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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.

**AMICUS CURIAE BRIEF OF THE
INSTITUTE FOR JUSTICE IN SUPPORT
OF SOUTH CAROLINA PUBLIC
INTEREST FOUNDATION and JOHN SLOAN**

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INTEREST OF AMICUS CURIAE

The Institute for Justice (“IJ”) is a non-profit, public-interest law firm committed to defending the essential foundations of a free society by securing greater protection for individual liberty. To that end, IJ challenges unconstitutional government surveillance of people and their property. IJ’s Fourth Amendment practice reflects a particular concern for the rights of innocent people who are subjected to unconstitutional searches. *See, e.g., Snitko v. United States*, 90 F. 4th 1250 (9th Cir. 2024); *Mendenhall v. City & County of Denver*, 2026 WL 125748 (10th Cir. Jan. 16, 2026); *Thomas v. Schaeffer*, 2025 WL 2581840 (M.D. Pa. Sept. 5, 2025); *Rosales v. Lewis*, 2025 WL 3256753 (W.D. La. Oct. 6, 2025); *Rainwaters v. Tenn. Wildlife Res. Agency*, 2024 WL 2078231, at *1 (Tenn. Ct. App. May 9, 2024).

IJ has unique experience litigating cases seeking to regulate the use of automated license plate readers (“ALPRs”) to surveil law-abiding people. IJ is litigating the first such civil case to advance to discovery, *see Schmidt v. City of Norfolk*, 2025 WL 410080, at *1 (E.D. Va. Feb. 5, 2025), and has since filed a second lawsuit against the City of San Jose, California, which operates a network of nearly 500 ALPRs, *see Compl., Tan v. City of San Jose*, No. 5:26-cv-03181 (N.D. Cal. Apr. 15, 2026), <https://bit.ly/43wP03k>. Additionally, the Institute for Justice launched the Plate Privacy Project, a nationwide campaign to bring awareness to how ALPRs are impacting the lives of law-abiding people.¹

Consistent with IJ’s view that the Fourth Amendment is a fundamental limit on discretionary executive power to intrude on the people’s security, IJ has also pushed back

¹ <https://plateprivacy.com/>

against novel claims of executive search authority that lacked statutory authorization. For instance, IJ commented on a notice of proposed rulemaking issued by the Department of Homeland Security that proposed to collect DNA samples from U.S. citizens and retain them indefinitely. *See* Inst. for Just., Comment Letter on Proposed Rule on Collection and Use of Biometrics by U.S. Citizenship and Immigration Services (Jan. 2, 2026), <https://www.regulations.gov/comment/USCIS-2025-0205-6743>. Among other things, IJ argued that collecting the DNA of millions of U.S. citizens for indefinite retention in a government database was a “major question” and that the agency lacked clear statutory authorization to create such a database under the U.S. Supreme Court’s major questions doctrine. *See id.* at 3–10.

STATEMENT OF ISSUES

This brief addresses only the following issue identified in the Initial Brief of Appellants: “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[.]” Initial Brief of Appellants at 1.

STATEMENT OF THE CASE

This brief adopts and relies upon the Appellants’ statement of the case. *Id.* at 5–14.

LEGAL STANDARD

This brief adopts Appellants’ statement of the legal standard. *See id.* at 14–15.

INTRODUCTION

Across the country, legislatures are debating how to regulate ALPRs. Many states that once had just a few ALPRs in crime hotspots now have dense networks that generate vast troves of data, often shared among hundreds or thousands of law enforcement agencies. Hardly any of the data ALPRs generate are relevant to an investigation. Instead, these data reflect law-abiding people driving to their homes, offices, loved ones, places of worship, doctors, and countless other places. Yet police departments have often created ALPR databases without going through the democratic process. That has repeatedly triggered backlash in communities across the country.

The question in this case is not whether ALPRs are good or bad. It is who has the authority to approve the creation of a massive statewide ALPR database: the General Assembly or the South Carolina State Law Enforcement Division (“SLED”)? The answer is clear from South Carolina’s Constitution, which mandates a strict separation of powers and grants the sole authority for policymaking and lawmaking to the General Assembly. Under South Carolina’s separation of powers precedent, for an agency to enact a program of massive significance like SLED’s ALPR database, there must be a clear grant of statutory authority empowering the agency to do so.

This case calls upon this Court to determine if the General Assembly clearly granted SLED the authority to surveil innocent South Carolinians through the use of ALPRs. The most straightforward way to do so is by applying the major questions doctrine.

The U.S. Supreme Court developed the major questions doctrine to prevent agencies from straining statutory text to assume new and consequential powers. Under it, federal courts typically assume that Congress intends to reserve major policy decisions to itself unless it clearly authorizes an agency to act. The doctrine reflects an understanding of congressional intent informed by separation of powers principles. South Carolina law embraces those same principles. The South Carolina Supreme Court has repeatedly held that agencies have no power beyond what the General Assembly grants them. So agencies must point to clear authorization for their actions; they cannot rely on vague or general statutory provisions.

Applying the major questions doctrine makes this an easy case.

Suspicionless surveillance of the entire driving public raises major questions under the Fourth Amendment to the U.S. Constitution and Article I, Section 10 of the South Carolina Constitution. The U.S. Supreme Court has held that surveillance of individuals' long-term movements is a search requiring a warrant. SLED's compilation of more than 150 million datapoints on where people drive raises profound constitutional concerns that are the subject of vigorous debate nationwide and in the General Assembly. To preserve the General Assembly's policymaking prerogative, the Court should require SLED to demonstrate clear authorization to maintain its mass surveillance database.

That it cannot do. SLED and the lower court conceded that SLED has, at best, only *implicit* authorization based on its power to create criminal justice databases and take actions consistent with its mission. But that falls far short of the clear legislative authorization the major question doctrine demands. SLED's statutory authority allows it

to create databases that record information about known or suspected *crimes* and *criminals*, not the public at large. That SLED has never before exercised its authority to create such a broad and indiscriminate surveillance database further signals that it has strayed well beyond its statutory authority. Holding otherwise would greenlight any number of mass surveillance databases, collecting information ranging from call records to financial documents to sensitive personal data bought from private data brokers.

SLED's database may be a useful crimefighting tool—or a serious violation of South Carolinians' civil liberties. Whatever it is, it is fundamentally a question for the General Assembly to deal with in the first instance. "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). Applying the major questions doctrine would give the General Assembly the opportunity to do just that.

Accordingly, the Court should hold that SLED lacks statutory authority to create the ALPR database, vacate the judgment, reverse the denial of the plaintiffs' motion for summary judgment, and remand for further proceedings.

ARGUMENT

I. This Court should apply the major questions doctrine.

In a series of cases, the Supreme Court has developed the major questions doctrine to prevent agencies from vastly expanding their authority beyond what Congress granted. The doctrine reflects an understanding of congressional intent informed by separation of powers concerns. Under it, a federal court may not read broad or vague

statutes to empower agencies to make the types of major policy decisions Congress normally reserves for itself.

South Carolina law reflects the same underlying separation of powers principles that led the U.S. Supreme Court to adopt the major questions doctrine, and the South Carolina Supreme Court has applied something very close to it in cases stretching back nearly a century. To avoid violating South Carolina's separation of powers, any agency action that "affects substantial rights" must not "be derived from mere inference" but instead "be founded upon language in the enabling acts which admits of no other reasonable construction." *Piedmont & N. Ry. Co. v. Scott*, 202 S.C. 207, 24 S.E.2d 353, 360 (1943).

This mirrors the major questions doctrine, which requires federal agencies making claims of sweeping authority to point to "clear congressional authorization" for that power. *West Virginia v. EPA*, 597 U.S. 697, 722-23. A mere "colorable textual basis" does not suffice. *Id.* Because the major questions doctrine was designed to address the same concerns that animate South Carolina's separation of powers precedent, this Court should use the doctrine to resolve this appeal.

A. The major questions doctrine prevents agencies from leveraging vague statutes to expand their authority in ways the legislature did not intend.

The U.S. Supreme Court developed the major questions doctrine to "address[] a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted." *West Virginia* 597 U.S. at 724.

“Such cases have arisen from all corners of the administrative state.” *Id.* at 721. In *Gonzales v. Oregon*, for instance, the Supreme Court refused to read “vague terms” and “ancillary provisions” to authorize the Attorney General to prohibit physician-assisted suicide—a “subject of . . . ‘earnest and profound debate’ across the country.” 546 U.S. 243, 267 (2006). In *Biden v. Nebraska*, it rebuffed the Secretary of Education’s argument that the authority to “waive or modify” statutory provisions carried the implied power to cancel hundreds of billions of dollars in student loans. 600 U.S. 477, 500–06 (2023). And in *Alabama Ass’n of Realtors v. Department of Health & Human Services*, the Court held that broad statutory authority to prevent the spread of disease provided too shaky a foundation to enact an unprecedented eviction moratorium. *See* 594 U.S. 758, 763–65 (2021) (per curiam). The list goes on. *See, e.g., Learning Res., Inc. v. Trump*, 607 U.S. 229, 240–42 (2026) (plurality op.); *West Virginia*, 597 U.S. at 720–24; *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–61 (2000), *superseded by statute on other grounds*.

The common thread running through these cases is “‘reluctan[ce] to read into ambiguous statutory text’ extraordinary delegations of Congress’s powers.” *Learning Res.*, 607 U.S. at 242 (alteration in original) (quoting *West Virginia*, 597 U.S. at 723). The point is not to discourage delegations or agency policymaking generally. *See Nebraska*, 600 U.S. at 515–16, 520 (Barrett, J., concurring). Instead, “[t]he major questions doctrine is a tool for discerning—not departing from—the text’s most natural interpretation.” *Id.* at 508. “The question . . . is not whether something should be done; it is who has the authority to do it.” *Id.* at 501 (maj. op.).

At its most basic level, the doctrine implements the “fundamental canon of statutory interpretation that the words of a statute must be read in their context,” *West Virginia*, 597 U.S. at 721, including “[b]ackground legal conventions,” “common sense,” and “constitutional structure,” *Nebraska*, 600 U.S. at 511–15 (Barrett, J., concurring); *accord Learning Res.*, 607 U.S. at 242–43 (plurality op.). Relevant here, the U.S. Constitution “vests [legislative powers] in Congress” alone, *Learning Res.*, 607 U.S. at 261–62 (Gorsuch, J., concurring), whereas agencies “possess only the authority that Congress has provided” them, *NFIB v. OSHA*, 595 U.S. 109, 117 (2022). Given that context, the Supreme Court “presume[s] that ‘Congress intends to make major policy decisions itself, not leave those decisions to agencies.’” *West Virginia*, 597 U.S. at 723 (citation omitted). That presumption rests on “both separation of powers principles and a practical understanding of legislative intent.” *Id.* The upshot is that agencies claiming unheralded or extravagant power must show “clear congressional authorization,” not just a “colorable textual basis.” *Id.* at 722–23.

No single rubric determines what is a “major question.” But precedent suggests at least three categories of agency action typically qualify. *First*, efforts to sidestep “earnest and profound debate” on politically significant issues. *See West Virginia*, 597 U.S. at 743 (Gorsuch, J., concurring) (first quoting *NFIB*, 595 U.S. at 117, then quoting *Gonzales*, 546 U.S. at 267–68).² *Second*, policies with vast economic consequences. *Id.* at 744 (collecting

² Cf. *Gonzales*, 546 U.S. at 267 (physician-assisted suicide was “the subject of an ‘earnest and profound debate’ across the country”); *Brown & Williamson*, 529 U.S. at 144 (“[O]n several occasions over this period, and after the health consequences of tobacco use and

cases).³ And *third*, intrusions into areas traditionally reserved to the states under longstanding federalism principles. *Id.*⁴

Determining that a case involves a major question is just the first step. The second is figuring out whether Congress authorized the agency to act. If the best reading of the statute is that Congress authorized the agency's action, then a court "must adopt" it "despite the 'majorness' of the question." *Nebraska*, 600 U.S. at 516–17 (Barrett, J., concurring). Anything less, though, tips the scale sharply in the opposite direction. See *West Virginia*, 597 U.S. at 723. So, for instance, a "mismatch[]" between a "broad" claim of power and a "narrow" authorizing statute will not survive review, *Nebraska*, 600 U.S. at 517–18 (Barrett, J., concurring), because legislatures typically do not "hide elephants in mouseholes," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Likewise, an agency will usually fall short when it claims to discover new power in a "long-extant statute" or repudiates its own "longstanding disavowal of authority." *Nebraska*, 600 U.S. at 517, 519 (Barrett, J., concurring). "Another telltale sign that an agency may have transgressed its statutory authority is when it regulates outside its wheelhouse." *Id.* at 518. In short, if an agency wants to claim a major new power, then it "must point to 'clear congressional authorization.'" *West Virginia*, 597 U.S. at 723.

nicotine's pharmacological effects had become well known, Congress considered and rejected bills that would have granted the FDA such jurisdiction.").

³ Cf. *Learning Res.*, 607 U.S. at 246 (trillions of dollars in tariffs); *Nebraska*, 600 U.S. at 501 (\$430 billion in loan obligations of 43 million borrowers).

⁴ *Ala. Ass'n of Realtors*, 594 U.S. at 764 ("The moratorium intrudes into an area that is the particular domain of state law: the landlord-tenant relationship.").

The major questions doctrine is a textualist canon that follows from basic separation of powers principles and reasonable assumptions about legislative intent. Because the Constitution requires that “major policy decisions” be “made by Congress” the Supreme Court as a textual matter has refused to credit extravagant assertions of agency power based on merely plausible readings of broad or ambiguous statutes. *Bureau of Alcohol, Tobacco & Firearms v. FLRA* 464 U.S. 89, 97 (1983) (quoting *Am. Ship Bldg. v. NLRB*, 380 U.S. 300, 318 (1965)). By demanding clear congressional authorization, the major questions doctrine safeguards separation of powers and prevents agencies from exceeding congressionally authorized bounds.

B. South Carolina law reflects the same underlying values that spurred federal development of the major questions doctrine.

Applying the major questions doctrine as a matter of state law would protect the same values reflected in the structure of this state’s government. Like the U.S. Constitution, the South Carolina Constitution mandates that “the legislative, executive, and judicial powers shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any others.” S.C. Const. art. I, § 8. And like the U.S. Congress, “the General Assembly has plenary power over all legislative matters,” for which it carries “the sole prerogative to make policy decisions.” *Hampton v. Haley*, 403 S.C. 395, 403-04, 743 S.E.2d 258, 262 (2013).

Executive agencies, meanwhile, are “creature[s] of statute.” *Brooks v. S.C. State Bd. of Funeral Serv.*, 271 S.C. 457, 461, 247 S.E.2d 820, 822 (1978). They “possess[] only those

powers that are conferred expressly or by reasonable necessary implication, or are merely incidental to the powers expressly granted.” *Id.* Although agencies “may make policy determinations when properly delegated such power by the legislature, absent such a delegation, policymaking is an intrusion upon the legislative power.” *Hampton*, 403 S.C. at 404, 743 S.E.2d at 262. Even then, there are limits to what the General Assembly can “properly delegate[.]” *Id.* Agencies can “fill up the details” to effect a law’s purpose, but even duly enacted laws may not delegate “broad and uncontrolled discretion.” *State v. Brown*, 274 S.C. 592, 595, 266 S.E.2d 415, 416–17 (1980) (citation omitted).

The South Carolina Supreme Court has interpreted delegations of authority to agencies against these principles. “[W]ords in a statute must be construed in context.” *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). Part of that context is “the legislature’s presumed intent to comply with the Separation of Powers Clause.” *Butts v. Mace*, --- S.E.2d ---, 2026 WL 1325050, at *8 (S.C. May 13, 2026). South Carolina courts will not lightly assume that the legislature has given up its “sole prerogative . . . to exercise discretion as to what the law will be.” *Id.* at *5 (quoting *Hampton*, 403 S.C. at 403, 743 S.E.2d at 262). Agencies must point to “language in the enabling acts which admits of no other reasonable construction.” *Piedmont & N. Ry. Co.*, 24 S.E.2d at 360. “Subtle or forced construction of statutory words for the purpose of expanding a statute’s operation is prohibited.” *TNS Mills, Inc. v. S.C. Dep’t of Revenue*, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998).

Although the South Carolina Supreme Court has not expressly adopted the major questions doctrine, its longstanding precedent mirrors it.

In *Piedmont & Northern Railway*, the South Carolina Supreme Court applied a clear statement rule to hold that an agency lacked authority to penalize freight shippers for using inefficient routes. See 24 S.E.2d at 354, 356, 360. Various statutes granted the agency specific authority over “rates, standards, classifications, practices, etc.” *Id.* at 358. And another broadly granted “the general supervision of all railroads and railways.” *Id.* at 359. But none specifically authorized the agency to regulate “the routing of freight.” *Id.* Citing *ICC v. Cincinnati, New Orleans & Texas Pacific Railway Co.*, 167 U.S. 479 (1897) – the first major questions doctrine case⁵ – the South Carolina Supreme Court held that such power to “affect[] substantial rights” could not “be derived from mere inference” but must instead “be founded upon language in the enabling acts which admits of *no other reasonable construction.*” *Piedmont & N. Ry.*, 24 S.E.2d at 360 (emphasis added). Yet the agency had long debated and disclaimed its authority over routes, and “the General Assembly took no action following th[at] determination.” Compare *id.*, with, e.g., *West Virginia*, 597 U.S. at 724, 731 (agency enacted rule that “Congress had conspicuously and repeatedly declined to enact itself” (citation omitted)). As a result, the court refused to let the agency cobble together an amalgam of broad statutory provisions to create that power.

Since then, the South Carolina Supreme Court has consistently refused to read broad or vague statutes to confer significant new powers. In *South Carolina Electric & Gas Co. v. Public Service Commission*, the court held that authority to fix rates did not authorize

⁵ See *Nebraska*, 600 U.S. at 516 n.3 (Barrett, J., concurring); *West Virginia*, 597 U.S. at 740–41 (Gorsuch, J., concurring).

an order to refund \$7 million to a utility's customers. *See* 275 S.C. 487, 488–91, 272 S.E.2d 793, 794–95 (1980). In *Gilstrap v. South Carolina Budget & Control Board*, the board cut agencies' budgets based on their rate of growth, rather than their share of overall appropriations, citing its authority to "take such action as is necessary" to deal with deficits. 310 S.C. 210, 212–13, 423 S.E.2d 101, 102–03 (1992) (citation omitted). But the board had long disclaimed such discretion, the legislature had expressly rejected it, and reading the statute as the board did "would make the Act an unlawful delegation of legislative authority." *Id.* at 214–16, 423 S.E.2d at 104–05. Finally, in *Hampton*, the court held that authority to set employee healthcare contributions did not allow the agency to raise those contributions *after* the General Assembly had fully appropriated the money and directed the board "to 'provide maximum benefit . . . within [the] available resources.'" 403 S.C. at 407, 743 S.E.2d at 264 (ellipsis in original) (quoting S.C. Code § 1-11-710). That interpretation was "guided" by the assumption that the General Assembly did not confer "unbridled power" to the agency in violation of the nondelegation doctrine. *See id.* at 407–09, 743 S.E.2d at 264–65.

These cases steer the same analytic course as the Supreme Court's major questions doctrine cases. In each, an agency claimed new and significant authority. In each, the agency's statutory interpretation was not the best, even if it was plausible. And in each, the South Carolina Supreme Court relied not only on its best interpretation of the statute, but also on the presumption that the legislature would not lightly delegate away its constitutional prerogative. *Cf. Gilstrap*, 310 S.C. at 217, 423 S.E.2d at 105 ("The clear statutory language, evidence of legislative intent, longstanding administrative

interpretation, and required constitutional construction of the Act leave no doubt . . .”). In other words, “both separation of powers principles and a practical understanding of legislative intent ma[d]e [the court] ‘reluctant to read into ambiguous statutory text’ the delegation claimed to be lurking there.” *West Virginia*, 597 U.S. at 723 (citation omitted). These cases effectively applied the major questions doctrine.

The major questions doctrine is therefore fully consistent with South Carolina Supreme Court precedent and this state’s strict separation of powers. By applying the doctrine, this Court would join many other state courts, including those of its closest neighbor. See *N.C. Dep’t of Revenue v. Phillip Morris USA, Inc.*, 388 N.C. 181, 194, 919 S.E.2d 175, 184 (2025); see also *Paxton v. Annunciation House, Inc.*, 719 S.W.3d 555, 577 (Tex. 2025); *Associated Builders & Contractors of Mich. v. Dep’t of Tech., Mgmt., & Budget*, 350 Mich. App. 168, 184, 31 N.W.3d 790, 801 (2024); *Roberts v. State*, 253 Ariz. 259, 270, 512 P.3d 1007, 1018 (2022); *Wis. Legislature v. Palm*, 2020 WI 42, ¶ 52, 391 Wis. 2d 497, 530, 942 N.W.2d 900, 917 (2020); *In re Plan for Abolition of Council on Affordable Hous.*, 214 N.J. 444, 469, 70 A.3d 559, 574 (2013); *State Dep’t of Highways v. Denver & Rio Grande W. R.R. Co.*, 789 P.2d 1088, 1093 (Colo. 1990); *Boreali v. Axelrod*, 130 A.D.2d 107, 114, 518 N.Y.S.2d 440, 444, *aff’d*, 71 N.Y.2d 1, 517 N.E.2d 1350 (1987); *Pasco Cnty. Sch. Bd. v. Fla. Pub. Emps. Rels. Comm’n*, 353 So. 2d 108, 116 (Fla. Dist. Ct. App. 1977).

II. Applying the major questions doctrine, SLED lacks clear statutory authorization to create a statewide mass surveillance database.

The decision to create a statewide database cataloguing hundreds of millions of datapoints about drivers’ movements across the state is a major question. The U.S.

Supreme Court has held that the Fourth Amendment prevents police from compiling long-term records of people's movements without a warrant. SLED's mass surveillance database at the very least raises serious Fourth Amendment questions—questions that are being debated across the country *and in the General Assembly itself*. Yet the lower court stretched the statutory text to allow SLED to unilaterally “resolve” this “‘earnest and profound debate.’” *Gonzales*, 546 U.S. at 267. Using the major questions doctrine, resolution of this appeal is straightforward: SLED lacks clear statutory authority for its mass ALPR surveillance database.

A. SLED's creation of a statewide ALPR database poses major constitutional questions.

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV. “When an individual ‘seeks to preserve something as private,’ and his expectation of privacy is ‘one that society is prepared to recognize as reasonable,’” then “official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause.” *Carpenter v. United States*, 585 U.S. 296, 304 (2018) (citation omitted). Because the Fourth Amendment “protects people, not places,” these protections can apply “even in an area accessible to the public.” *Katz v. United States*, 389 U.S. 347, 351 (1967). That honors the “central aim of the Framers . . . ‘to place obstacles in the way of a too permeating police surveillance.’” *Carpenter*, 585 U.S. at 305 (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)). Consistent with that aim, the U.S. Supreme Court has sought to preserve the “degree of privacy against government that existed

when the Fourth Amendment was adopted.” *Id.* (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)). South Carolina’s Constitution is even more “explicit”: it creates a “constitutional right to privacy” to “take care of the invasion of privacy through modern electronic devices.” *See State v. Forrester*, 343 S.C. 637, 644, 647, 541 S.E.2d 837, 840–42 (2001); *see* S.C. Const. art. I, § 10.

“Founding-era understandings” have led the U.S. Supreme Court to conclude that police violate the Fourth Amendment when they create records of people’s past movements without a warrant. *See Carpenter*, 585 U.S. at 305, 310. In *United States v. Jones*, the Court held that tracking a car with a GPS device for 28 days was a search. *See* 565 U.S. 400, 401, 403–04 (2012). The majority opinion so held because attaching the device was a trespass. *See id.* at 404–05. But five concurring justices also endorsed a privacy-based approach to long-term location tracking. *See Carpenter*, 585 U.S. at 307, 310 (discussing concurring opinions in *Jones*). Four feared that, under the majority’s approach, the Fourth Amendment would have nothing to say about non-trespassory tracking. *See Jones*, 565 U.S. at 425–26 (Alito, J., concurring). Rather than focus on the trespass, these justices homed in on how electronic tracking upset traditional privacy expectations. *See id.* at 430–31. They reasoned that technology had eroded the practical constraints that had historically cabined “long-term monitoring” to “investigation[s] of unusual importance.” *Id.* at 429. Justice Sotomayor, meanwhile, explained that in a different case she would reconsider “even short-term monitoring” that allowed police to track people “in the absence of any oversight from a coordinate branch.” *Id.* at 415–16 (Sotomayor, J., concurring).

The upshot of the *Jones* concurrences, *Carpenter* later explained, is that “individuals have a reasonable expectation of privacy in the whole of their physical movements.” *Carpenter*, 585 U.S. at 310. In *Carpenter*, prosecutors subpoenaed suspects’ cell-site location information (“CSLI”). *Id.* at 301–02. Even over a mere seven days, *id.* at 310 n.3, those “time-stamped data provide[] an intimate window into a person’s life,” *id.* at 311. “Prior to the digital age,” people reasonably expected that such tracking was effectively impossible for more than “a brief stretch.” *Id.* at 310. But technology has made long-term tracking possible “[w]ith just the click of a button . . . at practically no expense.” *Id.* at 311. “[T]he retrospective quality of” CSLI made that capability more alarming because it meant that “this newfound tracking capacity runs against everyone,” not just those suspected of crimes. *Id.* at 312. Accordingly, by collecting the CSLI, the government “invaded [the defendant’s] reasonable expectation of privacy in the whole of his movements.” *Id.* at 313.

The Supreme Court recently extended *Carpenter*’s reasoning in *Chatrie v. United States*, where it held that law enforcement’s accessing of a database that allowed the officers to “chart the movements of many individuals” was a “search” under the Fourth Amendment. 2026 WL 1855568 at * 11 (U.S. June 29, 2026). This was so, the Supreme Court held, even though that accessing resulted in only the revealing of Chatrie’s “short-term location information.” *Id.* at 12. As the Court held, “even short-term monitoring of a person’s physical movements can provide a wealth of detail about [his] familial, political, professional, religious, and sexual associations.” *Id.* (citing *Jones*, 565 U.S. at 415 (opinion of Sotomayor, J.))

SLED's surveillance trove shares the features *Carpenter* and *Chatrie* highlighted.

Like CSLI and location history data, ALPRs can reveal intimate information through pattern-based deductions or by placing people at sensitive locations. ALPRs have proliferated across the country in recent years, and they collect astounding amounts of information. The leading ALPR vendor boasts that its national database amasses over 20 billion datapoints every month.⁶ SLED's database mirrors the national trend, growing from 26 million datapoints to 150 million by 2025. *See* Initial Br. of Appellants at 8. These data are inherently sensitive. *Cf. Jones*, 565 U.S. at 417 n.* (Sotomayor, J., concurring) (“A car’s movements . . . are its owner’s movements.”). As the en banc Fourth Circuit explained, “people’s movements are so unique and habitual” that “just a few points of their location history” are sufficient to uniquely identify them. *Leaders of a Beautiful Struggle v. Balt. Police Dep’t*, 2 F.4th 330, 343 (2021). That means “the insight provided by [locational] data into individuals’ private lives is profound,” *id.* at 344 n.11 (citation omitted), and “prolonged tracking . . . can reveal intimate details through habits and patterns,” *id.* at 341. In some cities, the camera networks are so dense that they effectively act as checkpoints around sensitive locations (like healthcare facilities) and enable police to reconstruct virtually every driving route.⁷ Police are making ALPR databases even

⁶ *See* Flock Safety, *National LPR Network*, <https://bit.ly/3RQGPMB>.

⁷ *See, e.g.*, Compl. pp. 12–17 (¶¶ 48–49, 52–54 & figs. 4–7), *Tan v. City of San Jose*, No. 5:26-cv-03181 (N.D. Cal. Apr. 15, 2026), <https://bit.ly/43wP03k>.

more powerful and revealing by integrating them with other police data systems, third-party information sources, and data from the dark web.⁸

“With just the click of a button,” myriad government employees “can access” this “deep repository of historical location information at practically no expense.” *Carpenter*, 585 U.S. at 311; *see* Initial Br. of Appellants at 9. That “lead[s] to more surveillance and less accountability.” *United States v. Chatrue*, 136 F.4th 100, 124 (4th Cir. 2025) (en banc) (Wynn, J., concurring), *rev’d*, 2026 WL 1855568 (U.S. June 29, 2026). The thousands of government employees with access search SLED’s database 100 times per day on average. *See* Initial Br. of Appellants at 9. None of those searches require a warrant or even individualized suspicion. *See id.* at 9–10. SLED has apparently provided zero detail on how – or even *if* – it audits those searches after the fact. *See id.* at 10–11. Meanwhile, “this newfound tracking capacity runs against everyone,” *Carpenter*, 585 U.S. at 312, not just those police suspect of a crime, *see* Initial Br. of Appellant at 8 (“99.8% of all location records” are not relevant to any investigation). And “history discloses that the chief vice the framers sought to prevent was suspicionless searches and seizures.” Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. Mem. L. Rev. 483, 489–90 (1995); *see Payton v. New York*, 445 U.S. 573, 583–84 & n.21 (1980).

Suspicionless mass surveillance has real consequences. “Awareness that the government may be watching chills associational and expressive freedoms.” *Jones*, 565

⁸ *See, e.g.,* Joseph Cox, *License Plate Reader Company Flock Is Building a Massive People Lookup Tool, Leak Shows*, 404 Media (May 14, 2025), <https://bit.ly/3RskHlv>.

U.S. at 416 (Sotomayor, J., concurring). Across the country, countless stories of the dangers of unregulated ALPR surveillance have surfaced. Officers have repeatedly abused ALPR databases to stalk romantic interests.⁹ Departments have pursued political opponents and tracked protestors.¹⁰ And given that the overwhelming majority of the data concerns people not suspected of any crime, even relatively small rates of technological or human error can translate into many wrongful detentions or investigations.¹¹ Founding-era sources well document that the Framers feared precisely these types of second-order consequences. *See, e.g.,* Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1195, 1316–18 (2016) (leading eighteenth-century commentators condemned general warrants because they allowed government officials to indulge personal “curiosity,” “prevent political opposition,” “cast aspersions” on innocent people, and “embarrass” people).

The Court need not find, though, that SLED’s database violates the Fourth Amendment and Article I, Section 10. Instead, the “serious concerns” it raises are sufficient to trigger the major questions doctrine, particularly given that this state’s right

⁹ *See generally* Christopher Ingraham, *Police Have Reportedly Used License Plate Readers to Stalk Romantic Interests at Least 20 Times in Recent Years*, Institute for Justice (Apr. 27, 2026), <https://bit.ly/4u1bggq>.

¹⁰ *See, e.g.,* Dave Maass & Rindala Alajaji, *How Cops Are Using Flock Safety’s ALPR Network to Surveil Protestors and Activists*, Elec. Frontier Found. (Nov. 20, 2025), <https://bit.ly/4tZ9AEh>; Sam Zeff, *Lenexa Police Investigated Author of Column Criticizing the Department. He’s ‘pissed off’*, KCUR (Feb. 2, 2026), <https://bit.ly/4ffN5Y1>.

¹¹ *See, e.g.,* Spencer Soicher, *Not a One-Off: More Coloradans Stopped by Police After Data Errors Triggered Flock Alerts*, 9News (Apr. 30, 2026), <https://bit.ly/4wSdD81>; Kurt Knutsson, *How Surveillance Tech Led Police to Accuse the Wrong Person*, Fox News (Mar. 18, 2026), <https://bit.ly/3RSI0wa>; Nicole Einbinder, *Flock Flocked Up*, Business Insider (Mar. 9, 2026), <https://bit.ly/4wNLUW2>.

to privacy “favors . . . offering a higher level of privacy protection than the Fourth Amendment.” *State v. Forrester*, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001); cf. *Mexican Gulf Fishing Co. v. U.S. Dep’t of Com.*, 60 F.4th 956, 970–71, 973 (5th Cir. 2023) (agency violated Administrative Procedure Act by not responding to public comments raising serious Fourth Amendment concerns). All the more so because ALPR surveillance “has been the subject of an ‘earnest and profound debate’ across the country.” *Gonzales*, 546 U.S. at 267. A bipartisan federal bill would have banned them.¹² Some states, meanwhile, have sharply limited how long police can retain ALPR data. *See, e.g.*, N.H. Rev. Stat. § 261:75-b(VIII) (three minutes if a plate scan does not trigger an alert). Or required at least some individualized suspicion. *See, e.g.*, Va. Code § 2.2-5517(D)(i); Me. Rev. Stat. tit. 29-a, § 2117-A(3)(C), (4)–(5). Or even required a warrant. *See* Minn. Stat. § 13.824 subd. 2(d). In the General Assembly, there is an ongoing debate over what this state should do. *See* H. 4675, 126th Gen. Assemb., Reg. Sess. (S.C. 2025) (requiring ALPR data to be stored within the state, banning certain vehicle identification technologies, requiring deletion of ALPR data after 21 days, and generally requiring a warrant to access ALPR data, subject to specified exceptions).

SLED’s ALPR database raises serious Fourth Amendment concerns. Those concerns should be left to the General Assembly, which can “draw detailed lines” and “balance privacy and public safety in a comprehensive way.” *See Jones*, 565 U.S. at 429–30 (Alito, J., concurring). To prevent SLED from unilaterally “end[ing] an ‘earnest and

¹² *See* Christie Smythe, *Legislation Killed That Would Have Effectively Blocked Police LPR, Including Flock, IPVM* (May 28, 2026), <https://bit.ly/4nWzdnT>.

profound debate” over ALPR surveillance, the Court should apply the major questions doctrine. *See West Virginia*, 597 U.S. at 743 (Gorsuch, J., concurring) (citation omitted).

B. SLED lacks clear statutory authority to set up a statewide surveillance database tracking the movements of millions of innocent people.

Even if the statutes the lower court cited could reasonably be read to authorize SLED’s ALPR database, the major questions doctrine makes this an easy case. “Extraordinary grants of regulatory authority are rarely accomplished through modest words, vague terms, or subtle devices.” *West Virginia*, 597 U.S. at 723 (cleaned up). SLED must therefore identify a statute that grants authority to create the database “expressly or by reasonably *necessary* implication,” rather than through “mere inference.” *Piedmont & N. Ry.*, 24 S.E.2d at 360. Its textual argument must be “more than . . . merely plausible,” *West Virginia*, 597 U.S. at 723; it must be “founded upon language in the enabling acts which admits of *no other reasonable construction*,” *Piedmont & N. Ry.*, 24 S.E.2d at 360 (emphasis added). “Any reasonable doubt . . . should ordinarily be resolved against its exercise of the power.” *Id.*

Yet the trial court found no clear or explicit authorization. Instead, it held that three statutory provisions allow SLED to create and maintain the database. S.J. Order at 15 (citing S.C. Code § 23-3-15(A)(4), (9); S.C. Code § 23-3-110). According to the trial court, these provisions taken together authorize SLED to (i) “operat[e] and maint[ain] . . . a central, statewide criminal justice data base and data communication system,” S.C. Code § 23-3-15(A)(4); *see id.* § 23-3-110, and (ii) engage in “other activities not inconsistent with [its] mission . . . or otherwise proscribed by law,” *id.* § 23-3-15(A)(9). By SLED’s and the

trial court's own concession, none of these provisions survive the major questions doctrine gauntlet because, at best, they only "implicitly authorize [SLED's] operation of the ALPR database." S.J. Order at 8. And under the major questions doctrine "implicit" authorization is not enough. *Cf., e.g., Gonzales*, 546 U.S. at 267 ("The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the CSA's registration provision is not sustainable.").

As the Appellants well explain, the *best* reading of these provisions is that they do not authorize SLED's mass surveillance database. *See* Initial Br. of Appellants at 18. The first two authorize SLED to collect "*criminal* information" or establish a "*criminal justice* data base." *See* S.C. Code §§ 23-3-15(A)(4), 23-3-110 (emphases added). The adjectives "criminal" and "criminal justice" modify *and limit* the "information" and "databases" that SLED can gather and maintain, specifically to information and databases about known or suspected *crimes* or *criminals*. *See id.* at 18–23; *cf. Hughes v. W. Carolina Reg'l Sewer Auth.*, 386 S.C. 641, 648, 689 S.E.2d 638, 642 (Ct. App. 2010) ("[T]he addition of the adjective . . . qualifies the term to a narrower class . . ."). The lower court ignored these key qualifiers and instead interpreted the statute to allow SLED to collect and store information about the entire driving population of South Carolina—the vast majority of which is not (and never will be) suspected of wrongdoing. That reads the adjectives "criminal" and "criminal justice" out of the relevant statutes and broadens SLED's authority. *Cf. NFIB*, 595 U.S. at 117 ("The Act empowers the Secretary to set *workplace* safety standards, not broad public health measures."). SLED's claim of authority fails under ordinary

principles of statutory interpretation, and the major questions doctrine reinforces that conclusion. *See Nebraska*, 600 U.S. at 506 n.9.

Even worse, the trial court's interpretation of the third provision allows SLED to use its mission statement as a bootstrap to expand its own power. In reports to the General Assembly in 1993 and 1999, SLED defined its mission (very broadly) as providing "manpower" and "technical" assistance to law enforcement. S.J. Order at 10. So when the General Assembly enacted and amended the statute in 1993 and 2003, the trial court reasoned, it must have intended "to provide SLED with broad authority to take actions consistent with SLED's mission." *Id.* at 10–11. That is quite a leap. Legislatures do not "hide elephants in mouseholes." *Whitman*, 531 U.S. at 468. Just because the General Assembly *possibly* was aware of SLED's mission, it does not follow that the General Assembly understood that SLED would assert the power to create a mass surveillance database decades later. *Cf. West Virginia*, 597 U.S. at 724 (rejecting agency's argument that it "discover[ed] in a long-extant statute an unheralded power" (citation omitted)). That reasoning makes the "enabling legislation" an "open book to which the agency [may] add pages and change the plot line." *Id.* at 723 (alteration in original) (citation omitted).

Beyond the statutory text, "[i]t is telling that," prior to the ALPR database, SLED "has never before [creat]ed a broad" surveillance database "of this kind." *NFIB*, 595 U.S. at 120; *accord Piedmont & N. Ry.*, 24 S.E.2d at 360 (noting "[t]he fact that in over fifty years of railroad regulation no such practice as that imposed in the order involved in this appeal . . . has prevailed in South Carolina"). As the Appellants explain, all of SLED's previous data collection efforts concentrated on known *crimes* and *criminals*, consistent

with the statutory text. *See* Initial Br. of Appellants at 19–20. Far from collecting broad swaths of information about the entire driving public, SLED has focused largely on creating databases of *criminal* history information. *See id.* at 19. The General Assembly, meanwhile, has sharply limited SLED’s authority to retain information about people not suspected or, in some cases, *not convicted* of crimes. *See id.* at 19–20. So SLED is not simply creating a new database resembling its existing ones. It is asserting *new* authority to collect troves of information about the “public . . . more generally” that is “untethered” to SLED’s traditional ambit of “criminal” and “criminal justice” information. *See NFIB*, 595 U.S. at 118–20. SLED’s “established practice . . . shed[s] light on the extent of power conveyed by [the] general statutory language.” *West Virginia*, 597 U.S. at 725–26; *accord Piedmont & N. Ry.*, 24 S.E.2d at 360 (absence of similar regulation “is a factor of much, though not controlling weight”).

Accepting the trial court’s reasoning would also have far-reaching consequences. *Cf. Gonzales*, 546 U.S. at 268 (noting that “the Government’s theory” would give the Attorney General broad authority to regulate the practice of medicine). For instance, SLED could subpoena every cellphone service provider to compile a database of every number every one of their South Carolina customers dialed, on the rationale that a tiny fraction of the data might be useful in investigations. *See, e.g., State v. Brayboy*, 2026 WL 915621, at *3 n.4 (S.C. Ct. App. Apr. 1, 2026) (unpublished). Or subpoena financial businesses to create vast databases of individuals’ transactions. *Cf. United States v. Escobedo*, 2019 WL 6493943, at *1 (D. Mont. Dec. 3, 2019) (explaining that Arizona has long maintained a database of transactions at money services businesses). Or simply buy and

compile deeply revealing and personal information from private data brokers. *See, e.g.,* Barry Friedman & Danielle Keats Citron, *Indiscriminate Data Surveillance*, 110 Va. L. Rev. 1351, 1363–66 (2024) (detailing the information data brokers sell to government entities, including demographic information, location data, and even biometric information). The potential consequences of ruling for SLED “makes the oblique form of the claimed delegation all the more suspect.” *Gonzales*, 546 U.S. at 267.

The lower court brushed away these concerns and focused on how SLED claims to use the ALPR database, rather than “the information contained in” it. S.J. Order at 13. But the major questions doctrine is fundamentally about the distribution and delegation of government power. *See Nebraska*, 600 U.S. at 501. Simply accepting an agency’s reassurances about how it currently uses its newfound power and assuming it will “exercise sound judgement and good faith” elides the key question. *S.C. State Highway Dep’t v. Harbin*, 226 S.C. 585, 596, 86 S.E.2d 466, 471 (1955) (citation omitted). That question is whether the legislature really granted the agency the broad power it claims. And to figure out the answer to that question, both the U.S. and South Carolina Supreme Courts have considered *what else* the agency could do with its newfound power. *Compare Gonzales*, 546 U.S. at 268 (noting that Attorney General’s argument would grant broad authority to regulate how any drug is prescribed), *with Harbin*, 226 S.C. at 595–96, 86 S.E.2d at 471 (“[C]ourts . . . should take into consideration the things which the act affirmatively permits, and not what action an administrative officer may or may not take.” (citation omitted)). The trial court was wrong to ignore the upshot of its decision.

The extent to which law-abiding South Carolina drivers should be surveilled, tracked, or otherwise spied on by their government is an area of “earnest and profound debate.” *Gonzales*, 546 U.S. at 267. SLED’s claim that it was granted the authority to unilaterally decide that issue rests on catch-all provisions and statutory language SLED previously invoked to collect data only on those suspected of crimes. In accepting SLED’s arguments, the lower court ran afoul of the major questions doctrine. This Court should not allow SLED to end the debate over mass surveillance, and instead return the issue to “the people, through their elected representatives in the General Assembly.” *Decker v. Bishop of Charleston*, 247 S.C. 317, 325, 147 S.E.2d 264, 268 (1966) (quoting *Rogers v. Florence Printing Co.*, 233 S.C. 567, 574, 106 S.E.2d 258, 262 (1958)).

CONCLUSION

This Court should apply the major questions doctrine to hold that SLED lacks statutory authorization to create a statewide ALPR surveillance database. The judgment below should be vacated, the denial of Plaintiffs’ summary judgment motion reversed, and the case remanded for entry of declaratory and injunctive relief.

Respectfully submitted,

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July 1, 2026

Charleston, South Carolina

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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.

PROOF OF SERVICE

This is to certify that I have this day served counsel in the above-captioned matter with a copy of the **Motion for Leave to File Brief of Institute for Justice as *Amicus Curiae* in Support of Plaintiffs-Appellants and *Amicus Curiae* Brief of the Institute for Justice in Support of South Carolina Public Interest Foundation and John Sloan** via electronic mail only, addressed as follows:

fred.hanna@smithrobinsonlaw.com
austin.reed@smithrobinsonlaw.com
murrell@smithrobinsonlaw.com
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Respectfully submitted,

s/E. Brandon Gaskins

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July 1, 2026

VIA E-FILING

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211
ctappfilings@mvalaw.com

Re: South Carolina Public Interest Foundation and John Sloan, individually and on behalf of all others similarly situated vs. South Carolina State Law Enforcement Division and Mark Keel, in his official capacity as Chief of the South Carolina State Law Enforcement Division
Civil Action No.: 2023-CP-40-01850
Appellate Case No.: 2025-002437

Dear Ms. Kitchings,

With regard to the above-referenced matter, please accept the following for filing:

- Motion for Leave to File Brief of Institute for Justice as *Amicus Curiae* in Support of Plaintiffs-Appellants;
- *Amicus Curiae* Brief of the Institute for Justice in Support of South Carolina Public Interest Foundation and John Sloan; and
- Proof of Service.

The required filing fee in the amount of \$50.00 for the motion is being mailed to the Court under separate cover.

By copy of this letter, I am serving all counsel in the above matter with a copy of the above. Thank you for your assistance in this matter. If you should have any questions or concerns, please feel free to contact me.

Sincerely,



E. Brandon Gaskins

EBG/lp

Enclosures: As Stated.

cc:

VIA EMAIL ONLY

James G. Carpenter, Esq.

Jeremy Peterman, Esq.

Alexandra Elysse Menegakis, Esq.

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Barry Friedman, Esq.

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