IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

RAUL MAS CANOSA, CASE NO.: 2018-33927-CA-01

Plaintiff,

vs.

CITY OF CORAL GABLES, FLORIDA, *et al.*,

Defendants.

_____/

PLAINTIFF'S RESPONSE TO DEFENDANT FLORIDA DEPARTMENT OF LAW ENFORCEMENT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Raul Mas Canosa files this response to Defendant Florida Department of Law Enforcement's ("FDLE") motion for summary judgment. For the reasons set out below, FDLE has not established that a grant of summary judgment in its favor is appropriate. This Court should deny the City's motion and grant Mr. Mas's corresponding motion for summary judgment.

I. INTRODUCTION

Rather than promulgating a rule, FDLE used a guidance document to prescribe policy and practice requirements of general applicability that implement Florida law governing the administrative collection and retention of ALPR data. FDLE concedes that this state-wide policy repeatedly uses mandatory language like "enforce," "shall," and "comply," but then FDLE insists that it never meant to require compliance with its Guidelines. The Guidelines' most direct and mandatory language, however, appears in subsection 6.e., governing "Data Retention and Use[,]" the provision with which the City was obligated to comply and which forms the basis of Mr. Mas's complaint. Citing Florida Statute 316.0778, which requires FDLE's participation in setting Florida's data-retention policy, FDLE limits localities from retaining ALPR data for more than three years and requires that "[d]ata

captured, stored, generated, or otherwise produced *shall* be accessible in the ALPR system for 30 days for tactical use." Maj. Raul Pedroso Dep. Exhibit 26 at 7 (emphasis added).

FDLE attempts to avoid the obvious reading that its Guidelines are meant to apply "uniform[ly] statewide … pursuant to Section 943.08," Pedroso Exhibit 26 at 1, by highlighting that not every single clause of every single sentence in the Guidelines includes explicitly compulsory language. But it has been clear since the legislature directed FDLE to promulgate rules setting a data retention schedule that the Guidelines were meant to set a comprehensive policy, which would be mandatory on localities that should have been promulgated through rulemaking.

As early as the drafting process, agency staff recognized that the Guidelines were likely a rule that FDLE must promulgate through formal procedures. The Council's meeting notes and the Department of State both flagged the fact that the Guidelines, including the ALPR data-retention schedule, "may need to be promulgated" as a rule. FDLE 234, 292. The City (and surely other agencies) understood the binding nature of the Guidelines, amending its prior 30-day retention policy in compliance with FDLE's general policy. In the City's view, the Guidelines "set" "the limit," not the City's own policy. Nelson Gonzalez Dep. 83:14-20 July 31, 2020. Indeed, this Court dismissed Counts VIII and IX of Mr. Mas's Amended Complaint because the City lacked any authority to destroy ALPR data after 30 days because doing so would violate the State's retention policy. Order on Mot. to Dismiss, at 16-17.

FDLE cannot now dismiss as mere suggestions its formal rule implementing Florida law. FDLE did *something* when it issued the Guidelines requiring "[e]very Florida law enforcement agency that uses or possesses an ALPR" to adopt a data-retention and use policy "consistent with these Guidelines." Pedroso Exhibit. 26 at 2. The Guidelines are an "unadopted rule" that was promulgated without following the required rulemaking procedures. This Court should vacate FDLE's rule.

A. The Guidelines Interpreted Florida Law and Implemented a General Rule that FDLE Intended Localities Statewide to Follow

Under Florida law, a rule is an agency's "statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule." Fla. Stat. § 120.52(16). If an agency statement "meets the definition" of a rule "but [] has not been adopted pursuant to the requirements of" Section 120.540, the statement is an impermissible "unadopted rule." Fla. Stat. § 120.50(20).

The stated purposes of FDLE's Guidelines were to create a "uniform statewide policy … pursuant to Section 943.08" and to "ensure that ALPRs are used in accordance with the substantive procedural safeguards" that FDLE set out in the Guidelines. Pedroso Exhibit 26, at 1. FDLE insists that the Guidelines aren't mandatory, however, because the word "shall" appears *only* 13 times in six pages. (FDLE MSJ, at 28). Despite FDLE's suggestion that 13 mandatory instructions in six pages should still be read as nonbinding, the Guidelines explicitly instruct that "all law enforcement agencies must comply with Florida Statutes governing the use of ALPR data[,]" and they then set out FDLE's interpretation of that Florida law. Pedroso Exhibit 26. With respect to the use and retention requirements at issue in this case, the Guidelines use language that leaves no doubt about whether local law enforcement can disregard FDLE's policy:

> ALRP data *shall* he retained in accordance with Florida Statute 316.0778. *ALRP data* that are part of an ongoing or continuing investigation and information that is gathered and retained without specific suspicion *may be retained for no longer than 3 anniversary years.* Access to ALPR data for criminal investigations or intelligence purposes *is limited* to authorized Criminal personnel for no longer than 3 anniversary years and *requires* an agency case number or case. Data captured, stored, generated, or otherwise produced *shall be accessible in the ALPR system* for 30 days for tactical use.

Pedroso Exhibit 26 at 7 (emphasis added). No rational reading of this language suggests that the City (or any other locality) was free to ignore the Guidelines.

FDLE concedes—as it must—that the first and fourth sentences of this mandate are written in compulsory terms through the use of "shall." (FDLE MSJ, n.18, n.24). That the two remaining sentences do not *also* use "shall" does not mean that those sentences are permissive. This Court must use a functional test, and consider the "effect of the agency statement," not just tally magic words. *See Coventry First, LLC v. Office of Ins. Regulation*, 38 So.3d 200, 203 (Fla. 1st DCA 2010). Besides, unpromulgated rules are invalid as a whole; not just the parts that happen to use mandatory language. *See Dep't of Revenue of State of Fla. v. Vanjaria Enterprises, Inc.*, 675 So. 2d 252, 256 (Fla. 5th DCA 1996) (entire training manual was "void" because it was an unpromulgated rule). FDLE's argument is just a distraction, and one that ignores the obvious import of the language used in the Guidelines.

A breakdown of Subsection 6.e. confirms its compulsory nature. For starters, FDLE begins its data-retention policy by noting that agencies "shall" comply with Florida Statute 316.0778. Pedroso Exhibit 26, at 7. Section 316.0778 tasks the Department of State with establishing a data-retention schedule "[i]n consultation with [FDLE]." By invoking this statutory directive, a reader must understand that what follows is FDLE's interpretation of the state law it is tasked in part with implementing. The second sentence then tells agencies that they can retain ALPR data for "no longer than 3 anniversary years." Pedroso Exhibit 26, at 7. Again, this plain instruction leaves little doubt that individual departments lack any authority to adopt local policies that do not meet FDLE's 3-year limitation. Next, FDLE expressly "limit[s]" who may access ALPR data and "requires" agencies to use a case number. Pedroso Exhibit 26, at 7. No part of this decree reads like a mere suggestion to localities adopting their own ALPR policies. And the final sentence of the provision confirms the lack of local discretion by once again using the word "shall" to require agencies to make their ALPR data "accessible in the ALPR system for 30 days for tactical use." Pedroso Exhibit 26, at 7. Taken together, these four sentences articulate a general, statewide policy for how all agencies that use ALPRs can use and retain that data. The very next subsection, entitled "Oversight," once again uses the word

"shall" repeatedly. Pedroso Exhibit 26, at 7. To the extent a local agency may make its own ALPR policy, the Guidelines leave no doubt that the agency's policy must comply with the data-retention and use requirements of the Guidelines.

As a generally applicable policy that interprets and implements state law, the Guidelines are a rule that should have been promulgated through the formal process—particularly given that the Guidelines adversely affect the constitutional rights of Floridians. The statewide policy that the Guidelines set for the use and retention of ALPR data is integral to the City's ability to paint a picture of Mr. Mas's movements over time. Therefore, the Guidelines adversely affect Mr. Mas's rights, further confirming their status as an unadopted rule. *See Coventry First, LLC*, 38 So.3d at 203 ("If the *effect* of an agency statement is to create certain rights or *adversely affect other rights*, it is a rule.") (emphasis added).

The cases on which FDLE relies are inapposite and do not change this conclusion. For instance, in *Agency for Health Care Administration v. Custom Mobility*, the Court considered whether an auditing technique that the agency used constituted a rule. 995 So.2d 984, 986 (Fla. 1st DCA 2008). The agency, however, actually used the formula at issue in only 10% of its audits, and the court rightly recognized that the formula did not create any rights or require compliance because in practice it was not binding. *Id.* at 985. Similarly, the guidelines at issue in *Department of Highway Safety & Motor Vehicles v. Schluter* applied only "in certain circumstances." 705 So.2d 81, 82 (Fla. 1st DCA 1997). By contrast with those two decisions that dealt with non-general policies, the Guidelines at issue here set a statewide policy and purport to apply to *every* law-enforcement office that uses ALPRs. And, in this instance, they have been *followed* by Coral Gables.

FDLE, however, claims unconvincingly that its Guidelines are not a generally applicable rule because localities remain free to decide whether to adopt an ALPR system in the first place and, once adopted, can adopt their own policies. (FDLE MSJ, at 21). But nowhere in the *Guidelines* does FDLE

state that those localities are free to depart from FDLE's Guidelines once the local law-enforcement agency chooses to implement an ALPR system. The very purpose of the Guidelines was to implement a statewide use and retention policy consistent with FDLE's interpretation of the law. *See Grabba-Leaf, LLC v. Dep't of Business and Professional Regulation*, 257 So.3d 1205, 1211 (Fla. 1st DCA 2018) ("The Department's memo constitutes a 'rule' because it is a statement of general applicability that implements and interprets the law."). The Executive Summary to the Guidelines even says that they are "uniform statewide guidelines" concerning the use of ALPRs. Pedroso Exhibit 26, at 2. Indeed, this general applicability of the Guidelines has been clear to all since FDLE adopted its policy—including to the City, which understood that the Guidelines "set" "the limit," not the City's own policy. Gonzalez at 83:14-20. FDLE's insistence that this Court ignore the Guidelines' text, and substitute instead the arguments of its attorneys about how they apply, must be rejected.

Accepting FDLE's argument would mean that no statewide policy promulgated by a state agency constitutes a rule unless the agency includes a mechanism by which the state can hold localities to account for their failure to follow the statewide policy. Such inter-governmental enforcement, however, is not a component of what constitutes a rule. Indeed, a policy of sanctioning local governments for non-compliance with state preferences is not a dispositive feature of a "rule." *See Fla. League of Cities, Inc. v. Admin. Comm'n*, 586 So.2d 397, 406 (Fla 1st DCA 1991) ("The sanctions policy fits the definition of incipient or evolving policy, and not the section 120.52(16) definition of a rule."). In the end, FDLE's arguments are wholly unsupported by the law.

B. This Court Has the Authority to Rule that FDLE Issued the Guidelines Without Following Required Procedures

For the first time in its motion for summary judgment, FDLE floats the idea that, "[t]o the extent that Plaintiff is bringing an as-applied challenge," this action should have been brought through administrative channels rather in state court. (FDLE MSJ, at 16-17). But this waived argument does

not apply to Mr. Mas's facial challenge, and it does not support FDLE's request for summary judgment.

As a primary matter, this challenge is a facial and procedural one to FDLE's unconstitutional and unadopted rule. All the cases on which FDLE relies are cases in which a party challenged a rule as specifically applied to the facts of their case. *See, e.g.*, *Fla. Fish & Wildlife Conservation Comm'n v. Pringle*, 838 So.2d 648 (Fla. 1st DCA 2003) (rejecting a plaintiff's unexhausted claim that an agency wrongly decided that their fishing net didn't meet the agency's regulation for such nets). It makes sense that courts faced with as-applied challenges implicating an agency's expertise would require exhaustion of administrative procedures. Permitting agencies to apply their expertise to particular facts is, after all, the purpose of the exhaustion doctrine. *See id.* at 650 ("The issue raised in the complaint involves technical expertise in the area of fishing gear specifications and prohibitions.").

The issue presented in this case, however—whether FDLE's Guidelines are an unadopted rule—is a facial challenge to the rule presenting a pure question of statutory and constitutional law, divorced from the agency's expertise, which is appropriate for this Court's consideration in the first instance. *See* Fla. Stat. § 120.56(3) (authorizing a challenge "at any time" to assert that an "existing rule is an invalid exercise of delegated legislative authority"); *id.* § 120.54(1) (authorizing a challenge to an unadopted rule); *Jenkins v. State*, 855 So.2d 1219 (Fla. 1st DCA 2003) (permitting an administrative attack on an FDLE rule to proceed before a trial court in the first instance); *Shaktman v. State*, 553 So.2d 148, 150 (Fla. 1989) (entertaining a challenge under Article I, Section 23 of the Florida Constitution); *Hillsborough Inv. Co. v. Wilcox*, 13 S.2d 448, 453 (Fla. 1943) (reasoning that person can bring suit any time "his constitutional rights have been abrogated or threatened by the provisions of the challenged act").

At any rate, administrative exhaustion was unnecessary because no administrative procedure over FDLE's Guidelines could have resolved the constitutional issues raised in Mr. Mas's complaint,

nor would any such proceeding have resolved whether FDLE should have promulgated the rule pursuant to formal rulemaking procedures. *See Fla. Pub. Emps. Council 79, AFSCME v. Dep't of Child. & Fams.*, 745 So.2d 487, 491 (Fla. 1st DCA 1999). Requiring administrative exhaustion in this instance would have been futile and "needlessly time-consuming and expensive." *Id.*

It is also telling that FDLE never outright claims that this Court is an improper forum or that its exhaustion theory is grounds for judgment as a matter of law. FDLE concludes its exhaustion argument by focusing on the standard of proof that Mr. Mas must meet in his proceeding before this Court. (FDLE MSJ, at 20). This Court's jurisdiction to rule on Mr. Mas's administrative-process claims is not in question.

Moreover, to the extent FDLE is invoking the doctrine of administrative exhaustion, it is not doing so in reliance on statute or some theory implicating this Court's jurisdiction. Such prudential claims of exhaustion are best thought of as affirmative defenses that an agency must raise in response to a complaint. *See Braden Woods Homeowners Ass'n, Inc. v. Mavard Trading, Ltd.*, 277 So.3d 664, 671 (Fla. 2d DCA 2019) ("The failure to exhaust administrative remedies is typically an affirmative defense."). As such, FDLE forfeited its half-hearted, late-in-the-day exhaustion defense by failing to raise the issue in its motion to dismiss.

C. FDLE's Unadopted Rules Led the City to Infringe Mr. Mas's Fourth Amendment Rights

As discussed in detail in Mr. Mas's response to the City's motion for summary judgment, the use and retention of ALPR data violates Mr. Mas's Fourth Amendment rights. How long an agency retains ALPR data and with whom the agency shares that data all directly implicate the picture that data can create of an individual's movements over time. *Cf. Carpenter v. United States*, 138 S. Ct. 2206, 2215 (quoting *United States v. Jones*, 565 U.S. 400, 430 (2012) (Alito, J., concurring)); *Commonwealth v. McCarthy*, 142 N.E.3d 1090 (Mass. 2020). Thus, as much as FDLE would like to believe that it has no

responsibility for the City's constitutional violations, the mandatory Guidelines clearly exacerbated the harms Mr. Mas has suffered.

III. CONCLUSION

FDLE promulgated rules without following the required procedures, and those rules were then used to carry out direct violations of Mr. Mas's constitutional rights. This Court should deny FDLE's motion for summary judgment.

Dated: June 23, 2021

Respectfully,

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CERTIFICATE OF SERVICE

I CERTIFY that on this day, June 23, 2021, undersigned counsel has electronically filed the foregoing document with the Clerk of the Court using the Florida Courts E-Portal. Pursuant to Fla. R. Jud. Adm. 2.516(b), I also certify that the foregoing document has been furnished to all counsel of record and interested parties identified on the attached Service List via transmission of Notices of Service of Court Document generated by the E-Portal, or in the manner listed on the attached service list.

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