Case No. S227106

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, Case No. B259392
Los Angeles County Superior Court, Case No. BS143004
(Hon. James C. Chalfant)

PETITIONERS' OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED

1. Do data collected by police using "automated license plate readers"—high-speed cameras that automatically scan and record the license plate numbers and time, date and location of every passing vehicle without suspicion of criminal activity—constitute law enforcement "records of . . . investigations" that are permanently exempt from disclosure under the Public Records Act pursuant to Government Code § 6254(f)?

2. Does Proposition 59—the 2004 amendment to the California Constitution requiring "[a] statute, court rule, or other authority . . . be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access"—require agencies and courts to take a narrow approach when applying the records of investigations exemption under Government Code § 6254(f)?[1]

SUMMARY OF ARGUMENT

Amid growing concern over the government's use of surveillance technology to collect massive amounts of data on the lives of ordinary Americans, Petitioners sent requests under the Public Records Act (PRA), Gov't Code §§ 6250 *et seq*.,[2] to the Los Angeles Police Department (LAPD) and the Los Angeles Sheriff's Department (LASD), agencies of Real Parties in Interest City and County of Los Angeles (City and County respectively), seeking information on one such technology: Automated License Plate Readers (ALPRs).

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[1] *See* Pet. For Review (filed June 15, 2015). Neither Respondents' Answer nor this Court's order granting review presented revised or alternative issues for review. Cal. Rules Ct. 8.520(b)(2).

[2] Unless otherwise noted, all statutory citations are to the California Government Code.

ALPRs are high-speed cameras, mounted on police vehicles or attached to fixed objects like light poles, that automatically and indiscriminately scan and record the license plate number and the time, date and precise location of every passing vehicle, along with an image of the vehicle and its immediate surroundings. Only a tiny fraction of these scans—one in five hundred according to one study—shows any link to vehicle registration issues or criminal activity.[3] But because ALPRs can capture data on thousands of plates in a single shift, and because agencies store that data for years, police can use ALPRs to build massive databases of the past locations of law-abiding residents. The ALPR systems of the two agencies in this case alone capture data on about three million vehicles in Los Angeles every week and likely contain well over half a billion plate scans—including data on where each car was at the exact time and date its plate was scanned.[4]

In the courts below, Real Parties in Interest argued, and the Court of Appeal held, that because the data were collected in part for the purpose of locating stolen and wanted vehicles, every single data point constituted a

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[3] Typically, only about 0.2% of plate scans are connected to suspected crimes or vehicle registration issues. ACLU, *You Are Being Tracked: How License Plate Readers Are Being Used to Record Americans' Movements*, pp. 13-15 (July 2013) https://www.aclu.org/technology-and-liberty/you-are-being-tracked-how-license-plate-readers-are-being-used-record (all web pages cited were last visited Oct. 22, 2015).

[4] *See* Slip Op. at 4 (respondents collect data on approximately 3 million license plates per week); Jon Campbell, *License Plate Recognition Logs Our Lives Long Before We Sin*, LA Weekly (June 21, 2012) http://www.laweekly.com/2012-06-21/news/license-plate-recognition-tracks-los-angeles (respondents held data on more than 160 million license plate scans in June 2012).

"record[] of . . . investigation[]" and was therefore permanently exempt from disclosure under § 6254(f)—including data on the 99.8% of scans of drivers unconnected even to a registration issue.

In interpreting § 6254(f) to shield from public view this entire class of records, the lower court improperly expanded the scope of the investigatory records exemption far beyond prior precedent as established by this Court in *Williams v. Superior Court* (1993) 5 Cal.4th 337 and *Haynie v. Superior Court* (2001) 26 Cal. 4th 1061, and so stretched the meaning of "investigation" as to force the absurd result that all cars in Los Angeles are constantly under police investigation.

In so doing, the lower court also ignored the recently enacted constitutional directive of Proposition 59: to "broadly construe[]" the Public Records Act to the extent "it furthers the people's right of access" and to "narrowly construe[]" it to the extent "it limits the right of access." Cal. Const. Art. I, § 3 (b)(2); *accord Sierra Club v. Super. Ct.* (2013) 57 Cal. 4th 157, 166 (applying Art. I, § 3 (b)(2) to require narrow interpretation of the PRA's exemption for computer software); *Sander v. State Bar of Cal.* (2013) 58 Cal. 4th 300, 313 (same as to state bar rules). California voters passed Proposition 59 by an overwhelming margin in 2004. But the Court of Appeal failed to recognize this change in interpretive rule when it cited to cases predating the amendment for the proposition that the exemption for law enforcement records is a broad one, and in fact failed to cite the constitutional rule of narrow construction a single time. *See* Slip Op. at 6 n.3.

Both Real Parties and the court below also failed to recognize the fundamental differences between the mass surveillance capabilities of ALPRs and traditional human policing and instead mechanically applied

old case law addressing targeted investigations by human officers to ALPR technology. The Court of Appeal's opinion rests on the presumption that there is no difference between an officer manually checking a single license plate and high-tech surveillance equipment automatically cataloging the locations of millions of vehicles in Los Angeles every week. *See* Slip Op. at 11 (noting "the ALPR system replicates, albeit on a vastly larger scale, [an officer] visually reading a license plate and entering the plate number into a computer . . . . The fact that the ALPR system automates this process does not make it any less an investigation . . . ."). This is out of step with courts and commentators that have recognized that legal rules and definitions developed in a pen-and-paper era cannot blindly be applied to new technology capable of collecting data on a mass scale. *See, e.g., United States v. Jones* (2012) 132 S.Ct. 945, 955 (Sotomayor, J., concurring); *id.* at 958 (Alito, J., concurring) (distinguishing GPS monitoring of a car's location 24 hours per day for 28 days from one officer following one vehicle on public streets); *Riley v. California* (2014) 134 S.Ct. 2473, 2490 (distinguishing the search incident to arrest of small physical items from the search of a cell phone); *United States v. Graham* (4th Cir. 2015) 796 F.3d 332, 353 (distinguishing seven months of detailed cell phone location information obtained from a cell phone provider from three days of landline dialing information shared with a phone company).

As Professor Orin Kerr has noted, "[a]s technology advances, legal rules designed for one state of technology begin to take on unintended consequences." Orin Kerr, *Applying the Fourth Amendment to the Internet* (2010) 62 Stan. L.Rev. 1005, 1009. The mechanical application of old case law governing what constitutes an "investigation" under § 6254(f) to ALPR technology yields an extraordinary result unintended by the Legislature.

Even if one officer manually checking a license plate would be performing an "investigation" within the meaning of § 6254(f), the Legislature did not expressly intend the exemption for records of law enforcement investigations to extend to records generated from the automated and suspicionless logging of the license plates of millions of law-abiding Los Angeles drivers. But such express legislative authorization is required for public records to be exempt from disclosure. *Sierra Club v. Super. Ct.* (2013) 57 Cal.4th 157, 166 (given "strong public policy" and "constitutional mandate" favoring disclosure, "all public records are subject to disclosure unless the Legislature has expressly provided to the contrary" (quotation and citations omitted)).

Under the broad application of § 6254(f)'s investigatory records exemption sought by Real Parties, law enforcement agencies could withhold from public review virtually unlimited amounts of information gathered on innocent Californians merely by claiming it was collected for an investigative purpose. This would remove an important and necessary check on law enforcement action and a mechanism to hold police accountable to the public. It cannot be what the Legislature intended when it drafted § 6254(f) in 1968, nor what the voters intended when they added government transparency as a fundamental right to the state constitution in 2004.

The Public Records Act allows public scrutiny of agency records so that the people of California can engage in free and informed debate on questionable government policies and conduct. Recent events clearly demonstrate the value of public access to records about the workings of government; over the summer, Congress passed historic legislation restricting the government's powers of surveillance by ending the National

Security Agency's bulk collection of telephony metadata.[5] Only when the facts of this and other secret NSA programs became known could the public and legislators fully debate and ultimately reshape government policy. So, too, here: Petitioners seek access to public records so that the legal and policy implications of the government's use of ALPRs to collect vast amounts of information on almost exclusively law-abiding Angelenos may be fully and fairly debated.

STATEMENT OF THE CASE

I. The Nature of Automated License Plate Readers[6]

ALPRs are computer-controlled camera systems—generally mounted on police cars or fixed objects such as light poles or freeway overpasses—that automatically capture an image of every license plate that comes into view. Slip Op. at 3. ALPRs detect when a license plate enters the camera's field of view, capture an image of the car and its surroundings (including the plate), and convert the image of the license plate into alphanumeric data—in effect "reading" the plate.[7] *Id.* ALPRs record data

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[5] *See* USA FREEDOM Act of 2015, Pub.L. No. 114-23 (June 2, 2015), __Stat.__; Jennifer Steinhauer & Jonathan Weisman, *U.S. Surveillance in Place Since 9/11 Is Sharply Limited*, N.Y. Times (June 2, 2015) http://www.nytimes.com/2015/06/03/us/politics/senate-surveillance-bill-passes-hurdle-but-showdown-looms.html.

[6] The Court of Appeal's opinion correctly sets forth the facts of the case. Slip Op. at 3-5.

[7] Real Parties have consistently agreed with Petitioners that ALPRs conduct "untargeted" scans that "automatically and indiscriminately" collect data "on each and every driver in Los Angeles who passes within range of their cameras . . . whether or not those drivers are suspected of wrongdoing." City Opp. to Pet. for Writ. of Mandate at 7 (citing Pet. for Writ of Mandate at 29); *see also id.* (noting that "it is correct that the ALPR scans are not specifically targeted at persons suspected of criminal activity"); *see generally id*. at 7–9 (describing how ALPRs function); Exs. to Pet. for Writ

on each plate they scan, including not only the plate number but also the precise time, date and location it was scanned. *Id.* at 2, 4.[8] The images captured by the systems can also reveal the vehicle's occupants and their immediate surroundings.[9] This collection is indiscriminate: an officer turns the vehicle-mounted ALPR on at the start of the shift, and the devices scan plates continuously until the officer turns off the ALPR at the end of the shift.[10] Fixed ALPRs have a continuous connection to the ALPR server and are never turned off.[11]

Police use ALPR data in two ways. First, ALPR systems can compare scanned license plates against a "hot list" of plates associated with suspected crimes or warrants and alert officers when any match or "hit" in the database occurs so they can take enforcement action. *Id.* at 3. Second, police accumulate and store ALPR data for use in future investigations. *Id.* at 4.

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of Mandate (hereinafter "EP") Vol. II, Ex. 9 (Gomez Decl.) at 410; EP Vol. I, Ex. 2 (Tr. of August 21, 2014 Hearing on Pet. for Writ of Mandate) at 35 (ALPR camera is on all the time); EP Vol. II, Ex. 9 (City Trial Ct. Br.) at 405 ("As Petitioners are well aware, ALPR devices 'automatically' and 'indiscriminately' scan the license plates of all vehicles within range.").

[8] Mobile ALPRs encode data with GPS coordinates. *See* LASD ALPR training, EP Vol. II, Ex. 8-B (LASD ALPR Training) at 256.

[9] *See* LASD ALPR training, EP Vol. II, Ex. 8-B at 256 (ALPR provides "overview photograph"), 282-83 (sample data with photos); Ali Winston, *License Plate Readers Tracking Cars*, SF Gate (June 25, 2013) http://www.sfgate.com/bayarea/article/License-plate-readers-tracking-cars-4622476.php (license plate image clearly showed man and his daughters stepping out of vehicle in their driveway).

[10] *See* LAPD ALPR Instructions, EP Vol. II, Ex. 8-C at 299, 301.

[11] *See* EP, Vol. II, Ex. 11-B (LASD Field Operations Directive) at 434—37.

By scanning every license plate that comes into view—scans of up to 14,000 cars during a single shift—ALPRs collect an enormous volume of data.[12] LAPD estimates it records plate scan data for approximately 1.2 million cars per week and retains that data for five years. LASD estimates it records between 1.7 and 1.8 million plate scans per week and currently retains data for at least two years, although it would prefer to retain the data indefinitely. *Id.* Based on these figures, the agencies have likely collected more than 400 million plate scans just in the three years since Petitioners filed their requests and likely have well over half a billion records of driver locations in their databases—an average of more than 65 plate scans for each vehicle registered in Los Angeles County.[13] LAPD and LASD also share data with each other and with other agencies, so that, for example, LASD can query license plate data from 26 other police agencies in Los Angeles County and is working to expand its reach to Riverside and San Bernardino Counties.[14]

Because each ALPR scan records the specific location of a vehicle at an exact moment in time, LAPD and LASD's ALPRs allow them to collect

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[12] *See* EP Vol. II, Ex. 8-B (LASD ALPR training) at 256.

[13] According to the DMV, 7,719,360 vehicles were registered in Los Angeles County in 2014. Dept. of Motor Vehicles, *Estimated Vehicles Registered by County for the Period of January 1 Through December 31, 2014*, https://www.dmv.ca.gov/portal/wcm/connect/add5eb07-c676-40b4-98b5-8011b059260a/est_fees_pd_by_county.pdf.

[14] EP Vol. II, Ex. 8 at 231 (Sgt. Gaw Letter); Ex. 8 (LASD ALPR training) at 272-74; *see also* David J. Roberts & Meghann Casanova, *Automated License Plate Recognition Systems: Policy and Operational Guidance For Law Enforcement*, Intn'l Assoc. of Chiefs of Police, 19, 21 (Sept. 2012) http://www.theiacp.org/Portals/0/pdfs/IACP_ALPR_Policy_Operational_Guidance.pdf; ACLU, *supra* note 3, at 19, 22.

a vast amount of data on the location history of Los Angeles drivers that officers can query for years into the future. Because license plate readers capture plate scans "regardless of whether the car or its driver is linked to criminal activity," Slip Op. at 11, the agencies are compiling this data on overwhelmingly law-abiding residents.[15] This detailed history, can not only reveal where a driver was on a given date and time in the past, but may also be used to project where a driver may be in the future.[16] LASD has said it has "no written guidelines as to how to use the data."[17]

II. Petitioners' Public Records Requests and this Action

To understand and educate the public on the risks to privacy posed by ALPRs in Los Angeles, Petitioners sought documents related to LAPD and LASD's ALPR use, including one week's worth of ALPR data

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[15] *See You Are Being Tracked*, supra note 3, at 13-15 (noting only about 0.2% of plate scans are connected to suspected crimes or vehicle registration issues).

[16] State of New Jersey, *Attorney General Guidelines for the Use of Automated License Plate Readers (ALPRs) and Stored ALPR Data* (Effective January 18, 2011) http://www.state.nj.us/lps/dcj/agguide/directives/Dir-2010-5-LicensePlateReadersl-120310.pdf ("'Crime trend analysis' refers to the analytical process by which stored ALPR data is used, . . . to predict when and where future crimes may occur[.]"); Steve Connor, *Surveillance UK: Why this Revolution Is Only the Start*, The Independent (April 1, 2009) http://www.independent.co.uk/news/science/surveillance-uk-why-this-revolution-is-only-the-start-520396.html ("We can use ANPR . . . looking forward in a proactive, intelligence way. Things like building up the lifestyle of criminals—where they are going to be at certain times.").

[17] EP, Vol. II, Ex. 11-C (ALPR System – Dept. Policies & Guidelines) at 441.

collected between August 12 and August 19, 2012.[18]

Both LAPD and LASD withheld the single week of ALPR data on various grounds, including that the data were exempt from disclosure under the PRA's exemption for law enforcement investigatory files and records, § 6254(f), and under the catch-all exemption, § 6255(a).[19] On May 6, 2013, Petitioners filed a petition for writ of mandate with Respondent Superior Court seeking to enforce the requests. The Superior Court held a hearing on the petition and, in a written opinion issued on August 27, 2014, agreed with the City and County's positions and upheld their decisions to withhold the records under both § 6254(f) and § 6255(a). Petitioners petitioned the Court of Appeal for a writ of mandate.

III. Court of Appeal Opinion

The Court of Appeal upheld the trial court's decision, holding that the automated scanning of plates by ALPR systems constitutes a law enforcement "investigation" and that the data collected by ALPR systems—the data sought by Petitioners—were exempt as "records of . . . investigations" under § 6254(f). Slip Op. at 10. The court reasoned that because the agencies use ALPR data in part to check against "hot lists" of wanted vehicles associated with some kind of criminal activity, the license plate scanning constitutes an "investigation" of the "hot list" crimes. *Id.* ("Real Parties have deployed the ALPR system to assist in law enforcement

[18] Petitioners also sought documents on policies, practices, procedures, training, and instructions related to ALPRs. Those records are not at issue in this Court's review.

[19] Because the Court of Appeal's opinion is based solely on the investigatory records exemption under § 6254(f), no other exemption claims are before this Court on review.

investigations involving an identified automobile's license plate number. It follows that the records the ALPR system generates in the course of attempting to detect and locate these automobiles are records of those investigations.").

In reaching its holding, the Court of Appeal recognized that ALPRs collect data automatically and indiscriminately—that an "ALPR system scans every license plate within view, regardless of whether the car or its driver is linked to criminal activity." Slip Op. at 11 (quotations omitted); *see also id.* at 3 (ALPRs "automatically capture an image of every passing vehicle's license plate in their immediate vicinity"); *id.* at 12 ("[t]he ALPR system necessarily scans every car in view"). But the court rejected Petitioners' argument that such indiscriminate and untargeted scanning, could not constitute an investigation. The court emphasized that data collected through these scans were being used in investigations of specific crimes reflected in the "hot lists," *id.* at 11, reasoning that the law enforcement investigations exemption "does not distinguish between investigations to determine if a crime has been or is about to be committed and those that are undertaken once criminal conduct is apparent." *Id.* at 11-12 (quoting *Haynie*, 26 Cal. 4th at 1070).

The court also rejected Petitioners' argument that the mass scale of data collection through ALPRs and the prolonged retention of data made ALPR data fundamentally different from records of traffic stops or other investigations that have been held exempt under the PRA. The volume of data collected, the court reasoned, did not change the character of the act of collecting it. *See* Slip Op. at 11 ("[T]he ALPR system replicates, albeit on a vastly larger scale, a type of investigation that officers routinely perform manually by visually reading a license plate and entering the plate number

into a computer to determine whether a subject vehicle might be stolen or otherwise associated with a crime."); *id.* at 12 ("The fact that ALPR technology generates substantially more records than an officer could generate in manually performing the same task does not mean the ALPR plate scans are not records of investigations."). Nor did the retention of data solely for use in future investigations render it subject to disclosure *before* those speculative future investigations occur; rather, the court held that because the data fell within the "records of . . . investigations" exemption initially, they would be exempt indefinitely, "even after the investigations for which they are created conclude." *Id.* at 13 (citing *Williams*, 5 Cal. 4th at 357).

Because the Court of Appeal held the records exempt under § 6254(f), it did not reach the propriety of withholding the data under § 6255's catch-all exemption. *Id.*

STANDARD OF REVIEW

In reviewing a trial court's order under the PRA, an appellate court "conduct[s] an independent review of the trial court's ruling." *Times Mirror Co. v. Super. Ct*. (1991) 53 Cal. 3d 1325, 1336; *see also State Bd. of Equalization v. Super. Ct.* (1992) 10 Cal. App. 4th 1177, 1185 (equating scope of review by writ under the PRA with scope of review on appeal); "[F]actual findings made by the trial court will be upheld if based on substantial evidence." *Times Mirror,* 53 Cal. 3d at 1336.

ARGUMENT

Against the broad disclosure requirements of the Public Records Act, § 6254(f) provides an exemption for:

> Records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of

> . . . any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes. . . .

I. The Court of Appeal's Holding Improperly Expands the Exemption for "Records of . . . Investigations"

A. *The Definition of "Investigation" and Structure of the Statute Suggest § 6254(f) Applies to Targeted Inquiries*

Interpreting "records of . . . investigations" under § 6254(f) not to encompass data collected through mass, suspicionless monitoring not only fits with the commonsense understanding of the term "investigation," but also fits with the structure of § 6254(f) as a whole.

The PRA defines neither "investigations" nor "records of . . . investigations." Dictionary definitions of the word "investigate" suggest targeted or focused inquiry, but these definitions, alone, do not provide a clear answer between a broader exemption that encompasses all information-gathering and a narrower one targeting a particular suspect or crime. *See, e.g.*, Black's Law Dict. (9th ed. 2009) (defining "investigate" as "1. To inquire into (a matter) systematically; to make (a suspect) the subject of a criminal inquiry . . . 2. To make an official inquiry."); Webster's Third New International Dictionary of the English Language Unabridged (1968) (defining "investigate" as "to observe or study closely: inquire into systematically" and "investigation" as "1. the action or process of investigating: detailed examination . . ." and "2. a searching inquiry . . .").

However, reading the words in the context of the rest of § 6254(f) supports the conclusion that the term "investigation" applies only to inquiries that are "targeted." Following the language exempting "records of . . . investigations conducted by" law enforcement, § 6254(f) requires

certain information from law enforcement investigations to be disclosed, including the details surrounding any "incident," details about any person arrested, and information about requests for assistance. § 6254(f)(1), (2).[20] All of this information would result from targeted investigations into particular individuals or suspected criminal acts, not from indiscriminate collection of information on law-abiding civilians.

The term "investigation" should not be read to mean a broad, generalized inquiry when the disclosure provisions clearly contemplate a narrower understanding of police investigation into criminal incidents and conduct. If § 6254(f) specifies disclosure of specific information that would result only from targeted investigations, it is reasonable to conclude, as a matter of statutory interpretation, that the exemption only applies to records of similarly targeted investigations.[21]

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[20] This includes the time, date, and location of the incident; the names of people involved, including witnesses, and any statement they gave; and a description of any property involved. § 6254(f). It also includes the full name, occupation, and physical description of arrestees, as well facts about the arrest, charges, and bail; and information about requests for assistance (including the time, location, substance, and the agency's response, including information about victims, injuries, property, or weapons involved). *Id*.

[21] This is further supported by the fact that, for law enforcement, "investigation" is a term of art. For example, LAPD's manual sets guidelines and procedures for dozens of types of "investigations" of different criminal activity, but each contemplates a targeted inquiry. *See, e.g.*, LAPD Manual 540.10:

> Follow−up investigation consists of efforts to interview victims and witnesses; locate, identify, and preserve physical evidence; recover stolen property; identify, locate, interview, and arrest suspects; present the case to the prosecutor; and cooperate in the prosecution of the defendant. Such investigations are conducted to produce evidence relating to the guilt or

B. *The Court of Appeal's Holding is Out of Step with Prior Case Law Addressing the "Records of . . . Investigations" Exemption*

The Court of Appeal's holding that each ALPR scan is a record of an investigation—rather than data that may be useful in an investigation—constitutes a significant expansion over this Court's prior interpretations of § 6254(f) and would lead to the absurd conclusion that all drivers in Los Angeles are constantly under investigation, merely because their vehicle may come into view of one of the agencies' ALPR cameras. This result does not fit with any common-sense understanding of the term "investigation" as it is used to exempt "records of . . . investigations" in § 6254(f).

Opinions by the few courts in California that have held records exempt as "records of . . . investigations" under § 6254(f) support the interpretation that § 6254(f) only applies to targeted inquiries. All involved investigations into a specific crime or person that fit easily within the common understanding of police investigations, including a traffic stop,[22] a

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innocence of any suspect and to recover property. http://www.lapdonline.org/lapd_manual/volume_1.htm; *see also id.* 3/580.60 (discussing "Collision Investigation"); 3/815 *et seq.* (discussing guidelines and procedures for complaint investigations); *id.* 3/837.30 (discussing "scope of the investigation" for investigations of conduct by LAPD employees). *id.* 4/709.10 ("Death Investigation"). LASD's manual similarly discusses investigations at length, from the responsibility of patrol stations for "initial investigation of reported or observed crimes; . . . initial investigation of reports of missing, found or unidentified persons; . . . and investigating complaints received from the public," MPP 2-06/030.05, and detectives' investigative responsibility for certain specified initial and follow-up investigations, *id.*

[22] *Haynie,* 26 Cal. 4th at 1070-71.

corruption investigation against a local official,[23] police internal affairs investigations,[24] and disciplinary proceedings against police officers.[25] In no case prior to the Court of Appeal's ruling below had a California court ever held that data collected indiscriminately on every member of a community constitutes investigative records under § 6254(f).

In the main case to address the investigative records exemption, *Haynie v. Superior Court*, this Court defined "records of investigation exempted under section 6254(f)" as pertaining to "only those investigations undertaken for the purpose of determining whether a violation of law may occur or has occurred." 26 Cal. 4th at 1071. In *Haynie*, after LASD deputies detained a man in response to a civilian report of suspicious activity in the area, the man sought records related to his detention and the reasons for it. *Id.* at 1066. This Court held that, because "the investigation that included the decision to stop Haynie and the stop itself was for the purpose of discovering whether a violation of law had occurred and, if so, the circumstances of its commission[,] [r]ecords relating to that investigation [were] exempt from disclosure by section 6254(f)." *Id*. at 1071.

Haynie is readily distinguishable from this case because it involved an investigation targeted from its inception at responding to a specific report of possible criminal activity. Deputies received a civilian tip regarding three Asian teenagers who may have been armed getting into a blue Ford van. *Id.* at 1065. Minutes later, they stopped a van matching that

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[23] *Rivero v. Super. Ct.* (1997) 54 Cal. App. 4th 1048, 1050-51.
[24] *Rackauckas v. Super. Ct.* (2002) 104 Cal. App. 4th 169, 171.
[25] *Williams v. Super. Ct.* (1993) 5 Cal. 4th 337, 341.

description driven by Mr. Haynie, a 42-year-old African American man. *Id*. The Court held all records connected to his stop were part of the investigation into the report of armed teenagers and Haynie's possible involvement in that activity and were therefore exempt as records of investigations.

Both Real Parties below and the Court of Appeal relied on *Haynie*'s description of the investigative records exemption to argue that the provision applies to ALPR data. Both point to *Haynie*'s statement, in recognizing that the report of armed teens "did not necessarily describe a crime," that "section 6254(f) *does not distinguish between investigations to determine if a crime has been or is about to be committed and those that are undertaken once criminal conduct is apparent*." 26 Ca1. 4th at 1070 n.6 (cited in Slip Op. at 7 (emphasis in Slip Op.)). The court also relied on *Haynie*'s statement:

> The records of investigation exempted under section 6254(f) encompass only those *investigations undertaken for the purpose of determining whether a violation of law may occur or has occurred*. If a violation or potential violation is detected, *the exemption also extends to records of investigations conducted for the purpose of uncovering information surrounding the commission of the violation and its agency.*

Id. at 1071 (cited in Slip Op. at 8 (emphasis in Slip Op.)).

But *Haynie* addressed a fundamentally different circumstance than this case—one in which officers targeted their investigation of potential criminal activity at a specific vehicle and detained the driver based on some level of suspicion he was involved in that activity. *Id.* at 1065-66; *see also id.* at 1070 n.6 (noting that the stop was a "'routine police inquiry' based on *mere suspicion* of criminal conduct" (emphasis added)). In light of those

facts, *Haynie* means only that § 6254(f) protects records of a police investigation into a particular person—based on some level of suspicion—even if police did not know at that time whether or not a crime had been committed. In contrast, ALPR plate scans are not precipitated by a specific criminal investigation, nor even an officer's mere suspicion of criminal conduct—they are only precipitated by the nonspecific goal of collecting data on thousands of license plates each hour that may be helpful in locating known stolen or wanted vehicles. *Haynie*'s holding—that police need not be certain in advance that a crime has been committed for their inquiry into a particular suspect to qualify as an "investigation" under § 6254(f)—says nothing about application of the exemption to the suspicionless and untargeted mass surveillance conducted by ALPRs.

This interpretation is further supported by the purpose of the law enforcement records exemption, which is to protect "the very sensitive investigative stages of determining whether a crime has been committed or who has committed it." *Haynie*, 26 Cal. 4th at 1070. As *Haynie* noted, if records were not exempt from disclosure,

> Complainants and other witnesses whose identities were disclosed might disappear or refuse to cooperate. Suspects, who would be alerted to the investigation, might flee or threaten witnesses. Citizens would be reluctant to report suspicious activity. Evidence might be destroyed.

Id. at 1070-71. Yet none of these risks exist with the disclosure of ALPR data. Because police collect ALPR data indiscriminately on all drivers, the fact that a particular license plate may appear in ALPR data does not mean the driver is under special police scrutiny; nor does it mean that police are investigating any particular crime. Thus the release of raw ALPR data would not alert a suspect to an investigation, nor cause witnesses to

disappear, citizens to be reluctant to report suspicious activity, nor evidence to be destroyed. Treating ALPR data as "records of . . . investigations" therefore does not fit the purpose of § 6254(f).

All of the very small number of other cases holding documents exempt from disclosure under the "records of . . . investigations" clause of § 6254(f) are distinguishable for the same reason: they each involve requests for documents related to targeted investigations into specific criminal acts. In *Williams v. Superior Court*, a newspaper requested records of disciplinary proceedings against two deputies involved in the brutal beating of a drug suspect. 5 Cal. 4th at 341. In *Rivero v. Superior Court*, a former police officer requested records relating to the "investigation of a local official for failing to account properly for public funds." 54 Cal. App. 4th at 1051. And in *Rackauckas v. Superior Court*, a newspaper requested records concerning the investigation of "two separate incidents of alleged police misconduct involving" a specific officer. 104 Cal. App. 4th at 171-72. In each of these cases, the courts found the records were linked to *specific* criminal investigations and therefore were properly withheld as records of those investigations.

It is hardly surprising that this Court's prior cases do not address indiscriminate data collection. As set forth in more detail below, *infra* Section III, even as recently as *Haynie*, the technology for the kind of mass, indiscriminate surveillance at issue here was not in widespread use,[26] so police investigations necessarily involved particular targets.

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[26] LAPD appears to have first used ALPRs in its Rampart Division in 2005. *See LAPD Uses New Technologies to Fight Crime* (Feb 1, 2005) http://www.lapdonline.org/february_2005/news_view/19849.

Operating ALPRs does not involve a "decision" to investigate like the "decision to stop [a driver]." *Haynie,* 26 Cal. 4th at 1071. The scan of each individual license plate is not prompted by any suspicion that a particular vehicle is connected to any particular crime. Instead, ALPRs automatically photograph and record all plates within view, without the officer targeting any particular car and without even "mere" suspicion that the car or driver was somehow involved in criminal activity. *Id*. at 1070 n.6. ALPR systems do not conduct investigations; they collect data. Under no prior cases is such data-gathering an "investigation" for purposes of § 6254(f).

C. ***Data Collected To Aid Existing and Future Investigations Do Not Necessarily Become Records of Investigations***

If ALPR data are not "records of . . . investigations" when they are collected, they do not become "records of . . . investigations" based on the later and separate checks the ALPR systems and officers perform—whether those involve the prompt comparison of scanned plates against a "hot list" of plate numbers that may be associated with criminal activity or the search of stored plate data, months or years after its collection, to link a plate to a crime that had not yet been committed when the data were first collected. Neither the Court of Appeal nor Real Parties have suggested that ALPR systems are fundamentally anything but data collection machines. The fact that the data they collect may be used later in investigations does not make those data "records of . . . investigations."

Although the Court of Appeal stated ALPR systems check plates against "hot lists" "[a]t virtually the same time" they collect plate numbers, the court recognized the collection of data occurs separate from their investigative use. *See* Slip Op. at 2; *id*. at 3 (an ALPR "'*almost* instantly'

checks the number against a list of 'known license plates' associated with suspected crimes" (emphasis added)). Real Parties acknowledged this in their opposition briefs filed with the Court of Appeal. The County stated, "[t]he parties all agree that *once license plates are scanned* by ALPR cameras, the plates are checked against stolen vehicle databases." *See* County Opp. to Pet. for Writ of Mandate at 9 (emphasis added). The City similarly described the two-step process of collecting data and checking it against the "hot list," referring to the "initial plate scan" as simply a "read" that "[c]apture[s] data.'" *See* City Opp. to Pet. for Writ of Mandate at 7.

The "hot lists" represent the fruits of *prior* investigations that have identified certain vehicles as connected with particular crimes, and Petitioners have sought neither those "hot lists" nor the license plate data associated with those lists. The fact that a very small number of scanned plates will match those on a "hot list" does not transform the entire database of plates into investigative records.[27]

Nor does the agencies' second use for ALPR data make the initial collection an "investigation." After ALPR data have been accumulated and stored, police can search that data—data that provides a history of where Los Angeles drivers have been over the last two to five years—in future investigations. For example, police investigating a robbery can check the database of scanned plates, not just to identify vehicles that might have been in the area when the crime occurred, *see* City Opp. to Pet. for Writ of Mandate at 23 (providing examples), but also to identify vehicles that have been scanned near the robbery location for many years in the past.

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[27] *See* ACLU, *supra* note 3 (only 0.2% of plates scanned are connected to any suspected crime or registration issue).

Therefore, the accumulated data allows officers to investigate crimes that had not yet been identified or committed at the time a driver's plate was scanned. While the data accumulated by ALPRs can be used for these future investigations, the possibility of such a use does not transform the accumulation of data before the crime has ever been committed into an "investigation," nor does it turn the accumulated data into "records of . . . investigations."

The collection of raw ALPR scan data that Petitioners seek—license plate number, time and location information unconnected to "hot lists" or other investigations—does not itself represent a record of an inquiry "undertaken for determining whether a violation of law may occur or has occurred" under *Haynie*. Instead, it represents the collection of data for use in ongoing or subsequent investigations. It does not, therefore, fall within § 6254(f)'s investigatory records exemption.

II. The 2004 Amendment Adding a Right to Government Transparency to the California Constitution Supports a Finding that ALPR Data Are Not Investigatory Records

A. ***Proposition 59 Created a New Narrowing Construction for State Authorities that Limit the People's Right of Access to Public Records***

In 2004, California voters elevated governmental transparency to a constitutional mandate when they passed Proposition 59 by an overwhelming margin, thereby amending the state constitution to add the requirement that:

> A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access.

Cal. Const. Art. I, § 3(b)(2).

As the plain text indicates and this Court has repeatedly recognized, the express purpose of Proposition 59 was to create a new interpretive rule for courts. *See Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal. 4th 59, 68 (*LBPOA*) (explaining that Art. I, § 3(b)(2) "direct[s] the courts to broadly construe statutes that grant public access to government information and to narrowly construe statutes that limit such access").[28] This Court has recognized this interpretive requirement and applied it in numerous contexts. *Id*. (analysis of names of officers involved in shootings under Pen. Code, §§ 832.7-832.8); *Sierra Club v. Super. Ct.* (2013) 57 Cal. 4th 157, 167 (exemption for computer software); *Sander v. State Bar of Cal.* (2013) 58 Cal. 4th 300, 313 (state bar rules); *Int'l Fed'n of Prof'l & Technical Eng'rs, Local 21, AFL-CIO v. Super. Ct.* (2007) 42 Cal. 4th 319, 328-30 (salary information).

California appellate courts have similarly recognized that Art. I, § 3(b)(2) requires them to construe non-privacy exemptions to the PRA narrowly. *See County of Los Angeles v. Super. Ct.* (2012) 211 Cal. App. 4th 57, 63-64, *review den*. (Feb. 20, 2013) 2013 Cal. Lexis 1237 ("records pertaining to pending litigation"); *Marken v. Santa Monica-Malibu Unified Sch. Dist.* (2012) 202 Cal. App. 4th 1250, 1262, *rev. denied* (May 9, 2012) 2012 Cal. Lexis 4200 (records regarding alleged teacher misconduct); *Sonoma Cnty. Emps. Ret. Ass'n. v. Super. Ct.* (2011) 198 Cal. App. 4th 986, 1000-04 (records under Gov't Code § 31532); *see also L.A. Unified Sch. Dist. v. Super. Ct.* (2007) 151 Cal. App. 4th 759, 765-72 (applying Art. I,

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[28] *See also Ballot Argument in Support of Proposition 59*, Cal. Sec. of State, http://vigarchive.sos.ca.gov/2004/general/propositions/prop59-arguments.htm.

§ 3(b)(2) to require broad construction of term "person" in interest of furthering transparency).

B. ***The Narrowing Construction Required by Art. I, § 3 Applies to § 6254(f)***

Although no court has yet addressed the application of Art. I, § 3 to the investigative records exemption within § 6254(f),[29] its narrowing construction must apply with equal force to this provision.

In *Commission on Peace Officer Standards & Training v. Superior Court*, a case decided after Proposition 59 passed, this Court observed that the need for transparency applies with particular force to police:

> Law enforcement officers carry upon their shoulders the cloak of authority to enforce the laws of the state. . . . It is undisputable that . . . the public has a far greater interest in the qualifications and conduct of law enforcement officers, even at, and perhaps especially at, an "on the street" level . . . .

(2007) 42 Cal. 4th 278, 297-98 (quotations omitted).

While Proposition 59 stated that its terms "do[] not repeal or nullify . . . any constitutional or statutory exception to the right including, but not limited to, any statute protecting the confidentiality of law enforcement . . . records," Cal. Const. Art. I, § 3(b)(5), that language makes clear only that the Legislature and California voters intended to maintain the statutory

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[29] Decisions addressing § 6254(f) after 2004 have dealt with other aspects of that provision. *See, e.g.*, *Fredericks v. Super. Ct.* (2015) 233 Cal. App. 4th 209 (addressing information that must be disclosed pursuant to § 6254(f)(2)); *State Office of Inspector Gen. v. Super. Ct.* (2010) 189 Cal. App. 4th 695, 709-710 (records exempt as part of an investigatory *file* for which the prospect of enforcement was concrete and definite); *Dixon v. Super. Ct.* (2009) 170 Cal. App. 4th 1271, 1275-79 (coroner's and autopsy records exempt as investigatory *files* for which the prospect of enforcement was concrete and definite).

exemption for law enforcement investigatory records;[30] it does not change the new constitutional requirement that exemptions must be construed narrowly. Nor does the statement that the amendment does not "repeal or nullify" any statutory exception to the PRA suggest that courts should not reconsider prior case law *interpreting* those statutory exemptions in light of the amendment's new interpretive rule. The drafters could have exempted prior case law from new application of the constitutional rule and did so elsewhere: Art. I, § 3(b)(3) makes clear that Proposition 59 did not "affect[] the *construction* of any statute" that protects "information concerning the official performance or professional qualifications of a peace officer." (emphasis added). But the amendment makes no such reservation for law enforcement records outside the official performance of a peace officer.

C. ***Because the Court of Appeal Failed to Even Acknowledge the Constitutional Amendment, Its Decision Must be Overturned***

Despite the clarity of the constitution's interpretive rule, the Court of Appeal's opinion ignores it entirely. The decision neither mentions the 2004 constitutional amendment nor cites a single authority more recent than 2001. Instead, relying on precedent from this Court that predates Proposition 59, the Court of Appeal reasoned that, "[n]otwithstanding the general directive to narrowly construe such exemptions, our Supreme Court has explained that section 6254, subdivision (f) 'articulates a *broad* exemption from disclosure for law enforcement investigatory records[.]'"

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[30] The California Legislature approved this language in Senate Constitutional Amendment 1, which later became Proposition 59. *See* SCA 1 (2003) ftp://leginfo.public.ca.gov/pub/03-04/bill/sen/sb_0001-0050/sca_1_bill_20030604_amended_sen.html.

Slip Op. at 6 n.3 (citing *Williams*, 5 Cal. 4th at 349 (italics in Slip Op.)). But this Court's characterization in *Williams* of the "broad exemption" for law enforcement records was made in 1993 and is undermined by the subsequent constitutional requirement for narrow construction of exemptions. *See* Cal. Const. Art. I, § 3.

The Court of Appeal's opinion goes on to rely heavily on the broad interpretation articulated by this Court in *Haynie* (also prior to Proposition 59) for its conclusion that each automatic, indiscriminate scan of a plate within range of a police car constitutes a record of an "investigation" within the meaning of § 6254(f). Slip Op. at 10; 6-7. However, even if this reading of *Haynie* were accurate, it would bear serious reconsideration in light of the constitutional amendment enacted three years later.

To the extent there is any ambiguity whether the location data collected from mass, suspicionless license plate scans constitute "records of . . . investigations conducted by" police under the meaning of § 6254(f), or whether ALPR scans are "investigations undertaken for the purpose of determining whether a violation of law may occur or has occurred" under *Haynie*, 26 Ca1. 4th at 1071, the Constitution after Proposition 59 mandates that those ambiguities be resolved in favor of disclosure.

The Court of Appeal's failure to apply the narrowing rule of Art. I, § 3, and its reliance on decisions that predate that constitutional requirement not only undermines its holding on ALPR data, but, if upheld by this Court, would set troubling precedent for future applications of § 6254(f) to data gathered using other law enforcement surveillance technologies.

III. The Fundamental Differences Between ALPR Technology and Traditional Policing Impact the Interpretation of § 6254(f)

Courts are increasingly recognizing that advances in technology that fundamentally change law enforcement's ability to collect information on citizens require a re-interpretation of old rules to ensure those rules continue to serve the same functions and protect the same values as they did in the past. Applying *Williams* and *Haynie* to the facts of this case, without recognizing the impact new technologies such as ALPRs have on how courts should interpret § 6254(f), fails to ensure the underlying values supported by the PRA are preserved in an era of increasing technological change. This approach is also out of step with other courts that have addressed the impact of new technologies on old rules.

ALPR systems are able to capture vastly more data than an officer ever could record by hand, even if he or she were to devote an entire shift to writing down and checking the license plates of as many passing vehicles as possible. As set forth above, LAPD and LASD's ALPR systems together record the plate number, time, date, and location of approximately 3 million vehicles every week. LASD has stated that an "ALPR has the 'ability' to read more than 14,000 license plates during the course of a shift," EP Vol. II, Ex. 8-B (LASD ALPR training) at 256, and one ALPR system vendor has claimed that its product can "capture[] up to 1,800 license plate reads per minute."[31] Nevertheless, the Court of Appeal presumed that "[t]he fact

[31] *ALPR Products and Solutions > Mobile Plate Hunter – 900,* ELSAG North America, http://elsag.com/mobile.htm. LASD also notes that ALPRs "can read a license plate, coming in the opposite direction, at over 160 mph." EP Vol. II, Ex. 8-B (LASD ALPR training) at 256. It is unlikely a human could accurately record plate data on a vehicle traveling at this speed.

that the ALPR system automates this process and generates exponentially more records than officers could humanly produce has no bearing on whether those plate scans and associated data are records of investigations under § 6254, subdivision (f).” Slip Op. at 12 n.6; *see also id.* at 11, 12.[32]

The Court of Appeal is incorrect: the vast data collection possible with ALPRs is fundamentally different from license plate checks by human officers, and that difference cannot be ignored. Human officers cannot possibly check as many plates per minute as an ALPR system, let alone check the license plate of every car that passes on the streets of Los Angeles. For this reason, an officer manually checking license plates must choose one vehicle to check over others—even if just on the basis of mere suspicion or a hunch. But because ALPRs lack these human limitations, they can collect, check, and store data on every plate that comes into view. ALPRs are untargeted, indiscriminate and comprehensive in a way that human officers can never be. When this Court addressed the investigatory records exemption in *Williams* and *Haynie*, it could not have contemplated an application of § 6254(f) that would cover such a vast collection of data.

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[32] The Court of Appeal imagined a hypothetical police force devoted to taking down and checking the license plates of every car that passes. *See* Slip Op. at 12 n.6. This hypothetical police force parallels an argument advanced by Justice Scalia in *United States v. Jones* that a GPS tracker was not unlike a “constable[] concealing himself in a target’s coach to track the subject’s movements,” 132 S. Ct. at 950 n.3, a hypothetical that Justice Alito pointed out would require “either a gigantic coach, a very tiny constable, or both—not to mention a constable with incredible fortitude and patience.” *Id.* at 958 n.3 (Alito, J., concurring in the judgment). Similarly here, the inability of human officers to collect data in the manner ALPRs can and do illustrates that the devices are doing something quite different from human officers.

Other courts and commentators have recognized that technological change does matter and that legal rules and definitions developed in a pen-and-paper era cannot blindly be applied to new technology capable of collecting data on a mass scale. As Professor Orin Kerr has observed:

> Technology provides new ways to do old things more easily, more cheaply, and more quickly than before. As technology advances, legal rules designed for one state of technology begin to take on unintended consequences. If technological change results in an entirely new technological environment, the old rules no longer serve the same function. New rules may be needed to reestablish the function of the old rules in the new technological environment.

Kerr, 62 Stan. L. Rev. at 1009.

Courts are developing new rules in response to technological change in other contexts. For example, while officers can undoubtedly follow a car without a warrant, five justices of the U.S. Supreme Court concluded that the constant stream of electronic data and detailed location information provided by a GPS tracker means that placement of such a tracker on a car without a warrant violates the Fourth Amendment. *Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring); *id.* at 958 (Alito, J., concurring) (concluding that defendant had a reasonable expectation of privacy from GPS location monitoring). Similarly, while police who make an arrest have long been permitted to search physical containers found on the arrestee's person, the Supreme Court in *Riley v. California* held that warrantless searches incident to arrest of the contents of cell phones violated the Fourth Amendment. 134 S. Ct. at 2485. Because phones have "immense storage capacity" and can contain an extraordinary range of personal information, the Court held they "differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." *Id.* at 2489.

Courts addressing computer searches have similarly found old rules cannot blindly be applied to new technology. For example, in *United States v. Ganias*, the Second Circuit Court of Appeals noted that computer files "may contain intimate details regarding an individual's thoughts, beliefs, and lifestyle" and may therefore warrant even greater Fourth Amendment protection than "18th Century 'papers.'" (2d Cir. 2014) 755 F.3d 125, 135, *reh'g en banc granted* (2015) 791 F.3d 290. And in *United States v. Cotterman*, the Ninth Circuit held officers must have reasonable suspicion to conduct a forensic search of a computer at the border because the "gigabytes of data regularly maintained as private and confidential on digital devices" distinguish the contents of a computer from the contents of luggage. (9th Cir. 2013) 709 F.3d 952, 957, 964; *see also*, *e.g.*, *United States v. Lichtenberger* (6th Cir. 2015) 786 F.3d 478, 485 (recognizing "extensive privacy interests at stake in a modern electronic device" and distinguishing a computer from a package under the private search doctrine); *United States v. Saboonchi* (D. Md. 2014) 48 F. Supp. 3d 815, 819, *appeal filed* (noting "[f]acile analogies of forensic examination of a computer or smartphone to the search of a briefcase, suitcase, or trunk are no more helpful than analogizing a glass of water to an Olympic swimming pool because both involve water located in a physical container" and holding forensic searches of smartphones and a flash drive at the border must be based on reasonable, particularized suspicion).

Courts have been increasingly sensitive to the ways that technologies like ALPRs can track a person's location information over time and are fundamentally different from observations or searches police traditionally use to gather such information. For example, in requiring a warrant for cell site location information (CSLI)—data on a phone's location generated

when cell phones identify themselves to nearby cell towers[33]—the Fourth Circuit Court of Appeals recently recognized that "long-term location information disclosed in cell phone records can reveal both a comprehensive view and specific details of the individual's daily life." *United States v. Graham* (4th Cir. 2015) 796 F.3d 332, 348. Similarly, in holding that the Massachusetts state constitution requires a warrant to obtain CSLI, the Massachusetts Supreme Judicial Court recognized that historical location data gives police access to something they would never have with traditional law enforcement investigative methods: the ability "to track and reconstruct a person's past movements." *Commonwealth v. Augustine* (Mass. 2014) 4 N.E. 3d 846, 865. And in *State v. Earls*, the New Jersey Supreme Court distinguished CSLI from older, less sensitive tracking devices like beepers because CSLI blurs "the historical distinction between public and private areas . . . [and thus] does more than simply augment visual surveillance in public areas." (N.J. 2013) 70 A. 3d 630, 642-43 (citing *United States v. Knotts* (1983) 460 U.S. 276, 282); *see also Tracey v. State* (Fla. 2014) 152 So. 3d 504, 522, 524-25 (distinguishing real-time cell site location information from the *Knotts* beeper and holding the Fourth Amendment requires a warrant for that data).

Here, the mechanical application of rules from prior cases obscures the basic question before the Court: Could the Legislature, in creating § 6254(f)'s exemption for "records of . . . investigations" in 1968, ever

[33] "CSLI can be used to approximate the whereabouts of the cell phone at the particular points in time in which transmissions are made. The cell sites listed can be used to interpolate the path the cell phone, and the person carrying the phone, travelled during a given time period." *Graham*, 796 F.3d at 390.

have intended to exempt data collected *en masse* by automated systems about every driver in Los Angeles, law-abiding and criminal alike? Because such systems did not exist in 1968 or even by the time this Court decided *Williams* in 1993, because they allow law enforcement to collect information in a fundamentally different way and on a different scale than they could at the time the statute was enacted, and because protecting that data does not serve the purposes of § 6254(f), the answer is clearly no.

As with GPS trackers, CSLI, and cell phone and computer searches, ALPR technology fundamentally changes the "technological environment." Kerr, 62 Stan. L. Rev. at 1009. The Court of Appeal's rote application of *Williams* and *Haynie* to the facts of this case not only fails to acknowledge the impact of technology on modern law enforcement data collection, but fails to preserve the democratic values the PRA was intended to protect.

IV. To the Extent This Court Determines that ALPR Data Fall Within Section 6254(f) as set forth in *Williams* and *Haynie*, It Should Revisit *Williams*' Application to §6254(f) Where There Is No Longer An Investigation

If this Court does determine that ALPR data fall within the definition of "records of . . . investigations" as set forth in *Williams* and *Haynie*, then Proposition 59—an amendment expressly intended to affect courts' construction of exemptions to the PRA and expand access to records, *see supra* Section II.A—requires a re-examination of *Williams*. *Williams* interpreted "records of . . . investigations" to encompass information collected by law enforcement not only during investigations, but also long after any investigation has ceased. As such, the case resolved an ambiguity in § 6254(f) in favor of shielding records. But its conclusion, perhaps reasonable at the time, was not dictated by the text, structure, or purpose of

the statute, and cannot survive Proposition 59's new constitutional rule of construction in favor of disclosure.

Section 6254(f) exempts "records of . . . investigations," but neither defines the term "investigation," *see supra* Section I.A, nor explicitly addresses whether the exemption applies only to information while an investigations is ongoing, or whether it extends after the investigation has ended. While a definition—or even a modifier describing the scope of investigations covered—might have resolved this ambiguity, the statute provides none. *Cf. Gen. Dynamics Land Sys. v. Cline* (2004) 540 U.S. 581, 613 (noting, in addressing whether statute barring age discrimination prohibited favoring older employees over younger, provision's "reference to 'age' carries no express modifier and the word could be read to look two ways," but rejecting the "more expansive possible understanding"); *Regents of Univ. of Cal. v. E. Bay Mun. Util. Dist.* (2005) 130 Cal. App. 4th 1361, 1388 (holding that modifier "any" indicated intent to give broad construction to term and similar statute that lacked modifier "any" was "amenable to [a] narrow construction").

In *Williams*, this Court adopted a broad reading of the exemption to allow indefinite withholding of records, even after investigations are closed. 5 Cal. 4th at 355. In so doing, it rejected a lower court's narrowing construction to protect records of investigations where there was a "concrete and definite" prospect of enforcement. *Id.* The lower court's construction, *Williams* observed, imported terms from the federal Freedom of Information Act (FOIA), but found "no support in the statutory language [of the CPRA]." *Id*. at 350. But, at the same time, no clear language in § 6254(f) supports the contrary construction adopted by the Court. Nowhere, for example, does the statute expressly state that records, once

deemed investigatory, are permanently shielded from public disclosure. Thus, while the lower court's limiting construction did not rest on any express statutory language, neither did *Williams*' broad construction.

Williams primarily relied on the structure of § 6254(f), which generally exempts law enforcement "records" from release while requiring disclosure of specified "information" about arrests, suspects, crimes, and victims. *See id.* at 353-54. The Court concluded that the "Legislature's careful efforts to provide access to selected information from law enforcement investigatory records was largely a waste of time if, as the Court of Appeal held, the records themselves are subject to disclosure." *Id*.

But this "surplusage" argument overlooks another important aspect of the statute's structure: § 6254(f) generally requires that the specified information be disclosed immediately, absent specific interference with the investigation. *See, e.g.*, Gov't Code § 6254(f) (requiring release of information "unless the disclosure would endanger the safety of a witness or other person involved in the investigation, or unless disclosure would endanger the successful completion of the investigation or a related investigation"). Thus, even if the provision is interpreted as protecting "records" of investigations only during the pendency of the investigation, those records (as opposed to specific information from the records) would not be released for perhaps months or even years after an incident. Indeed, the amendments to § 6254(f) that require the disclosure of specific information, to which *Williams* points as adopting this approach, were enacted to allow for accurate reporting of insurance information[34]—which

[34] The 1976 amendment to § 6254(f) by Senate Bill 1097, to which *Williams* points as adopting this approach, required reporting information

requires information soon after an incident has occurred, rather than much later once the investigation has closed. Because the disclosure provisions made limited information available immediately, rather than at the conclusion of the investigation, they are not surplusage even if § 6254(f) is interpreted to require the release of records once the investigation is complete.

Finally, *Williams* also rejected the notion that the text of § 6254(f) allowed importing criteria from FOIA wholesale into the exemption, as the court of appeal appeared to do. But even if the Legislature did not intend to incorporate the particulars of FOIA into the PRA, that does not mean that ambiguities should be resolved in a way contrary to both FOIA and the open government goals of the PRA. As this Court held in *Deukmejian*, an exemption that "would effectively exclude the law enforcement function of state and local governments from any public scrutiny under the California Act" would not only be inconsistent with the parallel provision within FOIA, but would produce "a result inconsistent with [the PRA's] fundamental purpose." *Am. Civil Liberties Union Found. v. Deukmejian* (1982) 32 Cal. 3d 440, 448-49.

Conversely, interpreting § 6254(f) as shielding records only for investigations that are open or active would not undermine the exemption's

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(including persons or property involved in the incident and witness statements) to individuals involved or injured in the incident or to insurance carriers against which claims had been made. *See* concurrently filed Pet'r Mot. for Judicial Notice at Ex. A (final language of Senate Bill 1097). The amendment clearly aimed to facilitate insurance claims and civil litigation, which would require such information soon after an incident has occurred, rather that possibly much later after investigations and any prosecutions had been completed.

purpose of protecting "the very sensitive investigative stages of determining whether a crime has been committed or who has committed it," *Haynie*, 26 Cal. 4th at 1070—those stages would be safely concluded by the time the records were released.[35] It would also support Proposition 59's mandate that exemptions be construed narrowly in favor of disclosure. *See supra* Section II.A, B.

V. Expanding § 6254(f) to Exempt Mass Police Data Collection Has Broad Implications for Police Transparency in California

The Court of Appeal's broad application of § 6254(f) to exempt indiscriminately collected data holds implications far beyond ALPRs. It would exempt from public disclosure any information collected by police through automated surveillance technology, without suspicion of wrongdoing and without any human targeting at all. This would block public access to information not only about ALPRs, but about other forms of police surveillance and data compiled to promote police accountability, including the footage from police body cameras.

The Court of Appeal's decision hides the full implications of ALPR and other surveillance technology from public scrutiny and stifles informed debate about the balance between privacy and security. ALPRs pose significant risks to privacy and civil liberties. They can be used to scan and record vehicles at a lawful protest or house of worship; track all movement

[35] For circumstances when disclosure may cause harm even after an investigation is closed—when, for example, records include information such as the names of confidential informants or other sensitive witnesses—other PRA exemptions, including the catch-all provision in § 6255, would allow for the necessary redactions without categorically barring public access to records of long-concluded police work.

in and out of an area;[36] gather information about certain neighborhoods[37] or organizations;[38] or place political activists on "hot lists" so that their movements trigger alerts.[39] The U.S. Supreme Court has noted the sensitive nature of location data and the fact that it can reveal "a wealth of detail about [a person's] familial, political, professional, religious, and sexual associations." *See Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring); *id.* at 958 (Alito, J., concurring). Taken in the aggregate, ALPR data can create a revealing history of a person's movements, associations, and habits.

This has already occurred. In August 2012, the Minneapolis *Star Tribune* published a map displaying the 41 locations where license plate readers had recorded the Minneapolis mayor's car in the preceding year.[40] And this data is ripe for abuse; in 1998, a Washington, D.C., police officer "pleaded guilty to extortion after looking up the plates of vehicles near a

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[36] Cyrus Farivar, *Rich California Town Considers License Plate Readers for Entire City Limits*, Ars Technica (Mar. 5, 2013) http://arstechnica.com/tech-policy/2013/03/rich-california-town-considers-license-plate-readers-for-entire-city-limits.

[37] *See* Paul Lewis, *CCTV Aimed at Muslim Areas in Birmingham to be Dismantled*, The Guardian (Oct. 25, 2010) http://www.guardian.co.uk/uk/2010/oct/25/birmingham-cctv-muslim-areas-surveillance.

[38] *See* Adam Goldman & Matt Apuzzo, *With Cameras, Informants, NYPD Eyed Mosques*, Associated Press (Feb. 23, 2012) http://www.ap.org/Content/AP-In-The-News/2012/Newark-mayor-seeks-probe-of-NYPD-Muslim-spying.

[39] Richard Bilton, *Camera Grid to Log Number Plates*, BBC (May 22, 2009) http://news.bbc.co.uk/2/hi/programmes/whos_watching_you/8064333.stm.

[40] Eric Roper, *City Cameras Track Anyone, Even Minneapolis Mayor Rybak*, Minneapolis Star Tribune (Aug. 17, 2012) http://www.startribune.com/local/minneapolis/166494646.html.

gay bar and blackmailing the vehicle owners."[41]

Police tracking of the public's movements can have a significant chilling effect on civil liberties and speech protected by the First Amendment and the California Constitution. The International Association of Chiefs of Police has cautioned that ALPR technology "risk[s] . . . that individuals will become more cautious in the exercise of their protected rights of expression, protest, association, and political participation because they consider themselves under constant surveillance."[42] And, indeed, communities that have faced excessive police surveillance that has included ALPR tracking have experienced fear of engaging in political activism, expressing religious observance and exercising other basic constitutional rights.[43]

Despite these risks, police use of ALPRs has exploded in recent years. A 2007 survey showed that nearly half of the largest law enforcement agencies were regularly using ALPRs, as were nearly one-third of medium-sized agencies.[44] A 2011 Police Executive Research

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[41] Julia Angwin & Jennifer Valentino-DeVries, *New Tracking Frontier: Your License Plates*, Wall St. J. (Sept. 29, 2012) http://online.wsj.com/news/articles/SB10000872396390443995604578004723603576296.

[42] Intn'l Assoc. of Chiefs of Police, *Privacy Impact Assessment Report for the Utilization of License Plate Readers*, 13 (Sept. 2009) http://www.theiacp.org/Portals/0/pdfs/LPR_Privacy_Impact_Assessment.pdf.

[43] *See generally* Creating Law Enforcement Accountability & Responsibility (CLEAR) Project, CUNY School of Law, *Mapping Muslims: NYPD Spying and its Impact on American Muslims* (Mar. 11, 2013) http://www.law.cuny.edu/academics/clinics/immigration/clear/Mapping-Muslims.pdf.

[44] Roberts & Casanova, *supra* note 14, at 24.

Forum survey of more than 70 of its member police departments showed that 71% used ALPR technology and 85% expected to acquire or increase use in the next five years.[45]

Public access to ALPR data has provided important checks against abuse and prompted debate about the technology. The Minneapolis *Star Tribune*'s story illustrating how license plate readers tracked the mayor's movements led to intense public debate on appropriate data retention policies and the introduction of state legislation to curb ALPR data misuse.[46] At a public hearing after the data were released, a Minneapolis city official stated, "now that we see someone's patterns in a graphic on a map in a newspaper, you realize that person really does have a right to be secure from people who might be trying to stalk them or follow them or interfere with them." And a state legislator and former police chief noted at that same hearing, "even though technology is great and it helps catch the bad guys, I don't want the good guys being kept in a database."[47] In May of

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[45] Police Executive Research Forum, Critical Issues in Policing Series, *How are Innovations in Technologies Transforming Policing?*, 1-2 (Jan. 2012) http://www.policeforum.org/assets/docs/Critical_Issues_Series/how%20are%20innovations%20in%20technology%20transforming%20policing%202012.pdf.

[46] Eric Roper, *Minnesota House Passes Protections on Vehicle Tracking, Data Misuse*, Minneapolis Star Tribune (May 17, 2013) http://www.startribune.com/politics/statelocal/207965541.html.

[47] Chris Francescani, *License to Spy,* Medium (Dec. 1, 2014) https://medium.com/backchannel/the-drive-to-spy-80c4f85b4335 (emphasis added). The fact that these data are held by law enforcement rather than in the public domain does not necessarily reduce the risk of impacting Angelenos' privacy interests. For example, a state audit of law enforcement access to driver information in Minnesota revealed "half of all law-enforcement personnel in Minnesota had misused driving records. Often the breaches involved men targeting women." *Id*.

this year, after extensive public debate, the Minnesota legislature passed legislation that places strict limits on the use of license plate readers, including requiring a warrant to use ALPRs to "monitor or track an individual who is subject to an active criminal investigation."[48] The legislation also requires the destruction of ALPR data unrelated to an active criminal investigation within 60 days, places strict limits on the sharing of any data gathered by ALPRs, and requires law enforcement agencies using ALPRs to maintain a public log of their use, including the locations of cameras, the times and days of use, and the number of plates scanned.[49]

Similarly, after a request for ALPR records revealed that the Boston Police Department was misusing its ALPR technology, the police department "indefinitely suspended" its ALPR use,[50] and the Massachusetts legislature introduced legislation that would limit law enforcement use of ALPR technology, including imposing a 48-hour limit on data retention.[51] In Connecticut, the disclosure of ALPR data revealed that some small towns retained more than 20 plate scans per person.[52] This helped to inform

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[48] Minn. Stat. § 13.824.
[49] *Id.*
[50] Shawn Musgrave, *Boston Police Halt License Scanning Program*, The Boston Globe (Dec. 14, 2013) https://www.bostonglobe.com/metro/2013/12/14/boston-police-suspend-use-high-tech-licence-plate-readers-amid-privacy-concerns/B2hy9UIzC7KzebnGyQ0JNM/story.html.
[51] *See* S.1817, 189th Session, Ma. (April 15, 2015); H.3009, 189th Session, Ma. (Jan. 20, 2015).
[52] Ken Dixon, *Plate-Scan Database Divides Conn. Police, ACLU*, CT Post (Mar. 5, 2014) http://www.ctpost.com/local/article/Plate-scan-database-divides-cops-ACLU-5288829.php. The ACLU of Connecticut used a Freedom of Information request in 2012 to obtain a database of 3.1 million plate scans accumulated by 10 police departments. "Using this data, the ACLU was able to map the locations of cars driven by its own staff around the area." *Limit Storage of Plate Scan Data To Protect Privacy,* ACLU of

the debate in that state over new legislation that would set appropriate retention periods for the data.[53]

Other articles and publications have used ALPR data to provide important insight into the use—and potential abuse—of ALPRs. In 2012, the Wall Street Journal obtained ALPR data from Riverside County, allowing reporters to analyze the number of times cars appeared in the database, to find the number of unique plates, and to set up a web-based tool to allow readers to see if (and where and when) their vehicles had been scanned in Riverside County.[54] Petitioner EFF used ALPR data obtained from the Oakland Police Department to perform a similar analysis, to create a "heat map" to show where ALPRs are deployed most frequently, and to map ALPR use against publicly-available crime and census data.[55] The combination of these additional data sources indicated "lower-income neighborhoods are disproportionately captured by ALPR patrols, with police vehicles creating a grid of license plates in the city's poorest neighborhoods."[56] The data also showed ALPR use did not correlate with the amount of crime in a given neighborhood. Raw ALPR data shows more

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Connecticut (Feb. 23, 2012) https://www.acluct.org/updates/limit-storage-of-plate-scan-data-to-protect-privacy.

[53] *Id.*

[54] *See* Julia Angwin & Jennifer Valentino-DeVries, *New Tracking Frontier: Your License Plates*, Wall Street J. (Sept. 29, 2012) http://on.wsj.com/1w2G8gB. The article also described a San Leandro resident who received 112 images of his vehicle over a two-year period in response to a records request.

[55] Jeremy Gillula & Dave Maass*, What You Can Learn from Oakland's Raw ALPR Data*, Electronic Frontier Foundation (Jan. 21, 2015) https://www.eff.org/deeplinks/2015/01/what-we-learned-oakland-raw-alpr-data.

[56] *Id*.

clearly than any other information how police use ALPRs. Without that data the public whose whereabouts are being recorded cannot know the scope of the intrusion nor challenge policies that inadequately protect their privacy.

California voters and legislators have already shown concern over ALPR use. Earlier this month, Governor Brown signed legislation that requires any agency using ALPRs to maintain reasonable security procedures and practices, implement a usage and privacy policy, maintain a record of access to ALPR information, provide an opportunity for public comment on its ALPR program, and disclose any breach of the security of the system. But access to data that reveals the full scope of ALPR tracking remains necessary for the public to fully understand and regulate the technology.

The Court's holding in this case will have ramifications for access to public records beyond just ALPR data. Police agencies across California are equipping their officers with body cameras that will collect video on interactions with the public, but public access to those recordings is uncertain.[57] And police are increasingly using other military intelligence and surveillance tools—such as closed circuit camera feeds, facial recognition and behavior detection technology, mobile biometrics devices, drones and data analytics tools—to amass stunning amounts of information on the daily lives of individuals that are not connected with existing

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[57] *See* Lyndsay Winkley, *SDPD Reaffirms Stance on Body Camera Footage*, The San Diego Union-Tribune (Sept. 9, 2015) http://www.sandiegouniontribune.com/news/2015/sep/09/sdpd-body-camera-policy/ (reporting San Diego Police Department reaffirmed policy of not releasing body camera footage outside rare exceptions).

investigations.[58] Armed with this new wealth of information, law enforcement agencies—including those in Los Angeles—are shifting their approach from traditional responsive models to more predictive models of policing that seek to anticipate where crimes are likely to occur.[59]

Repeatedly, the public has expressed dismay and pushed back on the use of intrusive surveillance tools and tactics once they have been brought to light, citing privacy concerns and fears of increasingly intrusive policing tactics.[60] But under the rule set forth by the Court of Appeal, all data

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[58] *See* Timothy Williams, *Facial Recognition Software Moves From Overseas Wars to Local Police*, N.Y Times (Aug. 12, 2015) http://www.nytimes.com/2015/08/13/us/facial-recognition-software-moves-from-overseas-wars-to-local-police.html?_r=2; Kyle Chayka, *Biometric Surveillance Means Someone Is Always Watching*, Newsweek (April 17, 2014) http://www.newsweek.com/2014/04/25/biometric-surveillance-means-someone-always-watching-248161.html; Darwin Bond-Graham & Ali Winston, *Forget the NSA, the LAPD Spies on Millions of Innocent Folks*, LA Weekly (Feb. 27, 2014) http://www.laweekly.com/news/forget-the-nsa-the-lapd-spies-on-millions-of-innocent-folks-4473467; Mark Schosberg & Nicole A. Ozer, *Under the Watchful Eye,* ACLU (2007) https://www.aclunc.org/docs/criminal_justice/police_practices/under_the_watchful_eye_the_proliferation_of_video_surveillance_systems_in_california.pdf.

[59] *See* Nate Berg, *Predicting Crime, LAPD-Style*, The Guardian (June 25, 2014) http://www.theguardian.com/cities/2014/jun/25/predicting-crime-lapd-los-angeles-police-data-analysis-algorithm-minority-report; Bond-Graham & Winston, *supra* note 58.

[60] *See* Erin Kelly, *Stingray Surveillance Sparks Privacy Concerns in Congress*, USA Today (Aug. 3, 2015) http://www.usatoday.com/story/news/politics/2015/08/03/stingray-surveillance-privacy-issa/30933707/; Anthea Mitchell, *Should America Be Worried About Police Drones?*, The Cheat Sheet (May 15, 2015) http://www.cheatsheet.com/politics/are-police-drones-a-privacy-nightmare-or-a-safety-advantage.html/; Ellen Nakashima, *Secrecy Around Police Surveillance Equipment Proves a Case's Undoing*, Wash. Post (Feb. 22, 2015) https://www.washingtonpost.com/world/national-security/secrecy-

gathered with any of these tools could be categorically exempt from public scrutiny. If large-scale, suspicionless data collection like ALPR plate scans qualifies as an investigation based on how the data are later used, it will impact a wide range of other "records generated by an automated process." Slip Op. at 7. For example, data collected by body cameras or patrol car dash cameras could corroborate complaints of police misconduct, but under the Court of Appeal's holding such footage could be within the agencies' discretion to withhold. This will not only threaten to make data collected for purposes of providing police accountability confidential, it will hamstring the public's ability to monitor and understand rapidly changing law enforcement practices—and participate in fundamental decisions about how police should approach their role within the community, regardless of the tools available.

CONCLUSION

The Court of Appeal's decision significantly expands the Public Records Act exemption for records of law enforcement investigations to encompass data gathered indiscriminately on law-abiding Californians, without any individualized suspicion of criminal activity. Because of the erroneous result, the tension between the Court of Appeal's analysis and the preference for public access to records embodied in Art. I, § 3 of the California Constitution, and the profound implications of the Court of

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around-police-surveillance-equipment-proves-a-cases-undoing/2015/02/22/ce72308a-b7ac-11e4-aa05-1ce812b3fdd2_story.html; *Biometric Security Poses Huge Privacy Risks*, Scientific American (Dec. 17, 2013) http://www.scientificamerican.com/article/biometric-security-poses-huge-privacy-risks; Schosberg & Ozer, *Under the Watchful Eye*, *supra* note 57.

Appeal's opinion for public access to records of police surveillance, Petitioners respectfully request that this Court reverse the Court of Appeal and hold that data collected by ALPRs does not fall within § 6254(f)'s exemption to the PRA for "records of . . . investigations conducted by" law enforcement.

Dated: October 23, 2015

Respectfully submitted,

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I certify pursuant to California Rules of Court 8.204 and 8.504(d) that this Opening Brief on The Merits is proportionally spaced, has a typeface of 13 points or more, contains 12,580 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: October 23, 2015

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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.

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