Case No. _____
2nd Civil No. B259392
Los Angeles Superior Court No. BS143004

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 (No. B259392)

PETITION FOR REVIEW

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PETITION FOR REVIEW

I. ISSUES PRESENTED FOR REVIEW

1. Do data collected by police using "automated license plate readers"—high-speed cameras that automatically scan and record the license plate numbers and time, date and location of every passing vehicle without suspicion of criminal activity—constitute law enforcement "records of . . . investigations" that are permanently exempt from disclosure under the Public Records Act pursuant to Gov't. Code § 6254(f)?

2. Does Proposition 59—the 2004 amendment to the California Constitution requiring "[a] statute, court rule, or other authority . . . be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access"—require agencies and courts to take a narrow approach when applying the records of investigations exemption under Gov't. Code § 6254(f)?

II. WHY REVIEW SHOULD BE GRANTED

This case involves Public Records Act (PRA) requests to the Los Angeles Sheriff's and Police Departments for data collected by "automated license plate readers," or "ALPRs"—high-speed cameras, mounted on police vehicles or attached to fixed objects like light poles that automatically scan and record the license plate number and time, date and location of every passing vehicle. Respondents below argued (and the Court of Appeal agreed) that, because police use the data collected by ALPRs in part by checking it against lists of vehicles suspected of involvement in criminal activity or registration violations, the act of scanning is an "investigation" of those lists of offenses, and respondents could therefore permanently withhold the collected data from the public as

"records of . . . investigations" pursuant to Gov't. Code § 6254(f).

The Court of Appeal recognized the novelty of this question—that "no case has considered whether records generated by an automated process, like that performed by the ALPR system, qualify for exemption" as the record of a law enforcement investigation under Gov't. Code § 6254(f). *See* Slip Op. (attached as Exhibit A) at 7. But the court's opinion upholding the agencies' decision to withhold this data broadens the scope of that exemption far beyond previous case law. It also has profound implications for public access to data and images routinely gathered by police using technology ranging from body-worn cameras and public surveillance cameras now to drones and other technologies in the future. Because this case presents important issues of law, including the proper interpretation of § 6254(f) in light of the 2004 amendment to the Constitution requiring a statute be "broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access," Petitioners respectfully request this Court grant review.

The PRA recognizes access to public records as "a fundamental and necessary right of every person in this state." Gov't. Code § 6250— a right that is further enshrined in California's Constitution, article. I, § 3(b) ("The people have the right of access to information concerning the conduct of the people's business . . ."). Given the documented history of abuse of police power both within Los Angeles law enforcement agencies and across the country, nowhere is this right more important than to shine light into and act as a check on law enforcement action. Petitioners sought access to a week's worth of license plate data gathered by the two Los Angeles law enforcement agencies for precisely this reason—to shed light on police use of ALPRs and to learn how and where the agencies were using ALPRs to

collect massive amounts of license plate and location information—data on approximately three million vehicles every week.

The fact that ALPRs collect license plate and location data indiscriminately, scanning every license plate that comes into view, is not disputed. Nor is the fact that the vast majority of license plates scanned by ALPRs (nearly 99.8% by some estimates[1]) have no connection to criminal activity or even vehicle registration issues. Nevertheless, the Court of Appeal agreed with the agencies that because the data were collected in part for the purpose of locating stolen and wanted vehicles, every single data point constituted a record of investigation and was therefore exempt under § 6254(f).

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

In doing so, the court also ignored the constitutional directive established in 2004 by Proposition 59 to "broadly construe[]" the Public Records Act to the extent "it furthers the people's right of access" and to "narrowly construe[]" it to the extent "it limits the right of access." Cal.

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

Const. art. I, § 3(b)(2); *accord Sierra Club v. Super. Ct.*, 57 Cal. 4th 157, 166 (2013) (applying Art. I, § 3(b)(2) to require narrow interpretation of the PRA's exemption for computer software); *Sander v. State Bar of Cal.*, 58 Cal. 4th 300, 313 (2013) (same as to state bar rules). Indeed, the Court of Appeal did not cite the constitutional rule of narrow construction a single time, and instead cited cases that predate the amendment for the proposition that the exemption for law enforcement records is a broad one, without noting any intervening change in interpretive rule. *See* Slip Op. at 6 n.3.

The court also failed to address the fundamental differences between the mass surveillance technology in ALPRs and traditional human policing, and instead mechanically applied old caselaw addressing targeted investigations by human officers to ALPR technology. Indeed, the court's opinion rests on the presumption that there is no difference between an officer manually checking a single license plate and high-tech surveillance equipment automatically cataloging the locations of millions of vehicles in Los Angeles every week. *See* Slip Op. at 11 (noting that "the ALPR system replicates, albeit on a vastly larger scale, [an officer] visually reading a license plate and entering the plate number into a computer[.] . . . The fact that the ALPR system automates this process does not make it any less an investigation[.] . . ."). This is out of step with courts and commentators that have recognized that legal rules and definitions developed in a pen-and-paper era cannot blindly be applied to new technology capable of collecting data on a mass scale. *See, e.g., United States v. Jones*, 132 S. Ct. 945, 955 (2012) (Sotomayor, J., concurring); *id.* at 958 (Alito, J., concurring) (distinguishing GPS monitoring of a car's location 24 hours per day for 28 days from one officer following one vehicle on public streets); *Riley v. California*, 134 S. Ct. 2473, 2490 (2014) (distinguishing the search incident

to arrest of small physical items from the search of a cell phone).

As Professor Orin Kerr has noted, "[a]s technology advances, legal rules designed for one state of technology begin to take on unintended consequences." Orin Kerr, *Applying the Fourth Amendment to the Internet,* 62 Stan. L. Rev. 1005, 1009 (April 2010). The Court of Appeal's mechanical application of old case law governing what constitutes an "investigation" under § 6254(f) yields an extraordinary result unintended by the Legislature. Even if one officer manually checking a license plate would be performing an "investigation" within the meaning of § 6254(f), the Legislature did not expressly intend the exemption for records of law enforcement investigations to extend to the automated logging of the license plates of millions of law-abiding Los Angeles drivers. But such express legislative authorization is required for public records to be exempt from disclosure. *Sierra Club v. Super. Ct.*, 57 Cal. 4th 157, 166 (2013) (given "strong public policy" and "constitutional mandate" favoring disclosure, "all public records are subject to disclosure unless the Legislature has expressly provided to the contrary" (quotation and citations omitted)).

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

The Public Records Act allows public scrutiny of agency records so that the people of California can engage in free and informed debate on questionable government policies and conduct. Recent events clearly demonstrate the value of public access; only this month, Congress passed historic legislation restricting the government's powers of surveillance by ending the National Security Agency's bulk collection of telephony metadata. It wasn't until the facts of this and other secret government programs were disclosed that the public and legislators were able to fully debate and ultimately reshape government policy. So, too, here: Petitioners seek access to public records so that the legal and policy implications of the government conduct at issue may be fully and fairly debated.

The rapid advance of digital-era technology since *Williams* and *Haynie* calls for reexamination of this Court's analog-era guidelines for determining the scope of the PRA's "records of . . . investigations" exemption, and Petitioners urge this Court to grant review.

III. STATEMENT OF THE CASE

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

A. The Nature of Automated License Plate Readers

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

record data on each plate they scan, including not only the plate number but also the precise time, date and location it was scanned. *Id.* at 2, 4. The systems often capture images not just of the license plate and vehicle but also of the vehicle's occupants.[2]

Police use ALPR data in two ways. First, ALPR systems can compare scanned license plates against a "hot list" of license plates associated with suspected crimes or warrants and alert officers when any match or "hit" in the database occurs so they can take enforcement action. *Id.* at 3. Second, police accumulate and store ALPR data for use in future investigations. *Id.* at 4. LAPD estimates it records plate scan data for approximately 1.2 million cars per week, and retains that data for five years. LASD estimates it records between 1.7 and 1.8 million plate scans per week and currently retains data for at least two years, although it would prefer to retain the data indefinitely. *Id.* These totals indicate that just these two agencies may have close to *half a billion* records of driver location in their databases—an average of nearly 65 plate scans for each vehicle registered in Los Angeles County.[3]

LAPD and LASD therefore retain vast amounts of data on the location history of Los Angeles drivers—a detailed history compiled on

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[2] *See* Ali Winston, *License plate readers tracking cars*, SFGate (June 25, 2013) available at http://www.sfgate.com/bayarea/article/License-plate-readers-tracking-cars-4622476.php (license plate image clearly showed man and his daughters stepping out of vehicle in their driveway).

[3] According to the DMV, 7,719,360 vehicles were registered in Los Angeles County in 2014. Department of Motor Vehicles, *Estimated Vehicles Registered by County for the Period of January 1 Through December 31, 2013*, available at http://apps.dmv.ca.gov/about/profile/est_fees_pd_by_county.pdf (last visited May 28, 2015).

overwhelmingly law-abiding residents that they can query in investigations of future crimes.

B. Petitioners' Public Records Requests and this Action

To understand and educate the public on the risks to privacy posed by ALPRs in Los Angeles, Petitioners sought documents related to LAPD and LASD's ALPR use, including one week's worth of ALPR data collected between August 12 and August 19, 2012.[4]

Both LAPD and LASD withheld the single week of ALPR data, claiming the data were exempt from disclosure under the PRA's exemption for records of law enforcement investigations, Gov't. Code § 6254(f), and the catch-all exemption, *id.* § 6255(a). Petitioners filed a petition for writ of mandate with Respondent Superior Court seeking to enforce the requests. The Superior Court held a hearing on the petition, agreed with the City and County's positions and upheld their decisions to withhold the records. Petitioners petitioned for a writ mandate at the Court of Appeal.

C. Court of Appeal Opinion

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

[4] Petitioners also sought documents on policies, practices, procedures, training, and instructions related to ALPRs. Those requests are not at issue in this Petition.

plate scanning constitutes an "investigation" of the "hot list" crimes. *Id.* at 10 ("Real Parties have deployed the ALPR system to assist in law enforcement investigations involving an identified automobile's license plate number. It follows that the records the ALPR system generates in the course of attempting to detect and locate these automobiles are records of those investigations.").

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

The court also rejected Petitioners' argument that the mass scale of data collection through ALPRs and the prolonged retention of data made ALPR data fundamentally different from records of traffic stops or other investigations that have been held exempt under the PRA. The volume of data collected, the court reasoned, did not change the character of the act of

collecting it. *See* Slip Op. at 12 ("The fact that ALPR technology generates substantially more records than an officer could generate in manually performing the same task does not mean the ALPR plate scans are not records of investigations."). Nor did the retention of data and its use in subsequent investigation render it subject to the PRA, as documents that fall within the "records of . . . investigation" exemption are exempt indefinitely, "even after the investigations for which they are created conclude." *Id.* at 13.

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

Petitioners did not file a petition for rehearing with the Court of Appeal.

IV. ARGUMENT

A. The Court of Appeal's Holding Significantly Expands the Exemption for "Records of . . . Investigations" Beyond All Prior Case Law

The Court of Appeal held that, because LAPD and LASD use their ALPR systems to gather data that may be helpful in finding stolen or wanted vehicles, the data must necessarily constitute "records" of these investigations. The Court of Appeal reasoned that "[t]hese records would not exist were the County or the City not investigating specific crimes in an attempt to locate persons who are suspected of having committed crimes." Slip Op. at 10 (quotation omitted). However, the holding that each ALPR scan is a record of an investigation rather than the collection of data that may be useful in an investigation constitutes a significant expansion over this Court's prior interpretations of § 6254(f) and would lead to the absurd

conclusion that all drivers in Los Angeles are constantly under investigation, merely because their vehicle may come into view of one of the agencies' ALPR cameras. This result does not fit with any common sense understanding of the term "investigation" as it is used to exempt "records of . . . investigations" in § 6254(f).

1. No Prior Court Has Held the Indiscriminate Collection of Data on Every Member of the Public to Be an "Investigation" under § 6254(f)

The PRA defines neither "investigations" nor "records of . . . investigations," and very few courts in California have addressed this section of the statute. However, the few cases to hold records exempt as "records of . . . investigations" under § 6254(f) all involve targeted inquiries into a specific crime or person that fit easily within the common understanding of police investigations, including a traffic stop,[5] a corruption investigation against a local official,[6] police internal affairs investigations,[7] and disciplinary proceedings against police officers.[8] In no case has a California court ever held that data collected indiscriminately on every member of a community constitute investigative records under 6254(f)—until the Court of Appeal's ruling here.

In the main case to address the investigative records exemption, *Haynie v. Superior Court*, this Court defined "records of investigation exempted under section 6254(f)" as pertaining to "only those investigations

[5] *Haynie v. Super. Ct.*, 26 Cal. 4th 1061, 1070-71 (2001).
[6] *Rivero v. Super. Ct.*, 54 Cal. App. 4th 1048, 1050-51 (1997).
[7] *Rackauckas v. Super. Ct.*, 104 Cal. App. 4th 169, 171 (2002).
[8] *Williams v. Super. Ct.*, 5 Cal. 4th 337, 341 (1993).

undertaken for the purpose of determining whether a violation of law may occur or has occurred." 26 Cal. 4th at 1071. In *Haynie*, a man detained by LASD deputies after a civilian reported suspicious activity in the area involving a vehicle similar to his sought records related to his detention and the reasons for it. *Id.* at 1066. This Court held that, because "the investigation that included the decision to stop Haynie and the stop itself was for the purpose of discovering whether a violation of law had occurred and, if so, the circumstances of its commission[,] [r]ecords relating to that investigation [were] exempt from disclosure by section 6254(f)." *Id*. at 1071.

Haynie is readily distinguishable from this case because it involved an investigation targeted from its inception at responding to a specific report of criminal activity. Deputies decided to stop Haynie because they suspected he might be involved in that activity based on the details given in a civilian tip. Therefore all information linked to his stop was also part of the investigation into whether he matched that tip. In contrast, ALPR plate scans are not precipitated by a specific criminal investigation, nor even an officer's hunch—they are only precipitated by the nonspecific goal of collecting data that may be helpful in locating known stolen or wanted vehicles. ALPR cameras photograph every license plate that comes into view, and the systems store data on up to 14,000 cars during a single shift, regardless of whether the car or its driver is linked to criminal activity. Ex. B at 3 (LASD ALPR Training Presentation).[9] ALPR systems do not

[9] LASD released this presentation in response to Petitioner EFF's original PRA request. The document was included as an exhibit submitted to the

conduct investigations; they collect data.

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

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

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

But what the Court of Appeal failed to recognize is that *Haynie* addressed a fundamentally different circumstance than this case, one in which officers targeted their investigation of potential criminal activity on a specific vehicle and detained the driver based on a tip. *Id.* at 1065-66. *Haynie*'s holding—that police need not be certain in advance that a crime has been committed for their actions to qualify as an "investigation" under § 6254(f)—is limited by those facts and does not reach the suspicionless mass surveillance conducted by ALPRs.

All of the very small number of other cases holding documents exempt from disclosure under the "records of . . . investigations" clause of

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trial court and available as part of the record submitted to the Court of Appeal.

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

In *Haynie*, this Court stated, "we do not mean to shield everything law enforcement officers do from disclosure." 26 Cal. 4th at 1071. In doing so, the Court acknowledged the "records of . . . investigations" exemption has limiting principles, even if it did not define at the time what those were. The automated collection of data on millions of innocent drivers in Los Angeles is not an "investigation" within the meaning of *Haynie* or any of the cases to apply its rule. ALPRs do not involve a "decision" to investigate like the "decision to stop Haynie," *Haynie,* 26 Cal. 4th at 1071; they also do not involve any specific allegations of wrongdoing or a connection to any particular crime. Instead, LPR cameras automatically photograph all plates within view without the driver's knowledge, without the officer targeting any particular car, and without any level of suspicion. Under no prior cases is such data-gathering an "investigation" for purposes of § 6254(f).

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

The Court of Appeal also erred by holding the data exempt as "records of . . . investigations" based on the later and separate checks the ALPR systems perform—comparing the scanned plates against a "hot list" of plate numbers that may be associated with criminal activity. But the fact that the data are used later in investigations does not make them "records of . . . investigations."

Neither the Court of Appeal nor Real Parties suggest that ALPR systems are fundamentally anything but data collection machines, and although the court stated ALPR systems check plates against hot lists "[a]t virtually the same time" they collect plate numbers, the court recognized the collection of data occurs separate from their investigative use. *See* Slip Op. at 2; *id*. at 3 (an ALPR "'*almost* instantly' checks the number against a list of 'known license plates' associated with suspected crimes" (emphasis added)). Real Parties acknowledged this in their opposition briefs filed with the Court of Appeal. The County stated, "[t]he parties all agree that *once license plates are scanned* by ALPR cameras, the plates are checked against stolen vehicle databases." *See* Ex. C at 2 (County Opp'n to Pet. for Writ of Mandate) (emphasis added)). The City similarly described the two-step process of collecting data and checking it against the "hot list," referring to the "initial plate scan" as simply a "read" that "[c]apture[s] data.'" *See* Ex. C at 4 (City Opp'n to Pet. for Writ of Mandate).

The "hot lists" of wanted vehicles represent the fruits of *prior* investigations that have identified certain vehicles as connected with particular crimes, and Petitioners have not sought those "hot lists," nor the

license plate data associated with those lists. The fact that a very small number of scanned plates will be listed on a hot list does not transform the entire database of plates into investigative records.[10]

Nor does the agencies' second use for ALPR data make their collection an "investigation." After ALPR data has been accumulated and stored, police can search that data—data that provides a history of where Los Angeles drivers have been over the last two to five years—in future investigations. For example, if a robbery occurs while an ALPR-equipped vehicle drives past a house, police who are investigating the robbery can check the database of scanned plates, not only to identify nearby vehicles that might have been connected to the crime, *see* Ex. C at 5 (City Opp'n to Pet. for Writ of Mandate (providing examples)), but also to learn which vehicles have been scanned near that house for many years in the past. Therefore, the accumulated data allows officers to investigate crimes that were not identified or committed at the time a driver's plate was scanned. While the data accumulated by ALPRs can be used for these future investigations, the accumulation of data, in itself, does not constitute an "investigation." And when that data is not linked to an investigation at the time it was accumulated, the data cannot constitute a "record" of an investigation.

The collection of license plate number, time and location information by the ALPR systems—the ALPR scan data that Petitioners seek—therefore does not itself represent a record of an inquiry "undertaken for determining whether a violation of law may occur or has occurred"

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[10] *See* ACLU, *supra* n.1 (only 0.2% of plates scanned are connected to any suspected crime or registration issue).

under *Haynie*. And it is this "raw LPR data" captured in the "initial plate scans," unconnected from its later use for "hot list" checks or other investigations, that Petitioners seek, nothing more.

Because the untargeted collection of millions of datapoints each week on the locations of Los Angeles drivers is not itself an "investigation" under this Court's prior cases, those datapoints cannot be "records of . . . investigations" under § 6254(f), and the Court of Appeal erred by holding that they were.

B. In Expanding the Exemption for Records of Law Enforcement Investigations, the Court of Appeal Ignored the Constitutional Requirement that Exceptions to Disclosure Be Narrowly Construed

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

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

Cal. Const. art. I, § 3(b)(2). Despite this important and recent change to government transparency law in California, the Court of Appeal never once mentioned the state Constitution or this amendment in its opinion. As such it failed to recognize that this new constitutional narrowing requirement must necessarily factor in to its application of pre-2004 case law to the facts of this case. Because the Court of Appeal failed to apply this interpretive requirement to its analysis of Section 6254(f)'s "[r]ecords of . . . investigations" exemption, this Court should grant review to address this important issue.

As the plain text indicates, and this Court has repeatedly recognized, the express purpose of Proposition 59 was to create a new interpretive rule for courts. *See Long Beach Police Officers Assn. v. City of Long Beach*, 59 Cal. 4th 59, 68 (2014) ("*LBPOA*") (explaining that Art. I, § 3(b)(2) "direct[s] the courts to broadly construe statutes that grant public access to government information and to narrowly construe statutes that limit such access.").[11] This Court has recognized this interpretive requirement and applied it in numerous contexts. *See LBPOA*, 59 Cal. 4th at 68 (analysis of names of officers involved in shootings under Pen. Code, §§ 832.7-832.8); *Sierra Club v. Super. Ct.*, 57 Cal. 4th 157, 167 (2013) (exemption for computer software); *Sander v. State Bar of Cal.*, 58 Cal. 4th 300, 313 (2013) (state bar rules); *Int'l Fed'n of Prof'l & Technical Eng'rs, Local 21, AFL-CIO v. Super. Ct.*, 42 Cal. 4th 319, 328-30 (2007) (salary information).

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

[11] *See also* Ballot Argument in Support of Proposition 59, Cal. Sec. of State, available at vote2004.sos.ca.gov/voterguide/propositions/prop59-arguments.htm (last visited June 11, 2015).

Unified Sch. Dist. v. Super. Ct., 151 Cal. App. 4th 759, 765-72 (2007) (applying Art. I, § 3(b)(2) to require broad construction of term "person" in interest of furthering transparency).

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

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

42 Cal. 4th 278, 297-98 (2007) (quotations omitted). Such transparency regarding the conduct of law enforcement is particularly crucial in the context of surveillance activities, where rapid technological change has the capacity to dramatically alter how departments go about everyday, "on the street" policing. *See infra* Section IV.C.

Despite the clarity of the interpretive rule, the Court of Appeal's opinion ignores it entirely. Indeed, the decision neither mentions neither the 2004 constitutional amendment nor cites a single authority more recent than 2001. Instead, relying on precedent from this Court that predates Proposition 59, the Court of Appeal reasoned that "[n]otwithstanding the general directive to narrowly construe such exemptions, our Supreme Court has explained that section 6254, subdivision (f) 'articulates a *broad* exemption from disclosure for law enforcement investigatory records[.]'" Slip Op. at 6 n.3 (citing *Williams*, 5 Cal. 4th at 349 (italics in Slip Op.)). But this Court's characterization in *Williams* of the "broad exemption" for law enforcement records was made in 1993 and is undermined by the subsequent constitutional requirement for narrow construction of

exemptions. *See* Cal. Const. art. I, § 3.

The Court of Appeal's opinion goes on to rely heavily on the broad, plain-text interpretation of the exemption articulated by this Court in *Haynie* in 2001 for its conclusion that each automatic, indiscriminate scan of a plate within range of a police car constitutes a record of an "investigation" within the meaning of the § 6254(f) exemption and repeatedly cites *Haynie* in arguing that the exemption "broadly shield[s]" records from disclosure. Slip Op. at 10; 6-7. However, even if this reading of *Haynie* were accurate, it would bear serious reconsideration in light of the constitutional amendment enacted three years later.

The Court of Appeal's failure to apply the narrowing rule of art. I, § 3, and its reliance on decisions that predate that constitutional requirement not only undermine its holding on ALPR data, but set troubling precedent for future interpretations of § 6254(f). Neither this Court nor any court of appeal has yet addressed the implications of Proposition 59 for § 6254(f)'s exemption for "records of . . . investigations."[12] Therefore, the Court of Appeal's broad interpretation now represents the primary authority for lower courts on the scope of that exemption. This Court should grant review to ensure Proposition 59's mandated preference for disclosure is

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

applied to the exemption for police "records of . . . investigations."

C. The Court of Appeal's Opinion Fails to Acknowledge the Fundamental Differences Between ALPR Technology and Traditional Policing and the Impact of that Difference on Public Records

Courts are increasingly recognizing that advances in technology that fundamentally change law enforcement's ability to collect information on citizens require a re-interpretation of old rules to ensure those rules continue to serve the same functions and protect the same values as they did in the past. And yet, in the Court of Appeal's application of *Williams* and *Haynie* to the facts of this case, it assumes new technologies such as ALPRs have no impact on how courts should interpret Section 6254(f). This approach not only is out of step with other courts that have addressed the impact of new technologies on old rules but also fails to ensure the underlying values supported by the Public Records Act are preserved in an era of increasing technological change.

The Court of Appeal recognized that LAPD and LASD's ALPR systems together record the plate number, time, date, and location of approximately 3 million vehicles every week. LASD has stated that "ALPR has the 'ability' to read more than 14,000 license plates during the course of a shift," Ex. B at 3 (LASD ALPR Training Presentation), and one ALPR system vendor has claimed that its product can "capture[] up to 1,800 license plate reads per minute."[13] Nevertheless, the Court of Appeal

[13] ELSAG North America, ALPR Products and Solutions > Mobile Plate Hunter – 900, http://elsag.com/mobile.htm (last visited June 11, 2015). LASD also notes that ALPRs "can read a license plate, coming in the opposite direction, at over 160mph." Ex. B at 3 (LASD ALPR Training

presumed that "[t]he fact that the ALPR system automates this process and generates exponentially more records than officers could humanly produce has no bearing on whether those plate scans and associated data are records of investigations under § 6254, subdivision (f)." Slip Op. at 12 n.6; *see also id.* at 11, 12. But the vast data collection possible with ALPRs means these two situations are fundamentally different.

Although the Court of Appeal imagines a hypothetical police force devoted to taking down and checking the license plates of every car that passes, *see* Slip Op. at 12 n.6, human officers cannot possibly check as many plates per minute as an ALPR system, let alone check the license plate of every car they pass on the streets of Los Angeles.[14] For this reason, officers necessarily check vehicles based on suspicion or hunches and select particular plates to run against the database. Because ALPRs check every plate that comes into view, they are untargeted, indiscriminate and comprehensive in a way that human officers can never be. When this Court addressed the investigatory records exemption in *Williams* and *Haynie*, it could not have contemplated an application of § 6254(f) that would cover such a vast collection of data.

Presentation). It is unlikely a human could accurately record plate data on a vehicle traveling at this speed.

[14] This hypothetical police force parallels an argument advanced by Justice Scalia in *Jones* that a GPS tracker was not unlike a constable concealing himself in a target's coach to track the subject's movements." *Jones*, 132 S.Ct. at 950 n.3 (Scalia, J.), a hypothetical that Justice Alito pointed out would require "either a gigantic coach, a very tiny constable, or both—not to mention a constable with incredible fortitude and patience." *Id.* at 958 n.3 (Alito, J., concurring in the judgment). Similarly here, the inability of human officers to collect data in the manner ALPRs can and do illustrates that the devices are doing something quite different from human officers.

Contrary to the Court of Appeal's approach, other courts and commentators have recognized that technology does matter and that legal rules and definitions developed in a pen-and-paper era cannot blindly be applied to new technology capable of collecting data on a mass scale. As Professor Kerr has observed:

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

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

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

Courts addressing computer searches have similarly found old rules cannot blindly be applied to new technology. For example, in *United States v. Ganias*, the Second Circuit Court of Appeals noted that computer files "may contain intimate details regarding an individual's thoughts, beliefs, and lifestyle" and may therefore warrant even greater Fourth Amendment protection than "18th Century 'papers.'" 755 F.3d 125, 135 (2d Cir. 2014). And in *United States v. Cotterman*, the Ninth Circuit held officers must have reasonable suspicion to conduct a forensic search of a computer at the border because the "gigabytes of data regularly maintained as private and confidential on digital devices" distinguish the contents of a computer from the contents of luggage. 709 F.3d 952, 957, 964 (9th Cir. 2013); *see also*, *e.g.*, *United States v. Lichtenberger*, 2015 U.S. App. LEXIS 8271, at *17, *20 (6th Cir. May 20, 2015) (recognizing "extensive privacy interests at stake in a modern electronic device" and distinguishing a computer from a package under the private search doctrine); *United States v. Saboonchi*, 48 F. Supp. 3d 815, 819 (D. Md. 2014) (noting "[f]acile analogies of forensic examination of a computer or smartphone to the search of a briefcase, suitcase, or trunk are no more helpful than analogizing a glass of water to an Olympic swimming pool because both involve water located in a physical container" and holding forensic searches of smartphones and flash drive at the border must be based on reasonable, particularized suspicion).

Courts have been increasingly sensitive to technology, like ALPRs, that can track a person's location information over time. For example, in protecting cell site location information (CSLI)[15] in *Commonwealth v.*

[15] CSLI is data generated when cell phones identify themselves to nearby cell towers. It "allows carriers to locate cell phones on a real-time basis and

Augustine, the Massachusetts Supreme Judicial Court recognized that historical location data gives police access to something they would never have with traditional law enforcement investigative methods: the ability "to track and reconstruct a person's past movements." 4 N.E. 3d 846, 865 (Mass. 2014). Similarly, in *State v. Earls*, the New Jersey Supreme Court distinguished CSLI from older, less sensitive tracking devices like beepers because CSLI blurs "the historical distinction between public and private areas . . . [and thus] does more than simply augment visual surveillance in public areas." 70 A.3d 630, 642-43 (N.J. 2013)(citing *United States v. Knotts*, 460 U.S. 276, 282 (1983)); *see also Tracey v. State*, 152 So. 3d 504, 522, 524-25 (Fla. 2014) (distinguishing real-time cell site location information from the *Knotts* beeper).

Here, the mechanical application of rules from prior cases obscures the basic question before the court: Did the Legislature, in creating § 6254(f)'s exemption for "records of . . . investigations" in 1968, intend to exempt data collected *en masse* by automated systems about every driver in Los Angeles, law-abiding and criminal alike? The answer is clearly no. The exemption for law enforcement records is intended to protect "the very sensitive investigative stages of determining whether a crime has been committed or who has committed it," *Haynie*, 26 Cal. 4th at 1070. The data collected by ALPRs provides no information about who police are investigating. The ALPR's automated scanning of a license plate is not an investigation; it is the collection of data that can be used in investigations.

As with GPS trackers, CSLI, and cell phone and computer searches,

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to reconstruct a phone's movement from recorded data." *Earls*, 70 A.3d at 632.

ALPR technology fundamentally changes the "technological environment." Kerr, 62 Stan. L. Rev. at 1009. The Court of Appeal's rote application *Williams* and *Haynie* to the facts of this case not only fails to acknowledge the impact of technology on modern law enforcement data collection but fails to preserve the democratic values the Public Records Act was intended to protect.

D. Expanding § 6254(f) to Exempt Mass Police Data Collection Has Broad Implications for Public Records Access in California

The Court of Appeal's broad ruling exempting from public disclosure any information collected by police through automated surveillance technology, without any suspicion of wrongdoing and indeed without any human targeting at all, holds profound implications for access to information not only about ALPRs, but about other forms of police surveillance and data compiled to promote police accountability, including the footage from police body cameras.

By putting data out of public reach, the Court of Appeal's decision significantly hinders police transparency in at least two ways. First, the Court of Appeal's ruling holds implications for a wide range of other "records generated by an automated process." Slip Op. at 7. For example, data collected by body cameras or patrol car dash cameras could corroborate complaints of police misconduct, but under the Court of Appeal's holding such footage would be exempt from disclosure. The opinion therefore threatens to make even data collected for purposes of providing police accountability confidential and within department's discretion to withhold.

Second, the decision hides the full implications of ALPR and other surveillance technology from public scrutiny and stifles informed debate about the balance between privacy and security. ALPRs pose significant risks to privacy and civil liberties. They can be used to scan and record vehicles at a lawful protest or house of worship; track all movement in and out of an area;[16] gather information about certain neighborhoods[17] or organizations;[18] or place political activists on hot lists so that their movements trigger alerts.[19] The U.S. Supreme Court has noted the sensitive nature of location data and the fact that it can reveal "a wealth of detail about [a person's] familial, political, professional, religious, and sexual associations." *See Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring); *id.* at 958 (Alito, J., concurring). The International Association of Chiefs of Police has cautioned that ALPR technology "risk[s] . . . that individuals will become more cautious in the exercise of their protected rights of

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[16] Cyrus Farivar, *Rich California town considers license plate readers for entire city limits*, Ars Technica (Mar. 5, 2013) http://arstechnica.com/ tech-policy/2013/03/rich-california-town-considers-license-plate-readers-for-entire-city-limits/.

[17] *See* Paul Lewis, *CCTV aimed at Muslim areas in Birmingham to be dismantled*, The Guardian (Oct. 25, 2010). http://www.guardian.co.uk/uk/2010/oct/25/birmingham-cctv-muslim-areas-surveillance (last visited June 11, 2015).

[18] *See* Adam Goldman & Matt Apuzzo, *With cameras, informants, NYPD eyed mosques*, Associated Press (Feb. 23, 2012). http://www.ap.org/Content/AP-In-The-News/2012/Newark-mayor-seeks-probe-of-NYPD-Muslim-spying (last visited June 11, 2015).

[19] Richard Bilton, *Camera grid to log number plates*, BBC (May 22, 2009), available at http://news.bbc.co.uk/2/hi/programmes/ whos_watching_you/8064333.stm (last visited June 11, 2015).

expression, protest, association, and political participation because they consider themselves under constant surveillance."[20]

Despite these risks, police use of ALPRs has exploded in recent years. In a 2011 survey, 71% of police departments used ALPR technology and 85% expected to acquire or increase use in the next five years.[21]

Public access to ALPR data has provided important checks against abuse and prompted debate about the technology. The Boston Police Department "indefinitely suspended" its ALPR use after data released to the *Boston Globe* led to questions about the scope of data collected, the privacy invasion involved, and the department's ability to safeguard data.[22] In Minneapolis, a *Star Tribune* story about ALPRs led to a public debate on data retention policies.[23] Other articles and publications have used ALPR data to provide important insight into the use—and potential abuse—of ALPRs. In 2012, the Wall Street Journal obtained ALPR data from

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[20] International Association of Chiefs of Police, *Privacy impact assessment report for the utilization of license plate readers*, 13 (Sept. 2009), available at http://www.theiacp.org/Portals/0/pdfs/LPR_Privacy_Impact_Assessment.pdf (last visited June 11, 2015).

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

[22] Shawn Musgrave, *Boston Police halt license scanning program*, Boston Globe (Dec. 14, 2013), available at http://www.bostonglobe.com/metro/2013/12/14/boston-police-suspend-use-high-tech-licence-plate-readers-amid-privacy-concerns/B2hy9UIzC7KzebnGyQ0JNM/story.html (last visited June 11, 2015).

[23] Eric Roper, *Minnesota House passes protections on vehicle tracking, data misuse*, Minneapolis Star Tribune (May 17, 2013). http://www.startribune.com/politics/statelocal/207965541.html

Riverside County, allowing reporters to analyze the number of times cars appeared in the database, to find the number of unique plates, and to set up a web-based tool to allow readers to see if (and where and when) their vehicles had been scanned in Riverside County.[24] Petitioner EFF used ALPR data obtained from the Oakland police to perform a similar analysis, to create a "heat map" to show where ALPRs are deployed most frequently, and to map ALPR use against publicly-available crime and census data.[25] Raw ALPR data shows more clearly than any other information how police use ALPRs. Without that data the public whose whereabouts are being recorded cannot know the scope of the intrusion nor challenge policies that inadequately protect their privacy.

The extraordinary implications of the Court of Appeal's ruling for ALPRs and for other technology necessitate this Court's review.

V. CONCLUSION

The Court of Appeal's decision significantly expands the Public Records Act exemption for records of law enforcement investigations to encompass data gathered indiscriminately on law-abiding Californians, without any individualized suspicion of criminal activity. Because of the erroneous result, the tension between the Court of Appeal's analysis and the

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

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

preference for public access to records embodied in Article I, section 3 of the California Constitution, and the profound implications of the Court of Appeal's opinion for public access to records of police surveillance, Petitioners respectfully request that this Court review this important case and restore the public's constitutionally protected right of access.

Dated: June 15, 2015

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I certify pursuant to California Rules of Court 8.204 and 8.504(d) that this Petition for Writ of Mandate is proportionally spaced, has a typeface of 13 points or more, contains 8,260 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: June 15, 2015

_____

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CERTIFICATE OF SERVICE

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

On June 15, 2015, I served the foregoing document: **PETITION FOR REVIEW,** on the parties in this action by placing a true and correct copy of each document thereof, enclosed in a sealed envelope on the persons below as follows:

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I deposited the sealed envelopes with the United States Postal Service, with postage thereon fully prepaid. I am a resident of the county where the mailing occurred. The envelope was placed in the mail at San Francisco, California.

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By _____
Madeleine Mulkern