ELECTRONIC FRONTIER FOUNDATION
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April 17, 2017

Honorable Chief Justice
Tani Gorre Cantil-Sakauye
and Honorable Associate Justices
California Supreme Court
Earl Warren Building
350 McAllister Street
San Francisco, CA 94102

RE: *ACLU Fdn. of So. Cal. and EFF v. Superior Court*
California Supreme Court Case No. S227106
Petitioners' Letter Brief in Reply to Supplemental Briefs filed by Real Parties and Amici

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Petitioners submit this reply brief in response to the supplemental letter briefs filed by Real Parties in Interest and their supporting Amici on the application of Govt. Code § 6255[1] to the ALPR data sought in this case.

Real Party City of Los Angeles relies on its briefing on § 6255 filed before the Court of Appeal. In response, Petitioners explicitly rely on pages 17-33 of their Reply in Support of Petition for Writ of Mandate, also filed before the Court of Appeal, and portions of their Petition for Writ of Mandate before the Court of Appeal cited therein. Petitioners file this reply brief to address additional arguments raised in the supplemental letter briefs filed by Real Party County of Los Angeles, Amici League of California Cities and California State Association of Counties ("League") and Amici California State Sheriffs' Association, et al ("Sheriffs' Association").

INTRODUCTION

All parties agree that the collection of license plate data raises significant privacy concerns. As Senator Jerry Hill, author of Senate Bill 34, the key California statute addressing license plate data, notes in his amicus brief filed with this Court, "[p]ervasive and persistent location-tracking technologies raise serious constitutional questions about the privacy of citizens and their right to be free from constant government surveillance

[1] All references to statute are to the Government Code unless otherwise noted.

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under the Fourth Amendment." (Amicus Br. of Sen. Jerry Hill in Support of Pet. ("Hill Br.") (July 11, 2016) at 6).) However, the proper response to that problem is not to hide from public view the very records that would shed light on how police use this invasive technology every day.

As this Court recently noted, the "CPRA and the Constitution strike a careful balance between public access and personal privacy." (*City of San Jose v. Super. Ct*. (2017) 2 Cal. 5th 608, 616.) But the legislature struck that balance with a clear preference for disclosure: § 6255's requirement that public records may only be withheld if the public interest in nondisclosure "clearly outweighs" the public interest in disclosure. (§ 6255(a).) Here, the public interest in disclosure is strong, and the public interest in nondisclosure to protect the privacy of Los Angeles drivers can be addressed by anonymizing or redacting key datapoints from the raw ALPR data. While the proffered concerns about the disclosure of ALPR data impacting law enforcement are so conjectural that this Court should give them little weight, they too can be addressed through anonymization and redaction. As such, the interests in nondisclosure should at most call for redaction of limited datapoints within the week's worth of ALPR data sought by Petitioners, and only then to the extent this Court deems necessary. The ALPR data should not be exempt from disclosure under § 6255.

I. Disclosure of ALPR Data, Even in Redacted Form, Would Provide Significant Insight on ALPR Use and Help Shape the Debate on the Proper Use of this Technology

Real Parties and their amici attempt to discount the power that disclosure of raw ALPR data would have in helping to shape the debate on whether and how to use this invasive surveillance technology. Yet Petitioners have cited multiple examples from other jurisdictions where raw ALPR data has done just that. (*See* Pet'rs' Opening Br. (Oct. 26, 2015) at 39-41.) The County argues that if the data are redacted, they will provide little insight into the intrusiveness of ALPRs. But this is simply wrong: the public can learn the extent to which ALPRs convey information about someone's life from anonymized ALPR data. The public can learn the extent to which ALPR surveillance is focused on certain communities from a map of scans with time and date stamps redacted. The public can understand more about how much information the police gather on cars by getting information about the number of times each plate has been scanned. EFF's presentation of ALPR data from the Oakland Police Department does not identify particular plates, even in anonymized form, but nonetheless tells a powerful story of how ALPRs are used in that community. (*Id.* at 41.)

Relatedly, the County suggests that ALPR data would provide little additional insight into police use of ALPRs over the policies and procedures previously released. (County Suppl. Br. (Apr. 3, 2017) at 6.) This argument suffers several flaws. First, the written ALPR policies do not demonstrate how ALPRs are used in practice or the extent

of their use, such as which communities police target for heaviest ALPR surveillance, whether police target certain types of locations for collection (such as mosques, political demonstrations, or addiction-treatment centers), and how many scans police have compiled on individual vehicles. Second, even if the policies did purport to address how ALPRs are used, there is frequently an enormous difference between what a government agency says it should do in a policy and what it actually does in practice.

II. None of Real Parties' or Amici's Supplemental Briefs Show ALPR Data Should Be Exempt Under § 6255

A. *Neither § 6254(f) Nor the "New Legal Authority" Cited by Amici Have Any Bearing on the Application of § 6255 to ALPR Data*

The League argues the Court should look to § 6254(f) to determine whether § 6255 exempts ALPR data, arguing that because § 6254(f) protects records of investigations, and ALPR data somehow implicates analogous interests, this should impact the analysis under § 6255. (League Suppl. Br. (Mar. 28, 2017) at 4-5 (citing *Times Mirror Co. v. Super. Ct.* (1991) 53 Cal.3d 1325, 1338-1339); *see also* County Suppl. Br. at 7-8 (arguing ALPR data are records of investigations).) This argument addresses a point that is not in dispute: Petitioners recognize the government interest in preserving effective criminal investigations can be an interest in nondisclosure balanced under § 6255. But courts must still conduct the balancing analysis by evaluating the strength of *all* interests at stake.

Here, disclosure of ALPR data would not undermine law enforcement investigations significantly, if at all, and any potential impact could be addressed through anonymization or, if necessary, redaction. Petitioners argue that ALPR data are not records of investigation under § 6254(f) in significant part because disclosing ALPR data would not serve the purposes of § 6254(f) in protecting "the very sensitive investigative stages of determining whether a crime has been committed or who has committed it." (Pet. Opening Br. at 18-19 (citing *Haynie v. Super. Ct.* (2001) 26 Cal.4th at 1070).) Police collect ALPR data indiscriminately, so a person's vehicle's presence in ALPR data does not indicate they are under investigation for any crime.

The County argues for the first time in its supplemental brief that because release of ALPR data could show the movements of ALPR-equipped police cars, that would reveal not just "patrol patterns" but could also somehow reveal details of the sensitive early stages of criminal investigations. (County Suppl. Br. at 7.) But the record is devoid of any showing that the movements of ALPR-equipped cars reveal "investigations" as opposed to an *ad hoc* mix of responses to calls for service, routine and non-sensitive patrols dictated by daily enforcement needs, and non-enforcement travel to community meetings, administrative obligations, or even to lunch. And as with patrol patterns, the County cannot seriously argue that there is a strong interest in keeping the locations of

police cars secret when they are conspicuously marked and readily observable. This is the sort of vague and conclusory allegation of risk from disclosure that this Court has held insufficient to justify withholding under § 6255. (*Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59, 75; *CBS Inc. v. Block* (1986) 42 Cal.3d 464, 652.)

Similarly the case cited as "new legal authority" by Amici Sheriff's Association, (*County of Los Angeles v. Super. Ct.* (2015) 242 Cal.App.4th 475), is inapposite. Although the case involved vehicle records, that is where its similarity to this case ends. Not only did *County of Los Angeles* involve information arguably more immediately sensitive than ALPR data—the names and addresses of owners of impounded vehicles and a list of items removed and inventoried from their cars—but there is nothing new about the legal authority. The Court of Appeal simply held the information exempt, not under § 6254(f) or 6255, but under § 6254(k), because several longstanding state and federal statutes expressly prohibit disclosure of the names, addresses, and personal information from vehicle records. (*See id.* at 483-488.) Here, Real Parties have never invoked any of the statutory prohibitions on which *County of Los Angeles* relied, because none would apply to ALPR data, so that case is inapplicable here.[2]

B. *The County Ignores California's Strong Presumption of Access to Public Records*

In its supplemental brief, the County ignores the governing legal standards for this Court's review: that this Court reviews *de novo* the balancing of interests under § 6255 and accepts factual findings only if based on substantial evidence; that in arguing for exemption under § 6255, Real Parties bear the burden of proof "to demonstrate a clear overbalance' in favor of nondisclosure;" and that the California Constitution imposes a rule of interpretation favoring disclosure. (*See* Pet'rs' Suppl. Br. (Apr. 3, 2017) at 2 (citing *Los Angeles County. Bd. of Supervisors v. Super Ct.* (2016) 2 Cal.5th 282, 291 (citation omitted)).) Instead, the County cites a case that pre-dates the Public Records Act by seventeen years and Proposition 59 by more than fifty for the proposition that it is

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[2] If anything, the fact that state and federal laws prohibit disclosure of the names of drivers from DMV data mitigates the threat to privacy posed by the release of ALPR data and thus reduces the public interest in nondisclosure. Because state and federal laws prohibit the release of a name in connection with a particular license plate, members of the public cannot legally associate even un-anonymized ALPR data gathered on a particular plate with a particular person through public records alone. (*See* Veh. Code § 1808(e); 18 U.S.C. §§ 2721(a)(1), 2725(3).)

"well established at common law" that "public records should not be open to indiscriminate public inspection … even if they contain material of a public nature." (County Suppl. Br. at 4 (citing *City & County of San Francisco v. Super. Ct.* (1951) 38 Cal.2d 156).) This is certainly not the law in California today. The County also asserts, without any legal foundation, that there is a "presumption that, on balance, requests for disclosure of [ALPR] information threaten the privacy of individual citizens," and that Petitioners must "overcome [this] presumption." (*Id.*) However, the fact that the disclosure of ALPR data implicates privacy interests does not shift the burden from agencies like Real Parties to show, under § 6255, that the public interest in nondisclosure clearly outweighs the public interest in disclosure. This Court must reject the County's incorrect statement of the law and hold Real Parties to their burden.

C. *Senate Bill 34 Was Intended to Promote Transparency and Accountability in Government ALPR Use and Does Not Support Withholding ALPR Data Under § 6255*

In its opposition brief with this Court, the County argues that Senate Bill 34 (ch. 532, Stat. 2015) ("SB 34"), which put in place requirements that address the collection, use, sharing, sale, and transfer of ALPR data, bars disclosure of the ALPR data sought here. (*See* County Answering Br. (filed Jan. 27, 2016) at 19-22).) In their supplemental briefs, both the County and League again raise SB 34, arguing that the Legislature's regulation of ALPR data weighs in favor of withholding data under § 6255's balancing test. But as with their original invocation of SB 34, this argument fails because it misunderstands the purpose and reach of that law.

As SB 34's lead author, Sen. Hill, argues in his amicus brief, because the "overall purpose of SB 34 [is] to increase the transparency and oversight of public agencies' retention and use of ALPR data[,]" PRA requests for ALPR data are consistent with the law. (Hill Br. at 5; *see also id.* at 19 ("the Legislature designed SB 34 to promote transparency and accountability in the collection and maintenance of ALPR data by public agencies"), 21 ("SB 34 was meant to enable the public to exercise its right to provide input and supervision over how government agencies collect, manage, use, share, and protect ALPR data.").) Indeed, SB 34 "does not purport to modify any other laws that might authorize or require such disclosures because those disclosures are 'otherwise permitted by law'" under the statute. (*Id.* at 5.) While SB 34 may have been motivated in part by the concern that the collection of license plate data threatens Californians' privacy rights, it neither created a new PRA exemption for ALPR data nor suggested an intent to limit public access to ALPR data.

By invoking SB 34 in the context of § 6255, the County and League in essence argue that, because the Legislature recognized ALPR data implicates privacy interests, this should somehow add additional weight to tip the balance in favor of nondisclosure.

But all parties to this litigation already recognize that location information in ALPR data strongly implicates the privacy interests of drivers. SB 34 does not tip the balance further because (1) SB 34's focus on the importance of transparency and accountability also weighs in *favor* of disclosure so that the public can understand the extent and nature of police use of this invasive technology, and (2) the privacy concerns recognized by the legislature and by all parties can be addressed through anonymization or redaction of license plates. *See* Pet'rs' Suppl. Br. 6-7.

D. *Real Parties and Amici Fail to Account for Redaction in Addressing Interests in Non-Disclosure*

Petitioners explain at some length in their opening Supplemental Brief how anonymization and redaction of the computerized ALPR data can address each proffered public interest in nondisclosure:

- The privacy interest of drivers in their location information can be addressed by anonymizing license plates using unique identifiers, or, if the court deems it necessary, providing one file with plate information completely redacted and only time and location data remaining (preventing the public from linking particular plates to specific times and locations) and one file redacting time and location information (and so providing a list of plates, indicating how frequently each has been scanned);

- The purported law enforcement interest in not allowing criminals to see if police have gathered ALPR data on their vehicles (the harm of which is highly speculative) can be addressed through the same anonymization or, if necessary, redaction used to protect drivers' privacy;

- The purported (but completely unsupported) law enforcement interest in not disclosing "patrol patterns" can be addressed by redacting minutes (or if necessary hours, or even days) from the time stamp so that the path of individual patrol cars is not obvious.

(*See* Pet'rs' Suppl. Br. at 6-7.)

Recently this Court reemphasized that agencies may rely on redaction to mitigate privacy and other concerns implicated by disclosing public records. (*See City of San Jose v. Super. Ct*. (2017) 2 Cal.5th 608, 626 (2017) (citing § 6253(a) and noting "information not related to the conduct of public business, or material falling under a statutory exemption can be redacted from public records that are produced or presented for review").) Despite this, the County sharply discounts the ability of redaction to allow LASD to release key portions of ALPR data that would be useful to the public while still protecting the privacy interests of Los Angeles drivers. (County Suppl. Br. at 8.) And

Amici fail to address redaction in their supplemental briefs at all.

The County argues that even disclosing redacted data "would compromise law enforcement's ability to investigate vehicle-related crimes, by effectively making patrol patterns, force strength and disposition, and the gaps in these resources, a matter of public record." (*Id.* at 7.) This argument lacks any basis in the record or common sense—if time and even dates are redacted, revealing the places that ALPR-equipped vehicles have scanned a license plate during a one-week period will reveal nothing about patrol patterns that cannot be learned by observing police cars. And it will reveal nothing about force strength or resources that cannot be gleaned from budgets or staffing assignments that are also public records.[3]

CONCLUSION

For the foregoing reasons, § 6255 does not exempt the requested ALPR data from disclosure.

Respectfully submitted,

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[3] The County also implies Petitioners requested disclosure of the "actual photographs" associated with each ALPR scan. (County Br. at 7). Petitioners did not. (*See, e.g.,* EFF Letter to LASD, EP, Vol. 1, Exh.3-C at 120 n.7 ("EFF is not requesting copies of the plate and vehicle images or photographs captured by LASD's ALPR technology.") (emphasis in original).)