JONATHAN MARKOVITZ (SBN 301767)(jmarkovitz@aclusandiego.org)
DAVID LOY (SBN 229235)(davidloy@aclusandiego.org)
ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES
P.O. Box 87131
San Diego, CA 92138-7131
Telephone: (619) 398-4493

GENEVIÉVE L. JONES-WRIGHT (CA SBN 235168)
director@moralgovernance.org
COMMUNITY ADVOCATES FOR JUST & MORAL GOVERNANCE
2760 5th Ave, Ste 220
San Diego, CA 92103-6330
Telephone: 619.500.7720

BRODY MCBRIDE (CA SBN 270852)(brody@SLFfirm.com)
TRENTON LAMERE (CA SBN 272760)(trenton@SLFfirm.com)
SINGLETON LAW FIRM
450 A Street, 5th Floor
San Diego, CA 92101
Telephone: 619.771.3473
Fax: 619.255.1515

Counsel for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Christina GRIFFIN-JONES,

Plaintiff,

v.

CITY OF SAN DIEGO; J. DOE Nos. 1–25,

Defendants.

Case No. 3:21-cv-00024-CAB-JLB

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES

Date: February 11, 2021
Time: PER CHAMBERS RULES, NO ORAL ARGUMENT UNLESS SEPARATELY ORDERED BY THE COURT
Judge: Hon. Cathy Ann Bencivengo
Court: 15A (15th Floor)

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TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that Plaintiff will and hereby does move this Court for an order granting a preliminary injunction requiring Defendants to return her cell phone immediately.

Plaintiff's motion is based on this Notice of Motion and Motion; the supporting Memorandum of Points and Authorities, the declarations and exhibits attached hereto; on all papers, pleadings, records, and files in this case; on all relevant matters of which judicial notice may be taken; and on such other argument evidence as may be presented to this Court at a hearing on this motion.

DATED: January 7, 2021

Respectfully submitted,

By: *s/Brody McBride*
Singleton Law Firm
Attornevs for Plaintiff

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The City of San Diego ("City") is violating fundamental constitutional rights by continuing to impound the cell phone of Christina Griffin-Jones, who was arrested over three months ago at a protest against police brutality. At a protest in September, she was arrested by San Diego Police Department ("SDPD") and held overnight. When she was released, SDPD refused to return her cell phone. After counsel demanded release of arrested protesters' phones on September 24, 2020, SDPD admitted it was holding such phones without having sought or obtained search warrants. Since that time, SDPD has released phones belonging to some protesters but continues to impound the phone belonging to Ms. Griffin-Jones without providing the notice required by state law of any search of the phone pursuant to warrant. The Constitution does not allow SDPD to continue impounding Ms. Griffin-Jones's cell phone for over three months without a warrant or judicial review. SDPD is also violating due process by impounding the phone indefinitely without notice or opportunity for hearing to challenge the impoundment. Those violations flow directly from City policies that authorize indefinite impoundment of cell phones without a warrant or judicial review. The violation of Ms. Griffin-Jones's constitutional rights is irreparable harm as a matter of law, and the balance of equities and public interest always favor an injunction to protect constitutional rights. The Court is therefore respectfully requested to enter a preliminary injunction directing the immediate return of Ms. Griffin-Jones's phone.

II. FACTS

On September 23, 2020, Ms. Griffin-Jones was arrested at a protest against the police killing of Breonna Taylor in Louisville, Kentucky. Griffin-Jones Decl. at 1:15-21. She was held for a time at SDPD headquarters or elsewhere before being booked into jail. *Id.* at 1:19-22. As a result of the arrests, SDPD impounded her personal property, including her cell phone, without her consent. *Id.* at 1:23-28. Ms. Griffin-Jones was released from jail within a day or two after her arrest. Most of her impounded property was returned

upon release, but her cell phone was not. *Id.* at 2:2-6.

On September 24, 2020, counsel for Plaintiff sent a letter to SDPD demanding immediate return of cell phones impounded from persons arrested at an August 28 protest against police brutality. Markovitz Decl. ¶ 4. On September 29, SDPD admitted it had impounded cell phones of persons arrested at the August 28 protest but had not yet decided whether to seek warrants to search them. It claimed that "[w]ithin the next several days, detectives will be releasing cell phones to their owners for those which are not retained as evidence" and contended "phones which are impounded as evidence will remain in our custody and if the contents are going to be sought, a detective will request a search warrant from a judge." *Id.* ¶ 5. Soon afterward, SDPD released phones belonging to certain protesters. However, SDPD has refused to release the phone belonging to Ms. Griffin-Jones, who has received no notice that a search warrant has been executed on her phone, as required by California Penal Code § 1546.2(a). Griffin-Jones Decl. at 2:6-7. As a result, SDPD has apparently not obtained a warrant for searching Ms. Griffin-Jones's phone.

According to SDPD policy, "All property discovered, gathered, or received in the course of performing Departmental duties that is determined to be of some evidentiary or monetary value shall be impounded and physically deposited in the Property Room by the end of shift." Policy 3.02 § V(A). "Detectives must maintain a system to track evidence/property associated to cases assigned to them…. All new impounds are assigned a retention period automatically based on criteria predetermined by the Property Room. If a detective requests the retention period be extended, that date will change." *Id.* § XII(F). Property impounded as evidence in misdemeanor, wobbler, or felony cases is retained until adjudication of those cases, including any appeals, or specified time periods after arrest.[1] *Id.* § XII(G)(1)(a)–(c).

Official SDPD policy does not recognize the unique nature of smartphones as digital devices containing enormous amounts of private information or the need to obtain

[1] San Diego Police Department policies are publicly available at: https://s3.amazonaws.com/themis.datasd.org/policies_procedures/Procedures/3.0%20Investigations/302.pdf

warrants for searching them promptly. The policy does not distinguish between smartphones and other impounded property or provide safeguards against retaining smartphones that are not evidence of a crime in the same way as weapons or contraband. The policy thus authorizes SDPD to retain a smartphone for a prolonged time at a detective's discretion without obtaining a search warrant or ensuring judicial review.

III. ARGUMENT

A preliminary injunction is warranted when plaintiffs show a likelihood of success on the merits and irreparable harm and the balance of equities and public interest favor an injunction. *Winter v. Natural Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008); *Doe v. Wolf*, 432 F. Supp. 3d 1200, 1207 (S.D. Cal. 2020). If "the balance of hardships tips sharply" in her favor, Ms. Griffin-Jones need only demonstrate "serious questions going to the merits." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011).

Ms. Griffin-Jones is entitled to a preliminary injunction because the City is likely violating her constitutional rights by impounding her cell phone for several months without a warrant or judicial review. The violation of her constitutional rights is per se irreparable harm, and the balance of equities and public interest always favor an injunction to protect constitutional rights. Ms. Griffin-Jones need not meet any heightened standard because she seeks "a classic form of prohibitory injunction" in asking the Court to enjoin an ongoing constitutional violation. *Hernandez v. Sessions*, 872 F.3d 976, 998 (9th Cir. 2017).

A. THE CITY IS LIKELY VIOLATING THE CONSTITUTION BY IMPOUNDING AND RETAINING MS. GRIFFIN-JONES'S CELL PHONE FOR A PROLONGED TIME.

1. The Prolonged Impoundment of Ms. Griffin-Jones's Cell Phone Without a Warrant or Judicial Review Likely Violates Both the Fourth Amendment and Due Process.

Ms. Griffin-Jones was arrested without a warrant. Ordinarily, perhaps the Fourth Amendment allows the police to search personal effects as a matter of course incident to arrest. *Illinois v. Lafayette*, 462 U.S. 640, 648 (1983). But cell phones are different.

Because of their unique nature as "minicomputers" with "immense storage capacity" for holding or accessing "detailed information about all aspects of a person's life," including extensive private, personal, and proprietary data, a cell phone may not be searched without a warrant, consent, or exigent circumstances. *Riley v. California*, 573 U.S. 373, 386, 393–96 (2014).

No consent or exigent circumstances exist here. The issue is therefore whether the City is likely violating the Fourth Amendment by impounding Ms. Griffin-Jones's cell phone for several months without seeking or obtaining a warrant. "Because warrantless searches and seizures are *per se* unreasonable, the government bears the burden of showing that a warrantless search or seizure falls within an exception to the Fourth Amendment's warrant requirement." *Recchia v. City of Los Angeles Dep't of Animal Servs.*, 889 F.3d 553, 558 (9th Cir. 2018).

In some circumstances, perhaps police may impound a phone while seeking a warrant to search it. *See Riley*, 573 U.S. at 388; *United States v. Place*, 462 U.S. 696, 701 (1983). To justify such impoundment, the record must satisfy two elements. First, "the known facts and circumstances" must be "sufficient to warrant a [person] of reasonable prudence in the belief that contraband or evidence of a crime will be found" on the phone. *Ornelas v. United States,* 517 U.S. 690, 696 (1996). Second, the police must promptly seek a warrant. Neither condition is met.

Probable cause to arrest Ms. Griffin-Jones, if any, does not automatically translate into probable cause to search her phone.[2] *Zurcher v. Stanford Daily,* 436 U.S. 547, 556 (1978); *United States v. Rodgers*, 656 F.3d 1023, 1029 (9th Cir. 2011). Ms. Griffin-Jones was arrested for routine charges during an otherwise lawful protest. The facts relevant to those charges are based on alleged conduct at the date and time in question. Any fishing expedition into data beyond that alleged conduct—for example, contacts, location data, text or email messages, or social media posts—threatens to chill her First Amendment rights.

[2] This action assumes without conceding probable cause existed for her arrest.

Even assuming SDPD has legitimate cause for a limited search of Ms. Griffin-Jones's phone, it has inexcusably impounded the phone for several months without seeking a warrant. A "seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment's prohibition on 'unreasonable seizures'" and its "length unduly intruded upon constitutionally protected interests." *United States v. Jacobsen*, 466 U.S. 109, 124 & n.25 (1984).

Therefore, the prolonged impoundment of a person's property can "become an unreasonable seizure within the meaning of the Fourth Amendment." *United States v. Aldaz*, 921 F.2d 227, 229 (9th Cir. 1990). Police officers may not "obtain search warrants … at their leisure," because to hold otherwise "would allow an unlimited period of seizure without judicial intervention" and "nullify the seizure portion of the search and seizure clause of the fourth amendment." *United States v. Dass*, 849 F.2d 414, 415 (9th Cir. 1988). "Thus, even a seizure based on probable cause is unconstitutional if the police act with unreasonable delay in securing a warrant." *United States v. Mitchell*, 565 F.3d 1347, 1350 (11th Cir. 2009) (citation and quotation marks omitted).

Ms. Griffin-Jones was arrested in September. She has not received notice of any warrant to search her phone as required by state law. Cal. Penal Code § 1546.2(a). SDPD is therefore likely violating the Fourth Amendment by impounding her phone for several months without a warrant.

Like computers, cell phones "are relied upon heavily for personal and business use. Individuals may store personal letters, e-mails, financial information, passwords, family photos, and countless other items of a personal nature in electronic form" on cell phones. *Mitchell*, 565 F.3d at 1351. Ms. Griffin-Jones retains an "undiminished possessory interest in the cellphone[s]" because she "didn't consent to the seizure" and is not incarcerated. *United States v. Pratt*, 915 F.3d 266, 272–73 (4th Cir. 2019).

Accordingly, Ms. Griffin-Jones's "possessory interest at stake here was substantial," yet "there was no compelling justification for the delay" in seeking a warrant.

Mitchell, 565 F.3d at 1351. A warrant application is a simple matter. As recognized for decades, police may seek a warrant telephonically, and now they can do so by email as well. Cal. Penal Code § 1526. A judge may telephonically authorize an officer to sign the judge's name to a duplicate warrant, obviating any need for the officer to appear in person. Cal. Penal Code § 1528(b).

Courts have long recognized the availability, utility, and expediency of telephonic warrants. *People v. Morrongiello*, 145 Cal. App. 3d 1, 12 (1983); *People v. Sanchez*, 131 Cal. App. 3d 323, 329 (1982); *People v. Peck*, 38 Cal. App. 3d 993, 999–1000 (1974). In 1973, "the San Diego District Attorney's office estimated that 95 percent of telephonic warrants take less than 45 minutes." *People v. Blackwell*, 147 Cal. App. 3d 646, 653 n.2 (1983) (citation omitted). Today, it should take even less time to obtain a warrant. *Missouri v. McNeely*, 569 U.S. 141, 173 (2013) (Roberts, C.J., concurring in part and dissenting in part) (noting "police officers can e-mail warrant requests to judges' iPads; judges have signed such warrants and e-mailed them back to officers in less than 15 minutes."). The San Diego County Superior Court has been open since at least May 26, 2020, obviating any contention that judges were unavailable.[3] Assuming a warrants were justified, SDPD has no reasonable excuse for taking over three months to seek one.

Accordingly, SDPD is likely violating the Fourth Amendment by impounding Ms. Griffin-Jones's cell phone for over three months. *Pratt*, 915 F.3d at 273 (holding "31-day delay" in seeking warrant to search cell phone "violates the Fourth Amendment"); *Mitchell*, 565 F.3d at 1351 (holding detention of "hard drive for over three weeks before a warrant was sought" violated Fourth Amendment).

SDPD cannot justify impounding a "phone indefinitely because it had independent evidentiary value, like a murder weapon. Only the phone's files had evidentiary value," if any, and "the phone itself is evidence of nothing." *Pratt*, 915 F.3d at 273. Assuming a

[3] San Diego Superior Court, "Services Available During COVID-19, http://www.sdcourt.ca.gov/pls/portal/docs/PAGE/SDCOURT/GENERALINFORMATION/COVID-19INFO/GUIDE%20TO%20SD%20SUPERIOR%20COURT%20SERVICES%20DURING%20COVID-19.PDF

search warrant were justified, SDPD "could have removed or copied [any] incriminating files and returned the phone." *Id.* Therefore, the phone cannot be impounded as if it were weapons or contraband.

In any event, the prolonged impoundment of Ms. Griffin-Jones's phone also violates due process. Even when the government claims the right to retain property as evidence in a potential prosecution, due process requires judicial review of the retention. *See Krimstock v. Kelly*, 464 F.3d 246, 255 (2d Cir. 2006) (holding that where vehicles were impounded as evidence, due process required "immediate judicial review," because of "the importance of a vehicle to an individual's ability to work and conduct the affairs of life … and the serious harm thus resulting from the undue retention of a vehicle by the government"). Such review might initially be ex parte, but if a retention order is granted, the claimant must have notice and opportunity for a hearing. *Krimstock v. Kelly*, 506 F. Supp. 2d 249 (S.D.N.Y. 2007). The City has not provided Ms. Griffin-Jones with any notice or opportunity for hearing on whether continued impoundment of her phone is justified. The prolonged impoundment thus likely violates due process.

2. The City Is Subject to an Injunction Because its Policies Authorized and thus Caused the Prolonged Impoundment of Ms. Griffin-Jones's Cell Phone Without a Warrant or Judicial Review.

The record shows that the City is subject to an injunction because it is likely to be held liable under *Monell* for the violation of Ms. Griffin-Jones's constitutional rights. *Monell v. New York City Dept. of Social Servs.,* 436 U.S. 658 (1978). Ms. Griffin-Jones is likely to prevail against the City because her "injury was caused by a municipal policy or custom," as necessary for an injunction against the City. *Los Angeles County v. Humphries*, 562 U.S. 29, 31 (2010). The relevant policy need not be "per se unconstitutional" but instead need only cause a constitutional violation. *Jackson v. Gates*, 975 F.2d 648, 654 (9th Cir. 1992); *Wallis v. Spencer*, 202 F.3d 1126, 1143 (9th Cir. 2000); *McKinley v. City of Eloy*, 705 F.2d 1110, 1117 (9th Cir. 1983). Here, official SDPD policy caused the violation of Ms. Griffin-Jones's constitutional rights.

Although it may not direct or require them to do so, SDPD policy authorizes detectives to retain impounded cell phones at their discretion for an indefinite time without a warrant or judicial review. The policy caused the violation of Ms. Griffin-Jones's rights because it made that violation acceptable, even if it did not command the violation. *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1097 (9th Cir. 2013) (holding city could be liable although "[n]o one contends the City had a policy *requiring* officers to tase non-threatening suspects," because "the City's policy told [officer] that tasing nonresisting individuals in circumstances like this one was acceptable"); *Chew v. Gates*, 27 F.3d 1432, 1444 (9th Cir. 1994) (holding that if police department had policy that "authorized seizure of *all* concealed suspects—resistant or nonresistant, armed or unarmed, violent or nonviolent—by dogs trained to bite hard and hold," such policy caused injury of nonresisting plaintiff bitten by police dog); *Savage v. City of Twin Falls*, No. 1:13-CV-00179-EJL, 2015 WL 1635252, at *12 (D. Idaho Apr. 13, 2015) (where policy authorized officers "to use any form of non-deadly force against all fleeing or resisting suspects, regardless of whether their resistance is active or passive, whether they are armed or unarmed, violent or non-violent," policy was "moving force" behind injury to "non-violent, passively resistant" plaintiff struck in face with closed fist).

The City "cannot escape liability for the consequences of established and ongoing departmental policy regarding" retention of impounded property "simply by permitting such basic policy decisions to be made by lower level officials who are not ordinarily considered policymakers." *Chew*, 27 F.3d at 1445. To the extent the City permitted policy regarding such retention "to be designed and implemented at lower levels of the department," the City promulgated "an established municipal 'custom or usage' … for which the City is responsible." *Id.*; *see also Savage*, 2015 WL 1635252, at *12 (holding city could not avoid liability for injury caused by use of force policy where "it places the reasonableness determination" for use of force "solely within the discretion of the arresting officers").

"In other words, even if the policy is constitutional, a municipal entity may be held

liable for its unconstitutional application by its employee. Granting discretion to the employee does not automatically immunize the municipal entity from a § 1983 claim." *Burge ex rel. Burge v. Colton Sch. Dist. 53*, 100 F. Supp. 3d 1057, 1067 (D. Or. 2015) (holding school district could be liable under *Monell* for student's suspension although plaintiff "established only that [district employee] had the discretion to act in a certain way and did so"). SDPD policy fails to constrain the discretion of detectives by requiring them to promptly seek a warrant to search an impounded cell phone. The policy also improperly allows detectives to treat cell phones as mere evidence of crimes, as if they were weapons or contraband, when a phone itself has no evidentiary value beyond any data that it might contain. *Pratt*, 915 F.3d at 273. Therefore, Ms. Griffin-Jones is likely to prevail against the City because official SDPD policy improperly authorizes detectives to impound cell phones indefinitely without a warrant or judicial review.

B. The Violation of Ms. Griffin-Jones's Constitutional Rights Is Irreparable Harm, and the Balance of Equities and Public Interest Necessarily Favor an Injunction to Protect Constitutional Rights.

Given the fundamental rights at stake, this case meets the elements of irreparable harm, balance of hardships, and public interest. The "deprivation of constitutional rights unquestionably constitutes irreparable injury," and thus Ms. Griffin-Jones faces "irreparable harm in the form of a deprivation of constitutional rights absent a preliminary injunction." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citation and quotation marks omitted). The balance of equities and public interest necessarily support an injunction. The government "cannot reasonably assert that it is harmed in any legally cognizable sense" by being compelled to follow the law. *Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1983). It cannot be equitable to allow the City "to violate the requirements of federal law." *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014). Finally, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres*, 695 F.3d at 1002.

/ / /

IV. CONCLUSION

For the foregoing reasons, the Court is respectfully requested to enter a preliminary injunction commanding the City to return Ms. Griffin-Jones's cell phone immediately.

DATED: January 7, 2021

Respectfully submitted,

By: *s/Brody McBride*
Singleton Law Firm
Attornevs for Plaintiff