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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Thomas W. McGee III, Circuit Court Judge

Trial Court Case No. 2023-CP-40-01850
Appellate Case No. 2025-002437

SOUTH CAROLINA PUBLIC INTEREST FOUNDATION and JOHN SLOAN, individually, and on behalf of all others similarly situated..... Appellants,

v.

SOUTH CAROLINA STATE LAW ENFORCEMENT DIVISION and MARK KEEL, in his official capacity as Chief of the South Carolina State Law Enforcement Division ..... Respondents,

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STATEMENT OF ISSUES ON APPEAL

1. Whether the South Carolina Law Enforcement Division has statutory authority to operate a vehicle surveillance database that tracks the precise movements of South Carolina drivers who have no suspected connection to criminal activity?

2. In the alternative, if the South Carolina Law Enforcement Division has statutory authority to operate a vehicle surveillance database that tracks the precise movements of South Carolina drivers who have no suspected connection to criminal activity, whether that delegation of statutory authority violates the separation of powers and the nondelegation doctrine?

3. Whether the South Carolina Law Enforcement Division violated the Administrative Procedures Act when it established its vehicle surveillance database without following that Act's notice-and-comment and presentment requirements?

INTRODUCTION

Every time South Carolinians leave for work, are late returning for dinner, drive to church, visit a doctor, or drop their children at school, the South Carolina Law Enforcement Division ("SLED") may be watching—recording their movements, cataloguing their routines, and storing it all in a searchable database. It does so using automated license plate readers or "ALPRs." ALPRs are cameras that indiscriminately identify and store the movements of any passing vehicle to create a detailed picture of each vehicle's travel over time. It makes no difference whose car drives by. SLED tracks *every* vehicle without regard to whether a person or vehicle has any connection to criminal activity. Indeed, SLED does not dispute that 99.8% of all vehicle location observations in its database—over 140 *million* vehicle captures—have no suspected connection to criminal activity when they are captured and stored.

At issue in this case is whether SLED has authority to operate its vehicle surveillance program with respect to people unsuspected of crimes. But the true stakes are whether SLED may create a surveillance state unilaterally. SLED asserts the same power that permits it to surveil vehicles authorizes it to use facial recognition to track and store the movements of *every* person walking on South Carolina's sidewalks. SLED's view of its authority, which the circuit court adopted, is that SLED may collect and store *any* information about *anyone* that in its view might one day be useful for law enforcement—an unbounded category which could include firearm ownership, vaccination records, or even religious affiliation.

SLED's vehicle surveillance database can be useful in some circumstances for identifying people who commit crimes. But such powerful capabilities also impose costs on the millions of people not suspected of criminal conduct. The South Carolina Constitution makes clear that it is the General Assembly's role to make public policy judgments weighing the competing benefits and harms implicated by such a vast system of surveillance. In doing so, it can tailor legislation to

achieve desired benefits while installing guardrails to protect against harms. But the General Assembly has not yet done so.

Accordingly, SLED's database is unlawful for three independent reasons, and the circuit court erred in concluding otherwise.

First, South Carolina's constitutional separation of powers requires that SLED exercise only power granted by the legislature. But the General Assembly has not empowered SLED to keep tabs systematically on South Carolinians unsuspected of crimes. It certainly did not make such a consequential policy choice silently, with no deliberation or debate. On the contrary, in defining SLED's authority to maintain databases, the General Assembly drew a clear and sensible distinction between maintaining databases on people connected to crimes, which SLED may do, and maintaining databases on people unconnected to crimes, which SLED may not. In finding the General Assembly implicitly authorized SLED's surveillance database, the circuit court erred by focusing on how SLED *intends to use* the information—purportedly, only for law enforcement purposes. But SLED's authorizing statutes speak in terms of the *nature* of the information stored, not its purported use. To adopt the circuit court's reasoning would effectively empower SLED to collect any information about anyone it deems potentially useful to criminal enforcement (at some unknown and unstated point in the future). In addition, when the General Assembly has authorized data collection, it typically has included statutory safeguards. The General Assembly did not afford SLED such unfettered authority.

Second, if the Court finds that the General Assembly nonetheless implicitly authorized SLED's vehicle surveillance database, then that legislation violates the nondelegation doctrine. The nondelegation doctrine prohibits the General Assembly from abdicating its "power to make policy determinations" by delegating unfettered discretion. *Hampton v. Haley*, 403 S.C. 395, 409,

743 S.E.2d 258, 265 (2013). Authorizing SLED to collect *any* information about *anyone* that SLED considers potentially useful is unfettered discretion. In holding otherwise, the circuit court purported to find limits on SLED's power—such as an implied prohibition on collecting vaccination records. But no such limit exists on SLED's and the circuit court's mistakenly broad view of SLED's statutory authority. The circuit court overlooked that nearly any information about a person could potentially be useful to law enforcement. Knowing what guns someone owns could be useful for solving gun crimes. Knowing a person's romantic history could be useful for solving crimes of passion. Knowing a person's vaccination history could be useful for enforcing emergency quarantine laws. And there have been times in our history when people have argued that knowing a person's place of worship could also serve law enforcement purposes. If the General Assembly granted SLED such broad and ill-defined power, then it unconstitutionally delegated to SLED the power to make the difficult policy tradeoffs inherent in monitoring people unsuspected of crimes.

Finally, SLED's operation of the vehicle surveillance database violates the Administrative Procedures Act ("APA"), which ensures the public and legislature have a voice in shaping weighty policy decisions. In promulgating its policy governing the use of license plate readers, it is undisputed that SLED failed to comply with the APA's notice-and-comment and legislative presentment requirements concerning a policy that impacts every South Carolina driver. The circuit court wrongly concluded SLED's vehicle surveillance database was not subject to the APA, reasoning that SLED's policy is not a "regulation" within the meaning of the APA. But SLED's policy qualifies as a regulation because it binds the public, SLED, and other law enforcement agencies.

SLED's vehicle surveillance database operates outside of the law, and in doing so, it subjects anyone traveling on South Carolina's roads and highways to unlawful and unjustified surveillance, without legislatively-determined safeguards against misuse. The Court should hold that SLED lacks authority to operate its database unless and until the legislature grants SLED such authority.

STATEMENT OF THE CASE

On November 17, 2022, Appellants filed a Petition for Original Jurisdiction in the South Carolina Supreme Court because SLED's operation of a vehicle surveillance program without statutory authority is of significant public interest and requires prompt resolution. The Supreme Court denied Appellants' Petition on February 9, 2023.

Appellants then filed this action in the Richland County Court of Common Pleas on April 11, 2023. *See generally* Complaint. Appellants seek a declaration that SLED's collection and storage of more than 100 million vehicle location observations concerning people unsuspected of crimes exceeds SLED's statutory authority. *Id.* at 18. Alternatively, Appellants seek a declaration that the Legislature's broad delegation of unconstrained discretion to SLED violates the separation of powers and the nondelegation doctrine. *Id.* Appellants further seek a declaration that SLED's policy governing its vehicle surveillance program ("Policy 13.40") violates the South Carolina Administrative Procedures Act ("APA"). *Id.* at 19. Defendants filed an Answer on May 15, 2023. *See generally* Answer.

After completing discovery, Appellants filed a Motion for Summary Judgment on January 9, 2025; Respondents filed a Cross-Motion for Summary Judgment and Opposition on February 10, 2025; Appellants filed a Combined Reply and Opposition on March 12, 2025; and Respondents filed a Reply on March 24, 2025. The Court of Common Pleas held a hearing on the motions on April 7, 2025.

On May 13, 2025, the Court issued an Order denying Appellants' Motion for Summary Judgment and granting Respondents' Motion for Summary Judgment. On May 22, 2025, Appellants timely filed a Motion to Alter or Amend the Order. On November 5, 2025, the Court granted Appellants' motion and indicated the Court would issue an amended order. On November 12, 2025, the Court issued its Amended Order. In the Amended Order, the Court first assumed without deciding that Appellants had standing. MSJ Order 7-8. It then held that "S.C. Code Ann. §§ 23-3-15(A)(4), -(A)(9), and -110 each authorize SLED's operation" of a vehicle surveillance database. MSJ Order 15. The Court further held that those statutes do not run afoul of the nondelegation doctrine, *see* MSJ Order 17, and that SLED Policy 13.40 does not violate the APA because it is not a "regulation" as defined by the APA. *See* MSJ Order 18-19.

Appellants timely filed their Notice of Appeal on December 5, 2025.

STATEMENT OF FACTS

I. SLED Tracks And Stores The Movements Of Anyone Driving On South Carolina Roads.

If you have driven in South Carolina, SLED is almost certainly storing records of where you have driven, and when, in a searchable surveillance database. SLED oversees an extensive network of surveillance cameras known as ALPRs. ALPRs are cameras connected to computer software that capture images of passing vehicles and automatically detect the vehicle's license plate and other identifying features, as well as the time the vehicle passed the camera. *See* Answer ¶ 19 (admitting allegations in Compl. ¶¶ 21-28); MSJ Order 2; Peterman MSJ Decl., Ex. 2, at 7 (Request for Admission #1); SLED MSJ Ex. 1 (Admissions); SLED MSJ, Ex. 4, at 1 (SLED Policy 13.40). ALPRs can be placed almost anywhere, which makes it possible to record every vehicle that visits a specific location, including sensitive locations like churches, political rallies, or medical providers. Answer ¶ 19 (admitting Compl. ¶ 22).

SLED uses ALPRs in two ways. One use—which is not challenged in this lawsuit—is to notify law enforcement officers and analysts in real time if a passing license plate is on a "hot list" (i.e., a list of license plates that a government agency has flagged as belonging to a vehicle of interest, such as a stolen car). MSJ Order 3. This hot list function does not require collecting and storing the travel history of every vehicle that passes an ALPR camera. Indeed, states like New Hampshire use ALPRs to identify passing vehicles on hot lists without storing information about vehicles that have no connection to any law enforcement purpose. *See* N.H. Rev. Stat. § 261:75-b(V, VIII).

The other use of ALPRs, and the use at issue in this appeal, is to create a vehicle surveillance database. After an ALPR photographs a vehicle, it records the software's interpretation of the license plate number, distinctive vehicle characteristics such as "make, model, and color," as well as "date, time, and geographical coordinates," to create a digital observation or "read" of exactly where a vehicle was and when. MSJ Order 2-3; *see* SLED MSJ, Ex. 4, at 1 (SLED Policy 13.40). The ALPRs then transmit each observation to SLED's searchable database, which stores the information. Answer ¶¶ 19 (admitting Complaint ¶¶ 21-28), 23; Peterman MSJ Decl., Ex. 5, at 3-4 (SLED Training Document).[1] The database gives SLED the capacity to compile a detailed picture of drivers' lives that can reveal sensitive information, including their daily routine, contacts and associates, where they travel, and what religious services, gun shows, or political rallies they attend. SLED claims the authority to retain such extensive personal information on *every* vehicle that passes the ALPR cameras on the theory that the information might one day be useful to law enforcement. SLED MSJ at 13.

[1] When this litigation began, SLED stored each license plate read in its database for three years. Peterman MSJ Decl., Ex. 1, at 4-5 (Response to Interrogatories #3, 5); MSJ Order 3 n.1. During the litigation, SLED changed its retention policy to one year. MSJ Order 3 n.1. Just as it contracted it, SLED unilaterally may expand its retention policy at any time.

The size of SLED's database is growing exponentially, limited only by the number of ALPR cameras scanning vehicles. SLED populates its database using its own license plate readers as well as data from ALPR systems from 42 other law enforcement agencies across South Carolina. *See generally* Peterman MSJ Decl., Ex. 8 (List of Contributing Systems); MSJ Order 4. In 2014, the database catalogued 26 million vehicle location observations. *See* Peterman MSJ Decl., Ex. 7, at 6 (SLED FOIA Response). By February 2025, the database catalogued nearly 150 million vehicle location observations per year—a fivefold increase. *See* Peterman MSJ Decl., Ex. 1, at 5 (Response to Interrogatory #4); SLED MSJ, Ex. 6, at 3.

The overwhelming majority of observations in SLED's database concern ordinary people going about their private lives. SLED admits that it "collects and stores license plate reads *without any suspicion of criminal activity*" and that "each license plate collected in the ALPR database *is not suspected of being involved in criminal activity*." Peterman MSJ Decl., Ex. 2, at 7 (Request for Admission #2) (emphasis added); SLED MSJ, Ex. 1 (Admissions); Peterman MSJ Decl., Ex. 1, at 5 (Response to Interrogatory #5) (emphasis added); *see also* Answer ¶ 28. In fact, SLED's own data reveals that 99.8% of all location records have no connection to any vehicle of interest to law enforcement when SLED captures and stores them. *See* Peterman MSJ Decl., Ex. 1, at 5 (Response to Interrogatory #4); Peterman MSJ Decl., Ex. 9, at 4 (Supplemental Response to Interrogatory #19).

II. Thousands Of People Can Access And Conduct Detailed, Pinpoint Location Searches In SLED's Vehicle Surveillance Database.

SLED has provided access to its trove of vehicle location information to thousands of law enforcement officers. *See* Peterman MSJ Decl., Ex. 11, at 4 (reporting "2,077 active users"). As of June 2023, more than 400 individual users from at least 71 different state, local, and federal agencies had current access to SLED's database. Peterman MSJ Decl., Ex. 12 (List of Users). The database is programmed to allow these users to run various types of searches. Users can search for a specific license plate number—or even a partial license plate number—and obtain a report showing every place an ALPR observed the vehicle, including a picture of the vehicle and the date, time, and location each image was taken. *See* Peterman MSJ Decl., Ex. 5, at 3-4. Users also can limit these searches to a specific time frame or a particular geographic region, *see id.*, which could include sensitive locations, like a political rally, doctor's office, or church.

The database allows users to compile detailed location histories of particular vehicles that no individual person could acquire simply by observing a car driving in public. Tracking a year's worth of a vehicle's movements provides SLED with the potential to learn intimate details about a person's life. Although the names of the individual owners of cars may not be included in SLED's database, SLED has acknowledged that such personally identifying information can be obtained easily by matching the license plate number to records in other government databases, such as DMV records. SLED's own training documents state that "[i]t is possible to remove anonymity from an ALPR data record … if the user has access to a state's DMV database," which SLED does. Peterman MSJ Decl., Ex. 5, at 2. During 2022, SLED's database was queried 35,451 times—an average of nearly 100 times per day. *See* Peterman MSJ Decl., Ex. 13, at 5 (Supplemental Response to Interrogatory #11).

Despite the highly sensitive nature of the data in SLED's vehicle surveillance database,

there is no evidentiary threshold that an officer must satisfy before accessing or searching the database. SLED's "use of [ALPR] systems and the data collected from the systems" is governed by its own internal Policy 13.40. SLED MSJ, Ex. 4, at 1. The policy does not require officers to have a particular level of suspicion of criminal activity—such as reasonable suspicion—before searching the database. *Id.* Rather, Policy 13.40 allows law enforcement officers and analysts to access the ALPR database for any "public safety-related missions" or for undefined "official public safety purposes." *Id.* at 2.

SLED has not identified any guidance provided to officers on what does and does not qualify as a "public-safety related mission." So long as an officer purports to be searching for crime, then SLED's policy does not stop an officer from conducting suspicionless fishing expeditions that could include searching the travel history or tracking the movements of people not presently suspected of wrongdoing—a former romantic partner, a politician, a journalist, an activist, or an annoying neighbor. After all, any search could be justified as a "public safety-related mission" when it theoretically is possible that an investigation into someone's movements *might* detect crime. And troublingly, SLED can "revise" its policies and remove any purported safeguards any time it wishes and without notice. *Id.* at 1. Indeed, during the course of this litigation, SLED unilaterally changed the retention period for information in its database. *See* MSJ Order 3 n.1.

SLED's use of its database also is not subject to any external auditing to ensure compliance with SLED's undefined "public-safety related mission" standard. SLED maintains it conducts some audits of its ALPR use. MSJ Order 4. But it has provided no detail on what those audits entail. For instance, SLED has not suggested that it audited each of 35,451 searches it conducted on its ALPR database in 2022 to ensure that each actually furthered a public-safety purpose. *See*

Peterman MSJ Decl., Ex. 13, at 5 (Supplemental Response to Interrogatory #11). SLED's policy sets no frequency for audits and says nothing about how thorough or comprehensive such audits must be.

III. Misuse Of Vehicle Surveillance Databases Generates Significant Public Concern.

Vehicle surveillance databases created with ALPR technology have become matters of significant public concern as such databases are vulnerable to inaccuracies, abuse, and misuse. As SLED recognized in a training presentation, "BAD READS HAPPEN." Peterman MSJ Decl., Ex. 5, at 5 (SLED Training Document). Indeed, one randomized control trial in California determined that 35-37% of supposed matches to a hot list were misreads, i.e., the ALPR misidentified the vehicle's license plate.[2] Misreads can result in police wrongfully stopping innocent people and treating them as violent criminals. Multiple lawsuits have been filed against law enforcement agencies alleging wrongful arrests of families at gunpoint based on ALPR errors.[3] Recently, in Greenville, South Carolina, police officers stopped two women at gunpoint after an ALPR erroneously flagged their rental car as stolen. *See* Complaint, *Bryan v. City of Greenville*, No. 2024-CP-23-00352 (Greenville Cty. Ct. Jan. 18, 2024).

There are also widely publicized privacy concerns about ALPR vehicle surveillance. The U.S. Department of Homeland Security has noted that vehicle surveillance data "may, in the aggregate, reveal information about an individual's travel over time, or provide details about an individual's private life, leading to privacy concerns or implicating constitutionally-protected

[2] *See* Peterman MSJ Decl., Ex. 14, Ángel Díaz & Rachel Levinson-Waldman, *Automatic License Plate Readers: Legal Status and Policy Recommendations for Law Enforcement Use*, Brennan Center for Justice (Sept. 10, 2020).

[3] *See, e.g.,* Peterman MSJ Decl., Ex. 15, Complaint, *Gonzales v. City of Espanola*, No. D-117-CV-2024-00008 (Rio Arriba Cty. Ct. Jan. 3, 2024) (two sisters arrested at gunpoint based on ALPR conflating "2" and "7"); Peterman MSJ Decl., Ex. 16, Complaint, *Gilliam v. City of Aurora*, No. 2021CV30146 (Arapahoe Cty. Ct. Jan. 25, 2021) (family of five detained at gunpoint based on misidentification of vehicle as stolen).

freedoms."[4] There have been numerous reports of ALPRs being used to track people who attended a gun show,[5] attended political rallies,[6] visited a gay bar,[7] and visited mosques.[8] Mobile ALPRs can even be used to identify and search for lawn signs and bumper stickers with political speech on them.[9] And hackers have breached law enforcement databases, raising concerns about vehicle surveillance location data being accessed by bad actors.[10] There also have been multiple reported instances of law enforcement officers using vehicle surveillance data to stalk and harass former romantic partners.[11]

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[4] Peterman MSJ Decl., Ex. 17, Dep't of Homeland Sec., *Privacy Impact Assessment for CBP License Plate Reader Technology* at 9 (July 6, 2020), https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp049a-cbplprtechnology-july2020.pdf.

[5] Peterman MSJ Decl., Ex. 19, Devlin Barrett, *Gun-Show Customers' License Plates Come Under Scrutiny*, Wall Street Journal (Oct. 2, 2016), www.wsj.com/articles/gun-show-customers-license-plates-come-under-scrutiny-1475451302.

[6] Peterman MSJ Decl., Ex. 20, Mark Bowes, *Police Recorded License Plates at Obama Inauguration*, Richmond Times-Dispatch (Aug. 18, 2013), https://richmond.com/news/local/crime/police-recorded-license-plates-at-obama-inauguration/article_32678a59-f9e1-5e46-8336-d5f4ba076cb7.html.

[7] Peterman MSJ Decl., Ex. 21, Avis Thomas-Lester & Toni Locy, *Chief's Friend Accused of Extortion*, Wash. Post (Nov. 26, 1997) https://www.washingtonpost.com/wp-srv/local/longterm/library/dc/dcpolice/stories/stowe25.htm.

[8] Peterman MSJ Decl., Ex. 22, Adam Goldman & Matt Apuzzo, *With Cameras, Informants, NYPD Eyed Mosques*, Associated Press (Feb. 23, 2012), https://www.ap.org/ap-in-the-news/2012/with-cameras-informants-nypd-eyed-mosques.

[9] Peterman MSJ Decl., Ex. 23, Matt Burgess & Dhruv Mehrotra, *License Plate Readers are Creating a US-Wide Database of More than Just Cars*, WIRED (Oct. 3, 2024), https://www.wired.com/story/license-plate-readers-political-signs-bumper-stickers/.

[10] Peterman MSJ Decl., Ex. 24, Kari Paul, *Los Angeles Police: Personal Data of Thousands of Officers Stolen in Breach*, The Guardian (July 29, 2019), https://www.theguardian.com/us-news/2019/jul/29/los-angeles-police-officer-data-breach; Peterman MSJ Decl., Ex. 25, Nicole Perlroth & Julian E. Barnes, *D.C. Police Department Data Is Leaked in a Cyberattack*, N.Y. Times (Apr. 27, 2021), https://www.nytimes.com/2021/04/27/us/dc-police-hack.html; Peterman MSJ Decl., Ex. 26, Jenna McLaughlin, *Hackers Steal Sensitive Law Enforcement Data in a Breach of the U.S. Marshals Service*, NPR (Feb. 28, 2023), https://www.npr.org/2023/02/28/1160112051/hackers-steal-sensitive-law-enforcement-data-in-a-breach-of-the-u-s-marshals-ser.

[11] *See, e.g.,* Peterman MSJ Decl., Ex. 30, Eric Connor, *Greenville Adding More Cameras to Read License Plates, Raising Questions of Oversight, Privacy*, The Post & Courier (Dec. 20, 2020),

IV. John Sloan And The South Carolina Public Interest Foundation Challenge SLED's Vehicle Surveillance Database, And The Circuit Court Grants SLED Summary Judgment.

Plaintiff John Sloan is a citizen of South Carolina who owns a car and has driven regularly on South Carolina roads for nearly 45 years. *See* Sloan MSJ Decl. ¶ 3; *see also* Compl. ¶¶ 13, 17-18. Mr. Sloan "drive[s] most days" and "visit[s] other cities." Sloan MSJ Decl. ¶ 3; *see also* Compl. ¶ 18. Mr. Sloan does not "want to have [his] license plate and precise location information captured by automated license plate reader … cameras and stored in a database operated by … SLED." Sloan MSJ Decl. ¶ 4; *see also* Compl. ¶ 17.

Mr. Sloan and the South Carolina Public Interest Foundation brought this declaratory judgment action to stop SLED from unlawfully tracking the movements of people and vehicles with no connection to criminal activity. *See generally* Compl. Specifically, Appellants seek a declaration that SLED's collection and storage of over 100 million vehicle location observations concerning people unsuspected of crimes exceeds SLED's statutory authority. Alternatively, Appellants seek a declaration that the General Assembly's broad delegation of unconstrained discretion to SLED violates the separation of powers and the nondelegation doctrine. Appellants further seek a declaration that SLED's policy governing its vehicle surveillance program violates the South Carolina Administrative Procedures Act ("APA").

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https://www.postandcourier.com/greenville/news/greenville-adding-more-cameras-to-read-license-plates-raising-questions-of-oversight-privacy/article_4cf2761a-4157-11eb-98b9-9b7e9434164e.html; Peterman MSJ Decl., Ex. 27, Cole West, *Kechi Officer Used License Plate Reader to Track Estranged Wife, Police Say*, KAKE ABC (Oct. 31, 2022), https://www.kake.com/news/crime/kechi-officer-used-license-plate-reader-tech-to-track-estranged-wife-police-say/article_88ae2583-9279-5424-9c21-9277a2ab4f16.html; Peterman MSJ Decl., Ex. 28, Ellen Dennis, *Everett Ex-Cop Acquitted of Perjury But Is Still Guilty of Stalking*, The Daily Herald (Feb. 14, 2022), https://www.heraldnet.com/news/everett-ex-cop-acquitted-of-perjury-but-is-guilty-of-stalking; Peterman MSJ Decl., Ex. 29, Becky Metrick, *Former Pa. Police Officer Arrested on Stalking Charges Following Standoff*, PennLive (Sept. 28, 2021), https://www.pennlive.com/news/2021/09/former-pa-police-officer-arrested-on-stalking-charges-following-standoff-report.html.

On cross-motions for summary judgment, the circuit court held that SLED's surveillance database is lawful. The court first assumed without deciding that Appellants have standing to bring this action. MSJ Order 7-8. On the merits, the court acknowledged that the separation of powers requires that the General Assembly authorize SLED's surveillance database and that the General Assembly nowhere expressly authorized SLED to track the movements of people unsuspected of crimes. MSJ Order 8. The court instead found the General Assembly *implicitly* authorized the database in three statutory provisions—two related provisions that authorize SLED to maintain "criminal" information databases and a third catch-all provision that authorizes SLED to act in furtherance of its statutory mission. MSJ Order 8-13 (discussing S.C. Code Ann. § 23-3-15(A)(4), (A)(9) and S.C. Code Ann. § 23-3-110). The court concluded these provisions permit SLED to collect and maintain any information that hypothetically may be used "in criminal investigations and other public safety emergencies," and thus authorize SLED's database. MSJ Order 11, 13.

The court then held these purported authorizing statutes provide sufficient guidance to satisfy the nondelegation doctrine. MSJ Order 15-17. In so holding, the court did not explain how implicitly authorizing SLED to collect any information about anyone that might one day be useful to it provided any guide for SLED's use of its discretion. MSJ Order 16-17. The court simply asserted SLED's discretion was not so unfettered. MSJ Order 16-17.

Finally, the court held SLED's policy establishing its vehicle surveillance database did not violate the APA. MSJ Order 17-19. The court concluded SLED's policy was not a regulation subject to the APA because it purportedly binds only officers with access to the ALPR database and not the general public whose information SLED systematically collects.

STANDARD OF REVIEW

"When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Turner v. Milliman*, 392 S.C. 116, 121-

22, 708 S.E.2d 766, 769 (2011). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. When, as here, "a circuit court grants summary judgment on a question of law, this Court will review the ruling de novo." *Wright v. PRG Real Est. Mgmt., Inc.*, 426 S.C. 202, 212, 826 S.E.2d 285, 290 (2019).

ARGUMENT

"[T]he division of governmental powers into executive, legislative, and judicial represents probably the most important principle of government declaring and guaranteeing the liberties of the people." *State ex rel. McLeod v. Yonce*, 274 S.C. 81, 86, 261 S.E.2d 303, 306 (1979) (quoting 16 Am. Jur. 2d *Constitutional Law* § 212). The separation of powers safeguards liberty by giving the people, through their democratically accountable representatives in the General Assembly, "sole prerogative to make policy decisions; to exercise discretion as to what the law will be." *Hampton*, 403 S.C. at 403-04, 743 S.E.2d at 262. In finding SLED's vehicle surveillance database lawful, the circuit court misapplied this "most important" principle in three respects and eliminated the essential role of the people's representatives to make public policy balancing the security and liberty interests inherent in mass surveillance.

First, the circuit court erred in holding that the General Assembly implicitly authorized SLED to engage in mass surveillance of people unsuspected of crimes. On the contrary, the General Assembly has sensibly limited SLED's authority to maintain sensitive databases to those suspected of or convicted of crimes. *See infra* § I.

Second, the circuit court improperly permitted the General Assembly to abdicate its policymaking function. The nondelegation doctrine prohibits the General Assembly from delegating unfettered discretion. Yet the court failed to grapple with how, under its errant statutory

construction, the General Assembly would have granted SLED unfettered discretion to collect effectively *any* information about *anyone* without safeguards. Such a broad grant of discretion impermissibly surrenders the General Assembly's responsibility to make the difficult policy judgments about when (and with what safeguards) to permit mass surveillance of people unsuspected of crimes. *See infra* § II.

Third, the court improperly freed SLED from the important notice-and-comment and legislative presentment requirements the legislature imposed on agencies to ensure public accountability under the APA. In finding the APA does not apply to SLED's surveillance policy because that policy purportedly does not bind the public, the court ignored that the policy affects everyone who drives on South Carolina's roads as well as law enforcement agencies in the state. *See infra* § III.

Finally, Appellants have both constitutional and public interest standing to maintain this action. *See infra* § IV.

I. SLED's Vehicle Surveillance Database Is Not Statutorily Authorized.

SLED's vehicle surveillance database is unlawful because the General Assembly has not empowered SLED to engage in mass surveillance of people unsuspected of crimes. As an executive agency, SLED's authority to act is limited to "those powers expressly conferred or necessarily implied" by the General Assembly through its governing statutes. *Edisto Aquaculture Corp. v. S.C. Wildlife & Marine Res. Dep't*, 311 S.C. 37, 40, 426 S.E.2d 753, 755 (1993) (quoting *Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council*, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991)). Exceeding that authority "violate[s] the separation of powers … and infring[es] upon the General Assembly's power to make policy determinations." *Hampton*, 403 S.C. at 409, 743 S.E.2d at 265; *see S.C. Pub. Int. Found. v. S.C. Dep't of Transp.*, 421 S.C. 110, 123-24, 804 S.E.2d 854, 861-62 (2017) (holding Department of Transportation bridge inspections *ultra vires* when

conducted without statutory authorization); *Gilstrap v. S.C. Budget & Control Bd.*, 310 S.C. 210, 212-14, 423 S.E.2d 101, 103 (1992) (holding agency's proposed budget plan "exceeded the authority granted to it by the Legislature").

Whether an executive agency is exceeding its statutory authority presents a question of statutory interpretation. The Court examines the text of the agency's authorizing statutes and determines whether the agency's conduct falls within the General Assembly's grant of authority. In considering that question, the plain language as drafted by the legislature is what controls. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). That is because "[t]he legislature is presumed to have fully understood the meaning of the words used in a statute and, unless this meaning is vague or indefinite, intended to use them in their ordinary and common meaning or in their well-defined legal sense." *Pee v. AVM, Inc.*, 344 S.C. 162, 168, 543 S.E.2d 232, 235 (Ct. App. 2001), *aff'd*, 352 S.C. 167, 573 S.E.2d 785 (2002).

Here, the plain text of SLED's authorizing provisions establishes that the General Assembly afforded SLED no power to collect and store information about persons unsuspected of criminal activity in its vehicle surveillance database. *Infra* § I.A. The circuit court reached a contrary result by ignoring the plain statutory text. *Infra* § I.B.

A. The General Assembly authorized SLED to maintain databases on people suspected of crimes—not people with no connection to criminal activity.

SLED's authorizing statutes establish a clear line dividing what information the General Assembly has authorized SLED to collect and store and what information it has not. SLED may collect, store, and maintain databases of information about crimes and people suspected of committing crimes. It may not collect, store, and maintain databases of sensitive information about those unconnected to crimes. The General Assembly established this line by limiting each

delegation of authority to SLED to maintain databases to information about only people connected to criminal activity.

To start, the General Assembly expressly addressed SLED's authority to create databases in SLED's list of enumerated "authorities and responsibilities." S.C. Code Ann. § 23-3-15(A). The General Assembly delegated authority for the "operation and maintenance of a central, statewide criminal justice data base." *Id.* § 23-3-15(A)(4). (The General Assembly relatedly "established as a department within [SLED] a statewide criminal information and communication system." *Id.* § 23-3-110.) The plain language of this delegation limits SLED to collecting information about crimes and people *connected to crimes*. That is because the statutory terms "criminal justice" and "criminal information" each refer only to people suspected of crimes. *See Criminal*, Black's Law Dictionary (12th ed. 2024) (defining "criminal" as "[s]omeone who is involved in illegal activities; one who has committed a criminal offense"); *Justice*, Black's Law Dictionary (12th ed. 2024) (defining "criminal justice" as "[t]he methods by which a society deals with those who are accused of having committed crimes"). Consistent with that definition, when describing specific information to be stored in this database, the General Assembly identified only information about criminal suspects, further confirming it intended the database to only include information about people suspected of crimes. *See* S.C. Code Ann. § 23-3-120 (referring to a "person subjected to a lawful custodial arrest," "persons taken into custody," and people "charged with offenses"). By qualifying the database as a "criminal" database, the General Assembly defined and restricted SLED's delegated authority to collecting and maintaining information about crimes or about people involved in crimes. *See Hughes v. W. Carolina Reg'l Sewer Auth.*, 386 S.C. 641, 648, 689 S.E.2d 638, 642 (Ct. App. 2010) (holding the addition of the adjective "motor" in phrase "motor truck" qualified the term "truck" "to a narrower class of vehicles").

Indeed, SLED itself, and the Attorney General, have understood the criminal database provisions to be limited in this way. In its own regulations creating the "Criminal Justice Information System," SLED defines that system in terms of information about people suspected of crimes—"a system … for the collection, processing, preservation, or dissemination of *criminal history record information*," "consisting of identifiable descriptors and *notations of arrests, detentions, indictments, information, or other formal charges*, and any dispositions arising therefrom." *See* S.C. Code Ann. Regs. 73-20(C)-(D) (defining "Criminal Justice Information System" and "Criminal History Record Information") (emphasis added). And the Attorney General's Office has advised municipalities that "civil contempt" sanctions should not be reported to the criminal database because they are not crimes. South Carolina Office of the Attorney General, Opinion Letter, 2012 WL 5464987 (Oct. 8, 2012).

Moreover, at the same time the General Assembly enacted the criminal justice database provisions, it *limited* SLED's authority to store information about people unsuspected of crimes. It *required* SLED to "destroy[]" "arrest and booking record[s], associated bench warrants, mug shots, and fingerprints" stored in the database of persons who were charged with crimes if those charges were "dismissed" or the person was "found not guilty." S.C. Code Ann. § 17-1-40 (1976).[12]

That decision is utterly irreconcilable with SLED's claim that the General Assembly implicitly granted it the unfettered right to collect information about people unsuspected of crimes. It would make no sense for the General Assembly to prohibit SLED from retaining information on

[12] The General Assembly subsequently added limited exceptions for when SLED "may" retain information, such as "for purposes of ongoing or future investigations and prosecution of the offense, administrative hearings, and to defend the agency and the agency's employees during litigation proceedings." S.C. Code Ann. § 17-1-40(B)(1)(a). These limited exceptions concerning only information connected to a known crime are fully consistent with the general prohibition on collecting and storing information unconnected to any suspected crime.

people charged with crimes and subsequently acquitted while at the same time affording SLED broad implicit authority to collect and retain boundless information on those not suspected of crimes in the first place. Such a reading of the statutes would reflect a greater concern for the privacy of someone who was accused of a violent felony, tried, and ultimately acquitted, than for a law-abiding person who never so much as violated the speed limit.

This pattern of authorizing SLED to collect certain criminal information and restricting SLED's authority to collect noncriminal information persists throughout SLED's authorizing statutes. Beyond SLED's general criminal justice database authority, the General Assembly also authorized SLED to create several specific databases, and each time it did so, it hewed to the same distinction between people suspected of criminal activity and those not. For example, when the General Assembly authorized SLED to create a State DNA Database, S.C. Code Ann. §§ 23-3-610 *et seq.*, it explicitly prohibited SLED from maintaining DNA samples for persons who were not convicted or had charges dismissed. *See* S.C. Code Ann. § 23-3-660. When the General Assembly authorized SLED to create a sex offender registry, it required SLED to "remove[]" juveniles with expunged records from the sex offender registry, as well as persons whose convictions are "vacated on appeal." S.C. Code Ann. §§ 23-3-430(E), -437. And when the General Assembly authorized SLED to create a statewide criminal gang database for information relating to gangs and gang-related incidents, it strictly limited the registry to persons who met specific indicia of suspicion. *See* S.C. Code Ann. §§ 16-8-230, -330(D); S.C. Code Ann. Regs. 73-540(3).

SLED's enabling statutes accordingly show a consistent and continuous pattern of authorizing SLED to collect and store sensitive information about people connected to crimes and limiting SLED's authority to collect information about people unsuspected of crimes. The General Assembly did not afford SLED broad, unregulated surveillance power over people with no

connection to criminal activity, let alone the authority to create a mass surveillance database in which 99.8% of observations concern people unsuspected of crimes.

B. The circuit court erred in finding the General Assembly implicitly authorized SLED to operate a surveillance database in which 99.8% of observations concern people unsuspected of criminal activity.

The circuit court agreed that SLED's conduct "must be authorized by statute." MSJ Order 8. It also agreed that the General Assembly never expressly authorized SLED to maintain a sensitive surveillance database about people unsuspected of criminal activity. *Id.* However, the court wrongly found "two sources … implicitly authorize" the database: (1) the criminal database provisions discussed above, and (2) a catch-all provision (S.C. Code Ann. § 23-3-15(A)(9)). MSJ Order 8. None of these provisions supply the required authority.

1. SLED's authority to create "criminal" information databases does not authorize a surveillance database in which 99.8% of observations concern people unsuspected of criminal activity.

The circuit court purported to find implicit authority for SLED to maintain a vehicle surveillance database that stores location observations without regard to criminal suspicion in the two related criminal database provisions discussed above (at __). MSJ Order 12-13 (discussing S.C. Code Ann. § 23-3-15(A)(4) (statewide criminal justice database) and § 23-3-110 (statewide criminal information and communication system)). Despite acknowledging that "the majority of the license plate reads in the database"—indeed all but 0.2%—"relate to vehicles that are not suspected of being involved in criminal activity," MSJ Order 12, the court nonetheless found that the criminal database provisions authorized SLED to collect and store vast amounts of information about people unsuspected of crimes. In doing so, the circuit court misinterpreted the statutory text in two respects.

First, the court erred in reasoning that the criminal database provisions authorize SLED to store information beyond what it referred to as "*exclusively* criminal information." MSJ Order 13.

But the General Assembly explicitly included the modifier "criminal" in its authorization:

- S.C. Code Ann. § 23-3-15(A)(4) authorizing SLED to operate and maintain "a central, statewide *criminal* justice data base and data communication system" (emphasis added);
- S.C. Code Ann. § 23-3-110 establishing within SLED "a statewide *criminal* information and communication system" (emphasis added).

By modifying the information that SLED may store with the term "criminal," the General Assembly indeed limited SLED's database authority to storing only, i.e., exclusively, criminal information. That is what a modifier does. It "limits" a broader term. *State v. Elwell*, 396 S.C. 330, 334, 721 S.E.2d 451, 453 (Ct. App. 2011), *aff'd,* 403 S.C. 606, 743 S.E.2d 802 (2013) ("The use of these two modifiers, 'required' and 'pre-test,' limits the application of the subsection"); *see supra* __ (discussing modifier "motor" in "motor truck" limiting meaning of "truck"). Deeming a modifier nonexclusive, as the circuit court did, renders the modifier meaningless and "violates the rule that we should seek a construction that gives effect to every word of a statute." *Hinton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 357 S.C. 327, 342, 592 S.E.2d 335, 343 (Ct. App. 2004).

Further, the court failed to grapple with the overwhelming additional textual evidence discussed at __ showing that the General Assembly did not afford SLED the power to maintain sensitive information on people unsuspected of crimes. The Court did not, for instance, address the fact that the General Assembly affirmatively required SLED to "destroy[]" information about people acquitted of crimes from the criminal database at the same time it created the database—something the General Assembly would not have done had it intended for the criminal database to include vast amounts of information about people unconnected to crimes. *See* S.C. Code Ann. § 17-1-40 (1976); *supra* __ (discussing prohibition on storing information).

The court also misunderstood the significance of the General Assembly prohibiting SLED from storing noncriminal information when authorizing the DNA, sex offender and gang databases. *See* MSJ Order 14-15; *supra* __; S.C. Code Ann. § 23-3-660 (prohibiting SLED from maintaining DNA samples for persons who were not convicted of, or are not presently being charged with, a crime); S.C. Code Ann. § 23-3-437 (requiring SLED to "remove[]" juveniles with expunged records from sex offender registry); S.C. Code Ann. §§ 16-8-230, -330(D), S.C. Code Ann. Regs. 73-540(3) (strictly limiting gang registry to persons who met specific indicia of suspicion). As explained (at __), those provisions reinforce that when the General Assembly authorized a "criminal" database, it intended to limit the database to information about people connected to crimes, as the General Assembly consistently and repeatedly drew the same distinction whenever addressing SLED's database authority.

Rather than recognize that the General Assembly repeatedly distinguishing between criminal and noncriminal information shows that it did not authorize SLED to collect information about people suspected of no criminality, the court drew exactly the opposite conclusion—and got the separation of powers backwards in doing so. It reasoned that because SLED created these databases *before* the General Assembly acted, i.e., without legislative direction, that the provisions actually "demonstrate" that SLED has authority to collect any information it wants in the first instance, subject only to the General Assembly mustering the votes after the fact to stop SLED. MSJ Order 14-15. That reasoning fails multiple times over.

As an initial matter, the circuit court did not find that SLED actually stored information on people unsuspected of crimes in those databases. So, there is no indication that SLED's practice was even inconsistent with the criminal/noncriminal information distinction the General Assembly established for SLED's general database power and repeatedly reinforced. *Id.* More

fundamentally, even if SLED had stored information on people unsuspected of crimes, the separation of powers prohibits SLED from unilaterally expanding the scope of its authority. *See S.C. Pub. Int. Found.*, 421 S.C. at 123-24, 804 S.E.2d at 861-62. The scope of SLED's authority is determined solely by parsing its authorizing statutes. *See Hodges*, 341 S.C. at 85, 533 S.E.2d at 581. And here, the General Assembly's use of the word "criminal" and the broad statutory context make unambiguously clear that the General Assembly did not authorize SLED to collect and store information about people unconnected to crimes when it empowered SLED to maintain criminal databases.

Second, the court further contorted the statutory text by holding that "it is proper to consider the manner in which the database functions, rather than focusing solely on the information contained in the database." MSJ Order 13. The court then went on to hold the vehicle surveillance database qualified as a criminal information database because the purported "sole purpose of" the database is "serv[ing] as a resource for law enforcement when criminal investigations or other public safety emergencies arise." *Id.*

The statutory text nowhere states, nor even implies, that SLED may collect and store *any* information that might be useful to an unknown future investigation. On the contrary, the statutory text focuses unambiguously on whether the information in the database is *presently* "criminal *information*" and not on how the information might be used in the future. Further, an interpretation focused on whether the information is connected to someone presently suspected of a crime is the only reading that comports with the provisions requiring SLED to destroy information about persons acquitted of crimes—despite that information hypothetically being useful to future investigations of other crimes. *See* S.C. Code Ann. § 17-1-40 (1976); *supra* __ (discussing prohibitions on storing noncriminal information). Had the General Assembly intended to authorize

SLED to retain any information about any South Carolina resident that, in SLED's view, could one day be a resource for law enforcement, it would have written a different statute.

Other courts, in closely related contexts, have rejected the argument that statutes authorizing data collection related to criminal activity apply to information about people unsuspected of criminal activity on the theory that the information might one day be used as part of a criminal investigation. Virginia, for example, has a statute that exempts "investigations and intelligence gathering related to criminal activity" from a statute that imposes requirements on the government's data management. The Virginia Supreme Court held that vehicle surveillance systems that indiscriminately collect and store information do not generally qualify as "investigations … related to criminal activity" because such information is not limited to "any specific law enforcement investigation" even though the information could be used in a future investigation. *Neal v. Fairfax Cnty. Police Dep't*, 295 Va. 334, 348-49, 812 S.E.2d 444, 450-51 (2018). Likewise, in *ACLU v. Clapper*, the Second Circuit rejected the "unprecedented and unwarranted" argument that information qualifies as "relevant" to a criminal investigation if it could be relevant "at some unknown time in the future." 785 F.3d 787, 812 (2d Cir. 2015). The circuit court's reasoning here followed that same rejected logic.

2. SLED's authority to act consistent with its "mission" does not authorize a surveillance database in which 99.8% of observations concern people unsuspected of criminal activity.

The circuit court also found that SLED's surveillance database was authorized by S.C. Code Ann. § 23-3-15(A)(9)—a catch-all provision that authorizes SLED to undertake "other activities not inconsistent with the mission of the division or otherwise proscribed by law." MSJ Order 8-12. The court reasoned that the General Assembly's reference to SLED's "mission" tacitly incorporated SLED's self-described mission from Accountability Reports SLED provided to the legislature: "to provide quality manpower and technical assistance to law enforcement agencies

and to conduct investigations on behalf of the state as directed by the Governor and Attorney General." MSJ Order 9 (quoting https://www.sled.sc.gov/). The court then concluded that maintaining a vehicle surveillance database qualifies as providing "technical assistance" to law enforcement, and is thus authorized, because the database can be used to help law enforcement solve crimes. MSJ Order 11. In this way, the court read § 23-3-15(A)(9), like the criminal database provisions, to implicitly empower SLED to collect and store any information about anyone that could be hypothetically useful to solving crimes in the future.

But nothing in the text of the statute suggests that the General Assembly gave SLED such broad power in such a circuitous and indirect fashion. Legislatures don't "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). The General Assembly did not empower SLED to collect and store nearly any information about any person unconnected to crimes in a generic catch-all provision that refers only to an agency acting consistent with its general mission.

The circuit court misread subsection (A)(9) to afford SLED such broad unfettered discretion by failing to read that general provision in the context of the broader statutory scheme. That scheme makes clear that the General Assembly did not understand SLED's mission, even if that mission includes providing "technical assistance," to include collecting sensitive information about people unsuspected of crimes. *S. Mut. Church Ins. Co. v. S.C. Windstorm & Hail Underwriting Ass'n*, 306 S.C. 339, 342, 412 S.E.2d 377, 379 (1991) ("[W]ords in a statute must be construed in context…."). As discussed, the General Assembly took pains in the criminal database provisions to specify only that SLED may collect "criminal" information and, even then, to cabin SLED's authority to retain sensitive information about people unsuspected of crimes—for example, by mandating that SLED purge records, fingerprints, and DNA associated with those

acquitted of crimes. *See supra* __. In that way, the General Assembly made clear that when it comes to collecting and storing information, SLED's mission includes collecting only sensitive information on people connected to crimes. The General Assembly that placed such strict restraints on data collection and retention in every provision addressing SLED's authority to collect and store criminal information did not undo that careful balance in an ill-defined catch-all provision and give SLED carte blanche to collect sensitive information about anyone, regardless of suspicion. "The Court must construe statutory language in light of the intended purpose of the statute, and … 'not … in a way which leads to an absurd result or renders it meaningless.'" *State v. Cnty. of Florence*, 406 S.C. 169, 174, 749 S.E.2d 516, 518 (2013) (quoting *Florence Cnty. Democratic Party v. Florence Cnty. Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012)).

The circuit court's reasoning further ran afoul of other basic rules of statutory construction. "The general rule of statutory construction is that a specific statute prevails over a more general one," and a general statute should not be read to render a more specific provision meaningless. *See Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp.*, 319 S.C. 556, 558, 462 S.E.2d 858, 859 (1995); *see also Capco of Summerville, Inc. v. J.H. Gayle Constr. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) ("more specific statute will be considered an exception to, or a qualifier of, the general statute"). Here, the criminal database provisions (subsection (A)(4) and S.C. Code Ann. 23-3-110) are specific provisions that define the scope of SLED's authority to develop and maintain databases without additional legislative authorization. Reading subsection (A)(9) to expand this specific database authority beyond "criminal justice" or "criminal information" would improperly render the more specific provisions' limit to *criminal* information meaningless as SLED could use the (A)(9) catch-all to enact countless non-criminal

information databases.[13] Further, if the General Assembly's explicit legislation on SLED's database authorities does not inform the scope of SLED's authority to act on that topic, then SLED's authority would be effectively unguided and limitless. As explained in Part II, *infra*, that would constitute an unconstitutional delegation of the legislative function to SLED.

C. Limiting SLED to its statutory authority ensures that the General Assembly has the opportunity to evaluate the tradeoffs of ALPR technology.

Requiring agencies to act within the scope of their statutory authorization is no mere technicality. To the contrary, such a requirement respects the plain statutory language that the legislature chose and the legislature's "sole prerogative to make policy decisions." *Hampton*, 403 S.C. at 403-04, 743 S.E.2d at 262. As elected officials committed to the needs of the people they represent, "[a] legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way." *United States v. Jones*, 565 U.S. 400, 429-30 (2012) (Alito, J., concurring).

When the General Assembly acts to permit SLED to collect and maintain sensitive information it typically imposes safeguards to protect the privacy interests of its constituents. For example, a bill has been introduced in the General Assembly that would prohibit SLED from retaining ALPR surveillance data for more than 21 days (absent a criminal investigation) and require a warrant before searching the ALPR database. *See* H. 4675, 2025 Leg., 126th Sess. (S.C. 2025) (Sponsored by Reps. Kilmartin, Chumley, Edgerton and Magnuson). Similarly, the statute authorizing SLED to operate a DNA database prescribes the limited circumstances under which DNA may be collected; sets forth permissible uses of the database; establishes confidentiality

[13] For this same reason, it makes no difference that the General Assembly provided in S.C. Code Ann. § 23-3-15 that SLED has authority "in matters including but not limited to" its enumerated powers. MSJ Order 11. That language suggests that SLED may have authority *on additional topics* beyond what the General Assembly enumerated. It does not permit SLED to exercise authority inconsistent with the enumerated powers.

requirements; limits access to the database; creates criminal penalties for abuses; establishes expungement procedures by which individuals can have their DNA sample removed from the database; and conditions the continued force of the statute upon SLED's promulgation of numerous regulations and the legislature's continued annual appropriations.[14]

When legislatures in other states have authorized vehicle surveillance databases, they have likewise imposed limitations on the collection and/or use of ALPR data that simply are not present in the SLED-created and legislatively unauthorized database at issue here.[15] State legislatures have chosen a far shorter retention period than SLED's one-year period. *See, e.g.*, Me. Rev. Stat. tit. 29-A, § 2117-A(5) (limiting image preservation to 21 days); Minn. Stat. § 13.824, subd. 3(a) (60 days); Cal. Veh. Code § 2413(b) (60 days); Mont. Code § 46-5-118(1) (90 days); N.C. Gen. Stat. § 20-183.32(a) (90 days); Tenn. Code § 55-10-302(b) (90 days); Ark. Code § 12-12-1804(a) (150 days); Neb. Rev. Stat. § 60-3204(1) (180 days). Indeed, New Hampshire requires that ALPR images "be purged from the system within 3 minutes of their capture." N.H. Rev. Stat. § 261:75-b(VIII). State legislatures also have limited the use of the database to the investigation of specific crimes or to a comparison with specific hot lists, *see, e.g.*, Ark. Code § 12-12-1803(b) & Mont. Code § 46-5-117(2)(d)(V); prohibited sharing ALPR data with private entities, *see, e.g.*, Minn. Stat. § 13.824, subd. 4; required detailed public reports concerning the collection and use of ALPR data, *see, e.g.*, Neb. Rev. Stat. § 60-3206(3); and/or provided individuals harmed by data breaches with a private right of action, *see, e.g.*, Cal. Civ. Code § 1798.90.54.

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[14] *See* S.C. Code Ann. §§ 23-3-600 *et seq*. Over the years, the legislature has amended the statute several times. *See* H. 3120, 2000 Leg., 113th Sess. (S.C. 2000); S. 492, 2001 Leg., 114th Sess. (S.C. 2001); H. 3594, 2004 Leg., 115th Sess. (S.C. 2004); S. 429, 2008 Leg., 117th Sess. (S.C. 2008).

[15] *See, e.g.*, N.C. Gen. Stat. § 20-183.32; Mont. Code § 46-5-117(2)(d)(V); Ark. Code § 12-12-1803(b); Md. Code, Pub. Safety § 3-509(c)(2); Fla. Stat. § 316.0777(2); Minn. Stat. § 13.824, subd. 2; Neb. Rev. Stat. § 60-3206(3).

Of course, it is up to the legislature—not Appellants or SLED—to determine whether SLED should maintain a vehicle surveillance database and, if so, what safeguards would be appropriate. But because the General Assembly never authorized SLED to operate the vehicle surveillance database, the legislative consideration and management of the tradeoffs of indiscriminately tracking everyone driving on South Carolina roads never occurred.

Critically, the circuit court's argument that "the General Assembly always retains the lawmaking authority to direct SLED in the performance of its activities" post-hoc provides no answer. MSJ Order 15. "Mustering the broad social consensus required to pass new legislation is a deliberately hard business…." *McGirt v. Oklahoma*, 591 U.S. 894, 903 (2020). It is far harder to pass legislation than to maintain the status quo. When the executive short-circuits the legislative process, it removes the pressure needed to produce legislative compromise on challenging policy judgments. It is this Court's duty to limit the executive to its delegated power and ensure the legislature undertakes the "hard business" of making law.

II. Alternatively, The General Assembly Unconstitutionally Delegated Its Legislative Power To SLED.

If SLED's "implicit" authority is broad enough to permit it to collect any and all information about South Carolinians that might at some future date be useful in solving a crime or furthering SLED's self-described mission, then that broad delegation violates the nondelegation doctrine. The nondelegation doctrine prohibits the legislature from delegating undefined discretion. Granting SLED authority to collect and store any information that could, one day, possibly, be relevant to a criminal investigation violates that constitutional prohibition because it affords SLED effectively limitless power with no guidance on how to exercise it. SLED could collect and retain *any* information about *any* person, based solely on bare speculation that the information *might* hypothetically one day be relevant to something concerning SLED's mission.

A. The South Carolina Constitution prevents the legislature from delegating its law-making power.

The South Carolina Constitution vests the legislative power in the South Carolina General Assembly—not the executive, or any executive agency. S.C. Const. art. III, § 1. "The legislative department makes the laws," *State ex rel. McLeod v. Yonce*, 274 S.C. 81, 84, 261 S.E.2d 303, 304-05 (1979), and has "plenary power over all legislative matters," *Hampton*, 403 S.C. at 403, 743 S.E.2d at 262. This legislative power includes the "sole prerogative to make policy decisions; to exercise discretion as to what the law will be." *Id.* at 403-04. Because the three branches of government must be "forever separate and distinct from each other," S.C. Const. art. I, § 8, "the legislature may not delegate its power to make laws," *S.C. State Highway Dep't v. Harbin*, 226 S.C. 585, 594, 86 S.E.2d 466, 470 (1955).

A statute violates the separation of powers and the nondelegation doctrine, and thus is unconstitutional, if it "reposes an absolute, unregulated, and undefined discretion in an administrative body," such as when it "sets up no standard to guide the [agency] and contains no limitations" or fails to "lay down an intelligible principle to which the administrative officer or body must conform." *Id.* at 594-95 (quotation omitted). To determine whether a statute contains sufficient guiding standards, the proper focus is on the full scope of conduct that the statute would permit, and not merely whether the specific conduct at issue was reasonable. "The presumption that an officer will not act arbitrarily but will exercise sound judgment and good faith cannot sustain a delegation of unregulated discretion." *See id.* at 596 (quotation omitted).

Applying this principle, the Supreme Court has recognized unconstitutional delegations of lawmaking power on multiple occasions. In *Harbin*, the Court held the legislature violated the nondelegation doctrine when it statutorily authorized a different law enforcement agency—the State Highway Department—"to suspend or revoke a license for *any* cause which it deems

satisfactory." *Id.* at 595 (emphasis added). Exercising that authority, the agency then enacted a thoughtful and considered point system under which motorists received points for traffic violations and a certain number of points could eventually lead to a license suspension. *Id.* at 588-89. But the Court held the General Assembly's delegation nonetheless violated the nondelegation doctrine because permitting the Department to revoke licenses for "any cause" failed to offer any "standard to guide the Department" or any "limitations" on that authority. *Id.* at 595.

Likewise, in *Gilstrap*, the Supreme Court held a statute that authorized the Budget Control Board to reduce appropriated expenditures if the reductions were "applied as uniformly as may be practicable" would violate the nondelegation doctrine if it were construed to authorize anything other than perfectly proportionate reductions. *Gilstrap*, 310 S.C. at 214, 216-17, 423 S.E.2d at 104-05. The broad, but still somewhat cabined, discretion to act "as uniformly as may be practicable" was insufficient. *Id.* And in *Hampton*, the Court held a statutory provision authorizing an agency to decline appropriated funds based on what the agency believes is the best policy "would constitute an impermissible delegation of legislative powers." *Hampton*, 403 S.C. at 408, 743 S.E.2d at 265. There too, such a general delegation without specific direction as to the criteria to apply when determining whether to decline funds would give the agency improper "unbridled discretion." *Id.*

B. If SLED's authorizing statutes afford SLED discretion to maintain the vehicle surveillance database, they constitute an unconstitutional delegation of lawmaking authority.

Under SLED's and the circuit court's construction of SLED's statutory authority, the General Assembly violated the nondelegation doctrine. According to the circuit court, the General Assembly delegated discretion to SLED to collect and store any information that SLED determines could, one day, possibly, be relevant to a criminal investigation or consistent with SLED's self-defined mission. Such a vast delegation contains no standard or limiting principle. It leaves SLED

with unguided discretion to decide for itself whether to collect and retain *any* information about *any* person, based solely on bare speculation that the information *might* one day prove useful. SLED could, for instance, use facial recognition to track and store for years every citizen's movements 24/7, claiming that such information *might* one day help a criminal investigation or serve a law enforcement purpose. *See* April 7, 2025 MSJ Hearing Tr. 48. Or it could collect information about what items individuals purchase, with whom they interact, which places they frequent, whether and where they attend religious services, based on bare speculation. SLED would have a blank check to use ever more invasive and previously uncontemplated technologies to create mass surveillance systems centered on individuals suspected of no criminal activity. That SLED may decide to collect vast troves of information about people unsuspected of crimes is not implausible—99.8% of the information SLED collects and stores in its ALPR database has no known connection to criminal activity.

Such unguided authority to collect and maintain sensitive information mirrors the improper delegations in *Harbin*, *Gilstrap*, and *Hampton*. Just as in *Harbin* no provision provided guidance for when the Highway Department should revoke a license for cause, here, no statutory provision would provide any guiding principle for how SLED should decide what information to collect and retain. SLED could collect information for any reason it considers consistent with its self-described mission, which is no different from any reason "which it deems satisfactory." *Harbin*, 226 S.C. at 595, 86 S.E.2d at 470-71. The delegation to SLED would also provide no more guidance than the delegation to an agency to decline appropriated funds based on the agency's own judgment in *Hampton* or to exercise its own judgment about how to reduce appropriated expenditures "as uniformly as may be practicable" in *Gilstrap*. *Hampton*, 403 S.C. at 408, 743 S.E.2d at 265; *Gilstrap*, 310 S.C. at 216-17, 423 S.E.2d at 105.

While the nondelegation violation on the circuit court's construction is clear, the Court can, and should, avoid finding SLED's authorizing statutes unconstitutional by adopting Appellants' reasonable statutory interpretation. *See Hampton*, 403 S.C. at 408, 743 S.E.2d at 265 (South Carolina courts do not interpret statutes in ways that will render them "unconstitutional when a constitutional reading [is] possible."); *see Gilstrap*, 310 S.C. at 216-17, 423 S.E.2d at 105 (construing statute to avoid nondelegation problem). But if the Court rejects Appellants' reading of SLED's authorizing statutes, then the General Assembly's broad delegation to SLED violated the nondelegation doctrine and is unconstitutional.

C. The circuit court erred in finding no nondelegation violation.

In finding no nondelegation doctrine violation, the circuit court engaged in circular reasoning. It simply quoted the language of SLED's authorizing statutes, i.e., that an "action must not be 'inconsistent with [SLED's] mission' or 'proscribed by law'" and that a database must serve "criminal information and communication" purposes. It then concluded, with no further analysis, that "the language of each statutory provision reveals an intelligible principle restricting SLED's authority." MSJ Order 17. But the court never said what those principles are. Simply repeating legislative text does not by itself offer an "intelligible principle" for how the agency must exercise its discretion if the text itself does not. As explained throughout, the circuit court interpreted those same authorities to provide SLED unfettered discretion to decide for itself, with no guidance, when, whether, how, and with what, if any, safeguards, to collect and store essentially any information about any person without regard to suspicion of criminal wrongdoing.

The circuit court's unexplained assertion that SLED could not track vaccination records actually illustrates the problem here. MSJ Order 17. According to the court, "SLED plainly could not create a database storing citizens' vaccination records without exceeding the limitations imposed by subsection 23-3-15(A)(4) and section 23-3-110." *Id.* But why not? SLED could easily

determine that vaccination records might one day be relevant to a criminal investigation or to SLED's self-described mission of providing "technical assistance to law enforcement agencies" and "conduct[ing] investigations on behalf of the state as directed by the Governor and Attorney General." MSJ Order 9 & n.3. This is all the circuit court's reasoning requires. For example, the Emergency Health Powers Act affords broad powers to "isolate or quarantine … persons who are unable or unwilling for any reason … to undergo vaccination" during certain "public health emergenc[ies]." S.C. Code Ann. § 44-4-520(A). And the Act authorizes "law enforcement officers [to] arrest, isolate, or quarantine" individuals. *Id*. § 44-4-530(D)(4). An individual's vaccination status plainly could be relevant one day to SLED exercising such powers. That, on the circuit court's interpretation, the legislature afforded SLED power so broad and ill-defined that it permits SLED to collect information the circuit court thought plainly prohibited proves the nondelegation point.

The court further erred by misreading *Harbin* as supporting *SLED's* position because it "recognizes the flexibility inherently necessary in legislating police activities." MSJ Order 17. But *Harbin* stands for the opposite proposition. While *Harbin* did recognize the importance of flexibility, it held flexibility does not trump the constitutional separation of powers. The Supreme Court went on to hold that the legislature violated the separation of powers by delegating excessive flexibility to the Highway Patrol. *Harbin*, 226 S.C. at 595, 86 S.E.2d at 470-71.

III. SLED's Policy Governing Its Vehicle Surveillance Database Violates The APA.

SLED's vehicle surveillance database is unlawful for another independent reason. SLED failed to comply with the APA's notice-and-comment and legislative presentment requirements when it adopted Policy 13.40, which governs its vehicle surveillance database. That was a stark departure from SLED's typical practice. SLED followed the APA's requirements when implementing policies for other SLED databases and programs, including its DNA database,

breathalyzer testing, gang database, and crime reporting requirements. *See* S.C. Code Ann. Regs. 73-61; S.C. Code Ann. Regs. 73-1, 2, 3, 5; S.C. Code Ann. Regs. 73-540, 73-550, 73-560; S.C. Code Ann. Regs. 73-30. SLED's failure to subject its vehicle surveillance database to the same public and legislative scrutiny violated the APA and thus improperly deprived the public and the legislature of the required opportunity to weigh in on vehicle surveillance databases' substantial privacy impacts.

A. The APA requires SLED to engage in notice-and-comment rulemaking and to secure legislative approval before promulgating a regulation.

The APA imposes two fundamental requirements for South Carolina agencies like SLED to promulgate regulations: First, the agency must engage in notice-and-comment rulemaking, giving the public notice of its proposed action and an opportunity to comment. *See* S.C. Code Ann. § 1-23-110 (establishing notice-and-comment procedures). Second, the agency must submit the proposed regulation to the General Assembly for legislative approval or disapproval, with a few (inapposite) exceptions. *See* S.C. Code Ann. § 1-23-120. SLED regularly complies with those requirements when issuing regulations. *See infra* __.

The APA defines "regulation" broadly to mean "each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency." S.C. Code Ann. § 1-23-10(4). "Whether a particular agency creates a regulation or simply announces a general policy statement depends on whether the agency action establishes a 'binding norm.'" *Joseph v. S.C. Dep't of Labor, Licensing and Reg.*, 417 S.C. 436, 454, 790 S.E.2d 763, 772 (2016) (*quoting Home Health Serv., Inc. v. S.C. Tax Comm'n*, 312 S.C. 324, 328, 440 S.E.2d 375, 378 (1994)). The "key inquiry" in determining whether the agency action establishes a binding norm is "the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case." *Id.* (internal

quotation marks omitted). "When there is a close question whether a pronouncement is a policy statement or a regulation, the agency should promulgate the ruling as a regulation in compliance with the APA." *Id.* (citation and alteration omitted).

B. SLED failed to adhere to the APA's requirements for promulgating a regulation when it adopted Policy 13.40.

It is undisputed that SLED did not follow the APA's notice-and-comment or legislative approval requirements when it enacted SLED Policy 13.40. MSJ Order 18. Therefore, if SLED Policy 13.40 qualifies as a regulation, it violates the APA.

Policy 13.40 qualifies as a regulation under the APA because it establishes binding norms for using and maintaining SLED's ALPR vehicle surveillance database that bind (1) the public, (2) other police departments, and (3) SLED employees.

1. Policy 13.40 binds the public because it substantively affects the public and does not "leave[] [SLED] free to exercise its discretion to follow or not to follow that general policy in an individual case." *Joseph*, 417 S.C. at 454, 790 S.E.2d at 772. Pursuant to Policy 13.40, every time members of the public drive past ALPR cameras, they will have their time- and location-stamped license plate image captured and included in SLED's vehicle surveillance database. MSJ Order 2-3; Peterman MSJ Decl., Ex. 2, at 7 (Request for Admission #2); SLED MSJ Ex. 1 (Admissions); Peterman MSJ Decl., Ex. 1, at 5 (Response to Interrogatory #5). This happens automatically, without any discretion.

In *Electronic Privacy Information Center v. DHS*, the D.C. Circuit held an analogous TSA policy invalid for failing to comply with the similar federal notice-and-comment rulemaking requirement. 653 F.3d 1, 6 (D.C. Cir. 2011); *see* 5 U.S.C. § 551(4) (defining "rule" as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of

an agency"). In that case, the Court held that the TSA was required to undertake notice-and-comment rulemaking before screening airline passengers with new "advanced imaging technology" instead of metal detectors. 653 F.3d at 2-3. The Court explained that the TSA's use of the new technology "ha[d] the hallmark of a substantive rule"—the equivalent of a "regulation"— because it "substantively affect[ed] the public to a degree sufficient to implicate the policy interests animating notice-and-comment rulemaking." *Id.* at 6. The technology "impose[d] directly and significantly upon … many members of the public" and "much public concern and media coverage … focused upon issues of privacy, safety, and efficacy." *Id.* Here SLED's vehicle surveillance database likewise has the hallmarks of a regulation because it substantially affects *everyone* who drives on South Carolina's roads and has been subject to significant public concern and media coverage. *Supra* __.

2. Policy 13.40 also binds local law enforcement. Municipal police departments expressly have stated that SLED Policy 13.40 is binding on them. For example, Myrtle Beach Police Department Policy #276 states that the department "shall adhere to SLED policy and guidelines related to the storage and/or retrieval of ALPR data as per South Carolina Law Enforcement Division Policy Statement 13:40, Automated License Plate Recognition." *See* Peterman MSJ Decl., Ex. 32, at 4 (Myrtle Beach Police Department, Administration Regulations and Operating Procedures # 276); *cf. Joseph*, 417 S.C. at 455, 790 S.E.2d at 773 (holding that a Position Statement issued by the South Carolina Board of Physical Therapy was a "binding norm" because the Board intended physical therapists to rely on the statement and therefore it had the effect of a regulation).

3. Policy 13.40 binds SLED employees. SLED has stated that Policy 13.40 informs employees and law enforcement agencies of the "proper use" of the ALPR vehicle surveillance system, and "any misuse … may subject the offending entity … to sanctions and/or disciplinary

actions." Peterman MSJ Decl., Ex. 4, at 5. Moreover, the Policy is replete with compulsory words, which demonstrate SLED's "intent to enact a mandatory requirement." *See Collins v. Doe*, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002). For example, the Policy provides that "[i]t is the policy of SLED that *all members abide by the guidelines set forth herein* when using ALPR systems." SLED MSJ, Ex. 4, at 1 (emphasis added). Policy 13.40's use of mandatory language leaves SLED with no discretion to refuse to follow the Policy in a given case.

Because Policy 13.40 binds the public, other law enforcement agencies, and SLED, it is a regulation subject to the APA.

C. The circuit court erred in finding no APA violation.

The circuit court misapplied the APA in finding Policy 13.40 and SLED's vehicle surveillance database did not qualify as a regulation.

As to the Policy's impact on the public, the court reasoned in a solitary sentence that Policy 13.40 did not sufficiently bind the public because any effect was only "indirect." MSJ Order 19. But the court overlooked that the Policy *directly* affects the public. Drivers must either pass the ALPR cameras and suffer the uneasiness of having their movements tracked by SLED or take burdensome measures to avoid the cameras, such as locating and avoiding the cameras or limiting driving. The court cited no authority that agency action that directly impacts South Carolinians is somehow immune from the APA because that effect is achieved indirectly by "governing how officers" act. *Id.* Such a rule would substantially weaken the APA as regulations commonly direct agencies to act upon the public in similarly indirect ways. *See, e.g.*, S.C. Code Ann. Regs. 73-61 (DNA database); S.C. Code Ann. Regs. 73-1, 2, 3, 5 (breathalyzer testing).

As to the Policy binding other law enforcement officers and SLED, the court misapplied an exception to the APA's definition of regulation. The APA excludes from its definition of regulation "other agency actions relating only to specified individuals." S.C. Code Ann. § 1-23-

10(4). The court found this exception satisfied because Policy 13.40 governs "SLED's employees tasked with operating the database and other law enforcement officers with access to the database," who, the court found, qualify as "specified individuals." MSJ Order 18. That was error.

The meaning of "other agency actions relating only to specified individuals" appears to be a question of first impression in this case. The APA's text, structure, and legislative history establish that the phrase refers to adjudicative-type administrative actions that settle the rights of specific parties to adjudicative-type proceedings and not any policy implemented by specific government personnel. The APA governs two types of agency action—rulemaking, in which an agency creates general rules, *see* S.C. Code Ann. §§ 1-23-10 *et seq.*, and adjudication or "contested cases," in which an agency determines legal rights of "person[s] or agenc[ies] named … as a party," *id.* §§ 1-23-310 & 1-23-310 *et seq*.—and establishes distinct procedures governing each. The carve-out for "agency actions relating only to specified individuals" in the definition of regulation ensures that any agency action taken against specific individuals falls within the framework for adjudication. *See* John R. Steer, *Administrative Law*, 30 S. Car. L. Rev. 1, 4 n.18 (1979) ("The intent apparently was to … make agency actions relating only to specified individuals subject only to the procedural protections of article II" governing adjudications.).

Further evidencing that "specified individuals" does not cover all agency action that applies to government personnel, the General Assembly elsewhere carved out "descriptions of agency procedures applicable only to agency personnel" from the definition of regulation. S.C. Code Ann. § 1-23-10(4). Reading the "specified individuals" exception to apply to all actions directed at agency personnel would render meaningless the General Assembly's limited carve-out for only "descriptions of agency procedures." *See CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67,

74, 716 S.E.2d 877, 881 (2011) ("we must read the statute so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous'").

Moreover, because an agency acts through individual employees, interpreting "specified individuals" as the circuit court did to include any policies that govern agency personnel would create a massive loophole that risks undermining the entire notice and comment rulemaking requirement. Agencies could circumvent the notice and comment requirement simply by casting policies as directives for agency personnel to act and then argue no notice and comment was required because the policy only governed those specified individuals.

The court erred in finding SLED did not violate the APA.

IV. Appellants Have Standing to Challenge SLED's Vehicle Surveillance Database.

The Court below assumed without deciding that Appellants have standing, because it held that Appellants' claims failed on the merits. *See* MSJ Order 7-8 (citing *Bodman v. State*, 403 S.C. 60, 69, 742 S.E.2d 363, 367 (2013)). As the foregoing established, Appellants' claims succeed on the merits. Appellants also have standing under the well-established public importance doctrine, and Plaintiff John Sloan additionally has constitutional standing.

A. John Sloan and the South Carolina Public Interest Foundation have public importance standing.

The public importance doctrine permits plaintiffs to bring lawsuits when a case "involves a matter of wide public importance and resolution of the case is needed for future guidance affecting the public interest, not merely the interests of private litigants." *Eidson v. S.C. Dep't of Educ.*, 444 S.C. 166, 177, 906 S.E.2d 345, 350 (2024). The purpose of public importance standing is to "allow interested citizens a right of action in [the] judicial system when issues are of significant public importance to ensure accountability and the concomitant integrity of government action." *S.C. Pub. Interest Found.*, 421 S.C. at 118, 804 S.E.2d at 858 (cleaned up). The Supreme

Court repeatedly has found that plaintiffs challenging unauthorized agency actions—like the Appellants here—have public importance standing. *See, e.g., id*. (plaintiffs challenging Department of Transportation's statutory authority to inspect bridges in private communities had public importance standing); *Sloan v. Dep't of Transp.*, 365 S.C. 299, 304-05, 618 S.E.2d 876, 878-79 (2005) (plaintiff alleging department lacked statutory authority to use a particular bidding process had public importance standing); *Evins v. Richland Cnty. Hist. Pres. Comm'n*, 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000) (plaintiff alleging county preservation commission exceeded its statutory authority by conveying property had public importance standing); *Baird v. Charleston Cnty.*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999) (plaintiffs alleging a county exceeded its statutory authority by issuing hospital bonds had public importance standing).

Whether SLED has statutory authority to create and maintain a vehicle surveillance database that gathers millions of location datapoints about South Carolina drivers not suspected of any criminal activity presents a clear question of public importance. The question affects the public broadly because all drivers in the state may have their movements captured in the database. *See Thompson v. S.C. Comm'n on Alcohol & Drug Abuse*, 267 S.C. 463, 467, 229 S.E.2d 718, 719 (1976) (finding plaintiffs had standing where the questions were "of such wide concern, both to law enforcement personnel and to the public, that the court should determine the issues"). And, as discussed above, vehicle surveillance systems have generated significant public concern about the legality and potential for abuse of those systems. *See supra* ___.

Resolving the issues in this case also is essential for future guidance. Future guidance is needed when a case "involves the conduct of government entities and the expenditure of public funds." *Adams v. McMaster*, 432 S.C. 225, 236, 851 S.E.2d 703, 708 (2020); *see also Eidson*, 444 S.C. at 177, 906 S.E.2d at 350. Similarly, future guidance is needed when a decision could "have

far-reaching … consequences for the safety of [South Carolina] citizens" and when "there is no judicial guidance addressing the issue" despite evidence that the situation is likely to continue in the future. *S.C. Pub. Interest Found.*, 421 S.C. at 119, 804 S.E.2d at 859; *see also Adams*, 432 S.C. at 236, 851 S.E.2d at 708.

The present case shares all of these factors. It concerns the lawfulness of government conduct and the continuing expenditure of public funds. A decision here also will have far-reaching consequences for South Carolina residents, as it will determine SLED's authority to collect and retain residents' personal information without legislative authorization. And there is currently no judicial guidance addressing SLED's authority to collect information about people not suspected of criminal activity. Absent judicial guidance, SLED will continue to operate its vehicle surveillance database, without regard to its legality or constitutionality. *See Vicary v. Town of Awendaw*, 425 S.C. 350, 359-60, 822 S.E.2d 600, 604-05 (2018) (finding guidance necessary when government agency planned to engage in challenged act in future); *Baird*, 333 S.C. at 531, 511 S.E.2d at 75 (finding standing in light of "significant interest in ensuring that their county acts within the legal parameters established by the legislature"). Resolving this case also will provide broader guidance to SLED and the legislature about the scope of SLED's statutory authority to adopt new surveillance technologies, such as the facial recognition technology SLED already claims the power to deploy on South Carolina's streets. April 7, 2025 MSJ Hearing Tr. 48.

B. John Sloan has constitutional standing.

Additionally, John Sloan has constitutional standing because he has suffered a particularized injury, caused by SLED, that will be redressed by a favorable decision in this litigation. *See ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). Mr. Sloan is a citizen of South Carolina who owns an automobile and has driven regularly on South Carolina roads for nearly 45 years. *See* Sloan MSJ Decl. ¶ 3; *see also* Compl. ¶¶ 13, 17-18.

Mr. Sloan "drive[s] most days" and "visit[s] other cities." Sloan MSJ Decl. ¶ 3; *see also* Compl. ¶ 18. And Mr. Sloan does not "want to have [his] license plate and precise location information captured by automated license plate reader … cameras and stored in a database operated by … SLED." Sloan MSJ Decl. ¶ 4; *see also* Compl. ¶ 17. Given that SLED currently captures and stores nearly 150 million license plate reads each year in its database, it is a near certainty that an ALPR camera has surveilled Mr. Sloan's vehicle and location and that these cameras will continue to do so in the future. *See* Compl. ¶ 18.[16] Records of Mr. Sloan's whereabouts and movements therefore are stored, or will be stored, in SLED's vehicle surveillance database, and accessible to thousands of persons. Such "collection" and "maintenance in a government database" of "records relating to [Mr. Sloan]" establish cognizable harm. *Clapper*, 785 F.3d at 801; *see also Schuchardt v. President of the United States*, 839 F.3d 336, 348-51 (3d Cir. 2016); *ATC South*, 380 S.C. at 195, 669 S.E.2d at 339 (applying same constitutional standing analysis as federal courts). And that harm will be redressed by a favorable decision in this litigation by ending the unauthorized surveillance.

In the Court below, SLED insisted that the harm caused to Mr. Sloan is not sufficiently particularized because SLED's database includes information about many other motorists too. In other words, SLED contended that its database injures too many people for any individual person to suffer a particularized harm. But courts time and again have rejected the argument that "[h]arm to all … [is] harm to no one." *Hassan v. City of New York*, 804 F.3d 277, 291 (3d Cir. 2015), as amended (Feb. 2, 2016) (finding standing to challenge police surveillance program even though

[16] During discovery, Appellants sought to discover from SLED whether SLED possessed Mr. Sloan's location information in its database. SLED sought protection from discovery on the ground that whether it in fact possessed Mr. Sloan's location information is irrelevant to Mr. Sloan's standing to bring this case, and the Court permitted SLED to withhold the requested information on that basis. *See* Order on Defendants' Motion for Protective Order (Nov. 25, 2024). While Mr. Sloan has public interest and constitutional standing regardless whether he is in the database, insofar as the Court believes this fact essential to standing, it should remand to permit discovery.

"hundreds or thousands (or even millions) of other persons may have suffered the same injury"). For example, in *ACLU v. Clapper*, the Second Circuit determined that plaintiffs who had their telephone metadata collected by the National Security Administration "surely [had] standing to allege injury from the collection, and maintenance in a government database, of records relating to them," even though those records were collected "in bulk on an ongoing basis" about millions of people. *Clapper*, 785 F.3d at 793, 801. Multiple other courts have reached the same conclusion when reviewing challenges to other surveillance programs. *See Schuchardt*, 839 F.3d at 346 (finding standing to challenge a surveillance program that collected "all or substantially all of the e-mail sent by American citizens" because the program was "unmistakably personal in the purported harm" despite being "universal in scope"); *Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193, 210 (4th Cir. 2017) (finding a "concrete and particularized" injury in challenge to government surveillance of communications "despite the fact that [the injury was] suffered by a large number of people") (cleaned up). The fact that SLED is harming countless others, also in particularized ways, by collecting and storing their personal information does not convert Mr. Sloan's personalized grievance into "a generally available grievance about government." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573 (1992).

For these reasons, Plaintiff John Sloan has constitutional standing, in addition to public importance standing.

CONCLUSION

Appellants request that the Court reverse the circuit court's grant of summary judgment and hold that SLED's vehicle surveillance database exceeds SLED's delegated authority or, if it does not, that the broad delegation of unconstrained discretion violates the nondelegation doctrine. Following a ruling for Appellants, the General Assembly then would have an opportunity to evaluate the privacy and law enforcement interests at stake and decide through the legislative

process whether vehicle surveillance databases may be operated in South Carolina, and if so on what terms. In the event the Court holds that SLED's vehicle surveillance database is statutorily authorized and compliant with the nondelegation doctrine, Appellants alternatively request that the Court hold SLED's Policy 13.40 violates the APA.

Respectfully submitted,

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