2nd Civ. No. B259392

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION THREE

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.

OPPOSITION TO PETITIONFOR WRIT OF MANDATE

Los Angeles County Superior Court, Case No. BS143004
Honorable James C. Chalfant, Judge Presiding

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CERTIFICATE OF INTERESTED PARTIES

There are no interested parties within the meaning of California Rule of Court 8.208(e)(3).

Respectfully Submitted,

Dated: November 26, 2014

COLLINS COLLINSMUIR + STEWART LLP

By: _____

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TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No(s).

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Local police agencies use special cameras to read license plates and check whether a passing vehicle is stolen or of interest to a criminal investigation. This technology is known as ALPR, for "automatic license plate reader." The American Civil Liberties Union and the Electronic Frontier Foundation (hereinafter collectively "ACLU") sought disclosure of ALPR data from the Los Angeles County Sheriff's Department ("LASD") and the Los Angeles Police Department ("LAPD"). Both police agencies opposed on the ground that the records were exempt from disclosure.

The trial court agreed with the agencies. The definition of "investigation," California precedent, and the facts before the trial court established that ALPR data constitutes a "record of investigation" under the California Public Records Act ("CPRA"), which makes the data exempt from public disclosure.

Not content with the finding that resulted from dispassionate analysis of the issue, the ACLU now brings in a bevy of collateral considerations designed to closely tie the LASD and the LAPD with fear of societal breakdown, and obtain disclosure of the records on the hoped-for grounds of fear alone. The appropriate criteria for deciding whether documents are subject to disclosure are evidence and the law, not the fear that the ACLU substitutes for those considerations. However, even if generalized fear somehow figured into a balancing test for disclosure, the fears created by the ACLU are vague, not specific to either the LASD or LAPD, and therefore are not reasonable. So such fears cannot be a basis for ordering the records disclosed, as explained below.

STATEMENT OF FACTS

ALPR technology is a computer-based system that utilizes special cameras to capture both a color image and an infrared image of a license plate. The infrared image is translated into the characters of the license plate through character recognition technology. The license plate is then compared against a "hot list" of stolen vehicles or vehicles wanted in an investigation. The user is notified of "hit" by an audible alert and a notification on the user's computer screen. Exhibits to Writ Petition ("Ex.") 8-237, 11-427 (Gaw Decl. 2:5-10).

The LASD uses ALPR technology to investigate specific crimes that involve motor vehicles. This includes stolen motor vehicles, Amber alerts that identify a specific motor vehicle, warrants that relate to the owner of a specific motor vehicle, and license plates of interest that relate to a specific investigation being conducted by the LASD. Ex. 11-427 (Gaw Decl. 2:11-16). ALPR data can and is used to find vehicles that might not have been of interest in an investigation at the time scanned, but which later were involved in an investigation. An example is the case of Lamondre Miles, who was found at Lake Castaic, murdered, on September 4, 2013. Through the use of ALPR reads, the LASD was able to determine that the murder actually occurred the day before, 50 miles away. The suspects were caught. *Id.*; Ex. 10-415 (County's Opp. to Writ Petition 2:12-15.

The investigatory records generated by ALPR units are referred to as plate scan data. Plate scan data collected from ALPR units is transmitted to an ALPR server within the LASD's confidential computer system. Plate scan information is retained for a

minimum period of two years. The LASD would prefer to retain plate scan information indefinitely but is limited by storage considerations.

Access to plate scan data is restricted to approved law enforcement personnel within the Department and within other law enforcement agencies with which the Department shares data. Access to plate scan data is for law enforcement purposes only. Any other use of plate scan data is strictly forbidden. The use of plate scan data by Department law enforcement personnel is governed by Manual of Policies and Procedures sections 3-07/210.00, 3-07/220.00, and 3-07/220.20, which outlines permissible uses of Department computer resources, prohibited uses of Department computer resources, and penalties for violation of these policies. All Department personnel with access to the LASD's computer system are required to execute an agreement confirming their knowledge of and agreement to abide by Department policies and procedures on the use of ALPR. Ex. 11-427-428 (Gaw Decl. 2:25 – 3:6).

PROCEDURAL HISTORY

LASD agrees with the procedural history stated by the ACLU. Petition ("Pet.") 9-13.

STANDARD OF REVIEW

De Novo on the Legal Ruling

The ACLU frames the standard of review as *de novo*, but does acknowledge that "factual findings made by the trial court will be upheld if based on substantial evidence." *Times Mirror Co. v. Superior Court*, 53 Cal. 3d 1325, 1336 (1991). The appellate court reweighs the competing public interest factors of disclosure versus nondisclosure, but

accepts the trial court's determination of what the facts of the case are. *Humane Society of the United States v. Superior Court of Yolo County*, 214 Cal. App. 4th 1233, 1253-1254 (2013).

Presumption of Correctness on Factual Findings

As to those factual findings made by the trial court, any order challenged by the ACLU is presumed correct. *Denham v. Superior Court*, 2 Cal.3d 557, 564 (1970). "This is not only a general principle of appellate practice but an ingredient in the constitutional doctrine of reversible error." *Id.* (citations and internal quotations omitted). Thus, an appellant must affirmatively demonstrate the existence of prejudicial error. The test "must necessarily be based upon reasonable probabilities rather than upon mere possibilities; otherwise, the entire purpose of the constitutional provision would be defeated." *People v. Watson*, 46 Cal. 2d 818, 837 (1956).

This presumption of correctness calls for the appellate court to affirm if the lower court was right on any theory, regardless of whether the reasoning may have been incorrect. *Rappleyea v. Campbell*, 8 Cal.4th 975, 980-981 (1994). Even the trial judge's oral remarks should not be used to undermine the order on appeal. *Whyte v. Schlage Lock Co.*, 101 Cal.App.4th 1443, 1451 (2002). If the appellant did not object to the trial court's statement of decision by pointing out errors in the factual findings, the appellate court is to assume that the trial court made all factual findings necessary – either explicitly or implied – to support the judgment. *Fladeboe v. American Isuzu Motors Inc.*, 150 Cal. App. 4th 42, 58-61 (2007).

These primal elements of appeal create the rule, "The burden of affirmatively

demonstrating error is on the appellant." *Fundamental Investment etc. Realty Fund v. Gradow*, 28 Cal.App.4th 966, 971 (1994). The corollary is that "[a]ll intendments and presumptions are indulged to support [the order] on matters as to which the record is silent, and error must be affirmatively shown." *Denham v. Superior Court,* 2 Cal. 3d at 564 (citations and internal quotation marks omitted). The presumption of correctness requires that any ambiguity in the record be resolved in favor of the appealed order. *Winograd v. American Broadcasting Co.*, 68 Cal.App.4th 624, 631 (1998).

Substantial Evidence on Factual Findings

> "Where findings of fact are challenged on a civil appeal, we are bound by the elementary, but often overlooked principle of law, that the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, to support the findings below."

Bickel v. City of Piedmont, 16 Cal.4th 1040, 1053 (1997) (citation and internal punctuation omitted), *superseded by statute on another ground as stated in De-Berard Properties, Ltd. V. Lim*, 20 Cal.4th 659, 668 (1999).

Review under the substantial evidence standard involves an undertaking to "view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court." *Jessup Farms v. Baldwin*, 33 Cal.3d 639, 660 (1983) (citations omitted). This standard of review is "deferential" to the factual findings of the trial court. *Bickel v. City of Piedmont*, 16 Cal. 4th at 1053.

Employing these considerations, the reviewing court defers to the trier of fact (or, as here, the trial court in its fact-finding role) on issues of credibility, which are in the exclusive province of the fact-finder. *Lenk v. Total-Western, Inc.* 89 Cal.App.4th 959, 968 (2001). Where the trial court is called on to make credibility judgments, its decisions will stand so long as they are not arbitrary. *See Foreman & Clark Corp. v. Fallon*, 3 Cal.3d 875, 890 (1971). Where different inferences may reasonably be drawn from the undisputed evidence, the conclusion of the factfinder "must be accepted by the appellate court." *In re Providian Credit Card Cases*, 96 Cal.App.4th 292, 301 (2002) (citation and internal punctuation omitted). "The fact that it is possible to draw some inference other than that drawn by the trier of fact is of no consequence." *Jessup Farms v. Baldwin*, 33 Cal. 3d at 660. Deference to the trial court embraces both express and implied factual findings. *People ex rel. Dept. of Corrections v. Speedee Oil Change Systems, Inc.*, 20 Cal.4th 1135, 1143 (1999).

ARGUMENT

I. The trial court properly found the documents at issue to be records of investigation.

The writ petition never defines "investigation"; nor did the ACLU define it below. Instead, petitioner chose to define what an "investigation" was not, by pointing to how different ALPR readers are from a "traditional" investigation such as responding to a specific call from a citizen. See Exhibits to Writ Petition ("Ex.") 2 at 9:25-27 (p. 2-29). But the reality of "investigation" is not anchored to the ACLU's viewpoint.

"The dictionary is a proper source to determine the usual and ordinary meaning of

words in a statute." *Humane Society of the United States v. Superior Court of Yolo County*, 214 Cal. App. 4th 1233, 1251 (2013). Black's Law Dictionary defines "investigate" as, "1. To inquire into (a matter) systematically; to make (a suspect) the subject of a criminal inquiry <the police investigated the suspect's involvement in the murder>. 2. To make an official inquiry <after the judge dismissed the case, the police refused to investigate further>." Black's Law Dictionary (Bryan A. Garner ed., 9th ed. 2009); *see also Pullin v. Superior Court*, 81 Cal.App.4th 1161, 1164 (2000) *citing* Black's Law Dictionary 478, 830 (7th Ed. 1999). The trial court itself relied upon a similar Oxford dictionary definition: "the action of investigating something or someone; formal or systematic examination or research." Ex. 1-11 (Decision on Petition for Writ of Mandate), citing Ex. 9-396 (City's Memorandum in Opposition to Petition at 3:8-9).

These definitions are broad. They make no distinctions between inquiries undertaken to investigate a specific complaint (as detectives might do), or simply observing public places to make sure no crime occurs within the officer's view (as a cop walking or driving a beat might do). These definitions do not require that a crime occur first before the actions of officers constitute "investigation."

The ACLU does acknowledge the evidence that requires that ALPR data be defined as a record of investigation, *i.e.* the Gomez and Gaw declarations submitted below. Ex. 12-501 to 12-502 (ACLU's Reply in Support of Petition at 3:25 – 4:3). But then its thinking goes wrong.

The ACLU decides, without evidence, that looking for stolen cars by the thousands cannot be an investigation. Nothing in the law or the evidence on the nature of

ALPR data supports that conclusion. The parties all agree that once license plates are scanned by ALPR cameras, the plates are checked against stolen vehicle databases. *Id.* So records of the plate scans are records of attempts to investigate a crime, and the ACLU has conceded as much.

What seems to be the real problem for the ACLU is the scope of the investigation. The ACLU conflates the dictionary definition of "investigate," *inquiring into systematically*, with the ACLU's more intrusive label of "under investigation . . . without individualized suspicion." See Pet. 33. That rhetoric advocates the dystopian theory of oppression advanced by the ACLU very well; it also misleads. A person has no privacy interest in his or her license plate. *U.S. v. Diaz-Castaneda*, 494 F.3d 1146, 1151 (9th Cir. 2007). Whether that license plate is viewed by one officer on a public street trying to determine whether the car is stolen, or 10 officers on 10 public streets, or 1000 officers on 1000 public streets, the license plate never becomes private. That plate still does not become private if an officer then looks at a different plate nearby, or 10 nearby plates, or 1000 nearby plates, to determine if any of those cars are stolen. Logic provides no reason as to why the police are no longer investigating whether any of the cars are stolen if they have a machine read the plates on public streets rather than employ more humans to do so.

The legislature has, so far, only regulated ALPR data with respect to the California Highway Patrol. But it is clear that the legislature believes the data to be a record of investigation protected from disclosure to anyone who is not part of a law enforcement agency. See Cal. Veh. Code § 2413(b)-(c).

Both the evidence and the law support the trial court's ruling that ALPR data is a record of investigation for purposes of the exemptions from disclosure found in Government Code §§ 6254(f) and 6255(a). Nevertheless, the ACLU makes much of the trial court's reasoning that an officer in a vehicle equipped with ALPR readers makes a "targeted" inquiry of what paths to take and what license plates to search. Ex. 1-13. This reasoning is irrelevant. The trial court's statements at the hearing are not part of the analysis of whether the ruling should be upheld. *Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th1443, 1451 (2002). A record is one of investigation if it was generated during an investigation undertaken "for the purpose of determining whether a violation of law may occur or has occurred." *Haynie v. Superior Court*, 26 Cal. 4th 1061, 1071 (2001). Nothing in this language requires an investigation be "targeted" in order to generate records protected from disclosure under Government Code § 6254(f). The facts show that the entire purpose of the ALPR readers is investigation, as they automatically check license plates against "hot lists" of stolen vehicles and vehicles wanted for other crime investigations.

As ALPR data is systemically collected, is checked against "hot lists," is used to determine whether a crime has occurred, is only used prospectively for criminal investigation, and is protected by agency policy from being used for any non-law enforcement purpose, it constitutes a record of investigation under Government Code § 6254(f).

II. As records of investigation, the public interest in disclosure is outweighed by the investigatory interest in nondisclosure.

In the trial court, the LASD addressed the balancing test in the context of the official information privilege, but not in the context of the catch-all exemption. This does not preclude the LASD from addressing the issue in opposition to the writ petition. "The writ of mandate is not a writ of error to review the action of the trial court . . . , but is an original proceeding to be determined upon its merits." *Chrisman v. Superior Court in & for Fresno County*, 63 Cal. App. 477, 480 (1923). The issue in the mandamus proceeding is whether what happened in the trial court was proper, not whether every particular argument was made to the trial court. *Id.*

The ACLU wants "the license plate number, date, time, and location information for each license plate recorded." Pet. 9. Once that type of information is disclosed to the ACLU, it must be disclosed to anyone who requests it. *City of San Jose v. Superior Court (San Jose Mercury News)*, 74 Cal. App. 4th 1008, 1018 (1999).

The test for withholding a record under the CPRA's catch-all exemption is whether "*on the facts of the particular case* the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." Cal. Gov't Code § 6255(a) (emphasis added). It is the *public's* interest in disclosure that is important to the test, not the ACLU's interest or motive, nor the convenience to the ACLU in having the information turned over. *City of San Jose*, 74 Cal. App. 4th at 1018; *Connell v. Superior Court (Intersource, Inc.)*, 56 Cal. App. 4th 601, 616-617 (1997). The CPRA was modeled on the federal Freedom of Information Act. *Los Angeles Unified*

Sch. Dist. v. Superior Court (Los Angeles Times), 228 Cal. App. 4th 222, 238 (2014). One may look to the construction of that Act by federal authorities to understand how to interpret "public interest" under the CPRA. *Id.* at 241.

The ACLU is curious about how many times a particular license plate has been read. Ex. 2-51 (transcript of hearing 31:1-7). It claims that the number of reads will explain "how severe the intrusion into privacy [is]." Id. 31:7. But there is no evidence that there actually has been an intrusion into privacy. No one has a privacy interest in a license plate. As explained by the Sixth Circuit,

> "A tenet of constitutional jurisprudence is that the Fourth Amendment protects only what an individual seeks to keep private. *Katz,* 389 U.S. at 351-52, 88 S.Ct. 507. "What a person knowingly exposes to the public ... is not a subject of Fourth Amendment protection." *Id.* at 351, 88 S.Ct. 507. It is also settled that "objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure ...." *Harris v. United States,* 390 U.S. 234, 236, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968). Following this reasoning, the Court held that an automobile's Vehicle Identification Number, located inside the passenger compartment, but visible from outside the car, does not receive Fourth Amendment protection:
>
> > [I]t is unreasonable to have an expectation of privacy in an object required by law to be located in a place ordinarily in plain view from the exterior of the automobile. The VIN's mandated visibility makes it more similar to the exterior of the car than to the trunk or glove compartment. The exterior of a car, of course, is thrust into the public eye, and thus to examine it does not constitute a "search."
>
> *Class,* 475 U.S. at 114, 106 S.Ct. 960. Logically, this reasoning extends to a legally-required identifier located *outside* the vehicle.
>
> [¶] No argument can be made that a motorist seeks to keep the information on his license plate private. The very purpose of a license plate number, like that of a Vehicle Identification Number, is to provide identifying information to law enforcement officials and others."

United States v. Ellison, 462 F.3d 557, 561 (6th Cir. 2006); *see also U.S. v. Diaz-Castaneda*, 494 F.3d 1146, 1151-1152 (9th Cir. 2007). So the ACLU presumes its conclusion in order to argue its premise.

Further, there is no dispute that the LASD and LAPD are reading license plates. That information is not being hidden. At the hearing, the LAPD disclosed that in a one-week period it reviewed as a sample, its ALPR cameras had over 1.2 million reads. Ex. 2-49. The LASD disclosed that it generated between 1.7 and 1.8 reads in a week. *Id.* A person's license plate likely is being read by ALPR devices, many times. That knowledge is more of a given than goal. Where the information sought is not likely to disclose something about the workings of government (because it is already known), the public interest in disclosure is not a strong one. *See, e.g., Los Angeles Unified School District*, 228 Cal. App. 4th at 242.

As a final consideration in the framing of the public interest at issue here, no facts presented in this case show how the public (including law enforcement members of the public) would have an interest in its driving patterns being made public. Right now, only law enforcement can access the information, only for a legitimate law enforcement purpose, and automatic notifications of the specific location of a particular vehicle only occur if that vehicle is wanted in a crime. That information will be available to anyone for any purpose, even nefarious ones, if the ACLU wins disclosure.

Balanced against that possibility is the interest the public has in not disclosing the information. The privacy concerns noted above is one weight in that scale. Another is the danger to law enforcement investigations established by the evidence. Ex. 9-410

(Gomez Decl. 2:18-27). While the ACLU dismisses the evidence presented on the potential compromise of investigations should ALPR data be disclosed, expert opinion on the potential negative consequences of disclosure is admissible for the balancing test analysis. *Los Angeles Unified Sch. Dist.*, 228 Cal. App. 4th at 244-245. Sgt. Gomez is an expert on ALPR technology. Ex. 9-409 (Gomez Decl. 1:3-12). His declaration was proper evidence upon which the trial court could determine that disclosure of ALPR data could disrupt criminal investigations.

Common sense and knowledge of human nature are also valid grounds upon which to decide the dangers of disclosure. *Los Angeles Unified Sch. Dist.*, 228 Cal. App. 4th at 245-246. It does not require an expert to know that if vehicle location information becomes open to the public, a litany of abusive personalities (dangerous significant others, stalkers, untrusting or harassing supervisors, etc.) can obtain the information if they know your license plate.

The balance tips in favor of nondisclosure. The trial court should be upheld.

However, the analysis cannot end there. The ACLU has introduced one more element into the test of whether or not these records are exempt from disclosure. That element – fear – is addressed below.

III. The ACLU's concerns about the fearful nature of ALPR data are not reasonable on the facts here, and should not affect the analysis of whether the records are protected from disclosure.

To the envy of all lesser advocates, Fear's presentation is more watched, more marveled at, its words listened to with greater care and believed more quickly. Fear has

come into its own in modern trial advocacy, with the debut of the "Reptile Theory." This theory is an evolution of Dr. Paul McLean's work which identified three areas in the human brain: the ape brain, which controls higher cognitive functions; the dog brain, which controls emotions and memory; and the reptile brain, which controls our baser functions. Ben Howard & Neil Dymott, *A Field Guide to Southern California Snakes: Identifying and Catching Plaintiffs' Reptile Theory in the Wild*, Verdict, Volume 3 2013, at 11, available online at http://www.ascdc.org/PDF/ASCDC%2013-3.pdf (last visited November 25, 2014). In particular, the Reptile Theory caters to a human's subconscious fear response: If you can identify your legal opponent as a threat to the jury's safety, the reptile brain will take over and guarantee that the jury finds against your opponent. *Id.* at 12; William A. Ruskin, *Plaintiffs' bar embraces Reptile strategy and defense bar responds*, Lexology, October 4, 2013, http://www.lexology.com/library/detail.aspx?g=ad754e6a-c50c-4570-8990-71900cdf6795 (last visited November 20, 2014). The hypnotic effect of this technique radiates from the writ petition.

A. The ACLU sidesteps the record created below and instead presents a record of other events in other localities where the facts are more alarmist.

Words can paint a picture, but the petition's words can be a funhouse mirror. For example, the ACLU writes, "Agencies have created massive databases of license plate data that record the travels of millions of drivers in an area." Pet. 17. The problem is the word *travels*. *Travels* are not being recorded. The only evidence presented is that ALPR cameras snap a photo of a license plate at a pinpoint moment in time. Exs. 9-409 (Gomez

decl. 1:13-19), 11-427 (Gaw decl. 2:5-10). If travels were being recorded, the Lamondre Miles murder would have been prevented, not uncovered after the fact. The ACLU also writes that the LASD and the LAPD together collect "3 million scans per week tracking the specific locations of Los Angeles drivers." *Tracking* suggests something dire and imminent, like local drivers hunted by an unseen thing behind them. But the evidence at the hearing was that the ALPR and the officers operating it are indifferent to most of the cars scanned, because the equipment only pings notification of a scan result if it reads a plate belonging to a vehicle reported as stolen or of interest in a criminal matter. Ex. 11-427 (Gaw decl. 2:8-10). Similarly unsupported language comprises the statement "the very people whose whereabouts are being recorded...." Pet. 38. This is not the fascist England of science fiction works like *V for Vendetta*, where government trucks roll through the streets recording all cell phone conversations and pedestrian movements in real time. This is a look at vehicle license plates out in public view. Such word choices reveal the ACLU's belief that it needs to make the situation more than what it is in order to win.

Consistent with that plan, the ACLU recounts news article reports of ALPR abuses (or claimed abuses), some of which occurred in locations that traditionally have shown antagonism to civil rights; the ACLU then by implication suggests that the same problems are or will be happening here in Los Angeles County. See Pet. fns. 12-15. The ACLU cites a story about how Piedmont, California, a wealthy city surrounded by less-wealthy and crime-ridden Oakland, has installed ALPR cameras at its border. The ACLU then quotes itself by sighting to a conjecture one of its staff attorneys raised in the

article about how the cameras could be used to create a record of all movements in and out of the city. See Pet. 20, citing fn. 12. In other words, there is no evidence in support of the writ petition that ALPR cameras can be or have been used to "track" movements in and out of a city, because that assertion was merely an argument against the installation of the cameras raised in the article by the ACLU itself. Footnote 12 conflates argument to the level of evidence.

Similar problems occur in footnotes 13 through 15. Footnotes 13 and 15 involve ALPR readers in the United Kingdom. Civil liberties in England have been less extensive than in this country for quite some time, as a result of government response to the bloody civil war in Ireland and labor protests under Margaret Thatcher. The Interception of Communications Act of 1985, which made all government wiretapping legal, itself bespeaks a very different nation than the United States. England used to have a balancing test between the public interest in disclosure and the government's interest in nondisclosure for when someone chose to expose a government secret; now, there is no balancing test, due to the Official Secrets Act of 1989, and all "official secrets" simply remain secret. In contrast, the United States has the Freedom of Information Act, underscoring the contrary feeling toward government secrecy in this country, and the very different constitutional milieu in which the instant case is to be decided.[1] Footnote 14 involves troubles between the NYPD and Muslim communities, a situation which

[1] For a survey of statutes which minimize civil liberties in the United Kingdom, see https://www.liberty-human-rights.org.uk/human-rights/countering-terrorism/overview-terrorism-legislation (last accessed November 26, 2014) and http://en.wikipedia.org/wiki/Main_Page (last accessed November 21, 2014).

made the national news because of the post-9/11 NYPD's open policy of surveilling people because they were Muslim. New York's institutional persecution of other nonwhites is also widely known: the stop-and-frisk law used primarily against African American and Latino men, and actor Danny Glover's battle to get taxi cabs to stop for African American men, are well known examples.

Delving into the specifics of these three footnotes reveals additional problems with accepting them as grounds for affecting the analysis of whether the records at issue in this case should be disclosed. The police in the story cited in footnote 13 were just being blatantly racist to the Muslim community; they even lied to the town elders about the purpose of the cameras in order to get permission to install them. The wrong against the political activist discussed in the article cited in footnote 15 started long before his plate was read by an ALPR camera: the British police had put a "marker" on his car because he attended a political demonstration, and that marker ultimately allowed the police to treat him as a terrorist. (A power the police have in England, because of modern anti-terrorism statutes such as the Anti-Terrorism and Crime Security Act of 2001, the Prevention of Terrorism Act of 2005, and the Terrorism Act of 2006, to name just a few.) And similar to what the British police did in the Birmingham story (footnote 13), the NYPD in the story recounted in footnote 14 specifically racially profiled Muslims, *i.e.* they performed surveillance on them for being Muslim, and according to many violated a specific federal court order while doing so.

There is no situation in Los Angeles County shown in the evidence or widely publicly known that is comparable to any of the instances cited by the ACLU. The

evidence put in front of the trial court was that the LASD and LAPD have policies in place to govern how the ALPR cameras are to be used, when the data can and cannot be accessed, and for what purposes. Those policies punish misuse of the technology. Ex. 11-427-428; 11-436-437; 11-442-444; Ex. 8-308. This is markedly different from the British police's use of the data, which led to complaints that the data's use was unregulated. See article cited in Pet. fn. 15.

So the factual record developed in this case showing how ALPR technology functions and ALPR data is used in Los Angeles County is not nearly so alarmist as the terrifying picture the ACLU paints in the petition.

B. Even if the ACLU's alarmist view of ALPR data is accepted, its fears of oppression caused by this tool are still unreasonable in light of far more intrusive investigations the police are allowed to conduct.

The LASD understands that this is a Public Records Act case, and not a Fourth Amendment case subject to different standards of review. Nevertheless, in order to address what the LASD feels is an attempt to sidestep the facts and power an argument with outrage against the technology, the LASD feels it must address Fourth Amendment standards to show the relative reasonableness of ALPR technology.

There are the literal words of the ACLU's argument, and then there is the sub-literal instinctual impression that its argument creates. That impression could be articulated as follows: "If you look for one stolen car, that is an investigation. If you look for all of them, that is a Fourth Amendment violation." And of course, Fourth Amendment violations are not a protected category under the Public Records Act, and if routine are matters of public concern.

But simply investigating does not rise to the level of a Fourth Amendment search. The most basic form of investigating is looking around. "Visual surveillance was unquestionably lawful [at common law] because "'the eye cannot by the laws of England be guilty of a trespass.'" *Boyd v. United States,* 116 U.S. 616, 628, 6 S.Ct. 524, 29 L.Ed. 746 (1886) (quoting *Entick v. Carrington,* 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K.B.1765))." *Kyllo v. United States*, 533 U.S. 27, 31-32 (2001) (explaining how Fourth Amendment jurisprudence arose out of trespass rationales). Even though Fourth Amendment jurisprudence has become detached from the law of trespass, the Supreme Court still maintains that "visual observation is no 'search' at all." *Id.*

Consistent with that core rationale, many activities more intrusive into a person's life than a momentary reading of their license plate also are not considered Fourth Amendment violations:

- *California v. Ciraolo*, 476 U.S. 207 (1986): Warrantless aerial observation of fenced-in backyard within curtilage of home was not unreasonable under the Fourth Amendment because defendant knowingly exposed his backyard to aerial observation.
- *People v. Lindsey*, 182 Cal.App.3d 772 (1986): Police Officer's act of peering through an automobile windshield to see VIN in plain view on steering column was constitutionally permissible without a warrant.
- *People v. Doty*, 165 Cal.App.3d 1060 (1985): Warrantless search for parts of a stolen vehicle at an Auto Wrecking yard was not a Fourth Amendment violation. The court determined that what is observable to the general public at a commercial

establishment is also observable by police officers conducting a warrantless search. It is not unreasonable even if officers enter the premises purely for an investigative purpose; they do not have to enter for the purpose for which the general public enters.

- *People v. Potter*, 128 Cal.App.4th 611 (2005): A warrantless search of an automobile repair shop was authorized under closely-regulated industry exception to the warrant requirement. Under the open-to-the-public exception, the government may enter and inspect commercial premises that are viewable by the public. When a business owner opens his business to the public, he or she has no reasonable expectation of privacy in the area. The government is free to conduct a search of items in the business that are in plain view during normal business hours.
- *Smith v. Maryland*, 442 U.S. 735 (1979): Installation and use of a pen register by the telephone company at police request did not constitute a Fourth Amendment violation. The pen register recorded the numbers dialed from the petitioner's home. Petitioner did not have an expectation of privacy in the numbers dialed because phone companies regularly record that type of information.
- *California v. Greenwood*, 486 U.S. 35 (1988): One who discards garbage by setting it out on the public street has renounced any expectation of privacy in the contents of his garbage bin.
- *United States v. Knotts*, 460 U.S. 276 (1983): A beeper was inserted into a drum of chloroform which authorities believed would be used for the manufacture of illicit drugs. The beeper was monitored only on its journey over public roadways

up to the time the drum was transferred into a private residence. The court reasoned that there was no indication that the beeper was used in any way to reveal information as to the movement of the drum within the cabin, or in any way that would not have been visible to the naked eye from the outside of the cabin.

And the Ninth Circuit could have been writing about ALPR data, when it explained why a license plate check could not be a Fourth Amendment violation:

> "We agree that people do not have a subjective expectation of privacy in their license plates, and that even if they did, this expectation would not be one that society is prepared to recognize as reasonable. *Cf. Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring) (setting forth criteria for searches under Fourth Amendment). First, license plates are located on a vehicle's exterior, in plain view of all passersby, and are specifically intended to convey information about a vehicle to law enforcement authorities, among others. No one can reasonably think that his expectation of privacy has been violated when a police officer sees what is readily visible and uses the license plate number to verify the status of the car and its registered owner. *See Ellison*, 462 F.3d at 561-62. Second, a license plate check is not intrusive. Unless the officer conducting the check discovers something that warrants stopping the vehicle, the driver does not even know that the check has taken place. *See Walraven*, 892 F.2d at 974. Third, the Supreme Court has ruled that people have no reasonable expectation of privacy in their vehicle identification number (VIN), which is located *inside* the vehicle but is typically visible from the outside. *See New York v. Class*, 475 U.S. 106, 113-14, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986). If it was not a Fourth Amendment search when the police officers in *Class* opened a car's door and moved papers obscuring the VIN, it surely also was not a search when Helzer ran a computerized check of Diaz's license plate.
>
> We are sympathetic to the concerns raised in dissent by Judge Moore in *Ellison*. Her dissent argued that while there may not be a legitimate privacy interest in "the particular combination of letters and numerals that make up[a] license plate number," there is such an interest in the use of the license plate to "access information about the vehicle and its operator that may not otherwise be public or accessible by the police without heightened suspicion." 462 F.3d at 566-67

(Moore, J., dissenting). Furthermore, Judge Moore contended, license plate checks may easily be abused if there is no standard governing when police officers may conduct them; the "psychological invasion that results from knowing that one's personal information is subject to search by the police, for no reason, at any time one is driving a car is undoubtedly grave," *id.* at 568; and the "possibility and the reality of errors in the computer databases accessed by [the checks may] result in unwarranted intrusions into privacy in the form of stops made purely on the basis of incorrect information," *id.* at 569.

We nevertheless side with the *Ellison* majority. First, any "psychological invasion" stemming from a license plate check does not seem particularly severe. To the contrary, silent computerized checks, conducted without any inconvenience to the vehicle's driver, are less intrusive than many actions the Supreme Court has held are not Fourth Amendment searches. *See, e.g., Oliver v. United States,* 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984) (holding that entry into private property to observe marijuana plants in violation of "No Trespassing" sign was not a search); *Class,* 475 U.S. at 113-14, 106 S.Ct. 960 (same for physical opening of car door and moving of papers obscuring VIN); *Smith v. Maryland,* 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979) (same for use of pen register to record numbers dialed on phone line). Second, the possibilities of database error and police officer abuse, while real, do not create a legitimate expectation of privacy where none existed before. Government actions do not become Fourth Amendment searches simply because they *might* be carried out improperly. If an officer does go outside the proper bounds of a license plate search, it is *that* misconduct that might give rise to a constitutional or statutory violation."

U.S. v. Diaz-Castaneda, 494 F.3d 1146, 1151-1152 (9th Cir. 2007).

So when viewed in the totality of actions available to the police, and potential dangers that can be caused by those actions which courts have already examined, ALPR data is not a terror from which dispassionate legal analysis should flee.

CONCLUSION

The evidence shows that ALPR data is used by the LASD and the LAPD to investigate crime. There are standards for its use, consequences for its misuse, and

potentially devastating consequences to both law enforcement efforts and the privacy of the driving public if the data is disclosed. The trial court recognized that the ALPR data is a record of investigation, balanced the interest in disclosure against the interest in nondisclosure, and properly determined the records should not be disclosed. The LASD respectfully requests that this Court reach the same conclusions.

Dated: November 26, 2014

COLLINS COLLINSMUIR + STEWART LLP

By: _____

Tomas A. Guterres, Esq.
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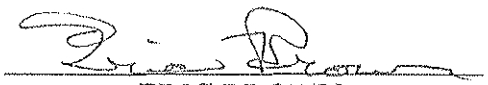
COUNTY OF LOS ANGELES

VERIFICATION

I, Eric C. Brown, declare as follows:

I am one of the attorneys for the responded herein. I have read the foregoing Opposition to Petition for Writ of Mandate and know its contents. The facts alleged in this opposition are within my own knowledge, and I know these facts to be true, except as to those matters which I state on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on November 26, 2014 at South Pasadena, California.



ERIC BROWN

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c)(1))

The text of this brief, excluding this Certificate and the Certificate of Interested Parties, consists of 6,526 words as counted by the Microsoft Word version 2010 word-processing program used to generate the brief.

Dated: November 26, 2014

ERIC BROWN

PROOF OF SERVICE
(CCP §§ 1013(a) and 2015.5; FRCP 5)

State of California,)
) ss.
County of Los Angeles.)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1100 El Centro Street, South Pasadena, California 91030.

On this date, I served the foregoing document described as **OPENING BRIEF OF APPELLANT COUNTY OF LOS ANGELES** on the interested parties in this action by placing same in a sealed envelope, addressed as follows:

SEE ATTACHED SERVICE LIST

☒ (BY MAIL) - I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States mail in **South Pasadena**, California to be served on the parties as indicated on the attached service list. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at: South Pasadena, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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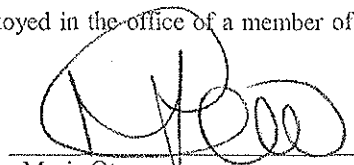
Executed on November 26, 2014 at: South Pasadena, California.

☒ (STATE) - I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ (FEDERAL) - I declare that 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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