

1 SAIRA HUSSAIN (SBN 300326)
ADAM SCHWARTZ (SBN 309491)
2 MUKUND RATHI (SBN 330622)
ELECTRONIC FRONTIER FOUNDATION
3 815 Eddy Street
4 San Francisco, CA 94109
Tel.: (415) 436-9333
5 Fax: (415) 436-9993
Email: saira@eff.org
6 adam@eff.org
7 mukund@eff.org

8 MATTHEW CAGLE (SBN 286101)
ACLU FOUNDATION OF NORTHERN CALIFORNIA, INC.
9 39 Drumm Street
San Francisco, CA 94111
10 Tel.: (415) 621-2493
11 Fax: (415) 255-1478
Email: mcagle@aclunc.org

12
13 *Attorneys for Plaintiffs*

14
15 **SUPERIOR COURT OF CALIFORNIA**
16 **IN AND FOR THE COUNTY OF SAN FRANCISCO**
17 **UNLIMITED JURISDICTION**
18

19 HOPE WILLIAMS, NATHAN SHEARD, and
20 NESTOR REYES,
21 Plaintiffs,
22
23 v.
24 CITY AND COUNTY OF SAN FRANCISCO,
25 Defendant.

Case No.: CGC-20-587008

**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

Hearing Date: December 17, 2021
Time: 9:30 a.m.
Department: 302

Action Filed: October 7, 2020
Trial Date: February 22, 2022

ELECTRONICALLY
FILED

Superior Court of California,
County of San Francisco

10/22/2021
Clerk of the Court

BY: SANDRA SCHIRO
Deputy Clerk

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

TABLE OF AUTHORITIES 2

INTRODUCTION AND SUMMARY OF ARGUMENT 3

STATEMENT OF FACTS 4

ARGUMENT 6

 I. The SFPD’s day-long surveillance of Pride does not trigger the Ordinance’s grace
 period 6

 A. The Ordinance’s text and history show the grace period is not triggered by
 single, temporary uses of surveillance technology 6

 B. The grace period provision does not encompass a future use that expands
 beyond the use preceding the Ordinance’s effective date 10

 II. CCSF has not shown that the SFPD timely submitted to the Board a proposed
 use policy for BID cameras, which alone bars CCSF’s assertion of the grace
 period 12

CONCLUSION 14

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

Cases

Al Otro Lado, Inc. v. McAleenan,
394 F. Supp. 3d 1168 (S.D. Cal. 2019)..... 7

Kinzua Res., LLC v. Oregon Dep’t of Env’t Quality,
468 P.3d 410 (Or. 2020) 7

Pennisi v. Dep’t of Fish & Game,
97 Cal. App. 3d 268 (1979) 13

Quinn v. State of California,
15 Cal. 3d 162 (1975) 13

Shell v. Burlington N. Santa Fe Ry. Co.,
941 F.3d 331 (7th Cir. 2019) 7

State ex rel. Cable News Network, Inc. v. Bellbrook-Sugarcreek Loc. Sch.,
170 N.E.3d 748 (Oh. 2020)..... 7

United Artists Theatre Circuit, Inc. v. CA Reg. Water Qual. Board,
42 Cal. App. 5th 851 (2019) 7

Wilcox v. Birtwhistle,
21 Cal. 4th 973 (1999) 10

Statutes

S.F. Admin. Code Ch. 19B *et seq.* *passim*

Other Authorities

Automated License Plate Recognition Vehicles, SFPD Department Bulletin, No. 10-273
(Sept. 22, 2010)..... 7

Bryan A. Garner, *Garner’s Modern English Usage* 1020 (4th ed. 2016) 6

Heather Somerville, *ShotSpotter Has Long History with Bay Area Police*, Mercury News
(Nov. 11, 2013)..... 7

Justino Aguila, *Late-night Muni Driver Stabbed in Arm*, S.F. Gate (Nov. 15, 1999) 7

SFPD Continues Rollout of Body Worn Cameras, San Francisco Police Department
(Sept. 2, 2016)..... 7

1 **INTRODUCTION AND SUMMARY OF ARGUMENT**

2 Defendant City and County of San Francisco (“CCSF”) has mounted a last-ditch effort to
3 excuse the San Francisco Police Department’s (“SFPD”) unlawful surveillance of Plaintiffs and the
4 protests for Black lives they helped organize. CCSF’s only defense—which it did not raise in its
5 Amended Answer to Plaintiffs’ complaint, during discovery, or at any other time in this case—relies
6 on a cherry-picked reading of subsection 19B.5(d) (“the grace period provision”) of the Acquisition
7 of Surveillance Technology Ordinance (“the Ordinance”). But the text, structure, and legislative
8 history of the Ordinance are firmly at odds with this new defense. *See* Pl. Br. at 9–14. Section 19B.5
9 offers a limited grace period only for surveillance technologies incorporated into city department
10 operations and continuously possessed or used prior to the effective date of the Ordinance.

11 The text, structure, and history of the Ordinance show that the SFPD’s day-long use of the
12 Union Square Business Improvement District’s (“USBID”) surveillance cameras during 2019 Pride
13 does not trigger the grace period. By its text, subsection 19B.5(d) covers only a surveillance
14 technology that a department is “possessing or using” on an ongoing basis before the Ordinance’s
15 effective date. The Ordinance’s history likewise demonstrates that the grace period provision was
16 intended to address technologies that departments had incorporated into their operations, had
17 ongoing possession or use of, and could use without third-party permission. None of these were true
18 as to the SFPD’s use of the USBID camera network to spy on the 2019 Pride Parade. Further, the
19 Ordinance’s text and structure prohibit a department from expanding on uses of a surveillance
20 technology that occurred prior to the law’s effective date; yet the SFPD’s use of the USBID camera
21 network to monitor the May and June 2020 protests was far more extensive, in duration and in
22 number and location of cameras, than the SFPD’s use of the USBID cameras to monitor the 2019
23 Pride Parade. Finally, section 19B.5 requires a department to comply with explicit procedures and
24 deadlines in the law to enjoy the grace period, which the SFPD did not do. The Board of
25 Supervisors’ (“Board”) undisputed purpose in passing the Ordinance—to protect civil rights and
26 civil liberties, Pl. Br. at 5–6, Def. Br. at 5—also compels a limited reading of any exception to the
27 core oversight provisions.

28 CCSF’s meritless invocation of the grace period provision is a mere attempt to distract from

1 the central statutory provision of this lawsuit: subsection 19B.2(a), which the SFPD violated in May
2 and June 2020 when it repeatedly acquired and used the USBID camera network to spy on protests
3 for Black lives without prior Board approval. Pl. Br. 9–14. CCSF has not and cannot defend its
4 violations of the Ordinance. This Court should deny Defendant’s motion for summary judgment and
5 grant Plaintiffs’ motion for summary judgment.

6 STATEMENT OF FACTS

7 I. Legislative history of section 19B.5 of the Ordinance

8 On May 14, 2019, the Board of Supervisors amended section 19B.5 of the proposed
9 Ordinance, titled “Compliance for Existing Surveillance Technology,” in two ways. First, in part at
10 the request of SFPD Chief Bill Scott, the Board extended the deadline for city departments to submit
11 use policies for existing surveillance technologies to 180 days from 120 days. Pl. Opp. SUMF ¶¶ 13–
12 14;¹ *see* S.F. Admin. Code § 19B.5(b). Second, the Board changed the grace period provision to
13 allow city departments “possessing and using” an existing surveillance technology to continue their
14 use “until such time as the Board enacts an ordinance” concerning that technology. Pl. Opp. SUMF ¶
15 10; *see* S.F. Admin. Code at § 19B.5(d).

16 At the May 14, 2019 Board meeting, Supervisors and a Deputy City Attorney spoke at length
17 about the grace period provision. Ordinance author Supervisor Aaron Peskin stated that the amended
18 provision “allows departments to continue use of surveillance technology pending Board of
19 Supervisors’ consideration of a Surveillance Technology Policy.” Pl. Opp. SUMF ¶ 11. A Deputy
20 City Attorney testified further that the amended section 19B.5 would allow a department to continue
21 its use of an existing surveillance technology that it possessed at the effective date of the Ordinance
22 if it submitted a proposed use policy and the Board failed to act on it. Pl. Opp. SUMF ¶ 12.

23 Supervisor Peskin also repeatedly emphasized that the Ordinance would require city
24

25 ¹ Plaintiffs reference various statements of undisputed material facts in this brief. The first, Separate
26 Statement of Undisputed Material Facts in Support of Plaintiffs’ Motion for Summary Judgment, is
27 referred to throughout as “Pl. SUMF.” The second, Defendant City and County of San Francisco’s
28 Separate Statement of Undisputed Material Facts in Support of Motion for Summary Judgment, is
referred to throughout as “Def. SUMF.” The third, Plaintiffs’ Separate Statement of Undisputed
Material Facts in Opposition to Defendant’s Motion for Summary Judgment, is referred to
throughout as “Pl. Opp. SUMF.”

1 departments to inform the Board and the public of their existing surveillance technologies. Pl. Opp.
2 SUMF ¶¶ 15–16. During a discussion about amendments to section 19B.5, Supervisors and a city
3 department witness spoke about four specific examples of departments possessing and using
4 technologies: ShotSpotter, police body worn cameras, automated license plate readers, and city bus
5 cameras. Pl. Opp. SUMF ¶ 17.

6 **II. SFPD’s acquisition and use of the USBID camera network**

7 The SFPD sought remote live access from the USBID to its surveillance camera network on
8 five separate occasions. Pl. SUMF ¶¶ 18, 49; Pl. Opp. SUMF ¶ 26. Shortly after the passage of the
9 Ordinance, on June 19, 2019, SFPD Officer Oliver Lim sent an email to USBID Director of Services
10 Chris Boss seeking remote live access to the USBID cameras that showed Market Street during the
11 2019 Pride Parade. Pl. Opp. SUMF ¶ 19. The USBID granted the SFPD access for a 24-hour period
12 on June 30, 2019, the day of the Pride Parade. Pl. Opp. SUMF ¶ 20.

13 The SFPD had to seek permission from the USBID to access the camera network on each
14 subsequent occasion. Pl. Opp. SUMF ¶¶ 25, 26, 31; Pl. SUMF ¶ 18. And the SFPD had to seek new
15 log-in credentials from the USBID on each occasion where the USBID granted permission. Pl. Opp.
16 SUMF ¶¶ 29, 30, 32; Pl. SUMF ¶ 21.

17 The USBID denied one of SFPD’s requests for remote live access to the camera network
18 following SFPD’s use during the 2019 Pride Parade. Pl. Opp. SUMF ¶¶ 25–28. Shortly before the
19 2020 Super Bowl, the SFPD made two requests to the USBID: (1) for access to Union Square area
20 cameras on February 2, the day of the Super Bowl, and (2) for access to the cameras only on Market
21 Street on February 5, the day of the scheduled parade, had the 49ers won. Pl. Opp. SUMF ¶¶ 25–26.
22 The USBID denied the former request. Pl. Opp. SUMF ¶¶ 27–28.

23 **III. SFPD’s noncompliance with the grace period provision’s requirements**

24 The Ordinance requires, as a condition of enjoying the grace period, that a department send
25 the city’s Committee on Surveillance Technology (“COIT”) a list of existing surveillance
26 technologies within 60 days of the Ordinance’s effective date, and either submit a Surveillance
27 Technology Policy to the Board for its review within 180 days of the Ordinance’s effective date or
28 seek extensions of up to 90 days per extension if it cannot meet the 180-day deadline. *See* S.F.

1 Admin. Code § 19B.5(a)–(c). CCSF has not introduced evidence that the SFPD met any of these
2 requirements. COIT’s website likewise does not contain any publicly available record regarding
3 discussion of the SFPD’s creation of a policy for non-city entity surveillance cameras or time
4 extension requests for the same. Pl. Opp. SUMF ¶ 18.

5 ARGUMENT

6 **I. The SFPD’s day-long surveillance of Pride does not trigger the Ordinance’s grace 7 period.**

8 CCSF seeks to transform the SFPD’s day-long, temporary use of the USBID camera network
9 in June 2019 into an indefinite pass for all future uses. But section 19B.5 provides a temporary grace
10 period only for a surveillance technology that a city department had incorporated into its operations
11 at the time of the Ordinance’s effective date. The SFPD did not do so here. The grace period
12 provision also requires explicit procedural obligations, which CCSF’s brief glosses over and the
13 SFPD did not meet. *Infra* Sec. II.

14 **A. The Ordinance’s text and history show the grace period is not triggered by 15 single, temporary uses of surveillance technology.**

16 By its text, the grace period provision authorizes a department “possessing or using” an
17 “existing surveillance technology” to “continue its use” of only that technology. S.F. Admin. Code
18 §§ 19B.5 & (d). CCSF’s brief editorializes on this subsection with words like “grandfather” and
19 “safe harbor.” *See, e.g.*, Def. Br. at 6, 9. But section 19B.5’s text and history make clear that the
20 Board did not intend to create a broad exception from the Ordinance’s protections for a single,
21 temporary use in the past.

22 By its plain text, the grace period provision requires that a department be “possessing or
23 using” the surveillance technology before the effective date of the Ordinance. S.F. Admin. Code §
24 19B.5(d). The provision employs the present participle—e.g., “using” instead of “use” or “used”—
25 which requires the possession and use to be continuous, and not just single and temporary. Bryan A.
26 Garner, *Garner’s Modern English Usage* 1020 (4th ed. 2016) (defining “present participle” as “[a]
27 nonfinite verb form ending in -ing and used in verb phrases to signal the progressive aspect.”).
28 Courts interpret other statutes that use this verb form to have an element of continuity. *See, e.g.*, *Al*

1 *Otro Lado, Inc. v. McAleenan*, 394 F. Supp. 3d 1168, 1200 (S.D. Cal. 2019) (“The use of the present
2 progressive, like use of the present participle, denotes an ongoing process.”); *Shell v. Burlington N.*
3 *Santa Fe Ry. Co.*, 941 F.3d 331, 336 (7th Cir. 2019) (“‘Having’ means presently and continuously. It
4 does not include something in the past that has ended or something yet to come.”); *Kinzua Res., LLC*
5 *v. Oregon Dep’t of Env’t Quality*, 468 P.3d 410, 414 (Or. 2020) (use of present participle “tell[s] us
6 that the legislature intended to describe a current action” or “a current status”); *State ex rel. Cable*
7 *News Network, Inc. v. Bellbrook-Sugarcreek Loc. Sch.*, 170 N.E.3d 748, 759 (Oh. 2020) (“[A]
8 person who attended school in the past cannot be said to be *attending* the school under any common
9 usage of that word.”) (emphasis in original).

10 In accordance with this established case law, the legislative debate on section 19B.5 focused
11 on surveillance technologies that departments had incorporated into their operations on an ongoing
12 basis. See *United Artists Theatre Circuit, Inc. v. CA Reg. Water Qual. Board*, 42 Cal. App. 5th 851,
13 866 (2019) (“[T]he evil to be prevented is of prime consideration in . . . interpretation.”). Members
14 of the Board of Supervisors and a city agency witness discussed the grace period provision at the
15 May 14, 2019 Board meeting and spoke of four specific technologies: ShotSpotter, police body worn
16 cameras (“BWCs”), automated license plate readers (“ALPRs”), and city bus cameras. Pl. Opp.
17 SUMF ¶ 17. City departments had been regularly using these technologies for years—city bus
18 cameras for decades, ALPRs since at least 2010, ShotSpotter since at least 2013, and BWCs since
19 2016.² Departments operate these technologies in distinct ways and in varying contexts, but they are
20 unified in the control they exert over these technologies. Departments continuously possess them and

21 _____
22 ² See, e.g., Justino Aguila, *Late-night Muni Driver Stabbed in Arm*, S.F. Gate (Nov. 15, 1999),
23 <https://www.sfgate.com/bayarea/article/Late-night-Muni-driver-stabbed-in-arm-3058283.php> (“45
24 new buses are equipped with cameras”); *Automated License Plate Recognition Vehicles*, SFPD
25 Department Bulletin, No. 10-273 (Sept. 22, 2010),
26 https://cdn.muckrock.com/foia_files/2019/02/08/ALPR20DB20DGO20POLICIES.pdf; Heather
27 Somerville, *ShotSpotter Has Long History with Bay Area Police*, Mercury News (Nov. 11, 2013),
28 <https://www.mercurynews.com/2013/11/11/shotspotter-has-long-history-with-bay-area-police/> (“. . .
San Francisco also track[s] gun violence with ShotSpotter”); *SFPD Continues Rollout of Body Worn
Cameras*, San Francisco Police Department (Sept. 2, 2016),
<https://www.sanfranciscopolice.org/news/sfpd-continues-rollout-body-worn-cameras> (“As of
September 1st, 279 sworn members (approximately 14 percent) have been equipped with BWCs
since the Department began issuing the devices in July.”).

1 regularly use them over an extended period that has no firm endpoint—in other words, their use is
2 not temporary or under an imminent time-limit. Further, departments can freely use these
3 technologies without obtaining new permissions and credentials from a third-party for each new use.
4 Strikingly, none of these technologies are legally and technologically controlled by a third-party with
5 the unilateral power to veto a department’s use.

6 Unlike the ongoing, continuous use contemplated by the Ordinance’s grace period provision,
7 the SFPD made only a single, temporary use of the USBID camera network during the 2019 Pride
8 Parade. The SFPD did so with a technology unlike those discussed by the Board as eligible for the
9 grace period. The SFPD requested one-time access to a subset of USBID’s cameras for a 24-hour
10 period, which the USBID granted. Pl. Opp. SUMF at ¶¶ 19–20. The undisputed record makes clear
11 that each subsequent access by the SFPD to the USBID camera network constituted a *new*
12 possession and use.

13 First, the SFPD needed new permission from the USBID each time it sought access to the
14 USBID camera network. The SFPD could not be “possessing” or “using” the network on an ongoing
15 basis, as required by the grace period provision, *see* S.F. Admin. Code § 19B.5(d), because the
16 USBID only permitted a temporary, 24-hour use during Pride 2019 and had complete control over
17 the system. Since then, the USBID has considered, on a case-by-case basis, whether to grant
18 permission to the SFPD each of the four times they requested remote live access. *See* Pl. Opp.
19 SUMF ¶¶ 25, 26, 31; Pl. SUMF ¶ 18. For example, when the SFPD made two separate requests for
20 remote live access to the USBID cameras during the 2020 Super Bowl—for Union Square area
21 cameras on February 2, and for cameras only on Market Street on February 5—the USBID denied
22 the former request. Pl. Opp. SUMF ¶¶ 25–27. They stated: “We will not grant remote access for all
23 of our cameras in this instance. However, we will allow anyone of the officers assigned to this event
24 to come to our video control center and monitor with our staff from our office.” Pl. Opp. SUMF ¶
25 28. The USBID’s denial demonstrates that they had complete control over the camera network, and
26 thus that the SFPD was not “possessing and using” it on a continuing basis. *See* S.F. Admin. Code §
27 19B.5(d). This is unlike the surveillance technologies—ALPRs, bus cameras, BWCs, and
28 ShotSpotter—discussed at the May 14, 2019 Board meeting in connection with the grace period

1 provision, which departments regularly used, continuously possessed, and could freely deploy
2 without a third party’s permission each time. *See* Pl. Opp. SUMF ¶ 17.

3 Second, the SFPD not only needed permission, but also access in the form of new log-in
4 credentials each time the USBID granted their request for remote live access after the day-long
5 surveillance of Pride ended. After granting the SFPD permission to use the USBID camera network
6 for Pride 2019, USBID Director of Services Boss told Officer Lim that the USBID’s technician
7 would provide a “user account credential for accessing the cameras” for that particular access. Pl.
8 Opp. SUMF ¶¶ 21–22. For each of the SFPD’s three subsequent requests for camera access—during
9 the 2020 Super Bowl celebrations, the May and June of 2020 protests, and the 2020 Fourth of July
10 celebrations—the SFPD still had to ask for, and the USBID still had to provide, new log-in
11 credentials. Pl. Opp. SUMF ¶¶ 29, 30, 32; Pl. SUMF ¶ 21. Because the SFPD could not use the
12 camera network again unless it obtained USBID’s controlling credentials, the SFPD was not
13 continuously “possessing or using” the system prior to the Ordinance’s effective date. *See* S.F.
14 Admin. Code § 19B.5(d). Again, this is unlike the surveillance technologies discussed by the
15 Supervisors, which city departments could freely use without a third party agreeing to issue new
16 credentials each time. *See* Pl. Opp. SUMF ¶ 17.

17 CCSF acknowledges the purpose of the grace period was to avoid “unnecessary short-term
18 disruptions in how City departments *were already conducting business.*” Def. Br. at 16 (emphasis
19 added). *See also id.* at 5 (grace period avoids “unnecessarily upending the manner in which City
20 departments were already conducting their operations” and “immediately depriving City departments
21 of the tools they already had come to use”). Departments may plausibly suffer such harms if the
22 Board commanded them to immediately stop possessing and using ShotSpotter, BWCs, ALPRs, bus
23 cameras, and similar surveillance technologies. But a department suffers no such harm because it
24 previously received permission for a single, temporary use of a third-party surveillance technology
25 and then could not seek such permission a second time.³

26 _____
27 ³ CCSF’s approach to discovery in this case indicates its own belief that the SFPD’s acquisition and
28 use of USBID’s cameras for the 2019 Pride Parade was unconnected to its acquisition and use for
the 2020 protests. Although Plaintiffs requested all documents related to the instances in which the

1 departments to expand their surveillance programs in ways that present new threats to civil rights
2 and liberties, all without public or Board oversight.

3 The SFPD’s use of the USBID camera network to spy on protests for Black lives in May and
4 June 2020 expanded significantly beyond its use during the Pride Parade the year prior. First, the
5 SFPD’s use in May and June 2020 was different in “manner” because it spanned eight days rather
6 than just 24 hours, and it involved repeated viewing of live surveillance feeds rather than simply
7 checking the system to see if it worked. *See* Pl. SUMF ¶¶ 17, 24, 27; Def. SUMF ¶ 6; Pl. Opp.
8 SUMF ¶ 6, 23. Second, the SFPD’s use in May and June 2020 was different in “manner” and
9 “location” because it expanded to the entirety of the USBID camera network, spanning over 300
10 cameras and many city blocks. *See* Pl. SUMF ¶¶ 10, 12, 14, 23. On the other hand, the SFPD’s Pride
11 2019 surveillance only used cameras on Market Street, the southernmost boundary of the USBID
12 network. *See* Pl. Opp. SUMF ¶¶ 6, 22; Pl. SUMF ¶ 10. To this day, the Board has not approved a
13 Surveillance Technology Policy that expands the “manner” and “location” of the SFPD’s uses of the
14 USBID network. *See* Def. SUMF ¶ 9; Pl. Opp. SUMF ¶ 9. As a result, the narrow grace period does
15 not encompass the SFPD’s expanded use of the USBID network to spy on protests against police
16 violence.

17 Finally, the Ordinance’s text and structure also show that the grace period does not
18 encompass the SFPD’s acquisition of, and agreement to acquire and use, the USBID camera network
19 to surveil the May and June 2020 protests. The Ordinance’s ordinary requirement of Board control
20 over surveillance technology applies not just to possession and use, but also to acquisition and to
21 agreements to acquire and use it. S.F. Admin Code § 19B.2(a). But the Ordinance’s grace period
22 provision applies only to possession and use. *Id.* at § 19B.5(d). During the protests in May and June
23 2020, the SFPD both (1) acquired the USBID camera network, which it did not previously have
24 possession of, and (2) entered into a new agreement to acquire and use the network, which was not
25 previously covered by an agreement. *See* Pl. Br. at 11–13. Thus, the Ordinance’s ordinary
26 requirements govern; the grace period provision simply does not apply to the SFPD’s unlawful
27 acquisition of and agreement to acquire and use the USBID system.

28

1 **II. CCSF has not shown that the SFPD timely submitted to the Board a proposed use**
2 **policy for BID cameras, which alone bars CCSF’s assertion of the grace period.**

3 Even if SFPD’s use of the USBID’s cameras during Pride 2019 triggered the grace period,
4 which it did not, the SFPD’s failure to comply with key grace period requirements precludes their
5 reliance on the provision.

6 The grace period provision follows three interrelated requirements in section 19B.5. That
7 section, titled “Compliance for Existing Surveillance Technology,” mandates that any department
8 “possessing or using” surveillance technology before the Ordinance’s effective date: (a) submit an
9 inventory of its surveillance technologies to COIT within 60 days of the Ordinance’s effective date,
10 (b) submit a proposed Surveillance Technology Policy ordinance to the Board of Supervisors within
11 180 days of the Ordinance’s effective date, and (c) notify COIT if it is unable to meet the 180-day
12 timeline by writing to request an extension and outlining the reasons for the request. S.F. Admin.
13 Code § 19B.5(a)–(c). Following these requirements, subsection (d) then states that a department
14 “possessing and using” surveillance technology before the effective date of the Ordinance may
15 continue using it “until such time as the Board enacts an ordinance regarding the Department’s
16 Surveillance Technology Policy.” *Id.* at § 19B.5(d). In other words, subsection 19B.5(d) is not an
17 unconditional allowance of a grace period to all city departments for all of their pre-existing
18 surveillance technology.

19 The Ordinance’s legislative history further shows that the grace period provision is
20 contingent on a department’s timely submission of a draft use policy. At the May 14, 2019 Board of
21 Supervisors meeting, Supervisor Peskin introduced an amendment to this subsection, and explained
22 it “allows departments to continue use of surveillance technology *pending Board of Supervisors’*
23 *consideration of a Surveillance Technology Policy.*”⁵ Pl. Opp. SUMF ¶ 11 (emphasis added).

24
25
26 ⁵ The version of the legislation prior to amendment stated: “If the Board has not approved a
27 Surveillance Technology Policy for Surveillance Technology in use before the effective date of this
28 Chapter 19B, within 180 days of its submission to the Board, the Department shall cease its use of
the Surveillance Technology . . .” Pl. Opp. SUMF ¶ 10. Thus, the amendment changed what
departments may do if the Board does not act on a proposed use policy, from barring continued use
of an existing technology, to allowing continued use. *Compare id., with* § 19.5(d). However, the

1 Likewise, a Deputy City Attorney testified that a department could continue using existing
2 surveillance technology under this amendment if the Board failed to act on a proposed use policy. Pl.
3 Opp. SUMF ¶ 12. Such contemporaneous construction of a statute by those with a duty to implement
4 it carries great weight. *See Pennisi v. Dep't of Fish & Game*, 97 Cal. App. 3d 268, 274 (1979);
5 *Quinn v. State of California*, 15 Cal. 3d 162, 173 (1975). Obviously, the Board cannot act on a
6 policy that it never receives for consideration.

7 The legislative history also makes clear that the Board viewed compliance with section 19B.5
8 as integral to the Ordinance's goals of public transparency and Board control. The Ordinance's
9 author repeatedly emphasized the need to understand the inventory of existing technologies that
10 departments possess. *See, e.g.*, Pl. Opp. SUMF ¶ 15 (“[T]hat is precisely why this legislation is
11 important . . . this will require every department to tell us and the public what they’ve got.”); *id.* ¶ 16
12 (“The thrust of this legislation . . . is about knowing, and departments knowing, and the public
13 knowing how that technology is used.”). Moreover, the Board carefully considered the deadlines for
14 compliance, and even amended the Ordinance to extend the deadline for departments to submit use
15 policies to 180 days from 120 days, in part at the request of SFPD Chief Bill Scott. *See* Pl. Opp.
16 SUMF ¶¶ 13–14. Thus, the highest levels of the SFPD were aware that the grace period for existing
17 technologies was not indefinite, but rather required timely compliance with its obligations.⁶

18 Here, CCSF has failed to produce evidence that the SFPD took any steps to fulfill these
19 obligations prior to its acquisition and use of the USBID camera network for the May and June 2020
20 protests. Specifically, CCSF did not produce evidence showing that the SFPD: (1) sent COIT an
21 inventory of its existing surveillance technology that included non-city entity camera networks,
22 within 60 days after the Ordinance's effective date; (2) submitted a use policy for the non-city entity
23 camera networks, within 180 days of that date; or (3) sought and obtained from COIT any extensions
24 of these deadlines. COIT's website likewise lacks any information indicating that the SFPD

25 _____
26 legislative record is clear that the department's duty to timely submit a proposed use policy did *not*
27 change.

28 ⁶ Notably, when the SFPD sought USBID camera access for its day-long surveillance of Pride, the
SFPD was well aware of the Ordinance and its applicability to non-city cameras. Pl. Opp. SUMF ¶
24.

1 attempted to comply with the Ordinance’s obligations. Pl. Opp. SUMF ¶ 18. This evidence is also
2 strikingly absent in the threadbare declaration of the very SFPD employee responsible for drafting
3 and processing the SFPD’s surveillance technology policies. *See Steeves Decl.* Because the SFPD
4 failed to comply with *any* of the Ordinance’s requirements for the grace period, CCSF cannot now
5 claim that subsection 19B.5(d) allows the SFPD to use the USBID camera network in perpetuity.

6 CCSF’s motion ignores these requirements entirely, essentially seeking to write them out the
7 Ordinance. As of today, more than two years after the Ordinance’s enactment, the SFPD still has not
8 submitted a policy on non-city cameras for Board review. *See Steeves Decl.* ¶ 7. *See also* Def.
9 SUMF ¶ 9; Pl. Opp. SUMF ¶ 9. CCSF now seeks the protection of the Ordinance’s grace period
10 provision even though the SFPD has long shirked the legal obligations necessary to obtain it.

11 CONCLUSION

12 For the foregoing reasons, this Court should deny Defendant’s Motion for Summary
13 Judgment, and grant Plaintiff’s Motion for Summary Judgment.

14 Dated: October 22, 2021

By: /s/ Saira Hussain

SAIRA HUSSAIN

15
16 SAIRA HUSSAIN (SBN 300326)
17 ADAM SCHWARTZ (SBN 309491)
18 MUKUND RATHI (SBN 330622)
19 ELECTRONIC FRONTIER FOUNDATION
20 815 Eddy Street
21 San Francisco, CA 94109
22 Tel.: (415) 436-9333
23 Fax: (415) 436-9993
24 Email: saira@eff.org
25 adam@eff.org, mukund@eff.org

Attorneys for Plaintiffs Williams and Reyes

26 MATTHEW CAGLE (SBN 286101)
27 ACLU FOUNDATION OF
28 NORTHERN CALIFORNIA, INC.
39 Drumm Street
San Francisco, CA 94111
Tel.: (415) 621-2493
Fax: (415) 255-1478
Email: mcagle@aclunc.org

Attorneys for Plaintiffs Williams, Sheard, and Reyes