THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC 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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INTRODUCTION

The parties present two starkly competing views of the surveillance power the General Assembly has afforded to SLED. On Appellants' view, the General Assembly authorized SLED to collect and store personal information *only about people connected to crimes* and did not permit SLED to maintain a vehicle surveillance database tracking vehicles unconnected to crime. On SLED's alternative view, it may create a database with information tracking the daily lives of all South Carolinians, *with no connection to criminal activity whatsoever*, based on the theoretical possibility that collected information could be useful for future public-safety related purposes. SLED's view of its power violates the statutory scheme the General Assembly adopted, the nondelegation doctrine, and the Administrative Procedures Act (APA).

In comparing these contrasting views, most telling are the questions SLED does not and cannot answer. In insisting it can collect information on anyone, even if they are not suspected of any criminal offense, SLED cannot explain why the General Assembly required SLED to "*destroy*" information about people whose criminal charges are dropped, and consistently and repeatedly has prohibited SLED—when authorizing DNA, sex offender, and gang databases—from maintaining information on people unconnected to crimes. It would make no sense to ban SLED from holding all this other information, which could be potentially useful in just the way Automated License Plate Reader (ALPR) information could be, if the General Assembly truly intended to give SLED wide-ranging authority to collect and hold a swath of personal information on people suspected of no criminality whatsoever. The General Assembly did no such incomprehensible thing. SLED's authorizing statutes mean what they say: SLED may collect and maintain only "criminal information"—that is, information about people connected to crimes—not noncriminal information about everyone else.

As to the nondelegation doctrine, SLED similarly dodges the dispositive question. The nondelegation doctrine prohibits the General Assembly from delegating unfettered discretion to agencies by requiring all delegations to include an "intelligible principle" to guide agency discretion. To satisfy the nondelegation doctrine, SLED therefore must identify a principle that guides and cabins its claimed sweeping authority to maintain personal information on people unsuspected of crimes. If tracking drivers' movements is within SLED's authority, why may SLED not also track people with facial recognition, maintain a vaccine database, or collect virtually any information about anyone that one day could theoretically be used to investigate an unknown future offense? SLED does not even try to respond to these questions, saying whether it may "engage in mass surveillance" and "collect and retain boundless information on those not suspected of crimes" are "hypotheticals" for another day. Respondents' Answering Brief ("AB") 12. In the context of the nondelegation doctrine, that non-answer does not work. The nondelegation doctrine requires that the General Assembly supply an intelligible principle limiting agency discretion *at the time the statute is enacted*. *See S.C. State Highway Dep't v. Harbin*, 226 S.C. 585, 594-95, 86 S.E.2d 466, 470 (1955). SLED's inability to identify such a principle means that if (as SLED argues) SLED's vehicle surveillance database is authorized by existing statutes, then those statutes violate the nondelegation doctrine.

And as to the APA, SLED fails to explain how the policy governing its vehicle surveillance database does not directly affect every person driving past ALPRs on South Carolina roads, thereby triggering the APA's notice-and-comment requirement. SLED claims the APA does not apply because the policy is directed only to SLED personnel and SLED may change it at any time. But the APA does not permit an agency to circumvent its notice-and-comment obligations with such arguments.

Lacking answers to these critical legal questions, SLED turns to what ultimately are irrelevant factual assertions. SLED says it has never abused the database and that it maintains adequate safeguards to ensure proper use. But those arguments cannot make up for the lack of lawful statutory authority here. In any event, the claims are overstated. SLED aggressively shields the contents and use of its database from public scrutiny, making it difficult for any misuse to be detected. *E.g.*, AB9 (describing SLED's efforts to prevent discovery concerning contents of database). SLED has provided no evidence showing the frequency or rigor of its internal audits. AB6. SLED does not dispute that ALPR databases can be abused. Appellants' Opening Brief ("OB") 11-12; *see also* Seth Taylor, *2 Upstate officers fired after improper use of license plate readers*, Post and Courier, July 14, 2026, http://postandcourier.com/greenville/news/greer-police-officers-fired-license-readers/article_80f2d985-ad5d-449f-b6d6-67449cf72179.html (describing abuse of ALPR database by two Greer, South Carolina police officers since SLED filed its brief). And SLED's claims about safeguards are meaningless given that SLED claims it may abandon any of the purported safeguards at any time without notice. *See* AB29 (asserting "SLED remains free to revise or depart from the Policy" governing use of its database).

Ultimately, this case is not about whether SLED is using its database responsibly, whether ALPRs are good or bad, or even whether South Carolina can have a vehicle surveillance database at all (which, if properly authorized, and not otherwise in violation of the state and federal constitutions, it could). It is about whether the General Assembly has made that weighty decision as *it* must, and, if so, has done so in a constitutional manner. Because the General Assembly has not yet lawfully authorized SLED's database, the Court should reverse and hold SLED may not maintain a vehicle surveillance database on people unsuspected of crimes until the General

Assembly lawfully authorizes it to do so. In the alternative, this Court should hold that the delegation is unconstitutional, and that SLED's vehicle surveillance policy violates the APA.

ARGUMENT

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

A. The General Assembly afforded SLED authority to maintain sensitive information only about people connected to crimes.

As the Opening Brief explained, SLED's authorizing statutes impose a clear, sensible, and consistent limit on SLED's database authority—one that reflects the foundational principle that the government should not snoop into citizens' personal lives without suspicion. The General Assembly afforded SLED broad authority to collect and maintain personal information on people *connected to crimes*, but it denied SLED such authority with respect to people unconnected to crimes. OB17-21.

SLED does not dispute the key features of the statutory scheme that create this dichotomy. SLED does not dispute that when the General Assembly expressly addressed SLED's database authority, it afforded SLED authority to create only "criminal" and "criminal justice" databases, and it further does not dispute that the plain meanings of those words require a person be connected to crime. OB18; AB17-20. Nor does SLED dispute that *every single time* the General Assembly legislated on SLED's database power it included specific provisions clarifying that SLED's authority did not extend to retaining information on people unconnected to crimes—something it would not have done had it granted SLED broad discretion to store information about people unconnected to crimes. OB19-21 (discussing S.C. Code Ann. § 17-1-40 (1976); S.C. Code Ann. § 23-3-660 (DNA); S.C. Code Ann. §§ 23-3-430(E), -437 (sex offender); S.C. Code Ann. §§ 16-8-230, -330(D) (gang); S.C. Code Ann. Regs. 73-540(3)); AB17. That should be the end of the matter. When the statutory text reveals the legislature's clear intent, the Court may not override it

with a "subtle or forced construction." *Sloan v. Hardee*, 371 S.C. 495, 499, 640 S.E.2d 457, 459 (2007); *Ga.-Carolina Bail Bonds, Inc. v. Cnty. of Aiken*, 354 S.C. 18, 25, 579 S.E.2d 334, 337 (Ct. App. 2003).

B. SLED's arguments for broader authority distort the statutory text.

In arguing that the General Assembly granted SLED broad discretion to create a surveillance database in which 99.8% of the observations have no connection to criminal activity, SLED contorts the plain statutory text and upends the normal rules of statutory construction. Despite the General Assembly saying over and over that SLED may not maintain sensitive information on people unconnected to crimes, SLED asserts that the General Assembly did not actually care *whom* SLED collects information about. Rather, SLED says, the General Assembly was concerned with only how SLED *uses* that information—so long as SLED uses the information it collects for public-safety related purposes, it may collect and store *any* information on *anyone*. AB19. That's quite the slalom. Unsurprisingly, SLED's arguments do not support the sweeping authority it claims to establish such a surveillance state.

1. SLED's authority to create "criminal" databases does not authorize storing sensitive information about people unconnected to crimes.

SLED first attempts to turn the plain meaning of the word "criminal" on its head. SLED contends the provisions authorizing a "statewide *criminal* justice data base and data communication system," S.C. Code § 23-3-15(A)(4) (emphasis added), and a "statewide *criminal* information and communication system," *id.* § 23-3-110 (emphasis added), actually authorize storing information about people "unconnected to criminal activity," AB18-19.

The criminal database provisions mean what they say. A "criminal information … system" means a system containing information about crimes or people connected to crimes, and a "criminal justice data base" means a database containing information about people accused of

having committed crimes. Indeed, SLED does not dispute the premises of this interpretation. It does not dispute that adjectives, like criminal and criminal justice, modify the nouns that follow. *See* OB18 (citing *Hughes v. W. Carolina Reg'l Sewer Auth.*, 386 S.C. 641, 648, 689 S.E.2d 638, 642 (Ct. App. 2010)); *see also Nielsen v. Preap*, 586 U.S. 392, 406 (2019) ("no one can deny that the adjectival clauses modify … the noun"). Nor does SLED dispute that "criminal" means "[s]omeone who is involved in illegal activities" or that "criminal justice" refers to "those who are accused of having committed crimes." *Criminal*, Black's Law Dictionary (12th ed. 2024); *Criminal Justice*, Black's Law Dictionary (12th ed. 2024).

To get around this plain meaning, SLED argues that even if the database may contain only criminal information, this does not require that information be "*presently* 'criminal information.'" AB19. In other words, according to SLED, information can still be "criminal information" if it is not criminal now, but the information might be useful for a currently non-existent but theoretical future investigation. That cannot possibly be correct. *See Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342-43, 713 S.E.2d 278, 283 (2011) ("Courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the Legislature[.]"); *Hardee*, 371 S.C. at 499, 640 S.E.2d at 459 ("Words must be given their plain and ordinary meaning without resort to subtle or forced construction to … expand the statute's operation."). Inherent in the "criminal information" requirement is that the information have a known connection to crime *when it is collected and stored*, not at some future time that may never come to pass. Just as a "professional baseball player database" refers to information about professional baseball players and not high schoolers who might one day reach the big leagues, a criminal information database refers to information about people actually connected to crime at the time it is collected and stored, not information that might hypothetically be relevant to some future

investigation. Had the General Assembly authorized SLED to collect any information that could theoretically be useful to a future investigation, it would have said so. Instead, the General Assembly consistently and repeatedly denied SLED authority to maintain information about people unconnected to crime. *See* S.C. Code Ann. § 17-1-40 (1976); S.C. Code Ann. § 23-3-660 (DNA); S.C. Code Ann. §§ 23-3-430(E), -437 (sex offender); S.C. Code Ann. §§ 16-8-230, -330(D) (gang); S.C. Code Ann. Regs. 73-540(3).

SLED offers no reason to conclude the General Assembly intended such a tortured construction (let alone one that would raise significant nondelegation concerns, *see infra* Part II). Other than the database challenged here, SLED identifies no prior instances in its nearly 100-year history of assembling criminal information databases with information on people unsuspected of crimes. SLED offers no substantive response to the arguments in the Opening Brief establishing that SLED and the Attorney General historically interpreted the criminal information provisions to permit collecting information only about people connected to crimes. OB19 (discussing SLED regulations governing "Criminal Justice Information System" and Attorney General Opinion). SLED does not attempt to distinguish the judicial decisions interpreting similar statutory language to require a known connection to crime when the information is stored. *See Neal v. Fairfax Cnty. Police Dep't*, 295 Va. 334, 348-49, 812 S.E.2d 444, 450-51 (2018) (holding vehicle surveillance systems that indiscriminately collect and store information do not generally qualify as "investigations … related to criminal activity"); *ACLU v. Clapper*, 785 F.3d 787, 812 (2d Cir. 2015) (rejecting as "unprecedented" the argument that information qualifies as "relevant" to a criminal investigation if it could be relevant "at some unknown time in the future"). And SLED does not explain how the General Assembly requiring SLED to "destroy" information about persons no longer charged with crimes when it enacted the "criminal" database provisions can be

squared with SLED's claim that the same General Assembly intended those same provisions to confer broad authority to collect information on people unsuspected of crimes. OB19, 24; AB20; *see* S.C. Code Ann. § 17-1-40 (1976).[1]

2. SLED's authority to act consistent with its mission does not authorize storing sensitive information about people unconnected to crimes.

SLED also contends that the General Assembly hid the massive power to collect and store sensitive information on people unconnected to crimes in the generic catch-all provision authorizing SLED to undertake "other activities not inconsistent with the mission of the division or otherwise proscribed by law." S.C. Code § 23-3-15(A)(9); AB12. According to SLED, the General Assembly intended this provision to incorporate SLED's mission statement, which includes providing "technical assistance" to local police departments. SLED then argues its vehicle surveillance database qualifies as "technical assistance" because SLED sometimes uses it to assist local law enforcement. AB13-14. This strained argument ignores well-settled interpretative principles.

First, SLED urges the Court to find that its "technical assistance" argument is plain from the text of the statute. AB16 ("rules of statutory interpretation, such as the one Appellants invoke

[1] There is no merit to SLED's argument that Appellants did not adequately preserve several arguments supporting this statutory construction because the trial court did not expressly address them. *See* AB20 n.7. While preservation requires a trial court to pass upon each legal *theory*, the preservation rules do not require the trial court to discuss every *authority* a party relies on in support of a theory. This Court has found arguments preserved when a motion was "denied in a form order, stating, 'Post trial motion by Defendant are [sic] denied'" and the record on appeal contained the arguments before the court. *Bailey v. Segars*, 346 S.C. 359, 364, 550 S.E.2d 910, 913 (Ct. App. 2001); *cf. State v. Mack*, 441 S.C. 526, 536, 894 S.E.2d 820, 825 (Ct. App. 2023) (rejecting argument that appellant must cite cases to the trial court to rely on authorities on appeal). Here, Appellants prominently and repeatedly relied on these authorities in their summary judgment brief. *See* R. pp. 118-120, 122. The trial court was aware of the authorities and implicitly found them unpersuasive when it rejected Appellants' proposed statutory construction. R. pp. 39-44. And there is a developed record "for meaningful appellate review." *See Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (quotation omitted). Nothing more was required.

here 'are not needed' when the statute's language is plain and unambiguous."). It is not. The statute does not even mention "technical assistance," and that phrase does not inherently include maintaining a surveillance database. Rather, "words 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); *see State v. Morgan*, 352 S.C. 359, 366, 574 S.E.2d 203, 206 (Ct. App. 2002) (stating context includes "looking at the other terms used in the statute"). Here, the statutory context establishes that the General Assembly did not consider maintaining boundless information on people unconnected to crimes consistent with SLED's "mission"—even if that mission includes providing "technical assistance." OB25-28; *supra* 4-8. As already explained, the General Assembly limited SLED's express database authority to "criminal" databases and consistently barred SLED from holding information on people not connected to any crime. *Id*. It did not undo those limits with a general reference to SLED acting consistent with its mission. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (Legislatures do not "hide elephants in mouseholes").

SLED nonetheless insists that the catch-all authorization to undertake "other activities not inconsistent with the mission of the division or otherwise proscribed by law," S.C. Code § 23-3-15(A)(9), simply trumps the General Assembly's clear limitation of SLED's database authority to "criminal information." SLED points to a provision saying the catch-all power is "[i]n addition to" other authorities "set forth in this chapter," AB16 (quoting § 23-3-15(A)(9)); *see also id.* (discussing § 23-3-15(A)). But that the General Assembly afforded SLED *some* additional authorities in the catch-all does not mean collecting and maintaining sensitive information on people unconnected to crime was one of them. If the General Assembly intended to authorize SLED to maintain any database it wishes with private information on millions of people accused

of nothing whatsoever, it would have had no reason to provide specific authorization for *criminal* databases and limit SLED's authority to maintain information on people unconnected to crime. The only reading that harmonizes the database provisions with the catch-all and gives each its full meaning is Appellants'. *See State v. Cnty. of Florence*, 406 S.C. 169, 174, 749 S.E.2d 516, 518 (2013) (requiring courts to give meaning to all provisions); *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) ("a specific statute prevails over a more general one").

Even less plausible is SLED's argument that the General Assembly's clear intent to prohibit SLED from retaining information on people unconnected to crimes somehow does not extend specifically to its vehicle surveillance database. SLED says its vehicle surveillance database is different because it does not contain "truly sensitive and personal information," as ALPRs "collect the same information that an individual could observe standing along a roadway." AB2, 20. But SLED's authorizing statutes do not speak in terms of whether information is "truly sensitive"—they speak in terms of criminal information.

SLED's premise is also wrong. While it may be possible to observe where a person travels at one moment in time, *no* member of the public could realistically track where a person drives over an entire year, let alone do so for an entire state. *See United States v. Jones*, 565 U.S. 400, 430 (2012) (Alito, J., concurring) ("society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period"). In any event, SLED does not dispute that its vehicle surveillance database may reveal information including one's daily routine, contacts and associates, travel history, and attendance at religious services, gun shows, or political rallies—all things people reasonably consider personal and sensitive. OB7; *see also* Brief

of Institute for Justice as *Amicus Curiae* in Support of Plaintiffs-Appellants; Brief of Cato Institute as *Amicus Curiae* in Support of Plaintiffs-Appellants; R. p. 134 ¶ 4; R. pp. 57-58 ¶¶ 17-18.[2]

Finally, it makes no difference to the catch-all analysis that other South Carolina police departments are operating ALPR systems and that SLED helps those departments by storing their data. AB7-8, 13-14. Even assuming those departments are acting lawfully, what other departments may be doing does not speak to whether the General Assembly has authorized *SLED* to store such information in a state-wide surveillance database, which it has not.[3]

To be clear: this is not to say that SLED is prohibited from all uses of ALPRs and can never assist local law enforcement. Consistent with its statutory authority, SLED can maintain ALPR databases containing information connected to criminal investigations, can deploy ALPRs to compare passing cars to a hot list of vehicles of interest to law enforcement, and can provide assistance to other police departments, *so long as it does not store information about people unconnected to crimes.* For example, SLED argues it is helpful to be able to centrally coordinate ALPRs when responding to an AMBER alert. AB7. SLED remains free to use ALPRs to track the real time movements of AMBER alert vehicles. But what the General Assembly has not authorized SLED to do is collect and store boundless information about the locations of people unsuspected of crimes.

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[2] Even under the Fourth Amendment, which SLED invokes and is not at issue here, courts have recognized that vehicle surveillance databases may invade a reasonable expectation of privacy. *See United States v. Jackson*, No. 24-cr-10010-JWB, 2025 WL 1530574, at *9 (D. Kan. May 29, 2025) (quoting *Carpenter v. United States*, 585 U.S. 296, 311-12 (2018)); *Sidor v. Thornell*, No. CV-25-08141-PCT-DWL, 2025 WL 3282976, at *10 (D. Ariz. Oct. 24, 2025); *Commonwealth v. Bell*, 113 Va. Cir. 316, *2 (2024); *Commonwealth v. McCarthy*, 484 Mass. 493, 506, 142 N.E.3d 1090, 1104 (2020).

[3] SLED is not merely storing other departments' information. It concedes that it has at least five ALPR systems, including an unknown number of cameras, with which it collects and stores information about people unsuspected of crimes. AB7.

C. SLED gets the separation of powers backwards.

With the statutory text against it, SLED attempts to turn the separation of powers on its head. SLED argues that because the General Assembly is aware of its vehicle surveillance system and has not passed legislation to *stop* it, the Court should not "spur debate that is already taking place" and "should respect that the General Assembly has chosen not to pass additional legislation to date." AB22; *see also* AB17 (arguing the Court "should not use judicial construction to impose restrictions the General Assembly has declined to enact"). SLED cites no authority in support of that utterly novel understanding of the constitutional separation of powers, because none exists.

Allowing SLED to continue exercising undelegated power because the General Assembly *has not stopped it* from doing so would violate the separation of powers doubly. It first would violate the separation of powers by reversing the constitutionally required order of operations between the legislature and the executive. The separation of powers commits "plenary power over all legislative matters" to the General Assembly, and the executive may exercise "only that discretion given by the legislature." *Hampton v. Haley*, 403 S.C. 395, 403-04, 743 S.E.2d 258, 262 (2013). It is axiomatic that the legislature must act *before* an agency can exercise delegated power. *See Heyward v. Long*, 178 S.C. 351, 183 S.E. 145, 156 (1935) ("[T]he chief executive has no prerogative powers, but is confined to the exercise of those powers conferred upon him by the Constitution and Statutes." (quoting 12 Corpus Juris, § 402, p. 898)); Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 225-26 (Walter Carrington ed., 8th ed. 1927) ("Upon the legislature the people have impliedly conferred authority to determine … the exercise of police power … ; and it cannot redelegate to any one the ultimate right to determine when, to what extent, and under what circumstances the power may properly be exercised in any given case."); *The Statutes at Large of*

South Carolina vii (Thomas Cooper ed., 1836) (referring to "legislative authority" as "an authority, which in my opinion the Legislature cannot delegate; to any man or set of men").

Further, under the system of separated powers, it is the judicial branch's essential function to say what the law is and enforce the constitution. *See State ex rel. McLeod v. Yonce*, 274 S.C. 81, 84, 261 S.E.2d 303, 305 (1979). SLED would have the judiciary do nothing, and thus fail in its most consequential function, out of "respect" for the General Assembly's failure to act in the face of SLED usurping power.

The fact that the General Assembly has not reined in SLED's surveillance of people unsuspected of crimes says little about the General Assembly's view of the lawfulness of that practice, and everything about the long understood and widely appreciated practice of legislative bodies avoiding difficult questions. *See Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) ("[W]e [have] criticized … reliance on congressional inaction, saying that 'as a general matter … the argument deserves little weight in the interpretive process.'" (quoting *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (cleaned up))). "Mustering the broad social consensus required to pass new legislation is a deliberately hard business…." *McGirt v. Oklahoma*, 591 U.S. 894, 903 (2020). The General Assembly may hope the courts solve this problem for it, or the Members may be struggling to solve the problem themselves. But neither scenario creates statutory authorization where none exists. It is the job of courts to "say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Permitting SLED's unauthorized surveillance of people unconnected to crimes to continue would violate the judiciary's own role in the system of separation of powers.

II. SLED's Sweeping Interpretation Of Its Statutory Authority Would Violate The Nondelegation Doctrine.

By stretching the statutory text to provide SLED with maximum discretion to collect any

information about anyone so long as SLED purports to only *use* it for investigating crimes should the need arise, SLED runs headlong into the nondelegation doctrine. As the Opening Brief explained, on the trial court's and SLED's view of SLED's authority, the General Assembly would have violated the nondelegation doctrine by conferring impermissible unfettered discretion on SLED to collect nearly any information about anyone with no "intelligible principle to which … [it] must conform." OB31-32 (quoting *Harbin*, 226 S.C. at 594-95, 86 S.E.2d at 470). In resisting this conclusion, SLED points to intelligible principles that are illusory at best and misstates the controlling legal standard.

A. SLED's claimed intelligible principles are illusory.

SLED agrees that to pass constitutional muster a delegation of authority must contain an "intelligible principle" to guide an agency's discretion. AB23. In the Opening Brief, Appellants explained that under SLED's and the circuit court's construction of the catch-all and criminal database provisions, the General Assembly impermissibly delegated to SLED the authority to collect and store nearly any information on anyone with no intelligible principle to guide that discretion. OB32-33. That is because there is no principle that distinguishes (a) maintaining a database tracking the movements of people unconnected to crimes, on the theory that such information may theoretically be useful to investigating an unknown crime in the future, from (b) collecting nearly any other category of personal information, such as religious affiliation, vaccination status, gun ownership, or location using facial recognition.

SLED fails to identify any principle in response. SLED asserts baldly that the "statutory framework does not leave SLED free to collect individuals' data without limitation." AB25. But SLED offers no meaningful statutory limit, direction, or guidance on what information it may or may not collect. It cannot tell us whose information can or cannot be collected, or what information can or cannot be collected. Take the purported "intelligible principle" SLED points to with respect

to the criminal database provisions. SLED says the "'criminal justice' qualifier is the intelligible principle" because "it confines SLED to systems that serve criminal justice purposes and forecloses precisely the kind of general-purpose surveillance … Appellants hypothesize." AB25-26. But this *creates* the problem; it does not solve it. Limiting SLED to collecting information that *could serve* criminal justice purposes at some point in the future is no limit at all when nearly any information may theoretically be useful to an unknown future investigation. Tellingly, SLED can point to no principle or reason other than its own say-so for why a vaccination record database would not plainly fall within this claimed authority—this too could "serve as a resource" during a public health emergency. AB19, 24 n.9; OB34. An unexplained assertion is not an *intelligible* principle.

SLED's purported limiting principle in the subsection (A)(9) catch-all authorizing SLED to conduct "other activities not inconsistent with the mission of the division" fares no better. SLED says that provision ties "SLED's discretion to an external, ascertainable standard" by limiting that authority, in relevant part, to "technical assistance." AB26. But again, SLED does not explain how, on its and the trial court's interpretation, the words "technical assistance" provide *any* limit or direction on the information SLED may collect and store about people unsuspected of crimes. Like with the criminal database provisions, SLED interprets technical assistance to include storing *any* information for another law enforcement agency, and collecting and storing any information that SLED could theoretically provide to another law enforcement agency to aid with a criminal investigation. AB13-14. In other words, via its purported technical assistance authority, SLED could collect and store any information it chooses.

In short, SLED fails to articulate any "intelligible principle" limiting these statutes—as SLED and the circuit court read them—from giving SLED unfettered discretion to create a

surveillance state. Absent an intelligible principle *found in the statute* that distinguishes collecting license plate reader information of those suspected of no crime whatsoever, from collecting their movements through facial recognition, or their vaccination records, or anything else, the challenged statutes violate the nondelegation doctrine.

B. SLED misreads *Harbin* and applies the wrong legal standard.

SLED seeks to get around the missing intelligible principle by arguing for a faulty standard. SLED contends that in assessing the breadth of a purported delegation, the Court may not consider "hypothetical abuses … that the statutory authority empowers." AB23-24. Rather, according to SLED, the focus is only on "what the … agency is actually doing." *Id.* In SLED's view then, the Court should not consider SLED's concession that its interpretation of its authority would permit it to track ordinary citizens walking down the street with facial recognition, R. p. 690, or that SLED and the circuit court's interpretation of the statutory authority logically permits SLED to collect and store any information about anyone that in its view might one day be useful for law enforcement.

The Supreme Court has said the opposite. As the Opening Brief explained, when assessing whether a delegation violates the nondelegation doctrine, the Court must consider the *full scope* of the conduct that the statute permits. OB31. The Supreme Court demonstrated this principle in *Harbin*, when it struck down a statute giving the Highway Patrol the power to revoke driver's licenses "for any cause which it deem[ed] satisfactory" because it supplied no standard to guide that broad discretion. 226 S.C. at 595, 86 S.E.2d at 470-71. Just as SLED does here, the Highway Patrol argued that there was "no reason to suppose that the Department will revoke a license arbitrarily or capriciously and that it may fairly be assumed that this will only be done when necessary for the safety of the public." *Id.* The Supreme Court rejected that reasoning, holding that whether an agency has actually wielded its authority reasonably, or could be presumed to do so, is

"no answer to the question of whether there is an unlawful delegation of legislative power." *Id.* Rather, the *Harbin* Court directed that "courts … should take into consideration the things which the act affirmatively *permits*." *Id.* (emphasis added). That rule follows from basic nondelegation principles. Because the nondelegation doctrine "prohibits the delegation of one branch's authority to another branch," what matters is the scope of what the legislature delegated, and whether the legislature included an intelligible principle, not how the executive has so far used the power. *See Hampton*, 403 S.C. at 407, 743 S.E.2d at 264.[4]

SLED fails to distinguish this case from the cases in which the Supreme Court has found overly broad delegations. AB26. Just like in *Harbin*, where the General Assembly delegated to the Highway Patrol the power to revoke driver's licenses with no standard, SLED's interpretation of its authority would "affirmatively permit[]" the collection of boundless information. *Harbin*, 226 S.C. at 595-96, 86 S.E.2d at 471. On SLED's reading, the statute here provides no "standard except the personal judgment" of SLED concerning what information SLED may collect and store about people unconnected to crimes. AB26 (quoting *Harbin*, 226 S.C. at 596, 86 S.E.2d at 471).

SLED also attempts to distinguish *Gilstrap* and *Hampton* as cases in which the Court found no nondelegation violation. But in each the Supreme Court recognized that delegations with more guidance than the delegation here would be unconstitutional. In *Gilstrap* the Court found a delegation to the Budget Control Board "to apply [appropriation] reductions … uniformly" would impermissibly "allow the Board to appropriate funds with unbridled discretion." *Gilstrap v. S.C. Budget & Control Bd.*, 310 S.C. 210, 216, 423 S.E.2d 101, 105 (1992). And in *Hampton*, the Court similarly found giving an agency discretion to choose between funding the cost of insurance with

[4] *Harbin* also did not adopt an "especially forgiving" standard for delegations that "relate[] to police regulations." AB23. *Harbin* held the delegation in a police regulation unconstitutional despite that acknowledged need for flexibility.

appropriated funds or premiums based on its own judgment would confer unbridled discretion. *Hampton*, 403 S.C. at 408, 743 S.E.2d at 265. The Court only found no nondelegation violation in each case because it elected to construe the statute more narrowly to avoid the constitutional problem. *Gilstrap*, 310 S.C. at 216, 423 S.E.2d at 105; *Hampton*, 403 S.C. at 408-09, 743 S.E.2d at 265.

The Court should take that sensible approach here—not simply because of the nondelegation doctrine, but because the statutory text does not support SLED's claimed authority in the first place. *Supra* Part I. But if the Court adopts SLED's view of its authority, then the purported authorizing statutes confer unbridled discretion upon SLED to collect any information about people unconnected to crimes without any intelligible principle and therefore violate the nondelegation doctrine.

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

Finally, SLED's vehicle surveillance database is also unlawful because SLED failed to comply with the notice-and-comment requirements of the Administrative Procedures Act when it adopted the policy governing the database. OB35-41. SLED does not dispute that its failure to seek public comment was a stark departure from its typical practice of following the APA's requirements when implementing policies governing other databases. OB35-36 (citing 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 instead says its policies do not qualify as regulations subject to the APA because (1) they apply only to agency personnel and specified individuals, and (2) they establish no binding norm. Both arguments fail.

A. SLED first argues that the Policy governing its ALPR database falls within the APA's exception for "descriptions of agency procedures applicable only to agency personnel … and other agency actions relating only to specified individuals." S.C. Code Ann. § 1-23-10(4); AB29.

According to SLED, the Policy applies only to "a subset of law enforcement officers" who are "permitted to use an ALPR system," and the Policy is therefore only applicable to agency personnel and those specified individuals. AB29. This argument fails for multiple reasons.

SLED first offers no response to Appellants' argument that SLED's Policy binds *the public* as well as law enforcement personnel. OB37-38. 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—automatically, with no discretion. As the Opening Brief explained, the D.C. Circuit recognized that a similar policy governing TSA employees conducting screening at airports qualified as a regulation because the policy "substantively affect[ed] the public to a degree sufficient to implicate the policy interests animating notice-and-comment rulemaking" because it "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." *Elec. Privacy Info. Ctr. v. DHS*, 653 F.3d 1, 6 (D.C. Cir. 2011); *cf. Clapper*, 785 F.3d at 801 (finding that the government's collection of telephone metadata was an injury conferring standing to sue); OB37-38. The same is true here. SLED does not attempt to distinguish this authority.

SLED also offers no response to Appellants' arguments explaining why the exceptions for procedures applicable only to agency personnel and specified individuals additionally do not apply here. As to "specified individuals," Appellants explained that exception refers to adjudicative-type administrative actions that settle the rights of specific parties to adjudicative-type proceedings, which are not at issue here. OB40-41. SLED offers no response.

And as to "descriptions of agency procedures applicable to agency personnel," AB28, SLED did not rely on that theory before the trial court, and the Court should not consider it. *I'On,*

L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000) ("[T]he respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it."). In any event, SLED's ALPR policy is not merely a *description* of procedures applicable to agency personnel. That limitation only applies to policies that do not "substantively affect[] the public to a degree sufficient to implicate the policy interests animating notice-and-comment rulemaking." *Elec. Priv. Info. Ctr.*, 653 F.3d at 6 (discussing analogous 5 U.S.C. § 553(b)(4)(A)); *see also Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987). But SLED's Policy sets forth substantive policies that directly affect every driver on South Carolina's roads, including that SLED will retain the location and image of every car that passes ALPR cameras for one year. *See, e.g.,* R. pp. 463-464 § F (allowing SLED to retain ALPR data and images for one year) and § C(4) (allowing traffic stops based on ALPR alerts).

B. SLED next argues that the Policy "does not create a binding norm" because SLED "remains free to revise or depart from the Policy." AB29. As an initial matter, this argument contradicts SLED's assertion that Policy 13.40 protects against misuses and abuses of its database—because apparently SLED may abandon those protections on a whim. *E.g.*, AB2.

In any event, SLED's argument about its ability to exercise discretion in following Policy 13.40 is unfounded. An agency may not avoid the APA simply by stating that an existing policy may be revised in the future. That is because the ability to *revise* a policy is distinct from the discretion as to whether or not to *follow* a policy while it is in effect. Nowhere does SLED claim that it can, in an individual case, choose not to follow whatever version of Policy 13.40 is in effect at that time. Nor does SLED claim that pursuant to its Policy, it does not automatically capture and store the location of every vehicle regardless of any connection to criminal activity. To the contrary, Policy 13.40 states explicitly that "[i]t is the policy of SLED that all members abide by

the guidelines set forth herein when using ALPR systems." R. pp. 461-465. Crediting SLED's argument that its Policy is insufficiently binding because it might be revised would leave agencies free to implement and apply policies without seeking the public input the APA requires merely by stating that the policy may be revised in the future. The APA does not countenance such circumvention.

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. 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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September 16, 2026