DAVID CHIU, State Bar #189542
City Attorney
WAYNE K. SNODGRASS, State Bar #148137
Deputy City Attorney
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
Telephone: (415) 554-4675
Facsimile: (415) 554-4699
E-Mail: wayne.snodgrass@sfcityatty.org

Attorneys for Defendant
CITY AND COUNTY OF SAN FRANCISCO

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

HOPE WILLIAMS, NATHAN SHEARD, and NESTOR REYES,

Plaintiff,

vs.

CITY AND COUNTY OF SAN FRANCISCO,

Defendant.

Case No. CGC-20-587008

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT CITY AND COUNTY OF SAN FRANCISCO'S MOTION FOR SUMMARY JUDGMENT

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

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Trial Date: February 22, 2022

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INTRODUCTION

Plaintiffs oppose the City's motion for summary judgment based not on the City's Acquisition of Surveillance Technology Ordinance ("the Ordinance") as the Board of Supervisors enacted it, but based, instead, on a far more restricted (and imaginary) version of that legislation that plaintiffs evidently wish the Board had enacted. While plaintiffs repeatedly urge this Court to read additional terms into Section 19B.5(d) of that Ordinance that the Board could have enacted but chose not to, and also ask this Court to ignore the clear terms of that section that the Board *did* enact, they fail to raise any tenable argument defeating the City's motion. The City respectfully requests that its motion for summary judgment be granted.

ARGUMENT

I. PLAINTIFFS ASK THIS COURT TO ADD NEW REQUIREMENTS INTO THE SURVEILLANCE TECHNOLOGY ORDINANCE THAT THE BOARD OF SUPERVISORS DID NOT ENACT OR INTEND

A. Section 19B.5(D) Contains No Requirement Of "Continuous, Ongoing Use" Or Of "Incorporation Into A Department's Operations."

Plaintiffs strive to resist the City's motion for summary judgment by claiming that Administrative Code Section 19B.5(d) – the section of the Ordinance that allows a City department to continue its use of an existing surveillance technology "until such time as the Board enacts an ordinance regarding the Department's Surveillance Technology Policy and such ordinance becomes effective" under the City Charter – includes multiple limitations and restrictions that the Ordinance, in fact, does not impose.[1] Plaintiffs claim, for example, that Section 19B.5(d) provides a grace period only for a surveillance technology that a city department "had incorporated into its operations" by the time the Ordinance took effect. (Plntff. Mem. of Pts. & Auth. ["MPA"] at 6:10-11.) They also claim that Section 19B.5(d) provides a grace period only for surveillance technologies that a City department "continuously possess[es] and regularly use[s] over an extended period of time that has no firm endpoint," and that are in "ongoing, continuous use." (MPA at 7:20-8:1; *id.* at 8:6.) Because the SFPD used the surveillance camera network owned and operated by the Union Square Business

[1] Plaintiffs suggest that the City failed to disclose in discovery the SFPD's June 2019 use of USBID's surveillance camera network before the Ordinance took effect. (See, e.g., MPA at 3:5.) This is incorrect. The City's interrogatory responses disclosed and discussed that June 2019 use in detail. (*See* Supp. Decl. of Wayne Snodgrass ISO Mtn. for Summ. J. at ¶ 4.)

Improvement District to monitor San Francisco's 2019 Pride celebration for a period of up to 24 hours in June 2019 while that celebration was taking place, but did not continue using that camera network *after* the Pride celebration had ended, plaintiffs claim that the USBID camera network cannot constitute an "existing surveillance technology" under Section 19B.5(d).

Plaintiffs' claims are without merit, however, because the restrictions that plaintiffs claim are found in Section 19B.5(d) find no support in that section's text. Section 19B.5(d) states, in its entirety, as follows:

> Each Department possessing or using Surveillance Technology before the effective date of this Chapter 19B may continue its use of the Surveillance Technology and the sharing of data from the Surveillance Technology until such time as the Board enacts an ordinance regarding the Department's Surveillance Technology Policy and such ordinance becomes effective under Charter Section 2.105.

(Admin. Code § 19B.5(d) [Ex. A to Decl. of Wayne Snodgrass in Support of Mtn. for Summ. J.].)

Plaintiffs thus ask this Court to insert additional, restrictive language into Section 19B.5(d) that the Board of Supervisors could have included in that section, but evidently chose not to. The Court must reject plaintiffs' invitation, however, because "in construing … statutory provisions a court is not authorized to insert qualifying provisions not included and may not rewrite the statute to conform to an assumed intention which does not appear from its language." (*In re Hoddinott* (1996) 12 Cal.4th 992, 1002 [internal brackets omitted].) This Court should not "violate[] the cardinal rule of statutory construction that courts must not add provisions to statutes." (*People v. Guzman* (2005) 35 Cal.4th 577, 587.) This cardinal principle of statutory construction "has been codified in California as Code of Civil Procedure section 1858, which provides that a court must not 'insert what has been omitted' from a statute." (*Id*. [internal brackets omitted]; *Security Pacific National Bank v. Wozab* (1990) 51 Cal.3d 991, 998.) This Court should respect and follow this cardinal rule of statutory construction.

The limitations that plaintiffs ask this Court to read into Section 19B.5(d) are entirely of plaintiffs' own creation. Nowhere in its text does Section 19B.5(d) mention the concept of whether or how much, as of the Ordinance's effective date, a department has "incorporated [a particular surveillance technology] into its operations," much less state that such "incorporation" is required for a particular surveillance technology to be subject to Section 19B.5(d)'s temporary grandfathering.

Similarly, nowhere in its text does Section 19B.5(d) make any mention of whether a department, as of the Ordinance's effective date, was using a particular surveillance technology "continuously," "regularly," or on an "ongoing" basis, rather than intermittently, sporadically, or episodically.

The Board of Supervisors was obviously able to include in Section 19B.5(d) the kind of restrictions that plaintiffs urge this Court to read into that section. Many sections of the Ordinance are enormously detailed, and carefully and expressly limit what City departments, the City's Committee On Information Technology ("COIT"), or the Board itself can do. And the Board knew full well how to include language addressing the frequency with which particular events occur. In Section 19B.1, for example, in the definition of an "Annual Surveillance Report" that a City department must provide to COIT, the Board addressed the required contents of such a report in exhaustive detail, and included a requirement that such a report include "a general description of whether and how often" data obtained from a particular surveillance technology has been shared with outside entities. Plainly, the Board was fully capable of specifying in Section 19B.5(d) that an existing surveillance technology was temporarily grandfathered in only if that technology had been in "continuous" and "ongoing" use, and was "incorporated" into the department's operations, as of the date the Ordinance took effect. The fact that the Board did not include such limitations in Section 19B.5(d) is powerful evidence that the Board did not intend to restrict what can constitute an "existing surveillance technology," for purposes of Section 19B.5(d)'s grace period, as plaintiffs claim.[2]

B. By Making Its Grace Period Turn On Possession *Or* Use Of A Surveillance Technology, Section 19B.5(D) Allows The Grace Period Even For Technologies That A Department Had Used Only Episodically Or Intermittently, Or Had Not Used At All.

Plaintiffs' claim that Section 19B.5(d) provides a temporary grace period only for surveillance technologies that were in "ongoing, continuous use" at the time the Ordinance took effect (MPA at

[2] Plaintiffs' claims that Section 19B.5(d)'s grace period should be limited to surveillance technologies that a department had "incorporated into its operations" and was using on an "ongoing" basis are so vague as to be meaningless. In what manner, for how long, and how many times, must a department have used a particular technology before the Ordinance took effect, for that technology to have become "incorporated" into the department's operations, and for its use to qualify as "ongoing"? Plaintiffs cannot answer these questions, because the Ordinance does not even mention these concepts, much less make them a requirement for a surveillance technology to be grandfathered in under Section 19B.5(d).

8:6) is also undermined by the fact that in drafting that section, the Board of Supervisors chose to extend that section's grace period to any particular surveillance technology that a City department was "possessing *or* using." (Section 19B.5(d) [emphasis added].) The Board's decision to employ the term "or" is highly significant, and further defeats plaintiffs' proffered interpretation of Section 19B.5(d), for several reasons.[3]

First, because Section 19B.5(d) provides its grace period to a particular surveillance technology that a City department was already "possessing *or* using" when the Ordinance took effect, that grace period is available even if the department *used* a surveillance technology without *possessing* it – in other words, a surveillance technology that the department acquired or gained access to on a temporary basis, such as by borrowing it or receiving temporary access to it from its owner (as in this case). Logically, any surveillance technology that a department was borrowing or temporarily accessing was unlikely to be in "ongoing, continuing use." Yet the Board of Supervisors nonetheless intended that under those circumstances, when a City department had been "using" a surveillance technology that it did not "possess," the department may continue to use that technology until the Board enacts an ordinance regarding that technology and that ordinance takes effect.[4]

Second, because Section 19B.5(d) provides its grace period to a particular surveillance technology that a City department was already "possessing *or* using" when the Ordinance took effect, the grace period is available for any surveillance technology that, at the time the Ordinance took effect, was already in the department's *possession,* even if the department had *used* that technology only sporadically, or not at all. Under Section 19B.5(d)'s plain text, "use" – much less "continuing, ongoing use" – of a particular surveillance technology simply is not a prerequisite for that technology

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[3] Notably, plaintiffs' claim that Section 19B.5(d) affords a temporary safe harbor only for surveillance technologies that a department "continuously possess[es] … *and* regularly use[s]" (MPA at 7:20-8:1 [emphasis added]) is flatly contradictory to that section's phrase "possessing *or* using," replacing the statutory term "or" with an "and." This illustrates how plaintiffs' proffered interpretation of Section 19B.5(d) is contradictory to, and is undermined by, that section's plain text.

[4] Plaintiffs make much of the fact that "the SFPD needed new permission from the USBID each time it sought access to the USBID camera network. (MPA at 8:13-14.) This is correct, but irrelevant, because Section 19B.5(d)'s use of the phrase "possessing *or* using" (emphasis added) shows that the Board of Supervisors intended that section's grace period to apply even where the surveillance technology a department had used was not possessed by the department, but rather was possessed and controlled by a third party.

to be grandfathered in. If, for example, a department had already acquired automated license plate readers ("ALPRs") by the time the Ordinance took effect, but had used those ALPRs only one day every six months, or indeed had not yet used them at all, that department was still "possessing or using" the ALPRs at the time the Ordinance took effect. Section 19B.5(d) would thus allow the department to use them in the future, until such time as the Board of Supervisors enacted an ordinance regarding the ALPRs' use.

That Section 19B.5(d)'s phrase "possessing *or* using" undermines plaintiffs' claim of a "continuous, ongoing use" requirement is shown by plaintiffs' repeated claims that that section's grace period cannot apply here because SFPD was not "possessing *and* using" the USBID's camera network. (MPA at 7:20-8:1 [arguing that Section 19B.5(d) affords a temporary safe harbor only for surveillance technologies that a department "continuously possess[es] … *and* regularly use[s]"] [emphasis added]; *id*. at 8:26 [arguing that Section 19B.5(d)'s grace period cannot apply because "the SFPD was not 'possessing *and* using'" the camera network continuously] [emphasis added].) Plaintiffs evidently cannot state their position without significantly distorting the actual text of Section 19B.5(d). This illustrates how plaintiffs' proffered interpretation of Section 19B.5(d) is contradictory to, and is undermined by, the actual text that the Board of Supervisors enacted.

For these reasons, the fact that the Board of Supervisors chose to extend Section 19B.5(d)'s temporary grace period to a department "possessing *or* using" a surveillance technology shows that the Board did not intend to restrict Section 19B.5(d)'s temporary grandfathering to those surveillance technologies that had been in "ongoing, continuous use," or that the department had "incorporated into [its] operations on an ongoing basis." (MPA at 8:6; *id.* at 7:11-12.) Plaintiffs' request that this Court read a requirement of "ongoing, continuous use" into Section 19B.5(d) should be rejected because it would contradict that section's express terms.

C. Section 19B.5(d)'s Use Of The Present Participle Does Not Show The Board Intended That Section's Grace Period To Apply Only To Surveillance Technologies That Were in Ongoing, Continuous Use.

In an effort to sidestep the lack of textual support for their claim that only those surveillance technologies that were in "ongoing, continuous use" at the time the Ordinance took effect can be grandfathered in under Section 19B.5(d), plaintiffs urge that Section 19B.5(d)'s terms "possessing"

and "using" should be read to "have an element of continuity," because those terms are in the "present participle" verb tense. (MPA at 6:21-7:9.) Other courts, according to plaintiff, have interpreted "other statutes that use this verb form to have an element of continuity." (*Id*.)

This argument, however, relies on a strained overreading of Section 19B.5(d)'s use of the present participle tense, placing far more weight on that happenstance than it can bear. None of the cases plaintiffs cite use the fact of a present participle tense to distinguish between a use occurring continuously and a use that is episodic, as plaintiffs attempt to do here. In fact, one of the cases plaintiffs cite – *Kinzua Resources, LLC v. Oregon Dept. of Environmental Quality* (Or. 2020) 468 P.3d 410 (Opp. MPA at 7:4-6) – actually discredits plaintiffs' argument. The court there held it was "not persuaded" by the argument advanced by the petitioners in that case, who, like plaintiffs here, asserted that "it is textually significant that the legislature used the term 'controlling,' rather than the term 'control,'" and that the legislature's choice of the present participle tense "indicates 'some current action.'" (*Id*., 468 P.3d at p. 414.)

Moreover, other courts have rejected the argument that a statute's use of the present participle tense shows that the legislative body intended to mean a present and contemporaneous action, rather than an action occurring in the past. (*See, e.g*., *Perkovic v. Zurich American Insurance Company* (Mich. 2017) 893 N.W.2d 322, 327-28 [holding that statute providing that notice of injury may be given to an insurer by a person "claiming to be entitled to benefits therefor" "contains no temporal requirement that the insured be claiming benefits at the time the notice of injury is transmitted to the insurer"; court expressly rejects dissent's attempt to "read[] such a temporal requirement" into the statute by "arguing that the use of the present participle 'claiming' means that the insured must be making a claim at the time that notice is sent to the insurer"]; *Wireless One, Inc. v. Mayor and City Council of Baltimore* (Md. Ct. App. 2019) 214 A.3d 1152, 621, 640 [holding that ""nothing in the plain language of [statute defining "displacing agency"] includes a temporal element" requiring that displacement be currently occurring, despite "the repeated use of the present participle in the sentence ('displacing agency' and 'carrying out')."].)

Plaintiffs' efforts to inject meaning into the Board of Supervisors' use of the present participle tense in Section 19B.5(d) are also defeated by the fact that the Board also chose to repeatedly use the

present participle tense in Section 19B.2(a), the section of the Ordinance that plaintiffs claim the SFPD violated by acquiring a link to the USBID's camera network during the George Floyd protests in 2020. Section 19B.2(a) contains multiple examples of the present participle tense, stating that a City department must obtain the approval of the Board of Supervisors before "acquiring or borrowing" new surveillance technology, "using" new or existing surveillance technology for purposes beyond those approved by the Board, or "entering into [an] agreement" with a non-City entity to share or use surveillance technology. (*Id*., subds. (2), (3), and (4).) If the Board's use of the present participle tense in Section 19B.2(a) does not show that that section only prohibits "continuous and ongoing" conduct (as plaintiffs logically must contend), then the Board's use of the present participle tense in Section 19B.5(d) should also be presumed not to show that that section's grace period applies only where the department made "continuous and ongoing" use of the surveillance technology in question. (*People v. Wells* (1996) 12 Cal.4th 979, 986 [absent evidence of a contrary intent, courts "presume the Legislature intended that we accord the same meaning to similar phrases"].)

D. The "Legislative Debate" Does Not Show That A Surveillance Technology Must Have Been Used "Continuously" To Qualify For Section 19B.5(d)'s Grace Period.

Plaintiffs claim that because members of the Board of Supervisors discussed Section 19B.5(d)'s grace period on May 14, 2019 and spoke of four specific surveillance technologies – Shotspotter, body worn cameras, ALPRs, and cameras on MUNI buses – that City departments "continuously possess … and regularly use," the Board must have intended such "ongoing, continuous use" to be *required* for Section 19B.5(d)'s grace period to apply. (MPA at 7:10-8:5.) But plaintiffs cannot, and do not, claim that anyone stated at that meeting that only surveillance technologies that were in "ongoing, continuous use" could be subject to Section 19B.5(d)'s grace period. And as we have explained, Section 19B.5(d)'s use of the phrase "possessing *or* using" defeats any claim that "ongoing, continuous use" was required. Moreover, it is unremarkable that the discussion at the Board should focus on the handful of surveillance technologies that were particularly in the public eye and that were familiar to most people. It also is unremarkable that the discussion at the Board on May 14, 2019 did not include mention of USBID's surveillance camera network, which as of that date, SFPD

had never sought or acquired access to. The Board's May 14, 2019 discussion does not support plaintiffs' efforts to rewrite, and significantly narrow, Section 19B.5(d)'s grace period.

E. The Ordinance's Limits On The Use of A Surveillance Technology After The Board Has Adopted An Ordinance Regulating That Use Do Not Apply During The Grace Period Before The Board Adopts Such An Ordinance.

The Ordinance states that *after* the Board of Supervisors has adopted a Surveillance Technology Policy ordinance, the department may not, without prior Board approval, use that technology "for a purpose, in a manner, or in a location" other than what the Board's approved Surveillance Technology Policy ordinance allows. (Section 19B.2(a)(3).) Plaintiffs claim that because the Ordinance thus carefully restricts a department's use of surveillance technology *after* the Board has legislatively regulated that technology, the same restrictions on the "purpose," "manner," and "location" in or for which a surveillance technology can be used *before* the Board has acted to regulate that technology, must be read into Section 19B.5(d)'s grace period. (MPA at 10:1-11:16.) But this argument, too, asks the Court to read into Section 19B.5(d) restrictions that the Board obviously knew how to enact – because it *did* enact them, in Section 19B.2(a)(3) – but that it evidently chose not to enact in Section 19B.5(d). The Court should decline plaintiffs' invitation to "violate[] the cardinal rule of statutory construction that courts must not add provisions to statutes." (*People v. Guzman, supra,* 35 Cal.4th at p. 587.)[5]

This Court should respect the balance that the Board struck. The Board clearly wanted to assume regulatory control over City departments' use of surveillance technologies, and it thus placed meaningful limits on how a department could use surveillance technologies that the Board had already acted to regulate. But the Board's choice to not place any similar restrictions on a department's use of existing surveillance technologies during Section 19B.5(d)'s temporary grace period – which only lasts until the Board adopts a Surveillance Technology Policy ordinance and that ordinance takes effect – shows that the Board did not wish to similarly restrict a department's use of a particular

[5] The Legislative Digest, which was before the Board at the time it considered the Ordinance, stated that the Ordinance "would allow Departments possessing or using Surveillance Technology to continue to use the Surveillance Technology" until the Board adopted an ordinance regulating that technology, without mentioning any limits on how the department could continue to use the technology during that interim period. (Snodgrass Decl. ISO Mtn. for Summ. J. at pp. 70-71.)

surveillance technology during that grace period. During that grace period, therefore, a department that previously had used ALPRs to only read license plates of cars in one area of the City could begin using ALPRs to also read license plates of cars in another area. And a department that previously used the USBID's surveillance cameras could use them again, including to monitor portions of the Union Square area it had not monitored the first time. This Court should respect the policy choice the Board made.

II. THE BOARD WOULD NOT REASONABLY HAVE SOUGHT TO REQUIRE "ONGOING, CONTINUOUS" USE OF A SURVEILLANCE TECHNOLOGY THAT RESPONDS TO CIRCUMSTANCES THAT ARE PRESENT ONLY OCCASIONALLY

Plaintiffs' claim that Section 19B.5(d)'s grace period requires "ongoing, continuous use" of the surveillance technology in question makes little sense in the context of the particular surveillance technology at issue here, and the circumstances in which SFPD used it. SFPD acquired a link to the USBID's camera network in 2019 and 2020 because large gatherings of revelers or protestors in the Union Square area created the potential for criminal activity or security problems. Such large gatherings of revelers or protestors occur only occasionally, not continuously. The SFPD's use of USBID's camera network naturally ceased once the celebration or other large gathering of people was over, and the crowd dispersed. Thus, even if some Section 19B.5(d)'s terms "possessing" and "using" implied some "element of continuity," SFPD's use of USBID's surveillance camera network would still constitute an "existing surveillance technology" entitled to that section's grace period. The SFPD obtained access to USBID's camera network for a period of up to 24 hours, which was the entirety of the 2019 Pride celebration for which residents and visitors to San Francisco were expected to congregate and potentially create security issues. The SFPD had no need to continue its access to the camera network when the crowds in the Union Square area had dispersed.

III. THE SFPD IS ENTITLED TO RELY ON SECTION 19B.5(d)'s GRACE PERIOD

Plaintiffs argue that even if SFPD's use of USBID's camera network during the 2019 Pride celebration triggered Section 19B.5(d)'s grace period, SFPD cannot rely on that grace period here, because it "failed to comply with key grace period requirements." (MPA at 12:3-5.) This claim, like the rest of plaintiffs' opposition, misstates Section 19B.5(d)'s requirements, seeks to add terms to that section that the Board of Supervisors did not enact, and is insufficient to defeat summary judgment.

First, nothing in the text of the ordinance, or its legislative history, links compliance with the requirements of subdivisions (a) – (c) of Section 19B.5 by a department or by COIT to the department's ability to continue using existing surveillance technology during the grace period afforded by Section 19B.5(d). It would have been a simple matter for the Board of Supervisors to add the words "provided that that department meets the deadlines contained in subdivisions (a) through (c), above" to Section 19B.5(d), but the Board did not do so, suggesting that it viewed the grace period as an independent provision. The Legislative Digest, similarly, does not tie subdivision (d)'s grace period to the procedures listed in subdivisions (a) through (c), but instead simply states that [t]his ordinance would allow Departments possessing or using Surveillance Technology to continue to use the Surveillance Technology … until the Board enacted a Surveillance Technology Policy ordinance, following COIT's development of a policy and recommendation." (Snodgrass Decl. ISO Mtn. for Summ. J. at pp. 70-71.) Plaintiffs' claim that the grace period has been waived by SFPD here, or indeed is even waivable, flies in the face of the Ordinance's express terms and its legislative history.

Second, and equally important, the summary judgment record shows that as the City has implemented the Ordinance, it is COIT, not the SFPD, that "sets the schedule for each City department that possesses or uses one or more forms of surveillance technology to submit draft surveillance technology policies and impact reports concerning its surveillance technologies" to COIT for review, after which the Board of Supervisors can consider the adoption of an ordinance approving the surveillance technology policy. (Steeves Decl. ISO Mtn. for Summ. J., ¶ 7.) As Ms. Steeves explains, COIT has instructed SFPD to submit draft surveillance technology policies and impact reports covering SFPD's use of non-City entity surveillance cameras by November 12, 2021. (*Id.*) Any claim that SFPD has "shirked the legal obligations necessary to obtain" Section 19B.5(d)'s grace period, based on a schedule imposed by COIT rather than by SFPD, is without merit.

CONCLUSION

Defendant the City and County of San Francisco respectfully requests that its motion for summary judgment be granted.

Dated: November 19, 2021

DAVID CHIU
City Attorney
WAYNE K. SNODGRASS
Deputy City Attorney

By: s/Wayne K. Snodgrass
WAYNE K. SNODGRASS

Attorneys for Defendant
CITY AND COUNTY OF SAN FRANCISCO