UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ROBERT WRIGHT *et al*,

Plaintiffs,

v.

ROBERT GOLDSTEIN, in his official capacity as Commissioner of the Massachusetts Department of Public Health, and MAURA HEALEY, in her official capacity as Governor of Massachusetts

Defendants.

Civil Action No. 3-22-CV-11936

ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

Kimberly Parr, BBO No. 679806
Erin E. Fowler, BBO No. 707188
Konstantin Tretyakov, BBO No. 698430
Assistant Attorneys General
Office of the Attorney General
Government Bureau
One Ashburton Place
Boston, MA 02108
(617) 963-2489
Kimberly.Parr@mass.gov

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Defendants Robert Goldstein[1], as Commissioner of the Massachusetts Department of Public Health, and Maura Healey, as Governor of Massachusetts, submit this memorandum in support of their motion to dismiss the First Amended Complaint for Declaratory and Injunctive Relief ("Amended Complaint" or "Am. Compl.") as moot under Fed. R. Civ. P. 12(b)(1) and for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

INTRODUCTION

In the midst of the COVID-19 pandemic, a representative body of public health laboratories known as the Association of Public Health Laboratories ("APHL") collaborated with Google, Inc. ("Google") and others on a national effort to implement the Exposure Notification System (or "ENS")—a multi-faceted digital technology designed to curb the spread of the virus through automated alerts and guidance. Like many of its counterparts around the country, the Massachusetts Department of Public Health (the "Department") participated in the ENS program through a number of voluntary measures collectively referred to as "MassNotify." As relevant to this lawsuit, one of those measures enabled users to anonymously exchange Bluetooth codes through their mobile devices, so that they would receive an automatic alert if a user with whom they had been in close proximity later reported a positive COVID-19 test result. The first version of this technology became available for download as an application from the Google Play store in April 2021. Within two months, Google added the technology as an optional setting on Android devices, meaning that device owners had the opportunity to participate in the Bluetooth-exchange aspect of the exposure notification program without downloading anything; they simply needed to turn the MassNotify setting "on."

[1] Goldstein succeeded former Public Health Commissioner Margret Cooke in April 2023 and is automatically substituted for her as a party to this action. Fed. R. Civ. P. 25(d).

This lawsuit challenges the implementation of that second version of the technology, which Defendants refer to herein as the "MassNotify Setting." Plaintiffs—six individuals who live and/or work in Massachusetts—allegedly discovered the MassNotify Setting on their Android devices in July 2021 (for the originally named plaintiffs, Robert Wright and Johnny Kula) and November 2022 (for the four plaintiffs added to the Amended Complaint). They each deleted the setting without suffering any repercussions from the Commonwealth. Even so, they filed this purported class action lawsuit alleging that the MassNotify Setting operated as "spyware," surreptitiously installed on over one million Android devices to track and record their owners' movements. Plaintiffs ask the court to declare that the MassNotify Setting violated the Fourth and Fifth Amendment protections against unreasonable searches and uncompensated takings, respectively, Am. Compl. at p. 31, and to enter an injunction prohibiting "the continued installation of [the MassNotify Setting] on private mobile devices without the knowledge or permission of device owners," *id.*, requiring Defendants "to work with Google to uninstall [the MassNotify Setting] from private Android mobile devices where the device owner did not give permission for such installations," *id.*, and requiring Defendants "to delete all records it has amassed through [the MassNotify Setting] from mobile devices where the device owner did not give permission for installation of the application." *Id.* They are entitled to no such relief.

At the threshold, Plaintiffs' claims are now moot. The MassNotify Setting was discontinued on May 11, 2023, when APHL and its partners shut down the broader ENS program at the expiration of the national COVID-19 public health emergency. Consequently, there is no controversy left for the court to decide nor is there any effective relief for the court to grant. And even if a live controversy existed, the Amended Complaint falls far short of establishing that any constitutional violation occurred; indeed, it boasts more unfounded speculation and baseless

attacks on the Commonwealth than concrete factual allegations about MassNotify. The Amended Complaint also does not allege any involvement by the Governor. For these reasons, as discussed more fully in this memorandum, the court should dismiss the Amended Complaint in its entirety.

BACKGROUND

I. Procedural History

On November 15, 2022, Plaintiffs Wright and Kula filed a complaint asserting nine state- and federal-law claims against the Department and the Commissioner. Dkt No. 1. The defendants moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Dkt No. 20-21. Instead of opposing that motion, Plaintiffs Wright and Kula elected to amend the complaint pursuant to Fed. R. Civ. P. 15(a)(1). Dkt No. 22. The Amended Complaint adds four individual plaintiffs, replaces the Department with the Governor as a defendant, drops all of the state-law claims and one federal-law claim, and proceeds only under the Fourth and Fifth Amendments to the United States Constitution via 42 U.S.C. § 1983. After the Amended Complaint was filed, this court denied the pending motion to dismiss as moot. Dkt No. 23.

II. Pertinent Factual Allegations[2]

A. The COVID-19 Pandemic

The respiratory illness COVID-19 "emerged at around the start of 2020 in China, and within months it spread around the world." *Desrosiers v. Governor*, 486 Mass. 369, 372 (2020).

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[2] This section is drawn from Plaintiffs' factual allegations, which must be accepted as true at this early stage in the litigation, material cited in the Amended Complaint, and other information of which the court may take judicial notice. *See Haley v. City of Boston*, 657 F.3d 39, 46 (1st Cir. 2011) (on 12(b)(6) review, court may consider "data points gleaned from documents incorporated by reference into the complaint, matters of public record, and facts susceptible to judicial notice"). Additionally, though the Department worked with Apple, Inc. ("Apple") to release a version of the exposure notification system for iOS devices, Am. Compl. ¶ 21, the Amended Complaint only pertains to Android devices and their owners. As such, the Defendants do not discuss Apple in this memorandum.

In January 2020, the Word Health Organization ("WHO") declared a public health emergency due to the spread of the virus, Am. Compl. ¶ 13, and the United States Secretary of Health and Human Services declared a public health emergency nationwide.[3] Within weeks, WHO elevated the outbreak to a pandemic, the President of the United States announced a national state of emergency, and the Governor of Massachusetts declared a state of emergency in the Commonwealth. *See Desrosiers*, 486 Mass. at 370-72. By April 2021, in Massachusetts alone, over 584,000 people had been infected with COVID-19 and over 16,600 had died.[4]

B. Implementation of the MassNotify Setting in Massachusetts

In May 2020, Google launched an application programming interface ("API") that public health authorities could use—and did use—to complement the authorities' manual contract-tracing efforts. Am. Compl. ¶¶ 21-24; *see id.* ¶ 14 (contract tracing is a "method of disease mitigation [that] involves identifying individuals who had contact with infected persons and notifying them of potential exposure so that they may be tested and isolated"). At the time, Google's API allowed public health authorities to develop apps for Android devices that would quickly and anonymously alert users who may have come in contact with another user who reported a positive COVID-19 test in the app.[5]

According to the Amended Complaint, the Department used Google's API to develop the Bluetooth exchange functionality for MassNotify. Am. Compl. ¶ 25. The first version was a

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[3] Determination that a Public Health Emergency Exists, available at https://aspr.hhs.gov/legal/PHE/Pages/2019-nCoV.aspx (last visited May 22, 2023).

[4] Massachusetts Department of Public Health Weekly COVID-19 Public Health Report, April 1, 2021, available at https://www.mass.gov/doc/weekly-covid-19-public-health-report-april-1-2021/download (last visited May 22, 2023).

[5] Google & Apple, *Exposure Notification API Launched to Support Public Health Agencies* (May 20, 2020), available at https://blog.google/inside-google/company-announcements/apple-googleexposure-notification-api-launches/, cited at Am. Compl. ¶ 22 n.11.

standalone application that became available for download from the Google Play store in or around April 2021. Am. Compl. ¶ 26. Once downloaded, it appeared as an icon on the device's home screen. *Id.* According to Plaintiffs, only about 5,000 users downloaded the MassNotify application and it was no longer maintained by the time they initiated this lawsuit in November 2022. Am. Compl. ¶¶ 26-27.

The second version (*i.e.,* the MassNotify Setting, which Plaintiffs describe as the "Contact Tracing App") was distributed differently. According to Plaintiffs, this version was not released as a standalone app available for download. Am. Compl. ¶¶ 28-30. Rather, starting on or around June 15, 2021, the Department allegedly "worked" with Google to automatically incorporate the MassNotify Setting into the settings of all Android devices located in or transported through the Commonwealth. Am. Compl. ¶¶ 28, 32. The MassNotify Setting was found within the device's "view all apps" feature; it did not appear on the home screen. Am. Compl. ¶ 30. Plaintiffs' claims focus on the MassNotify Setting, as opposed to the downloadable application.

Plaintiffs allege that the installation of the MassNotify Setting onto Android devices was performed "automatically" and "without users' permission or awareness." Am. Compl. ¶ 28. Plaintiffs further claim on "information and belief" that the MassNotify Setting has been "secretly install[ed]" in this manner on over one million Android devices, Am. Compl. ¶ 31, and that the Department periodically installed the MassNotify Setting on Android devices located in or transported through Massachusetts. Am. Compl. ¶¶ 36-37. They claim that the setting re-installed even after device owners removed it. Am. Compl. ¶¶ 2, 37-38.

C. Technical Specifications of the MassNotify Setting

According to publicly available material cited in the Amended Complaint, each Android device owner decided whether to use the MassNotify Setting—the setting was "off" unless the

owner turned it "on."[6] For those who elected to participate, the MassNotify Setting "use[d] Bluetooth technology to detect when two devices [were] near each other, without revealing the location of either device."[7] More specifically, Plaintiffs allege that when a user who activated the MassNotify Setting was near another user, their phones exchanged anonymous codes called "Rolling Proximity Indicators" ("RPIs ").[8] RPIs operated as "beacons" to detect devices within range of one another.[9] They "change[d] on average every 15 minutes . . . [to] reduce[] the risk of privacy loss."[10] When a user entered a positive COVID-19 test result into the MassNotify Setting on their mobile device and provided consent, the ENS program sent "push notifications" to other users with whom the infected user had recently exchanged RPIs, notifying them of the possible exposure.[11] According to Google, this process was "privacy-focused" and "[n]o GPS or location information from [a user's phone] will ever be collected or used by [the ENS]."[12]

Nonetheless, Plaintiffs contend that the MassNotify Setting broadcast, received, and stored codes that allegedly revealed an Android device owner's movements and personal contacts. *See* Am. Compl. ¶¶ 41-50. Plaintiffs specifically allege that the MassNotify Setting forced all Android devices on which it was installed—regardless of whether the owner had activated the exposure notification functionality—to (1) exchange "Media Access Control" ("MAC") addresses and

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6 David Burke, *An Update on Exposure Notifications*, Google: The Keyword Blog (July 31, 2020), available at https://blog.google/inside-google/company-announcements/update-exposure-notifications, cited at Am. Compl. ¶ 21, n. 10.

7 Burke, *supra* note 6; *see also Exposure Notification: Bluetooth Specification*, Google (Apr. 2020), available at https://blog.google/documents/70/Exposure_Notification_-_Bluetooth_Specification_v1.2.2.pdf / (hereinafter "*ENS: Bluetooth Specification*"), cited at Am. Compl. ¶ 41 n. 37.

8 *Id.*

9 *ENS: Bluetooth Specification*, *supra* note 7.

10 *Id*.

11 *Id.*

12 *Id.*; *accord* Burke, *supra* note 6.

(2) store all of that information on a "system log" allegedly accessible by the Department and potentially others. Am. Compl. ¶¶ 42-53. A MAC address is a "sequence of characters that identifies a device on a network." Am. Compl. ¶ 42. According to Plaintiffs, MAC addresses are "readily associated with specific locations," such that "knowing when an individual's device connected with a MAC address associated with a specific location—such as a store—would provide knowledge of the device owner's location at a particular time . . . [and] a series of such data points would provide a reasonably precise timeline of the device owner's movement." Am. Compl. ¶ 43. Plaintiffs allege that, because the MassNotify Setting allegedly recorded all of the MAC addresses that a device sent or received, an entity with access to a single device's system log "could . . . correlate received MAC addresses with MAC addresses associated with known fixed locations, thereby determining where the device owner has been." Am. Compl. ¶ 50. They also allege that an entity with access to the system logs of multiple devices "would know which MAC addresses are associated with each device and thus could determine when individual device owners were in close proximity with one another." *Id*. Plaintiffs do not allege any facts showing that Defendants actually analyzed the system logs from their (or any other) Android devices or otherwise used the MassNotify Setting for the purpose of tracking the device owner's movements and personal contact information.

The Amended Complaint includes two screenshots that allegedly show how the MassNotify Setting "appear[ed] through a typical Android device's 'view all app' feature." Am. Compl. ¶ 30. Both screenshots show that the MassNotify Setting did not use any of the device's mobile data, did not use any of the device's battery since the device was last fully charged, and used approximately 15MB of internal storage. *Id.* Though the screenshots do not bear this out, Plaintiffs claim "on information and belief" that the MassNotify Setting caused two of their

devices' Bluetooth functionality to turn on, thereby "broadcasting signals and draining the battery . . . without their awareness." Am. Compl. ¶ 57.

III. Additional Facts Regarding the Discontinuation of MassNotify in May 2023[13]

The MassNotify Setting was part of a nationwide ENS program operated by Google, APHL, and other entities not named in this lawsuit.[14] Affidavit of Catherine M. Brown ("Brown Aff.") ¶ 5. The technology was wholly dependent on servers maintained by APHL. *Id.* ¶¶ 5, 7. Briefly, the RPIs that Plaintiffs described in their Amended Complaint operated as "keys." *Id.* ¶ 5. Those keys were exchanged between mobile devices of participating users who were in close proximity to one another and sent to a key verification server and a national key server hosted by APHL. *Id.* Those servers performed the "matching" of keys needed to alert users of a potential exposure. *Id.*; *see id.* ¶ 6.

On February 21, 2023, APHL notified the Department that it would end the ENS program (of which MassNotify was a part) with the expiration of the COVID-19 national public health emergency on May 11, 2023. Brown Aff. ¶ 8. On May 12, 2023, the Department was notified by APHL that the national key server and verification server had been taken down, as planned. *Id.* Consequently, the MassNotify Setting is no longer operational. Brown Aff. ¶ 9. It will no longer be installed by Google as a setting on Android devices or be otherwise available. *Id.* The

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[13] The court may consider these additional facts as they are relevant to Defendants' claim of mootness. *Manguriu v. Lynch*, 794 F.3d 119, 121 (1st Cir. 2015) ("federal courts ordinarily must answer jurisdictional questions before tackling the merits of a case," and "[b]ecause mootness implicates a court's jurisdiction, the court can properly look to facts outside the record so long as those facts are relevant to a colorable claim of mootness."); *Valentin v. Hospital Bella Vista*, 254 F.3d 358, 364 (1st Cir. 2001) (courts enjoy "broad authority" to consider "extrinsic evidence" when conducting mootness inquiry under Fed. R. Civ. P. 12(b)(1)).

[14] APHL is a non-profit membership organization of state and local public health, environmental health, agricultural, food safety and veterinary laboratories; it works closely with federal agencies to develop and execute national health initiatives. *See* APHL Profile, available at https://www.aphl.org/aboutAPHL/Pages/profile.aspx (last visited May 22, 2023).

Department is not aware of any plans by APHL to bring back the national key and verification servers. *Id.* The Department also does not have any present intention of or capacity to start any other digital exposure notification system. *Id.*

According to Google, users who previously chose to enable the MassNotify Setting on their devices do not need to take any action to turn off COVID-19 exposure notifications. *See* Brown Aff. ¶ 11 & Exhibit 1. Even so, Google has provided instructions for users to confirm that the system is no longer active on their phones and/or to uninstall it. Brown Aff. ¶ 11. The Department has published these instructions online. *See id*. The Department does not have the technical ability to remove the MassNotify Setting from Android devices on which it had been previously installed. Brown Aff. ¶ 10. Based on representations made by Google to the Department, Google also does not have this technical capability without initiating a system-wide update on all Android devices. *Id.*

While the ENS program was operational, the Department received anonymous, aggregate data from MassNotify through one of the entities that collaborated with APHL and Google on the national ENS program. Brown Aff. ¶ 12. This data included metrics on the number of devices contributing anonymous data, exposure notification metrics, exposure notification interaction metrics, key upload metrics, verification code metrics, and anonymous keys that had been voluntarily shared. *Id.* This data did not ever include any personal or location information. *Id.* The Department also has access to the following aggregate, anonymous analytics data from Google: estimated number of active users with the MassNotify Setting enabled, installed audience (the estimated number of devices with the MassNotify Setting installed), aggregate number of uninstalls, and high-level usage and diagnostic data for those that opted into sharing that data, like number of crashes and "Application Not Responding" errors. *Id.* ¶ 14. The Department does not

have, and has never had, access to personalized data—including, but not limited to, a user's name, email address, or location—via the MassNotify Setting. *Id.* ¶ 15.

ARGUMENT

Because the technology of which Plaintiffs complain is no longer operational, their claims are moot, and the court should dismiss the Amended Complaint for lack of subject-matter jurisdiction. Beyond that threshold issue, the court also should dismiss the complaint because Plaintiffs have not established plausible Fourth and Fifth Amendment claims against the Commissioner, and they have not alleged *any* facts about the Governor.

I. This Court Lacks Jurisdiction Over Plaintiffs' Claims for Injunctive and Declaratory Relief Because the Claims Have Become Moot.

A. Plaintiffs' claims are moot because the MassNotify Setting is no longer operational.

"The doctrine of mootness enforces the mandate 'that an actual controversy must be extant at all stages of the review, not merely at the time the complaint is filed.'" *American Civil Liberties Union of Massachusetts v. U.S. Conference of Catholic Bishops* ("*ACLUM*"), 705 F.3d 44, 52 (1st Cir. 2013), *quoting Mangual v. Rotger-Sabat*, 317 F.3d 45, 60 (1st Cir.2003). "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Id.*, *quoting D.H.L. Associates, Inc. v. O'Gorman*, 199 F.3d 50, 54 (1st Cir. 1999). Where a complaint seeks injunctive relief but there is "no ongoing conduct left for the court to enjoin," the case is moot. *Id.* at 53 (citations omitted). Similarly, when events transpire after the case is filed that "disable a federal court from granting effective relief," the case is moot. *Manguriu v. Lynch*, 794 F.3d 119, 121 (1st Cir. 2015). And where a case seeks declaratory relief, but intervening events have transpired that would render the court's declaration purely advisory, the case is moot because "federal courts 'are not in the business of pronouncing that past actions which

have no demonstrable continuing effect were right or wrong.'" *ACLUM*, 705 F.3d at 53, *quoting Spencer v. Kemna*, 523 U.S. 1, 18 (1998). Those standards are easily met in this case.

As reflected in the Brown Affidavit and publicly available information, the MassNotify Setting is no longer functional, Brown Aff. ¶¶ 9, 11 & Exhibit 1; the third-party servers on which MassNotify was dependent were disabled when the national public health emergency expired on May 11, 2023. Brown Aff. ¶¶ 8-9. As a result, Plaintiff's requested injunctive relief would have no effect, as there is nothing left for the court to enjoin. *ACLUM*, 705 F.3d at 52-54. Likewise, any declaration about whether the MassNotify Setting may have infringed Plaintiffs' constitutional rights at some point in the past would be purely advisory. *See Boston Bit Labs, Inc. v. Baker*, 11 F.4th 3, 6-7, 9 (1st Cir. 2021) (no "'substantial controversy of sufficient immediacy and reality' exists 'to warrant the issuance of a declaratory judgment'" where Governor's COVID-19-related order closing video arcade parlors was superseded by another order allowing them to re-open, and the Governor had lifted the COVID-19 state declaration of emergency), *quoting ACLUM*, 705 F.3d at 54. As such, the case is moot. *ACLUM*, 705 F.3d at 52-54. And, as explained below, neither of the two exceptions to mootness that might conceivably apply—voluntarily cessation and the capable-of-repetition-yet-evading-review doctrine—has any application in these circumstances.

B. Because MassNotify ended for reasons unrelated to this litigation, the voluntary cessation doctrine does not apply.

This case is not one in which a defendant's voluntary cessation of the challenged conduct might save the claims from dismissal. In general, this exception arises where a defendant voluntarily ceases the challenged practice in an attempt to end the litigation and insulate itself from judicial review. *See ACLUM*, 705 F.3d at 54. It does not apply where, as here, "the voluntary cessation of the challenged activity occurs because of reasons unrelated to the litigation" and there

is no "reasonable expectation that the challenged conduct will be repeated following dismissal of the case." *Id.* at 55-56 (citations omitted).

MassNotify ended because APHL (which is not a party to this case) ended the ENS program and disabled the necessary servers when the national public health emergency expired on May 11, 2023. Brown Aff. ¶¶ 7-9; *ACLUM,* 705 F.3d at 55 ("[V]oluntary cessation exception is not invoked when the challenged conduct ends because of an event that . . . is not brought about or hastened by any action of the defendant."). The Department did not participate in this decision and did nothing to hasten the shutdown of MassNotify (including the specific MassNotify setting) for the purposes of avoiding this litigation. Thus, "this case [does not] raise[] the kind of litigation-scheming suspicions typically associated with defendant-initiated mootness." *Boston Bit Labs*, 11 F.4th at 10.

In addition, there is no reasonable expectation that the challenged conduct will reoccur. Even accepting the remote possibility that COVID-19 cases could resurge or another pandemic of equal severity could emerge, there is no "demonstrated probability" that the Department would respond in the same manner, by joining a nationwide initiative to provide digital exposure notification technology to mobile device owners in the Commonwealth; nor is there reason to believe that APHL or any other entity would provide the underlying technology and hardware, let alone in the same form, as it did with the MassNotify Setting. Any suggestion to the contrary would be sheer speculation. *See Boston Bit Labs*, 11 F.4th at 10-11.

C. Plaintiffs' claims also are not capable of repetition yet evading review.

Another mootness exception—for claims that are "capable of repetition, yet evading review"—is also inapplicable here. This doctrine applies only in "exceptional situations" where a plaintiff can show that "there was a reasonable expectation that the same complaining party would

be subjected to the same action again" and that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration." *ACLUM*, 705 F.3d at 57, *citing Gulf of Me. Fisherman's Alliance v. Daley*, 292 F.3d 84, 89 (1st Cir. 2002); *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983).

As to the first element, for the reasons discussed *supra* at p. 12, Plaintiffs' claims are not "capable of repetition" because there is no reasonable expectation that the challenged conduct will reoccur. And as to the second, Plaintiffs cannot plausibly establish "a realistic threat that no trial court ever will have enough time to decide the underlying issue [they have raised]." *Cruz v. Farquharson*, 252 F.3d 530, 535 (1st Cir. 2001) (citation omitted). Their constitutional claims are "not among the 'inherently transitory' claims"—such as those related to elections or pregnancy, for example—"the Supreme Court has recognized as likely to evade review." *ACLUM*, 705 F.3d at 57 (citations omitted). Equally important, state and federal courts *were* able to reach the merits of numerous lawsuits that were brought, like the present case, to challenge some action the government took during the COVID-19 pandemic. *See, e.g.*, *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66-67 (2020); *Delaney v. Baker*, 511 F. Supp. 3d 55, 73-75 (D. Mass. 2021); *Desrosiers*, 486 Mass. at 392-93. Moreover, Plaintiffs could have filed suit much sooner: while Plaintiffs Wright and Kula were aware that the MassNotify Setting had been installed on their devices as early as July 1, 2021, Am. Compl. ¶¶ 1-2, they waited until November 14, 2022, to file this lawsuit. Dkt. No. 1. The Amended Complaint should be dismissed as moot.

II. Even If There Were a Live Controversy Between the Parties, the Court Should Dismiss the Amended Complaint Because It Fails to Plausibly Allege Any Constitutional Violations by Defendants.

A. Plaintiffs do not make any factual allegations about the Governor.

Even if the court concludes that Plaintiffs' claims are not moot (which they are), the Amended Complaint fails to set forth any factual or legal bases for including Governor Healey as a "named defendant in her official capacity as Governor of Massachusetts." Am. Compl. ¶ 8. To the extent Plaintiffs included the Governor because they seek injunctive or declaratory relief, her presence in this suit is unnecessary. Any relief, if warranted, would be available from the Commissioner. *See New Progressive Party v. Hernandez Colon*, 779 F.Supp. 646, 652 (D.P.R. 1991) (state officer is a proper party defendant to Section 1983 claim seeking injunctive relief, "provided that officer has some connection with the enforcement of the statute in connection"), *citing Ex parte Young*, 209 U.S. 123, 28 (1908). Accordingly, Plaintiffs' claims cannot proceed against the Governor, and she must be dismissed from this lawsuit. *See, e.g., McLeod v. Dukakis*, No. 89-0108, 1990 WL 180708 *1 (D. Mass. Nov. 2, 1990) (dismissing Section 1983 claim against former governor, in his official and individual capacities, because the complaint made no allegation that the alleged violation occurred under a policy or custom promulgated by him).

B. Count I fails to state a claim under the Fourth Amendment prohibition on unreasonable searches and seizures.

In Count I, Plaintiffs assert that Defendants conducted a search in violation of the Fourth Amendment by "enabl[ing] location tracking of an Android phone," Am. Compl. ¶ 81, and "secretly install[ing] an unwanted App onto the Android devices of over a million individuals for the purpose of gathering information about those individuals." Am. Compl. ¶ 83. Assuming for this motion that those actions—which were allegedly performed by Google—are attributable to the Defendants, Plaintiffs still do not allege sufficient facts to show that an unlawful search

occurred. A search under the Fourth Amendment occurs "whenever the government intrudes upon any place and in relation to any item in which a person has a reasonable expectation of privacy." *United States v. Moss*, 936 F.3d 52, 58 (1st Cir. 2019). As Plaintiffs recognize, however, trespass alone does not trigger a constitutional violation, *see* Am. Compl. ¶ 82; "there must be conjoined with [trespass] . . . an attempt to find something or to obtain information." *United States v. Jones*, 565 U.S. 400, 408 n.5 (2012). Setting aside the first two questions (reasonable expectation of privacy and trespass) for this motion only, Plaintiffs' Fourth Amendment claim fails on the third: they have not alleged any facts plausibly showing that the Department or the Commissioner attempted to obtain information about individual Android users through the MassNotify Setting. *See supra* at p. 14 (arguing that Plaintiffs failed to allege any conduct by the Governor).

In the first instance, Plaintiffs do not allege any facts to support their conclusory assertion that Defendants worked with Google to automatically install the MassNotify Setting "for the purpose of gathering information about [Android device owners]." Am. Compl. ¶ 83. To the contrary, the Amended Complaint affirmatively establishes that the Department undertook this effort, not to gather information on individual users, but to increase participation in the Commonwealth's digital exposure notification system following a low rate of adoption of the initial MassNotify application. *See* Am. Compl. ¶¶ 28 (alleging "[o]n information and belief" that "DPH and Google developed the [MassNotify Setting] in order to overcome Android users' low rate of voluntary adoption of the initial App"); *id.* ¶ 31 (alleging "[o]n information and belief," that "DPH decided to secretly install [the MassNotify Setting] onto over one million Android devices because its initial version, which required voluntary download, was not widely adopted by Massachusetts citizens by June 2021").

Plaintiffs further allege that the MassNotify Setting allows Defendants and potentially others to access device system logs that allegedly contain information (MAC addresses) that could be analyzed to reveal the device owners' movements and associates. *See* Am. Compl. ¶¶ 50-53,56. But the very documents upon which they rely in framing their complaint flatly refute these claims. *See supra* at pages 5-8; s*ee also Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 55 & n.3 (1st Cir. 2012) (on 12(b)(6) review, court may consider "implications from documents attached to or fairly incorporated into the complaint," knowing that "*the documents may trump the complaint's allegations if a conflict exists*, e.g., where a [plaintiff] has excised an isolated statement from a document and import[ed] it into the complaint") (emphasis added) (internal quotation marks omitted). Equally important, Plaintiffs do not allege that the Commissioner actually accessed those system logs, reviewed the MAC addresses, or otherwise tracked Android device owners using information allegedly collected through the MassNotify Setting—or even that the Commissioner or the Department attempted such actions. *Contrast, e.g., Jones*, 565 U.S. at 404-05 (holding that "the [g]overnment's installation of a GPS device on a target's vehicle, and its *use of that device to monitor the vehicle's movements*, constitutes a 'search'"; observing that "[t]he [g]overnment physically occupied private property *for the purpose of obtaining information*[, . . . which] would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted") (emphasis added). Consequently, even if the Court reaches the merits of Plaintiffs' claims (which it should not), the Court should dismiss Count I for failure to state a claim upon which relief can be granted. *See Ruiz Rivera v. Pfizer Pharm., LLC*, 521 F.3d 76, 84 (1st Cir. 2008) (dismissal under Rule 12(b)(6) appropriate if plaintiffs' well pleaded facts do not "possess enough heft to sho[w] that [plaintiff is] entitled to relief").

C. Count II fails to state a claim under the Fifth Amendment Takings Clause.

The Fifth Amendment Takings Clause, which applies to states through the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. *See generally, e.g.*, *Baptiste v. Kennedy*, 490 F. Supp. 3d 353, 387-91 (D. Mass. 2020) (rejecting Takings Clause challenge to Massachusetts's COVID-related eviction moratorium). The Supreme Court has recognized two types of takings claims: one addressing physical occupation or *per se* takings, and the other addressing regulatory takings. *Id.* at 387. Plaintiffs rely on the physical occupation doctrine, asserting in Count II that the Department "occupied (and continues to occupy) the digital storage of over one million private mobile devices when it worked with Google to secretly install [the MassNotify Setting] onto citizens' mobile devices," Am. Compl. ¶ 91, without offering or providing device owners compensation. Am. Compl. ¶ 92.

To state a cognizable claim under the physical occupation doctrine, Plaintiffs must allege facts plausibly suggesting that they possess a constitutionally protected property interest and that the government physically occupied that interest, whether by itself or through a third party, without compensating them. *See Loretto v. Telephone Manhattan CATV Corp.*, 458 U.S. 419, 435-37 (1982); *In re Fin. Oversight and Mgmt. Bd. for Puerto Rico*, 54 F.4th 42, 58 n.18 (1st Cir. 2022) (and cases cited). The Amended Complaint fails to support either requirement. Thus, in the event the court concludes this matter is not moot, Count II must be dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

1. The First Amended Complaint does not allege sufficient facts about Plaintiffs' purported property interest in the digital storage space of their Android devices.

Count II rests exclusively on Plaintiffs' belief that they have a constitutionally protected property interest in the digital storage space of their Android devices. Am. Compl. at pp. 3-4, ¶ 91. Yet they offer nothing more than a legal conclusion—which the court need not credit under Rule 12(b)(6), *Garcia-Catalan v. United States*, 734 F.3d 100, 103 (1st Cir. 2013)—to support this belief. *See* Am. Compl. ¶ 69 ("Plaintiffs . . . have [a] constitutional property interest[] in not having an app, especially one that they did not want or agree to have installed, use up storage space on their Android devices (smartphones and tablets) . . .").[15] There are no underlying factual allegations that Plaintiffs exclusively own this storage space, *see Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021), and the Amended Complaint suggests they do not where Google was able to "automatically distribute[]" the MassNotify Setting to their Android devices, Am. Compl. ¶ 28, and thus exercised some control over the available storage space. Plaintiffs also fail to identify the source of their purported property interest. *Garcia-Rubiera v. Calderon*, 570 F.3d 443, 452 (2009) (for purposes of the Takings Clause, "the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as a state law"); *Lone Star Indus., Inc. v. United States*, 109 Fed. Cl. 746, 753-758 (Fed. Cl. 2013) (dismissing takings claim because complaint did not identify state or federal law, or other source, that actually established plaintiff's claimed property interest in deep-water access). Count

[15] Though Plaintiffs also assert that they hold a "constitutional property interest[] in not having an app . . . drain the batteries [of their Android devices]," Am. Compl. ¶ 69, they do not carry that assertion into Count II. And in any event, the screenshots embedded in the Amended Complaint directly refute the allegation that MassNotify "drains" the batteries of Android devices. Am. Compl. ¶ 32.

II must be dismissed. *See Garcia-Catalan*, 734 F.3d at 103 (at pleading stage, complaint "must suggest more than a sheer possibility that a defendant has acted unlawfully").

2. Installation of the MassNotify Setting could not constitute a taking, as a matter of law, where Plaintiffs were able to delete the MassNotify Setting without consequence.

Plaintiffs likewise fail to allege facts plausibly suggesting that installation of the MassNotify Setting amounted to a physical occupation of their devices. "The government effects a physical taking only where it *requires* the []owner to submit to the physical occupation of his [property]." *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 527 (1992) (emphasis in original). "This element of required acquiescence is at the heart of the concept of occupation." *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987). But there can be no "required acquiescence"—and thus no physical occupation—where Plaintiffs affirmatively acknowledge that they and others were able to delete the MassNotify Setting without suffering any repercussions from Defendants. *See* Am. Compl. ¶¶ 1-6, 36.

As the Supreme Court explained in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982), the physical invasion of property violates the Fifth Amendment when it "effectively destroys" the owner's rights to possess, use, and dispose of the property. Unconstitutional physical takings may be permanent, like the government-sanctioned installation of cable television equipment on a property owner's roof with screws, nails, and bolts in *Loretto*, or temporary and intermittent, like the labor organizers' regulatory right to access agricultural employers' property during specified time frames in *Cedar Point Nursery*. In either scenario, the property owner must be required to submit to the invasion: the property owner in *Loretto* could not physically remove the equipment, 458 U.S. at 438; the agricultural employer in *Cedar Point*

Nursery could not interfere with the organizers' right to access without facing the threat of an unfair labor practice charge and possible sanctions. 141 S. Ct. at 2076-78.

This reveals another fatal flaw in Plaintiffs' Fifth Amendment claim. Though they allege that Defendants, working with Google, installed the MassNotify Setting onto their Android devices, they do not allege that they were compelled to keep the setting or that they suffered any adverse action for deleting it. The mere allegation that some users believe that the Department reinstalled the MassNotify Setting after they deleted it—without more—does not prove otherwise. As such, the court should dismiss Count II. *See Turntable Fishery & Moorage Corp. v. United States*, 52 Fed. Cl. 256, 263 (2002) (dismissing takings claim where plaintiffs failed to allege that they were "compelled" by the government to transfer plaintiff Turntable's common facilities).

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this court dismiss Plaintiffs' Amended Complaint in its entirety and with prejudice.

Respectfully submitted,

ROBERT GOLDSTEIN, in his official capacity as Commissioner of the Massachusetts Department of Public Health, and MAURA HEALEY, in her official capacity as Governor of Massachusetts,

By their attorney,

ANDREA JOY CAMPBELL,
ATTORNEY GENERAL

/s/ Kimberly Parr

Kimberly Parr, BBO No. 679806
Erin E. Fowler, BBO No. 707188
Konstantin Tretyakov, BBO No. 698430
Assistant Attorneys General
Office of the Attorney General
Government Bureau
One Ashburton Place
Boston, MA 02108
(617) 963-2489
Kimberly.Parr@mass.gov

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(A)(2)

I certify that in April and May 2023, Defendants' counsel conferred with counsel for the plaintiffs, Sheng Li, Esq., by teleconference and attempted in good faith to resolve or narrow the issues in dispute.

/s/ *Erin E. Fowler*
Erin E. Fowler
Assistant Attorney General

Dated: May 22, 2023

CERTIFICATE OF SERVICE

I certify that this document, filed through the court's ECF system, will be sent electronically to registered participants and that copies will be sent to non-registered participants by email on May 22, 2023.

/s/ *Erin E. Fowler*
Erin E. Fowler
Assistant Attorney General

Dated: May 22, 2023