IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION THREE

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTHERN CALIFORNIA and ELECTRONIC FRONTIER FOUNDATION, Petitioners, v. SUPERIOR COURT FOR THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES, Respondent.	App. No. 2nd Civ. No. B259392 On Appeal from Los Angeles County Superior Court No. BS143004 Hon. James C. Chalfant, Presiding Judge
COUNTY OF LOS ANGELES, and the LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, and the CITY OF LOS ANGELES POLICE DEPARTMENT, Real Parties in Interest.	

APPLICATION AND BRIEF OF AMICUS CURIAE, NORTHERN CALIFORNIA CHAPTER OF SOCIETY OF PROFESSIONAL JOURNALISTS; [PROPOSED] ORDER

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Northern California Chapter of Society of Professional Journalists respectfully requests leave to file the accompanying brief in support of the Verified Petition for Writ of Mandate to Enforce California Public Records Act Pursuant to Government Code § 6259(C), filed by Petitioners Electronic Frontier Foundation and American Civil Liberties Union Foundation of Southern California.

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 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 Respondents, and for a meaningful discussion on the same. Nor. Cal. SPJ can assist this Court by highlighting and explaining the importance of transparency in government and the free flow of information with respect to Automated License Plate Readers ("ALPR") data, and the public interest in, and the risks posed by it. Additionally, 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, that have not yet been raised.

For the foregoing reasons, Amicus Curiae Nor. Cal. SPJ respectfully requests that the Court accept the accompanying brief for filing in this

case.[1]

Dated: February 10, 2015

Respectfully submitted,

By _______________________

James Wheaton
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[1] 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.

BRIEF OF AMICUS CURIAE

> The security of the Nation is not at the ramparts alone. Security also lies in the value of our free institutions. A cantankerous press, an obstinate press, an ubiquitous press must be suffered by those in authority in order to preserve the even greater values of freedom of expression and the right of the people to know. In this case there has been no attempt by the Government at political suppression [or] to stifle criticism. Yet in the last analysis it is not merely the opinion of the editorial writer or of the columnist which is protected by the First Amendment. It is the free flow of information so that the public will be informed about the Government and its actions. These are troubled times. There is no greater safety valve for discontent and cynicism about the affairs of Government than freedom of expression in any form. This has been the genius of our institutions throughout our history. It is one of the marked traits of our national life that distinguish us from other nations under different forms of government.

(*United States v. New York Times Co.* (S.D.N.Y. 1971) 328 F. Supp. 324, 331.)

I. INTRODUCTION

The Los Angeles Police and Sheriff's Departments' mass, indiscriminate collection of license plate data, recording the location, movements, and behavior of 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. The Los Angeles Police Department

(“LAPD”) and Los Angeles Sheriff’s Department (“LASD”) of course disagree. But a meaningful public debate on the dangers and virtues of this program is significantly stifled, if not totally foreclosed, as long as Automated License Plate Reader (“ALPR”) data is withheld from the public by the very government organizations that trumpet its value.

Amicus Curie Society of Professional Journalists, Northern Californian Chapter, (“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. Not unsurprisingly, Amicus Nor. Cal. SPJ have 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 Public Records Act, 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 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, 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 Amicus readily acknowledge that the disclosure of the data sought by Petitioners through the Public Records Act will threaten the privacy interests of California drivers, and who they associate with, Amicus respectfully submit that that the balance in the public interest tips toward transparency and informed debate.

This case presents an inescapable conundrum. When law enforcement agencies secretly collect massive amounts of data on everyone to create searchable dossiers of information concerning everyone's travel and habits, innocent and guilty alike, there are two unpalatable outcomes. In one case, that data is disclosed under the Public Records Act, and the invasion of personal privacy is palpable. Moreover, that data can be collected by private entities whose interest in protecting privacy is absent at best. For example, imagine that information about everyone's travel habits is in the hands of Google, Facebook, or other information brokers. But in the other case, the one advocated here by LAPD and LASD, that invasion of privacy is every bit as complete, except it is secret; the information has been collected, but the ends to which it is put, and who controls it, remains secret. In that latter scenario, we become dimly aware we are being watched, but we do not entirely know 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.”[2] The decision of whether to gather this information at all should not solely be left in the hands of those who wish to keep it secret.

Amicus further submit that this result is compelled by the Public Records Act itself. LAPD and LASD, and the Superior Court below, rely on an exception to the Act’s requirement of openness provided to law enforcement investigative records. But, if the LAPD and LASD’s definition of what constitutes an “investigation” is accepted here, the exception has no limit. The Public Records Act will be rendered meaningless with respect to law enforcement agencies if every scrap of data they indiscriminately gather for potential future use is exempt. Amicus urge the Court to reject the Superior Court’s reasoning to the contrary, issue the requested writ, and grant the relief requested by Petitioners.

II. ARGUMENT

A. The Law Requires the Release of the ALPR Data

“[A]ccess to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.” (Cal. Gov. Code, § 6250; see also Cal. Const. art. I, § 3(b)(1).) Thus, the presumption is that this information is open and accessible. (See, e.g., *Sander v. State Bar of Cal.*, (2013) 58 Cal.4th 300, 318; *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.) Exemptions are limited and narrowly construed. (*Id.*; Cal. Const. art. I, § 3(b)(2).) “The general policy of disclosure reflected in the act “can only be accomplished by narrow

[2] This quotation is generally attributed to Justice Louis Brandeis, but not one of his Supreme Court opinions. Rather, it is found in his 1914 work “Other People’s Money and The How Bankers Use It.”

construction of the statutory exemptions." (*Citizens for A Better Env't v. Dep't of Food & Agric.* (Ct. App. 1985) 171 Cal. App. 3d 704, 711 (internal citations omitted).)

The government bears the burden of proving that any exemption applies. Absent an explicit exemption, the agency must show "that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." (Cal. Gov't Code § 6255(a).) Moreover, under that "'catch-all' public interest exemption of Public Records Act, the burden of proof is on the agency proponent of nondisclosure "to demonstrate a *clear overbalance on the side of confidentiality*." (*Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal. 4th 59, 67 [emphasis added].) The Superior Court erred in holding that the LAPD and LASD met this burden.

1. There is a Strong Public Interest in The Disclosure of Public Records Concerning the Indiscriminate Collection and Retention of Unnecessary ALPR Data

Real Party in Interest County of Los Angeles's ("County") cites a string of Fourth Amendment cases to demonstrate the "reasonableness of ALPR", and for the proposition that Fourth Amendment case law does not recognize a privacy expectation in a license plate. (See Respondent's Opposition to Petitioner's Writ of Mandate ("Resp. Oppo.") at 9, 19-23.) The County misses the point entirely. It is the protections for the right to privacy found in the state constitution, and the federal and state free speech and press rights that are inextricably linked to it, that are at the forefront of

this discussion.[3]

The "inalienable right" to privacy[4] guaranteed to "all people" in article 1, section 1, of the California Constitution, is specifically concerned with 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*, 13 Cal.3d at 775 [emphasis added].)[5] This express right is considerably broader than the implied federal right to privacy under the Fourth Amendment. (*Digital Music News LLC v. Super. Ct.* (2014) 226 Cal.App. 4th 216, 228 (citing *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 326).) The driving force behind the state amendment was the concern over the "accelerating encroachment on personal freedom and security caused by *increased surveillance and data collection activity* in contemporary society." (*White,* 13 Cal. 3d at 774 [emphasis added].) Those concerns are directly at issue

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[3] This is not to say that there are *no* Fourth Amendment concerns at play. The fact that prior cases have held that one has no reasonable expectation of privacy in a license plate does <u>not</u> mean that one would not have a reasonable expectation of privacy in the ALPR data collected by law enforcement.

[4] In 1972, California voters amended article 1, section 1, of the Constitution to include the right to privacy. In full, article 1 provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." (Cal. Const. art. I, § 1.)

[5] In *White*, the Court also recognized other potential abuses of privacy that the constitutional amendment guards against, like "the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party; and … the lack of a reasonable check on the accuracy of existing records." (*White*, 13 Cal. 3d at 775.)

here.

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*, a taxpayer challenged the LAPD's covert intelligence gathering at UCLA. The complaint alleged that members of the LAPD, serving 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.) 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.* at 767). 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, made with the purpose of creating a database of personal information, inevitably inhibits the right to privacy, the exercise of free speech, and the right of association.

The salient difference here, contrary to the argument of Amici Curiae California Sheriffs' Assoc. et al., is that new technology does matter. ALPR technology creates new opportunities for police to solve crimes,[6] but it also exponentially increases the invasiveness of the surveillance. Massive, indiscriminate collection of data on everyone is, in itself, the violation. That the government collects this information in secret, and insists on keeping it secret, only compounds the problem. Indeed, in a recent case analyzing the constitutionality of the DNA Act, the California Supreme Court noted that the question presented, which is one increasingly presented to the courts of this state and nation is, "the extent to which technology can be permitted to "shrink the realm of guaranteed privacy." (*People v. Buza* (2014) 231 Cal. App. 4th 1446, 1495 (review filed Jan. 9, 2015) [striking down DNA Act to the extent it required capture and retention of all arrestees' DNA in law enforcement database].)

This discussion is of great public import, and the public interest weighs heavily on the side of public disclosure of the ALPR data.

2. 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.

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[6] It is worth noting that, 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.

These risks to fundamental rights, which are linked to the right to privacy just discussed, also 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, section 2(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."[7] (*Delaney v. Super. Ct.* (1990) 50 Cal. 3d 785, 796-97 (quoting Cal. Const. Art. 1, sec. 2(b) [Italics added]).) This Constitutional provision, as well as the corresponding and identical 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*

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[7] 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."

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

a public place."[8] (*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 and 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 underestimated. Some of the most important stories of our time, particularly those involving government corruption or abuse, are only possible with the use of such sources.[9]

One does not need to be paranoid or a conspiracy theorist to recognize the problem for journalists and their sources, particularly where

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[8] 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.)

[9] As a simple example, the famous source of Watergate reporters Woodward and Bernstein, known as "Deep Throat", insisted on meeting in a parking garage. Such garages are no longer reliably anonymous if the identity of every car going in and out can be recorded.

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 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 dragnet surveillance.[10] 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.

(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

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[10] 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." 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

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.*, 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.).*[11] These essential functions cannot be fulfilled if the exercise of these rights are chilled by the mass surveillance and indiscriminate stockpiling of information at issue

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[11] 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.")

here. Nor can the press function if it fears the misuse of this information against it, or other reprisals from knowledge gleaned from ALPR data.[12]

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 the limited ALPR data released, the privacy of thousands (if not 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 LAPD and LASD will harm citizens if better, more accurate information about it is disclosed and discussed. It is only through the release of these public documents that the public can be informed and debate the virtues, values, flaws, and dangers of LAPD and LASD's collection and retention of ALPR data.

3. The Investigatory Exemption Does Not Apply

As amply argued in Petitioner's Opening and Reply briefs, expanding the definition of "investigation" to include the constant, secret, surveillance of law-abiding citizens, who have not committed a crime and

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[12] For example, it was 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." (http://www.bostonglobe.com/metro/2013/04/08/big-brother-better-police-work-new-technology-automatically-runs-license-plates-everyone/1qoAoFfgp31UnXZT2CsFSK/story.html.)

are not suspected of committing a crime, would necessarily render the term "investigation" meaningless.

Amici Cal. State Sherriff's Assoc. cite *Williams v. Super. Ct.* (1993) 5 Cal. 4th 337, 335, for the proposition that the "exempt status of investigatory files does not dissipate according to the status or extent of the investigation … [t]he exemption for law enforcement investigatory files does not end when the investigation ends." [Amici Brf. at 7 (citing *Williams*, 5 Cal 4th at 335).] Such a statement begs the question – when did the investigation on everyone begin? And does it never end?

Moreover, the answer that ALPR simply automates what an officer does every day, in his car and walking down the street, is deeply problematic. First, it defies reason to believe that an officer, with nothing but his eyes, is capturing every license plate that passes by, running it against a list of "hot vehicles", and permanently cataloging that information for potential future use. The ALPR system 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.) Nor can it reasonably be argued that a police officer or sheriff walking down the street is "investigating" every person he lays his eyes on.

Contrary to Amici's assertion, ALPR data (at least the initial plate scans), are really more like the "ordinary, routine pesticide reports" that were held not to be investigative records in *Uribe v. Howie* (1971) 19 Cal. App. 3d 194. A "routine report in a public file" that "gains exemption not

because of its content but because of the use to which it was put." (*Black Panther Party v. Kehoe* (1974) 42 Cal. App. 3d 645.)

The alternative is that a scan of any citizen's license plate, at any time, is part of an investigation with no beginning and no end. Under this logic, anything and everything a law enforcement officer does, says, or sees is tantamount to an investigation. That makes the law enforcement exception of the Public Records Act limitless -- for every scrap of information, public or private, for now and always. That simply cannot be the case. The Legislature did not exempt all law enforcement agencies from the Act, but the Superior Court's ruling effectively does.

III. CONCLUSION

Amicus respectfully urge this Court to issue the requested writ, grant the relief requested by Petitioners, and release the ALPR data to the public.

Respectfully submitted,

Date: February 10, 2015

FIRST AMENDMENT PROJECT

Cherokee D.M. Melton
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Attorneys for Amicus Curiae
Society of Professional
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[PROPOSED] ORDER

Having read and considered the application, the Court grants the application to file the Brief by Amicus Curiae Northern California Chapter of Society of Professional Journalists in Support of Verified Petition for Writ of Mandate to Enforce California Public Records Act Pursuant to Government Code § 6259(C) filed by Petitioners Electronic Frontier Foundation and ACLU of Southern California.

Dated: ________________ ________________________________

Judge of the Court of the Appeal of the State of California, Second Appellate District

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 is 4,833 words, including footnotes. I have relied on the automated word count of the computer program used to prepare the brief.

Date: February 10, 2015

FIRST AMENDMENT PROJECT

Cherokee D.M. Melton

CERTIFICATE OF SERVICE

I, Nicole Feliciano, hereby declare:

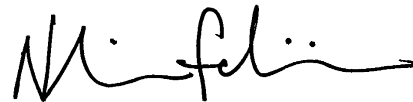
I am over the age of 18 years and am not a party to this action. I am employed in the county of Alameda. My business address is First Amendment Project, 1736 Franklin Street, Ninth Floor, Oakland, CA 94612.

On February 11, 2015, I caused to be served the attached:

APPLICATION AND BRIEF OF AMICUS CURIAE, NORTHERN CALIFORNIA CHAPTER OF SOCIETY OF PROFESSIONAL JOURNALISTS; [PROPOSED] ORDER

__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 February 11, 2015.



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