Case No. S227106

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTHERN CALIFRONIA and ELECTRONIC FRONTIER FOUNDATION,

Petitioners,

v.

SUPERIOR COURT FOR THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,

Respondent,

COUNTY OF LOS ANGELES, and the LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, and the CITY OF LOS ANGELES, and the LOS ANGELES POLICE DEPARTMENT,

Real Parties in Interest.

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CLERK SUPREME COURT

After a Decision by the Court of Appeal,
Second Appellate District, Division Three, Case No. B259392
Los Angeles County Superior Court, Case No. BS143004
(Hon. James C. Chalfant)

APPLICATION OF THE NORTHERN CALIFORNIA CHAPTER OF THE SOCIETY OF PROFESSIONAL JOURNALISTS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to California Rule of Court 8.520, the Northern California Chapter of the Society of Professional Journalists respectfully requests leave to file the accompanying *amicus curiae* brief in support of Petitioners' request that this Court reverse the Court of Appeal and hold that data collected by Real Parties using Automated License Plate Readers ("ALPR") are not "[r]ecords of … investigations…" within the meaning of Government Code § 6254(f),[1] and therefore not exempt from disclosure under the California Public Records Act, § 6250 *et seq.*

The Society of Professional Journalists ("SPJ") is a not-for-profit, national journalism organization dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. SPJ was founded in 1909 as Sigma Delta Chi, a journalistic fraternity. It is the oldest, largest, and most representative organization serving journalists in the United States.

SPJ works to inspire and educate current and future journalists through professional development. SPJ also works to protect First Amendment guarantees of freedom of speech and press through its advocacy efforts. Among other things, SPJ actively follows administrative, legislative, and judicial developments, and makes its voice heard through court filings and petitions on behalf of journalists who have been shut-out of hearings, denied access to information, or compelled to turn over notes and research. SPJ has nearly 9,000 members nation-wide, including broadcast, print, and online journalists, journalism educators and students, and other non-journalist members who support SPJ's mission. The

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[1] All further statutory references are to the Government Code unless otherwise indicated.

Northern California Chapter ("Nor. Cal. SPJ") was founded in 1931 and has approximately 200 members. Nor. Cal. SPJ has an active Freedom of Information Committee that has recommended that the Chapter be involved in this matter.

Nor. Cal. SPJ has a significant interest in this case, and in particular, in upholding the public's right of access and the free flow of information that is vital to a well-informed citizenry and a free press. Specifically, Nor. Cal. SPJ has an interest in the disclosure of the public records at issue here because they are necessary to the education of the public on the activities of the Real Parties, and for a meaningful discussion on the same.

Nor. Cal. SPJ agrees with Petitioners that the Court of Appeal's holding significantly expands the exemption for law enforcement "records of investigation" under § 6254(f). Nor. Cal. SPJ also agrees with Petitioners that the Court of Appeal improperly ignored the Constitutional mandate to construe the exemptions to disclosure narrowly. (See Cal. Const. art. I, § 3, subd. (b)(2).) Nor. Cal. SPJ further agrees that the Court of Appeal failed to acknowledge the fundamental difference between automated ALPR technology and traditional policing, and the impact of that difference on public records law.

Nor. Cal. SPJ can assist the Court by highlighting and explaining the importance of transparency in government and the free flow of information with respect to ALPR data, particularly from the point of view of the media. In addition, Nor. Cal. SPJ is concerned with the chilling effect the Court of Appeal's decision will have on state and federal constitutional rights, namely, the right to free speech, press, assembly, anonymity, and the right to privacy. Moreover, Nor. Cal. SPJ has identified specific burdens and risks uniquely placed on the media, and those who work with the media, as

a result of ALPRs.

For the foregoing reasons, Nor. Cal. SPJ respectfully requests that the Court accept the accompanying brief for filing in this case.[2]

Dated: May 3, 2016 Respectfully submitted,

By____________________

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[2] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

<u>BRIEF OF *AMICUS CURIAE*</u>

I. INTRODUCTION

The Los Angeles Police and Sheriff's Departments' mass, indiscriminate collection of license plate data that records the location, movements, and behavior of innocent, ordinary citizens, implicates serious state and federal constitutional concerns. Chief among them is the loss of privacy, which inevitably flows from the type of "government snooping" and "overbroad collection and retention of unnecessary personal information" prohibited by the California Constitution. (*White v. Davis* (1975) 13 Cal.3d 757, 775; Cal. Const. art. I, § 1.) The extent of this secret surveillance is so far-reaching, and the potential for abuse so great, that the chilling effect is enormous on the rights to free speech, a free press, the right to association, and the attendant right to anonymity.

To make matters worse, the City and County[3] refuse to disclose the records of this widespread "government snooping" in response to Petitioners' California Public Records Act ("CPRA") request. Real Parties claim that the Automated License Plate Reader ("ALPR") data are "[r]ecords … of investigations" and thus, exempt from disclosure under Government Code § 6254(f). The Court of Appeal agreed.

The Court of Appeal's decision that the ALPRs routine, untargeted, mass collection of data is an "investigation" is error. It is an unprecedented expansion of the term, and one that renders it totally meaningless. It effectively removes any limit on what information police may gather and keep secret. That interpretation also ignores the constitutional mandate that

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[3] *Amicus Curiae* Nor. Cal. SPJ refers to Real Parties in Interest City of Los Angeles as "City," County of Los Angeles as "County," and the two collectively as "Real Parties."

statues limiting access to public documents be narrowly construed. (Cal. Const., art. I, § 3, subd. (b)(2).) The decision to shield these records from the public significantly stifle, if not wholly foreclose, a meaningful public debate on the dangers and virtues of this program.

Amicus curiae Northern Californian Chapter of the Society of Professional Journalists ("Nor. Cal. SPJ") are journalists and non-journalists who support the organization's mission of upholding the public's right of access and the free flow of information that is vital to a well-informed citizenry and to a free press. Thus, Nor. Cal. SPJ has a significant interest in the disclosure of the public records necessary to have such a debate.

It is the job of the press to investigate and report on the affairs of government, and speech by citizens on matters of public concern lies at the heart of the freedoms of speech and press guaranteed by the state and federal constitutions. The bedrock for these guarantees in the California Constitution is the CPRA, the purpose of which is to "increas[e] freedom of information by giving members of the public access to information in the possession of public agencies." (*Filarsky v. Super. Ct.* (2002) 28 Cal.4th 419, 425.)

However, the interest of *amicus* here is not just in the disclosure of public records and information necessary to fully expose and discuss the business of the government and its effects on the lives of the people of this state. For the mass collection and retention of secret ALPR data does not just place heavy burdens on journalists wishing to report the news, but also on their ability to gather it in the first place. The ability to piece together, through ALPR data, where a journalist was and who she was meeting with, and where she may be next – all in secret – strikes at the heart of the legal safeguards enacted to guarantee that the media continue to act as the

unfettered eyes and ears of the public, and protect confidential and anonymous sources who are the foundation of investigative journalism.

While the issue of privacy may be irrelevant to the legal question of whether ALPR data are "records of investigation" within the meaning of § 6254(f), *amicus* Nor. Cal SPJ respectfully urges this Court to consider the chilling effect the Court of Appeal's decision will have on the exercise of state and federal constitutional rights, including the right to privacy.

This case presents an inescapable conundrum. The law enforcement agencies' decision to collect massive amounts of data to create searchable dossiers of information concerning everyone's travel and habits, innocent and guilty alike, and then insist on keeping all the data secret, present this Court with two outcomes, both unpalatable. In one case, that data is disclosed under the CPRA, and the invasion of personal privacy the police have already inflicted is repeated and magnified. Moreover, that data can be collected by private entities whose interest in protecting privacy is scant at best. But in the other case, that invasion of privacy is every bit as complete, except it is kept secret. In that latter scenario, we become dimly aware we are being watched, but we do not entirely know when or by whom, or what is done with the information. Lawful use surely, but also abuse, can be expected. In choosing between these equally unpleasant choices, the California Constitution points to the preferred outcome: disclosure and debate. As is so often said, "sunlight is said to be the best of disinfectants."[4] The decision of whether to gather this information at all and what

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[4] Justice Louis Brandeis, *Other People's Money and The How Bankers Use It* (1914).

information is in fact gathered should not be left solely in the hands of those who wish to keep it secret.[5]

II. ARGUMENT

A. The Mass, Indiscriminate Collection of Data on Every Vehicle in Los Angeles is Not a "Record of Investigation" Under Government Code § 6254(f)

The purpose of the CPRA is to "increas[e] freedom of information by giving members of the public access to information in the possession of public agencies." (*Filarsky*, *supra*, 28 Cal.4th at 425.) Transparency and accountability are especially important when it comes to the activities of law enforcement officers who, as this Court recently stated, "… hold one of the most powerful positions in our society." (*Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59, 73.) "[O]ur dependence on them is high and the potential for abuse of power is far from insignificant." (*Ibid.* [internal citations omitted].) Indeed, as this Court has recognized:

> Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process.

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[5] It is worth noting that this conundrum is one entirely of the Real Parties own making. Assuming, *arguendo*, that the initial mass scan of every license plate within an area to check for "hot plates" of stolen vehicles, perpetrators at large, or "Amber Alert" vehicles, is legitimate, that legitimacy vanishes once a vehicle has been scanned and found innocent. The problem arises here because the agencies choose to thereafter keep the data in massive searchable databases, thus rendering them subject to a Public Records Act request. If the police configured their technology to check a license plate against a known list and then instantly discard those that did not yield a positive hit, there is no record and the entire issue and the attendant concerns over privacy vanish. Having created the problem they should not be heard to solve it by keeping data on millions of innocent citizens secret.

(*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651.) Thus, access to public records "is a fundamental and necessary right of every person in this state." (§ 6250; see also Cal. Const., art. I, § 3, subd. (b)(1).) The presumption is that this information is open and accessible. (See, e.g., *Sierra Club v. Super. Ct.* (2013) 57 Cal.4th 157, 166-67; *Cty of Los Angeles v. Super. Ct.* (2012) 211 Cal.App.4th 57, 60.) Significantly, since the passage of Proposition 59, the Constitution requires that courts "broadly construe statutes that grant public access to government information and narrowly construe statues that limit such access."[6] (*Long Beach Police Officers Assn., supra*, 59 Cal.4th at 68; Cal. Const., art. I, § 3, subd. (b)(2).)

The Court of Appeal held that the records generated from the automatic, untargeted scanning of every vehicle license plate traveling through Los Angeles constitutes "records of … investigations" exempt from disclosure under § 6254(f). This was error. As amply argued by Petitioners, the unprecedented expansion of the term "investigation" to include the mass, indiscriminate collection of data is not only inconsistent with prior case law, it renders the term meaningless. While the City argues that Petitioners' proffered limit on the meaning of "investigations" to only include targeted inquiries "into a specific crime or person," is unworkable, law enforcement offers no rule at all. (Pets. Open. Br. at 15.) Indeed, under the logic offered by Real Parties, any information gathered by a police

[6] Real Parties argue that passage of the Constitutional amendment in Proposition 59 changed nothing, or simply restated existing law. To uphold that interpretation would require that this Court overrule its own recent case law, finding that Proposition 59 did in fact create a new rule of interpretation, and that new rule affects how current statutes and past case law should be applied since its passage. (See *Sierra Club, supra*, 57 Cal.4th at 166; *Long Beach Police Officers Assn.*, *supra*, 59 Cal.4th at 68.)

officer, at any time, on entirely innocent people not suspected of any wrongdoing would be a "record of investigation" because of its potential future use, even where there is no connection to a crime.

A single example of the breadth of this argument, applied outside the license plate context, reveals its unreasonableness. Imagine an innocent individual engaged in lawfully protected activity who is subject to mass surveillance that is kept secret. Whether entering a mosque, attending a political rally, or simply walking down the street, their movements are now recorded in secret and without the public accountability that the CPRA provides. Incredibly, this means that when that member of the political rally or mosque requests those images of herself under the CPRA, she will be told no because they are "records of an investigation." This is true even though the data collected has no connection to any actual investigation, and the individual is under no suspicion of actual wrongdoing.

The surveillance information described above, like the ALPR records at issue here, is just the bulk collection of data, a miniscule amount of which may possibly be connected to criminal activity.[7] That does not change the fact, however, that the indiscriminate collection of information is just that, and not an "investigation" into any particular suspect or crime. Its essential nature does not change because it may become useful later on, at a time and in a situation yet to be determined, and which in nearly all cases will never materialize. (See *Commission on Peace Officer Standards*

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[7] For example, in November 2014, Menlo Park, California presented a report on automated license plate readers, which concluded that "only one stolen vehicle had been recovered even though police had tracked the license plates of 263,430 vehicles." Brian Hofer and the Oakland Privacy Working Group, *Oakland Poised to Lead in Protecting Privacy*, East Bay Express (Feb. 4, 2015) *available at* http://www.eastbayexpress.com/oakland/oakland-poised-to-lead-in-protecting-privacy/Content?oid=4185374 (all websites last visited on May 3, 2016).

& Training v. Super. Ct. (2007) 42 Cal.4th 278, 291, quoting, *Williams v. Super. Ct.* (1993) 5 Cal.4th 337, 355 [”(T)he law does not provide ... that a public agency may shield a record from public disclosure, regardless of its nature, simply by placing it in a file labelled “investigatory.”)]

Moreover, the Court of Appeal’s conclusion that ALPRs simply automate what an officer could otherwise do, and that technology is irrelevant to the question of what constitutes an “investigation,” is deeply problematic. (Slip. Op. at 11.) New technology does matter. A police officer walking down the street cannot and does not “investigate” every person or vehicle that passes by, run their information and plate numbers against police databases, and permanently catalog that information for potential future use. Yet, the ALPR system does just that. It allows law enforcement to track the movements of any citizen at any time, and thereby know where one has been, who they have met with, and where they may likely go, a process which heretofore was not possible. The fact that technology now allows the state to gather and retain this information with ease, does not make it any less worthy of protection. (See *Riley v. California* (2014) 134 S.Ct. 2473, 2494-95.)

If the mass stockpiling of information can be considered an investigation under the CPRA, then Real Parties truly have *carte blanche* to operate in secret. Such an interpretation does not just undermine the CPRA, it obliterates it, at least as far as law enforcement agencies are concerned.[8] Certainly, this is not what the Legislature had in mind when it enacted the CPRA, with the intention “to open agency action to the light of

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[8] Contrary to the City’s claim, Petitioners do not argue that “widespread data collection can never be an investigation …” (City Ans. at 29.) It is telling, however, that the City sought to rebut this claim by a singular citation to a decision of the Foreign Intelligence Surveillance Act (FISA) Court. (See City Ans. Brf. at 29 citing *In re FBI for an Order Requiring the*

public review …" (*Caldecott v. Super. Ct.* (2015) 243 Cal.App.4th 212, 223-24), "prevent secrecy in government and contribute significantly to the public understanding of government activities." (*League of California Cities v. Super. Ct.* (2015) 241 Cal.App.4th 976, 994 [internal citations omitted].)

B. Holding that All ALPR Data is Secret Will Have A Profound Chilling Effect on the Public's Exercise of State and Federal Constitutional Rights

While the nature and extent of the privacy violations the ALPR program inflicts on Los Angeles residents may be irrelevant to the legal question of whether ALPR data are "records of investigation" within the meaning of § 6254(f), *amicus* Nor. Cal. SPJ respectfully urge this Court to consider the chilling effects the Court of Appeal's decision to keep the data secret will have on the exercise of state and federal constitutional rights.

First and foremost, the right to privacy guaranteed by the California Constitution is specifically concerned with, among other things, providing protection to citizens against "government snooping and the *secret gathering of personal information* [and] the *overbroad collection and retention* of unnecessary personal information by government and business interests." (*White*, *supra*, 13 Cal.3d at 775 [emphasis added].) The driving force behind the provision was the concern over the "accelerating encroachment on personal freedom and security caused by *increased surveillance and data collection activity* in contemporary society." (*Id.* at 774 [emphasis added].)

Prod. Of Tangible Things [For. Intel. Surv. Ct., June 19, 2014] 2014 U.S. Dist. LEXIS 157864, *14.) Even there, the court was required to make a finding that there was a "reasonable, articulable suspicion" that "certain" telephone numbers involved were "associated with an international terrorist organization." (*In re FBI for an Order Requiring the Prod. Of Tangible Things,* 2014 U.S. Dist. LEXIS 157864.)

In *White v. Davis*, the California Supreme Court addressed another surveillance program by the LAPD that, like this one, involved the secret and overbroad collection of personal information, government snooping, and secret surveillance. (*Id.* at 757.) In *White*, the plaintiff alleged that members of the LAPD, acting as "secret informers and undercover agents," registered as students, attended University classes, and were submitting reports to the police department of class discussions and student meetings, both *public and private*. (*Id.* at 761 [emphasis added].) Like the ALPR program, the "intelligence" gathered in *White* by the LAPD agents did not pertain to any particular illegal activity or acts, but rather was gathered to be maintained in police files or 'dossiers' for future potential use. (*Id.* at 762.)

In defending the program, the LAPD argued that the "the gathering of intelligence information to enable the police to anticipate and perhaps prevent future criminal activity is a legitimate and important police function." (*Id.* at 766.) The *White* Court explained, however, that the right to privacy is an enforceable limit to law enforcement's admittedly legitimate interest in gathering information to forestall future criminal acts. (*Id.* at 766.) Indeed, analyzing the LAPD's surveillance program against the principals upon which the constitutional amendment was enacted, the Court found that "the police surveillance operation challenged … epitomizes the kind of governmental conduct which the new constitutional amendment condemns." (*Id.* at 775.)

Importantly, the Court took issue with the "*routine*" nature of the surveillance, including that which occurred in both *public and private*, and found that it constituted "government snooping" in the extreme." (*Id.* at 775-76.) Moreover, because the information gathered did not pertain to any illegal activity or acts, "a strong suspicion is raised that the gathered

material, preserved in 'police dossiers' may be largely unnecessary" for any legitimate or compelling governmental interest. (*Id.* at 776.) Last, the Court repeatedly noted that the secrecy of the program and the records was a decisive feature that rendered it constitutionally suspect. (*Id.* at 761, 767.) As a result, the Court held that the Complaint stated a *prima facie* violation of the constitutional right to privacy.

Equally significant was the Court's finding that the First Amendment imposed a limit to the LAPD's routine surveillance activities. (*Id.* at 761.) "[T]he Constitution's protection is not limited to direct interference with fundamental rights." (*Id.* at 767 (quoting *Healy* v. *James* (1972) 408 U.S. 169, 183).) Thus, secret police surveillance may run afoul of the First Amendment if the effect of the challenged activity is to chill protected activity. (*Id.*). The United States Supreme Court has found the same. (See e.g, *N.A.A.C.P. v. Alabama* (1958) 357 U.S. 449, 461 ["In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action."]; *United States v. U.S. Dist. Ct. for E. Dist. of Mich., S. Div.*) (1972) 407 U.S. 297, 320 ["Official surveillance, whether its purpose be criminal investigation or ongoing intelligence gathering, risks infringement of constitutionally protected privacy of speech."].)

In *White*, like here, secret surveillance of ordinary citizens, and the creation of a database of personal information, inevitably inhibits the right to privacy, the exercise of free speech, and the right of association. While it is true that ALPR technology creates new opportunities for police to solve crimes, it also exponentially increases the invasiveness of the surveillance. As this Court has recognized, the development of technology has "accelerated the ability of government to intrude into areas which a person

normally chooses to exclude from prying eyes and inquisitive minds." (*Burrows v. Super. Ct.* (1974) 13 Cal.3d 238, 248.) "Consequently judicial interpretations of the reach of the constitutional protection of individual privacy must keep pace with the perils created by these new devices." (*Ibid*.) That the government collects this information in secret, and insists on keeping it secret, compounds the problem.

1. The Collection of ALPR Data Places Unique Burdens on the Press

The collection and retention of mass surveillance data poses acute threats to the freedom and autonomy of the press, and to the rights of those who choose, either confidentially or anonymously, to be a source for news. These risks to fundamental rights, which are linked to the right to privacy just discussed, are also implicated here and weigh in favor of disclosure.

The right to not only publish the news, but also to gather it, is protected by the First Amendment. (See *Branzburg v. Hayes* (1972) 408 U.S. 665, 681; *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 576 (plurality opinion) [recognizing that the First amendment incorporates a right "to gather information"]; *Globe Newspaper Co. v. Super. Ct.* (1982) 457 U.S. 596, 604 [gathering information is among the freedoms that are "necessary to the enjoyment of other First Amendment rights."]; see also *United States v. Sherman* (9th Cir. 1978) 581 F.2d 1358, 1361 ["The Supreme Court has recognized that newsgathering is an activity protected by the First Amendment."].)

"[T]here is practically universal agreement that a major purpose of" the First Amendment "was to protect the free discussion of governmental affairs." (*Arizona Free Enter. Club's Freedom Club PAC v. Bennett* (2011) 131 S. Ct. 2806, 2828-29 (quoting *Buckley v. Valeo* (1976) 424 U.S. 1, 14).) That agreement "reflects our 'profound national commitment to the

principle that debate on public issues should be uninhibited, robust, and wide-open.'" (*Ibid.* (quoting *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 270).)

In addition, California has enacted specific safeguards to protect the press, its information, and its sources. Article I, § 2 subd. (b) of the California Constitution protects from forced disclosure a newsgatherer's "*source of any information*" and "*any unpublished information* obtained or prepared in gathering, receiving or processing of information for communication to the public."[9] (*Delaney v. Super. Ct.* (1990) 50 Cal.3d 785, 796-97 (quoting Cal. Const. Art. 1, § 2 subd. (b) [emphasis added]).) This Constitutional provision, as well as the corresponding and identical

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[9] Article 1, section 2(b), provides, in full: "A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, shall not be adjudged in contempt by a judicial, legislative, or administrative body, or any other body having the power to issue subpoenas, *for refusing to disclose the source of any information* procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, *or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public*. [¶] Nor shall a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in contempt *for refusing to disclose the source of any information* procured while so connected or employed for news or news commentary purposes on radio or television, *or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public*. [¶] As used in this subdivision, '*unpublished information' includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated* and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated." [emphasis added].

Evidence Code section 1070 is the statutory counterpart to article I, section 2(b), and contains nearly identical wording.

rule found in Evidence Code section 1070, shields *all* unpublished information, whether confidential or non-confidential, and *all* sources for such information. Unpublished information includes "a newsperson's unpublished, non-confidential eyewitness observations of an occurrence *in a public place*."[10] (*Id.* at 797 [emphasis added].) The shield law provides "virtually absolute immunity for refusing to testify or otherwise surrender unpublished information." (*Miller v. Super. Ct*. (1999) 21 Cal. 4th 883, 899.)

The right to privacy found in article 1, section 1 of the California Constitution, and the First Amendment to the federal constitution, provide additional protections for journalists and their sources, because they "protect[] the speech and privacy rights of individuals who wish to promulgate their information and ideas in a public forum while keeping their identities secret." (*Rancho Publications v. Super. Ct.* (1999) 68 Cal.App.4th 1538, 1547.)

Indiscriminate, massive collection of ALPR data that is then kept secret poses a particular threat to the media. In newsgathering, and especially in investigative reporting, confidential and anonymous sources are a vital resource whose importance cannot be understated. Some of the

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[10] To qualify for shield law protection, the newsperson must show "that he is one of the types of persons enumerated in the law, that the information was 'obtained or prepared in gathering, receiving or processing of information for communication to the public,' and that the information has not been 'disseminated to the public by the person from whom disclosure is sought.'" (*People v. Vasco* (2005) 131 Cal.App.4th 137, 151.)

most important stories of our time, particularly those involving government corruption or abuse, are only possible with the use of such sources.[11]

The ALPRs untargeted surveillance poses an acute problem for journalists and their sources, particularly where the source might be in law enforcement, or providing information about law enforcement activities or perceived misbehavior or malfeasance. Knowledge that essentially every car's movements can be indelibly recorded in a secret database for later search or examination makes movement extremely difficult in a culture built on the automobile. The problem is not that the police are diligently watching every vehicle on hundreds of screens in some underground bunker. The problem is more subtle, and effectively self-imposed by the mere knowledge of the fact of secret dragnet surveillance.[12] This is described no better than in the touchstone book "1984" by George Orwell:

> There was of course no way of knowing whether you were being watched at any given moment. How often, or on what system, the Thought Police plugged in on any individual wire was guesswork. It was even conceivable that they watched everybody all the time. But at any rate they could plug in your wire whenever they wanted to. You had to live — did live, from habit that became instinct — in the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinized.

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[11] For example, FBI Assistant Director Mark Felt – the famous source of Watergate reporters Woodward and Bernstein known as "Deep Throat" – insisted all meetings be held in a parking garage. Such garages are no longer reliably anonymous if the identity of every car going in and out can be recorded by the state.

[12] According to a recent East Bay Express Article: "In 2014, the PEN American Center surveyed writers in fifty nations, finding that many writers living in so-called free countries say they sometimes avoid controversial topics out of fear of government surveillance, and are self-censoring at levels near those in repressed nations." *Oakland Poised to Lead in Protecting Privacy*, *supra* note 7.

(Orwell, *1984*, Pt. 1, Chpt. 1, June 8, 1949.)

A law enforcement source knows of the capability of collecting auto movements, and so must avoid travelling to a place where a journalist's movement might also be captured, or even of allowing the journalist to come to their home or workplace. Thus, the massive collection and retention of ALPR data – which can pinpoint where a person has been and may likely be again – has the potential to undermine, if not obliterate, the fabric of safeguards described above. This threat not only exists for journalists, who rely on these protections to their jobs, but also on those individuals who choose to speak to the press as sources of information – whether in private *or* in public, and who do so only with the promise of confidentiality or anonymity. The right to speak or associate anonymously, whether to a journalist or otherwise, is deeply rooted in both the First Amendment and the state right to privacy. The secret, indiscriminate collection of everyone's movements undoubtedly undermines that right, and "[a]nonymity, once lost, cannot be regained." (*Rancho Publ.*, *supra*, 68 Cal.App. 4th at 1541.)

The United States Supreme Court has explained that the press fulfills its essential role in our democracy by baring the secrets of government and informing the people. (*New York Times Co. v. United States* (1971) 403 U.S. 713, 717 (Black, J. Concurring).) "Only a free and unrestrained press

can effectively expose deception in government." (*Ibid.).*[13] These essential functions cannot be fulfilled if the exercise of these rights are chilled by the mass surveillance and secret indiscriminate stockpiling of information at issue here. Nor can the press fully function if it fears the misuse of this information against it, or other reprisals from knowledge gleaned from secret ALPR data.

These concerns are not fanciful. For example, a Bay Area based reporter requested ALPR data on his own license plate from the Oakland Police Department ("OPD"). In so doing, he learned that OPD's ALPR system had captured his car 13 times between April 29, 2013 and May 6, 2013 at various points throughout the city, including at an intersection near his home. He had not committed any crime, nor was his car wanted or stolen. [14] [15]

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[13] See also *Near v. State of Minnesota ex rel. Olson* (1931) 283 U.S. 697, 719-20 ("[T]he administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities.")

[14] See Cyrus Farivar, *The Cops Are Tracking My Car – and Yours*, Arstechnica (July 18, 2013) *available at* http://arstechnica.com/tech-policy/2013/07/the-cops-are-tracking-my-car-and-yours/1/.

[15] It was also reported by the Boston Globe that, in 2004, police tracked Canadian reporter Kerry Diotte using automated license scans after he wrote articles critical of the local traffic division. "A senior officer admitted to inappropriately searching for the reporter's vehicle in a license scan database in an attempt to catch Diotte driving drunk." Shawn Musgrave, *License Plate-Reading Devices Fuel Privacy Debate*, The Boston Globe (April 9, 2013) *available at* http://www.bostonglobe.com/metro/2013/04/08/big-brother-better-police-work-new-technology-automatically-runs-license-plates-everyone/1qoAoFfgp31UnXZT2CsFSK/story.html.

To be clear, in arguing for disclosure of these documents, *amicus* Nor. Cal. SPJ acknowledges the rights to confidentiality and anonymity it cherishes will be threatened. If Petitioners' relief is granted, and even the limited ALPR data released, the privacy of millions of Los Angeles residents will be compromised. However, it is hardly for the law enforcement agencies that breached the privacy in the first instance to be heard now as advocating for protection from further invasion. Nor is it an answer to argue that the secret, mass surveillance program already in use by Real Parties will harm citizens if better, more accurate information about it is disclosed and discussed. It is only through the release of these records that the public can be informed and debate the virtues, values, flaws, and dangers of the collection and retention of ALPR data.

C. Senate Bill 34 Does Not Create a New Exemption to the CPRA

The County is wrong when it argues that Senate Bill 34, as set forth in Civil Code section 1798.90.5 *et seq*., created a new exemption to the CPRA. The California Constitution explicitly requires that statutes limiting the right of access "be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest." (Cal. Const. art. I, § 3 subd. (b)(2).) No such findings were adopted.[16] Furthermore, the CPRA mandates that "each addition or amendment to a statute that exempts any information contained in a public record from disclosure pursuant to subdivision (k) of Section 6254 shall be listed and described in this article …"[17] (§ 6275.) None of the provisions included in

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[16] See Sen. Bill 34, (2015), 2015 Cal. Legis. Serv. Ch. 532, *available at* http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0001-0050/sb_34_bill_20151006_chaptered.html.

S.B. 34 are listed in the Government Code Chapter which painstakingly cross-references and incorporate exemptions created by laws enacted outside of the CPRA. (See §§ 6276.01-6276.48.) S.B. 34 satisfies none of the legal requirements necessary for establishing a new exemption to the CPRA.

III. CONCLUSION

Amicus Nor. Cal. SPJ respectfully urge this Court to grant the relief requested by Petitioners, hold that the exemption found in § 6254(f) for "records of investigations" does not apply to ALPR data, and reverse the Court of Appeal.

Respectfully submitted,

Date: May 3, 2015

By________________________
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[17] Government Code section 6254 (k) provides that: "Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." If, as the County claims, S.B. 34 prohibited the disclosure of the ALPR data via the CPRA, § 6254(k) would provide the exemption.

WORD COUNT CERTIFICATE

I certify that I prepared this brief using Times 13 font using Word computing software, and that the attached application and brief together is 6,687 words, including footnotes, but excluding the cover, the tables, the signature block, and this certificate. I have relied on the automated word count of the computer program used to prepare the brief.

Date: May 3, 2015

FIRST AMENDMENT PROJECT

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CERTIFICATE OF SERVICE

I, Nicole Feliciano, hereby declare:

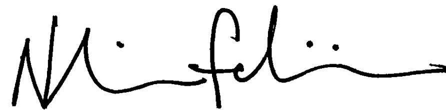
I am over the age of 18 years and am not a party to this action. I am employed in the county of Alameda. My business address is First Amendment Project, 1736 Franklin Street, Ninth Floor, Oakland, CA 94612.

On May 4, 2016 I caused to be served the attached:

APPLICATION OF THE NORTHERN CALIFORNIA CHAPTER OFTHE SOCIETY OF PROFESSIONAL JOURNALISTS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS

__X__ **BY MAIL**. I caused the above identified document(s) addressed to the party(ies) listed below to be deposited for collection at the Public Interest Law Offices or a certified United States Postal Service box following the regular practice for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, correspondence is deposited with the United States Postal Service on this day.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct, and that this Declaration was executed at Oakland, California on May 4, 2016.



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