*, 394 F.3d 1236, 1239 (9th Cir. 2005) (holding municipal police  
 20 departments are not considered “persons” within the meaning of 42 U.S.C§ 1983).  
 21 Given the above, Plaintiffs’ naming of the Los Angeles Department of Transportation is  
 22 improper, and that municipal department should be dismissed from the matter.

23 **V. CONCLUSION**

24 Plaintiffs Justin Sanchez and Eric Alejo decided to rent dockless scooters, a new  
 25 micro-mobility platform, for travel on Los Angeles' public right of way. Before doing  
 26 so, they agreed that the companies offering this new mode of travel could (a) capture  
 27 data related to their use of the dockless scooters, and (b) share that data with third  
 28 parties, including federal, state, or local authorities for regulatory and other

