COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

HOPE WILLIAMS, NATHAN SHEARD, and NESTOR REYES, Plaintiffs/Appellants, vs. CITY AND COUNTY OF SAN FRANCISCO, Defendant/Respondent.	Case No. A165040 San Francisco County Superior Court Case No. CGC-20-587008

RESPONDENT'S BRIEF

The Honorable Richard B. Ulmer

DAVID CHIU, State Bar #189542
City Attorney
WAYNE K. SNODGRASS, State Bar #148137
Deputy City Attorney
Office of the San Francisco 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/Respondent
CITY AND COUNTY OF SAN FRANCISCO

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

☒ There are no interested entities or persons to list in this Certificate per California Rules of Court, Rule 8.208.

☐ Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	
4.	

Please attach additional sheets with person or entity information if necessary.

Dated: November 9, 2022

DAVID CHIU
City Attorney
WAYNE K. SNODGRASS
Deputy City Attorney

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

Printed Name: WAYNE K. SNODGRASS
Deputy City Attorney

Address: City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682

State Bar #: 148137

Party Represented: Defendant/Respondent CITY AND COUNTY OF SAN FRANCISCO

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

San Francisco Statutes, Codes & Ordinances

Constitutional Provisions

Other References

INTRODUCTION

This action arises under a San Francisco ordinance, the "Acquisition of Surveillance Technology Ordinance," that San Francisco's Board of Supervisors enacted in 2019. That law, codified at Chapter 19B of San Francisco's Administrative Code, generally seeks to regulate most City departments' use of so-called "surveillance technologies" – a term that the law broadly defines to include, among many other things, surveillance cameras. Concerned about the possible effects of increased use of surveillance technologies upon civil rights and civil liberties, the Board of Supervisors sought to bring City departments' use of surveillance technologies under the Board's oversight. At the same time, however, the Board sought to avoid unnecessarily interfering in City departments' use of their existing technologies, until such time as the Board could consider and adopt legislation establishing policies that would govern a department's use of a particular surveillance technology on an ongoing basis.

For that reason, the local law expressly states that each City department possessing or using a particular type of surveillance technology before Chapter 19B took effect "may continue its use of the Surveillance Technology … until such time as the Board enacts an ordinance regarding the Department's Surveillance Technology Policy" as to that particular type of surveillance technology. (S.F. Admin. Code, Sec. 19B.5(d).)

Chapter 19B thus represents a balance of competing legislative goals, reflecting the Board's desire to regulate City

departments' use of surveillance technologies, but not by immediately preventing City departments from using the tools they already used. The balance that the Board of Supervisors struck, in determining the scope of the City's self-imposed restraint on the use of surveillance technologies, is an exercise of the Board's legislative judgment. That balance should be accorded respect by this Court.

Appellants are among the thousands of individuals who took to San Francisco streets to protest the police killing of George Floyd in Minneapolis in late May 2020. They contend that the San Francisco Police Department ("SFPD") violated Chapter 19B during those protests when, following rioting and looting of commercial businesses in Union Square on May 30, 2020, the SFPD requested and received access to a network of surveillance cameras owned and operated by the Union Square Business Improvement District ("USBID"). SFPD sought that access in case further looting or civil unrest occurred in Union Square in the days immediately following May 30.

The trial court granted summary judgment in the City's favor on Appellants' single cause of action, ruling that the SFPD's use of USBID's surveillance camera network falls squarely within the temporary grace period established by Section 19B.5(d), quoted above. On the record before the trial court, it was undisputed that by the time Chapter 19B took effect in July 2019, SFPD had already used USBID's surveillance cameras to monitor mass public gatherings occurring in the Union Square area – namely, San Francisco's 2019 Pride celebration, which

took place in June 2019. Section 19B.5(d) thus authorized the SFPD to again use USBID's camera network, at least until the Board of Supervisors enacted an ordinance approving SFPD's Surveillance Technology Policy for such non-city owned surveillance cameras. As of May and June 2020, when looting erupted in Union Square during the George Floyd protests, the Board had not enacted any such ordinance. The SFPD's actions in requesting and receiving access to USBID's camera network at that time did not, and could not, constitute a violation of Chapter 19B.

Since the trial court entered judgment in the City's favor, however, the City's Board of Supervisors *has* enacted an ordinance regarding SFPD's Surveillance Technology Policy for non-city owned surveillance cameras, and that ordinance has taken effect. Under the express terms of Section 19B.5(d), therefore, the "grace period" for the SFPD to continue using non-City entity surveillance cameras, whose scope was the subject of the proceedings in the trial court, has now ended. Because Appellants seek only prospective relief, the question of whether SFPD could rely on that "grace period," before it ended, to access surveillance camera networks, as it did in May and June 2020, no longer presents a live dispute. This appeal should be dismissed as moot.

If the Court does not dismiss the appeal as moot, it should affirm the judgment. SFPD's use of USBID's camera network during the May-June 2020 George Floyd protests was lawful under the plain text of Section 19B.5(d). Appellants' attempts to

show that the trial court erred are without merit, principally because Appellants ask this Court to read into Section 19B.5(d) restrictions and limitations that the Board of Supervisors could have enacted as part of that section, but chose not to. The trial court properly applied the Section 19B.5(d) that the Board of Supervisors enacted, not the hypothetical version of that section that Appellants believe the Board should have enacted. This Court should affirm.

FACTUAL BACKGROUND

I. IN JUNE 2019, SFPD REQUESTED AND WAS GIVEN ACCESS TO THE UNION SQUARE BUSINESS IMPROVEMENT DISTRICT'S SURVEILLANCE CAMERA NETWORK

A. The Union Square Business Improvement District And Its Surveillance Camera Network.

Business improvement districts, also known as community benefit districts, are "non-city entities formed by a majority of property owners within a certain geographic area, with approval from the Board of Supervisors and in accordance with state and local law." (Clerk's Transcript, Vol. 1, p. 238; *id*., p. 219.)[1] There are currently 18 such districts in San Francisco. Several of those districts have surveillance camera networks that consist of multiple cameras whose images are streamed to a control room located within the district. (CT1 219.)

One business improvement district is the Union Square Business Improvement District ("USBID"). USBID, which is a California nonprofit corporation, is bounded on the north by Bush

[1] The Clerk's Transcript is in three volumes. Respondent will refer to Volume 1 as "CT1," Volume 2 as "CT2," and Volume 3 as "CT3."

Street, on the east by Kearny Street, on the south by Market Street, and on the west by Taylor and Mason Streets. (CT1 238.) USBID operates a network of high-definition video surveillance cameras, which cover multiple streets within USBID's area, as well as Union Square itself. (CT1 219-220, 238.) As a business improvement district, USBID is a non-city entity. (CT1 219, 238.)

B. SFPD Requested And Obtained Access To USBID's Surveillance Camera Network To Monitor The 2019 Pride Parade.

The San Francisco Police Department ("SFPD") monitors the conduct of public gatherings in the City, in order to protect public safety. (CT1 237.)

One such public gathering is the City's annual Pride celebration. In 2019, San Francisco's Pride celebration took place on June 29 and 30, 2019. (CT1 227.) Before the 2019 Pride celebration began, SFPD asked USBID to allow SFPD to have access to USBID's surveillance camera network. The request for access was conveyed to USBID by SFPD Officer Oliver Lim, at the direction of his commanding officer. (CT1 227.)

USBID agreed, and gave SFPD access to its surveillance camera network. USBID supplied SFPD with log-in credentials which SFPD inputted into commercial software that had been installed on an SFPD laptop. (CT1 227.) By using the log-in credentials provided by USBID, SFPD accessed cameras in USBID's surveillance camera network for a period of up to 24 hours during the 2019 Pride celebration, in order to monitor the safety of the Pride Parade. (*Id.*)

II. IN JULY 2019, SAN FRANCISCO'S ACQUISITION OF SURVEILLANCE TECHNOLOGY ORDINANCE TOOK EFFECT

In June 2019, at the time when SFPD was accessing USBID's surveillance camera network in order to monitor the Pride celebration, San Francisco's Acquisition of Surveillance Technology Ordinance ("Chapter 19B") – the local law Appellants claim the City has violated – had been adopted by the Board of Supervisors, but had not yet taken effect. Chapter 19B took effect the following month, in July 2019. (CT1 217.)[2]

Chapter 19B restricts the ability of City departments to use surveillance technologies in a number of ways.[3] Among them are the following:

A. Chapter 19B Generally Prohibits Facial Recognition Technology.

First, among other things, Chapter 19B significantly prohibits the use of facial recognition technology, making it unlawful, with certain exceptions, for most City departments

> to obtain, retain, access, or use: 1) any Face Recognition Technology on City-issued software or a City-issued product or device; or 2) any information obtained from Face Recognition Technology on City-issued software or a City-issued product or device.

---

[2] The Acquisition of Surveillance Technology Ordinance is codified at Chapter 19B of the City's Administrative Code. Chapter 19B is located at CT1 66-CT1 72.

[3] Chapter 19B defines "surveillance technology" broadly to mean, *inter alia*, "any software, electronic device, system utilizing an electronic device, or similar device used, designed, or primarily intended to collect, retain, process, or share audio, electronic, visual, location, thermal, biometric, olfactory or similar information specifically associated with, or capable of being associated with, any individual or group." (S.F. Admin. Code § 19B.1.) "Surveillance technology" includes "surveillance cameras." (CT1 67-68, 237.)

(S.F. Admin. Code § 19B.2(d) [CT1 69].)

B. Chapter 19B Provides A Process For The Board Of Supervisors To Approve "Surveillance Technology Policies" Concerning Each Surveillance Technology.

Second, Chapter 19B sets forth a process by which City departments can seek the approval of the Board of Supervisors to acquire or use a surveillance technology. Such departments are to submit a "Surveillance Impact Report" to a City body, the Committee on Information Technology ("COIT"). The Surveillance Impact Report must describe specified aspects of the proposed surveillance technology that the City department wishes to acquire or use. (S.F. Admin. Code §§ 19B.1, 19B.3 [CT1 67, 70].)

COIT, in turn, is to prepare a proposed "Surveillance Technology Policy" concerning the particular technology in question, and submit that policy to the Board of Supervisors for consideration and possible approval by the adoption of an ordinance. (*Id.*, §§ 19B.3(a), 19B.2(a) [CT1 68, 70].) Until the Board of Supervisors adopts an ordinance approving a "Surveillance Technology Policy" for a particular surveillance technology, the City department may not "seek funds" for, "acquire or borrow," "use," "enter[] into agreement" to acquire, share or use, or enter into an agreement to regularly receive data from, that surveillance technology. (*Id.*, § 19B.2(a) [CT1 68-69].) Chapter 19B also includes a "standard for approval" to guide the Board of Supervisors in its consideration of any department's

"Surveillance Technology Policy" for possible approval. (*Id.*, § 19B.4 [CT1 70].)

C. Chapter 19B Gives City Departments a Grace Period, Allowing Them To Continue Using Their Existing Surveillance Technologies until an Ordinance Approving Their Use is Adopted and Becomes Effective.

Third, Chapter 19B sets forth special rules to govern any "existing surveillance technology" that a City department already possessed or used before Chapter 19B took effect. Under those rules, each City department has a grace period within which it can continue using any such "existing" surveillance technology that it already possessed or used, without the approval of the Board of Supervisors, until the Board enacts an ordinance concerning that surveillance technology and that ordinance takes effect under the Charter. (*Id.*, § 19B.5 [CT1 70].) Section 19B.5 is entitled "Compliance for Existing Surveillance Technology." Section 19B.5(d) states, in its entirety, as follows:

> (d) 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.[4]

(*Id.*, § 19B.5(d) [CT1 70].) The Board is to enact such an ordinance after the City department submits an inventory of its

[4] Section 2.105 of the City Charter states the general rule that in order to allow time for the qualification of a referendum as authorized by the California Constitution, "ordinances shall take effect no sooner than 30 days following the date of passage[.]" (*Id.*)

existing surveillance technologies to COIT; after COIT posts that inventory on its website; after the department submits a proposed policy concerning that surveillance technology to COIT; and after COIT submits its recommendation concerning the proposed surveillance technology policy to the Board of Supervisors. (*Id*., §§ 19B.5(a), (b); *id.,* 19B.3(a) [CT1 70].)

D. The Legislative Digest For Chapter 19B Stated That Departments May Continue To Use Any Surveillance Technology That They Were Already Using When Chapter 19B Took Effect Until The Board Adopts An Ordinance Regulating The Use of That Surveillance Technology.

The Board of Supervisors' legislative file for the enactment of Chapter 19B includes the official Legislative Digest, which was submitted to the Board of Supervisors at the time the Board was considering the proposed legislation that became Chapter 19B. The Legislative Digest confirms that under Chapter 19B, any City department that already was using a particular kind of surveillance technology before Chapter 19B became effective could continue to use that surveillance technology, until the Board adopted an ordinance regulating that technology. As the Legislative Digest explained,

> [t]his ordinance would allow Departments possessing or using Surveillance Technology to continue to use the Surveillance Technology, and share information from the Surveillance Technology, until the Board enacted a Surveillance Technology Policy ordinance, following COIT's development of a policy and recommendation.

(CT1 98.)

III. IN MAY AND JUNE 2020, AFTER BUSINESSES IN UNION SQUARE WERE LOOTED, SFPD AGAIN

REQUESTED AND WAS GIVEN ACCESS TO USBID'S SURVEILLANCE CAMERA NETWORK

Chapter 19B took effect in July 2019. (CT1 217.)

In late May 2020, the nation was rocked by the news that a white Minneapolis police officer had knelt on the neck of a Black Minneapolis resident, George Floyd, for nine minutes and 29 seconds, resulting in Mr. Floyd's death. Protests spread throughout the country, including in San Francisco. (CT1 238.) While the overwhelming majority of protests were peaceful, some people engaged in property destruction. (CT1 220.)

In San Francisco, thousands of people participated in protests over Mr. Floyd's killing during the period from the end of May to early June 2020. (CT1 238.) On May 30 and 31, 2020, protest activity took place around City Hall and east up Market Street, an area where USBID surveillance cameras are located. (*Id.*)

On Saturday, May 30, 2020, protests in San Francisco led to rioting in the Union Square area and looting of Union Square retail businesses. In response, the SFPD activated its Department Operations Center ("DOC"), an operations room that contains a wall-mounted video display and laptop computers whose screen images may be displayed on that video display. (CT1 199, 187, 191.)

On May 31, 2020, the morning after Union Square businesses had been looted, SFPD Officer Lim emailed USBID's Director of Services at the direction of his commanding officer, requesting that USBID again allow the SFPD to access USBID's surveillance camera network "to monitor the potential violence

today for situational awareness and enhanced response." (CT1 221.) USBID again agreed to give SFPD access to its surveillance camera network, initially for a 48-hour period, which was subsequently extended through June 7, 2020. (CT1 221-222.)

SFPD used a password-protected laptop computer on a table in the DOC to access the USBID surveillance camera network. The software on that laptop that linked to the USBID cameras was typically kept minimized during the period of access from May 31 through June 7, 2020. (CT1 191, 192.) At no time during that period were any images from the USBID camera network displayed on the DOC's video wall. (CT1 192.)

During the period from May 31 to June 7, 2020, SFPD Officer Tiffany Gunter, who was responsible for controlling what was displayed on the DOC's video wall, looked at the laptop screen several times "to ensure there were no crowds forming in Union Square," looking for less than a minute each time. (CT1 192.) Each time Officer Gunter looked briefly at the laptop screen, there was "no activity" to be seen on the USBID cameras, "so it gave us the awareness that there was no activity in Union Square." (CT1 194.) Officer Gunter testified that while there were some demonstrations that entered Union Square, she did not see them on the USBID cameras: "I don't remember seeing a crowd … I don't remember there being any further civil unrest beyond that Saturday [May 30] in Union Square." (CT1 194, 197.)

Officer Gunter did not take any screen shots, video, or other photos of the USBID camera feed. She also did not take

notes or otherwise document what she had viewed on the feed. (CT1 198.) She did not call or communicate with anyone else about what the feed displayed, nor did she see anyone else doing so. (CT1 198.) She has no knowledge that anyone at SFPD besides herself viewed the USBID camera feed at any time while SFPD had access to it. (*Id*.)

IV. PROCEEDINGS IN THE TRIAL COURT

A. In Their Complaint, Appellants Sought Only Prospective Relief And Only Alleged Violations of Section 19B.2.

On October 7, 2020, Appellants commenced this action by filing their "Complaint for Declaratory and Injunctive Relief." Appellants stated only a single cause of action, asserting that the SFPD had violated Chapter 19B by seeking and obtaining access to USBID's surveillance camera network during the George Floyd protests in May and June 2020. The only sections of Chapter 19B that Appellants alleged the City had violated were Sections 19B.2(a)(2), (3), and (4). (CT1 223.)

Appellants sought only prospective relief – specifically, a declaration that the City violated Chapter 19B, and an order enjoining the City from acquiring, borrowing, or using any private camera network without prior approval of the Board of Supervisors. Appellants also sought attorney's fees. (*Id*.)

B. The Parties' Cross-Motions for Summary Judgment.

The parties filed cross-motions for summary judgment, which were heard by the trial judge, the Honorable Richard Ulmer, on January 21, 2022 and February 1, 2022. (CT1 10.)

Judge Ulmer took the cross motions under submission on February 1, 2022. (*Id*.)

On February 9, 2022, Judge Ulmer issued his written order granting the City's summary judgment motion and denying Appellants' motion. (CT3 655-657.) He held that Chapter 19B's plain language showed that the SFPD had not violated that ordinance by seeking and obtaining access to USBID's surveillance camera network during the George Floyd protests in May and June 2020. As the trial judge explained:

> Section 19B.2(a) of the ordinance provides that a City department (e.g., the police) must obtain board of supervisor approval by a separate ordinance before "[e]ntering into agreement with a non-City entity to acquire, share, or otherwise use Surveillance Technology." No such ordinance had been passed. However, § 19B.5(d) of the ordinance provides: "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."

(CT3 656.) "[T]he ordinance's language is clear," the trial court held. "Section 19B.5(d) says a department 'possessing or using' surveillance technology before the ordinance's effective date, may 'continue its use.' Thus, the police's prior use of USBID's surveillance technology allowed the department to continue its use." (*Id*.)

The trial court entered judgment in the City's favor on March 10, 2022. (CT3 667.) Appellants filed their notice of appeal on March 25, 2022. (CT3 675.)

V. AFTER APPELLANTS FILED THIS APPEAL, THE BOARD OF SUPERVISORS ADOPTED AN ORDINANCE REGARDING SFPD'S SURVEILLANCE TECHNOLOGY POLICY FOR NON-CITY ENTITY SURVEILLANCE CAMERAS

At the time the trial court entered judgment, the Board of Supervisors had not yet adopted an ordinance approving the SFPD's Surveillance Technology Policy for the use of surveillance cameras owned and operated by non-City entities such as USBID. (CT1 230.)[5] It was for that reason that the grace period – the period within which Section 19B.5(d) authorized SFPD to "continue its use" of USBID's camera network – had not yet ended.

On September 27, 2022, however, the Board of Supervisors adopted an ordinance approving SFPD's Surveillance Technology Policy for use of surveillance cameras and surveillance camera networks owned and operated by non-City entities. (Motion for Judicial Notice, Ex. A.) That ordinance, Ordinance No. 205-22, was signed by the Mayor on October 6, 2022, and went into effect 30 days later. (*Id*.) As Ordinance No. 205-22 states, the process that led to the adoption of that ordinance began when SFPD "submitted to COIT a Surveillance Impact Report for Non-City Entity Surveillance Cameras." (*Id*. at Section 2(b).) After that,

- "[b]etween March 25, 2022 and April 21, 2022, inclusive, COIT and its Privacy and Surveillance Advisory Board (PSAB) conducted four public

[5] At that time, the Board of Supervisors had enacted ordinances approving SFPD Surveillance Technology Policies for only two other forms of surveillance technology used by SFPD – namely, ShotSpotter gunfire detection systems and Automated License Plate Readers ("ALPRs"). (CT1 231.)

hearings at which they considered the Surveillance Impact Report … and developed a Surveillance Technology Policy for the [SFPD's] use of non-City entity surveillance cameras" (*id*., Section 2(c)); and

- "[o]n April 21, 2022, COIT voted to recommend the SFPD Non-City Entity Surveillance Cameras Policy to the Board of Supervisors for approval." (*Id*., Section 2(d).)

In adopting Ordinance No. 205-22, the Board of Supervisors approved the SFPD's Non-City Entity Surveillance Cameras Policy, with specified modifications. (*Id*. at Section 3.) Ordinance No. 205-22 stated that SFPD's approved policy, as modified by the Board, "shall expire fifteen months after the effective date" of Ordinance No. 205-22. (*Id*. at Section 4.)

STANDARD OF REVIEW

The trial court's decision is reviewed *de novo*. (*Guz v. Bechtel. Nat. Inc.* (2006) 141 Cal.App.4th 110, 147.)

ARGUMENT

VI. BECAUSE THE BOARD OF SUPERVISORS HAS NOW ENACTED AN ORDINANCE APPROVING SFPD'S POLICY FOR NON-CITY ENTITY SURVEILLANCE CAMERAS, AND THAT ORDINANCE HAS TAKEN EFFECT, THIS APPEAL SHOULD BE DISMISSED AS MOOT

A. Legal Standards For Mootness.

"California courts will decide only justiciable controversies." (*Parkford Owners for a Better Community v. County of Placer* (2020) 54 Cal.App.5th 714, 722.) As our high court has held, "[i]t is settled that 'the duty of this court, as of every other judicial tribunal, is to decide actual controversies by a

judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." (*Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 132; *Sierra Club v. Board of Supervisors* (1981) 126 Cal.App.3d 698, 704.) Because a "judicial tribunal ordinarily may consider and determine only an existing controversy, and not a moot question or abstract proposition," it generally "is not within the function of the court to act upon or decide a moot question or speculative, theoretical or abstract question or proposition, or a purely academic question, or to give an advisory opinion on such a question or proposition." (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1490.)

Under California law, a case becomes moot "when 'the question addressed was at one time a live issue in the case,' but has been deprived of life 'because of events occurring after the judicial process was initiated.'" (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1574.) "The pivotal question in determining if a case is moot is therefore whether the court can grant the plaintiff any effectual relief." (*Id.*; *Parkford Owners for a Better Community, supra,* 54 Cal.App.5th at p. 722.) "If events have made such relief impracticable, the controversy has become 'overripe' and is therefore moot. When events render a case moot, the court, whether trial or appellate, should generally dismiss it." (*Id.* [internal brackets, citations, ellipses omitted].)

In *Wilson & Wilson, supra,* the First District applied these principles to hold that a suit challenging resolutions that authorized a public works project was moot, and must be dismissed, as soon as the project was completed, explaining that "completion of the Project deprived the controversy of life." (*Id*., 191 Cal.App.4th at pp. 1581, 1585.) Similarly, in *Parkford Owners for a Better Community*, a lawsuit contending "the County's approval of a building project without preparation of an EIR" violated the California Environmental Quality Act and the Planning and Zoning Law, the court held that "completion of the project rendered Parkford's challenge to the project's approval moot." (*Id*., 54 Cal.App.5th at pp. 724-25.)

B. The Enactment of Ordinance No. 205-22 Means That Section 19B.5(d)'s Grace Period Is Now Over, And This Case Has Become Moot.

These settled principles compel the conclusion that because of the Board of Supervisors' enactment of Ordinance No. 205-22, Appellants' claim that the SFPD violated Chapter 19B by requesting and obtaining access to USBID's camera network in May and June 2020 is now moot.

At the time the trial court granted the City's motion for summary judgment and entered judgment in the City's favor, there was a live dispute as to whether the SFPD could rely on Section 19B.5(d)'s grace period to allow the agency to use non-City entity surveillance camera networks, as it did when it accessed USBID's surveillance camera network in May and June 2020. The City contended that SFPD's use of USBID's camera network in May and June 2020 fell within Section 19B.5(d)'s

temporary "may continue to use" authority. Appellants, who sought only prospective relief in their complaint, prayed for declaratory and injunctive relief stating that SFPD's use of USBID's camera network in May and June 2020 did not fall within the authority granted by Section 19B.5(d). Because the event that marks the end of Section 19B.5(d)'s grace period – that is, the Board's "enact[ment of] an ordinance regarding the Department's Surveillance Technology Policy" and such ordinance taking effect (Section 19B.5(d)) – had not yet occurred, the question of whether the SFPD could continue to rely on Section 19B.5(d)'s grace period to access non-City entity camera networks presented a live dispute. At that time, a judicial determination of the scope of Section 19B.5(d) and an appropriate injunction, could provide Appellants with effectual relief. The trial court thus had jurisdiction to resolve that live dispute, and correctly did so by ruling in the City's favor.

Since then, however, the Board of Supervisors has adopted Ordinance No. 205-22, which approved the SFPD's Surveillance Technology Policy for non-City owned surveillance camera networks, such as the network owned and operated by USBID. Moreover, that ordinance has taken effect. Therefore, under Section 19B.5(d)'s plain language, that section's temporary "may continue to use" grace period has ended. The question of whether Section 19B.5(d) allows SFPD to access non-City entity surveillance camera networks, as SFPD did in May and June 2020 before that section's "may continue to use" grace period came to a close, no longer presents any live, ongoing controversy.

Just as the completion of a building project means that a dispute over the legality the issuance of the building permit at the outset of the project has become stale and purely theoretical, the enactment of Ordinance No. 205-22, and the end of Section 19B.5(d)'s "may continue to use" grace period, means that any dispute over whether Section 19B.5(d) had authorized the SFPD to access the USBID's camera network before that grace period came to an end is equally stale and theoretical.

Appellants' complaint seeks only prospective relief. Even if this Court were to grant Appellants every form of relief they seek in their complaint, that relief would be wholly ineffectual, and could have no practical, real-world impact on the conduct of the parties. The end of Section 19B.5(d)'s grace period means that the SFPD will never again confront the question of whether Section 19B.5(d) authorizes it to obtain access to a non-City entity surveillance camera network. Therefore, a judicial declaration that Section 19B.5(d) did not authorize SFPD to obtain access to USBID's camera network in 2020, and an injunction against SFPD doing so again, would have no practical effect. Such a declaration would solely address an issue that has become abstract and pertains only to the past, and that would not affect the parties' future conduct. In sum, this Court cannot grant Appellants any effectual relief – which is the very definition of mootness. (*Wilson & Wilson, supra,* 191 Cal.App.4th at p. 1574.)

The City anticipates that Appellants may argue that the enactment of Ordinance No. 205-22 does not give rise to

mootness, because by its terms, that Ordinance's approval of SFPD's Surveillance Technology Policy for non-City entity surveillance cameras "shall expire fifteen months after the effective date" of Ordinance No. 205-22 – in other words, in February 2024. (Ord. No. 205-22, Section 4.) Any such contention, however, would be wrong. Even if the Board of Supervisors does not extend its approval of that SFPD Surveillance Technology Policy, and that Policy thus expires and becomes unapproved in February 2024, Section 19B.5(d)'s "may continue to use" grace period will not spring back to life or be renewed. The event that terminated that period under Section 19B.5(d)'s plain text – the Board's enactment of an ordinance approving the SFPD's Surveillance Technology Policy, and that ordinance taking effect – took place. As a result of that event happening, Section 19B.5(d)'s grace period has ended, and cannot be renewed.

There is no longer any live dispute or ongoing controversy as to whether Section 19B.5(d) authorized the SFPD to access the USBID camera network during the George Floyd protests in 2020. Accordingly, this appeal should be dismissed as moot.

VII. THE TRIAL COURT CORRECTLY DETERMINED THAT BECAUSE THE SFPD ALREADY USED THE USBID'S CAMERA NETWORK BEFORE CHAPTER 19B TOOK EFFECT, SECTION 19B.5(d) AUTHORIZED THE SFPD TO REQUEST AND OBTAIN ACCESS TO USBID'S CAMERA NETWORK IN MAY AND JUNE 2020

If this Court does not dismiss this appeal as moot, it should affirm the trial court's judgment. The facts before the trial court were entirely undisputed, including the fact that the SFPD

sought and obtained access to USBID's camera network in 2019 before Chapter 19B took effect. Applying the plain language of Section 19B.5(d) to those undisputed facts, the trial court correctly held that the SFPD did not violate Chapter 19B by once again seeking and obtaining access to the USBID's surveillance camera network in May and June 2020.

A. Governing Principles of Statutory Interpretation.

This case turns solely on the interpretation of Chapter 19B, the City's Acquisition of Surveillance Technology Ordinance. Appellants do not contend that SFPD's actions with regard to the USBID camera network in late May and early June 2020 violate the United States or California Constitutions, or any state statute. The only task facing this Court, therefore, is to interpret Chapter 19B and apply it to the facts presented here.

The rules governing this exercise in statutory interpretation are familiar and well-settled. "In construing a statute, a court's objective is to ascertain and effectuate legislative intent. To determine legislative intent, a court begins with the words of the statute, because they generally provide the most reliable indicator of legislative intent." (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 871.) "When the language of a statute is clear and unambiguous and thus not reasonably susceptible of more than one meaning, there is no need for construction, and courts should not indulge in it." (*People v. Leal* (2004) 33 Cal.4th 999, 1007 [internal quotes omitted].)

The Court's task is "to construe, not to amend, the statute. In the construction of a statute the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or omit what has been inserted." (*Leal, supra*, 33 Cal.4th at p. 1008 [internal quotes, ellipses omitted]; Code Civ. Proc. § 1858.) "We may not, under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used." (*Leal, supra*, 33 Cal.4th at p. 1008; *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349.)

These familiar principles of statutory interpretation govern the interpretation of municipal ordinances. (*Harrington v. City of Davis* (2017) 16 Cal.App.5th 420, 434 ["[c]ourts interpret municipal ordinances in the same manner and pursuant to the same rules applicable to the interpretation of statutes"].) While this Court exercises its independent judgment on the interpretation of municipal ordinances, "a city's interpretation of its own ordinance is entitled to deference in our independent review of the meaning or application of the law." (*Id*., 16 Cal.App.5th at p. 434 [citing *Monterey v. Carrnshimba* (2013) 215 Cal.App.4th 1068, 1087, and *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1193].)

B. Section 19B.5(d)'s Plain Text Shows That SFPD's Actions Were Lawful.

The relevant section of Chapter 19B expressly states that if a City department already used a particular form of surveillance technology before Chapter 19B took effect, Chapter 19B allows that Department to continue to use that surveillance technology until the Board of Supervisors enacts an ordinance addressing the department's Surveillance Technology Policy as to that particular technology, and that ordinance has taken legal effect. Section 19B.5, entitled "Compliance for Existing Surveillance Technology," is clearly intended to set forth the rules that apply to "existing surveillance technologies" – that is, surveillance technologies that a City department already possessed or used before 19B took effect. And Section 19B.5(d)**Error! Bookmark not defined.** makes clear that a department's use of such an "existing surveillance technology" is effectively grandfathered in, until the Board of Supervisors addresses that department's use of that technology by the adoption of an ordinance:

> 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.

(*Id*., Section 19B.5(d) [emphasis added].)

The text of Section 19B.5(d) is clear and unambiguous in meaning: until the Board of Supervisors has addressed a department's use of "existing surveillance technology" by adopting an ordinance, and that ordinance has taken legal effect,

the department is permitted to continue using that particular technology. Because the statutory text is clear, the Court's statutory interpretation inquiry is at an end. The Court should simply apply Section 19B.5(d) as written.

Under that plain language, the trial court correctly granted summary judgment in the City's favor. The following facts are entirely undisputed:

- The 2019 Pride celebration occurred on June 29 and June 30, 2019.
- Before that celebration occurred, SFPD asked USBID to allow it to access cameras in USBID's surveillance camera network, and USBID agreed to the request and granted SFPD access to its camera network, and SFPD thereby accessed USBID's camera network.
- These events occurred – and SFPD was thus using non-city owned surveillance cameras – *before* Chapter 19B took effect in July 2019, making those surveillance cameras "existing surveillance technology" under Section 19B.5(d).
- At the time that the SFPD sought and was given access to the USBID camera network during the George Floyd protests in late May and early June, 2020, the Board of Supervisors had not enacted an ordinance concerning SFPD's Surveillance Technology Policy with regard to non-city surveillance cameras.

Under the plain meaning of Section 19B.5(d), which the Court must follow, the SFPD's actions requesting and receiving access to USBID's camera network in late May and early June 2020 did not give rise to any violation of Chapter 19B.

C. Chapter 19B's Legislative History Bolsters The Conclusion That SFPD Did Not Violate That Chapter.

"If the statutory language is clear and unambiguous, the plain meaning of the statute governs. In other words, if there is no ambiguity or uncertainty in the language, the Legislature is presumed to have meant what it said, and it is not necessary to resort to legislative history to determine the statute's true meaning." (*People v. Licas* (2007) 41 Cal.4th 362, 367 [internal quotes, cites omitted].)

Because the language of Section 19B.5(d) is unambiguous in meaning, the Court's inquiry ends there. The Court should simply apply that provision's plain meaning, rather than also looking to the legislative history of Chapter 19B.

But even if the Court were to consider Chapter 19B's legislative history, that legislative history only underscores the lack of merit in Appellants' claim. The Legislative Digest that was part of the Board of Supervisors' legislative packet at the time the Board considered and enacted the legislation that became Chapter 19B – and that thus is presumed to reflect the Supervisors' understanding of the meaning and purpose underlying Chapter 19 – expressly advises the Board that the legislation before it

> would allow Departments possessing or using Surveillance Technology to continue to use the

> Surveillance Technology, and share information from the Surveillance Technology, until the Board enacted a Surveillance Technology Policy ordinance, following COIT's development of a policy and recommendation.

(CT1 98.) The legislative history, therefore, merely confirms what Chapter 19B's plain text already dictates: when it comes to a particular kind of surveillance technology that a City department already possessed or used, Chapter 19B allows that department to continue possessing or using that particular kind of technology, until the Board adopts an ordinance regulating that particular technology's use.

The legislative purpose underlying this result is not hard to discern. In enacting Chapter 19B, the Board of Supervisors clearly sought to bring City departments' use of surveillance technologies under the Board's control and supervision, rather than allowing each department to set its own policies free of legislative oversight. But rather than immediately terminate each City department's use of existing surveillance technologies, and allow departments to resume using such existing technologies only after the Board had affirmatively blessed them, the Board chose the more moderate approach of not interfering in City departments' use of their existing technologies until such time as the Board adopted legislation (and that legislation became legally effective) establishing policies that would govern a department's use of a particular surveillance technology on an ongoing basis. The Board of Supervisors, in other words, sought to strike a balance between its desire to bring City departments' use of surveillance technologies under the Board's oversight, and

its desire to avoid unnecessary disruptions in the way City departments carry out their functions. This Court should respect the balance that the Board of Supervisors struck, and should reject Appellants' efforts to impose requirements on a City department's use of existing surveillance technologies that the Board could have imposed, but evidently chose not to.

VIII. APPELLANTS FAIL TO SHOW ANY ERROR BY THE TRIAL COURT

Appellants offer a number of arguments in an effort to show that Section 19B.5(d) did not authorize the SFPD to seek and obtain access to the USBID's surveillance camera network during the George Floyd protests in 2020. But Appellants' arguments are without merit, principally because they ask this Court to read into Section 19B.5(d) limitations and restrictions that the Board of Supervisors could have enacted as part of that section – and, in fact, *did* enact elsewhere in Chapter 19B – but evidently chose not to enact in Section 19B.5(d). None of Appellants' arguments withstand scrutiny or show any error by the trial court.

A. Section 19B.5(d) Contains No Requirement of Ongoing, Continuous Use.

Appellants claim that Section 19B.5(d) provides a grace period only for surveillance technologies that a City department possessed or used on a *continuous* and *ongoing* basis before Chapter 19B took effect. (AOB at pp. 21-24.) According to Appellants, because Section 19B.5(d)'s terms "possessing or using" are "present participles," those terms "signal the progressive aspect," and thus only refer to actions that are

"ongoing and unfinished." (AOB at p. 21 [citing Bryan A. Garner, *Garner's Modern English Usage* 1020 (4th Ed. 2016]; *id*. at p. 23.) Because the SFPD used the surveillance camera network owned and operated by the Union Square Business 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 2019 Pride celebration had ended, Appellants contend that that the SFPD's 2019 use of the USBID's network was a "one-time, temporary action" that "lacks the 'progressive aspect' that the words 'possessing or using'" allegedly require. (AOB at p. 22.) Thus, according to Appellants, the USBID camera network cannot constitute an "existing surveillance technology" under Section 19B.5(d).

1. Appellants ask this Court to add restrictions to Section 19B.5(d) that the Board of Supervisors could have enacted, but did not.

Appellants' claims are without merit, for the simple reason that the requirements of "ongoing and unfinished" possession or use that Appellants claims are found in Section 19B.5(d) find no support in that section's plain 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).) Nowhere in the text of Section 19B.5(d), or in the legislative history of Chapter 19B, is there any statement that a City department may avail itself of that Section's grace period only if, before Chapter 19B's effective date, that department used the surveillance technology at issue "continuously," "more than once," "regularly," or on an "ongoing and unfinished" basis, rather than intermittently, sporadically, or episodically. Appellants 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.

This Court must reject Appellants' invitation, 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 follow this cardinal rule of statutory construction here.

The Board of Supervisors was clearly able to include in Section 19B.5(d) the kind of restrictions that Appellants urge this Court to read into that section, had it wanted to do so. Notably, many other sections of Chapter 19B 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. Moreover, the Board knew full well how to include language in other sections of Chapter 19B 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, mandating 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 that section's grace period is available only for an existing surveillance technology that was in "ongoing" use, and whose use was "unfinished," when the Ordinance took effect. The fact that the Board did not include such limitations in Section 19B.5(d) demonstrates 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 Appellants claim.

2. 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 Section 19B.5(d) provides a grace period only for those surveillance technologies that were in "ongoing" use at the time Chapter 19B took effect, Appellants rely on a handful of cases cobbled together from various states to assert that "[m]any courts have interpreted a statute's employment of the present participle to apply to ongoing and unfinished actions, and not to completed, one-time events." (AOB at p. 23.) But this argument relies on a strained overreading of Section 19B.5(d)'s use of the present participle tense, and places far more weight on that happenstance than it can bear. For multiple reasons, Appellants fail to show any error by the trial court.

First, Appellants fail to cite even a single California case that holds that a statute's use of the present participle tense excludes events that are not "ongoing and unfinished."

Second, none of the cases Appellants cite uses the fact of a statutory present participle tense to distinguish between a use that is continuous and a use that is episodic and capable of repetition, as Appellants try to do here. Instead, Appellants cite cases holding that a statute written in the present participle tense does not encompass events that, by their nature, inherently occur only a single time, and are not readily capable of being repeated episodically. (See, e.g., *Al Otro Lado v. McAleenan* (S.D. Cal. 2019) 394 F. Supp. 3d 1168, 1200 [immigrants crossing

southern border into the United States][6]; *Sonitrol Northwest, Inc. v. City of Seattle* (1974) 84 Wn. 2d 588, 594 [installation of alarm system]; *State ex rel. Cable News Network, Inc. v. Bellbrook-Sugarcreek Loc. Sch.* (Ohio 2020) 170 N.E.3d 748, 759 [attendance at school by former student who is now deceased].) Unlike the inherently one-time events at issue in those cases, the SFPD's use of USBID's surveillance camera network not only was capable of repetition; it was actually repeated, multiple times. (CT1 259 [stating that in addition to accessing USBID camera network during George Floyd protests in 2020, "SFPD admits to using the network … on three other occasions: the 2019 Pride Parade, the anticipated 2020 Super Bowl celebrations, and the 2020 Fourth of July celebrations"].) The SFPD's use of the USBID camera network is qualitatively different from one-time events like the installation of an alarm system or the crossing of a border.[7]

---

[6] *Al Otro Lado* is also readily distinguishable because the court there relied on Congress' enactment of "the Dictionary Act to guide interpretation of congressional statutes," noting that that Act mandates that "words used in the present tense include the future as well as the present." (*Id.*, 394 F.Supp.3d at p. 1200.) As the court explained, "application of the Dictionary Act readily leads to the conclusion that Section 1158(a)(1)'s use of the present tense of 'arrives' plainly covers an alien who may not yet be in the United States, but who is in the process of arriving in the United States …" (*Id.*) Because Appellants do not cite – and San Francisco does not have – any local law analogous to the federal Dictionary Act, *Al Otro Lado* is inapposite.

[7] One of the cases Appellants cite – *Kinzua Resources, LLC v. Oregon Dept. of Environmental Quality* (Or. 2020) 468 P.3d 410 (Opp. MPA at 7:4-6) – discredits Appellants' argument. The court there held it was "not persuaded" by the argument advanced by petitioners in that case, who, like Appellants here, asserted that "it is textually significant that the legislature used the term 'controlling,' rather than the term 'control,'" and that the

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')."].) The Board's use of the present participle tense in Section 19B.5(d) does not show any intent on the part of the Board that only surveillance technologies in "ongoing" and "continuous" use could benefit from Section's grace period. The

---

legislature's choice of the present participle tense "indicates 'some current action.'" (*Id.*, 468 P.3d at p. 414.)

fact that Section 19B.5(d) employs the present participle tense cannot bear the weight Appellants try to put on it.

3. The Board would not reasonably have sought to require "ongoing" use of a Surveillance Technology that responds to circumstances that are present only occasionally.

Appellants' claim that Section 19B.5(d)'s grace period requires "ongoing" 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 has 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 and security problems. Such large gatherings 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 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.

4. 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 intermittently, or had not used at all.

Appellants' claim that Section 19B.5(d) provides a temporary grace period only for surveillance technologies that were in ongoing and continuous use at the time Chapter 19B took effect is also undermined by the fact that 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." The Board's decision to employ the term "or" is significant, and suggests that the Board wanted Section 19B.5(d)'s grace period to have broad, rather than narrow, application. The Board's decision to employ the term "or" in Section 19B.5(d) further defeats Appellants' proffered interpretation of that section, for several reasons.

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 Chapter 19B took effect, that grace period is available even if the department *used* a surveillance technology that the department did not itself possess – in other words, a surveillance technology that the department 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 would likely not be in "ongoing, continuing" use; if it was, the City department would

likely acquire and possess that technology itself. Yet the Board nonetheless intended that under those circumstances, when a City department had been "using" a surveillance technology that it did not "possess," the department could continue to use that technology until the Board enacts an ordinance regarding that technology and that ordinance takes effect.

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 Chapter 19B took effect, the grace period is available for any surveillance technology that, at the time Chapter 19B took effect, was already in the department's *possession,* even if the department had actually used that technology only sporadically, or not at all. Under Section 19B.5(d)'s plain text, "use" of a particular surveillance technology – much less "continuing, ongoing use" –is not a prerequisite for Section 19B.5(d)'s grace period to apply to that technology. If, for example, a department had already acquired automated license plate readers ("ALPRs") by the time Chapter 19B took effect, but had not yet used those ALPRs at all, that department was still "possessing or using" the ALPRs at the time Chapter 19B took effect, and Section 19B.5(d) would thus allow the department to use the ALPRs in the future, until such time as the Board of Supervisors enacted an ordinance regarding the ALPRs' use.

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 and continuous use. Appellants' request that this Court read a requirement of ongoing, continuous use into Section 19B.5(d) should be rejected.

B. Proposition 59 Is Irrelevant To This Case.

Appellants argue that Article 1, Section 3(b) of the California Constitution, enacted by the voters through the adoption of Proposition 59 in 2004, requires that Section 19B.5(d) be narrowly construed in order to "promote transparency" and further "the people's right of access to information concerning the conduct of the people's business." (AOB at pp. 25-27.) This claim is without merit.

First, by its express terms, Article 1, Section 3(b) of the California Constitution concerns "the people's right of access" to information about governmental actions in the context of public meetings and public records. (Art. 1, Sec. 3(b)1) ["[t]he people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny"].) The trial court's ruling applying Section 19B.5(d) has no effect on the scope of public records laws or public meeting laws. Nor does that ruling affect the degree to which members of the public can access information about local governmental conduct under those laws. (Indeed, Appellants obtained the communications in which the SFPD requested and obtained access to USBID's surveillance camera network [CT1

221] under the public records laws.) There is no intersection between the scope of public records and public meetings laws and the result below.[8]

Not surprisingly, Appellants do not cite any cases that suggest that Article 1, Section 3(b) requires a broad interpretation of any statute or ordinance outside of the context of public records and public meetings. And the courts have rejected similarly broad interpretations of Article 1, Section 3(b) in other contexts, holding, for example, that that provision does not create a right of public access to agricultural labor dispute mediations (*Gerawan Farming, Inc. v. Agricultural Labor Rel. Bd.* (2019) 40 Cal.App.5th 241, 263), and does not require a narrow construction of the attorney-client relationship created under a city charter (*St. Croix v. Superior Court* (2014) 228 Cal.App.4th 434, 444). Moreover, Appellants also cite no authority that would allow Article 1, Section 3(b) of the California Constitution to override the Board's policy decision to allow City departments possessing or using surveillance technologies at the time Chapter 19B took effect to continue using those technologies until the Board adopted an ordinance approving a Surveillance Technology Policy that addressed those technologies.

[8] Appellants suggest that under the trial court's ruling, "a department could hide how it is using a surveillance technology from the Board and public" by "pointing to a single instance when it used that technology prior to the effective date of the Ordinance." (AOB at pp. 26-27.) Appellants do not offer any reason, however, why a member of the public could not obtain information about that department's use of the surveillance technology through the public records laws.

Article 1, Section 3(b) of the California Constitution has no relevance to this case. Appellants' reliance on that provision fails to show any error by the court below.

C. Chapter 19B's Legislative History Does Not Support Appellants' Claim.

Appellants attempt to bolster their claim by noting that on May 14, 2019, when the Board of Supervisors was considering the legislation that would become Chapter 19B, members of the Board discussed Section 19B.5(d)'s grace period in the context of four specific surveillance technologies – Shotspotter, body worn cameras, ALPRs, and cameras on MUNI buses – that City departments "were possessing and using for years." (AOB at p. 28.) Meanwhile, according to Appellants, "Supervisors did not discuss the grace period's application to a department's one-time, temporary use of a surveillance technology." (*Id*. at p. 29.) Therefore, Appellants argue, the Board must have intended that Section 19B.5(d)'s grace period would *only* apply to surveillance technologies that departments had been using for many years.[9] (AOB at pp. 27-30.) This argument is without merit, and fails to show any error by the trial court.

[9] Appellants note that in its briefing in the trial court, the City stated that Section 19B.5(d)'s grace period served to avoid disrupting City departments' operations by not "immediately depriving City departments of the tools they already had come to use." (AOB at p. 28.) While it is accurate, this observation hardly helps Appellants. By the time Chapter 19B took effect, USBID's surveillance camera network was one of "the tools [SFPD] already had come to use" to address the public safety risks presented by crowds gathering in the Union Square area for special events.

As a logical matter, the fact that the Board's discussion focused on a few out of the many types of surveillance technologies that City departments possessed or used does not suggest that the Board intended Section 19B.5(d) to apply *only* to those few technologies, or to exclude other technologies that were not as prominent or well-known, and hence were not discussed. As the trial court aptly noted, "the absence of debate on USBID cameras does not remove them from § 19B.5(d)'s ambit." (CT2 664.) As a practical matter, it is entirely 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, including to the Supervisors. By the same token, it also is unremarkable that the discussion at the Board on May 14, 2019 did not include mention of USBID's surveillance camera network, a technology that, as of that date, SFPD had not yet 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.

Appellants also point to the fact that unlike USBID's surveillance camera network, SFPD (or other City departments) "could freely deploy [the technologies the Board discussed] without a third party's permission." (AOB at pp. 29-30.) But this, too, is simply unremarkable, and fails to show any error by the court below. Because Section 19B.5(d) affords a grace period for each City department "possessing *or* using" any surveillance technology before Chapter 19B took effect, that section clearly

contemplates that its grace period might allow continued use of a surveillance technology that a department uses, but does not possess, such as a technology owned by a non-City entity and used by the City department with that entity's permission. That SFPD needed USBID's permission to access its surveillance camera network is irrelevant, and does not show that the court below erred in holding that SFPD's accessing of USBID's network in May and June 2020 was permissible under Section 19B.5(d).

D. Section 19B.5(d) Does Not Require That A Department May Only Use A Surveillance Technology During The Grace Period For The Same Purpose, Or In The Same Manner Or Location, As It Used That Technology Before Chapter 19B Took Effect.

In enacting Chapter 19B, the Board of Supervisors carefully placed tight restrictions on departments' use of surveillance technologies pursuant to Board-approved surveillance technology policies. Chapter 19B states that *after* the Board 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).) Appellants ask this Court to import those "purpose, manner, and location" restrictions into Section 19B.5(d), where they do not appear, arguing that because Chapter 19B thus carefully restricts a department's use of surveillance technology *after* the Board has legislatively regulated that technology, Section 19B.5(d) must contain 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. (AOB at pp. 31-32.)

This argument fails, however, because it asks the Court to imply 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). Appellants thus invite the Court 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.)[10]

This Court should decline that invitation, and should instead 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 shows that the Board

[10] The Legislative Digest, which was before the Board at the time it considered the legislation that would become Chapter 19B, stated that Chapter 19B "would allow Departments possessing or using Surveillance Technology to continue to use the Surveillance Technology" until the Board adopted an ordinance regulating that technology. Notably, that legislative history does not mention any limits on *how, where*, or *for what purpose* the department could continue to use the technology during that interim period. (CT1 98.)

did not wish to similarly restrict a department's use of a particular surveillance technology during that grace period.

The Board evidently wanted the restrictions on departments' use of surveillance technologies to be fashioned deliberatively through the legislative process, rather than arbitrarily imposed by simply freezing departments' use of their existing surveillance technologies before those legislative deliberations could occur. During Section 19B.5(d)'s 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.

Appellants also urge that in allowing a department to "continue its use" of existing surveillance technologies during its grace period, Section 19B.5(d) necessarily constrained departments to only use those existing surveillance technologies in the same manner and scale as they used them before Chapter 19B took effect. But here, too, Appellants seek to read limitations into Section 19B.5(d) that the Board clearly could have enacted, but chose not to. Section 19B.5(d)'s term "continue" simply means that if the department used a particular technology before Chapter 19B took effect, the department also may use that technology during the grace period until the Board adopts a Surveillance Technology Policy ordinance.

E. Section 19B.5(d)'s Grace Period Is Independent Of The Inventory and Proposed Use Policy Provisions Found At Section 19B.5, Subdivisions (a) Through (c).

Appellants 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 allegedly "failed to comply with Section 5's disclosure obligations." (AOB at p. 33.) This claim, like the rest of Appellants' arguments, misstates Section 19B.5(d)'s requirements, seeks to add terms to that section that the Board of Supervisors did not enact, and fails to show any error by the court below

First, and most importantly, nothing in the text of Chapter 19B, or its legislative history, links compliance with 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). To the contrary, Section 19B.5(d)'s text simply states – without any qualification, limitation, or condition – that a department can continue to use an existing surveillance technology until the Board adopts an ordinance approving the Surveillance Technology Policy for that technology.

If the Board of Supervisors had wanted to make the availability of Section 19B.5(d)'s grace period depend on compliance with the inventory and proposed use policy provisions contained in Section 19B.5(a) – (c), it would have been a simple matter for the Board to add words such as "provided that that department meets the deadlines contained in subdivisions (a)

through (c), above" to Section 19B.5(d). The Board, however, chose not to do so. That choice suggests that the Board understood subdivision (d)'s grace period to be an independent provision, the availability of which did not turn on whether the department or COIT had met the timelines contained in subdivisions (a) through (c).

The Legislative Digest, similarly, does not tie subdivision (d)'s grace period to the procedures listed in subdivisions (a) through (c). Instead, that digest simply states – again without mentioning any qualification or condition – 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." (CT1 98.)

The fact that Section 19B.5(d)'s text and legislative history contain no mention of any linkage between subdivisions (a) through (c)'s internal procedural requirements and subdivision (d)'s grace period suggests that the Board did not want the availability of the grace period to be conditioned on compliance with the timelines set forth in subdivisions (a) through (c). That is understandable, as the grace period concerns departments' continued use of technologies that play important roles in helping to protect public health and safety, while subdivisions (a) through (c) set forth internal procedures and timelines for the implementation of the legislation. In view of the fact that the Board evidently did not want to condition subdivision (d) on

subdivisions (a) through (c), this Court should not invent such a linkage.

Second, while Appellants claim that SFPD "failed to timely submit an inventory" of its surveillance technologies to COIT, as required by Section 19B.5(a), Appellants cite nothing in the record to support that claim. Instead, appellants argue that "SFPD has failed to produce evidence" that it timely submitted the inventory to COIT. (AOB at p. 37.) But the record includes a declaration from an SFPD employee responsible for drafting SFPD's surveillance technology policies and submitting those policies to COIT, which states that "non-City entity surveillance cameras are … listed on the inventory of SFPD's surveillance technologies, which SFPD prepared and provided to COIT for posting on COIT's website pursuant to Chapter 19B." (CT1 231.) Appellants deride that declaration as "threadbare" (*id.*), but they do not cite to *any* record evidence suggesting that SFPD was untimely in providing COIT with that inventory. Appellants also ignore the fact that their complaint does not allege that SFPD or COIT violated subdivisions (a) through (c) of Section 19B.5, and there thus was no reason for SFPD to produce evidence concerning its compliance with those subdivisions.

Third, as the record before the trial court shows, as the City implemented Chapter 19B it was COIT, not the SFPD, that controlled the scheduling of when departments submitted proposed Surveillance Technology Policies to COIT for consideration and recommendation to the Board of Supervisors. COIT was the chokepoint that received and reviewed all City

departments' draft surveillance technology policies, and it thus had to control the timing of its workflow. As the SFPD's declarant testified, COIT "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. (CT1 231.) Appellants' claim that Section 19B.5(d)'s grace period does not apply to SFPD, based on a schedule imposed by COIT rather than by SFPD, is without merit and should be rejected by this Court.

CONCLUSION

The City respectfully requests that this Court affirm the judgment of the court below.

Date: November 9, 2022

DAVID CHIU
City Attorney
WAYNE K. SNODGRASS
Deputy City Attorney

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

Attorneys for Defendant/
Respondent CITY AND
COUNTY OF SAN
FRANCISCO

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13-point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 11,538 words.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on November 9, 2022.

DAVID CHIU
City Attorney
WAYNE K. SNODGRASS
Deputy City Attorney

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

Attorneys for Defendant/
Respondent CITY AND
COUNTY OF SAN
FRANCISCO

PROOF OF SERVICE

I, Pamela Cheeseborough, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, City Hall, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102.

On November 9, 2022, I served the following document(s):

RESPONDENT'S BRIEF

on the following persons at the locations specified:

Saira Hussain, Esq.
Adam Schwartz, Esq.
Mukund Rathi, Esq.
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Telephone.: (415) 436-9333
Facsimile: (415) 436-9993
Email: saira@eff.org
adam@eff.org
mukund@eff.org

[Co-Counsel for Plaintiffs/Appellants HOPE WILLIAMS, NATHAN SHEARD, and NESTOR REYES]

[VIA E-SERVICE]

Matthew Cagle, Esq.
Nicole Ozer, Esq.
ACLU FOUNDATION OF NORTHERN CALIFORNIA, INC.
39 Drumm Street
San Francisco, CA 94111
Telephone.: (415) 621-2493
Facsimile: (415) 255-1478
Email: mcagle@aclunc.org
Email: nozer@aclunc.org

[Co-Counsel for Plaintiffs/Appellants HOPE WILLIAMS, NATHAN SHEARD, and NESTOR REYES]

[VIA E-SERVICE]

California Supreme Court
[Submitted Electronically Through the Court of Appeal E-Submission]

Hon. Richard Ulmer
San Francisco County Superior Court
400 McAllister Street
Department 302
San Francisco, CA 94102

[VIA HAND DELIVERY]

in the manner indicated below:

☒ **BY PERSONAL SERVICE**: I sealed true and correct copies of the above documents in addressed envelope(s) and caused such envelope(s) to be delivered by hand at the above locations by a professional messenger service. **A declaration from the messenger who made the delivery ☐ is attached** or ☐ **will be filed separately with the court.**

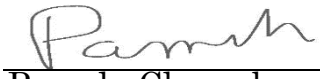
☐ **BY ELECTRONIC MAIL:** Based on a court order or an agreement of the parties to accept electronic service, I caused the documents to be sent to the person(s) at the electronic service address(es) listed above. Such document(s) were transmitted *via* electronic mail from the electronic address:

pamela.cheeseborough@sfcityatty.org ☐ in portable document format ("PDF") Adobe Acrobat or ☐ in Word document format. OR

☒ **BY ELECTRONIC-SERVICE:** Based on a court order or an agreement of the parties to accept electronic service, I caused the documents to be served electronically through **TrueFiling** in portable document format ("PDF") Adobe Acrobat.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed November 9, 2022, at San Francisco, California.



Pamela Cheeseborough