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

CASE NO: 2018-033927-CA-01
SECTION: CA06
JUDGE: Charles Johnson

Raul Mas Canosa
Plaintiff(s)

vs.

City of Coral Gables Florida et al
Defendant(s)
_____/

AMENDED ORDER ON PARTIES' CROSS MOTIONS FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court at a duly noticed hearing on (1) Defendant City of Coral Gables' Motion for Summary Judgment, (2) Defendants Florida Department of Law Enforcement and Commissioner Richard Swearingen's ("FDLE Defendants") Motion for Summary Judgment , (3) Plaintiff Raul Mas Canosa's Motion for Summary Judgment against the City of Coral Gables, and (4) Plaintiff Raul Mas Canosa's Motion for Summary Judgment against the FDLE Defendants. Having reviewed the parties' briefs and the relevant portions of the record, and heard argument of counsel for all parties, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED as follows: (1) the City's Motion (relating to the two remaining causes of action against the City – Counts III and VI) is GRANTED, (2) FDLE's Motion (relating to Counts II, V, and VII) is GRANTED, (3) Plaintiff's Motion for Summary Judgment against the City of Coral Gables is DENIED, and (4) Plaintiff's Motion for Summary Judgment against the FDLE Defendants is DENIED.

INTRODUCTION & PROCEDURAL BACKGROUND

Plaintiff Raul Mas Canosa filed this lawsuit in October 2018 to challenge the constitutionality of the use of Automated License Plate Reader ("ALPR") systems, which scan license plates of vehicles that pass by specified locations on roads or other public places and store the data from those scans for law enforcement use,

and also the data retention provisions that apply to ALPRs. Specifically, Plaintiff sought a declaration under Fla. Stat. § 86.021 that: (1) the enactment of a Rule by the Florida Department of State relating to retention of ALPR data (found at Fla. Admin. Code 1B-24.003(1)(b)), (2) the issuance of a 6-page set of Guidelines by the FDLE Defendants regarding the use of ALPRs by local law enforcement agencies (available on FDLE's website), and (3) the use of ALPRs by the City of Coral Gables all violated the federal and Florida constitutions. Plaintiff also brought a rulemaking challenge under the Florida Administrative Procedure Act against the FDLE Defendants based on their issuance of the Guidelines.

Plaintiff initially brought this suit not only against the City and the FDLE Defendants but also against the Florida Department of State and the Florida Secretary of State (collectively, the "Secretary of State Defendants"). However, in January 2019, the Secretary of State Defendants filed a Motion to Transfer Venue, under the home venue privilege, as to the two Counts brought against them (Counts I and IV), and the City and the FDLE Defendants moved to dismiss Plaintiff's Amended Complaint. After hearing argument on the Defendants' motions, the previously-assigned judge to this case issued an Order transferring Counts I and IV to the Second Judicial Circuit, and dismissing Counts VIII and IX (two non-constitutional claims that had been brought against the City). *See* Order on Motions to Dismiss, October 16, 2019. On March 11, 2021, Judge Angela Dempsey of the Second Judicial Circuit granted the Secretary of State Defendants' motion to dismiss Plaintiff's claims related to the ALPR data retention Rule with prejudice. *See* Order Granting Motion to Dismiss, *Mas Canosa v. Fla. Dep't of State*, No. 2019-CA-2813 (Fla. 2d Jud. Cir. Ct., Mar. 11, 2021).

The only remaining claims before this Court now are claims that seek a declaration that by issuing the ALPR Guidelines and by operating an ALPR system the FDLE Defendants and the City conducted an unlawful search or seizure in violation of the Fourth Amendment to the United States Constitution (Counts II and III) and of the Plaintiff's privacy rights under Article 1, section 23 of the Florida Constitution (Counts V and VI), and the rulemaking challenge against the FDLE Defendants based on their issuance of the Guidelines (Count VII).

After completing discovery, the parties filed cross-motions for summary judgment, supported by deposition testimony, affidavits, and other evidence. The material facts underlying this decision and order are undisputed. The Court heard argument from the parties on their summary judgment motions on August 31, 2021, and issued its oral ruling at that time; this Order memorializes the Court's ruling.

UNDISPUTED MATERIAL FACTS

A. State law and regulations relating to the use of ALPRs and related data

In 2014, the Florida Legislature enacted Sections 316.0777-316.0778 of the Florida Statutes, which provide, among other things, that the information gathered by ALPR programs in Florida is confidential and exempt from Florida's public records law (with the exception of a citizen's own ALPR records). Fla. Stat. §§ 316.0777-78.[1] Such information may be disclosed, however, "to a criminal justice agency in the performance of the criminal justice agency's official duties." Fla. Stat. § 316.0777(3)(a).

Prior to enacting these provisions, the Legislature conducted public meetings regarding ALPR programs and safeguards that apply to such programs.[2] Section 316.0778 instructs the Florida Department of State, in consultation with FDLE, to create a retention schedule for images and data generated by ALPR programs, and to "establish a maximum period that the records may be retained." Fla. Stat. § 316.0778(2).

In February 2015, the Department of State promulgated GS2-SL Law Enforcement, Correctional Facilities and District Medical Examiners schedule, Item #217, which governs the retention of "license plate records created by license plate recognition systems" and "images of license plates and any associated metadata." Fla. Admin. Code 1B-24.003(1)(b)), at Item #217, p. 14 ("Dept. of State Rule"), Exh. F to the City's Statement of Undisputed Facts in support of its Motion for Summary Judgment ("Undisputed Facts"). The Dept. of State Rule sets forth a retention period of up to three (3) years for ALPR data and images. Dept. of State Rule, at p. 14.

B. Issuance of the Guidelines

At some time after February 2015, the FDLE Defendants issued "Guidelines for the Use of Automated License Plate Readers," which note that ALPR technology "is being used by law enforcement agencies throughout the nation [to assist] in detection, identification and recovery of stolen vehicles, wanted persons, missing and/or endangered children/adults, and persons who have committed serious and violent crimes." *See* Guidelines (Exh. A of First Am. Compl.), at 2.[3]

The Criminal and Juvenile Justice Information Systems Council ("CJJIS"), a council located within the FDLE, as provided by Fla Stat. § 943.06, drafted the Guidelines pursuant to the Council's authority under

Fla. Stat. § 943.08, which specifically directs the CJJIS to adopt best practices "in order to guide local and state criminal justice agencies when procuring or implementing or modifying information systems." Fla. Stat. § 943.08(2). The CJJIS also is required to "support the development of plans and policies relating to public safety information systems" and to make recommendations addressing, *inter alia*,: privacy of data, accuracy and completeness of data, access to data and systems, and training. Fla. Stat. § 943.08(3). As reported in the Guidelines themselves, the CJJIS met "in the interest of being good stewards and balancing policy and privacy" to draft and issue the ALPR Guidelines. *See* Guidelines, Executive Summary. The Guidelines are described as "uniform statewide guidelines to ensure that ALPRs are used in accordance with substantive procedural safeguards that balance public safety needs and privacy rights." *Id*. The Guidelines do not provide penalty provisions or specific enforcement mechanisms and state only that they "are *encouraged* for all Florida law enforcement agencies … that own or operate one or more ALPRs." *Id.*, at Section 1.c., Purpose (emphasis added).

C. The use of ALPRs in the City of Coral Gables

Plaintiff has been a resident of the City of Coral Gables, Florida, since 1987. *See* Transcript of Deposition of Plaintiff, Ex. A to Undisputed Facts ("Plaintiff's Depo. Tr."), at 8:15-22. On December 8, 2015, the Coral Gables City Commission adopted Resolution No. 2015-307, authorizing the City to enter into contracts for the purchase, installation, and operation of an ALPR system (as well as a separate CCTV program not at issue here). *See* City of Coral Gables, Resolution 2015-307, Ex. H to Undisputed Facts.

The City currently utilizes ALPR scanners at fourteen fixed site locations and on three portable trailers. *See* Undisputed Facts ¶ 29. The City has 5,128 intersections, on more than 260 miles of roadways within its limits. *Id.* ¶ 30. The City's ALPR scanners do not actively target specific vehicles for scanning; instead, they passively scan the license plates of vehicles that happen to pass by an ALPR scanner. *Id.* ¶ 32. The City places its ALPR scanners on the more heavily travelled roadways in the City. *Id.* ¶¶ 33-34.

The City of Coral Gables Police Department considers its ALPR programs to be important to public safety, in part because Coral Gables experiences a significant amount of transient traffic along US-1. *Id.* ¶ 35. The City's ALPR program has assisted in investigating and solving crimes, including credit card skimming, automobile theft, vandalism, vehicular burglary, theft of other personal property, and to locate individuals who used stolen vehicles to commit other crimes, and the City asserts that it has deterred additional crime. *Id.* ¶ 36.

The adoption of the City's ALPR program was discussed and debated by the publicly-elected City Commission, and the Commission publicly voted in favor on adopting an ALPR program. *Id.* ¶ 39.

D. Plaintiff's lack of concrete injury

ALPR data associated with the vehicle Plaintiff drives has not been queried or searched in the City's ALPR database, other than when his ALPR data was pulled at his own request in connection with this litigation and with a prior public records request that he made for that ALPR data. *Id.* ¶ 43.

Plaintiff has also admitted that he is fully aware that members of the public and law enforcement can view and photograph his license plate and his vehicle[4] when he is driving on a public road. *See* Transcript of Deposition of Plaintiff Mas Canosa, Ex. A to Undisputed Facts, at 29:25.

E. Safeguards and procedures related to use of ALPRs

The City and the Department of State have adopted data security guidelines and procedures relating to ALPR programs, and the FDLE Defendants have issued recommendations to ensure that "ALPRs and ALPR-generated data are used only in a manner that is lawful and serves the public interest [while fulfilling] criminal investigative and intelligence needs." *See, e.g.,* Dept. of State Rule, at p. 14; Undisputed Facts ¶ 46; Guidelines, at p. 2.

The City's standard operating procedure for the ALPR program requires that only certain authorized and trained personnel can access the ALPR system, and when doing so, are only authorized for official law enforcement business. Undisputed Facts ¶ 47. The City also has auditing safeguards in place to further ensure that the data is not used for non-law enforcement purposes. *Id.* ¶ 48. By City policy and by agreement with the City's ALPR vendor, ALPR data is not used for non-law enforcement purposes. *Id.* ¶ 49.

ANALYSIS

Florida's summary judgment rule was amended, effective May 1, 2021, to "align Florida's summary judgment standard with … the federal summary judgment standard." *In re: Amendments to Florida Rule of Civil Procedure* 1.510, 309 So. 3d 192 (Dec. 31, 2020). Under that standard, summary judgment is proper if the pleadings and summary judgment evidence show that there is no genuine dispute as to any material fact

and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

Here, the parties have filed cross-motions for summary judgment and have not disputed the material facts. The Court also has determined on its own that no questions of material fact exist. *Ga. Stat. Conf. of NAACP v. Fayette Cty. Bd. of Comm'rs*, 775 F.3d 1336, 1345-46 (11th Cir. 2015) (filing of cross motions for summary judgment "may be probative of the nonexistence of a factual dispute but this procedural posture does not automatically empower the court to dispense with the determination whether questions of material fact exist").

As to any claim for which the movant does not have the burden of proof at trial, it may simply show that there is an absence of evidence to support the non-moving party's case. *United States v. Four Parcels of Real Prop*., 941 F.2d 1428, 1438 (11th Cir. 1991). The burden then shifts to the non-movant, and if they fail to make a sufficient showing as to an essential element of their case, then the movant is entitled to summary judgment. *Id.*

The plaintiff in a declaratory judgment action "has the burden of establishing the existence of a present, actual controversy, as well as proving the material allegations of the complaint." *City of Miami Beach v. New Floridian Hotel, Inc.*, 324 So.2d 715, 717 (Fla. 3rd DCA 1976) (citation omitted). Although Plaintiff bears the burden of proof on his claims, the Defendants also seek summary judgment on their affirmative defenses and as to those defenses they bear the burden of proving the absence of a genuine issue of material fact and that they are entitled to relief.[5] In order for a plaintiff to obtain summary judgment where a defendant has asserted affirmative defenses, the plaintiff "must either disprove those defenses by evidence, or establish their legal insufficiency." *Royal Harbour Yacht Club Marina Condomininum Ass'n, Inc. v. Maresma*, 304 So. 3d 1268, 1269 (Fla. 3rd DCA 2020) (quotation omitted).[6] Plaintiff has done neither in this case.

The pleadings, deposition testimony, affidavits, and other record evidence on file demonstrate that there is no genuine issue as to any material fact relating to Plaintiff's claims for declaratory relief under Fla. Stat. § 86.021, and the Court finds that the City and FDLE Defendants are entitled to judgment as a matter of law.

I. PLAINTIFF'S CLAIMS AGAINST THE CITY

A. The City Is Entitled To Summary Judgment As To Count III, Because The City Has Not

Infringed On Any Constitutionally-Recognized Privacy Interest Of Plaintiff.

Count III seeks a declaration that the City violated Plaintiff's Fourth Amendment rights under the U.S. Constitution, which provides protections against unreasonable governmental searches and seizures. The protections of the Fourth Amendment can only be invoked when the claimant "has a reasonable expectation of privacy in the invaded place." *See State v. Markus*, 211 So. 3d 894, 902 (Fla. 2017) (citing *Minnesota v. Olson*, 495 U.S. 91, 95 (1990)). This expectation of privacy requires both a subjective expectation of privacy as well as an objectively reasonable expectation as determined by societal standards. *See State v. Young*, 974 So. 2d 601, 608 (Fla. 1st DCA 2008). The City is entitled to summary judgment on Count III because there exists no genuine issue of material fact that the City has not infringed on any such constitutionally recognized privacy interest, which it is Plaintiff's burden to prove. *See Rawlings v. Kentucky*, 448 U.S. 98, 98 (1980).

1. No objectively reasonable expectation of privacy exists in ALPR data captured solely in plain sight of the public on public roadways

The Court finds that Plaintiff has no objectively reasonable expectation of privacy in images and data captured solely in plain view of the public on City roads and stored in accordance with the Department of State-approved data retention period. In *United States v. Knotts*, 460 U.S. 276 (1983), the U.S. Supreme Court held as follows:

> A person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. When [co- defendant] travelled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was travelling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property.

Id. at 281-82. Moreover, as Florida and federal courts have recognized, "[t]hroughout the history of the Fourth Amendment, vehicles on public roads have not been granted the deference afforded to houses for several reasons: the ready mobility of vehicles, the fact that the interiors of vehicles are generally in plain view of those passing by, and the reality of 'pervasive regulation' of vehicles by government, all of which result in a decreased expectation of privacy." *State v. Rabb*, 920 So. 2d 1175, 1189 (Fla. 4th DCA 2006) (citing *California v. Carney*, 471 U.S. 386, 390-92 (1985)).

For this reason, courts have routinely and consistently held that one does not have a reasonable expectation of privacy in images of his or her plainly visible license plate. *See, e.g.*, *United States v. Wilcox*, 415 F. App'x 990, 992 (11th Cir. 2011) (affirming ruling that criminal defendant "did not have a reasonable

expectation of privacy in the plainly visible license plate" and that the use of a license plate "tag reader" did not violate the Fourth Amendment); *United States v. Miranda-Sotolongo*, 827 F.3d 663, 668 (7th Cir. 2016) (holding that police officer's use of a suspect's tag number to retrieve registration information in a law enforcement database was not a "search" because the suspect had no reasonable expectation of privacy since the database contained only non-private information); *United States v. Ellison*, 462 F.3d 557, 561-63 (6th Cir. 2006) (rejecting an argument that storing and retrieving a motorist's information using a license plate reader program amounted to an unlawful warrantless search and stating that "[e]very court that has addressed this issue has reached the same conclusion."); *Olabisiomotosho v. City of Houston*, 185 F.3d 521, 529 (5th Cir. 1999) (rejecting argument that computer check of license plate required a warrant because "[a] motorist has no privacy interest in her license plate number," which "is constantly open to the plain view of passersby"); *United States v. Walraven*, 892 F.2d 972, 974 (10th Cir. 1989) (holding that running defendant's license plate through computer database did not implicate privacy interests).

This principle has also been recognized by courts that have upheld the use of ALPR systems like the one at issue in this case against constitutional challenges. *See Chaney v. City of Albany*, 2019 WL 3857995, at *8–9 (N.D.N.Y. Aug. 16, 2019) (holding that "use of the LPR technology did not violate Plaintiff's Fourth Amendment rights because he had no reasonable expectation of privacy in his license plate information while traveling on public roads," and observing that the ALPR system recorded "without any particular focus on specific individuals" and only recorded "the occasions when [a vehicle] passed a camera"); *Uhunmwangho v. State*, 2020 WL 1442640 (Tex. App. Mar. 25, 2020), at *1, 6-9 (rejecting a Fourth Amendment challenge to the use of an ALPR system); *United States v. Yang,* 2018 WL 576827, at *6 (D. Nev. Jan. 25, 2018), *aff'd on standing grounds*, 958 F.3d 851 (9th Cir. 2020) (rejecting a Fourth Amendment challenge to the use of an ALPR system).

The parties have brought no case to the Court's attention where the use of an ALPR system has been held to be unconstitutional

2. Aggregation of ALPR data captured in public view does not transform those public images into private information

Plaintiff seeks to avoid the application of these authorities to Plaintiff's claims by asserting that it is the City's aggregation of individual captures of license plate scans over the Department of State-sanctioned three-

year data retention period constitutes a Fourth Amendment violation. However, numerous federal courts have rejected this theory, including specifically in the context of camera images gathered from public view.[7]

Additionally, the Florida Supreme Court has criticized the mosaic theory. In *Tracey v. State*, 152 So. 3d 504, 520 (Fla. 2014), the Florida Supreme Court had before it a case involving whether the police's warrantless acquisition of cell phone location data violated the Fourth Amendment. The *Tracey* court analyzed the applicability of the "mosaic" theory, which it defined as "[t]he theory that discrete acts of surveillance by law enforcement may be lawful in isolation, but may otherwise infringe on reasonable expectations of privacy in the aggregate because they 'paint an 'intimate picture' of a defendant's life….'" *Id*. at 520.

The *Tracey* court rejected that argument, agreeing instead with the federal court in *United States v. Wilford*, 961 F. Supp. 2d 740, 771 (D. Md. 2013) that "the 'mosaic' theory has presented problems in practice" and is "problematic where traditional surveillance becomes a search only after some specified period of time." *Tracey*, 152 So. 3d at 520. The *Tracey* court explained as follows:

> We agree [with *Wilford*], and conclude that basing the determination as to whether warrantless real time cell site location tracking violates the Fourth Amendment on the length of the time the cell phone is monitored is not a workable analysis. It requires case-by-case, after-the-fact, ad hoc determinations whether the length of the monitoring crossed the threshold of the Fourth Amendment in each case challenged. The Supreme Court [of the United States] has warned against such an ad hoc analysis on a case-by-case basis…

Id. at 520.

The *Tracey* court further explained that the mosaic theory presents a "danger of arbitrary and inequitable enforcement." *Id*. at 521. In clarifying that this danger could not be avoided "by setting forth a chart designating how many hours or days of monitoring may be conducted without crossing the threshold of the Fourth Amendment," the *Tracey* court pointed to the U.S. Supreme Court majority opinion in *United States v. Jones*, 565 U.S. 400 (2012), which already had considered and rejected this approach. Id. at 521.

3. Plaintiff's reliance on cell phone location data cases is unpersuasive

The Plaintiff relies on cell phone location data cases such as *Carpenter v. United States*, 138 S. Ct. 2206 (2018), and argues that they are analogous to the ALPR data at issue in this case. The Court disagrees. In *Carpenter*, the U.S. Supreme Court held that the Government's warrantless acquisition of location records from a criminal defendant's cell phone, which secretly catalogued the whole of the defendant's movements for

a period of 127 days, was a violation of the Fourth Amendment. *Id.* at 2209. In so holding, the *Carpenter* Court found that the digital data at issue gave the Government "near perfect surveillance" of the defendant's comings and goings in private and public places. *Id*. at 2209-10. As that Court specifically explained, cell phone tracking data warrants more protection than information about a vehicle's location because "[w]hile individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time," and "[a] cell phone faithfully follows its owner *beyond public thoroughfares*." *Id.* at 2218 (emphasis added). Moreover, the *Carpenter* Court expressly stated that its opinion "do[es] not … call into question conventional surveillance techniques and tools, such as security cameras." *Id.* at 2220.

Consistent with the distinction made between cell phone location data (which can reveal the whole of ones' physical movements in private and public spaces) and vehicle location data (which reveals only a vehicle's movements on public thoroughfares), Florida's First District Court of Appeal recently held that no reasonable expectation of privacy existed in Global Positioning System ("GPS") tracking data that showed the movements of a vehicle that was being driven by a murder suspect on the night of the murder. *Bailey v. State*, 311 So. 3d 303 (Fla. 1st DCA 2020). In so holding, the *Bailey* court explained that it was bound by the *Knotts* ruling that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.* at 314 (quoting *Knotts*, 460 U.S. at 281).

> [T]he doctrine of *stare decisis* prevails. The Supreme Court has not explicitly overruled *Knotts* and continues to apply its precedent in recent Fourth Amendment analysis. Regarding Supreme Court precedent: "Its 'decisions remain binding precedent until [it] see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."

The *Bailey* court distinguished *Carpenter* (and other cases which hold that cell phone location data should not be obtained without a warrant), by explaining that cell phone location data "is not comparable" to license plate images captured in plain sight. *Id.* at 314. The *Bailey* court explained the stark distinction between the expectation of privacy in cell phone location data versus vehicle location data as follows:

> As explained in *Carpenter*, the harm inherent in a government's warrantless gathering of CSLI [(cell site location information)] is primarily borne of the virtual attachment of the device to its owner—allowing for all-encompassing, perpetual tracking which penetrates private spheres—and of the fact that the overwhelming majority of individuals more or less must own a cell phone. 138 S. Ct. at 2218. On these key points, the GPS data at issue is not comparable. The privacy-penetrating capacity of cell phones has been distinguished from cars, which have "little capacity for escaping public scrutiny" as they largely only travel through public thoroughfares. *Id*….(noting that individuals regularly leave their cars whereas cell phones are compulsively carried at all times).

> Because cars do not bear the same attachment to their owners and cannot penetrate private spaces to the same degree, government acquisition of a vehicle's GPS data does not give rise to the same risk of all-encompassing surveillance as CSLI. An individual often moves about—both publicly and privately—away from their vehicle. Additionally, as an owner's vehicle is frequently in operation and driven by others, GPS tracking of cars does not provide police the level of personal surveillance contemplated with CSLI. Because cell phones are treated as "almost a 'feature of human anatomy,'" tracking of a cell phone *is* tracking of the owner. *Id*. (quoting *Riley v. California*, 573 U.S. 373, 385, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014)).

Bailey, 311 So. 3d at 313-14; *see also id.* at 311, 314 (observing that, unlike vehicles, "cell phones are ubiquitous in daily life and are ever-present on an individual's person" and "penetrate[] private spheres") (citing *Carpenter,* 138 S. Ct. at 2218-20).

Plaintiff has pointed to no case law which affords the same protection to vehicle location data (such as the type of information captured by the City's ALPR system) as that afforded to cell phone location data which has the capacity to reveal the whole of one's physical movements. Indeed, a review of the Fourth Amendment principles addressed in the cell phone cases supports the City's position that its operation of an ALPR system does not constitute an invalid search.

1.

4. Plaintiff's reliance on a concurring opinion in the *Jones* case does not support his claims because the facts are materially different

Plaintiff also relies on *United States v. Jones*, 565 U.S. 400 (2012). In the *Jones* case, law enforcement had physically attached a GPS tracking device to the undercarriage of a vehicle owned by a suspected narcotics trafficker and had used that device to secretly monitor that individual's movements for four weeks, leading to his arrest. 565 U.S. at 402-03. Ruling that the physical attachment of the GPS device to the vehicle was common law trespass of the suspect's property, the Court held that the Government's installation of the GPS device on the suspect's vehicle constituted a search under the Fourth Amendment, which required a valid warrant. *Id*. at 404. In so holding, the *Jones* Court stated that "[i]t is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information." *Id*. Here, in contrast, Plaintiff of course does not claim, and does not have any evidence to support, that a trespass occurred.

Plaintiff relies instead on the concurrence authored by Justice Samuel Alito in the *Jones* case. However, even Justice Alito's concurring opinion in *Jones* was framed as a concern about a potential situation where law enforcement might "secretly monitor and catalogue every single movement of an individual's car

for a very long period." *Jones*, 565 U.S. at 430 (Alito, J., concurring). However, Justice Alito's stated concern is inapposite to the facts of this case. The ALPR scanners at issue here do not capture movements outside of fixed points on major thoroughfares, and do not "secretly monitor and catalogue every single movement of an individual's car" – for any period of time.

B. The City Is Also Entitled To Summary Judgment As To Count VI, Because The City Has Not Infringed On Any Constitutionally-Recognized Privacy Interest Of Plaintiff Under The Florida Constitution.

In Count VI of the Complaint, Plaintiff seeks a declaration that the City violated Plaintiff's right to privacy under Article I, section 23 of the Florida Constitution, which provides that "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein." The Court finds that Count VI fails for the same reasons that Count III fails.

Both of Plaintiff's constitutional counts against the City rely on the same allegations of harm, *i.e.*, the recording and retention of ALPR data from the license plates of vehicles on public thoroughfares. Moreover, as with well-settled Fourth Amendment case law, there can be no violation of one's right to privacy under Article I, section 23 if that individual does not first have a reasonable or legitimate expectation of privacy. *See, e.g., Bd. of Cty. Comm'rs of Palm Beach Cty. v. D.B.*, 784 So. 2d 585, 588, 590 (Fla. 4th DCA 2001) (explaining that "before the right to privacy attaches and the standard is applied, a reasonable expectation of privacy must exist."); *City of N. Miami v. Kurtz*, 653 So. 2d 1025, 1028 (Fla. 1995) ("[T]o determine whether Kurtz … is entitled to protection under [A]rticle I, section 23, we must first determine whether a governmental entity is intruding into an aspect of Kurtz's life in which she has a 'legitimate expectation of privacy.'"). Accordingly, for all of the same reasons that Plaintiff's Fourth Amendment claim fails (which are set forth in detail in Section I.A., above), Plaintiff's Article I, section 23 claim also fails as a matter of law.

Plaintiff points out that the right to privacy provided for in the Florida Constitution is broader in scope than the protection provided in the United States Constitution. While that is accurate in certain contexts, it is not accurate in the context of an alleged Fourth Amendment search or seizure. In this context, interpretation of Article I, section 23 is intertwined with, and coterminous with, interpretation and application of the Fourth Amendment (and with the parallel provision in Article 1, section 12 of the Florida Constitution). *See, e.g.*, *L.S.*

v. State, 805 So. 2d 1004, 1008 (Fla. 1st DCA 2001) ("Article I, section 23, does not modify the applicability of Article I, section 12, so as to provide more protection than that provided under the Fourth Amendment…"); *State v. Geiss*, 70 So. 3d 642, 645-46 (Fla. 5th DCA 2011) ("[T]he 'except as otherwise provided herein' language of article 1, section 23 must be read as authorizing governmental intrusion into one's private life to the same measure [as allowed under the Fourth Amendment by the U.S. Supreme Court.]"). The reason for this principle is that "Section 23 was designed to avoid an adverse effect on law enforcement by not implicating the search and seizure law." Commentary to 1980 Amendment, Art. I, § 23, Fla. Const. In any event, however, Plaintiff has not cited any cases which would indicate that Article I, section 23's provisions would provide privacy protections to information gathered solely from plain view of the public on public thoroughfares.[8]

II. PLAINTIFF'S CLAIMS AGAINST THE FDLE DEFENDANTS

A. The FDLE Defendants Are Entitled To Summary Judgment As To Count II, Because They Did Not Violate Plaintiff's Fourth Amendment Rights By Issuing The Guidelines

Plaintiff alleges, in Count II, that the issuance of the Guidelines by the FDLE Defendants violated the Fourth Amendment's prohibition on unreasonable searches. Specifically, Plaintiff
claims that the Guidelines "set[] out data retention policy" for law enforcement agencies using an ALPR, and that the Guidelines "permit the indiscriminate collection of ALPR data" that is stored and may be searched and disclosed and retained for "no longer than 3 anniversary years." First Am. Complaint, at ¶¶ 89-93. It is the Plaintiff's burden to establish that a search, or in this case, the mere issuance of the Guidelines, infringed on his reasonable expectation of privacy, and Plaintiff has failed to do so.

First, as discussed above, with respect to Plaintiff's Fourth Amendment-based challenge as to the City's use of ALPRs, Plaintiff cannot overcome the fact that vehicles traveling on public roadways are subject to "the reality of 'pervasive regulation' of vehicles by government" which results in a decreased expectation of privacy." *State v. Rabb*, 920 So.2d at 1189, *citing California v. Carney*, 471 U.S. 386, 390-92 (1985). As an example of the regulation of vehicles in Florida, "[e]very vehicle, at all times while driven, stopped, or parked upon any highways, roads, or streets of this state … shall … display the license plate … and [it] shall be … plainly visible and legible at all times 100 feet from the rear or front." Fla. Stat. § 316.605. That statutory requirement supports a finding that there is no objectively reasonable expectation of privacy in a license plate number when traveling on a public roadway in Florida and, further, that the issuance of Guidelines relating to

the use of ALPRs designed to record such license plate numbers cannot constitute a search that violates the Fourth Amendment.

Plaintiff also cannot establish that the issuance of the Guidelines by the FDLE Defendants resulted in a violation of Plaintiff's Fourth Amendment rights by any local law enforcement agency using an ALPR system, because the Guidelines are mere recommendations that law enforcement agencies may choose to follow or not. A determination of whether an alleged search is constitutional necessarily must focus on what an individual officer did, or did not do, at the time of the alleged search. A court in New York has found that even when a law enforcement officer failed to follow ALPR guidelines issued by the New York Police Department that were designed to protect a person's rights, such failure did not render the officer's ALPR-based stop of a vehicle unconstitutional, and therefore suppression of a gun recovered during that stop was not required. In *People v. Davila*, 901 N.Y.S.2d 787 (Sup. Ct., Bronx Cnty, NY 2010), the trial court found that the officer conducting the ALPR-based stop had not updated the ALPR system nor confirmed the result of the license plate search prior to the stop, both of which were requirements of the New York Police Department ALPR guidelines in effect at that time. The court found, however, that the NYPD guidelines, despite their requirement that procedures be complied with, were only recommendations and not law, and that because the officer's conduct was otherwise proper, suppression of the weapon was not required. The court noted that "[a]lthough the NYPD guidelines may reflect ideal practices, they constitute recommendations, not law." *Id*., at 791.

Plaintiff argues that the Guidelines "led the City to infringe" on his constitutional rights and the Guidelines "clearly exacerbated the harms [Plaintiff] has suffered." Plaintiff's Response to FDLE Defendants' Motion for Summary Judgment, at 9. Plaintiff testified at his deposition that he sees "some benefit" to the use of ALPRs, and what he "question(s) really" is "the accumulation of [ALPR] data for such a long period of time and the fact that accumulating that data not individually but over such a long period of time in such huge amounts creates literally a mosaic of my daily life, which nobody should have the right to have that data." Plaintiff's Depo. Tr., 37:9-17. The data retention period is authorized by the Department of State's Rule, however, and Plaintiff already has lost his constitutional challenge to that Rule. He fares no better by bringing such a claim against the FDLE Defendants who merely issued the Guidelines and have taken no action to enforce them or act upon them. References in the Guidelines to the Department of State Rule and the relevant data retention period cannot constitute a violation of the Fourth Amendment where that Rule already has withstood such a challenge. As discussed below, the Guidelines are not binding on anyone and were not issued

publicly until after the City's Police Department already had adopted its own procedures on ALPRs, so there is no basis for a finding that the Guidelines led anyone to infringe on Plaintiff's rights or exacerbated any harms Plaintiff allegedly suffered.

The existence of recommended policy guidelines cannot control the determination of whether the use of ALPRs is constitutional and, similarly, a party that issued such guidelines is not responsible for an alleged constitutional violation, even if one had been found – and here there is none. Because the use of ALPRs has been upheld by courts as constitutional, the mere issuance of Guidelines with recommended best practices to be used by individual criminal justice agencies who elect to acquire an ALPR system does not constitute an unreasonable search under the Fourth Amendment.

1. **B. The FDLE Defendants Are Entitled To Summary Judgment As To Count V, Because They Did Not Violate Plaintiff's Privacy Interest Protected By The Florida Constitution**

Plaintiff also alleges that by issuing the Guidelines the FDLE Defendants violated Plaintiff's privacy interests that are protected by the Florida Constitution. First Am. Compl., at ¶¶ 138-43. It is the Plaintiff's burden to establish that a search, or in this case, the mere issuance of the Guidelines, infringed on his privacy interests, and Plaintiff has failed to do so, for the same reasons discussed above regarding the Fourth Amendment challenge to the Guidelines. Plaintiff already challenged the Department of State's Rule by claiming that the Rule violated Plaintiff's privacy interests under the Florida Constitution, and he lost that challenge. Plaintiff's claim against the FDLE Defendants who merely issued the Guidelines and have taken no action to enforce them or act upon them is doomed to a similar fate. References in the Guidelines to the Department of State Rule and the relevant data retention period cannot constitute a violation of Article I, section 23 of the Florida Constitution where that Rule already has withstood such a challenge, and there is nothing else about the Guidelines that implicates a cognizable privacy interest under Florida law.

1. **C. The FDLE Defendants Are Entitled To Summary Judgment As To Count VII, Which Is Plaintiff's Rulemaking Challenge Against the FDLE Defendants**

Plaintiff claims that the Guidelines are unlawful under the Florida Administrative Procedure Act because they are "unpromulgated rules." First Am. Complaint, at ¶¶ 176, 184.[9] The FDLE Defendants argue

that Plaintiff's claim must fail because the Guidelines do not have the direct and consistent effect of a law and, thus, need not have been adopted through Florida's rulemaking procedure. A review of the pertinent legislative and regulatory background and the Guidelines themselves demonstrates that the FDLE Defendants are correct: the Guidelines are not a "rule" that required formal rulemaking.

1. Florida rulemaking procedures

When an agency seeks to adopt a rule, the agency must give notice of its intended action and follow the procedures set forth in Section 120.54(1)(a), (3), of the Florida Statutes. A "rule" is defined as a statement by an agency that is of general applicability and "implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency." Fla. Stat. § 120.52(16). An "unadopted rule" is defined as an "agency statement that meets the definition of the term 'rule' but that has not been adopted pursuant to the requirements of [Section 120.54]." Fla. Stat. § 120.52(20).

A claim alleging a violation of Section 120.54(1)(a) must be brought pursuant to Section 120.56(4), which sets forth provisions for "Challenging agency statements defined as unadopted rules." For example, Section 120.56(4)(a) requires that a petition challenging an agency statement as an unadopted rule "shall include the text of the statement or a description of the statement and shall state facts sufficient to show that the statement constitutes an unadopted rule." *Id*.

2. The Guidelines

As described above, in the Facts section, the CJJIS was specifically directed to adopt best practices "in order to guide local and state criminal justice agencies when procuring or implementing or modifying information systems." Fla. Stat. § 943.08(2). The CJJIS also is required to make recommendations addressing, *inter alia*: privacy of data, accuracy and completeness of data, access to data and systems, and training. Fla. Stat. § 943.08(3).

The Guidelines include a title page and six-pages of briefly stated guidance on multiple topics: purpose, policy, management, operations, data collection (and access, use, and retention), and oversight (and evaluation, auditing and enforcement), and a list of definitions and acronyms. *See* Guidelines. The stated

purpose of the Guidelines is to provide "direction to law enforcement agencies in Florida regarding the use of their ALPRs and ALPR data …. to ensure that ALPRs and ALPR-generated data are used only in a manner that is lawful and serves the public interest and fulfill[s] criminal investigative and intelligence needs." *Id*, Section 1.a.

> The section of the Guidelines titled "Purpose" includes this statement:
>
> These Guidelines are *encouraged* for all Florida law enforcement agencies operating under the authority of the laws of the state of Florida that own or operate one or more ALPRs, collect and maintain ALPR data, or receive or are provided access to ALPR data collected by another agency. *However*, all law enforcement agencies must comply with Florida Statutes governing the use of ALPR data.

Id., Section 1.c. (emphasis added). In the section titled "Policy," the Guidelines provide that: "Every Florida law enforcement agency that uses or possesses an ALPR *should* implement and enforce a policy that regulates the operation and use of ALPRs and the use, storage, access, and retention of ALPR data. The policy *should* be consistent with these Guidelines." *Id*., Section 2.a. (emphasis added). The Guidelines have no enforcement or penalty provisions, however, nor any requirements for reporting to FDLE. The brief section of the Guidelines titled: "Oversight, Evaluation, Auditing, and Enforcement" includes several bullet points, and as to "Enforcement" states only: "[Law enforcement agencies in Florida] shall establish procedures for enforcement if users are suspected of being or have been found to be in noncompliance with the Agency's ALPR policy." *Id*., Section 7.d.

Plaintiff has argued that the entire six pages of the Guidelines are an unadopted rule, and he argues that the "most direct and mandatory language" of the Guidelines, which also "forms the basis of [Plaintiff's] Complaint," is found in Section 6.e, governing "Data Retention and Use." Plaintiff's Response to FDLE's Motion for Summary Judgment, at 1. That section states:

> ALPR data shall be retained in accordance with Florida Statute 316.0778. ALPR 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 investigation or intelligence purposes is limited to authorized Criminal Justice Agency personnel for no longer than 3 anniversary years and requires an agency case number or case name and logging of access. Data captured, stored, generated, or otherwise produced shall be accessible in the ALPR system for 30 days for tactical use.

Guidelines, Section 6.e. That section of the Guidelines explicitly cites Fla. Stat. § 316.0778, which directed the

Department of State to establish a retention schedule for records containing images and data generated through the use of an ALPR system, which it did. The Department of State's rule (effective February 19, 2015) provides that license plate recognition records shall be retained "until obsolete, superseded, or administrative value is lost, but no longer than 3 anniversary years unless required to be retained under another record series [of data retention requirements]." Fla. Admin. Code 1B-24.003(1)(b), General Records Schedule GS2 for Law Enforcement, Item #217.[10]

3. The Guidelines are recommendations or "best practices" and not a "rule"

The test under Florida's Administrative Procedure Act to determine whether an agency's statement is a rule is a "functional" test, and courts must "consider the 'effect of the agency statement,' not just tally magic words." *Coventry First, LLC v. State of Fla., Office of Ins. Regulation*, 38 So. 3d 200, 203 (Fla. 1st DCA 2010). A review of the language used in the Guidelines reveals that they do not have the direct and consistent effect of law, and are instead recommended guidelines or best practices. Plaintiff has cited no authority that finds that a recommended guideline or best practice is a formal agency statement that must be subjected to Florida's formal rulemaking procedure.

a. The Guidelines do not have the "direct and consistent effect of law"

The standard for determining whether an agency statement is an unadopted rule is whether the statement was intended to have the direct and consistent effect of law, *e.g*., whether it creates rights or denies rights, is self-executing, or requires compliance. *See, e.g., Agency for Health Care Admin. v. Custom Mobility*, 995 So.2d 984, 986 (Fla. 1st DCA 2008) (reversing decision of administrative law judge that formula used to calculate overpayments to Medicaid providers was an unpromulgated rule); *see also, Coventry First*, 38 So.3d at 203-05 ("[W]here … [an agency] manual merely informs of a process or procedure without mentioning a penalty for noncompliance, it [is] not the equivalent of a rule."). The Guidelines do none of those things.

The "direct" nature of an agency's statement's effect can be assessed by determining whether the statement is self-executing. In *Dep't of Revenue v. Novoa*, 745 So.2d 378 (Fla. 1st DCA 1999), the court noted that a policy forbidding revenue examiners from preparing private tax returns after work hours was not a "rule" because it was "not self-executing." *Id.* at 382. Even though the policy set forth a standard of conduct, it did "not provide a remedy or establish a procedure that could be used to impose a penalty." *Id.*

Although Plaintiff is challenging an agency statement, *i.e*., the Guidelines, and not a rule or statute, if the Court were construing a statute, the Court would first look to the "plain meaning of the language used"; and when that language is unambiguous and conveys a clear and definite meaning, that meaning controls, "unless it leads to a result that is either unreasonable or clearly contrary to legislative intent." *J.M. v. Gargett*, 101 So.3d 352, 356 (Fla. 2012) (citation omitted). If, and only if, the language is ambiguous, then a court applies rules of statutory construction to determine legislative intent. *Alachua Cnty v. Expedia, Inc*., 175 So.3d 730 (Fla. 2015). A court can look to the "[a]dministrative construction of a statute" or "the legislative history of its enactment," *Donato v. Am. Tel. & Tel. Co*., 767 So.2d 1146, 1154 (Fla. 2000), but the Court must interpret the statute or rule de novo, Art. 5, section 21, Fla. Const.

Plaintiff has focused on the use of the terms "should" and "shall" in the Guidelines. As an initial matter, the term "should" does not carry the same weight as the term "shall," and even the term "shall" must be evaluated in the context in which it is used. The term "should" is "the weaker companion to the obligatory 'ought.'" *State v. Thomas*, 528 So. 2d 1274, 1275 (Fla. 3rd DCA 1988) (statutory maximum sentence is the recommended sentence, and court retains discretion to depart below such sentence). Although the word "shall" is "normally meant to be mandatory in nature," the "interpretation 'depends upon the context in which it is found and upon the intent of the legislature as expressed in the statute.'" *State v. Goode*, 830 So. 2d 817, 823 (Fla. 2002*), citing S.R. v. State*, 346 So.2d 1018, 1019 (Fla. 1977). [11]

Each use of the word "shall" in the Guidelines is related to either: a restatement of existing laws or a reminder that existing laws must be followed, and such statements are not an "unadopted rule". *see, e.g., Florida Dep't of Fin. Servs. v. Capital Collateral Representative*, 969 So. 2d 527 (Fla. 1st DCA 2007) (agency memo "reminding state agencies not to use state funds for lobbying purposes" did not support determination that memo was a "rule"); or recommendations regarding what individual agencies might elect to include in any ALPR policies they adopt, without a compliance or reporting requirement to FDLE, and such statements are not "rules", *see, e.g*., *Coventry First, LLC*, 38 So. 3d at 203 (manual that merely informs of a process without providing a penalty for non-compliance, or procedures that are not "rigid guides" and are applied on a case-by-case basis, are not rules). None of these uses of the term "shall" converts the Guidelines into a binding policy statement by FDLE that is the equivalent of a rule under Florida law.

b. The Guidelines lack compliance provisions and do not create rights for FDLE

"A recommendation which, standing alone, does not 'require compliance, create certain rights while adversely affecting others, or otherwise have the direct and consistent effect of law,' does not constitute a rule." *Florida Dep't of Fin. Servs.*, 969 So. 2d at 550. Documents that do not require compliance, or which were never used in connection with an agency action, or on which an agency "never acted in any way on," do not constitute a rule. *Id*. at 531.

In *Fla. League of Cities, Inc. v. Admin. Comm'n, Dep't of Cmty. Affairs*, 586 So.2d 397 (Fla. 1st DCA 1991), the court held that a policy of issuing sanctions when municipalities submitted comprehensive plans untimely was not an unadopted rule but rather was only a guideline. The court noted that "in keeping with its nature as a non-mandatory 'starting point' type of policy, the provisions are written in a grammatically concise, somewhat abbreviated form." *Id.* at 410. The sanctions policy was "clearly … intend[ed] … to serve as a general guideline" that "arguably 'implements' or 'interprets' law or policy as it sets forth the starting point for the Commission's consideration of the statutory penalties … [but] such a literal reading of the statutory definition of 'rule' would 'encompass virtually any utterance by an agency.'" *Id*. at 407 (internal quotations omitted). A review of the six pages of the Guidelines reveals a similar concise and abbreviated form of language that addresses a multitude of topics: policy, management, operations, data collection, data access, data use, data retention, oversight, evaluation, auditing and enforcement – in bullet form and without significant detail as to any particular statement.

The Guidelines do not prescribe new law or policy, nor do they "implement" or "interpret" law or policy in the manner that Florida courts have held constitutes a "rule" under Fla. Stat. § 120.52(16). When an agency statement "merely reiterates a law, or declares what is 'readily apparent' from the text of a law … the statement is not considered a rule." *Grabba-Leaf, LLC v. Dep't of Business and Professional Regulation*, 257 So. 3d 1205, 1211 (Fla. 1st DCA 2018). In *Grabba-Leaf*, the court found that an agency memorandum that interpreted an unclear statute regarding the definition of "tobacco products," with the result that a certain type of tobacco wrap products would not be taxed by the agency, but other types would continue to be taxed, was unenforceable because the memorandum created rights and had not been formally adopted as a "rule." Here, FDLE has no enforcement authority over the Guidelines, and the Guidelines do not even require agencies to report to FDLE regarding any use of an ALPR system. The Guidelines create no entitlement for FDLE to take action against anyone, and offer only recommendations that law enforcement agencies are "encouraged" to

follow.[12]

In summary, the language of the Guidelines reveals that their direct effect is non-binding, and they do not have the consistent effect of law. The Guidelines do not grant rights to the FDLE Defendants while taking away the rights of others – indeed, the Guidelines are silent as to any role of FDLE with respect to the Guidelines. The FDLE Defendants' Guidelines are recommendations that do not require compliance, and, thus, Plaintiff has failed to establish that the Guidelines are an unadopted rule under Florida law.

III. STANDING

The Defendants have also asserted that the Plaintiff lacks standing, in any event, with respect to the claims asserted in this case. The Court agrees, and this conclusion serves as an independent basis for the granting of the Defendants' motions for summary judgment and the denial of the Plaintiff's motions for summary judgment.

At the summary judgment stage, it is Plaintiff's burden to establish that he has standing, and to do so he must show, through "clear and definite facts," that he has "an actual or imminent injury that is concrete, distinct, and palpable." *Cmty. Power Network Corp. v. JEA*, No. 1D19-4687, 2021 WL 4097789, at *2-3 (Fla. 1st DCA Sept. 9, 2021).

> Although there is no precise formula to divine the line between an interest that is sufficient for standing purposes, and one that is not, Florida courts look to three familiar concepts – injury, causation, and redressability – to assess a plaintiff's standing…. At its core, standing exists when a plaintiff can identify an injury caused by the defendant's conduct that the court can remedy.

Id. (citation omitted). Speculative and conclusory allegations of harm cannot confer standing. *McCall v. Scott*, 199 So.3d 359, 366 (Fla. 1st DCA 2016).

The undisputed record in this case reveals that ALPR data regarding the vehicle that Plaintiff drives has never been utilized against the Plaintiff by the Defendants and has never been searched, queried, retrieved, or otherwise accessed by the Defendants in order to locate Plaintiff or to track his movements or the movements of his vehicle. Accordingly, Plaintiff has failed to establish that he suffered an actual or imminent injury that is "concrete, distinct, and palpable."

As the Florida Supreme Court has explained, "[e]ven though the legislature has expressed its intent that the declaratory judgment act should be broadly construed, there still must exist some justiciable controversy between adverse parties that needs to be resolved for a court to exercise its jurisdiction. Otherwise, any opinion on [the validity of a challenged statute] would be advisory only and improperly considered in a declaratory action." *Martinez v. Scanlan*, 582 So. 2d 1167, 1170-1171 (Fla. 1991).

CONCLUSION

The Court finds that the neither the City nor the FDLE Defendants violated Plaintiff's federal or Florida constitutional rights by operating an ALPR system or by issuing the Guidelines, and that the Defendants all are entitled to summary judgment as to Plaintiff's claims for declaratory relief under Fla. Stat. § 86.021. Additionally, the Court finds that the Plaintiff lacks standing, as he has suffered no legally cognizable injury on the facts presented here.

The undisputed facts also demonstrate that the Guidelines issued by the FDLE Defendants are merely recommendations, without the direct and consistent effect of law, and need not have been submitted to formal rulemaking. Therefore, the FDLE Defendants are entitled to summary judgment in their favor on Plaintiff's claim for declaratory relief under Fla. Stat. § 86.021 as to his rulemaking claim.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** as follows: (1) the City's Motion on Counts III and VI is GRANTED, (2) the FDLE Defendants' Motion on Counts II, V, and VII is GRANTED, (3) Plaintiff's Motion for Summary Judgment against the City on Counts III and VI is DENIED, and (4) Plaintiff's Motion for Summary Judgment against the FDLE Defendants on Counts II, V, and VII is DENIED. Judgment is hereby entered in favor of the City and the FDLE Defendants, and against Plaintiff.

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[1] Section 316.0777, Fla. Stat., defines an "automated license plate recognition system" as "a system of one or more mobile or fixed high-speed cameras combined with computer algorithms to convert images of license plates into computer-readable data."

[2] *See* 2014 Florida Senate Bill No. 226 Florida 116th Regular Session, available at https://www.flsenate.gov/Session/Bill/ 2014/226/ByCategory.

[3]The Guidelines, which are undated, are available on FDLE's public website, at https://www.fdle.state.fl.us/CJJIS/Documents/CJJIS-Council-ALPR-Guidelines. The "Document Properties" of the Guidelines reveals that they were posted by Charles Schaeffer (Mr. Schaeffer at that time was the Deputy Director of the CJJIS) on February 8, 2016.

[4]The license plate in question, which is associated with the vehicle that Plaintiff testified that he drives, was not registered to Plaintiff during most of the time in question but rather was registered to his wife. *See* Undisputed Facts ¶ 34.

[5]In addition to the issue of the City's affirmative defense of standing, which is discussed in Section III below, the FDLE Defendants also sought summary judgment as to their affirmative defense that they are not proper parties because the ALPR Guidelines "have no force of law, statute, or rule behind them." FDLE Defendants' Amended Answer and Affirmative Defenses, First Affirmative Defense. The Court need not address this argument separately based upon the Court's conclusions as to the FDLE Defendants' Motion for Summary Judgment as to Plaintiff's claims.

[6]Federal courts have long approached the burdens in summary judgment in this manner. *See, e.g., United States v. Four Parcels of Real Property*, 941 F.2d at 1438 n. 19 ("the moving party must point to specific portions of the record to demonstrate that the nonmoving party cannot meet its burden of proof at trial," citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

[7]*See United States v. Mazzara*, 2017 WL 4862793 at *11-12 (S.D.N.Y. Oct. 27, 2017) (holding that 21 months of warrantless video camera surveillance of a residence from across the street did not violate Fourth Amendment); *United States v. Moore*, 2014 WL 4639419, at *3-4 (S.D. Fla. Sept. 16, 2014) (upholding warrantless police video surveillance of an individual over eight months using six video cameras, and rejecting argument that the length of the surveillance changed the Fourth Amendment analysis); *United States v. Houston*, 813 F.3d 282, 287-89 (6th Cir. 2016) (finding no reasonable expectation of privacy surrounding the warrantless use of video cameras that were directed, full time, at an individual's property, because it captured the same views enjoyed by passersby on public roads; and finding that the length of time of that surveillance was not relevant); *United States v. Bucci*, 582 F.3d 108, 116-17 (1st Cir. 2009) (holding that eight month-long video surveillance of defendant's driveway and garage door did not violate his Fourth Amendment rights because those activities were conducted in public, and noting that the defendant's "lack of a reasonable objective expectation of privacy" was "clear"); *United States v. Aguilera*, 2008 WL 375210 at *2 (E.D. Wis. Feb. 11, 2008) (denying motion to suppress evidence from warrantless video surveillance because "[t]he police could have stood on the street outside defendant's house and observed the comings and goings from his driveway; substitution of a camera for in-person surveillance does not offend the Fourth Amendment; and the camera did not record activities within defendant's home or its curtilage obscured from public view").

[8]Because Plaintiff has not demonstrated any constitutionally-recognized privacy interest under Article I, section 23 that was infringed here, this Court need not reach the "compelling state interest" or "least intrusive means" analysis. *See Winfield v. Div. of Pari-Mutual Wagering*, 477 So. 2d 544, 547 (Fla. 1985). However, there is no doubt that the government interests in deterring and solving crime and in locating missing and endangered persons are compelling ones (*see State v. J.P.*, 907 So. 2d 1101, 1116-17 (Fla. 2004)) and that the City as well as the Department of State have instituted data security guidelines and other safeguards and procedures to achieve those interests via the least intrusive means.

[9]Plaintiff uses the term "unpromulgated," but in 2016, Section 120.56(4), Fla. Stat., was amended to refer to challenges to agency statements as "unadopted" rules.

[10]Agencies in Florida "shall comply with the rules establishing retention schedules and disposal processes for public records which are adopted by the records and information management program of the [Division of Library and Information Services of the Department of State]." Fla. Stat. § 119.021(2)(b).

[11]"'[S]hould, the weaker word, expresses mere appropriateness, suitability or fittingness.'" *State v. Thomas*, 528 So. 2d at 1275 (Fla. 3rd DCA 1988), *quoting* B. Garner, a Dictionary of Modern Legal Usage 396 (1987).

[12] The City's Police Department's Standard Operating Procedures related to its ALPRs do not even mention the Guidelines.

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 4th day of October, 2021.

2018-033927-CA-01 10-04-2021 9:20 AM
Hon. Charles Johnson

CIRCUIT COURT JUDGE
Electronically Signed

No Further Judicial Action Required on **THIS MOTION**

CLERK TO **RECLOSE** CASE IF POST JUDGMENT

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