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IN THE THIRD DISTRICT COURT OF APPEAL,
STATE OF FLORIDA

CASE NO. 3D21-1983
L.T. NO. 18-33927

RAUL MAS CANOSA,

Appellant,

vs.

CITY OF CORAL GABLES, *et al.*,

Appellees.

On Appeal from the Final Judgment
of the Circuit Court for the Eleventh Judicial Circuit
of Florida in and for Miami-Dade County

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Nothing in answering briefs submitted by the City of Coral Gables ("City") and the Florida Department of Law Enforcement ("FDLE") changes the conclusion that the City relied on FDLE's unpromulgated rule to implement an automatic license plate reader ("ALPR") program that violates the Fourth Amendment and Article I, Section 23 of the Florida Constitution. The City's ALPR program captures and retains three years of each resident's movements through city streets, which is shared with Vigilant Solutions, a private company that sells ALPR data to others. The program allows the City, Vigilant Solutions, and anyone to whom they share or sell the data to reconstruct each resident's historical movements through city streets going back three years, thereby violating the Fourth Amendment as a warrantless invasion of the reasonable expectation of privacy in the whole of one's movements. It also violates Article I, Section 23 of the Florida Constitution, which protects privacy more broadly than the U.S. Constitution.

ARGUMENT

I. APPELLANT HAS STANDING TO CHALLENGE THE GOVERNMENT'S SURVEILLANCE OF HIS MOVEMENTS OVER TIME

The City's standing argument—that Appellant suffered no Fourth Amendment injury because "there is no evidence to suggest that his information has ever been accessed by law enforcement or used in any way against him"—is wrong on several counts. City Br. at 58. This assertion starts with a faulty premise that law

enforcement does not access Appellant's ALPR data. The City does not dispute that it shares ALPR data with Vigilant Solutions' Law Enforcement Archival and Reporting Network ("LEARN"), R.697, which "*automatically* searches the City's database every three hours," Opening Br. at 18 (emphasis in original). Law enforcement thus continuously accesses Appellant's ALPR data. That Appellant is law abiding and thus never appears on the "hot list" does not change that fact.

Next, ALPR data need not be "used … against" Appellant in a law enforcement context to inflict a concrete injury because "[t]he Government's *acquisition* of [long-term location data] was a search within the meaning of the Fourth Amendment." *Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018) (emphasis added)); *accord Ferrari v. State*, 260 So.3d 295, 305 (Fla. 4th DCA 2018) ("[T]he *acquisition* of the [location] records without a warrant based upon probable cause violated Ferrari's Fourth Amendment rights.") (emphasis added). In *Leaders of a Beautiful Struggle v. Baltimore Police Department*, 2 F.4th 330, 342 (4th Cir. 2021) (en banc), Baltimore did not use historical location data collected by its aerial surveillance program to prosecute any plaintiff. Yet the *en banc* Fourth Circuit not only held that the program inflicted a cognizable injury, but that such injury was irreparable, justifying preliminary relief. *Id.* at 346. In considering Fourth Amendment injury inflicted by ALPR surveillance, the Supreme Court of Massachusetts explained that "it is not the amount of data that the Commonwealth

seeks to admit in evidence that counts, but, rather, the amount of data that the government *collects*[.]" *Commonwealth v. McCarthy*, 142 N.E.3d 1090, 1103 (Mass. 2020) (emphasis added). Here, too, the City's mere *collection* of Appellant's ALPR data itself causes a Fourth Amendment injury, independent of its use against him in a law-enforcement context.

Finally, the City acknowledges that its "lack of standing [argument] can be viewed … alternatively" as a merit-based argument that Appellant "fail[ed] to adequately prove the elemental requirements of an unlawful search or seizure necessary for a Fourth Amendment violation." City Br. at 60-61. "Such a concept improperly mixes the issue of merit with the issue of standing." *NAACP, Inc. v. Fla. Bd. of Regents*, 863 So.2d 294, 300 (Fla. 2003). The Florida Supreme Court has repeatedly explained that a party need not "prove that [it] would actually prevail on the merits … in order to establish … standing." *Id.*; *see also Griffin v. State*, 396 So.2d 152, 157 (Fla. 1981) (Sundberg, C.J., concurring in part) ("Standing does not depend on the merits of the case[.]"). The City's standing argument is thus "confused with the merits of the actual case" and must be rejected. *Chuck v. City of Homestead Police Dep't*, 888 So.2d 736, 738 (Fla. 3d Dist. Ct. App. 2004) (en banc).

II. Capturing and Recording Three Years of ALPR Movement Data Violates Appellant's Reasonable Expectation of Privacy and Thus Is a Warrantless Fourth Amendment Search

A. The Fourth Amendment Protects Appellant from Long-Term Government Surveillance Even in Public View

The City argues that, under "blackletter law established in *Knotts,* … '[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements[.]'" City Br. at 18-19 (quoting *United States v. Knotts,* 460 U.S. 276, 281-82 (1983)); *see also id.* at 19 (collecting state law cases stating that "individuals have no reasonable expectation of privacy in areas that are exposed to public view"). But the Supreme Court held in *Carpenter v. United States* that *Knotts* and other "public view" cases are inapplicable where, as here, the government uses high-tech surveillance to monitor long-term public movements. 138 S. Ct. at 2215.

In *Knotts*, police tricked a suspect into placing in his vehicle a beeper that augmented their visual surveillance in following him to a secret drug laboratory. The Court held that the beeper-assisted surveillance did not constitute a Fourth Amendment search because the vehicle's route on public roads had been "voluntarily conveyed to anyone who wanted to look," and thus the suspect could not assert a privacy interest in the information obtained. *Knotts*, 460 U.S. at 281. While it found no Fourth Amendment defect with using a beeper to track a car for a single trip, the *Knotts* Court explained that "different constitutional principles may

be applicable" to the then-hypothetical scenario of "twenty-four hour surveillance of any citizen of this country." *Id.* at 283. The Court revisited that scenario in *Carpenter* and confirmed "different [constitutional] principles" must apply to "the more sophisticated surveillance" developed in ensuing decades. 138 S. Ct. at 2215. The Florida Supreme Court reached the same conclusion four years before *Carpenter*, explaining that "[i]n the *Knotts* era, high tech tracking such as now occurs was not within the purview of public awareness or general availability. Thus, we conclude that we are not bound to apply the holding in *Knotts*" in high-tech tracking cases. *Tracey v. State*, 152 So.3d 504, 525 (Fla. 2014).

The "different constitutional principles" that *Carpenter* applied came from *United States v. Jones* (decided three decades after *Knotts*), where a majority of the justices concluded that longer-term monitoring of an individual's movements using modern surveillance techniques impinges on reasonable expectations of privacy "regardless whether those movements were disclosed to the public at large." *Carpenter*, 138 S. Ct. at 2215 (first citing *Jones*, 565 U.S. at 430 (Alito, J., concurring in judgment.); and then citing *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring)). *Carpenter* concluded that using cell-site location information ("CSLI") to track the defendant's movements over a seven-day period constituted a Fourth Amendment "search," even though the movements occurred in public view,

because similar comprehensive tracking by individual police officers watching public roads is not possible. *Id.* at 2217. The Court explained:

> Prior to the digital age, law enforcement might have pursued a suspect for a brief stretch, but doing so "for any extended period of time was difficult and costly and therefore rarely undertaken." … For that reason, "society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period."

Id. (quoting *Jones*, 565 U.S. at 429, 430 (Alito, J., concurring in judgment)).

"*Carpenter* solidified the line between short-term tracking of public movements," which typically is not a search, and "prolonged tracking that can reveal intimate details through habits and patterns. The latter form of surveillance invades the reasonable expectation of privacy that individuals have in the whole of their movements," and is therefore a search. *Beautiful Struggle*, 2 F.4th at 341 (citing *Carpenter*, 138 S. Ct. at 2217). As such, *Knotts* and the City's other "public view" cases, *see* City Br. at 18-20, are inapplicable because the City's ALPR program, which collects and retains three years of Appellant's movement data, is prolonged tracking that invades the reasonable expectation of privacy. As in *Carpenter*, the aggregation of this "time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" 138 S. Ct. at 2217 (quoting *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring)). The fact that such

movement takes place in public view does not change the reality that Appellant's expectation of privacy in the history of his movements over an extended period of time is objectively reasonable. *Id.*

The City's related argument that Appellant "lacked a subjective expectation of privacy in the location of his vehicle while on a public road" is meritless for the same reasons. City Br. at 50. As explained above, a person's awareness of being observable in public for discrete periods does not translate into an expectation of being monitored for prolonged periods. Indeed, the subjective expectation of being free from long-term and indiscriminate government tracking is so obvious for members of a free society that courts typically do not even analyze that prong of the *Katz* test. *See Carpenter*, 138 S. Ct. at 2206; *Beautiful Life*, 2 F.4th at 330. And when they do, they have no trouble finding it. *Tracey*, 152 So.3d at 525 ("Tracey had a subjective expectation of privacy in the location signals transmitted solely to enable the private and personal use of his cell phone, *even on public roads*.") (emphasis added). In any event, Appellant's public objections to the City's ALPR program and his decision to file this lawsuit are far more than enough to demonstrate his subjective expectation of privacy in the history of his movements on public roads.

Finally, the City's assertion that "one does not have a reasonable expectation of privacy in the images of his or her plainly visible license plate" misses the point. *See* City Br. at 20. The City cites several cases for the unremarkable position that no

Fourth Amendment violation occurs where police officers run motorists' license plates a single time through a database to view non-private registration information. *Id.* at 20-21 (collecting cases). These cases are irrelevant because Appellant does not challenge this practice. Rather, this case challenges the widespread deployment of ALPRs to populate a separate database containing a history of motorists' movements over a three-year span. As explained above, Appellant has both a subjective and objectively reasonable expectation of privacy to that information.

B. The First District Court of Appeal's Decision in *Bailey* on Third-Party Doctrine Grounds Does Not Change *Carpenter*'s Applicability to This Case

The City relies on *Bailey v. State*, 311 So.3d 303 (Fla. 1st DCA 2020), to argue *Carpenter* is inapplicable to this case. City Br. at 44-47. But *Bailey*'s decision not to apply *Carpenter* was based on the application of the third-party doctrine, which is not relevant here because ALPR data is collected directly by the City.

In *Bailey*, a murder suspect drove for one night his girlfriend's car, which "was equipped with a GPS tracker by agreement between the girlfriend and her financing company," and the police obtained "limited GPS records of the [car]'s movements" from the financing company to determine his whereabouts. 311 So.3d at 307. Under the third-party doctrine, a person lacks reasonable expectation of privacy to records that are knowingly provided to a third party. *United States v. Miller*, 425 U.S. 435, 443 (1976). While *Carpenter* recognized an exception to this

doctrine when it comes to CSLI, 138 S. Ct. at 2220, *Bailey* declined to extend that exemption to GPS records of a vehicle that one does not own, 311 So.3d at 313. The court instead held that the third-party doctrine defeated Bailey's expectation of privacy, holding that "[u]se of a car owned by another to traverse public streets renders [his] purported expectation of privacy unreasonable," and that "the consent to tracking on the part of the car owner further dilutes the argument that the precedent of *Carpenter* controls." *Id.* at 313-14.

The *Bailey* court thus differentiated vehicle-location data from CSLI solely for the purposes of the third-party doctrine, not for purposes of determining whether a person has a reasonable expectation of privacy in the whole of his public movements. Its holding was based on "[t]he fact … that [Bailey] chose to operate a car on public roads—a car owned by another who consented to GPS tracking. The police played no role in the recording of the information and simply availed themselves of the advantages." *Id.* at 315. The third-party doctrine plays no role in this case because the City directly collects and records ALPR data of its residents. As such, there is no reason to depart from *Carpenter* here.

C. The City's Pre-*Carpenter* Cases Cannot Undermine the Aggregation Principle Articulated in *Carpenter*

Bailey's departure from *Carpenter* was further justified based on the short period of time that police retrospectively tracked Bailey's girlfriend's car: "Although the Court in *Carpenter* forbid the government from warrantlessly accessing seven

days of historical CSLI from a target's wireless carriers, it declined to address whether one's 'reasonable expectation of privacy in the whole of his physical movements' extends to shorter periods of time or to other location tracking devices." 311 So. 3d at 314 (quoting *Carpenter*, 138 S. Ct. at 2217 n.3, 2219). *Bailey* thus determined that *Carpenter* requires aggregating the duration of public-movement tracking and found a single day of tracking was not enough to result in a Fourth Amendment search. The City's ALPR program, in contrast, tracks residents' movements for *three years*, and that duration must be aggregated for the purpose of Fourth Amendment analysis because surveillance of "the whole reveals far more than the sum of the parts." *McCarthy*, 142 N.E.3d at 1103.

Against this backdrop, the City asserts that "Fourth Amendment jurisprudence rejects the idea that [surveillance] images taken in plain view of the public can simply be added together to somehow create private information." City Br. at 23. This categorical claim is contradicted by the *en banc* Fourth Circuit's decision in *Beautiful Struggle*, which held that images taken via prolonged aerial surveillance of Baltimore's public streets invaded residents' privacy because "their movements will be recorded and aggregated in a manner that enables the government to ascertain details of their private lives." 2 F.4th at 342 (citation omitted). In finding a three-month video surveillance of a curtilage violated the Fourth Amendment, the Colorado Supreme Court likewise found the "extended duration and continuity of

the surveillance … to be constitutionally significant" because "indiscriminate video surveillance raises the spectre of the Orwellian state." *People v. Tafoya*, 494 P.3d 613, 622 (Co. 2021) (quoting *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987)). The Massachusetts Supreme Court explained this "aggregation principle … is wholly consistent with the statement in *Katz* that '[w]hat a person knowingly exposes to the public … is not a subject of Fourth Amendment protection,' because the whole of one's movements, even if they are all individually public, are not knowingly exposed in the aggregate." *McCarthy*, 142 N.E.3d at 1103.

The City tellingly cites only pre-*Carpenter* cases concerning pole cameras to support its contention that data gathered by dragnet surveillance should not be aggregated for the purpose of Fourth Amendment analysis. City Br. at 23-27 (first citing *United States v. Bucci*, 582 F.3d 108, 116-17 (1st Cir. 2009); then citing *United States v. Mazzara*, No. 16 Cr. 576, 2017 WL 4862793 (S.D.N.Y. Oct. 27, 2017); then citing *United States v. Houston*, 813 F.3d 282 (6th Cir. 2016); and then citing *United States v. Moore*, No. 14-20206-CR, 2014 WL 4639419 (S.D. Fla. Sept. 16, 2014)). These cases are inapplicable because they predate *Carpenter*'s distinction between long- and short-term surveillance. Indeed, three of six First Circuit judges recently explained they would overturn their own *Bucci* precedent because "the Supreme Court's decision in *Carpenter*, relying on *Jones*, provides new support for concluding that the earlier reasoning in *Bucci* is no longer correct."

United States v. Moore-Bush, 36 F.4th 320, 355 n.31 (1st Cir. 2022) (en banc) (Barron, J., concurring in judgment).

The City's reliance on the decision in *Tracey*, 152 So. 3d at 520, to apply an approach other than aggregation to hold that real-time CSLI tracking violates the Fourth Amendment is likewise unavailing. *See* City Br. at 28. *Tracey*, like the pole-camera cases cited above, pre-dates *Carpenter* and therefore was not bound by *Carpenter*. That has changed because "[t]he Supreme Court's opinion [in *Carpenter*] is binding upon Florida courts," which must now follow that decision's aggregation approach. *Ferrari*, 260 So.3d at 305. *Carpenter* made clear that aggregating duration in Fourth Amendment analysis is appropriate by explicitly "hold[ing] that accessing seven days of CSLI constitutes a Fourth Amendment search." 138 S. Ct. at 2217 n.3, while "suggest[ing] that less than seven days of location information may not require a warrant," *id.* at 2234 (Kennedy, J., dissenting). Accordingly, any Fourth Amendment analysis of the City's ALPR program must add up the movement data collected over its three-year retention period.

D. The City's Attempts to Distinguish *Jones* and *Carpenter* Are Unavailing

The City's argument that "*Jones* is inapposite" because its holding was based on a trespassory search, City Br. at 30, fails to mention that a five-justice majority in *Jones* concluded that vehicular tracking in that case would have been unconstitutional even without a physical trespass. Justice Alito's four-justice

concurrence concluded that "respondent's reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove," *Jones*, 565 U.S. at 430 (Alito, J., concurring in judgment), and Justice Sotomayor's separate concurrence "agree[d] with Justice Alito that, at the very least, 'longer term [surveillance] … impinges on expectations of privacy,'" *id.* at 415 (Sotomayor, J., concurring) (citation omitted). As the Supreme Court explained in *Carpenter*, "[a] majority of this Court has already recognized [in *Jones*] that individuals have a reasonable expectation of privacy in the whole of their physical movements." 138 S. Ct. at 2217 (first citing *Jones*, 565 U.S. at 430 (Alito, J., concurring in judgment); and then citing *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring)). The *Jones* concurrences apply to this case because the City's long-term monitoring of Appellant's vehicle violates his reasonable expectation of privacy in the whole of his movements.

The City's attempt to distinguish *Carpenter* by noting that it involved "cell phone tracking data," as opposed to "information about a vehicle's location," City Br. at 31, is also unavailing. *Carpenter* was explicitly based on the *Jones* concurrences' conclusion that obtaining long-term information about a vehicle's location is a Fourth Amendment search. *Carpenter*, 138 S. Ct. at 2217 (first citing *Jones*, 565 U.S. at 430 (Alito, J., concurring in judgment); and then citing *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring)). The Court expressed concern over the

emergence of a wide variety of "remarkably easy, cheap, and efficient" tracking technologies, *id.* at 2218, and did not suggest that tracking CSLI raised greater constitutional concerns than other high-tech methods. To the contrary, it reaffirmed that Fourth Amendment analysis "must take account of more sophisticated systems that are already in use or in development," *id.* (quoting *Kyllo v. United States*, 533 U.S. 27, 36 (2001)).

Carpenter thus did not create a fact-specific rule against warrantless access to CSLI, as the City suggests. *See* City Br. at 31. Rather, it held that law-enforcement personnel violated Mr. Carpenter's Fourth Amendment rights because CSLI they obtained "provide[d] an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" *Carpenter*, 138 S. Ct. at 2217 (quoting *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring)).

The facts underlying the Fourth Amendment claim in *Carpenter*—police obtained a suspect's CSLI for a seven-day period—differ from those at issue here. But many of those differences suggest the City's surveillance of Appellant are *more* intrusive of privacy. The City's residents are subject to daily surveillance for far longer than the seven days in *Carpenter*, and the City (and by extension Vigilant Solutions and its customers) retains ALPR data for at least three years. While CSLI data in *Carpenter* provided more frequent location information on any single day

than do the City's ALPR data, the latter's location information is far more accurate. CSLI could provide only an approximation of the target's location because it places the target within a "wedge-shaped sector ranging from one-eighth to four square miles." *Carpenter*, 138 S. Ct. at 2218. In contrast, ALPR information discloses Appellant's precise GPS coordinates—not a mere approximation. Most importantly, *Carpenter* involved a targeted investigation of a single suspected criminal and sought records covering only one week. The City's surveillance program is vastly larger in scope and longer in duration, and it entails long-term maintenance of personal information regarding every resident who drives (and many non-residents too), including law-abiding citizens like Appellant.

Finally, the City argues that, "[u]nlike the 'secret monitoring' in *Jones* and *Carpenter*, the public was made aware of the City's ALPR program," which was adopted by "elected members of the City Commission." City Br. at 33. But being enacted by a legislative body does not prevent the City's ALPR program from being surreptitious. *McCarthy*, 142 N.E.3d at 1104 ("ALPRs circumvent traditional constraints on police surveillance power by being cheap (relative to human surveillance) and *surreptitious*.") (emphasis added). That is especially true because the City's ALPR network includes multiple mobile units. R.1124. Thus, even a resident familiar with the entire network cannot plot a trip to avoid being surveilled, not to mention non-resident motorists who also did not vote.

The City cites no authority stating that surveillance that would otherwise violate the Fourth Amendment somehow becomes constitutional if it were enacted by a legislative body. To the contrary, in *City of Los Angeles v. Patel*, 576 U.S. 409, 428 (2015), the Supreme Court had no trouble striking down a warrantless inspection regulation under the Fourth Amendment even though it was enacted by a city government. Nor did being publicly enacted by city leadership prevent Baltimore's aerial surveillance program from violating the Fourth Amendment. *Beautiful Struggle*, 2 F.4th at 347. Constitutional rights exist to protect citizens from unlawful legislative power. The Fourth Amendment's protection against unreasonable searches would be eviscerated if surveillance policies enacted by elected officials were *ipso facto* constitutional.

E. The City's ALPR Cases Brought in the Suppression Context Recognize that Aggregation of ALPR Data Can Violate the Fourth Amendment

The City's criminal cases concerning suppression of ALPR evidence do not establish the constitutionality of its ALPR program and instead support the aggregation approach Appellant advances. *See* City Br. at 35-39.

To start, these cases reject the district court's conclusion that ALPR surveillance categorically cannot violate the Fourth Amendment because they do not "secretly monitor and catalogue every single movement of an individual's car." R.2167.; *see also* R.2165 (district court found no Fourth Amendment violation under

Carpenter for tracking "a vehicle's movements on public thoroughfares"). Rather, the City's cases recognized that ALPR surveillance can violate the Fourth Amendment and apply "an aggregation principle for the technological surveillance of public conduct" to determine if it does in a specific case. *McCarthy*, 142 N.E.3d at 1102, cited by City Br. at 38; *see also United States v. Porter*, No. 21-cr-00087, 2022 WL 124563, at *3 (N.D. Ill. Jan. 13, 2022), cited by City at 38 ("[A]ggregation of publicly displayed information obtained through new technologies may trigger Fourth Amendment protections."); *United States v. Brown*, No. 19 CR 949, 2021 WL 4963602, at *3 (N.D. Ill. Oct. 26, 2021), cited by City Br. at 36 ("Aggregating and then accessing even entirely public travel can invade a reasonable expectation of privacy in the whole of someone's physical movements.").

These cases further recognize perfect and continuous surveillance is not needed to establish a Fourth Amendment violation. "For while no ALPR network is likely to be as detailed in its surveillance as GPS or CSLI data, one well may be able to make many of the same inferences from ALPR data that implicate expressive and associative rights." *McCarthy*, 142 N.E.3d at 1104. They therefore analyzed "the extent to which a substantial picture of … public movements are revealed by the surveillance." *Id.*; *see also Porter*, 2022 WL 124563, at *3 (analyzing what ALPR data "reveals … about the intimate details of [the suspect's] life"); *Brown*, 2021 WL 4963602, at *3 (asking what ALPR "data tells us … about the privacies of Brown's

life”). The City’s cases therefore demonstrate that the district court’s refusal to apply the aggregation principle to analyze the constitutionally of the City’s ALPR program was erroneous.

The fact that the City’s cases upheld ALPR surveillance is of no moment because they all concerned the suppression of ALPR data that was far narrower than the city-wide, three-year surveillance being challenged here. The narrow focus of suppression cases on evidence being introduced make their holdings inapplicable. The City’s first case, *United States v. Bowers*, declined to follow the *en banc* Fourth Circuit’s decision to *Beautiful Struggle*, 2 F.4th at 330, in part because *Beautiful Struggle* “was a civil case brought against the police by concerned citizens, and, thus, did not address or involve individual suppression concerns such as those at issue here.” No. 2:18-CR-00292-DWA, 2021 WL 4775977, at *5 (W.D. Pa. Oct. 11, 2021), cited by City Br. at 35. By the same logic, the City’s cases involve individual suppression concerns and therefore do not address the sweeping surveillance of an entire city at issue in this civil case brought by a concerned citizen.

As one of the City’s suppression cases explained: “In determining whether a reasonable expectation of privacy has been invaded [by ALPRs], it is not the amount of data that the [government] seeks to admit in evidence that counts, but, rather, the amount of data that the government collects or to which it gains access.” *McCarthy*, 142 N.E.3d at 1103, cited by City Br. at 38. “For this reason, [a court’s]

constitutional analysis ideally would consider every ALPR record of a defendant's vehicle that had been stored and collected by the government up to the time of the defendant's arrest." *Id.* at 1103-04. But the full scope of ALPR surveillance was not presented in that or any other suppression cases cited by the City.

For instance, in *United States. v. Brown*, the police accessed an ALPR database to obtain a suspect's locations "between August 1 through October 10." 2021 WL 4963602, at *2 (N.D. Ill. Oct. 26, 2021), cited by City Br. at 36. The court recognized that ALPR "cameras and databases are a technological advance; they capture license plates passing by at a high rate of speed and in the dark of night. Mining such enhanced historical information to piece together a person's movements might encroach on society's expectations and justify Fourth Amendment intervention." *Id.* at *3. It thus warned that "[a]ggregating and then accessing even entirely public travel can invade a reasonable expectation of privacy in the whole of someone's physical movements." *Id.* But the court then failed to analyze the aggregated data of the suspect's "entirely public travel" and instead considered only the "two dozen snapshots of a car on the streets over ten weeks," which unsurprisingly "tells … very little about the privacies of [the suspect's] life." *Id.* The proper approach under the *Brown* court's own aggregation approach would have aggregated *all* ALPR data collected and stored.

The City's other suppression cases commit the same error. In *United States v. Porter*, the court recognized that "aggregation of publicly displayed information obtained through new technologies may trigger Fourth Amendment protections." 2022 WL 124563, at *3 (N.D. Ill. Jan. 13, 2022), cited by City Br. at 37-38. But its Fourth Amendment analysis ignored "the aggregation of publicly displayed information" and instead focused on the narrow subset of ALPR data collected "over a period of approximately eight weeks." *Id.* at *3. *See also United States v. Rubin*, 556 F. Supp. 3d 1123 (N.D. Cal. 2021), cited by City Br. at 38 (limiting Fourth Amendment analysis to subset of collected and stored ALPR data in database); *Bowers*, 2021 WL 4775977, *5 (same).

At bottom, the narrow evidence at issue prevents suppression cases from addressing the full scope of movement data being collected and stored. In contrast, civil challenges such as *Beautiful Struggle*, 2 F. 4th at 330, and this case allow the court to analyze the full scope of a surveillance program to determine whether it invades the expectation of privacy in the whole of one's movements.

While it examined a narrow subset of ALPR data that was presented in the suppression context, *McCarthy* outlined principles that guide the full analysis of ALPR programs. First, it said a "one-year retention period [of ALPR data] certainly is long enough to warrant constitutional protection." 142 N.E.3d at 1104. The City's three-year retention period is much longer. Next, "the analysis should focus,

ultimately, on the extent to which a substantial picture of … public movements are revealed by the surveillance." *Id.* In this regard, "ALPRs near constitutionally sensitive locations—the home, a place of worship, etc.—reveal more of an individual's life and associations than does an ALPR trained on an interstate highway." *Id.* The City's ALPR network does not just cover highways but rather city streets where residents shop, dine, worship, and otherwise enjoy their daily lives. The history of these public movements, stretching back three years, therefore implicates core privacy interests. The district court's failure to even consider the extent to which three years of historical ALPR data provides an intimate window into the lives of the City's residents was error.

III. THE CITY'S ALPR REGIME VIOLATES ARTICLE I, SECTION 23 OF THE FLORIDA CONSTITUTION

A. Article I, Section 23 Affords Broader Privacy Protection Than the Fourth Amendment

In response to Appellant's argument that the City's ALPR program violates the right to privacy under Article I, Section 23 of the Florida Constitution, Opening Br. at 38-42, the City asserts that "[t]his ground fails for the same reasons that [Appellant's] Fourth Amendment challenge fails," City Br. at 52-53. But the case cited in support of that argument's faulty premise—*i.e.*, that Section 23 protects privacy no more broadly than the Fourth Amendment—unequivocally says the opposite: "Florida's [Section 23] privacy right provides greater protection than the

federal constitution." *City of N. Miami v. Kurtz*, 653 So.2d 1025, 1027 (Fla. 1995), cited by City Br. at 54. "Indeed, Florida voters rejected a constitutional amendment in 2012 that would have interpreted Florida's explicit constitutional right of privacy as being no broader than the implicit federal constitutional right of privacy." *Gainesville Woman Care LLC v. State*, 210 So.3d 1243, 1253 (Fla. 2017).

The City quotes *Kurtz* to assert that, "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,'" 653 So.2d 1028, quoted at City Br. at 54, but it omits the crucial detail that the *legitimate* expectation of privacy under Section 23 is much broader than the Fourth Amendment's *reasonable* expectation of privacy. Florida courts have found Section 23's legitimate privacy interests to cover a wide range of rights not covered by the Fourth Amendment, including the right to terminate pregnancies, *Gainesville Woman Care*, 210 So.2d at 1253, and the right not to wear masks during a pandemic, *Green v. Alachua County*, 323 So.3d 246, 250 (Fla. 1st DCA 2021).

Whatever else Section 23 may protect, "there can be no doubt that the Florida amendment was intended to protect the right to determine whether or not sensitive information about oneself will be disclosed to others." *Rasmussen v. S. Fla. Blood Serv., Inc.*, 500 So.2d 533, 536 (Fla. 1987). "[A] principal aim of the constitutional provision is to afford individuals some protection against the increasing collection,

retention, and use of information relating to all facets of an individual's life," especially "by computer operated information systems" such as the City's ALPR program. *Id.* That program not only captures motorists' movements for three years, but also shares that sensitive data with a private company that sells the data to others. R. 697. A three-year record of Appellant's driving movements, which includes time-stamped GPS coordinates and surreptitiously taken photographs of the contents of his vehicle, is clearly sensitive information that falls within the core of the privacy interest protected by Article I, Section 23 of the Florida Constitution.

The City's contention that "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" fails to alter this conclusion. City Br. at 53 (quoting *L.S. v. State*, 805 So.2d 1004, 1008 (Fla. 1st DCA 2001)). The City relies on the Fifth District Court's statement in *State v. Geiss* that "[b]ecause article 1, section 12 expressly authorizes governmental searches and seizures to the extent found to be reasonable under the Fourth Amendment …, article 1, Section 23 must be read as authorizing [Fourth Amendment searches and seizures] to the same measure." 70 So.3d 642, 645–46 (Fla. 5th DCA 2011), quoted by City Br. at 53.

This principle, however, cannot narrow the scope of Section 23's privacy interests to that of the Fourth Amendment, as doing so would obviously contradict the Florida Supreme Court's conclusion that "Florida voters have clearly opted for

a broader, explicit protection of their right of privacy" than the Fourth Amendment. *Gainesville Woman Care*, 210 So.2d at 1253. Rather, all *Geiss* standa for is that one may not challenge an otherwise valid Fourth Amendment search under Section 23's strict scrutiny standard. 70 So.3d at 646 ("Thus, if the search warrant was valid under the Fourth Amendment, it cannot be barred by article I, Section 23."). This limitation on Section 23 cannot save the City's ALPR program because it applies only if that program results in Fourth Amendment searches. If that were the case, the Fourth Amendment's warrant requirement would apply, and the City concedes it did not obtain a warrant before monitoring Appellant's movements. And if the ALPR program were not a search, as the City insists, then it would still be subject to strict scrutiny under Section 23, which, as detailed below, the City also fails. Either way, the ALPR program is unconstitutional.

B. The ALPR Program Fails Strict Scrutiny Under Section 23

Under strict scrutiny required by Section 23, the City bears the burden "to justify an intrusion on privacy" by "demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means." *Winfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Regul.*, 477 So. 2d 544, 547 (Fla. 1985). While deterring and solving violent crimes may be a compelling interest, the City fails to demonstrate its dragnet ALPR program is the least intrusive means to achieve that objective.

The principal case on which the City relies held that municipal curfews on minors that were designed to deter crime were not the least intrusive means "because the broad coverage of both curfews includes otherwise innocent and legal conduct by minors even where they have the permission of their parents." *State v. J.P.*, 907 So.2d 1101, 1118 (Fla. 2004), cited by City Br. at 57. Here too, the vast majority of data captured by the City's ALPR program, including all of Appellant's data, depicts otherwise innocent and legal conduct. Despite constant surveillance of every motorist for years without end, the City made only a handful of arrests based on ALPR data. R.425. The program thus fails Section 23's requirement for "a clear connection between [] illegal activity and the person whose privacy would be invaded." *Shaktman v. State*, 553 So.2d 148, 152 (Fla. 1989).

Appellant's Opening Brief identified a number of readily available ways for the ALPR program to be less intrusive. The City could, for instance, institute a warrant requirement or significantly reduce the data-retention period (which could be extended pursuant to a valid warrant). Opening Brief at 42. The City provides no explanation why these options were not adopted or even considered. Nor did it attempt to show that any of its handful of ALPR-based would not have been possible under these options. Instead, the City merely asserts without elaboration that it "tailored the ALPR program to reduce unnecessary impacts." City Br. at 57. This self-serving *ipse dixit* falls far short of what strict scrutiny requires.

IV. THE FDLE'S GUIDELINES DOCUMENT IS AN UNPROMULGATED RULE

Florida's ALPR statute directed FDLE, in consultation with the State Department, to issue rules to "establish a maximum period that the [ALPR] records may be retained." Fla. Stat. 316.0778(2). Pursuant to this explicit delegation of authority, FDLE issued "Guidelines for the Use of Automated License Plate Readers" ("Guidelines Document"), which uses mandatory language to set precise limitations on the use and retention of ALPR data. But FDLE failed to undertake rulemaking procedures even though its own Criminal and Juvenile Justice Information System Council ("CJJISC") recognized that "the guidelines may need to go through the rule promulgation process." R.873. Under these circumstances, the Guidelines Document is an unpromulgated and therefore invalid rule, and none of the FDLE's counterarguments changes this conclusion.

FDLE starts by relying on *Department of Revenue v. Novoa*, 745 So.2d 378, 382 (Fla. 1st DCA 1999) to argue that the Guidelines Document is not a rule because it was not "self-executing." FDLE Br. at 19. But neither *Novoa* nor any other court has found self-execution to be a requirement for a rule. Rather, self-execution is a factor that courts have used to determine whether an internal employment policy is a rule. *Florida State University v. Dann* held that a document with instructions for how a state university awards merit-based pay was a rule rather than an "internal management memorandum" in part because the document's "merit-salary

procedures were virtually self-executing." 400 So.2d 1304, 1305 (Fla. 1st DCA 1981). In *Novoa*, the court held that an agency's employment policy that established a standard of conduct was an internal management memorandum rather than a rule in part because, unlike in *Dann*, it was not self-executing. 745 So.2d at 382. The concept of self-execution is thus confined to the question of whether an internal employment policy must undergo rulemaking procedures. It is totally irrelevant to the question here, where FDLE interpreted the ALPR statute to set limitations on the use and retention of ALPR data using mandatory language.

Next, FDLE argues that the "mere repeating of an existing statute [should not] convert[] anything that follows into an agency statement that must be adopted formally as an agency 'rule.'" FDLE Br. at 22. But the Guidelines Document does not merely "repeat" the Florida ALPR statute. Rather, it contains precise instruction for how "ALPR data shall be retained in accordance with Florida Statute 316.0778," R.487, and therefore exercises the power delegated to FDLE under that statute to "establish a maximum period that the [ALPR] records may be retained." FDLE's concern that "no agency would ever be able to even mention a statutory provision … without risking a legal challenge" is misplaced. FDLE Br. at 22. Agencies can *mention* statutes all they want. They simply cannot interpret statutory requirements to establish mandatory limits under a statute pursuant to authority delegated by statute without going through rulemaking procedures.

FDLE's argument that the Guidelines Document is not a rule because it is "abbreviated" is meritless because there is no exception under the Florida Administrative Procedure Act ("APA") for short rules. Nor does FDLE's case, *Florida League of Cities, Inc. v. Administration Commission*, 586 So.2d 397, 410 (Fla. 1st DCA 1991), cited by FDLE Br. at 23, provide one. The *League of Cities* court held that a policy was not a rule because "[n]othing in the policy itself states that it is mandatory or utilizes commonly accepted mandatory words such as 'shall.' In fact, 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.* In other words, a policy's "abbreviated form" is relevant only to the extent it suggests a "non-mandatory 'starting point'" that lacks "mandatory words such as 'shall.'" *Id.* The Guidelines Document, however, is clearly not a starting point but the final word that repeatedly uses mandatory language, such as "shall." Indeed, according to FDLE, "the word 'shall' appears in thirteen sentences in the six pages of the Guidelines." FDLE Br. at 29. Like the rule that the EPA improperly attempted to pass off as mere guidance in *Appalachian Power Co. v. EPA*, the Guidelines Document here "reads like a ukase. It commands, it requires, it orders, it dictates." 208 F.3d 1015, 1023 (D.C. Cir. 2000). Such a document is a rule no matter how abbreviated.

FDLE requests that the Court "look to the 'plain meaning of the language used.'" FDLE Br. at 25 (citation omitted). But its claim that the Guidelines Document's use of "shall" merely convey "restatements," "non-binding … provisions," or "general recommendations" turns plain meaning on its head. *Id.* at 29. The Florida Supreme Court has repeatedly "explained that in its normal usage, 'shall' has a mandatory connotation." *DeGregorio v. Balkwill*, 853 So.2d 371, 374 (Fla. 2003); *see also Townsend v. R.J. Reynolds Tobacco Co*., 192 So.3d 1223, 1229 (Fla. 2016) ("Generally, the word 'shall' is interpreted as mandatory in nature."). "Only when a particular provision relates to some immaterial matter, where compliance is a matter of convenience rather than substance, or where the statute's directions are given merely with a view to the proper, orderly and prompt conduct of business is" the word "shall" open to alternative construction. *DeGregorio*, 853 So.2d at 374. FDLE does not—and indeed cannot—point to either of these circumstances to depart from the ordinary meaning of "shall."

Moreover, municipalities have interpreted the Guidelines Document as containing binding legal requirements. Section 6 of the Guidelines Document states that "ALPR data shall be retained in accordance with Florida Statute 316.0778" and then establishes compliance critera. R.487. It commands that "ALPR data ... may be retained for no longer than 3 anniversary years." *Id.* The City understood this requirement was binding and "set" "the limit" on its use of ALPR data. R.1321. The

same is true of the City of San Marco Island, Florida, which defended itself in a separate ALPR lawsuit by asserting compliance with the Guidelines Document:

> Indeed, Florida law requires the Department of State, in consultation with the Florida Department of Law Enforcement ("FDLE") to "establish a retention schedule for records containing images and data generated through [use] of an [ALPR] system. The retention schedule must establish a maximum period that the records may be retained." … [T]he FDLE has issued said retention schedule, setting forth a three-year maximum retention period for ALPR records, unless "specific suspicion" exists. And … the City has stated it will maintain ALPR records for a three year maximum, absent specific suspicion. In other words, … the City is compliant with Florida law.

Defendants' Motion to Dismiss Complaint at PageID 102, *Schemel v. City of Marco Island*, No. 2:22-cv-00079-JLD-MRM (M.D. Fla. Mar. 3, 2021), ECF No. 25. San Marco Island clearly believes the FDLE promulgated a binding interpretation of the ALPR statute because it believes following the Guidelines Document establishes compliance with the statute. *Id.*

Section 6 of the Guidelines Document further commands that "Data captured, stored, generated or otherwise produced shall be accessible in the ALPR system for 30 days for tactical use." R.487. The lower court in this case believed this was a binding legal requirement when it held that the City lacked authority to destroy ALPR data because doing so would violate retention requirements under Florida law. R.340

Section 7 uses mandatory language to impose additional binding requirements: agencies "shall maintain records … to ensure strategic alignment and

assessment of policy compliance," "shall document in policy a reporting mechanism," "shall annually assess the overall performance of the ALPR system," "shall document in policy the manner in which audits will be conducted," and "shall establish procedures for enforcement" if its users violate the agency's policy. R.487-88. The inescapable conclusion is that the Guidelines Document imposes binding requirements and therefore is a rule that should have been, but was not, promulgated through rulemaking procedures under the Florida APA.

This conclusion is reinforced by FDLE's own CJJISC, which repeatedly recognized that the Guidelines Document was subject to the rulemaking process. R.873, 1967-68; *see also* Opening Br. at 3-4. For example, CJJISC staff stated at an August 14 meeting, "that the guidelines may need to go through the rule promulgation process[,]" and that "FDLE will verify with the State Department." R.873. FDLE now claims that the August 2014 speaker was discussing the need for the State Department's data retention schedule, as opposed to FDLE's Guidelines Document, to undergo rulemaking. FDLE Br. at 31. This *post hoc* explanation defies belief because the speaker clearly referred to "the guidelines." The State Department's retention schedule was never referred to as "guidelines" and was instead promulgated as *Rule* 1B-24.003(1)(b). *See* R.1536. In contrast, it was the FDLE that used—and continues to use—the term "guidelines" to describe its ALPR document.

At bottom, the Guidelines Document established binding ALPR requirements and therefore is an unpromulgated rule, and FDLE's counterarguments lack merit. FDLE's argument that declaratory judgment is not available because the "Guidelines … are not mandatory and instead are mere recommendations" merely echoes the same meritless arguments and therefore is itself meritless.

CONCLUSION

This Court should reverse the trial court's grant of summary judgment in favor of the City and FDLE and grant summary judgment in Appellant's favor.

Respectfully,

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CERTIFICATE OF SERVICE

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I HEREBY certify that this computer-generated brief complies with the Florida Rules of Appellate Procedure and the Court's May 24, 2022 Order expanding the word limit because this brief was prepared in Times New Roman font, size 14, and contains 7,634 words.

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