UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

CASE NO. 2:22-CV-00079-JLB-KCD

SHANNON SCHEMEL,
STEPHEN OVERMAN,
and MICHAEL TSCHIDA

Plaintiffs,

v.

CITY OF MARCO ISLAND, FLORIDA,

Defendant.
____/

PLAINTIFFS' SUPPLEMENTAL BRIEF ON NEW AUTHORITIES

Plaintiffs Shannon Schemel, Stephen Overman, and Michael Tschida file this Supplemental Brief of Authorities pursuant to this Court's April 9, 2024 Order (ECF 72), which permits the parties to file supplemental briefs regarding new authorities on arguments already presented in Defendants' motions to dismiss (ECF 54) and Plaintiffs' response thereto (ECF 58).

I. Overview of the Case

Plaintiffs allege that the City of Marco Island deployed Automatic License Plate Recognition systems (ALPR) at strategic locations that enable the City to capture the daily movements of the Island's residents, including all three Plaintiffs. *See* Amended Complaint, ECF 50 at 1-3. The City maintains ALPR data for at least three years, and computerized analysis of that data enables the reconstruction of Plaintiffs' historical movement, including precise times when they are on or off the Island. *Id.* Plaintiffs allege that the City's collection and maintenance of ALPR data violates their right to be free from long-term electronic surveillance that captures and records vast quantities of their historical movement under the Fourth Amendment to the U.S.

Constitution. *Id.* at 3 (citing *Carpenter v. United States*, 138 S. Ct. 2206 (2018); *United States v. Jones*, 565 U.S. 400, 430 (2012) (Alito, J., concurring in judgment); *id.* at 415 (Sotomayor, J., concurring)). Plaintiffs also allege that the City's ALPR program violates their "Right to Privacy" under Article I, Section 23 of the Florida Constitution.

The City's motion to dismiss argues that Plaintiffs fail to state a Fourth Amendment claim because they categorically lack reasonable expectations of privacy with respect to their license plate numbers and public movements. *See* ECF 54 at 5–14. The City further argues that Plaintiffs fail to establish a state-law "Right to Privacy" claim for the same reason—*i.e.*, Article I, Section 23 of the Florida Constitution "is coterminous with the interpretation and application of the Fourth Amendment." *Id.* at 15. According to the City, there is no reason for discovery into the scope and extent of the City's ALPR surveillance because no matter how broad or ubiquitous, such surveillance cannot violate the Fourth Amendment or Section 23.

II. Additional Federal Authority Supports Plaintiffs' Fourth Amendment Claim

Since the briefing on the City's motion to dismiss, three new authorities have been issued that are relevant to Plaintiffs' Fourth Amendment claim: *United States v. Mapson*, 96 F.4th 1323 (11th Cir. 2024); *United States v. Jiles*, No. 8:23-CR-98, 2024 WL 891956 at *1 (D. Neb. Feb. 29, 2024); and *United States v. Toombs*, 671 F.Supp.3d 1329 (N.D. Ala., 2023). All three cases arose in the suppression-of-evidence context in connection with criminal trials. While they each ultimately allowed ALPR data to be introduced, their reasoning undermines the City's argument that the warrantless collection of ALPR data may *never* violate the Fourth Amendment as a categorical matter. Instead, they support Plaintiffs' position that the constitutionality of warrantless ALPR surveillance depends on its scope, the determination of which requires discovery in this case.

A. United States v. Mapson

In *Mapson*, three sisters appealed their convictions on charges stemming from an elaborate murder plot. 96 F.4th at 1327–28. One sister lured the victim to a gas station in Alabama, where he was shot. At trial, the government introduced "reports from online databases showing that ALPRs captured a license plate matching the one on [another sister's] vehicle traveling in Alabama (and elsewhere) at suspiciously coincidental times and locations in relation to the shooting," even though that sister did not live in Alabama. *Id.* 1333.

The vehicle owner moved to exclude ALPR evidence as the fruit of a warrantless Fourth Amendment search. The trial court denied that motion, holding that she "did not have an expectation of privacy as to her tag or the exterior of her vehicle[.]" *Id.* The City made the identical argument that "one does not have a reasonable expectation of privacy in images of his or her plainly visible license plate." ECF 54 at 6. On appeal, the Eleventh Circuit *did not* rely on that reasoning to uphold the use of ALPR evidence. Rather, the court noted that the government investigator accessed ALPR data at issue several days before *Carpenter*, 585 U.S. 296 (2018), abrogated then-valid Eleventh Circuit precedent categorically allowing warrantless access to a suspect's historical location data. *Mapson*, 96 F.4th at 1335 (citing *United States v. Davis*, 785 F.3d 498, 513 (11th Cir. 2015) (*en banc*)). Thus, the court assumed without deciding that warrantless acquisition of ALPR data violated the Fourth Amendment under *Carpenter*, but held that the good-faith exception to the exclusionary rule nonetheless allowed the government to introduce pre-*Carpenter* ALPR evidence. *Id.*

Mapson's decision to rely on the good-faith exception rather than the trial court's reasoning—which is identical to the City's argument here—reveals the Eleventh Circuit's unwillingness to grant what the City seeks: a blanket rule that ALPR surveillance is not a Fourth

Amendment search. *See* ECF 54 at 6. Instead, as Plaintiffs explained, the constitutionality of an ALPR program depends on "a fact-intensive examination of the extent to which the program gathers information about an individual's life." ECF 58 at 8 (citing *Carpenter*, 138 S. Ct. at 2217–19). Such "a fact-specific issue [is] not appropriately decided in connection with a motion to dismiss." *Id.* So *Mapson* supports Plaintiffs' position.

B. United States v. Jiles

Jiles involved two criminal defendants whom a law enforcement officer stopped in Nebraska for a traffic violation. The officer plugged the vehicle's license plates into an ALPR database, which "generated 'only five or six hits'" and showed the vehicle had traveled west a few days ago from Colorado into Utah. *Jiles*, 2024 WL 891956, at *2-3. The officer smelled a strong odor of air freshener and marijuana, and his K-9 alerted to the presence of drugs. *Id.* at *4. He questioned the driver and passenger, who responded that they were coming from "a bit past Nebraska." *Id.* at *12. This response was inconsistent with ALPR data showing they recently drove from Colorado into Utah, which is well past Nebraska. *Id.* at *12–13. The suspects also became "flustered" when asked about weapons and drugs. *Id.* at *4. The officer searched the vehicle and found substantial amounts of methamphetamine. *Id*.

The two defendants were charged with drug offenses and moved to suppress the ALPR evidence as the product of a warrantless search, citing *Jones* and *Carpenter*. The district court relied heavily on Judge Bea's concurrence in *United States v. Yang*, 958 F.3d 851 (9th Cir. 2020), which recognized that "ALPRs *may* in time present many of the same issues the Supreme Court highlighted in *Carpenter*." *Jiles*, 2024 WL 891956, at *19 (quoting *Yang*, 958 F.3d at 863) (Bea, J., concurring). Judge Bea warned that an ALPR surveillance "without individualized suspicion" could violate the Fourth Amendment "[i]f enough data is collected … and records [are] maintained

for years." *Yang*, 958 F.3d at 683. But he concluded that the single ALPR data point law enforcement obtained in 2016 at issue in *Yang* was not a Fourth Amendment search because it "exposed nothing else about [the suspect's] 'particular movements' whatsoever." *Id*. The data point also came from a very recent point in time. *Jiles* relied on similar logic to conclude that the "'only five or six' hits on the [vehicle] over the past six months" was also not sufficient to establish a Fourth Amendment search. 2024 WL 891956, at *19.

Contrary to the City's assertion, *Jiles* does not undermine Plaintiffs' Fourth Amendment claim. Rather, it supports the reasoning in Judge Bea's concurrence that, whether warrantless ALPR surveillance violates the Fourth Amendment depends on how much data is collected and *for how long it is kept*. At this stage in litigation, before Plaintiffs have had an opportunity for discovery, such questions of fact must be resolved in Plaintiffs' favor.

C. United States v. Toombs

In *Toombs*, a criminal defendant charged with drug offenses relied on *Carpenter* to argue that the DEA's warrantless acquisition of ALPR evidence violated the Fourth Amendment. 671 F. Supp. at 1333. A DEA agent "testified that the DEASIL [ALPR] database reflected a reading on I-20 eastbound earlier that day. If his query yielded other results, [the agent] did not testify about them and the record does not otherwise establish them." *Id*. at 1334. The district court held that "[t]his single reading from earlier in the same day that [the agent] queried the DEASIL database is much different from" the voluminous historical-location data at issue in *Carpenter*. *Id*.

Toombs does not support the City's argument that ALPR surveillance categorically cannot constitute a Fourth Amendment search. *See* ECF 54 at 5–6, 9–10. Like *Jiles*, *Toombs* examined an extremely limited set of ALPR data—just a "single reading" on an interstate highway—to conclude that a search did not occur. By contrast, this case involves multiple years of constant

ALPR surveillance at strategic points near Plaintiffs' homes that capture their daily movements. ECF 50 at 1–2. Thus, warrantless surveillance data relied on in *Jiles* and *Toombs* were not as extensive, nor stored anywhere near as long, as the data on which the allegations in this case focus.

III. State Law Authority Relevant to Plaintiffs' Claim

The City cites as new authority the Florida Third District Court of Appeals's summary affirmance of *Raul Mas Canosa v. City of Coral Gables, et al.*, No. 2018-033927-CA-01 (11th Cir. Ct., Oct. 4, 2021), *aff'd*, No. 3D21-1983 (Fla. 3d DCA, Apr. 26, 2023)). ECF 75 at 2–3. This decision is not new because the City previously raised it (ECF 57), and Plaintiffs addressed that decision in their opposition to the City's second motion to dismiss. ECF 58 at 9 n.1. To start, because the appeals court gave no rationale for affirmance, that decision provides limited guidance to this case. *Id*.

Moreover, in *Mas Canosa*, the trial court had *denied* the City of Coral Gables's motion to dismiss a challenge against that city's ALPR surveillance system under the Fourth Amendment and Article I, Section 23. Order on Mots. to Dismiss, *Raul Mas Canosa v. City of Coral Gables, et al.*, No. 2018-033927-CA-01 (11th Cir. Ct., Oct. 15, 2019), attached as Ex. A. The trial court drew factual inferences in favor of Mas Canosa to find that Coral Gables's ALPR system collected a "vast quantity of searchable data," *id.* at 4. It concluded with respect to whether "the City's collection of his ALPR information violates his Florida or Federal rights to privacy," that Mas Canosa "has stated a cause of action and there is no basis under which to grant the motion to dismiss[,]" *id.* at 15. The same result is appropriate here, where the Court must also draw all factual inferences in Plaintiffs' favor when assessing the sufficiency of their claims.

While the trial court in *Mas Canosa* ultimately granted summary judgment to Coral Gables, that was only *after* discovery revealed the extent of ALPR surveillance into Mas Canosa's life,

and summary judgment was granted on that factual record. By contrast, Plaintiffs here have had no opportunity for discovery at the motion-to-dismiss stage, and there is no factual record that could support summary judgment. Like Mr. Canosa, Plaintiffs must have an opportunity for full discovery, including into the extent to which the City's ALPR system captured their historical movements, which requires the Court to deny the City's motion to dismiss.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by electronic filing on May 21, 2024, on all counsel of record on the Service List.

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