No. S227106

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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

American Civil Liberties Union Foundation of Southern California and Electronic Frontier Foundation

Petitioners

vs.

Superior Court for the State of California, County of Los Angeles

Respondent

County of Los Angeles, Los Angeles County Sheriff's Department, City of Los Angeles, and Los Angeles Police Department,

Real Parties in Interest

AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS COUNTY OF LOS ANGELES ET AL.

After a Decision by the Court of Appeal, Second Appellate District, Division Three, Case No. B259392; Superior Court of the State of California, County of Los Angeles, Case No. BS143004, Honorable James C. Chalfant, Judge Presiding

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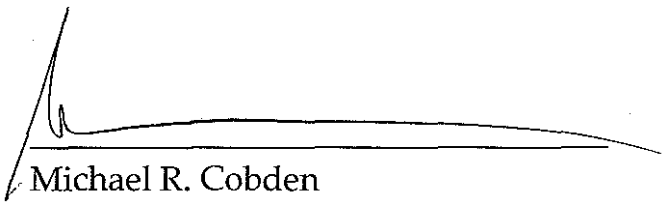
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no entities or persons that must be listed in this certificate under California Rules of Court, rule 8.208.

DATED:

COLANTUONO, HIGHSMITH & WHATLEY, PC



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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to rule 8.200(c) of the California Rules of Court, the League of California Cities ("League") and California State Association of Counties ("CSAC") respectfully requests permission to file an amicus curiae brief in support of Real Parties in Interest County of Los Angeles, et al. This application is timely made within 30 days after the filing of Petitioners' reply brief.

The League and CSAC represent cities and counties with substantial interest here because many of their police and sheriff's departments use automatic license plate reader (ALPR) technology. Such public safety departments will necessarily be affected by the outcome of this case, because the application of the California Public Records Act to the data those departments collect will have a profound impact on their daily operations.

The Court of Appeal's conclusion here reinforces a principle of substantial importance to the League, CSAC, and the public its members serve. Specifically, the opinion correctly applies this Court's prior decisions to ALPR technology to balance public safety, privacy, and the public's right to information about government activity. Reversal of the Court of Appeal would not only be contrary to the Legislature's recent adoption of SB 34 (chapter 532 of the Statutes of 2015), but would generally alter the application of the CPRA to law enforcement records and expose sensitive data to those

who might misuse it. If the Court adopts a new test requiring disclosure of data collected by technological means, it may force public agencies to stop using new technology in police investigations altogether. Such a test may also require costly and lengthy litigation for each significant new technology.

Amici's counsel have examined the parties' briefs and are familiar with the issues and the scope of the presentations. The League and CSAC respectfully submit that additional briefing would be helpful to clarify that recent legislation on ALPR technology confirms that the Court of Appeal correctly decided this case and that preserving the CPRA exemption for investigative materials is both legally correct and appropriately balances public safety, personal privacy, and public scrutiny of government.

Therefore, and as further amplified in the proposed brief, the League and CSAC respectfully request leave to file the brief combined with this application.

IDENTITY OF AMICI CURIAE AND STATEMENT OF INTEREST

The League of California Cities is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee

monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The California State Association of Counties is an association of California's 58 counties representing those public agencies before the California Legislature, administrative agencies, and the federal government. CSAC also provides educational programs to the public on the value and need for county programs and services. CSAC has a Litigation Coordination Program that is administered by the County Counsels' Association. The program is directed by the Association's Litigation Overview Committee, consisting of county counsels representing all areas of the state, in conjunction with a litigator coordinator in Sacramento. The program monitors litigation of concern to counties statewide, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

THE FACTS OF ALPR TECHNOLOGY

Amici generally adopt the statements of facts and of the case stated in the briefs of Real Parties LASD and LAPD. However, it is helpful to ground this brief in the facts of the technology in issue.

As noted in the parties' briefs, Automatic License Plate Reader ("ALPR") technology applies optical character recognition software to video and photo inputs from a camera to identify and record license plate information. The technology was first developed in

1976 at the Police Scientific Development Branch in the United Kingdom. (See McGrath, *The RPU officer, ANPR operator, road death/collision investigator and AFO,* Working in Policing, Ian Pepper (2011)].) The technology became more widespread in the 1990s, today approximately 71% of American police departments implement it to investigate crimes, and 85% of law enforcement agencies plan to increase their use of ALPRs in the next 5 years. ("How are Innovations in Technology Transforming Policing?" Police Executive Research Forum (January 2012) at pp. 1 and 2.)

The technology is not limited to police departments; other public agencies, such as toll bridge authorities, and private parties, such as shopping mall owners, use it for non-investigatory purposes.

In criminal investigations, the input usually comes from a video camera attached to a police vehicle, and the plate information is matched to the date, time, and GPS location of the camera. The system conducts an investigation by comparing all plates it sees to a "hot list" of vehicles associated with current criminal investigations. The system alerts officers in the vehicle to matches, allowing them to continue the investigation, as by approaching the identified vehicle. The system also records the plates it sees for use in future investigations. This larger list assists investigators by providing a record of where a suspect vehicle was at a given time, as can security cameras at ATMs and other places.

However, unlike a security camera, the ALPR system only records the license plate numbers, dates, times, and locations. It does not record names, photographs, or other personal information.

The Los Angeles Police Department ("LAPD") deploys ALPR technology on some police vehicles. It uses the resulting data to investigate cases involving auto thefts, missing children, and outstanding warrants. (Court of Appeal Slip Opinion ["Opn."] at p. 2; see also Exhibits to Petition for Writ of Mandate ["Exhs."] at Vol. 2, p. 427, ¶ 11.) As do many other agencies, LAPD also uses the data for future investigations of all kinds. It has developed policies and procedures for the use of ALRP technology and the data it produces.

STATEMENT OF THE CASE

On August 30 and September 4, 2012, petitioners American Civil Liberties Union Foundation of Southern California and Electronic Frontier Foundation (collectively "Petitioners") made requests of the Los Angeles Sherriff's Department ("LASD") and LAPD (collectively "Real Parties") under the California Public Records Act (Gov. Code § 6250 et seq. ("CPRA"))[1] for copies of:

> any policies, guidelines, training manuals and/or instructions on the use of ALPR technology and the use

[1] Unspecified statutory references are to the Government Code.

> and retention of ALPR data, including records on where the data is stored, how long it is stored, who has access to the data, and how [LAPD and LASD] access the data.

(Opn. at p. 4; see also Exhs., Vol. 1, pp. 90–91, 119–121.) The requests also sought a week's worth of ALPR data from each agency. (Opn. at p. 4.) LAPD and LASD produced the policies and guidelines, but withheld the requested data. (*Ibid.*; see also Exhs., Vol 1, pp. 115–116, 123–124.) Both cited section 6254, subdivision (f), which exempts records of law enforcement investigations from disclosure. (Exhs., Vol 1, pp. 115–116, 123–124.) The agencies also cited privacy concerns with publicly disclosing the dates and times of the locations of private vehicles. (Opn. at p. 3; Exhs., Vol 1, pp. 115–116, 123–124.)

Petitioners filed a verified petition for writ of mandate under the CPRA to compel production of the ALPR data. (Opn. at p. 4; Exhs., Vol. 1, p. 76.) LASD and LAPD opposed, citing section 6254, subdivision (f) and section 6255, the CPRA's general balance exception which exempts from disclosure records if "the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." (Exhs., Vol. 1, pp. 187–188, 395, 404, 417.)

Judge Chalfant tried the writ petition and entered an order denying the writ, citing both the CPRA's exemption for records of investigations under section 6254, subdivision (f) and the general

balancing exemption of section 6255. (Exhs., Vol. 1, pp. 1–18.) Petitioners petitioned the Court of Appeal for an appellate writ to compel Judge Chalfant to issue the writ directed to LAPD and LASD.

The Court of Appeal affirmed Judge Chalfant's decision in a published opinion, holding ALPR data subject to section 6254's exemption for records of investigations under this Court's precedent in *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, because the purpose of an ALPR system is "to assist in law enforcement investigations involving an identified automobile's license plate number." (Opn., at p. 10.) The Court of Appeal did not address section 6255. This Court granted review.

INTRODUCTION AND SUMMARY OF ARGUMENT

Effective January 1, 2016, law enforcement agencies, such as Real Parties here, cannot "share or transfer" "data collected through the use of an ALPR system." (Civ. Code §§ 1798.90.5, subd. (b), 1798.90.55, subd. (b).) This new statute, adopted with input from the ACLU, support's the Court of Appeal's affirmation of Judge Chalfant's reading of the CPRA to authorize the LAPD's and LASD's refusals to disclose ALPR data. This statute was not in effect when the records at issue here were requested, and it does not specifically reference the CPRA. However, it confirms that the

Legislature balances the interests of government transparency, personal privacy, and public safety as the lower courts did here.

In adopting section 6254, subdivision (f)'s investigatory exemption, the Legislature established a purposeful balance between government transparency on the one hand, and personal privacy and public safety on the other. The lower courts properly preserved that balance here, applying the framework this Court established in *Haynie v. Superior Court* (2001) 26 Cal.4th 1061 to determine whether this exemption applies to the particular records Petitioners seek.

Furthermore, the Legislature provided the general balancing test in section 6255 to ensure agencies could weigh competing public interests when responding to records requests. The LAPD and LASD properly balanced privacy interests against the need for public debate over new technology by releasing the policies governing that technology, but withholding the data that technology produces. In this way, the public may meaningfully debate the policies surrounding the use of ALPR technology and hold their governments accountable without exposing individuals to stalkers or other criminals. This is the same balance the Legislature struck in 2015's SB 34 (chapter 532 of the Statutes of 2015) ("SB 34"): policies must be revealed, but data remains private. The lower courts correctly concluded here that the balance of interests weighed in favor of withholding sensitive ALPR data.

Such data falls squarely within the "records of investigations" protected by section 6254 for several reasons. First, use of ALPR differs from "traditional" investigations only in scope. It is undisputed that "records of investigations" include notes taken by officers canvassing the vicinity of a crime and writing down license plate numbers observed there. Now a single officer does the same thing using a camera and a computer. Petitioners' position is that several humans with pens "investigate" but a single officer with a camera does not. (Petitioners' Opening Brief ("OB") at p. 28.) How can this be? Constitutional interests are intended to survive the centuries, not to come and go with each new technological change. Paper to audio tape to digital data are not necessarily constitutionally significant technological advances.

This Court has held that the proper test under the CPRA looks to the **purpose** for taking and keeping a record. (*Haynie, supra*, 26 Cal.4th at p. 1071.) ALPR data is not collected or retained for any purpose other than criminal investigations. Changing *Haynie*'s test to include analysis of the nature of the investigative technology is problematic. Such a test departs from the statutory text, but is also difficult to apply to a rapidly changing world. With each technological advance, law enforcement must consider whether its assistance goes "too far" to constitute investigation, exposing the resulting data to scrutiny by all. Such a rule would chill new investigative techniques, to the detriment of public safety.

Real Parties' voluntary production of the policies and procedures achieved Petitioners' purpose to inform public debate over the use of ALPR technology. (OB at p. 36 [purpose of requests is to inform public policy debate]; Exhs., Vol 1, pp. 115–116, 123–124 [policies were released].) That public debate is already well under way, as evidenced by the Legislature's recent adoption of SB 34. That statute requires publication of ALPR policies and public hearings before their adoption, but prohibits disclosure of APLR data. Again, this confirms the lower courts here found the right balance of the competing values at stake. Petitioners identify no purpose the data itself serves in that ongoing discussion. Does the debate over the wisdom and utility of this technology require that we know that Ms. Smith's car was at 5th and Main at 4 p.m. on Sunday, or that Mr. Jones' was on Broadway at 5 a.m.? Respectfully, Amici argue that the debate can be had without exposing the personal movements of particular individuals.

Petitioners' privacy concerns are not well served by the outcome they seek here. (OB at p. 37.) If ALPR data were publicly available, anyone might abuse it. Each scenario Petitioners describe in their brief would be multiplied 100-fold. Clever data miners could blackmail cheating spouses, enterprising burglars would know precisely when houses are unoccupied, and paparazzi could know the precise habits of their targets.

Petitioners may mistrust law enforcement, but it is absurd to think that the whole of the public is somehow less likely to exploit this data than police officers sworn to uphold the law. After all, police officers operate under supervision and oversight for adherence to strict policies and risk their livelihoods if they violate them. Those policies were recently strengthened by SB 34. In short, broad public disclosure of ALPR data harms both privacy and public safety, but adds little to government transparency. That the Legislature has the same view is plain from SB 34, which it adopted by large margins in both houses.

Petitioners would pit privacy interests against public safety overlooking that the CPRA values both. Indeed, the opening provision of that Act states:

> In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.

(§ 6250.) Thus, even before the fundamental purpose of transparent government is stated, the need to limit it to protect personal privacy is identified.

This Court need not wade into the privacy debate. As the City correctly observes, the proper forum to debate the balance of privacy and public safety is the Legislature, which has freshly addressed it

in SB 34. Furthermore, although Petitioners rely on search and seizure cases, there is no Fourth Amendment issue here — vehicle owners must display their license plates in public places to expose them to ALPR technology. Case law reflects longstanding regulatory exemptions to the prohibition on unreasonable searches and searches for license plate information on motor vehicles. Only construction of the CPRA is in issue here.

Ultimately, reversing the Court of Appeal would discourage new investigatory technologies. If more efficient investigations are no longer "investigations" under the CPRA, any new investigatory methods will create risk of litigation. That will reduce public safety services or, at least, make them more costly as the alternative will be to assign humans to do work that machines could do.

ARGUMENT

I. SB 34 EXPRESSLY PROHIBITS DISCLOSURE OF ALPR DATA

Petitioners' primary purpose for seeking disclosure of ALPR data is that it is necessary for a public debate over the use of the technology in law enforcement. (OB at p. 39.) However, as page 42 of Petitioners' Opening Brief admits, the public debate on ALPR technology is well under way. Because the Real Parties raised this issue in their Answer Briefs, Petitioners' Reply finally confronts the fact that in SB 34, the Legislature has freshly struck the balance of

the competing interests here, providing that law enforcement agencies must adopt policies to govern ALPR technology after public hearings and must make those policies public, too, **but may not release ALPR data**. (Civ. Code §§ 1798.90.5, subd. (b) and 1798.90.55, subd. (b) [public agencies may not "share or transfer" "data collected through the use of an ALPR system."].)[2] Significantly, the ACLU provided the Legislature the same statistics and arguments they present here. (See Motion for Judicial Notice ("MJN") filed concurrently with this Brief, Exh. B, pp. 4 and 5 [Senate Floor Analysis].) Effective January 1, 2016, SB 34 amended Civil Code, sections 1798.29 and 1798.82, and adopted sections 1798.90.5 – 1798.90.55 of that same code. These sections require public and private operators of ALPR technology to adopt and maintain security procedures and practices and to strictly limit use of the resulting data. Thus, Petitioners' privacy concerns have been addressed by the Legislature, which concluded that ALPR data should be exempt from disclosure under the CPRA. Although SB 34 does not reference the CPRA's investigative records exemption in the CPRA, its prohibition on release of ALPR data forcefully supports the lower courts' readings of section 6254, subdivision (f) here.

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[2] For the Court's convenience, a full copy of SB 34 is included in the MJN as Exhibit A. The relevant sections are found on pages 33 and 36.

SB 34 applies to any person or agency — public or private — who or which uses ALPR technology. (Civ. Code § 1798.90.5, subds. (c) & (e).) All ALPR operators must develop and implement security procedures and practices and a policy governing the use of the technology. (Civ. Code § 1798.90.51, subds. (a) & (b).) Such policies must be posted publicly, including on operators' websites. (Civ. Code § 1798.90.51, subd. (b)(1).) Such policies must protect the privacy of ALPR data. For instance, they must describe the specific purposes for which data may be accessed, the qualifications and training of personnel authorized to do so, monitoring to ensure "security of the information and compliance with applicable privacy laws," restrictions on sharing or transfer of the data, retention periods, and error correction. (Civ. Code § 1798.90.51, subd. (b)(2)(A) – (G).) In answer to Petitioners' privacy concerns, SB 34 requires any ALPR operator, public or private, to vigilantly protect the privacy of those whose information he holds. (Civ. Code § 1798.90.51, subd. (b)(2)(A) – (G); see also §§ 1798.90.52 and 1798.90.53.)

Furthermore, each access of the data must be recorded, including the date, time, data accessed and who accessed the data. (Civ. Code § 1798.90.52.) All who access such data ("ALPR end-users") must adopt and follow similar usage and privacy policies. (Civ. Code § 1798.90.53.) Thus if Petitioners were to request from a non-public ALPR operator data similar to what they seek here, they

would first need to demonstrate that they have sufficient usage and privacy policies in place to protect the data.[3]

Finally, "[a] public agency shall not sell, share, or transfer ALPR information, except to another public agency, and only as otherwise permitted by law." (Civ. Code § 1798.90.55, subd. (b).) In other words, LASD and LAPD cannot "share or transfer" "data collected through the use of an ALPR system." (Civ. Code §§ 1798.90.5, subd. (b) and 1798.90.55, subd. (b).) Petitioners' reply asserts that the Legislature's enactment of SB 34 "creates no new exemption to the [C]PRA" because it does not expressly adopt findings supporting "a new limit on the public's right of access to government records" as required by Proposition 59. (Reply at p. 35.) Petitioners fail to recognize that SB 34 is a reaffirmation of the application of an existing exemption — section 6254, subdivision (f) — to ALPR technology.

This new statutory requirement informs construction of the CPRA by demonstrating that the Legislature understood that ALPR data was exempt already. Why prohibit disclosure of public agency ALPR data under the Civil Code if that data must be generally disclosed under the CPRA? Petitioners note the lack of express

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[3] Petitioners would need to seek the data from a non-public ALPR operator because SB 34 prohibits public agencies from disclosing the data to private entities. (Civ. Code § 1798.90.55, subd. (b).)

legislative findings and note that the Legislature is well aware of the need to do so **when adopting a new exemption.** (Reply at p. 36)

There is no question that the Legislature was specifically concerned with privacy and limiting public access to ALPR data in enacting SB 34. (See MJN, Exh. B, pp. 2 and 4 [Senate Floor Analysis].) Petitioners' suggestion, on page 37 of the Reply Brief, that SB 34 "does not suggest an intent to limit public access to ALPR data" is plainly belied by the text and legislative history of the bill. (See, e.g. Civ. Code §§ 1798.90.5, subd. (b) and 1798.90.55, subd. (b) [public agencies prohibited from disclosing ALPR data to the public] and see MJN, Exh. B, pp. 2 and 4 [author's intent to protect privacy concerns raised in part by ACLU].) Given the Legislature's patent intent to limit public access to ALPR data, we must infer that the Legislature did not consider SB 34 to be adding a **new** exemption to the CPRA.

The Legislature, after all, is aware of the decisions of the courts. (*Viking Pools, Inc. v. Maloney* (1989) 48 Cal.3d 602, 609 ["We generally presume the Legislature is aware of appellate court decisions."].) Thus the Legislature was aware of this Court's approach to the CPRA in *Haynie* and *Williams v. Superior Court* (1993) 5 Cal.4th 337 ("*Williams*"). Therefore this Court may presume that the Legislature concluded, as did the trial and appellate courts here, that ALPR data fell within the investigative records exemption of the CPRA, and therefore SB 34 added nothing new to the CPRA.

Petitioners' position is instead that SB 34's express prohibition on Real Parties' disclosure of ALPR data was an exercise in ignorant futility. To reach Petitioners' conclusion, that the enactment of Civil Code section 1798.90.55, subdivision (b) was just so much spilled ink, this Court would have to assume either (1) that the Legislature was unaware of its duty to make express findings for a new limitation on access to records, or (2) that the Legislature drafted surplusage. Petitioners disproved the former possibility. (Reply at p. 36.) And this Court has generally rejected assuming the latter. (See, e.g. *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735, 248 ["An interpretation that renders related provisions nugatory must be avoided [citation]; each sentence must be read not in isolation but in the light of the statutory scheme [citation]; and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed."].)

Finally, reversing the Court of Appeal here would impliedly repeal — by judicial decision — Civil Code section 1798.90.55, subdivision (b) ("[a] public agency shall not sell, share, or transfer ALPR information, except to another public agency, and only as otherwise permitted by law."). This Court should avoid interpreting the CPRA in any way that is inconsistent with this more recent enactment. (See *Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4th 557, 573 ["the most recently enacted statute expresses the will of the Legislature"], as modified (Mar. 11, 2009).)

Even aside from the express prohibition on releasing ALPR data, SB 34 creates potential civil liability for release of ALPR data, which may extend to disclosures under the CPRA. (Civ. Code section 1798.90.54 [providing potential civil liability for knowingly causing harm by unlawful release of data].) If Real Parties released the data sought by Petitioners here, they would be violating numerous statutory requirements to protect the data and the privacy interests of those whose activities are revealed by the data. Real Parties would likely face lawsuits from many individuals whose information was contained in the data. Do Petitioners suggest this Court graft additional language onto SB 34 addressing this potential issue? This Court could avoid the problem by concluding that the Legislature's intent in drafting the investigative records exemption was consistent with its intent in drafting SB 34, and affirming the Court of Appeal.

The adoption of SB 34 demonstrates that robust public debate about ALPR technology does not require disclosure of ALPR data. Such data adds little to understanding of the technology — and at great cost to the privacy of those whose data is to be revealed.

Nor need this Court reprise a debate the Legislature has resolved. That the Legislature entertained that debate is clear. For example, SB 34's author states he proposed it to address ACLU's privacy concerns. (MJN, Exh. B, p. 4 [Senate Floor Analysis].) The bill received support from the Bay Area Civil Liberties Coalition and

the California Civil Liberties Council. (*Id.* at p. 6.) In short, SB 34 counsels affirmance here. The Legislature has freshly prohibited the relief Petitioners seek, which demonstrates the Legislature's balance of interests matches the analysis of the courts below, and confirms this Court's approach to the CPRA in *Haynie* and *Williams.* Finally, it shows the Legislature can and will address the unique challenges of new technology and that the courts can confidently apply existing statutory frameworks without fear of legislating by doing so. (Cf. *Apple, Inc. v. Superior Court* (2013) 56 Cal.4th 128, 137 ("*Apple*").)

II. THIS CASE PRESENTS A LEGAL ISSUE, WHICH PETITIONERS FRAME AS A POLICY QUESTION

If this Court opines on the statutory question here apart from the implications of SB 34, the question to be resolved is plain: Are ALPR data "records of investigations" within the meaning of section 6254, subdivision (f)?

Amici urge this Court to maintain *Haynie*'s reading of that phrase, not only because it is correct, but also because it serves the Legislature's purpose as to ALPR data just as well as for older forms of investigative records, as SB 34 demonstrates. Moreover, establishing a definition of "records of investigations" that distinguishes between human and technology-aided data gathering will discourage innovation in law enforcement, impoverishing both public safety and the public fisc.

The canons of statutory construction are well settled: in interpreting statutory language, "[this Court] begin[s] with the fundamental rule that our primary task is to determine the lawmakers' intent." (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798.) The primary indicator of intent is the words of the statute. (*Ibid.*) The Legislature's chosen language is the most reliable indicator of its intent because "'it is the language of the statute itself that has successfully braved the legislative gauntlet.'" (*California School Employees Assn. v. Governing Board* (1994) 8 Cal.4th 333, 338; see also *Williams, supra*, 5 Cal.4th at p. 350 ["[t]he statutory language, of course, is the best indicator of legislative intent."])

This Court gives statutory terms "a plain and commonsense meaning" unless the statute provides a special meaning. (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 577.) If statutory language is clear and unambiguous, there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature...." (*Lungren, supra*, 45 Cal.3d at p. 735.)

Section 6254, subdivision (f) exempts from disclosure under the CPRA:

> Records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of ... any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or

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

(§ 6254, subd. (f).)

The City's brief amply demonstrates that the terms of this statute are clear, as is its meaning here: ALPR data are "records of an investigation" because they result from the use of ALPR to investigate specific crimes and because use of the data is limited to criminal investigations.

In enacting the CPRA and its exemptions, the Legislature necessarily balanced competing public interests in governmental transparency, privacy and the contribution to public safety of effective criminal investigations. (§ 6250 [purpose of CPRA to enhance public disclosure while protecting privacy].) There is no need to re-weigh those policies here, as Petitioners would. Furthermore, if ALPR presents new challenges not considered when section 6254 was enacted, the Legislature has considered them in adopting SB 34 less than a year ago. This Court need only interpret the statute; it need not make new policy.

The essential question, then, is whether Real Parties' ALPR data were "[r]ecords of ... investigations conducted by ... [a] local police agency, ... for ... law enforcement ... purposes." (§ 6254, subd. (f).) The ordinary meaning of "investigate" is:

> To try to find out the facts about (something, such as a crime or an accident) in order to learn how it happened, who did it, etc.;
>
> To try to get information about (someone who may have done something illegal).

(Merriam Webster Online definition of "investigate" at <http://www.merriam-webster.com/dictionary/investigate> (last viewed Apr. 2, 2016).)

Petitioners do not contest that the LAPD and LASD gather ALPR data for "law enforcement purposes." (OB at p. 7.) Rather, they argue the efficiency of ALPR systems is no longer "investigatory" because it surpasses human capability. (OB at p. 28.) However, they offer no basis to define "investigation" as limited to what unassisted humans may do — they cite neither dictionaries, not this Court's prior interpretations of the statute. Moreover, such a rule would allow criminals to engage new technologies, while discouraging law enforcement's use of that same technology.

The Court of Appeal's opinion, on the other hand, is consistent with the ordinary meaning of "investigation" and this Court's precedent. In *Haynie*, this Court held the "investigations" referenced in section 6254 to include gathering data to determine whether a crime has occurred as well as to identify the culprit. *Haynie* involved a traffic stop following a report of suspicious activity. Haynie and his passengers were detained but ultimately

released. Haynie sued the agency which detained him for excessive force and sought records under the CPRA.

This Court held the investigation exemption applies to routine police work even if charges do not result. This, of course, reflects the language of section 6254(f), which applies to records of "investigations undertaken for the purpose of determining whether a violation of law may occur or has occurred." (*Haynie*, *supra*, 26 Cal.4th at p. 1071.)

Here, ALPR data is collected to locate or apprehend persons suspected of or sought for crimes; i.e., "for the purpose of determining whether a violation of law ... has occurred." (*Haynie*, *supra*, 26 Cal.4th at p. 1071.) One possible lead the police may have to help solve the crime is the license plate number of a suspect. It is thus well within the exception as this Court interpreted it in *Haynie*. That the investigation involves cameras and computers, rather than unaided human observation, does not change the legislative intent. (See *Apple, supra*, 56 Cal.4th at p. 137 [applying Song-Beverly Credit Card Act of 1971 to internet purchases].)

Petitioners do not assert a human performing the same action — reading a license plate and comparing it to a list of suspect vehicles — would fall outside section 6254, subdivision (f)'s definition of "investigation." Yet, they argue, ALRP technology does. (OB at p. 28.) The limit they urge is reflected in neither section 6254, subdivision (f)'s language nor in *Haynie*'s interpretation of that

language. Nor does the limit they seek reflect good public policy. It seems to bring an investigative technique within section 6254, subdivision (f) only if it is not too effective, applying some ill-defined subjective standard. Under such a standard would an investigatory tool be acceptable if used by Barney Fife, but not by the LAPD and LASD?

In *Williams*, this Court refused to add language to the CPRA the Legislature did not include. There, San Bernardino deputy sheriffs injured a suspect during an arrest. A newspaper sought records of the resulting internal discipline proceedings. The Sheriff asserted the requested records were investigatory records exempt from disclosure under section 6254, subdivision (f). (*Williams, supra,* 5 Cal.4th at p. 343.)

The Court of Appeal in *Williams* read into section 6254, subdivision (f) restrictions derived from the federal Freedom of Information Act. (*Williams, supra,* 5 Cal.4th at p. 345.) This Court reversed:

> In drafting subdivision (f) the Legislature expressly imposed several precise limitations on the confidentiality of law enforcement investigatory records. Clearly the Legislature was capable of articulating additional limitations if that is what it had intended to do.

(*Williams, supra,* 5 Cal.4th at p. 350.) This Court also rejected argument the exemption afforded by section 6254, subdivision (f) is limited to the pendency of an investigation. (*Williams, supra,* 5 Cal.4th at pp. 361–362.)

Thus, *Williams* demonstrates the CPRA's language controls, and courts may not add restrictions not adopted by the Legislature. The Court of Appeal followed that approach here, and interpreted the words of the statute without adding to them. This Court can therefore affirm.

Petitioners would add language to the statute to distinguish investigations aided by technology from others. (OB at pp. 28, 32.) Had the Legislature intended such a limitation, it would have done so in section 6254 subdivision (f) or in last year's SB 34. Petitioners' position is thus inconsistent with this Court's decision in *Williams*.

Petitioners suggest that the framers of the CPRA could not have envisioned ALPR technology when they drafted the investigative records exception. (OB at pp. 31–32.) However, that is no barrier to applying the CPRA's plain language to new technology:

> In construing statutes that predate their possible applicability to new technology, courts have not relied on wooden construction of their terms. Fidelity to legislative intent does not "make it impossible to apply a legal text to technologies that did not exist when the

> text was created.... Drafters of every era know that technological advances will proceed apace and that the rules they create will one day apply to all sorts of circumstances they could not possibly envision."

(*Apple, supra,* 56 Cal.4th at p. 137, quoting Scalia & Garner, Reading Law: The Interpretation of Legal Texts (2012) pp. 85–86.) The Legislature wisely framed the exception in issue here in terms of investigatory **purpose**. (*Haynie, supra,* 26 Cal.4th at p. 1071.) Thus, the legislators knew "the rules they create[d] will one day apply to" new forms of investigative technology. (Scalia & Garner, *supra,* at pp. 85–86.) The broad, simple, and inclusive language the Legislature used to describe the investigation exception simply will not support the limits Petitioners would find there.

This is no academic exercise in reciting and applying canons of construction. Cities and Counties must be able to rely on the ordinary meaning of statutory terms. Local governments can ill afford uncertainty in developing technology for law enforcement or policies for records retention. If this Court were to accept Petitioners' invitation to graft unwritten limits onto section 6254, subdivision (f), the meaning of the CPRA itself will be more uncertain with each new technological advance. This Court should preserve the balance it struck in *Haynie* (and also the one struck in SB 34) — ALPR policies are public record, but data collected using that technology need not be disclosed.

III. THIS COURT SHOULD PRESERVE THE BALANCE ITS PRIOR DECISIONS STRUCK

Under *Haynie*, the touchstone for the investigative records exception is the **purpose** for creating the record. Records of "investigations undertaken for the purpose of determining whether a violation of law may occur or has occurred" are exempt from disclosure. (*Haynie, supra,* 26 Cal.4th at p. 1071.) This standard not only reflects the language of the statute, but supports the legislative policy: criminal investigations need not be compromised to achieve transparency in government; nor need personal privacy. Focusing on the purpose for which documents are produced distinguishes information collected to detect crime and to identify perpetrators from that collected to serve administration or organizational activities of a law enforcement agency. Disclosing the latter serves public debate without compromising public safety, while disclosing the former undermines public safety while adding little to public control of government.

This case presents the distinction well. The **policies** governing ALPR are administrative and their disclosure promotes open discourse about how law enforcement collects and uses information. Those who oppose this investigative technique can scrutinize the policies and debate their merits— as the ACLU has done before the Legislature — without compromising any particular investigation or publishing private details about individuals. On the other hand,

disclosure of APLR **data** does very little to aid understanding of government conduct. What will the data show that the policies do not? The routes taken by the officers perhaps (something criminals would value), but otherwise ALPR data is the very information Petitioners assert should be private. (OB at pp. 36–40.) Disclosure of that data disserves both the values of privacy and public safety the Legislature carefully balanced in section 6254, subdivision (f). This is the balance struck in SB 34 as well: policies are to be made public and open to debate, while data is to remain private, allowing public oversight of government while protecting privacy and enabling law enforcement. (Civ. Code §§ 1798.90.55, subd. (a) and (b).)

Thus the lines drawn by the CPRA, as interpreted by this Court to date, preserve the Legislature's balance of public access to policies governing law enforcement, personal privacy, and public safety. SB 34 confirms this balance as to ALPR data. The Court of Appeal's opinion is consistent with this approach, and should therefore be affirmed.

Perhaps because of the paucity of support for their position in the CPRA and its case law, Petitioners cite Fourth Amendment cases. However, the balance of policy interests under the Fourth Amendment is fundamentally different from that of the CPRA.

> The Fourth Amendment requires an analysis of the "reasonableness" of a government intrusion into individual privacy: "The touchstone of the Fourth

> Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'"

(*People v. Sanders* (2003) 31 Cal.4th 318, 333, quoting *U.S. v. Knights* (2001) 534 U.S. 112, 118.)

Fourth Amendment cases examine the degree to which technology aids human investigations to determine whether an investigation is "reasonable". (See *Kyllo v. U.S.* (2001) 533 U.S. 27, 34 [warrantless thermal imaging of home unreasonable because it revealed information otherwise unavailable without entering home].) Under the CPRA, however, this Court must determine whether the records were gathered for an "investigative purpose." (*Haynie, supra,* 26 Cal.4th at p. 1071.)

These different standards reflect the differing language and goals of the Fourth Amendment and the CPRA. The Fourth Amendment's text speaks to "unreasonable" searches, and by implication "reasonable expectation of privacy"; section 6254, subdivision (f) refers to the purposes for which data is collected, not the manner of the collection. The Fourth Amendment asks "how?" This is why the Fourth Amendment cases are so preoccupied with technological advances: the question of how a search is performed is

fundamentally about method. Section 6254, subdivision (f) asks, "why?" This is why the CPRA applies to pen and paper in the same way it applies to ALPR data: purpose transcends method.

The balances of interests are different as well. The Fourth Amendment balances **privacy** against **law enforcement efficacy**. (*Knights*, *supra*, 534 U.S. at p. 118.) The CPRA balances **transparency** against **privacy** (§ 6250) and **law enforcement efficacy** (§ 6254). Case law frames two fundamentally different tests because the statutes they construe differ fundamentally. Accordingly, that Petitioners' Fourth Amendment authorities are of no help here.

Furthermore, ALPR is not a "search" under any standard. There is no expectation of privacy in a license plate on a vehicle in a public place, whether viewed by naked eye or by an ALPR camera. (E.g., *United States v. Ellison* (6th Cir. 2006) 462 F.3d 557, 561 ["a motorist has no reasonable expectation of privacy in the information contained on his license plate."].) Fourth Amendment case law has long recognized the diminished expectations of privacy in vehicles and identifying data like license plates and vehicle identification numbers. (E.g., *U.S. v. Grandstaff* (9th Cir. 1987) 813 F.2d 1353, 1358, fn. 6 ["There is little, if any, reasonable expectation of privacy in the identity of one's vehicle. [Citation]. … Moreover, motor vehicles must display license plates, which law enforcement officials can use to determine registered ownership."].)

Nor is the location or route of a vehicle private on public streets. (E.g., *U.S. v. Knotts* (1983) 460 U.S. 276, 281 ["A person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another."]; but see *U.S. v. Jones* (2012) __ U.S. ___, 132 S. Ct. 945, 949 [warrantless use of a GPS tracking device on vehicle unreasonable under Fourth Amendment because "The Government physically occupied private property for the purpose of obtaining information."].)

Even under Fourth Amendment standards, Petitioners' argument fails to persuade. There is nothing about ALPR technology which is not already visible to the naked eye. Unlike the GPS device in *Jones*, ALPR is not a physical occupation of private property. (*Jones, supra,* 132 S.Ct. at p. 949.) Furthermore, ALPR does not track one individual beyond what a police officer might observe — it efficiently captures all the data available to the human eye at one place and time. (*Knotts, supra,* 460 U.S. at p. 281.) Thus the Fourth Amendment does not require undermining the Court of Appeals' construction of the CPRA here.

Petitioners' privacy concerns are, fundamentally, a policy argument; one they have addressed to the Legislature with meaningful success. Yet, the Legislature concluded, reasonably, that privacy warrants denying public access to APLR data.

IV. ALPR DATA IS ALSO EXEMPT UNDER SECTION 6255'S GENERAL BALANCING EXEMPTION

Although the Court of Appeal did not address it, Judge Chalfant also found the LASD and LAPD properly withheld ALPR data under the general balancing exemption of section 6255. Under that section, public agencies may withhold a record if "the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record."

The Court of Appeal recently addressed section 6255, writing:

> Under section 6255, an agency's public interest showing about the reasons for nondisclosure, as opposed to disclosure, may be considered along with the factors supporting the desired request. The overriding issue is "whether disclosure would contribute significantly to public understanding of government activities."

(*Fredericks v. Superior Court* (2015) 233 Cal.App.4th 209, 234; quoting *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, 1324.)

"The weight of that interest is proportionate to the gravity of the governmental tasks sought to be illuminated **and the directness with which the disclosure will serve to illuminate**." (*Citizens for a Better Environment v. Department of Food & Agriculture* (1985) 171 Cal.App.3d 704, 715, emphasis added.)

The public interest in withholding ALPR data is at least two-fold. First, the public has an interest in preventing publication of information regarding where individuals go and when; this sort of information could be used for a wide range of nefarious purposes, as discussed above and in Petitioners' Opening Brief (at p. 28). Second, the public has an interest in the efficacy and integrity of law enforcement. Hampering the use of ALPR —as forced disclosure of ALPR data would surely do — might prevent solution of a murder or recovery of a missing child. At the very least, discouraging ALPR technology would make law enforcement more costly.

The public interest in disclosing raw ALPR data is public scrutiny of government conduct. (*Fredericks, supra,* 233 Cal.App.4th at p. 234.) The weight of this interest, then, derives from the nature of the information. (*Citizens for a Better Environment, supra,* 171 Cal.App.3d at p. 715; see also *Connell v. Superior Court* (1997) 56 Cal.App.4th 601, 616.) The issue is "whether disclosure would contribute significantly to public understanding of government activities." (*City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008, 1018; *County of Santa Clara, supra,* 170 Cal.App.4th at p. 1324.)

Although there is no doubt that the gravity of police investigations is significant, release of ALPR data provides almost no understanding of police practices that release of ALPR policies does not achieve. A list of license plate numbers with corresponding dates, times, and locations only minimally contributes to

understanding of investigators' use of ALPR technology. It discloses nothing not revealed by the policies and practices disclosed here and now required to be disclosed under SB 34. Thus, disclosure of ALPR data would not contribute significantly to public understanding of government conduct. (*City of San Jose, supra,* 74 Cal.App.4th at p. 1018.) The public interests in withholding ALPR data (privacy and effective law enforcement investigations) significantly outweigh the limited public interest in disclosing ALPR data and policies rather than policies alone.

V. COMPARISONS TO BODY CAMERAS ARE INAPT

Petitioners question whether the Court of Appeal's analysis here would exempt police-worn body camera footage from disclosure. (OB at p. 44.) The comparison is inapt. Body cameras may serve multiple purposes beyond investigation of crime, including training, risk management, civilian oversight, and performance evaluation. Under *Haynie*, which focuses on the purposes for which the record is made, the analysis would be fundamentally different from the Court of Appeal's discussion here. A court may well conclude under *Haynie* that body camera footage is not collected primarily for the purposes of investigations, and therefore is not generally exempt from disclosure under the CPRA's records of investigations exemption. However, depending on the agency's policy and the record before a court, body cameras may be

used primarily — or even exclusively — for investigations. Furthermore, placement of body camera footage in an investigation file would exempt it from disclosure, even if it would otherwise be subject to disclosure. (See § 6254, subd. (f); *Williams, supra*, 5 Cal.4th at pp. 361–362.) Investigation files often contain information that, apart from their relevance to an investigation, are subject to disclosure. A marriage license is a public record, but its use in an investigation to identify a bigamist requires confidentiality to achieve the law enforcement end.

In any event, Petitioners' concerns over access to body cameras are unaffected by the outcome here and courts should decide important questions of public policy one case at a time. Furthermore, the Legislature has recently addressed this issue as well. Last year's AB 69 (chapter 461 of the Statutes of 2015) recently added section 832.18 to the Penal Code to require consideration of best practices for usage and retention of data from body cameras. That the Legislature has proceeded deliberately to address this complex subject suggests this Court need not rush to address it.

Ultimately, ACLU's analogy of ALPR data to body camera footage demonstrates why the challenge of balancing privacy, public safety, and transparency is best left to the Legislature, especially as to emerging technologies. Courts necessarily look backward to precedent, rather than forward, and therefore possess fewer tools to address the new and the next, and to strike the appropriate balance

among competing public values. As SB 34 and AB 69 show, the Legislature is up to the task of addressing new technology and the challenges it may pose. This Court need not displace it.

VI. PETITIONERS OFFER NO USEFUL STANDARD FOR DECISION

Petitioners express discomfort with ALPR technology and its widespread use by law enforcement. However, this Court should decline to condemn police technology. Instead it may find guidance in SB 34 and maintain the *Haynie* standard. Our Constitution does not demand government eschew new technologies or that law enforcement techniques remain rooted in the 19th Century when California's Constitution was framed. Far less do our statutes require it.

Enhancing human abilities is not inherently problematic. No one doubts the benefits of technology ranging from reading glasses to word processors. Petitioners suggest that the investigative records exception does not apply to ALPR because it captures and processes more information more quickly than could one officer. (OB at p. 28.) Yet a Google search also captures and processes far more information than could a single person. Do Petitioners suggest a rule excluding search results from the investigative records exemption? Creating an arbitrary rule regarding technology is problematic; evaluating the benefits and challenges of any given technology in light of current information and expected developments is the best

approach. This is essentially a legislative task, and one the Legislature has already undertaken with respect to ALPR technology — and body cameras.

In essence, Petitioners argue technology is palatable only if it is less helpful than are ALPR systems. Any rule which distinguishes technologies based on the extent to which they aid human perception is unworkable under the CPRA's investigative exemption. Significantly, Petitioners offer no threshold to apply the investigatory exemption. Would a system be sufficiently "investigatory" if limited to analyzing 100 license plates? 20?

Petitioners' argument, taken to its logical conclusion, calls into question the applicability of the investigative records exception to virtually every aspect of police work. Is an officer's internet or database search not "investigatory" merely because a single officer cannot easily search millions of documents for references to a victim or suspect? Are an officer's reports not "investigatory" if prepared using a word processor, which allows for faster writing and reproduction of information than could a human alone? Are breathalyzer results or trained dogs not "investigatory" because the device can detect alcohol far more accurately than any human nose? Petitioners' argument dissolves the exception entirely.

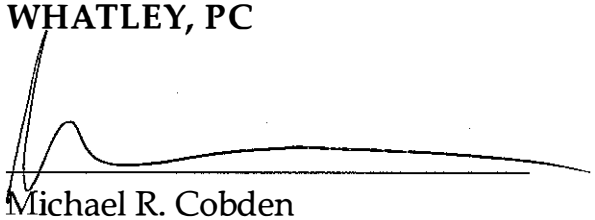
CONCLUSION

The Legislature has definitively prohibited the relief Petitioners seek here. The Court of Appeal correctly applied this

Court's precedent and well-established canons of statutory construction to conclude that ALPR data are exempt from disclosure under the CPRA as investigatory records. *Haynie*'s purpose test correctly identified legislative intent to exempt records created to investigate crime. Furthermore, SB 34 confirms that the Court of Appeal's opinion appropriately balances the competing values of government transparency, personal privacy and public safety. To the extent that balance bears reconsideration, the Legislature is more than up to the task.

DATED:

COLANTUONO, HIGHSMITH & WHATLEY, PC



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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), the foregoing Brief of Amicus Curiae in Support of Respondent contains 7,964 words, including footnotes, but excluding the caption page, tables, Certificate of Interested Entities or Persons, the Application for Leave to File, and this Certificate. This is fewer than the 14,000 word limit set by rule 8.204(c)(1) of the California Rules of Court. In preparing this certificate, I relied on the word count generated by Word version 15, included in Microsoft Office 365 ProPlus 2013.

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PROOF OF SERVICE

ACLU Fnd. of So. California, et al. v. Superior Court of California, et al.
Supreme Court Case No. S277106
Court of Appeal 2nd DCA Case No. B259392
Los Angeles County Superior Court Case No. BS143004

I, Ashley A. Lloyd, declare:

I am employed in the County of Nevada, State of California. I am over the age of 18 and not a party to the within action. My business address is 420 Sierra College Drive, Suite 140, Grass Valley, California 95945-5091. On April 29, 2016, I served the document(s) described as **AMICUS BRIEF IN SUPPORT OF REPONDENTS COUNTY OF LOS ANGELES, ET AL.** on the interested parties in this action as by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED LIST

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

Executed on April 29, 2016, at Grass Valley, California.

Ashley A. Lloyd

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