Case No. S227106

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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

Petitioners,

v.

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

Respondent,

COUNTY OF LOS ANGELES, and the LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, and the CITY OF LOS ANGELES, and the LOS ANGELES POLICE DEPARTMENT,

Real Parties in Interest.

After a Decision by the Court of Appeal,
Second Appellate District, Division Three, Case No. B259392
Los Angeles County Superior Court, Case No. BS143004
(Hon. James C. Chalfant)

PETITIONERS' REPLY BRIEF

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INTRODUCTION

When the Legislature adopted the Public Records Act in 1968 and created an exemption in Government Code § 6254(f) for "[r]ecords of complaints to, or investigations conducted by, or records of intelligence information or security procedures of . . . any state or local police agency," did it intend the word "investigations" to mean the targeted police inquiries into specific criminal activity, from murder cases to traffic stops? Or did it mean the term more broadly to include even the use of automated, discretionless technologies like automated license plate readers ("ALPRs"), which have been used by the police to amass an enormous database of license plate and location information on all Los Angeles drivers?

Petitioners in their Opening Brief present a straightforward argument: the scope of the Public Records Act ("PRA") exemption for "[r]ecords of… investigations" by law enforcement cannot be settled merely by resorting to dictionary definitions of the term "investigation," which may be read broadly to mean any inquiry or narrowly to mean a targeted inquiry into a particular crime or suspect. Other factors require reading the term to mean a targeted inquiry, including the structure of § 6254(f), which provides for the release of specific information around incidents and arrests; the use of "investigation" as a term of art in law enforcement; and judicial opinions interpreting the provision, which have universally involved targeted inquiries. Perhaps most importantly, the California Constitution's mandate to construe the Public Records Act in favor of disclosure requires reading the provision narrowly in the absence of clear evidence of legislative intent to the contrary. Cal. Const. Art. I,

§ 3(b)(2).

The City and County[1] do not fundamentally dispute that the statutory language is susceptible to both broad and narrow construction. They draw analogies to statutes from other jurisdictions with very different text, to technologies with very different capabilities, and to factual situations that are clearly targeted. They also cite broad language from this Court's opinions that does not address the question in this case. But they fail to demonstrate clear legislative intent for a broader reading, as the Constitution would require.

Because Real Parties cannot demonstrate that the Legislature clearly intended the exemption for "[r]ecords of . . . investigations" in § 6254(f) to reach mass, indiscriminate collection of license plate and location data by ALPRs, this Court must construe the exemption narrowly and reverse the Court of Appeal.

ARGUMENT

I. Real Parties Have Failed to Rebut Petitioners' Argument that an "Investigation" is a Targeted Inquiry, Not the Mass, Indiscriminate Collection of Data

A. *Statutory Interpretation Supports a Narrow Reading of the Term "Investigation"*

Neither the County nor the City has successfully rebutted Petitioners' argument that the term "investigation" as used in § 6254(f) is properly interpreted as a focused inquiry by police into a suspected crime, or an individual suspected of crime, rather than mass, indiscriminate

[1] Petitioners refer to Real Parties in Interest City of Los Angeles as the "City," County of Los Angeles as the "County," and the two together as "Real Parties."

collection of data. This interpretation is in keeping with both dictionary definitions and the use of "investigation" as a term of art by law enforcement meaning inquiry into specific crimes. *See* Pet. Opening Br. at 13 (citing *inter alia* Black's Law Dict. (9th ed. 2009) (defining "investigate" as "to make (a suspect) the subject of a criminal inquiry… To make an official inquiry.") & 14-15 n.21 (citing Los Angeles Police Department and Los Angeles Sheriff's Department manuals).

Both the City and County offer alternative definitions of "investigation" that are much broader and not limited to a targeted inquiry. County Ans. at 8-9; City Ans. at 9. But the fact that there may be other possible constructions of the statute does not mean the statute is clear, as Real Parties suggest. A statutory provision that is susceptible of two reasonable interpretations is ambiguous, and courts look to legislative history and other tools of statutory construction to determine its scope. *People v. Dieck* (2009) 46 Cal.4th 934, 940; *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1190. Neither the City nor the County has shown that Petitioners' definition of the term is out of step with dictionary definitions or is any different from how either the Legislature understood the term when it drafted § 6254(f) or how this Court understood the term in past cases.

Moreover, Real Parties' proffered definitions of "investigation" are so broad they would encompass not just a traffic stop or a murder investigation, but many activities the Legislature could not have intended to exempt, such as a review of best practices for use-of-force policies and trainings; the collection of crime statistics to study crime patterns and

effective deployment; or the bidding process for new law enforcement technology.[2] Such a broad interpretation would be at odds with this Court's instruction that the exemption does not "shield everything law enforcement officers do from disclosure." *Haynie v. Super. Ct.* (2001) 26 Cal.4th 1061, 1071.

The City argues that the language of § 6254(f) shows the Legislature's intent to create a "broad" investigation exception, City Ans. at 22, but it makes that assertion based solely on the fact that the exemption covers all law enforcement agencies and (tautologically) all investigatory or security files, without providing any other grounding in statutory language.

The City then mischaracterizes Petitioners' reference to a discussion of modifiers in *General Dynamics Land Sys. v. Cline* (2004) 540 U.S. 581, 613, asserting that "Petitioners appear to concede 'investigation' is a general term that would require a modifier to indicate a narrow application." City Ans. at 12. Petitioners concede no such thing, nor does the City provide any reasoned argument for such a position. As in *General Dynamics* and *Regents of Univ. of Cal. v. E. Bay Mun. Util. Dist.* (2005)

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[2] The definitions that the County suggests lend clarity include: "the action of investigating something or someone; formal or systematic examination or research; a formal inquiry or systematic study;" "the act or process of studying by close examination and questioning;" and "the act or process of investigating or the condition of being investigated; a searching inquiry for ascertaining facts; detailed or careful examination." *See* County Ans. at 8-9 (citing Google search results, Merriam-Webster Dictionary, and Dictionary.com, respectively); *see also* City Ans. at 9. Similarly, the City seems to embrace such breadth when it argues that even the observations of officers walking their beat should fall within the exemption for "investigations," because an officer is always on the lookout for crime. City Ans. at 16.

130 Cal.App.4th 1361, the term "investigation" in § 6254(f), without a modifier, is susceptible to both broad and narrow constructions. And as in *General Dynamics*, the Court should choose the narrower one based on relevant tools of statutory interpretation.

Finally, the City claims that Petitioners' argument that "dictionary definitions of the word 'investigate' suggest targeted or focused inquiry" is "not unlike the one rejected in *Haynie* that records of investigation should not be deemed to include routine or everyday police activity." City Ans. at 15. However, it utterly fails to explain how these arguments are similar beyond the bare assertion that both are equally wrong. City Ans. at 15.

B. *The City's Analogies to Other Statutes are Inapposite*

The City repeatedly points this Court to models for interpreting § 6254(f) in other jurisdictions' public records statutes, even while acknowledging substantial differences in statutory text and intent.

While the City recognizes that this Court in *Williams* declined to use FOIA as a tool of interpretation for § 6254(f) because of textual differences between the statutes, it nevertheless urges this Court to adopt standards from FOIA here. *See* City Ans. at 10-11.[3] Importing a standard from FOIA, the City argues that this Court should interpret the PRA to allow the law

[3] If FOIA governs interpretation of § 6254(f), that would provide a separate basis to overrule *Williams* and hold records must be disclosed when there is no concrete and definite prospect of enforcement, *see* Section II.C, *infra,* as is the rule under FOIA. *See Williams v. Super. Ct.* (1993) 5 Cal.4th 337, 354; *cf. NLRB v. Robbins Tire & Rubber Co.* 437 U.S. 214, 235-36 (1978) (FOIA investigatory records exemption does not apply "where an agency fails to [demonstrate] that the… documents [sought] relate to any ongoing investigation or… would jeopardize any future law enforcement proceedings" (citations omitted)).

enforcement records exemption to be asserted whenever there is a "rational nexus" between a law enforcement purpose and a document. The City cites *MacPherson v. I.R.S.* (9th Cir. 1986) 803 F.2d 479, 482, which explicitly adopted the "rational nexus" test as a "*broad reading*" of FOIA's law enforcement exemption. *See id.* at 483 (emphasis added) (recognizing that a "broad reading of the 'law enforcement purposes' exception to the FOIA" was necessary to "serve[] privacy by concealing more information from public view." (citation omitted)). But the California Constitution requires that exemptions to the PRA be read narrowly, not broadly. Cal. Const., Art. I, § 3(b)(2).[4] *MacPherson* is therefore inapposite.

The City's citation to *Chivers v. U.S. Dept. of Homeland Sec.* (S.D.N.Y. 2014) 45 F. Supp. 3d 380, 387, is even further afield, as its holding rested on the FOIA subsection exempting "techniques and procedures for law enforcement investigations or prosecutions" rather than a subsection that would parallel § 6254(f)'s investigatory records exemption. *See id.* at 388-390 (citing 5 U.S.C. § 552(b)(7)(E)); *cf.* 5 U.S.C. § 552(b)(7)(A), (B) (exempting records that "could reasonably be expected to interfere with enforcement proceedings" or "would deprive a person of a right to a fair trial"). The PRA's exemption for "records of… investigations" does not apply to procedures for investigations. *Cook v. Craig* (1976) 55 Cal.App.3d 773, 783.

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[4] As discussed further in Section III.B, *infra*, unlike FOIA, California's investigative records exemption is also not designed to protect privacy interests. Records that impact personal privacy may be withheld under § 6254(c) or § 6255, if the public interest in withholding the records clearly outweighs the public interest in disclosure. *Cf.* 5 U.S.C. § 552(b)(7)(C) (protecting against "unwarranted invasion of personal privacy"), § 552(b)(7)(D) (protecting "identity of a confidential source").

The City also points to statutes from other states as interpretive guidance, but cites only one general public records statute, North Carolina's, as adopting a broad definition of "investigation." City Ans. at 16 n.9. But unlike the PRA, North Carolina's statute explicitly defines the term "records of investigations" to include all information "compiled by public law enforcement agencies for the purpose of attempting to prevent or solve violations of the law." *Id.* (citing N.C. Gen. Stat. § 132-1.4(b)(1) (2003)). That the North Carolina legislature chose to define "investigation" explicitly and give it a broad definition does not prove it should be read the same way when not defined. Indeed, the fact that the North Carolina legislature believed it necessary to explicitly define the term, if anything, suggests that without definition the breadth of the term is at best ambiguous.

The City also points to other states' laws specifically dealing with ALPR records. *See id*. Whatever the wisdom of other states' laws that specifically address ALPRs as a policy matter, they provide little help in interpreting the meaning of "investigation" in § 6254(f).

C. *The Broad Language in* Williams *and* Haynie *Does Not Require § 6254(f) to Exempt Data Collected Through an Automatic and Untargeted Process*

The City and County cite *Haynie* and *Williams* to support their argument that § 6254(f) exempts ALPR data, but in doing so take broad language out of context and misapply it to a question very different from the one before those courts. In neither case was this Court tasked with addressing whether indiscriminately collected data like the ALPR records at issue here would be exempt from disclosure. Instead, both *Haynie* and *Williams* involved documents related to targeted investigations—a request

for the incident report in a traffic stop of a vehicle matching the description of one reported to contain armed men in *Haynie*, and a request for records of an investigation into two deputies involved in the brutal beating of a suspect in *Williams*.

In seeking disclosure of the report on his traffic stop, Haynie argued that the "[r]ecords of… investigations" exemption should apply "only when the prospect of enforcement proceedings is concrete and definite," and "should be defined so as to exclude investigations that are merely 'routine' or 'everyday police activity.'" *Haynie*, 26 Cal.4th at 1068, 1070. Both the City and County point to the Court's statements, in rejecting that argument, that § 6254(f) should protect "the very sensitive investigative stages of determining whether a crime has been committed or who has committed it," including "'routine' and 'everyday'" investigations and investigations aimed at determining "whether a violation of law may occur or has occurred." 26 Cal.4th at 1070, 1071. *See* County Ans. at 11-12; City Ans. 25-28 (arguing that, under *Haynie*, any collection of data for later use in criminal enforcement is an "investigation").

While that language may have addressed Haynie's arguments, it does not answer the question before this Court. Petitioners do not argue that the collection of data using an ALPR is not an "investigation" because the prospect of enforcement is too small or because police are not certain a car is involved with a crime when they scan its plates. Rather, Petitioners argue that ALPR scans are not investigations because they are indiscriminate and untargeted—they are an attempt to collect data on as many Los Angeles residents as possible for later use, rather than an attempt to find out information on specific vehicle targets. The language Real Parties cite does not help on that point, because the indiscriminate collection of license plate

and location information reveals no information from "sensitive investigative stages," since all cars are scanned. Nor does the mere collection of data reveal anything about whether a crime has occurred or is about to occur—only the subsequent check against a hot list or search in a later investigation reveals whether a vehicle may be involved in a crime or regulatory violation. Neither *Haynie* nor *Williams* addressed the distinction between targeted and untargeted investigations, as both those two cases and every other case in which this Court has addressed § 6254(f) have involved targeted investigations rather than the indiscriminate collection of data.

The City argues that *Haynie* and *Williams* cannot be distinguished because they "did not hinge on, or even take into consideration[] whether the investigation was 'targeted.'" City Ans. 24. But that is the very reason past cases should be distinguished. "The holding of a decision is limited by the facts of the case being decided, notwithstanding the use of overly broad language by the court in stating the issue before it or its holding or in its reasoning." *People v. Jennings* (2010) 50 Cal.4th 616, 684 (quotation omitted); *see also Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (1999) 19 Cal.4th 1182, 1195 ("It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered.").

D. *Petitioners' Proposed Limit on the Term "Investigation" is Workable*

The City argues that Petitioners offer no viable definition of "investigation" and no means for determining when a surveillance method is or is not an investigation, requiring a case-by-case analysis of any records created with the use of technology. City Ans. at 32. They also argue that adopting Petitioners' "targeted inquiry" limitation would require the

release of countless law enforcement records that would have been protected in the past. *Id.* at 34. Neither argument holds water. Petitioners draw a workable, principled distinction, clearly arguing that the term "investigation" in the exemption should be understood to mean *targeted* inquiries—"investigations into a specific crime or person," Pet. Opening Br. at 15—and to exclude the mass collection of information in an untargeted or indiscriminate fashion, such as through surveillance devices like ALPRs.

Responding to Petitioners' argument that ALPR plate scans are data collection rather than investigations, the City argues that because "[m]uch of the work done in an investigation is data collection," Petitioners' interpretation of § 6254(f) would result in mandatory disclosure of traditionally recognized law enforcement records. City Ans. at 34. But in pointing to other examples of "data collection," they repeatedly point to records collected as a result of targeted investigations rather than indiscriminate data collection. Taking fingerprints from a crime scene, asking neighbors about a crime, and taking crime scene photos are only done as part of a targeted investigation into a particular crime at a particular location. *See* City Ans. at 18; 34. Investigators do not take those actions at random across the city. Similarly, getting financial records in an embezzlement investigation and wiretapping a phone both occur only after an officer has shown there is probable cause to believe they will reveal evidence of specific criminal activity—whether or not that criminal activity is ultimately proved. *Id.* at 32, 41. Finally, taking DNA, fingerprints, and mug shots of suspects are all targeted because that information may only be collected from individuals arrested for or convicted of particular crimes. City Ans. at 34-37. If police randomly collected the fingerprints from

pedestrians around Los Angeles, that might be more analogous to the untargeted use of ALPRs, but the examples the City presents would be law enforcement investigations under Petitioners' definition, because they are not chosen indiscriminately but are all focused on particular individuals or places suspected of involvement in specific crimes.[5]

The County argues that distinguishing between targeted and untargeted investigations would require a "case-by-case" approach to determining whether records are exempt, which this Court rejected in *Williams.* But that claim misunderstands Petitioners' argument and misreads *Williams* as well. In *Williams*, this Court described how FOIA includes six specific categories of law enforcement records within its parallel law enforcement exemption and requires "the exemption's applicability to be determined on a on a case-by-case basis." *Williams*, 5 Cal.4th at 353. But *Williams* only observed that California had not adopted the more nuanced FOIA criteria under which disclosure turns on the precise nature and context of the information contained in the documents; it did not

[5] In its introduction, the City suggests that under Petitioners' definition, records collected by programs looking for child pornography would have to be disclosed—relying only on a criminal case from another state in which a defendant convicted on child pornography charges challenged, as an unconstitutional warrantless search, the use of software that scanned peer-to-peer network traffic for files with characteristics that matched a list of child pornography images. *See* City Ans. at 3 (citing *State v. Combest* (Or. App. 2015) 350 P.3d 222, 231-32, review denied (Or. 2015) 363 P.3d 501). *Combest* suggests that the government merely scanned internet traffic, not that it collected bulk internet traffic and stored it to search later for unlawful activity, as the City and County do with ALPR data. And the particular files that law enforcement identified that matched the characteristics of child pornography would properly be records of targeted investigations, much as Petitioners here acknowledge that the "hot lists" and lists of plates that match them are.

suggest that courts would never have to decide what is or is not an "investigation" under § 6254(f). Nor would a distinction between targeted investigations and the kind of automated, indiscriminate data collection involved in ALPRs require courts or agencies to examine individual records on a case-by-case basis to see if they are exempt—that determination can be made across categories of records (such as for all ALPR records), rather than individual documents. Petitioners' definition of "investigation" therefore does not require the "case-by-case" analysis this Court avoided in *Williams*.

The City suggests several times that Petitioners take the position that nothing is an investigation unless it identifies a suspect, and at times suggest Petitioners would require the suspect actually turn out to be guilty for records to be exempt. *See, e.g.*, City Ans. at 36, 41. The City turns that mischaracterization of Petitioners' position into a straw man and then attacks it on a number of grounds: that it would render statutory language surplusage by blurring the distinction between records of investigation and investigatory files, *id.* at 41; that it would effectively require "concrete and definite" enforcement proceedings for the exemption to apply, in contradiction to *Haynie*, *id.* at 42; that it runs afoul of the Court's observation in *Haynie* that there is no way to predict at the outset what might be a lengthy or important investigation, *id.* at 43. The City also accuses Petitioners of taking the opposite stance—that "the actual report of a stolen vehicle or AMBER Alert that results in a license plate being on the hot list" would not be exempt under § 6254(f), City Ans. at 26—which equally mischaracterizes Petitioners' position. None of these attacks are relevant because the City's straw men are emphatically not Petitioners' arguments.

E. *The City Distorts the Nature of ALPR Technology and the Importance of Technology to Petitioners' Argument*

To understand that ALPR data are not "[r]ecords of . . . investigations," the Court must examine how ALPR technology works. But Real Parties ignore or misconstrue the details of ALPR technology and mischaracterize the role it plays in Petitioners' arguments.

1. *The Use of ALPR Technology Is Not a Targeted Investigation.*

The City suggests that all crimes in Los Angeles associated with license plates are constantly under investigation, making each plate scan part of a "targeted" investigation for every crime on the hot list. City Ans. at 17. But this ignores the nature of ALPR technology—that the scan and the comparison to the hot list are two separate acts. ALPRs first scan, record, and store plate data (including information), and then subsequently both compare the plate with the hot list of license plates associated with violations and save the plate information for use in future investigations. The scan alone is not a comparison to wanted vehicles; this makes the scan merely the collection of data, not an investigation.

The City argues that Petitioners make too much of the "temporal gap" between the scan and comparison with the hot list, which happens very soon afterward. City Ans. at 39-41. But the point is not the length of delay, but that the scan and the check against the hot list are two distinct processes. Even if the comparison with the hot list is targeted to every crime in the hot list, the system still collects data indiscriminately, scanning every car that comes into range, as the Court of Appeal recognized. *See* Pet. Opening Br. at 11 (citing Slip Op. at 3, 11, 12).

The City tries to collapse this distinction by arguing that, if the comparison of ALPR plate scan data to a hot list is an investigation, then

the plate scan data are also part of an investigation because they are "created for that purpose." City Ans. at 28. But this argument ignores the nature of ALPRs—that, as the Court of Appeal noted, Real Parties collect ALPR data not only for comparison against hot lists but also so that it can be retained for use in future criminal investigations. *See* Pet. Opening Br. at 7; Slip Op. at 4. And if ALPR data are not records of investigations when collected, then their storage for subsequent use in later hypothetical investigations does not convert them into records of investigations. *See, e.g.*, Pet. Opening Br. at 21-22. The City argues that DNA records would not be exempt under this analysis, but they are wrong. City Ans. at 36. DNA records, which are collected only at crime scenes and from individuals arrested or convicted for specific crimes, are targeted to those specific individuals or crimes, and so would be records of investigations from the outset.

2. *Petitioners Do Not Seek A Categorical Exemption for Records Gathered Using Technology*

The City suggests that Petitioners' argument would require the Court to interpret § 6254(f) to exclude any records "created through the use of technology," or involving individuals who were innocent or who were ultimately "eliminated as suspects." City Ans. at 38. That is simply not Petitioners' position, nor does the City explain how Petitioners' distinction between targeted investigations and automated, indiscriminate data collection would lead to such a result. Of course, technology can be targeted, as in a wiretap, and information can be collected in a targeted fashion on individuals who are later eliminated as suspects or turn out to be innocent, as was the case with the traffic stop in *Haynie*. But when police collect data in an indiscriminate way—untethered from the identification of

any particular crime or suspect and just because that data might become useful in a later investigation—that is not targeted and should not qualify as an "investigation" under § 6254(f).

The City and County mischaracterize Petitioners as arguing that the quantity of data collected by ALPRs determines whether or not there is an "investigation." City Ans. at 33. But the massive quantity of data collected by the City and County—the overwhelming majority of which is on law-abiding drivers—is important only because it illustrates the indiscriminate nature of ALPR's collection of information, and helps frame the question before this Court: When the Legislature enacted the PRA's law enforcement investigative records exemption in 1968, did it intend to exempt the automated, indiscriminate collection of data by a system like ALPR?

3. *The Indiscriminate, Automated Nature of ALPR Technology Is Different from the Collection of Information by Human Officers*

The City also insists that consideration of ALPR technology has no place here: that automated, mass collection of plate and location data must be treated as legally identical to a human patrol officer checking individual license plates. As Petitioners described in detail, in the context of the Fourth Amendment, courts have recognized that legal rules may no longer make sense when mechanistically applied to new technology. *See* Pet. Opening Br. at 29-31 (citing *e.g.*, *United States v. Jones* (2012) 132 S.Ct. 945 and *Riley v. California* (2014) 134 S.Ct. 999 (analyzing GPS tracking devices and searches of cell phones incident to arrest, respectively)). The City offers a prolonged argument that ALPR collection of license plate information does not violate the Fourth Amendment. *See* City Ans. at 43-

51. But the City misses the point—whether ALPR plate scans are an "investigation" under § 6254(f) does not turn on whether use of ALPRs might be a search for Fourth Amendment purposes. The point is that, as those Fourth Amendment cases have recognized, technology can make a difference for legal analysis, and rules for actions taken by police one at a time may not translate to similar actions performed *en masse* by technology.[6]

The City posits that human police officers can check license plates as randomly as ALPRs and concludes that Petitioners' distinction between targeted human investigations and indiscriminate automated data collection is unworkable. City Ans. at 30-31. However, as with the discussion in *Jones* between Justices Scalia and Alito over whether the founders could have imagined a human constable hiding in a coach to collect information like a GPS tracker, or whether such a hypothetical would require "either a

[6] The City also blatantly misstates the amount of information ALPRs collect, suggesting that they likely collect only one or two scans per vehicle per year. *See* City Ans. at 47-48. While that may true at the times and in the jurisdictions the City cites, it is not true for all ALPR systems. *See, e.g.*, Ali Winston, "License plate readers tracking cars," Center for Investigative Reporting/SFGate (June 25, 2013), http://www.sfgate.com/bayarea/article/License-plate-readers-tracking-cars-4622476.php (San Leandro, California resident's plate was scanned 112 times over the course of two years). The City does not dispute that Real Parties in this case collect nearly 3 million scans per week or that they have close to half a billion records of plate and location data in their database, an average of more than 65 scans per vehicle for the 7.7 million vehicles registered in Los Angeles County. *See* Pet. Opening Br. at 8 & n.13. Even if the City is correct when it asserts that many vehicles are never scanned, that only means that their ALPRs have scanned other vehicles many more times than average and so have collected much more detailed location information on those vehicles.

gigantic coach, [or] a very tiny constable," *see* Pet. Opening Br. at 28 n.32; *Jones*, 132 S.Ct. at 950 n.3, 958 n.3, the limitations on human ability mean that an officer will always be forced to make choices about which plates to scan and which to ignore—to target some plates and not others. And if a human officer engaged in truly indiscriminate collection of license plate information—for example, if an officer in a small town logged the plate of every car that stopped at an intersection—there would be no line-drawing problem. Such collection of data would be no less indiscriminate and no more an "investigation" than if done by machine. The City argues that this would mean that some license plate checks by officers might be targeted investigations and others might not be, leading to an unworkable inability to segregate exempt records from nonexempt records. City Ans. at 31. The City overstates that concern—absent rigorous dedication to inclusivity, a human officer's checking of license plates will be targeted. But even assuming that some manual license plate checks could be random enough to create a problem of segregating those from targeted manual checks, that poses no problem for the present case: there is no suggestion in the record that ALPR data is mixed with manual license checks, so there will be no issue of segregability.

A fair examination of the way ALPRs function, by the automated, indiscriminate collection of license plate and location data for subsequent comparison with hot lists and use in criminal investigations, shows that the raw data are not properly "[r]ecords of . . . investigations" under § 6254(f).

II. Proposition 59's Constitutional Presumption in Favor of Disclosure Applies to § 6254(f) and Altered the Legal Standards Applied in *Williams* and *Haynie*

Neither the City nor the County disputes that California's constitutional rule that a statute "shall be broadly construed if it furthers the

people's right of access, and narrowly construed if it limits the right of access" applies to guide this Court's construction of § 6254(f). *See* Cal. Const. Art. I, § 3(b)(2); Pet. Opening Br. at 22-25. That alone weighs heavily on this Court's inquiry. To the extent the Court finds any ambiguity in whether § 6254(f)'s exemption for "[r]ecords of . . . investigation" encompasses the mass, indiscriminate collection of license plate data by ALPRs, this Court should resolve any ambiguity in favor of disclosure.

The constitutional presumption factors into this Court's analysis another way: Real Parties rely heavily throughout their Answers on the construction of § 6254(f) in *Williams* and *Haynie*, *see, e.g.*, County Ans. at 23-26; City Ans. at 14-15, 24-26, even though California voters overwhelming passed Proposition 59, the constitutional amendment that establishes the presumption, subsequent to those decisions. Real Parties argue that this Court should not even examine the impact of that constitutional change on *Williams*' construction, and if it does, it should find that the constitutional amendment has had no substantive effective on the legal standards under the PRA. The Court should reject both arguments.

A. *Proposition 59's Ballot Materials and Legislative History Show Voters and Legislators Intended it to Substantively Change the Law*

Real Parties argue that Proposition 59 should have no effect on the holdings of *Williams* and *Haynie* because the constitutional amendment worked no substantive change in public records law, but "simply wrote [existing] principles into the state Constitution." City Ans. at 52-53; *see also* County Ans. at 24. However, this narrow reading is directly at odds with Proposition 59's ballot materials and legislative history.

Real Parties rely on this Court's passing statements, in introductory descriptions of the PRA, that Proposition 59 "enshrined" the principle that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." *See Sierra Club v. Super. Ct.* (2013) 57 Cal.4th 157, 164; *Intl. Fedn. of Prof. and Tech. Engineers, Loc. 21, AFL-CIO v. Super. Ct.* (2007) 42 Cal.4th 319, 329. But this description does not amount to a holding the Proposition 59 did not alter the legal standards governing the PRA. Indeed, in *Sierra Club,* the Court went on to note that Proposition 59 created a new "rule of interpretation" that supplemented the Court's "usual approach to statutory construction," 57 Cal.4th at 166. Where "legislative intent is ambiguous, the California Constitution requires [the Court] to 'broadly construe[ ]' the PRA to the extent 'it furthers the people's right of access' and to 'narrowly construe[ ]' the PRA to the extent 'it limits the right of access.'" *Id*. (citing Art. I, § 3(b)(2)). While a few Courts of Appeal have expressly described Proposition 59 as simply "constitutionalizing" the existing rule of construction,[7] this Court never has.

More importantly, to hold that Proposition 59 merely added the existing rules governing the PRA to the constitution would be at odds with both the text of the provision and the legislative history provided in legislative analysis and the ballot materials. These materials clearly show the intent of California voters and legislators was for Proposition 59 to strengthen the public right of access beyond existing law. This Court should

[7] *See, e.g.*, *Sutter's Place v. Super. Ct.* (2008)161 Cal. App. 4th 1370 , 1382; *BRV, Inc. v. Super. Ct.* (2006) 143 Cal. App. 4th 742, 750–751.

not undercut that intent by reading the constitutional initiative to be a nullity.

1. *The Text of Proposition 59 Shows an Intent to Create a New Rule of Construction*

The text of Proposition 59 shows that its rule of construction was intended to alter existing law. Article I, § 3(b)(2) of the California Constitution, added by Proposition 59, not only states a rule of construction in favor of public access, but expressly provides that the rule applies retroactively to provisions already in effect: "A statute, court rule, or other authority, *including those in effect on the effective date of this subdivision*, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." (emphasis added). If the authors had believed that the amendment did not alter existing legal standards, there would have been no reason to make the provision expressly retroactive.

As evidence that Proposition 59 did not alter the interpretation of § 6254(f), Real Parties point to Article I, § 3(b)(5), which clarifies that Proposition 59 did not "repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records." *Id.* But repealing existing statutory exemptions is very different from applying a new interpretative rule for them. Reading subsections (b)(2) and (b)(5) together, Proposition 59 does the latter, not the former. Indeed, this is made even more clear by subsection (b)(3), which expressly states that Proposition 59 does not "affect[] the construction of any statute" to the extent the statute protects privacy or peace officer personnel records. Art. I, § 3(b)(3). The difference between (b)(3) and (b)(5) is telling: Proposition 59 could have made clear that it did not affect the construction

of all statutory exemptions. It did not. It made that provision only for privacy and peace officer personnel records. Thus by clear implication it contemplates a change in the construction of other exemptions, including § 6254(f).

2. *Proposition 59's Ballot Materials and Legislative History Show Voters' Intent to Create a Stronger Presumption In Favor of Disclosure*

In interpreting voter initiatives, this Court can examine extrinsic sources to determine voter intent, including ballot summaries and arguments. *Kwikset Corp. v. Super. Ct.* (2011) 51 Cal.4th 310, 321. Here, both the Ballot Measure Summary provided to California voters and the original bill's legislative history also make clear that legislators and voters drafted and adopted Proposition 59 to create a stronger presumption in favor of disclosure, in part to correct for court decisions that had restricted public access to documents. Nothing in the ballot materials provides any support for Real Parties' suggestion that Proposition 59 simply wrote the PRA's existing legal standards and rules of construction into the constitution.

First, the ballot materials clearly stated that the measure would "[p]rovide that statutes and rules furthering public access shall be broadly construed, or narrowly construed if limiting access." Ballot Pamphlet, Gen. Elec. (Nov. 2, 2004) (hereinafter "Ballot Pamphlet") at 12 ("Official Title and Summary" for Proposition 59).[8] The materials made no suggestion that this rule already existed and would simply be codified in the Constitution;

[8] *Available at* http://repository.uchastings.edu/ca_ballot_props/1221 (attached as Exhibit A to Petitioners' Request for Judicial Notice on Reply).

instead they described the amendment as if it created a new rule. For example, the "Analysis by Legislative Analyst" indicates an intent to apply a new rule of construction to existing law: "The measure also requires that statutes or other types of governmental decisions, *including those already in effect,* be broadly interpreted to further the people's right to access government information." *Id.* at 13 (emphasis added). Proponents' arguments also pointed to the rule of construction as part of a "new civil right" that would "ensure that public agencies, officials, and courts broadly apply laws that promote public knowledge. It will compel them to narrowly apply laws that limit openness in government—including discretionary privileges and exemptions that are routinely invoked even when there is no need for secrecy." *Id.* at 14 (Argument in Favor of Prop. 59).

Second, the ballot materials indicated the measure would require the government to make a stronger showing why material should be withheld, resulting in the disclosure of more information. The "Short Summary" at the beginning of the ballot materials stated, "A YES vote on this measure means: Californians would have a constitutional right of access to government information. A government entity would have to demonstrate *to a somewhat greater extent* why information requested by the public should be kept private." *Id.* at 3. The "Analysis by Legislative Analyst" echoed that language, also noting, "Over time, this change could result in additional government documents being available to the public." *Id.* at 13.

Third, the ballot materials also repeatedly indicated that the measure would correct judicial interpretations that limited public access to documents. The "Short Summary" described the "Pro" argument in terms of changing existing law: "California's government—all three branches, statewide and local—should be as transparent as possible to the public it

asks for funding, power, and trust. *But too often officials and judges choose secrecy over disclosure.* Proposition 59 would make transparency a constitutional duty owed to the people, to whom officials are accountable." *Id.* at 3 (emphasis added). Proponents explicitly framed the arguments in favor of the proposition in terms of correcting cramped interpretations of public access:

> California has laws that are supposed to help you get answers. But over the years they *have been eroded … by courts putting the burden on the public to justify disclosure*, and by government officials who want to avoid scrutiny and keep secrets. Proposition 59 will help reverse that trend.

Id. at 14 (Argument in Favor of Prop. 59) (emphasis added).

Fourth, the arguments for and against the measure illustrate the intent to strengthen the presumption in favor of disclosure over existing law. The sole argument against Proposition 59 in the ballot maintained that the measure did not go far enough, in part because "[t]he rule of interpretation contained in this measure would probably have a very limited effect." *Id.* at 15 (Argument Against Prop. 59). The proponents' rebuttal directly addressed this suggestion about the interpretive rule: "On the contrary, Proposition 59 will add independent force to the state's laws requiring government transparency." *Id.* (Rebuttal to Argument Against Prop. 59). Indeed, the rebuttal explicitly indicated that the measure would change judicial interpretations to more strongly favor public access, noting that the author of the opposition arguments had himself lost a court case seeking access to government information "because the court applied the general rule of access narrowly, and the exception allowing secrecy broadly—precisely what Proposition 59 would reverse." *Id.*

Finally, even the statements of fiscal impact suggest that the measure would change the law, resulting in costs from the disclosure of more information. Both the "Short Summary" and more detailed "Official Title and Summary" described the fiscal impact of "[p]otential minor annual state and local government costs *to make additional information available to the public*." Ballot Summary at 3, 12 (emphasis added); *see also id.* at 13.[9]

Proposition 59 passed with overwhelming support. The legislature voted unanimously to place it on the ballot, and Californians voted more than five-to-one to approve the measure, with 83.4% voting in favor and only 16.6% voting against. *See* Ballot Measure Summary at 12 (noting votes of 78-0 in the Assembly and 34-0 in the Senate); *Statement of Vote*, November 2, 2004 Election, California Secretary of State Kevin Shelley, xxi, 39 (2004). [10] This Court should abide by voters' extraordinary showing of support for increased public access to records and credit Proposition 59 with strengthening the presumption in favor of disclosure, as the text and ballot materials indicate it should.

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[9] The Assembly floor analysis of SCA1, the measure that put Proposition 59 on the ballot, provides similar support, noting that the measure responded to "recent court decisions [that] have weakened [the PRA and Brown Act," that "existing laws have not stopped widespread secrecy in government" and that the proposition provided a "new test" that could "reverse the application of current law." Assem. Floor Analysis of Sen. Const. Amend. 1, 3 (Sept. 3, 2003) http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0001-0050/sca_1_cfa_20030903_202148_asm_floor.html (attached as Exhibit B to Request for Judicial Notice on Reply).

[10] *Available at* http://elections.cdn.sos.ca.gov/sov/2004-general/sov_2004_entire.pdf (attached as Exhibit C to Petitioners' Request for Judicial Notice on Reply).

B. *This Court Has Discretion to Consider the Impact of Proposition 59 and Should Do So*

Real Parties argue that this Court should not consider the impact of Proposition 59 on the outcome of this case on grounds it was not properly raised below. But Petitioners cited Art. I, § 3(b) in their briefs and requested the Court of Appeal consider it at oral argument. *See* Ct. App. Pet. for Writ of Mandate at 23; Ct. App. Reply in Supp. of Pet. for Writ of Mandate at 18; Ex. 1 (Tr. of Selected Portions of Oral Arg.); *see also* Petitioners' Reply to Pet. for Review at 5-7. Even if they had not, the City and County both recognize that this Court may consider both of these questions now. County Ans. at 23; City Ans. at 58. Where, as here, the issue before the Court involves "pure questions of law, not turning upon disputed facts, and [is] pertinent to a proper disposition of the cause or involve[s] matters of particular public importance," the Court may address it, even if it was not presented to the lower court. *People v. Randle* (2005) 35 Cal.4th 987, 1001-1002 (emphasis omitted) (citing *People v. Super. Ct. (Ghilotti)* (2002) 27 Cal.4th 888, 901, n. 5), overruled on other grounds by *People v. Chun* (2009) 45 Cal.4th 1172. This Court should address the effect of an intervening constitutional amendment on its prior decision.

C. *Stare Decisis Does Not Prevent this Court from Revisiting* **Williams'** *Holding that Records of Investigations are Exempt Indefinitely*

The City relies extensively on *stare decisis* to argue that this Court should not even examine the effect of Proposition 59 on *Williams'* holding that § 6254(f)'s exemption continues to apply even after an investigation concludes, but that doctrine does not limit the Court. As the Court noted in *Moradi-Shalal v. Fireman's Fund Insurance*, although *stare decisis* is well established, "[i]t is likewise well established, however, that the foregoing

policy is a flexible one which permits this court to reconsider, and ultimately to depart from, our own prior precedent in an appropriate case." (1988) 46 Cal.3d 287, 296. And, although *stare decisis* "does indeed serve important values, it nevertheless should not shield court-created error from correction." *Id.* (citing *Cianci v. Super. Ct.* (1985) 40 Cal.3d 903, 924); *see also Johnson v. Dep't of Justice* (2015) 60 Cal.4th 871, 879.

Reexamination of precedent is warranted in cases such as this where "subsequent developments indicate an earlier decision was unsound, or has become ripe for reconsideration." *Moradi-Shalal*, 46 Cal.3d at 297 (citing *People v. Anderson* (1987) 43 Cal.3d 1104, 1138-1141). Here, the passage of Proposition 59, intended to strengthen the public right to government transparency and adopted twelve years after *Williams*, calls into question the continuing validity of a ruling that limited public access to important government records.

The City argues that the fact that the legislature has amended the PRA without addressing *Williams* somehow indicates acquiescence of the case's holding that § 6254(f)'s investigative records exemption applies indefinitely. City Ans. at 60-62. However, this Court has rejected that argument. In *Moradi-Shalal*, the plaintiff attempted to persuade the Court with a very similar argument that "legislative failure to act indicates acquiescence with the prior law." 46 Cal.3d at 300-01. However, the Court noted that "something more than mere silence should be required before that acquiescence is elevated into a species of implied legislation." *Id.* at 301. Where the legislature "has never expressly or impliedly adopted the holding in" a prior case, the Court is "free to reexamine" its holding in that case. *Id*. at 301 (citing *Cianci,* 40 Cal.3d at 923). Similarly, in *Sierra Club v. San Joaquin Local Agency Formation Commission*, when faced with a

similar assertion, the Court determined that "little hard evidence suggests the Legislature has affirmatively taken [the rule from a prior case] into account in enacting subsequent legislation." (1999) 21 Cal.4th 489, 505 (hereinafter "*San Joaquin Local Agency*"). The Court held that the legislature's failure to enact a statute specifically to overrule the holding in a previous case was "not necessarily dispositive of its intentions." *Id.* at 506; *see also County of Los Angeles v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 391, 404 ("The Legislature's failure to act may indicate many things other than approval of a judicial construction of a statute: the sheer pressure of other and more important business, political considerations, or a tendency to trust to the courts to correct their own errors….").

In the case relied on by the City, *People v. Preston* (2015) 239 Cal. App. 4th 415, 427, unlike here, the legislative amendments made after the Court of Appeal's initial decision indicated implied adoption of the earlier holding. Further, the court held that the statutory interpretation proposed by the defendant was inconsistent with the "mandatory nature of the statutes, the clear language [of its requirements, and] the overriding purpose of the entire statutory scheme." *Id.* at 427. Here, none of the amendments made to § 6254(f) in the twenty years since *Williams* have touched on—or appeared even to consider—the temporal aspect of the investigative records exemption. Instead, they have related narrowly to the disclosure of certain crime victims' and arrestees' information, private security company records obtained by law enforcement, and agencies covered by the section, as well as non-substantive "maintenance" revisions. *See* Stats. 1995, Ch. 438, § 1 (AB 985); Stats. 1996, Ch. 1075, § 11 (SB 1444); 2000 Cal. Legis. Serv. Ch. 184 (AB 1349); 2001 Cal. Legis. Serv. Ch. 159 (SB 662); 2004 Cal. Legis. Serv. Ch. 8 (AB 1209); 2004 Cal. Legis. Serv. Ch. 937 (AB 1933);

2007 Cal. Legis. Serv. Ch. 578 (SB 449); 2008 Cal. Legis. Serv. Ch. 372 (AB 38). Also unlike *Preston*, if this Court were to overrule the precedent set in *Williams*, doing so would be in harmony with the overarching goals of both the PRA and Proposition 59.

Moreover, there is no evidence that "the decision being reconsidered has become a basic part of a complex and comprehensive statutory scheme," rather than "simply a specific, narrow ruling that may be overruled without affecting such a statutory scheme." *People v. Mendoza* (2000) 23 Cal.4th 896, 924 (citing *People v. Latimer* (1993) 5 Cal.4th 1203, 1214-1216). For example, in *Latimer*, the Court declined to overrule the sentencing precedent at issue because it found the legislature had, in effect, completely transformed the entire sentencing scheme after the Court's earlier case was decided, including increasing the length of sentences for many crimes. 5 Cal.4th at 1215. If the Court were to have adopted a new rule, it would have impacted much of the new sentencing scheme in unpredictable ways and could have resulted in total sentences that "might well be greater than the Legislature ever contemplated." *Id.* In contrast, in *People v. King*, the Court determined the sentencing precedent at issue "was a specific, narrow ruling that could be overruled without affecting a complete sentencing scheme." *Latimer*, 5 Cal.4th at 1216 (discussing *King,* (1993) 5 Cal.4th 59 and the case it overruled, *In re Culbreth,* (1976) 17 Cal.3d 330).

Here**,** where there is no evidence that the Legislature has "affirmatively" taken *Williams* into account in enacting subsequent PRA-related legislation, revisiting the precedent set in that case is appropriate. *See San Joaquin Local Agency,* 21 Cal.4th. at 506. Further, like the precedents at issue in *Mendoza*, *King* and *San Joaquin Local Agency*,

Williams "sets forth a narrow rule of limited applicability,"—it is specifically limited to one small section within the PRA—so overruling it would have little to no impact on the PRA as a whole. *See Mendoza,* 23 Cal.4th at 924.

As Petitioners argue in their Opening Brief, the legislative history of § 6254(f) and its subsequent amendments suggests the legislature never specifically intended for the exemption to apply indefinitely. Pet. Opening Br. at 24-25. Given that § 6254(f) is silent as to whether it applies after an investigation has concluded, this Court should invoke Proposition 59's new "rule of interpretation" in giving meaning to the statutory language today. *Sierra Club*, 57 Cal.4th at 166. As set forth above, *see* Part II.A *supra*, Proposition 59 was drafted to allow this Court to revisit holdings in cases like *Williams* that created broad and unnecessary exemptions that eroded the peoples' right of access. Where "legislative intent is ambiguous," the California Constitution now requires this Court "to 'broadly construe[ ]' the PRA to the extent 'it furthers the people's right of access' and to 'narrowly construe[ ]' the PRA to the extent 'it limits the right of access.'" *Id*. (quoting Cal. Const. Art. I, § 3(b)(2)). As such, *Williams'* precedent is ripe for review.

Where, as here, concerns other than *stare decisis* predominate, "*stare decisis* does not mandate [the Court's] continued adherence" to old precedent. *Mendoza*, 23 Cal.4th at 924 (citing *Latimer*, 5 Cal.4th at 1216). Therefore, Petitioners respectfully request this Court revisit its holding in *Williams* and hold that the investigative records exemption no longer applies once an investigation has concluded.

III. Privacy Arguments Are Not Relevant to Whether ALPR Data Are Exempt As Records of Law Enforcement Investigations, But May Be Properly Addressed under the PRA's Catchall Exemption on Remand

Although the briefing in this case centers on whether ALPR data is exempt under § 6254(f), Real Parties repeatedly attempt to introduce privacy arguments, arguing both that this Court should find the records exempt on privacy grounds under the PRA's catch-all provision, § 6255, and that privacy issues implicated by ALPR data collection should inform the Court's analysis of whether those data should be exempt under § 6254(f). First, as the Court of Appeal did not address § 6255, and the parties have devoted little briefing to that complex issue here, this Court should not decide that issue but should remand to the Court of Appeal. Second, while the privacy implications of ALPR data raise important policy concerns, those are irrelevant to the interpretation of § 6254(f)'s exemption for investigative records.

A. *This Court Should Not Decide Whether ALPR Data Might Be Exempt Under the Catch-All Exemption in Government Code Section 6255*

Respondent County acknowledges the Court of Appeal did not reach the merits of § 6255's catchall exemption, County Ans. at 5, but nevertheless argues that, because the issue was "fully briefed in the Court of Appeal and expressly raised in [the County's own] Answer to Petition for Review," *id.* at 27, this Court should address § 6255 now. However, this complex issue should not be resolved in the first instance in this Court.

The County takes as given that ALPR data would be exempt under § 6255, and so devotes barely more than two pages to the question, but the issues are not that simple. Section 6255 allows the government to withhold records only where "the public interest served by not disclosing the record

clearly outweighs the public interest served by disclosure." Gov't Code § 6255(a) (emphasis added). Under this balancing test, the burden is on the government to show "a 'clear overbalance' on the side of confidentiality." *Cal. State Univ., Fresno v. Super. Ct.* (2001) 90 Cal. App. 4th 810, 831; *accord Black Panther Party v. Kehoe* (1974) 42 Cal. App. 3d 645, 657.

The County argues, "No facts presented in this case show how the public would have an interest in its driving patterns being made public." County Ans. at 27. But that contradicts the findings of the Superior Court—the only court in this case to address this issue—which acknowledged that "[t]he intrusive nature of ALPRs and the potential for abuse of ALPR data creates a public interest in disclosure of the data to shed light on how police are actually using the technology." Super. Ct. Order at 16 (attached as Ex. 1 to Ct. App. Pet. for Writ of Mandate). The trial court further found that the privacy interests of those whose license plates have been scanned could be addressed through redaction or by assigning random numbers to plates. *Id*. at 16-17.[11] As the Court of Appeal did not address § 6255 at all, it also did not disturb the trial court's findings.

The County also suggests that the disclosure of de-identified data will not serve the public interest, because the public already has access to its policies on the use of ALPRs and the total number of data points gathered in a week. But de-identified ALPR data can provide far greater

[11] As Petitioners noted in their Reply brief before the Court of Appeal, documents disclosed in the case regarding Real Parties' ALPR program state that data may be exported from the ALPR system into Excel. *See* Ct. App. Reply in Supp. of Pet. for Writ of Mandate at 31-32. Ct. App. Pet. For Writ of Mandate at Ex. 8 at 289–91. Once in Excel, data could be quickly and easily redacted or de-identified by replacing data points like license plate numbers with random identifiers.

insight than any other records into how ALPRs are actually used and the scope of the privacy invasion involved, as evidenced by Petitioner EFF's analysis of ALPR data from the City of Oakland.[12]

Should this Court determine ALPR data do not qualify for exemption under § 6254(f) but remain concerned with the privacy implications of disclosing ALPR data, it should remand the case for consideration of whether they may be withheld under § 6255, rather than address this question in the first instance here.

B. *The Privacy Concerns Implicated by Disclosure of ALPR Data or Other Records Have No Bearing on This Court's Analysis of Whether the Data Are Exempt Under Section 6254(f)*

Respondents repeatedly rely on privacy concerns to try to bolster their argument that ALPR data should be exempt as investigative records. Petitioners recognize that the location information collected by license plate readers strongly implicates privacy interests. Indeed, that is why Petitioners requested the information—to better analyze and explain the privacy implications of ALPRs to the public.

However, as compelling as the privacy concerns implicated by ALPRs may be, they do not factor into the analysis of whether ALPR data are investigative records under § 6254(f). As this Court noted in *Williams*, § 6254(f) differs from a similar law enforcement records exemption in the federal FOIA in part because § 6254(f) does not explicitly allow agencies to

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[12] *See* Pet. Opening Br. at 41-42 & n.55 (citing Jeremy Gillula & Dave Maass, *What You Can Learn from Oakland's Raw ALPR Data*, Electronic Frontier Foundation (Jan. 21, 2015), https://www.eff.org/deeplinks/2015/01/what-we-learned-oakland-raw-alprdata.

withhold records on the basis of personal privacy. 5 Cal.4th 337, 349; *cf.* 5 U.S.C. § 552(b)(7)(C). Instead it "permits the withholding of information that (a) would endanger the safety of a witness or other person, (b) would endanger the successful completion of an investigation, or (c) reflects the analysis or conclusions of investigating officers." 5 Cal.4th at 349.

The City argues that the "logical consequence" of holding ALPR data are not investigative records would be the disclosure of other highly private information collected by police, from fingerprints to wiretapped telephone conversations to genetic information. City Ans. at 32-34. As set forth earlier, most of these records would be exempt under § 6254(f) because they would be linked to a targeted investigation, *see* Section I.D, *supra*. Any highly private data not exempt as law enforcement records may be withheld either to protect personal privacy under § 6254(c) or because the privacy concerns implicated by release of unredacted versions of this information clearly outweigh the public interest in disclosure under § 6255.[13] And as this Court has recognized when analyzing the withholding of gun permit records under § 6255, where the public interest favoring disclosure conflicts with information about an individual that "entail[s] a substantial privacy interest" the information may be anonymized by deleting confidential information about individuals. *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 655.

[13] *See also* City Ans. at 48-49 (arguing simultaneously that "it is unlikely law enforcement could gather anywhere near the sort of aggregate information needed to raise privacy concerns" and that if it did, "it would also make ALPR use even more clearly an investigation as petitioners have defined it.")

The City also argues that, because ALPR data implicates privacy interests, and Proposition 59 states it does not affect the "construction of any statute . . . or *other authority* to the extent that it protects privacy," Proposition 59 does not impact the analysis of § 6254(f). City Ans. at 55-56 (citing Cal. Const., Art. 1, § 3(b)(3) (emphasis in Ans.). This argument again, misreads § 6254(f) as an exemption designed to protect privacy.

Section 6254(f) does not provide for the withholding of investigative records to protect against an unwarranted infringement of privacy. Courts have instead addressed those concerns under § 6254(c) or § 6255's balancing test. Respondents' privacy arguments should have no impact on the Court's determination of whether the data are exempt under § 6254(f).

IV. The Passage of Senate Bill 34 Does Not Resolve This Case

Real Parties, and the County in particular, argue that Senate Bill 34, signed into law on October 2015 and effective as of January 1, 2016, somehow exempts ALPR data from the PRA or preempts Petitioners' request for data for policy reasons. County Ans. at 19-22; City Ans. at 13, n. 8. Neither argument holds water.

A. *Real Parties' New Argument that S.B. 34 Exempts ALPR Data is Beyond the Scope of Review*

As an initial matter, the City and County's invocation of S.B. 34 falls outside the scope of the questions presented in this case. Even if S.B. 34 did somehow create an independent exemption from the PRA specifically for ALPR data, that does not bear on the question on which this Court granted review—whether ALPR data falls within § 6254(f)'s investigative records exemption. As with the County's arguments that ALPR data should be exempt under the catchall exemption in § 6255, this Court need not address an alternative ground for withholding not addressed

by the Court of Appeal, but can remand for resolution by the Court of Appeal. *See* Section III.B, *supra*.

B. *S.B. 34 Creates No New Exemption to the PRA*

Real Parties argue that S.B. 34 creates a new exemption to the PRA specifically for ALPR records, but their reading is inconsistent with the Constitution's rule that any new restriction on access to public records be explicit and supported by adequate factual findings.

Proposition 59 amended the Constitution to restrict the Legislature's ability to exempt government records from public access without explicit factual findings:

> A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be *adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest*.

Cal. Const., Art. I, § 3(b)(2) (emphasis added). As ballot arguments in support of Proposition 59 noted, this section was drafted as a direct response to years of the public's right of access being "eroded by special interest legislation, by courts putting the burden on the public to justify disclosure, and by government officials who want to avoid scrutiny and keep secrets." Ballot Pamphlet at 14 (Argument in Favor of Prop. 59). The section was intended to "create a high hurdle for restrictions on [the public's] right to information, requiring a clear demonstration of the need for any new limitation… [and permitting] the courts to limit or eliminate laws that don't clear that hurdle." *Id.*

Under these requirements, if the legislature had intended S.B. 34 to impose a new limit on the public's right of access to government records it would have needed to adopt findings "demonstrating the interest protected

by the limitation and the need for protecting that interest." Cal. Const., Art. 1 § 3(b)(2). The legislature never adopted any such findings as part of S.B. 34. Indeed, the bill lacks any factual findings whatsoever.[14]

In other statutes adopted after Proposition 59 that have exempted records from public disclosure, the Legislature has included the required findings on the need to limit public access to information. In exempting records about Native American sacred sites, the Legislature explicitly referenced the need for findings under § 3(b)(2) and found that the limitations on public disclosure were necessary "to provide protection for California Native American prehistoric, archaeological, cultural, spiritual, and ceremonial places… and to specify the necessary confidentiality afforded to those specific locations."[15] Similarly, in exempting certain state medical records, the Legislature made findings "to demonstrate the interest protected by these limitations and the need for protecting that interest," that "the limitations on the public's right of access imposed by…this act are necessary" to avoid constraining the state's ability to negotiate in providing health care coverage.[16] And in passing S.B. 857 in 2014, a bill that exempts "certain negotiations, negotiated rates, and privileged work product," the

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[14] *See* Sen. Bill 34, (2015), 2015 Cal. Legis. Serv. Ch. 532, *available at* http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0001-0050/sb_34_bill_20151006_chaptered.pdf.

[15] Sen Bill 922 § 5 (2005), 2005 Cal. Legis. Serv. Ch. 670, *available at* http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb_0901-0950/sb_922_bill_20051007_chaptered.pdf.

[16] Assem. Bill 1750 § 27 (2007), 2007 Cal. Legis. Serv. Ch. 577, *available at* http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_1701-1750/ab_1750_bill_20071013_chaptered.pdf.

legislature adopted findings showing these limitations on access to records were necessary to "protect the confidentiality" of these processes.[17]

While S.B. 34 may have been motivated in part by the concern that the collection of license plate data threatens Californians' privacy rights, even the larger structure of S.B. 34 does not suggest an intent to limit public access to ALPR data. S.B. 34 requires that both public and private entities that operate or use ALPR systems adopt policies to address both privacy and data security, by including ALPR data within data-breach notification laws and by providing civil remedies for violations of those requirements. While the provision the County cites provides that a "public agency shall not sell, share, or transfer ALPR information, except to another public agency," Civ. Code § 1798.90.55, neither that provision nor any other part of S.B. 34 expressly mentions the Public Records Act or any limitation on public access to government records. Indeed, if the data Petitioners' seek were de-identified, disclosure would be consistent with the bill's intent to ensure public accountability for government use of ALPRs.[18]

Because S.B. 34 does not explicitly restrict public access to government records and lacks any factual findings on the interests served by and need for an exclusion of ALPR data from the public access, the

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[17] Sen. Bill 857 § 99 (2014), 2014 Cal. Legis. Serv. Ch. 31, *available at* http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0851-0900/sb_857_bill_20140620_chaptered.pdf.

[18] The new statute places auditing and reporting requirements on agencies operating ALPR systems and requires a public agency considering the use of ALPRs to provide an opportunity for public comment at a regularly scheduled public meeting before it implements the program. S.B. 34, § 3.

statute fails to meet the requirements of Article 1, section 3 and therefore is not a basis to exempt ALPR records from disclosure under the PRA.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request this Court construe the exemption for "[r]ecords of . . . investigations" in § 6254(f) narrowly, as the Constitution requires, and reverse the Court of Appeal.

Dated: April 1, 2016

Respectfully submitted,

By:_____
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CERTIFICATE OF WORD COUNT

I certify pursuant to California Rules of Court 8.204 and 8.504(d) that this Petitioners' Reply Brief is proportionally spaced, has a typeface of 13 points or more, contains 10,845 words, excluding the cover, the tables, the signature block, verification, and this certificate, which is less than the total number of words permitted by the Rules of Court. Counsel relies on the word count of the Microsoft Word word-processing program used to prepare this brief.

Dated: March 31, 2016

_____
Jennifer Lynch
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CERTIFICATE OF SERVICE

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

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By _____
Madeleine Mulkern