Case No. S259392
2nd Civil No. B259392
Los Angeles Superior Court No. BS143004

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTHERN CALIFORNIA and ELECTRONIC FRONTIER FOUNDATION,
Petitioners,

v.

SUPERIOR COURT FOR THE STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES,
Respondent,

COUNTY OF LOS ANGELES, and the
LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, and the CITY OF LOS ANGELES, and the LOS ANGELES POLICE DEPARTMENT,
Real Parties in Interest.

After a Decision by the Court of Appeal,
Second Appellate District, Division Three (No. B259392)

REPLY IN SUPPORT OF PETITION FOR REVIEW

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INTRODUCTION

Respondents in their Answer do not meaningfully contest that the Court of Appeal's opinion rests on a dramatic expansion of the California Public Records Act's exemption for law enforcement "[r]ecords of . . . investigations" in Government Code § 6254(f). Respondents instead argue the fact that the case is novel—and therefore does not involve a split in authority between various Courts of Appeal—should somehow restrict this Court's jurisdiction to hear the case. However, this Court's mandate is not so limited. The Court's obligation to ensure "a correct and uniform construction of the constitution, statutes, and charters, and, in some instances, a final decision by the court of last resort of some doubtful or disputed question of law," *People v. Davis*, 147 Cal. 346, 348 (1905), unquestionably allows review here. The lower court's decision expands application of a statute beyond any prior precedent or commonsense interpretation of its meaning and fails to address constitutional rules of construction. The Court is empowered to hear cases such as this that raise "an important question of law." Cal. Rules of Ct., rule 8.500(b)(1).

The two issues presented for review by this case—whether data collected automatically and indiscriminately on millions of Californians constitute "[r]ecords of . . . investigations" exempt from public disclosure under the California Public Records Act, Government Code § 6254(f), and how a 2004 amendment to the California Constitution should guide courts' determination of that question—have reach far beyond the facts of this case. Law enforcement agencies now routinely employ technologies—like Automated License Plate Readers—that allow them to collect mass amounts of data on the public, and their reliance on these technologies will

only increase in the future. Access to the data police collect on the public at large will be crucial as a check on police power and will help to ensure police accountability.

Despite the fact that the indiscriminate and untargeted records involved in this case as well as the technology used to collect them are completely different from the facts in past cases that have applied §6254(f)'s "records of investigations" exemption, and despite an intervening constitutional amendment, the Court of Appeal broadly applied outdated case law to determine this entire class of data should be exempt from disclosure.

The lower court's analysis is out of step with this Court's post-2004 public records cases requiring courts to "broadly construe statutes that grant public access to government information and to narrowly construe statutes that limit such access." *Long Beach Police Officers Assn. v. City of Long Beach*, 59 Cal. 4th 59, 68 (2014). For this reason, the Court should grant review to correct the lower court's mistake.

ARGUMENT

I. Review is Necessary to Ensure Correct Construction of Government Code Section 6254(f) by Lower Courts

The Court of Appeal's decision withholding millions of datapoints collected by the Los Angeles Police and Sheriff's Departments through automated, indiscriminate, and suspicionless license plate scans over the course of a single week warrants review to settle the important legal question of whether these data constitute "[r]ecords of . . . investigations" within the meaning of Government Code § 6254(f). It also merits review to correct the Court of Appeal's unduly expansive interpretation of that phrase.

As Respondents recognize, this Court need not wait for a split in authority to accept review but may also review a lower court decision "[w]hen necessary . . . to settle an important question of law," or to "secure . . . a correct and uniform construction of the constitution, statutes, and charters." Resp't Answer at 6 (citing Cal. Rules of Ct., rule 8.500(b)(1); *People v. Davis*, 147 Cal. 346, 348 (1905)); *see also Snukal v. Flightways Mfg., Inc.*, 23 Cal. 4th 754, 772 (2000) (reciting the considerations in *People v. Davis* and adding that the state constitution was amended in 1985 to "authorize this court to 'review the decision of a court of appeal in any cause'") (quoting Cal. Const. Art. VI, § 12(b)).

The issues presented to the Court more than meet these requirements for this Court's review. Contrary to Respondents' claims, whether § 6254(f)'s investigative records exemption covers indiscriminate and automated data collection is far from settled. The fact that the PRA, on its face, exempts law enforcement "records of . . . investigations" (a point Petitioners do not challenge) does not settle the predicate question of whether data collected through ALPR scans qualify as records of investigations at all. Pet. for Review at 1. As explained in detail in the Petition for Review, the Court of Appeal's ruling dramatically expands the scope of the exemption under § 6254(f). *Id.* at 10-17. No prior court has held the indiscriminate collection of data on every member of the public to be an "investigation" under § 6254(f), and there is no support for such an expansion of the definition by the Court of Appeal. *Id.* at 11-14.[1]

[1] Respondents' arguments urging deference to factual findings are of no help here. Petitioners do not challenge the facts set forth in the Court of Appeal's opinion, *see* Slip Op. at 3-5; Pet. for Review at 6 ("The Court of Appeal's opinion correctly sets forth the facts of the case."), only the interpretation of the law the Court of Appeal applied to those facts.

Nor does it settle whether the phrase "[r]ecords of . . . investigations" must be interpreted narrowly in light of the amendment to the state constitution embodied in Article I, § 3(b)(2), which requires that "[a] statute, court rule, or other authority, . . . shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." The Court of Appeal ignored this interpretive mandate entirely, failing to cite, even once, to the California Constitution. *See* Pet. for Review at 17-19. In doing so, and, as the first and only appellate decision to consider the scope of the exemption for "[r]ecords of . . . investigations" since the amendment, *see id.* at 20-21, the Court of Appeal's ruling could hold broad precedential weight for courts grappling with access to records generated through a host of other automated processes, including video recorded by police body cameras and patrol car dash cameras. *See id.* at 26.[2] Whether the public has the right to access such records is already the subject of intense debate both within and outside California and will inevitably reach the courts.[3] Ensuring that the governing

[2] The Court of Appeal decision has already been cited as authority by law enforcement associations seeking to prevent public access to patrol car dash camera videos of a fatal police shooting. *See Mendez v. City of Gardena*, Case No: 2:13-cv-9042 SVW (AJX), Doc. No. 252 (Br. for Amici Curiae Cal. State Sheriffs' Assoc., et al., 6) (C.D. Cal. June 26, 2015).

[3] *Id.*; *see also, e.g.*, Henry Gass, *Body camera video is coming, but who gets to watch it?*, Christian Science Monitor (July 16, 2015), http://www.csmonitor.com/ USA/Justice/2015/0716/Body-camera-video-is-coming-but-who-gets-to-watch-it; Robert Salonga, *San Jose police's body camera policy worries watchdog,* San Jose Mercury News (May 23, 2015), *available at* http://www.mercurynews.com/crime-courts/ci_28177713/san-jose-police-auditor-voices-serious-concerns-about?source=pkg; *Restrictions on Public Access to Body Cam Footage Anger Many*, Christian Press (May 26, 2015), *available at* http://www.christianpress.com/legal-news/1516-restrictions-on-public-access-to-body-cam-footage-anger-many.html; Marissa Lang, *Sacramento police chief wants body cameras for*

construction of the § 6254(f) exemption is correct is therefore well within this Court's authority to review.

II. The Impact of Proposition 59 on § 6254(f)'s Records of Investigations Exemption is Properly Before the Court

As Petitioners note in their opening brief, the impact of the 2004 constitutional amendment on the proper interpretation of PRA exemptions cannot be overstated. As this Court has recognized in several contexts outside of § 6254(f), Proposition 59 created a new interpretive rule that "direct[s] the courts to broadly construe statutes that grant public access to government information and to narrowly construe statutes that limit such access," *Long Beach Police Officers Assn.*, 59 Cal. 4th at 68, and has applied this interpretive rule to promote transparency in several contexts. *See* Pet. at 18. Because the lower court failed to address the impact of Proposition 59 on the "records of investigations" exemption and instead broadly applied pre-2004 cases interpreting § 6254(f) to exempt millions of police-collected data points, this Court's review is particularly necessary.

Respondents claim this Court should not address the impact of Art. I, § 3(b)(2) on the construction of the phrase "[r]ecords of . . . investigations," arguing Petitioners failed to raise the issue in the Court of Appeal. But this is incorrect. Petitioners cited to and directed the Court of Appeal to consider Art. I, § 3(b) in their briefs and at oral argument. *See* Ct. App. Pet. for Writ of Mandate at 23; Ct. App. Reply in Supp. of Pet. for Writ of Mandate at 18; Ex. 1 (Tr. of Selected Portions of Oral Arg.). However, even had they not, the Court may consider it now. Where, as here, the issue before the Court involves "pure questions of law, not turning upon disputed

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officers, Sacramento Bee (May 19, 2015), *available at* http://www.sacbee.com/news/local/crime/article21447540.html.

facts, and [is] pertinent to a proper disposition of the cause or involve[s] matters of particular public importance," the Court may address it, even if it was not presented to the lower court. *People v. Randle*, 35 Cal. 4th 987, 1001-1002 (2005) (emphasis omitted)(citing *People v. Super. Ct. (Ghilotti)*, 27 Cal. 4th 888, 901, n. 5 (2002)).

The application of Proposition 59's interpretive rule to § 6254(f) satisfies the *Randle* criteria and is vital to the proper disposition of this case.[4] The text of Art. I, § 3(b) itself reinforces this point: while the provision expressly states that it does not "affect[] the construction of any statute" to the extent the statute protects privacy or peace officer personnel records, Art. I, § 3(b)(3), it states only that it does not "repeal or nullify" other exemptions. Art. I, § 3(b)(5). This difference makes clear that the constitutional amendment did affect the construction of statutory exemptions, including those in § 6254(f).

The impact of Proposition 59 on the public's access to law enforcement records is also a "matter[] of particular public importance." *Randle,* 35 Cal. 4th at 1002. As discussed in depth in the Petition for Review, the Court of Appeal's broad interpretation of the phrase "[r]ecords of . . . investigations" holds profound implications for access to information not only generated by ALPRs, but also by other forms of police surveillance, including body cameras and dash cameras—information that is compiled in part to promote police accountability. *See* Pet. for Review at 26-29. Similar questions of statutory interpretation have often been

[4] Again, Petitioners do not contend that Art. I, § 3(b) altered the mandate that records of investigations be exempt from public disclosure; but rather, that it instructed courts to narrowly construe the scope of records that could be considered investigative.

considered "matters of particular public importance" even when not raised below. *See, e.g.*, *Ghilotti*, 27 Cal. 4th 888, 901 n.5 (2002) (interpretation of state commitment statute); *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1118 (1988) (tolling of statute of limitations in class actions); *see also In re Farm-Raised Salmon Cases*, 42 Cal. 4th 1077, 1089 n.11 (2008) (preemptive effect of the Federal Food, Drug, and Cosmetic Act).

The impact of Art. I, § 3(b)(2) on the scope of exemptions under § 6254(f) is therefore properly before the Court and compels its attention.

III. Whether the Catch-All Exemption in Government Code Section 6255 Should Apply is Not Under Review

Respondents acknowledge the Court of Appeal did not address § 6255 but urge this Court to deny review because, they argue, the records at issue would be exempt under that provision.

Even if Respondents were correct about their analysis under § 6255, Respondents' argument misunderstands the nature of this Court's review. The Court should not let stand a Court of Appeal decision that improperly expands the CPRA exemption for law enforcement records beyond all precedent, with broad implications for data collection, simply because in this particular case there may be an alternate ground for the result—one that the Court of Appeal explicitly declined to address. Slip Op. at 13. Should the Court determine that the records at issue do not qualify for exemption under § 6254(f), it should remand the case for consideration of whether they may be withheld under § 6255.[5]

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[5] Respondents are also incorrect that the ALPR data is exempt under § 6255. As the Superior Court recognized, "[t]he intrusive nature of ALPRs and the potential for abuse of ALPR data creates a public interest in disclosure of the data to shed light on how police are actually using the technology." Super. Ct. Order at 16. That court further noted the privacy interests of those whose license plates have been scanned but recognized

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court review this important case and restore the public's constitutionally protected right of access to law enforcement records.

Dated: July 27, 2015

Respectfully submitted,

By:_____
Jennifer Lynch
ELECTRONIC FRONTIER FOUNDATION

Peter Bibring
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that these privacy interests could be addressed through redaction or by assigning random numbers to plates. *Id*. at 16-17. Respondents challenged these holdings at the Court of Appeal, and that court made no ruling on Petitioners' argument that the disclosure of a week's worth of ALPR data would advance those interests without significantly impacting any law enforcement efforts that might weigh against disclosure.

CERTIFICATE OF WORD COUNT

I certify pursuant to California Rules of Court 8.204 and 8.504(d) that this Reply in Support of Petition for Review is proportionally spaced, has a typeface of 13 points or more, contains 2,225 words, excluding the cover, the tables, the signature block, verification, and this certificate, which is less than the total number of words permitted by the Rules of Court. Counsel relies on the word count of the Microsoft Word word-processing program used to prepare this brief.

Dated: July 27, 2015

_____

Jennifer Lynch
Counsel for Petitioners

CERTIFICATE OF SERVICE

I, Madeleine Mulkern, do hereby affirm I am employed in the County of San Francisco, State of California. I am over the age of 18 years and not a party to the within action. My business address is 815 Eddy Street, San Francisco, California 94109. I am employed in the office of a member of the bar of this court at whose direction the service was made.

On July 27, 2015, I served the foregoing document: **REPLY IN SUPPORT OF PETITION FOR REVIEW,** on the parties in this action by placing a true and correct copy of each document thereof, enclosed in a sealed envelope on the persons below as follows:

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