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, the LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, 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)

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF OF SENATOR JERRY HILL IN SUPPORT OF PETITIONERS

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TO THE HONORABLE CHIEF JUSTICE TANI G. CANTIL-SAKAUYE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to California Rule of Court 8.520(f), Senator Jerry Hill seeks leave to appear as *amicus curiae* in this matter. Senator Hill respectfully requests leave to file the attached *amicus* brief in support of the petition for writ of mandamus submitted by the American Civil Liberties Union Foundation of Southern California and the Electronic Frontier Foundation.

This *amicus* brief is submitted by Senator Jerry Hill, the lead author of SB 34 (chapter 532 of the Statutes of 2015) ("SB 34"), and is intended to provide the Court with an understanding of the legislative intent behind its provisions, as understood by the California legislature and the author of the bill. Senator Hill seeks to provide the Court with the necessary context and history surrounding the passage of SB 34, especially given the erroneous interpretation of some of its provisions that Respondents and *amicus curiae* have advanced in connection with this appeal.

In accordance with California Rule of Court 8.250(f)(4), no party or counsel for any party, other than counsel for *amicus*, have authored the proposed brief in whole or in part or funded the preparation of the brief.

APPLICATION FOR EXTENSION OF TIME

Pursuant to California Rule of Court 8.60(c), proposed *amicus curiae*, Senator Jerry Hill, respectfully requests that the Court grant an extension of time to allow the filing of this *amicus* brief. Filed herewith is the Declaration of Senator Hill ("Hill Declaration"), setting forth the reasons this application should be granted.

Amicus curiae briefs must be served and filed 30 days after the last brief of the parties is filed or could have been filed, although the Court may allow later filing at the Chief Justice's discretion. *See* Cal. R. Ct. 8.520(f)(2); *see also* Cal. R. Ct. 8.60(b) (the Chief Justice may extend the time to serve and file an *amicus* brief for good cause). The Court has granted applications for the late filing of *amicus* briefs, even when the only reason an application was submitted late was because counsel for the *amicus curiae* was busy. *See, e.g., Edelstein v. City & County of San Francisco*, 29 Cal. 4th 164, 172 (2002) (granting application for late filing of an *amicus* brief and denying motion to strike). In this matter, Petitioners' reply brief was filed on April 1, 2016. As a result, this *amicus* brief would have been due on May 2, 2016. *See* Cal. R. Ct. 8. 520(f)(2). However, the *amicus* brief filed by the League of California Cities and the California State Association of Counties in support of Respondents was filed on April 28, 2016, and this proposed *amicus* brief was written primarily to respond to the erroneous assertions in that *amicus* brief. (*See* Hill Decl. ¶ 2.)

Because Senator Hill was unaware of the interpretation that the League of California Cities and the California State Association of Counties had applied to SB 34 until they filed their *amicus* briefs in this matter, Senator Hill was unaware of the need to set the record straight until very recently. (*See* Hill Decl. ¶ 2.) This *amicus* brief was prepared as quickly as possible under the circumstances, especially given that Senator Hill was unaware of the League of California Cities and the California State Association of Counties' *amicus* brief until mid-May, and only first contacted counsel in connection with this matter on or around June 9, 2016. (*See id.* ¶ 3.) Senator Hill therefore

respectfully requests that the Court extend the time within which an *amicus* brief may be filed by 59 days to allow the filing of this *amicus* brief. No prior extensions have been requested (*see id.* ¶ 4), and no prejudice will result from granting this extension.

In sum, Senator Hill respectfully requests that the Court grant this application to extend the time to file this amicus brief so that Senator Hill can provide the Court with an accurate statement of the legislative intent behind SB 34 before reaching its decision on the pending Petition.

INTEREST OF *AMICUS CURIAE*

Senator Jerry Hill is the lead author of SB 34, the primary California statute concerning the collection, use, sharing, sale, and transfer of automated license plate reader technology. The government's collection and dissemination of that data is at the core of this case. Senator Hill serves in the California Senate representing California's 13th District. Prior to his election to the Legislature, Senator Hill has served as a Mayor of the city of San Mateo and authored a City of San Mateo ordinance that regulated the sale of tobacco and restricted smoking in public places.

Senator Hill writes not only in the interest of assisting the Court to understand the purpose and intent of SB 34 more clearly, but also to protect the civil liberties and oversight of government surveillance that California sought to enhance in enacting SB 34.

* * *

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners the ACLU Foundation of Southern California and the Electronic Frontier Foundation ("Petitioners") filed a California Public Records Act ("CPRA") request for one week's worth of data derived from automated license plate scans collected by the County of Los Angeles Sheriff's Department and the City of Los Angeles Police Department. *See* Pet'rs' Opening Br. On the Merits at 9–10. That surveillance data was collected using Automated License Plate Reader ("ALPR") technology, a relatively new tool used by law enforcement agencies and private parties throughout California with major implications for the privacy and autonomy of millions of Californians. Respondents, the County of Los Angeles, the Los Angeles County Sheriff's Department, the City of Los Angeles, and the Los Angeles Police Department ("Respondents") denied that request because, among other reasons, they claim that SB 34 evidences the Legislature's intention to exempt ALPR data from disclosure under CPRA. (*See* Answer Br. On the Merits at 19–22.) However, the Legislature did not modify CPRA with SB 34.

In light of the unique and persistent dangers arising from public agencies constantly monitoring Californians' movement, the California legislature enacted SB 34 to impose guidelines on the collection, sharing, and use of ALPR data. Relevant here, the text of Civil Code Section 1798.90.55(b), provides that "a public agency shall not sell, share, or transfer ALPR information, except to another public agency, *and only as otherwise permitted by law*." Cal. Civ. Code § 1798.90.55(b) (emphasis added). The last clause provides that SB 34 allows transfers of ALPR data only when specifically

authorized by law. For example, the CPRA provides that citizens may seek any public records subject to limited exemptions that are specified in the CPRA itself. *See* Cal. Gov't Code § 6253. Read as a whole, SB 34 imposes limits on public agencies' ability to disclose ALPR data to third parties, but does not purport to modify any other laws that might authorize or require such disclosures because those disclosures are "otherwise permitted by law."

Because SB 34 does not purport to modify the CPRA, and specifically provides that transfer of ALPR data may be permitted where "otherwise permitted by law," there is no question that Petitioners' request under the CPRA is not prohibited by SB 34. Such CPRA requests are consistent with the overall purpose of SB 34: to increase the transparency and oversight of public agencies' retention and use of ALPR data.

However, Respondents and *amici* League of California Cities and California State Association of Counties ("Cities and Counties") argue that SB 34 prohibits a public agency from ever disclosing ALPR data except to another public agency. Not so. Cities and Counties would have this Court erroneously read the "and as otherwise permitted by law" clause out of SB 34. On the contrary, the Court should give effect to the legislative intent, which was to provide Californians with the necessary tools to monitor their government's collection and use of this highly informative and sensitive data.

That legislative intent is evidenced by the terms of SB 34 itself. For example, SB 34 provides that public agencies must promulgate privacy policies regarding

their use and *sharing* of ALPR data in order to allow public supervision of these tools. *See* Cal. Civ. Code §§ 1798.90.51(b)(2)(D); 1798.90.53(b)(2)(D). Likewise, SB 34 provides for a private right of action whenever a person is harmed through the disclosure of ALPR data. *See* Cal. Civ. Code § 1798.90.54. A subpoena issued by such a private litigant may require production of ALPR data, and SB 34 does not purport to modify that fundamental rule of discovery. *See* Cal. Civ. Proc. Code § 2025.270. Both of those provisions would make no sense if the Legislature meant to exempt ALPR data from disclosure to anyone but another public agency.

Because the Legislature did not intend for the radical and dangerous interpretation of SB 34 advanced by the Respondents and *amici*, the Court should give SB 34 its proper interpretation and effect, and allow Petitioners to proceed with their CPRA request.

LEGISLATIVE BACKGROUND

I. SB 34

In 2015, the California Senate was concerned with the growing threat to privacy and civil liberties posed by automated license plate reader technology and the widespread adoption and use of such technologies by public and private entities. *See* Assemb. Comm. on Transp. 2015-2016 Reg. Sess., Rep. on S. Bill No. 34, at 2 (June 19, 2015). Pervasive and persistent location-tracking technologies raise serious constitutional questions about the privacy of citizens and their right to be free from constant government surveillance under the Fourth Amendment. *See United States v.*

Jones, 132 S. Ct. 945, 963 (2012) (citing concerns raised by automated records of motorists passing through toll roads) (Sotomayor, J., concurring).

In recent years, several states have raised the stakes on the need to control and monitor ALPR systems. In 2013, 17% of local police departments were using ALPR technology, including a majority of those serving a population of 25,000 or more; that number is steadily increasing. *See* Brian A. Reaves, *U.S. Dep't of Justice, Local Police Departments, 2013: Equipment and Technology* 4 (2015); Am. Civil Liberties Union, *You Are Being Tracked: How License Plate Readers Are Being Used to Record Americans' Movements* 12 (2013). ALPR technology provides law enforcement a powerful tool to track citizens' movements and behavior, and that power is "only limited by the officer's imagination." *See id.* at 13. For example, in New York, police officers have used ALPR data around local mosques to create a record of the identities of each attendee. *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. Such ongoing and persistent surveillance raises the exact kinds of Fourth Amendment concerns that Justice Sotomayor raised in *Jones*. *See* 132 S. Ct. at 963–64.

ALPR data abuse includes contractual relationships between police departments and for-profit companies. For example, in 2013, the Tempe, Arizona police department was offered free ALPR scanners from Vigilant Solutions, a company that collects municipal fines, in exchange for agreeing to pursue at least 25 Vigilant-provided warrants per month. *See* Robert Faturechi, *Use of license plate photo databases is*

raising privacy concerns, Los Angeles Times, May 16, 2014, http://www.latimes.com/business/la-fi-law-enforcement-contractors-20140518-story.html. Likewise, before SB 34 was enacted, a private investigation revealed that private detectives could easily gain access to confidential license plate data by paying public agencies. *See id.*; (*see also* Hill Declaration Ex. 1 (Sen. Hill, sponsor of S. Bill No. 34 (2015-2016 Reg. Sess.)), letter to Gov. Brown, Sep. 8, 2015) ("[ALPR] can make it easy for anyone, whether it's the police, a private company, or an individual, to track and monitor the whereabouts of any person.")). Without a statutory requirement to disclose the nature and use of such ALPR systems, the public has no way of knowing, let alone controlling, whether public agencies use advanced surveillance techniques on behalf of private entities.

The majority of California's public agencies that use ALPR technology did not have any kind of usage or privacy standards to govern the use or maintenance of that data as late as 2015. *See* Assemb. Comm. on Transp., 2015-2016 Reg. Sess., Rep. on S. Bill No. 34, at 2 (June 19, 2015) ("This bill will put in place minimal privacy protections by requiring the establishment of privacy and usage protection policies . . . ."). The potential for abuse of ALPR systems and data, along with the potential consequences of a data breach of such sensitive information, spurred the Legislature to action.

Thus, the Legislature enacted SB 34 to protect ALPR information from mishandling and abuse, including the sale of such sensitive data to third parties. Through SB 34, California joined a nationwide movement to introduce legislation that would

require ALPR operators to "institute reasonable usage and privacy standards," including specific requirements regarding data management and disclosure.[1]

Pursuant to SB 34:

- A public agency may not sell or share ALPR data, except as specifically permitted by law. Cal. Civ. Code § 1798.90.55(b).[2]

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[1] *See* Ark. Code Ann. §§ 12-12-1801 *et seq.* (prohibiting use of ALPRs by individuals, partnerships, companies, associations or state agencies, with exceptions for limited use by law enforcement, parking enforcement entities or for controlling access to secure areas; prohibits data from being preserved for more than 150 days); Colo. Rev. Stat. § 24-72-113 (requiring that video or still images obtained by passive surveillance by governmental entities be destroyed within three years after the recording of the images, with exceptions allowing retention of passive surveillance records required to be created under federal law); Fla. Stat. 316.0777 (creating a narrow exemption to public records requests but only for information that is personally identifying); 29-A M.R.S.A. § 2117-A(2) (prohibiting the use of ALPR systems except for certain public safety purposes and providing that data collected is confidential and may be used only for law enforcement purposes); Md. Public Safety Code § 3-509 (requiring police to adopt data access procedures, training, and an audit process, and *explicitly* providing that ALPR data are not subject to disclosure under the Maryland Public Information Act); Minn. Stat. §§ 13.82, 13.824, 626.8472 (requiring the maintenance of a public log recording the uses of such data, maintenance and the auditing of such records, written procedures governing access to the data, and requiring certain notification when setting up readers); N.H. Rev. Stat. Ann. §§ 261.75-b, 236.130 (prohibiting the use of automatic license plate recognition systems or vehicle surveillance except in specific circumstances unless specifically authorized by statute); N.C. Gen. Stat. §§ 20-183.22 *et seq.* (requiring state or local law enforcement agencies to adopt a written policy governing data retention and sharing of data from ALPR systems involving training, supervision, data security, audits and reports of system use and effectiveness; limiting retention of ALPR data to no more than 90 days; and *explicitly* providing that data obtained by the system is confidential and not a public record); Tenn. Code Ann. § 55-10-302 (providing that any captured automatic license plate data collected by a government entity may not be stored for more than 90 days unless they are part of an ongoing investigation, and that the data be destroyed at the conclusion of the investigation); Utah Code Ann. §§ 41-6a-2001 *et seq.* (providing that ALPR data may only be shared in aggregated form without personally identifying information).

- Any data collected through ALPR are subject to California's Data Breach Law. Cal. Civ. Code § 1798.29.
- ALPR data must be protected with reasonable security safeguards in order to ensure its integrity and to protect the data from unauthorized access or disclosure. Cal. Civ. Code §§ 1798.90.51; 1798.90.53.
- Operators and end-users of ALPR technology must adopt and implement a privacy and use policy. Cal. Civ. Code §§ 1798.90.51; 1798.90.53.
- Operators of ALPR technology must keep a record of ALPR data access, including the date and time the information was accessed, the name of the person who accessed the data and the purpose for accessing the data, to ensure that ALPR data is accessed only for justified purposes. *See* Cal. Civ. Code § 1798.90.52.
- A public agency that considers purchasing ALPR systems must provide an opportunity for public comment at a regularly scheduled public meeting of the governing body of the public agency before the adoption of the program. *See* Cal. Civ. Code § 1798.90.55.

SB 34's various provisions, including the requirement to promulgate privacy and use policies, plainly demonstrate the Legislature's intention to ensure the right of the public to conduct oversight and hold their governmental agencies accountable

(cont'd from previous page)

[2] "A public agency shall not sell, share, or transfer ALPR information, except to another public agency, and only as otherwise permitted by law." Cal. Civ. Code § 1798.90.55(b).

for their use of ALPR technologies. *See* Assemb. Comm. on Transp. & Privacy & Appropriations, 2015-2016 Reg. Sess., 3d Reading Analysis of S. Bill No. 34, at 2, 7 (Sept. 2, 2015). Put simply, the legislative intent was to "institute a number of usage and privacy standards for the operation of ALPR," "establish a minimal set of privacy standards for personal data collected," and "to address the concern that existing law is silent on how government agencies manage and protect the ALPR data." *See id.*

II. The California Public Records Act

> The California Legislature in 1968, recognizing that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state," enacted the California Public Records Act, which grants access to public records held by state and local agencies. The act broadly defines "[p]ublic records" as including "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency". . . .

Long Beach Police Officers Ass'n v. City of Long Beach, 59 Cal. 4th 59, 66–67 (2014) (citations and internal quotation marks omitted). Courts interpreting the CPRA have further emphasized that its primary purpose is to give the public an opportunity to monitor the functioning of their government. *See, e.g., U.S. Dept. of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 750 (1989) (stating that the public interest lies in whether the information is "a record of what the [g]overnment is up to"); *Times Mirror Co. v. Superior Court*, 53 Cal. 3d 1325, 1344 (1991) ("access is power in its purest form"); *CBS Inc. v. Block*, 42 Cal. 3d 646, 651 (1986) ("access permits checks against the arbitrary exercise of official power and secrecy in the political process").

The CPRA was further enshrined in the California Constitution through Proposition 59. *See* Cal. Const. art. I, § 3(b)(1) ("The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny."). Pursuant to Proposition 59, any legislation curtailing the public's right of access, including the right to access government records set forth in the CPRA, must be justified with explicit and extensive factual findings. *See id.* § 3(b)(2). Relevant here, Proposition 59 provides that SB 34 should be interpreted as consistent with CPRA if possible because "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." *Id.* Because California has presumed that the public may access governmental records, new legislation that would diminish the public's right of access must be explicitly and extensively justified. *Id.* ("A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.").

ARGUMENT

I. ALPR Data May Be Disclosed Pursuant To A CPRA Request Because CPRA Requests Are "Otherwise Permitted By Law" Under SB 34

As discussed *supra*, the California Legislature enacted SB 34 out of concern for the potential dangers that could arise from the misuse of ALPR data. Apparently, the Legislature was not alone in its concern. Petitioners filed a CPRA

request for one week's worth of ALPR data from Respondents. (*See* Pet'rs' Opening Br. On the Merits at 9–10.) Petitioners' request was denied under the pretense that all ALPR data is part of an ongoing law enforcement investigation, and is therefore exempt from disclosure under the CPRA. (*See* Answer Br. On the Merits at 4–5.) Respondents also claimed that SB 34 demonstrated the Legislature's intent to exempt ALPR data from disclosure under CPRA. However, because Petitioners' duly filed CPRA request for ALPR data is "otherwise permitted by law," SB 34 does not preclude Respondents from providing the requested records. *See* Cal. Civ. Code § 1798.90.55(b).

Taking an even more extreme position than the Respondents, *amici* Cities and Counties contend that SB 34 precludes any transfer of ALPR data at all, unless it is to a public agency. (*See* Amicus Br. of League of California Cities and the California State Association of Counties at 19.) They ignore the language of Civil Code Section 1798.90.55(b) following the word "agency," in order to contend that Respondents "cannot 'share or transfer' 'data collected through the use of an ALPR system'" to the public under any circumstances. (*See id.* at 21.) Even in the situation presented here, where Petitioners seek exactly what SB 34 was enacted to require—*i.e.*, public oversight of the use of ALPR data—the Cities and Counties claim that they should be exempt from disclosing ALPR data because of SB 34.

The Court should not take the Cities and Counties' bait. Instead, the Court should begin with a reading of the statute at issue. Admittedly, Civil Code Section 1798.90.55 is not a model of clarity. It provides:

> a public agency shall not sell, share, or transfer ALPR information, except to another public agency, and only as otherwise permitted by law.

Cal. Civ. Code § 1798.90.55.

At first blush, one might assume that transfers of ALPR data to public agencies are qualified by the phrase "and only as otherwise provided by law." However, the comma following the word "agency" precludes that interpretation because the comma would be superfluous and grammatically incorrect. "Modifiers should come, if possible, next to the words they modify. If several expressions modify the same word, they should be arranged so that no wrong relation is suggested." William Strunk Jr. & E.B. White, *The Elements of Style* 30 (4th ed. 2000) (contrasting "She only found two mistakes" with "She found only two mistakes").

Applying that basic rule of construction here, if the Legislature had intended to restrict the sharing of ALPR data to public agencies, it would have written "a public agency shall not sell, share, or transfer ALPR information except **only** to public agencies and as otherwise permitted by law." Rather, the Legislature separated the "only" from the "except to another public agency clause," and used the conjunctive "and" to denote another instance of exceptions to the default prohibition on disclosure. Thus, the term "only" could be read as a modifier of the phrase "as otherwise permitted by law" to denote that disclosures to others apart from public agencies would only be permitted where otherwise specifically authorized by existing law. Because that result is consistent with the legislative intention behind SB 34, the Court should conclude that Section 1798.90.55 provides for that transfers of ALPR data are prohibited "except to public

agencies, and [to others but] only as otherwise provided by law." Indeed, the California Constitution requires the Court to adopt this interpretation. *See* Cal. Const. art. I, § 3(b)(2) ("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").

Thus, SB 34 may be read to allow the disclosure of ALPR data through a statutory mechanism like the CPRA because that disclosure would be *specifically* "permitted by law." The CPRA authorizes citizens to request government records through a legally authorized statutory mechanism, and SB 34 does not purport to change that rule. Similarly, a private litigant is lawfully permitted to issue a subpoena for ALPR data, which makes sense given that SB 34 also provides individuals with a right of action for any harm resulting from a misuse of ALPR information. *See* Cal. Civ. Code § 1798.90.54; Cal. Civ. Proc. Code § 2025.270. SB 34 does not purport to modify that fundamental rule of discovery. SB 34 should be interpreted consistently with respect to CRPA requests so that SB 34 fits within that statutory scheme, and does not act as a covert and unannounced blanket exemption to the public's constitutional rights. *See People v. Jimenez*, 80 Cal. App. 4th 286, 291 (2000) ("A court must construe a statute in a way that avoids an interpretation that would lead to absurd consequences.") (internal quotation marks omitted).

II. The California Legislature Did Not Intend To Modify The CPRA With SB 34

Given the lack of clarity in the "and only as otherwise permitted by law" clause in Civil Code Section 1798.90.55, the Court should look to the legislative history

behind the passage of SB 34 to conclude that no modification of the CPRA was intended. "Statutory exemptions from compelled disclosure under the CPRA are narrowly construed." *See Long Beach Police Officers Ass'n v. City of Long Beach*, 136 Cal. Rptr. 3d 868, 875 (2012), *aff'd*, 59 Cal. 4th 59, 60 (2014) (examining the legislative history of a statute that exempts police personnel records from disclosure to conclude that the statute did not preclude a CPRA request for the names of police officers involved in a highly publicized shooting). Even if the Court did conclude that the language of SB 34 supports the Cities and Counties' interpretation, it would nonetheless be required to reach the conclusion that SB 34 does not modify CPRA because "[t]he literal meaning of the words of a statute may be disregarded to avoid absurd results or to give effect to manifest purposes that, in the light of the statute's legislative history, appear from its provisions considered as a whole." *See Silver v. Brown*, 63 Cal. 2d 841, 845 (1966) (citations omitted); *People v. Superior Court*, 199 Cal. App. 3d 494, 498 n.4 (1988) (holding that ambiguity is not required before resorting to legislative history).

A. Nothing In The Legislative History Of SB 34 Suggests That It Exempts ALPR Data From Disclosure Pursuant To CPRA

Here, it is readily apparent that the Legislature did not intend for SB 34 to modify the CPRA. Unlike states that had specifically chosen to exempt such ALPR records from their respective public records acts,[3] in enacting SB 34, the California Legislature did not discuss or explicitly provide for any modification of the standard set forth in the CPRA. During four Legislative policy committee sessions, two Legislative

[3] *See supra*, n.2.

fiscal committee sessions, and on both the Senate and Assembly floors, no legislator discussed whether ALPR information should be exempt from public disclosure under the Public Records Act.[4]

Moreover, had the Legislature intended to modify the CPRA with SB 34, it would have had to make explicit factual findings to justify that modification. Under Proposition 59, any statute that narrows the public's right to access public records must be justified with extensive factual findings. *See* Cal. Const. art. I, § 3(b)(2) (requiring that the Legislature must make explicit factual findings justifying a statute that purports to narrow public records subject to disclosure under CPRA). But since the Legislature never even contemplated passing a bill that would amend the California Constitution to insulate government agencies from public oversight, no such factual findings are included in SB 34. The only inference left to draw is that the Legislature intended SB 34 to provide for public oversight on government agencies' abilities to freely disclose or sell

[4] *See* Assemb. Comm. on Transp. & Privacy & Appropriations, 2015-2016 Reg. Sess., 3d Reading Analysis of S. Bill No. 34 (Sept. 2, 2015); Assemb. Comm. on Transp., 2015-2016 Reg. Sess., Rep. on S. Bill No. 34 (June 19, 2015); S. Rules Comm., Off. of S. Floor Analyses, 2015-2016 Reg. Sess., Rep. on S. Bill No. 34 (Sept. 3, 2015); Assemb. Comm. on Consumer Protection & Privacy, 2015-2016 Reg. Sess., Rep. on S. Bill No. 34 (July 6, 2015); S. Comm. on Transp. & Hous., 2015-2016 Reg. Sess., Rep. on S. Bill No. 34 (Apr. 2, 2015); S. Comm. on Judiciary, 2015-2016 Reg. Sess., Rep. on S. Bill No. 34 (Apr. 13, 2015); S. Comm. on Appropriations, 2015-2016 Reg. Sess., Rep. on S. Bill No. 34 (May 4, 2015); S. Rules Comm., Off. of S. Floor Analyses, 2015-2016 Reg. Sess., 3d Reading Analysis of S. Bill No. 34 (May 6, 2015); Assemb. Comm. on Appropriations, 2015-2016 Reg. Sess., Rep. on S. Bill No. 34 (Aug. 18, 2015); Assemb. Comm. on Transp. & Privacy & Appropriations, 2015-2016 Reg. Sess., Analysis of S. Bill No. 34 (Aug. 21, 2015).

ALPR data to third party data brokers, and not to affect the constitutional right of Californians to access and review governmental records.

B. *SB 34 Promulgates Government Transparency Requirements That Are Inconsistent With Exempting Public Agencies From Disclosing ALPR Data*

Likewise, the overall legislative package included with SB 34 demonstrates the Legislature's intent to leave ALPR data accessible pursuant to CPRA requests. The California Legislature specifically stated that SB 34 would promote transparency in the use of ALPR systems and the sharing of ALPR data. (*See* Hill Declaration Ex. 1 (Sen. Hill, sponsor of S. Bill No. 34 (2015-2016 Reg. Sess.), letter to Gov. Brown, Sep. 8, 2015 ¶ 6.) Senator Hill explained that the prohibition against public agencies' disclosure was meant to "prohibit[] public agencies from selling the data collected by the technology because data collected with publicly funded technology that is intended to help fight crime *should not be made available to benefit businesses using automated license plate readers for commercial purposes*." *Id.* (emphasis added); *see also* Assemb. Comm. on Consumer Protection and Privacy, 2015-2016 Reg. Sess., Rep. on S. Bill No. 34 at 4 (July 6, 2015) ("This bill is intended to bring greater transparency to the use of ALPR systems . . . .").[5] The Legislature said nothing about modifications to CPRA.

[5] The Hill Declaration and his letter to Governor Brown is a significant reflection of the legislative intent of SB 34, given that Senator Hill was the primary sponsor of the legislation. *See Commodore Home Sys., Inc. v. Superior Court*, 32 Cal. 3d 211, 219, 221(1982) (relying on an undated memo in an Assemblyman's files to determine the legislative intent of Assembly Bill No. 738); *see also Silver*, 63 Cal. 2d at 846 (relying on affidavits of legislative employees who participated in drafting the statute).

Importantly, SB 34 explicitly authorizes the sharing and transferring of ALPR data. The Legislature acknowledged that SB 34 "doesn't prevent the authorized sharing of data, but if shared, must be justified and recorded." *See* S. Rules Comm., Office of S. Floor Analyses, 2015-2016 Reg. Sess., Rep. on S. Bill No. 34, at 6 (Sept. 3, 2015). Rather, the text of SB 34 itself requires ALPR operators to take measures that will "ensure that the collection, use, maintenance, *sharing, and dissemination* of ALPR information is consistent with respect for individuals' privacy and civil liberties." Cal. Civil Code § 1798.90.51(b)(1) (emphasis added). Likewise, SB 34 requires that ALPR operators and end-users, including public agencies, promulgate privacy and usage policies that specify "[t]he purposes of, process for, and restrictions on, *the sale, sharing, or transfer of ALPR information to other persons*." *See* Cal. Civ. Code §§ 1798.90.51(b)(2)(D); 1798.90.53(b)(2)(D); *see also* Cal. Civ. Code § 1798.90.52 (providing that operators may allow access on specified conditions). It would make little sense to require public agencies to promulgate privacy policies on the valid transfer of ALPR information "to other persons," if that did not include CPRA requests.

Indeed, the Cities and Counties' interpretation of Civil Code Section 1798.90.55 is impossible to square with its plain language or the legislative intent that led to its adoption. Again, the Legislature designed SB 34 to promote transparency and accountability in the collection and maintenance of ALPR data by public agencies. The Senate recognized that SB 34 "is necessary to institute reasonable usage and privacy standards for the operation of ALPR systems, which do not exist for the majority of local agencies . . . [and] requires an opportunity for public input on the usage and standards of

ALPR technologies . . . ." S. Rules Comm., Off. of S. Floor Analyses, 2015-2016 Reg. Sess., Rep. on S. Bill No. 34, at 6 (Sept. 3, 2015). Such transparency and accountability requires that the public be allowed to meaningfully determine whether such data mining is excessive or appropriate, including by testing the nature and extent of the public agencies' collection and the various abuses such data collection might enable.[6] Consequently, the Cities and Counties' interpretation, which would deprive the public the ability to even see the extent of the data collected, would gut the protections of SB 34 and inoculate state agencies' use of ALPR data against public oversight. That was not the Legislature's intention.

C. *SB 34 Creates Private Rights Of Action That Would Require Public Agencies' Disclosure Of ALPR Data*

In addition, the other provisions enacted within SB 34 indicate that the Legislature contemplated that public agencies might be required to disclose ALPR data in other contexts. For instance, the private right of action for individuals harmed by improper data disclosure may require civil discovery of ALPR data. One cannot seriously contend that Civil Code Section 1798.90.55 was meant to immunize all public agencies from the most basic civil discovery in those cases. If litigants were unable to receive the very evidence of how they have been harmed, the civil remedy the Legislature intended would be illusory. Because that interpretation cannot have been the

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[6] *See* 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 (last visited June 27, 2016).

Legislature's intent, the Cities and Counties' interpretation of Civil Code Section 1798.90.55 is incorrect.

III. SB 34 Is Meant To Allow Public Oversight Of ALPR Systems.

As described *supra*, SB 34 was meant to enable the public to exercise its right to provide input and supervision over how government agencies collect, manage, use, share, and protect ALPR data. *See* Assemb. Comm. on Transp. & Privacy & Appropriations, 2015-2016 Reg. Sess., 3d Reading Analysis of S. Bill No. 34, at 4 (Sept. 2, 2015) (recommending that SB 34 should be passed to provide "an opportunity for public input on the usage and standards of ALPR system[s] that are used by government entities" and to address the concern that "existing law is silent on how government agencies manage and protect the ALPR data"); Assemb. Comm. on Consumer Protection & Privacy, 2015-2016 Reg. Sess., Rep. on S. Bill No. 34, at 6 (July 6, 2015) ("regulations must be put in place to keep the government from tracking our movements on a massive scale").

Further, there need not be any threat to privacy by allowing the disclosure of ALPR data pursuant to a CPRA request. Any data provided under the CPRA can be easily anonymized. For example, in *CBS, Inc. v. Block*, the Court held that confidential gun license data could be anonymized pursuant to a request under CRPA, and then released to the public, without infringing citizens' protected privacy interests. 42 Cal. 3d 646, 655–56 (1986) ("If the . . . public [is] precluded from learning . . . there will be no method by which the public can ascertain whether the law is being properly applied or carried out in an even handed manner."). The same is certainly true of license plate data.

SB 34 was enacted as the *start* of, and not *conclusion* to, the on-going discussion on how to best establish the standards and privacy requirements related to ALPR systems, the public needs to be informed about the consequences of such decisions. *See* Assemb. Comm. on Transp., 2015-2016 Reg. Sess., Rep. on S. Bill No. 34, at 3 (June 19, 2015) ("this bill also provides an opportunity for public input on the usage and standards of ALPR system that are used by government entities, something the author contends most government entities do not practice"). SB 34 was written with the goal of creating a mechanism for oversight over the use of ALPR technology and establishing basic privacy standards for its use. The Court should interpret it as such.

CONCLUSION

If the Cities and Counties' interpretation of SB 34 prevails, Californians may well be left asking "*Quis custodiet ipsos custodes*?" For the foregoing reasons, *amicus curiae* Senator Hill respectfully requests that the Court interpret SB 34 in a manner that does not prohibit the disclosure of ALPR data pursuant to CPRA.

Dated: June 30, 2016

By: 

JASON D. RUSSELL
RICHARD A. SCHWARTZ
Attorneys for *Amicus Curiae* Jerry Hill

CERTIFICATE OF WORD COUNT

I certify pursuant to California Rules of Court 8.204 and 8.504(d) that this Application For Leave To File *Amicus Curiae* Brief and *amicus curiae* brief is proportionally spaced, has a typeface of 13 points or more, contains 6,150 words, excluding the cover, the tables, the signature block, and this certificate, which is less than the total number of words permitted by the Rules of Court, based on the word count feature of the Microsoft Word word-processing program used to prepare this brief.

Dated: June 30, 2016

By: Richard A. Schwartz BST

RICHARD A. SCHWARTZ
Attorney for *Amicus Curiae* Jerry Hill

DECLARATION OF SENATOR JERRY HILL IN SUPPORT OF HIS APPLICATION FOR AN EXTENSION OF TIME

I, Jerry Hill, declare and state as follows:

1. I am Senator Jerry Hill, representing California's 13th District. I am the sponsor and the lead author of SB 34 (chapter 532 of the Statutes of 2015) ("SB 34"). I make this declaration based upon my firsthand knowledge of the facts stated herein, and, if called to testify, could and would testify competently hereto.

2. The proposed *amicus curiae* brief filed herewith is intended to provide the Court with an understanding of the legislative history and intention behind SB 34, in part in response to *amicus curiae* brief filed by the League of California Cities and the California State Association of Counties on April 28, 2016. I was unaware of the League of California Cities and the California State Association of Counties' interpretation of SB 34 until mid-May 2016, after the League of California Cities and the California State Association of Counties' *amicus* brief was filed.

3. On or around June 9, 2016, I reached out to counsel to seek assistance in preparing the *amicus* brief filed herewith.

4. I have not previously requested any extension of time to file an *amicus* brief.

5. Attached hereto as Exhibit 1 is a true and correct copy of a letter I sent to Governor Edmund G. Brown Jr. on September 8, 2015, which does not appear to be readily accessible.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this the 28 day of June 2016, in Sacramento, California.

Jerry Hill

EXHIBIT 1

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GOVERNMENTAL ORGANIZATION

September 8, 2015

The Honorable Edmund G. Brown Jr.
Governor, State of California
State Capitol, First Floor
Sacramento, CA 95814

RE: SB 34 (Hill) — Request for Signature

Dear Governor Brown:

I write to respectfully request your signature on SB 34, which creates reasonable privacy and disclosure requirements for the use of automatic license plate readers, a technology used widely by local law enforcement and private businesses, such as vehicle repossession agencies, financial institutions, and parking companies. Despite the technology's wide use, and except when used by the CHP and transportation agencies, automatic license plate readers are entirely unregulated, which, if left so, poses substantial privacy and civil liberties concerns.

In the absence of statutory protections, local law enforcement agencies have been slow to adopt their own rules for the technology. For example, in 2013 the American Civil Liberties Union (ACLU) surveyed 118 cities and counties in California and found that out of the 57 local agencies that have approved the use of the technology, only 8 provided an opportunity for public input and only 16 agencies have a publicly available policy.

Automatic license plate readers use a combination of high-speed cameras, software and criminal databases to rapidly check thousands of license plates a minute. The technology is often mounted on law enforcement patrol cars, on stationary light poles, or on private vehicles owned by businesses. Automatic license plate readers have become a useful component of modern policing and have provided efficiencies for businesses, but the increased use of the technology has raised concerns about privacy and civil liberties. Whether or not a 'hit' occurs, all license plate scans are sent to fusion centers – large regional databases that aggregate data from various entities. The ACLU estimates that only 1 percent of data actually results in a 'hit.' The other 99 percent of data has no relation to the commission of a crime and yet is stored indefinitely. One private company has a database of over 1 billion license plate scans and another has one with over 1.8 billion. An agency that stores license plate data for northern California law enforcement agencies has over 100 million scans.

The aggregated license plate data is powerful information. Just like GPS, automatic license plate readers can make it easy for anyone, whether it's the police, a private company, or an individual, to track and monitor the whereabouts of any person. While abuses or questionable uses have not been identified in our state, there are examples from around the country. In New York, police used automatic license plate readers to monitor residents attending a local mosque and in Virginia, police used automatic license plate readers to track residents attending political rallies. A Minneapolis newspaper used automatic license plate reader data to construct a map of where the Mayor had gone during an entire year. A Massachusetts police officer used an automatic license plate reader to track a woman he had met while on duty.

When I started looking into this issue, I was curious what can and cannot be done with the technology. I wanted to find where my wife had gone and with her permission I hired a private investigator. The private investigator put her license plate number into a database and sure enough there was a picture of her vehicle, with her license plate, her exact location, time and date, and a satellite view of where she was. If you did that on a regular basis you could detect patterns, track people, and see where they are going across the state.

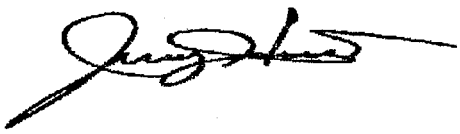
SB 34 provides protections to prevent automatic license plate readers from infringing on Californians' privacy and civil liberties, while balancing the technology as a legitimate crime fighting tool. Specifically, SB 34 requires a public agency considering the use of automatic license plate readers to provide an opportunity for public comment at a regularly scheduled public meeting of its governing body. The bill also prohibits public agencies from selling the data collected by the technology, because data collected with publicly funded technology that is intended to help fight crime should not be made available to benefit businesses using automatic license plate readers for commercial purposes.

SB 34 further requires public and private entities that use automatic license plate readers to adopt a privacy and use policy and post it on their website. The policy must contain specific provisions, such as how the technology will be used and how long the data will be kept. The bill also requires operators – entities that store the data – to keep a record of who accesses the data, when the data is accessed, and for what purposes. SB 34 makes automatic license plate reader data subject to California's Data Breach Law, consistent with the data breach requirements for social security numbers and driver's license numbers. This means that if a database is hacked, people affected must be notified. Lastly, operators must protect the data with reasonable security safeguards in order to ensure the data's integrity and confidentiality, and to protect the data from unauthorized access or disclosure.

I have worked closely with our state's law enforcement community to ensure that the requirements imposed by the bill protect Californian's privacy, but do not impact the utility of the technology as a crime fighting tool. SB 34 has received bipartisan support, has no opposition, and is supported by the California Civil Liberties Council, the Conference of California Bar Associations, the Media Alliance, Small Business California, and the Bay Area Civil Liberties Coalition.

If you have any questions or concerns regarding the legislation please contact me at (650) 619-6430 or have your staff contact Patrick Welch in my office at (916) 651-4013.

Sincerely,



Jerry Hill,
Senator, 13th District