

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

RECEIVED

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SC Court of Appeals

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,

**APPELLANTS' RESPONSE TO THE BRIEF OF AMICI CURIAE
SOUTH CAROLINA ATTORNEY GENERAL'S OFFICE AND
SOUTH CAROLINA SOLICITORS' ASSOCIATION**

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INTRODUCTION

The Attorney General and the South Carolina Solicitors' Association ("Attorney General") agree that this appeal presents "a relatively narrow legal question": whether SLED has statutory authority to maintain a vehicle surveillance database that systematically tracks the movements of people *unconnected* to crimes. AG Br. 6. Yet the brief never engages the critical statutory provisions and authorities that answer that question. It does not discuss the statutes in which the General Assembly expressly addressed SLED's database authority and expressly authorized collecting only "criminal" information. It ignores the General Assembly's repeated commands that SLED destroy, or decline to retain, information about people unconnected to crimes. And it offers no limiting principle that would keep its reading of SLED's authority from permitting SLED to track the movements of people using facial recognition, to create vaccination or gun ownership databases, or to collect virtually any information about anyone.

Instead, the Attorney General places outsized focus on matters that have no bearing on the legal question before the Court. It argues that ALPR use does not violate the Fourth Amendment. But Appellants have not brought a Fourth Amendment claim.¹ It attempts to recast Appellants'

¹ Because there are no Fourth Amendment issues in this case, Appellants do not respond to the Attorney General's Fourth Amendment argument except to note that courts have recognized that ALPR use may violate the Fourth Amendment. *See United States v. Kyle*, No. 26-CR-00189-SEH, 2026 WL 2958728, at *11-14 (N.D. Okla. Oct. 1, 2026) (holding use of ALPR system an unconstitutional warrantless search); *see also United States v. Jackson*, No. 24-cr-10010-JWB, 2025 WL 1530574, at *9 (D. Kan. May 29, 2025) ("the court is concerned that the aggregation and searchability of the photos taken on the Flock System could rise to the level where 'the retrospective quality of the data ... gives police access to a category of information otherwise unknowable.'"); *Sidor v. Thornell*, No. CV-25-08141-PCT-DWL, 2025 WL 3282976, at *10 (D. Ariz. Oct. 24, 2025) ("No one should misread this case, or those others, as establishing a rule that using [ALPR databases] cannot be a Fourth Amendment search."); *Commonwealth v. McCarthy*, 484 Mass. 493, 506, 142 N.E.3d 1090, 1104 (2020) ("With enough cameras in enough locations, the historic location data from an ALPR system in Massachusetts would invade a reasonable expectation of privacy and would constitute a search for constitutional purposes.").

statutory claim as a “policy” grievance and urges the Court to leave the issue “with the people and their elected representatives.” AG Br. 6, 19. But Appellants have not asked this Court to resolve any policy question about whether ALPRs are good or bad or what safeguards SLED should adopt to prevent abuse. Appellants agree that the people’s elected representatives must decide whether, and on what terms, SLED may track the movements of people unconnected to crimes. Indeed, that is the entire point of this case. The Attorney General’s argument depends on an inverted constitutional order in which an executive agency acts first, and the General Assembly must later muster a majority to stop it. The South Carolina Constitution does not work that way. 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). Because the General Assembly has never given SLED authority to systematically track and store the movements of people unconnected to crimes—99.8% of the more than 140 million observations in SLED’s database, R. p. 145; R. p. 226—the Court should reverse.

ARGUMENT

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

Throughout the briefing, Appellants showed that the General Assembly drew a clear line concerning SLED’s authority to compile databases on South Carolinians—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. Appellants’ Opening Brief (“OB”) 17-21; Appellants’ Reply Brief (“RB”) 4-5. It did so by expressly addressing SLED’s database authority and affording SLED authority to create only “criminal” and “criminal justice” databases. S.C. Code Ann. §§ 23-3-15(A)(4), -110; OB18-19, 21-22. And then, every single time the General Assembly legislated on SLED’s database power, it included specific provisions prohibiting SLED from 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)).

In arguing that SLED nonetheless has vast authority to track the movements of people unconnected to crimes, the Attorney General fails even to acknowledge Appellants’ argument, let alone engage with the significant statutory authorities that support it. AG Br. 7-9. For this reason alone, the Attorney General’s argument should be afforded little weight. It is a bedrock rule of statutory interpretation that “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). The meaning of a statute cannot be determined by focusing on isolated provisions and ignoring the statutory scheme as a whole, as the Attorney General does. *See Deal v. United States*, 508 U.S. 129, 132 (1993) (acknowledging “fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used”).

In any event, the little the Attorney General does say about the statutory scheme fails to establish that it authorizes SLED to maintain its vehicle surveillance database with respect to people unconnected to crimes. Like SLED, the Attorney General argues that by affording SLED “authority statewide . . . in matters including but not limited to . . . activities not inconsistent with the mission of the division or otherwise proscribed by law” the General Assembly afforded SLED “broad authority to accomplish its mission,” which it asserts includes maintaining a database of information that *could be* useful to a criminal investigation. AG Br. 7 (emphasis omitted) (quoting

S.C. Code Ann. § 23-3-15(A)(9)). But for all the reasons Appellants explained, the General Assembly affording SLED authority to further its mission does not answer the dispositive question whether SLED's mission and corresponding authority extend to mass surveillance of people unconnected to crimes. OB25-28; RB8-11. The General Assembly made plain it does not by expressly affording SLED authority to maintain only "criminal" databases and repeatedly limiting SLED's power to track information about people unconnected to crimes.

The Attorney General also argues that Appellants' interpretation produces "absurd results" by requiring SLED "to petition the General Assembly to amend the law each time it s[eeks] to use new innovative technologies or techniques to fulfill its mission." AG Br. 8-9. It does not. This case has nothing to do with SLED's authority to use new technologies. It is about *whose* movements SLED may systematically track. All that is at issue is whether SLED may maintain a surveillance database on *people unsuspected of crimes*. In this case, Appellants do not challenge SLED's use of ALPRs, the maintenance of ALPR databases, or the use of any other new technology with respect to people connected to crimes.

Tellingly, the Attorney General does not address the absurd results and the nondelegation problem that follow from its interpretation of SLED's authority as extending to collecting any information that can "serve[] as a resource and tool when criminal investigations or other public safety related emergencies arise." AG Br. 8. The Attorney General offers no principle that could distinguish SLED's vehicle surveillance database from a facial recognition database, a vaccination database, or a gun ownership database that could also be theoretically useful in solving crimes. And the Attorney General offers no intelligible principle to guide SLED's exercise of its database authority.

II. The Attorney General's Arguments For Deference To Legislative Inaction Get The Separation Of Powers Backwards.

Because no statute authorizes SLED to create a surveillance database tracking the movements of people unsuspected of crimes, the Attorney General, like SLED, urges this Court to leave it to the General Assembly to enact new legislation regulating SLED's ALPR use. At times the Attorney General tries to recast Appellants' challenge as a "policy" argument outside the purview of the Court, AG Br. 19, and at other times it urges the Court to defer to the General Assembly's failure to enact legislation, *e.g.*, AG Br. 21 ("despite full awareness of ALPR usage" the General Assembly "has, as of now, not decided to regulate"); AG Br. 22 ("[a]ffirming the lower court's decision would protect the legislative process, allowing the people to decide for themselves the tradeoffs between law enforcement and privacy"). However framed, the gambit fails.

To start, Appellants' authorization argument presents a purely legal question—whether the General Assembly has afforded SLED authority to maintain a vehicle surveillance database that tracks the movements of people unsuspected of crimes. Determining whether an executive agency is acting within the scope of its delegated authority is a quintessentially legal question that South Carolina courts regularly answer. *See, e.g., S.C. Pub. Interest Found. v. S.C. Dep't of Transp.*, 421 S.C. 110, 118, 804 S.E.2d 854, 858 (2017) (whether Department of Transportation had statutory authority to inspect bridges in private communities); *Sloan v. Dep't of Transp.*, 365 S.C. 299, 304-05, 618 S.E.2d 876, 878-79 (2005) (whether Department of Transportation had statutory authority to use a particular bidding process); *Evins v. Richland Cnty. Hist. Pres. Comm'n*, 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000) (whether county preservation commissions had statutory authority to convey property); *Baird v. Charleston Cnty.*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999) (whether county had statutory authority to issue hospital bonds). Appellants do not, and have not, asked the

Court to decide anything about ALPR use as a policy matter. As Appellants have explained, “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.” RB3. It is about whether the General Assembly has authorized SLED to act, as the separation of powers requires. *See Hampton*, 403 S.C. at 403-04, 743 S.E.2d at 262 (executive may exercise “only that discretion given by the legislature”); RB12.

The fact that the General Assembly has not to date reined in SLED’s surveillance database is also utterly irrelevant to the legal analysis. The failure of the legislature to act “deserves little weight in the interpretive process.” *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) (quoting *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994)) (cleaned up). Indeed, as Appellants explained, crediting such an argument upends the separation of powers by reversing the constitutionally required order of operations between the legislature and the executive and permitting the executive to exercise power the legislature, and by extension the people, never afforded. RB12-13. The Constitution is clear that the executive may exercise “only that discretion given by the legislature.” *Hampton*, 403 S.C. at 403-04, 743 S.E.2d at 262; *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)). The executive may not seize power and argue that a court is powerless because the legislature has not succeeded in claiming it back.

It is decidedly the Court’s function to declare what the law is. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *State ex rel. McLeod v. Yonce*, 274 S.C. 81, 84, 261 S.E.2d 303, 305 (1979); RB13. Declining to perform that function in the face of SLED usurping power would

abdicate the judicial role and fail to respect the General Assembly's decision not to afford SLED authority to maintain databases on people unsuspected of crimes. Properly finding no authorization, on the other hand, will place the issue before the General Assembly, where it belongs, and prompt the General Assembly to exercise its legislative function as the separation of powers requires.

CONCLUSION

Appellants request that the Court reverse the circuit court's grant of summary judgment.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned attorney hereby certifies that the Appellants served a copy of Appellants.
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