

March 8, 2023

The Honorable Anne Milgram
Administrator
U.S. Drug Enforcement Administration
8701 Morrisette Drive
Springfield, VA 22152

Re: Coalition letter regarding the Drug Enforcement Administration's unauthorized National License Plate Reader Program

Dear Administrator Milgram:

We write on behalf of a diverse group of organizations dedicated to racial equity, privacy, civil rights and civil liberties, and police and criminal justice reform. We seek to bring your attention to a DEA surveillance program—the National License Plate Reader Program (NLPRP)—that is both illegal and intrudes on the rights and liberties of millions of Americans. We request a meeting with policymakers from DEA to discuss our concerns and to explore ways to address them, both retrospectively and going forward. We believe a review of this program is incumbent upon DEA in light of the White House's recent Executive Order on police and criminal justice reform, and that the program should be discontinued.¹

The NLPRP uses automated license plate reader cameras (ALPRs) to indiscriminately capture the daily movements of millions of American motorists, regardless of whether they are suspected of a crime, much less a drug-related crime. Some of these ALPRs are operated by DEA itself. Others are provided by DEA to local law enforcement agencies, with no binding rules restricting how the cameras may be used. Whether operated by DEA or local police, the cameras capture and store hundreds of millions of records about American motorists, including license plate images stamped with the exact place and time they were taken. All of this data feeds into a central DEA database.²

Regardless of any potential law enforcement capabilities ALPRs may carry, they present significant concerns regarding privacy, discrimination, and technological error. They also raise serious civil liberties concerns and, at least in certain circumstances, likely violate the Fourth Amendment to the U.S. Constitution. ALPR technology has been misused by police to stalk an officer's former romantic partner; to identify a woman's license plate information in order to message her unsolicited through Facebook; and to monitor gun show attendees.³ ALPR data can

¹ See Executive Order on Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety, §§ 18(c)(ii), 20 (May 25, 2022).

² Although the broad contours of the NLPRP are known, DEA has been reticent to publicly disclose details regarding the program. See U.S. DEP'T OF JUST., DRUG ENF'T ADMIN., FY 2021 PERFORMANCE BUDGET CONGRESSIONAL BUDGET SUBMISSION 40, www.justice.gov/doj/page/file/1246331/download; Jay Stanley & Bennett Stein, ACLU, *FOIA Documents Reveal Massive DEA Program to Record Americans' Whereabouts With License Plate Readers* (Jan. 26, 2015), www.aclu.org/news/free-future/foia-documents-reveal-massive-dea-program-record-americans-whereabouts-license.

³ See *Police Officer in Westmoreland County Accused of Using License Plate Readers to Terrorize and Stalk Estranged Wife*, CBS NEWS PITTSBURGH (Sept. 28, 2021), www.cbsnews.com/pittsburgh/news/police-officer-in-

be used to track people who visit sensitive places such as abortion clinics, immigration assistance centers, political protests, and centers of worship. There are also anecdotal reports of ALPRs being used to perpetuate racial discrimination. In one widely reported case, police officers in New York City mounted ALPRs on top of unmarked cars and drove down the street near a mosque to record the license plates of everyone parked near the mosque.⁴

Importantly, ALPR technology is also not infallible, even if it is used as intended. One analysis of an ALPR system found that it misidentified a license plate's state about ten percent of the time.⁵ There are disturbing reports of police misidentifying criminal suspects based on errantly read license plates, misspelled names, and wrongfully flagged stolen vehicles. In one case, an ALPR camera misread the number "3" on a license plate as a "7" and flagged that vehicle as stolen, leading officers to pull over an innocent 47-year-old Black woman, surround her with their guns drawn, and order her to exit her car and kneel on the ground.⁶

These risks are inherent to any license plate reader program, but they are especially pronounced in one that operates without any legislative authorization or administrative rulemaking to establish constraints on the program's operation. Despite the sweeping and potent nature of the NLPRP, Congress has never authorized it legislatively. Nor has DEA ever engaged in public administrative rulemaking to promulgate regulations to govern the program. For those reasons, the NLPRP violates the law.

Federal agencies must act within the boundaries of their powers drawn by Congress. Agency actions that exceed the scope of the authority given to them by statute are *ultra vires*. See *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 297 (2013) ("[W]hen [agencies] act improperly, no less than when they act beyond their jurisdiction, what they do is *ultra vires*."). "[A]n agency literally has no power to act . . . unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 374 (1986).

Through the Controlled Substances Act, Congress has authorized the Attorney General to enforce the federal drug laws. 21 U.S.C. §§ 801-904. Congress and the President have further provided that DEA should serve as the primary agency responsible for carrying out this drug enforcement responsibility. See Reorganization Plan No. 2, 87 Stat. 1091 (1973). DEA's legal authority is thus circumscribed to drug enforcement. It is not authorized to engage in general, all-crimes policing and surveillance. Yet that is exactly what DEA does through its operation of the NLPRP. The program gathers detailed information about the locations of hundreds of millions of law-abiding

[westmoreland-county-accused-stalking-and-terrorizing-estranged-wife](#); Sadie Gurman, *Across US, Police Officers Abuse Confidential Databases*, AP (Sept. 28, 2016), apnews.com/article/699236946e3140659fff8a2362e16f43; Devlin Barrett, *Gun-Show Customers' License Plates Come Under Scrutiny*, WALL STREET JOURNAL (Oct. 2, 2016), www.wsj.com/articles/gun-show-customers-license-plates-come-under-scrutiny-1475451302.

⁴ Adam Goldman & Matt Apuzzo, *With Cameras, Informants, NYPD Eyed Mosques*, AP (Feb. 23, 2012), www.ap.org/ap-in-the-news/2012/with-cameras-informants-nypd-eyed-mosques.

⁵ Jay Stanley, ACLU, *Fast-Growing Company Flock is Building a New AI-Driven Mass-Surveillance System* (Mar. 3, 2022), www.aclu.org/report/fast-growing-company-flock-building-new-ai-driven-mass-surveillance-system.

⁶ Kade Crockford, ACLU, *San Francisco Woman Pulled Out of Car at Gunpoint Because of License Plate Reader Error* (May 13, 2014), www.aclu.org/news/privacy-technology/san-francisco-woman-pulled-out-car-gunpoint-because.

Americans and, by its nature, operates in a manner that goes well beyond the enforcement of federal drug laws. State and local agencies that receive ALPR cameras from DEA and that have access to DEA's centralized ALPR database have carte blanche to use this information for any and all surveillance and investigatory activities they choose. There is no binding limitation on these agencies' use of ALPR cameras and data to combat drug trafficking specifically. DEA thus exceeds its legal authority by operating the NLPRP.

To be sure, Congress has instructed the Attorney General to cooperate with state and local agencies in the pursuit of its drug enforcement mission. 21 U.S.C. § 873(a). But this delegation of authority cannot reasonably be construed to permit the operation of a sweeping national vehicle surveillance program in cooperation with local police departments—a power that Congress surely would have provided for explicitly had it intended to do so. No provision in that section grants DEA the authority to create and maintain a database that tracks the daily movements of hundreds of millions of American motorists. Nor does any provision in the section speak more specifically to the collection and sharing of license plate data with state and local policing agencies.

The NLPRP also violates the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, because DEA has not implemented it through notice-and-comment rulemaking. Such rulemaking is required given that the program creates rules that bind the public and “substantively affects the public to a degree sufficient to implicate the policy interests animating notice-and-comment rulemaking.” *Elec. Priv. Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 653 F.3d 1, 6 (D.C. Cir. 2011) (holding that a TSA decision to screen airline passengers with advanced imaging technology was a substantive legislative rule subject to notice-and-comment rulemaking requirements). The NLPRP subjects all members of the public who drive a car to automated surveillance in the form of electronic image capture and location tracking. Such a requirement intrudes upon the privacy interests of the public in a manner that “has the hallmark of a substantive rule” and requires notice-and-comment rulemaking. *Id.* at 6. Moreover, individuals have no way to opt out of ALPR surveillance and may face adverse consequences if, for example, they attempt to cover their license plates to avoid image capture. The program thus has a binding effect on the public and, under the APA, must be governed by rules promulgated through notice-and-comment rulemaking. *See id.* at 7.

These questions concerning democratic authorization for the NLPRP are compounded by the serious risks it poses to individuals' First and Fourth Amendment rights. As with cell phones, cars have long been “such a pervasive and insistent part of daily life” that for many individuals, owning and driving one “is indispensable to participation in modern society.” *Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018) (quotation marks and citation omitted). Our vehicles take us to sensitive and private places like our homes, doctors' offices, and places of worship. *See United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring). And yet, for many years now, with little to no oversight, law enforcement agencies and private companies have been quietly scanning and recording the locations of vehicles' license plates across the country, amassing databases with billions of vehicle location points. Because ALPR data is stored for years, ALPR databases allow for retrospective searches that enable law enforcement to infer driving patterns, associations, and sensitive details about drivers' lives. At bottom, searches of ALPR databases threaten to undermine the “degree of privacy against government that existed when the Fourth Amendment was adopted,” *Carpenter*, 138 S. Ct. at 2214 (quotation marks and citation omitted),

because they give police a capability unimaginable in the past—the ability to enter a virtual time machine and view people’s past movements.

In sum, the NLPRP violates basic principles of constitutional and administrative law, and threatens the civil rights and civil liberties of millions of Americans.

For all these reasons, we urge you to end the NLPRP immediately. At a minimum, we insist that you suspend the program unless and until the legislative authorization, administrative rulemaking, and constitutional rights concerns discussed above have been addressed. We respectfully request a meeting with policymakers from your agency and the Department of Justice to discuss the concerns outlined in this letter.

If you have any questions, and to schedule the requested meeting, please contact Farhang Heydari, Legal Director, Policing Project at NYU School of Law, farhang.heydari@nyu.edu, 212.998.6469.

Sincerely,

American Civil Liberties Union
Brennan Center for Justice
Center on Race, Inequality, and the Law at NYU School of Law
Community Resource Hub for Safety & Accountability
Electronic Frontier Foundation
Electronic Privacy Information Center (EPIC)
Fight for the Future
Policing Project at NYU School of Law
Restore The Fourth
Secure Justice
The Surveillance Technology Oversight Project