

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Thomas W. McGee, III, Circuit Court Judge
Case No. 2023-CP-40-01850

Appellate Case No. 2025-002437

RECEIVED
Oct 26 2026
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.

**RESPONDENTS' OMNIBUS RETURN TO THE BRIEFS OF AMICI THE CATO
INSTITUTE AND THE INSTITUTE FOR JUSTICE**

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INTRODUCTION

Amici Cato Institute (“Cato”) and Institute for Justice (“IJ”) beg this Court to transform a simple and straightforward statutory authority case into a sprawling policy referendum on law enforcement investigative techniques. To do so, their arguments depend on (1) importing an unrecognized “major questions” rhetoric into South Carolina’s well-settled approach to statutory interpretation and delegation; (2) rewriting the General Assembly’s enabling statutes; and (3) injecting unrelated Fourth Amendment-style privacy concerns to influence their desired policy outcome. But the question here is not whether ALPR programs in the context of law enforcement make for good or bad policy. Rather, it is whether the General Assembly has already enacted statutes authorizing SLED to operate statewide criminal justice information systems and to perform other mission-consistent activities not otherwise proscribed by law.

The amicus briefs, despite being incorrect on the merits, suffer from a more elementary threshold flaw: both seek to expand this appeal beyond the issues presented and litigated by the parties below. Cato invokes generalized Fourth Amendment privacy concerns and advances a speculative “sky is falling” argument that affirmance would authorize SLED to deploy an array of hypothetical surveillance technologies, including devices capable of monitoring individuals through walls. IJ likewise invokes Fourth Amendment concerns to urge this Court to adopt the federal major questions doctrine, a doctrine no South Carolina appellate court has adopted. To be certain, the Fourth Amendment is not at issue in this appeal, and the parties have not asked this Court to decide whether to adopt a new canon of statutory interpretation.

The questions properly before the Court are much narrower: whether South Carolina law authorizes SLED to operate and maintain its ALPR database, whether the governing statutes violate the nondelegation doctrine, and whether SLED Policy 13.40 constitutes a “regulation”

under the Administrative Procedures Act (“APA”). The circuit court answered each question correctly in favor of SLED, and nothing submitted by amici warrants disturbing that judgment.

ARGUMENT

I. The Cato Institute’s Amicus Brief should be disregarded because it exceeds the scope of issues on appeal. Nevertheless, its arguments are unavailing.

The Cato Institute advances two principal arguments in its amicus brief. First, invoking concerns that attempt to implicate the Fourth Amendment, Cato contends that SLED’s ALPR database threatens the privacy and security of South Carolinians. Amici Br. at 5. Second, Cato asserts that the lower court’s decision effectively authorizes SLED to implement virtually any surveillance technology it can conceive, including drones, futuristic security cameras, and systems capable of monitoring individuals through walls. *Id.* at 12-18. Neither argument is properly before this Court. And even if they were, neither provides a basis for disturbing the lower court’s decision.

Rule 213 of the South Carolina Appellate Court Rules expressly states that amicus curiae briefs “shall be limited to argument of the issues on appeal as presented by the parties. . . .” This limitation is not merely aspirational; our appellate courts have enforced it to prevent amici from introducing issues that the parties themselves have not raised. In *James v. Anne’s Inc.*, for example, our Supreme Court held that amici could not raise a standing argument that the parties had not presented, notwithstanding the Court’s recognition that it possessed the inherent authority to consider justiciability. 390 S.C. 188, 193-94, 701 S.E.2d 730, 732-33 (2010). The Court emphasized that the issue had not been preserved for appellate review because the trial court had not been afforded an opportunity to address it in the first instance. *Id.* at 193, 701 S.E.2d at 732-33. This Court has applied the same principle, declining to consider a standing argument raised

for the first time by an amicus. *See S.C. Pub. Int. Found. v. Richland Cnty.*, 436 S.C. 271, 281, 871 S.E.2d 599, 604 (Ct. App. 2021).

The same reasoning applies here. Neither of Cato’s principal arguments were raised by the parties, and neither falls within the issues presented for this Court’s appellate review. The issues before the Court are: (1) whether SLED possesses the statutory authority to operate its ALPR database; (2) whether the legislation authorizing SLED to operate the database delegates unlimited discretion in violation of the nondelegation doctrine; and (3) whether SLED Policy 13.40 constitutes a “regulation” under the APA. Appellants have not presented a claim that SLED’s database violates an individual’s constitutional privacy rights or a challenge to hypothetical surveillance technologies that SLED does not even employ. Cato’s arguments thus invite the Court to resolve (policy) questions that the parties have not presented and that are unnecessary to decide the legal issues on appeal. The Court should decline to consider them.

Even if Cato’s arguments were properly before the Court, they would not warrant a different result. Cato’s brief is littered with journalism and advocacy citations and warns of dystopian outcomes involving future technological advancements. First, Cato’s generalized concerns about the privacy and security implications of SLED’s ALPR database do not establish that SLED lacks statutory authority to operate the database, that the governing legislation violates the nondelegation doctrine, or that Policy 13.40 is a regulation under the APA. Those are distinct legal questions that must be resolved by applying the governing statutes and constitutional principles—not by treating the potential for privacy concerns as dispositive of the issues presented.

Indeed, this Court recently rejected similar privacy concerns in *State v. Michael L. Faile*, Unpublished Op. No. 2026-UP-323 (S.C. Ct. App. April 6, 2026). In *Faile*, the appellant was sentenced to fifty-four months’ imprisonment for shoplifting. The appellant subsequently

appealed his conviction, challenging the denial of his motion to suppress photographs obtained without a warrant from Flock Safety, a third-party ALPR surveillance company.¹ Specifically, he argued that law enforcement’s warrantless search of the Flock database violated the Fourth Amendment of the United States Constitution and Article I, Section 10 of the South Carolina Constitution. The trial court rejected that challenge, and this Court affirmed.

In affirming the trial court’s denial of the appellant’s motion to suppress, this Court found that the appellant had no reasonable expectation of privacy in the exterior appearance of his vehicle or its license plate. Notably, the appellant, like Cato, raised concerns about the potential for law enforcement to abuse the Flock database and intrude upon private lives of citizens. However, this Court rejected the notion that such generalized concerns controlled the constitutional analysis, explaining that courts evaluating Fourth Amendment claims are “called to evaluate the facts of the facts of the particular case, *not to assess the potential future concerns that could arise.*” (emphasis added).

This Court reached a similar conclusion under the South Carolina Constitution, reasoning that the appellant was operating his vehicle in plain view on a public road. As this Court explained, “[t]he Flock camera observed the same information that law enforcement could have obtained from visually noting the license plate number and conducting a routine check of DMV records.” Thus, to the extent Cato seeks to inject a broader constitutional debate into this case based on the

¹ An important distinction exists between SLED’s ALPR database and Flock’s systems: SLED is a state law enforcement agency operating a database in its governmental capacity, whereas Flock Safety is a private company that provides ALPR technology to law enforcement agencies and private customers alike. This distinction matters because SLED’s operation of its database is subject to statutory, constitutional, and agency-policy constraints that do not apply to Flock in the same manner.

potential future misuse of ALPR technology, its argument is both outside the scope of the issues presented and unavailing.

Second, Cato's speculation about the surveillance technologies SLED might theoretically employ at an unknown future time under the lower court's decision is even further removed from the issues on appeal. Cato does not contend that SLED has employed the hypothetical technologies it describes, much less that any such technology is at issue in this litigation. Its argument instead depends on speculation about what SLED might do in the future if the lower court's decision is affirmed.

Our Supreme Court has rejected that approach to questions involving the nondelegation doctrine. As the Supreme Court explained, the analysis under the nondelegation doctrine must focus on "the things which the act affirmatively permits," rather than speculative possibilities untethered to the authority the legislation actually confers. *S.C. State Hwy. Dep't v. Harbin*, 226 S.C. 585, 595-96, 86 S.E.2d 466, 471 (1955). Accordingly, the relevant inquiry is what the challenged legislation authorizes—not whether one can imagine other, more intrusive technologies that an agency might someday use.

Cato's hypothetical examples therefore do not advance the nondelegation analysis. Nor do they establish that SLED possesses statutory authority to employ the technologies Cato describes. Section 23-3-15(9) of the South Carolina Code of Laws authorizes SLED to carry out functions and activities "not inconsistent with the mission of the division or *otherwise proscribed by law*." (emphasis added). Thus, the statute does not grant SLED unfettered authority to employ any technology it might envision; its authority remains subject to existing legal restrictions.

Cato's hypothetical example of SLED using future technology to surveil individuals through walls illustrates the point. *See Amici Br.* at 17-18. The Supreme Court has already

established constitutional limits on the government’s use of technology to obtain information from inside a home. In *Kyllo v. U.S.*, the Supreme Court held that the use of a thermal-imaging device to obtain information about the interior of a home constituted an unlawful search under the Fourth Amendment. 533 U.S. 27, 40 (2001). Accordingly, to the extent Cato hypothesizes that SLED might one day employ surveillance technology in a manner prohibited by the Fourth Amendment or other applicable law, section 23-3-15(9) does not authorize that conduct. Cato’s speculation about hypothetical technologies therefore does not establish that the statutes delegate unlimited discretion to SLED or that the lower court erred in upholding the enabling statutory scheme.

In sum, Rule 213 does not permit an amicus to expand an appeal beyond the issues presented by the parties. Cato’s generalized privacy concerns and speculative discussion of hypothetical surveillance technologies do precisely that. And even considered on their own terms, those arguments do not establish any error on the part of the lower court. The Court should therefore decline to consider Cato’s arguments and resolve this appeal on the issues properly presented by the parties.

II. The Institute for Justice’s Amicus Brief is similarly unpersuasive.

IJ’s amicus brief suffers from the same fundamental defect as the Cato Institute’s brief: it advances an argument beyond the issues presented by the parties. However, IJ takes it a step further and asks this Court to adopt a federal doctrine that no South Carolina appellate court has adopted or applied—the major questions doctrine. Amici Br. at 5-11. This Court need not embrace a new legal doctrine to resolve the questions presented in this appeal. Our law is enough.

The major questions doctrine is a federal canon of statutory interpretation under which courts require an agency to identify clear congressional authorization when the agency claims authority to decide questions of vast economic or political significance. See *W. Virginia v. Env’t Prot. Agency*, 597 U.S. 697, 721-24 (2022). Although the doctrine’s underlying principles

developed through a series of earlier decisions, the Supreme Court expressly recognized and applied the doctrine in *W. Virginia v. Env't Prot. Agency*, holding that the Environmental Protection Agency could not locate transformative regulatory authority in an ancillary statutory provision without clear congressional authorization. 597 U.S. at 723-35.

The doctrine developed, in significant part, against the eroding backdrop of *Chevron* deference. Under the *Chevron* doctrine, courts generally deferred to an agency's interpretation of an ambiguous statute that the agency administered. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Counsel, Inc.*, 467 U.S. 837, 843 (1984). The major questions doctrine limited the circumstances in which courts would accept an agency's interpretation of broadly worded statutory provisions, particularly when the agency asserted authority over matters of "vast economic and political significance." *See W. Virginia v. Env't Prot. Agency*, 597 U.S. at 716. Although the Supreme Court did not formally characterize the doctrine as an exception to *Chevron*, its foundational cases repeatedly questioned whether Congress had implicitly delegated such consequential authority through statutory ambiguity.

For example, in *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, the Supreme Court explained that "[i]n extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." 529 U.S. 120, 159 (2000). The Court made that observation while discussing the premise underlying *Chevron* deference—that statutory ambiguity may reflect an implicit congressional delegation of authority. *Id.* ("Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to fill in the statutory gaps."). The Court's concern was that Congress should not be presumed to

have delegated authority of extraordinary consequences merely because an agency could identify statutory language broad enough to support its interpretation.

The Court reiterated that reasoning in *King v. Burwell*, 576 U.S. 473 (2015). There, the Court observed that the usual justification for *Chevron* deference did not apply with the same force to questions of deep economic and political significance. *Id.* at 485-86. Drawing on *Brown & Williamson*, the Court again cautioned against inferring an implicit delegation of consequential authority from statutory ambiguity alone. *Id.* Similarly, in *Utility Air Regulatory Group v. EPA*, the Court explained that “[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism.” 573 U.S. 302, 324 (2014). The Court made that observation while emphasizing that, even under *Chevron*’s deferential framework, agencies must remain within the bounds of reasonable statutory interpretation. *Id.* at 321.

These decisions illustrate the principles underlying the major questions doctrine and formed the foundation the Court’s formal recognition of the doctrine in *W. Virginia v. Env’t Prot. Agency*. See 597 U.S. at 721-24. But those principles do not require this Court to adopt a distinct, newly articulated doctrine to resolve the present dispute. Indeed, since the adoption of the major questions doctrine in 2022, the Supreme Court has overruled *Chevron*. See *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412 (2024). In *Loper Bright*, the Court held that the APA requires courts to “exercise their independent judgment in deciding whether an agency has acted within its statutory authority”; courts may not defer to an agency’s interpretation merely because the governing statute is ambiguous. *Id.* The Court expressly overruled *Chevron* and restored the judiciary’s responsibility to independently determine the meaning of statutory provisions. *Id.*

To be clear, *Loper Bright* did not eliminate the major questions doctrine. The doctrine remains a distinct principle requiring clear congressional authorization for agency associations of authority over questions of extraordinary economic and political significance. But *Loper Bright* eliminated the general deference framework against which the doctrine’s earlier cases developed. Courts must now independently determine the scope of an agency’s statutory authority rather than defer to an agency’s reasonable interpretation of an ambiguous statute.

That distinction is dispositive here. The question before this Court is whether the General Assembly authorized SLED to operate its ALPR database. That question can be answered by applying ordinary principles of statutory interpretation and the governing South Carolina law. The Court need not adopt the major questions doctrine as a separate rule of construction to determine the scope of authority the General Assembly conferred upon SLED.

Indeed, IJ acknowledges that South Carolina precedent already provides safeguards designed to achieve the objectives underlying the major questions doctrine. *See* Amici Br. at 11. Notably, South Carolina law requires courts to independently interpret the scope of agency authority. *See* S.C. Code Ann. § 1-23-38(5)(b) (“In interpreting a statute or regulation, the court shall not defer to the agency’s interpretation of the statute or regulation and instead shall interpret the statute or regulation *de novo*.”). South Carolina also has well-established canons of statutory construction for resolving ambiguous statutory language, including the principle that statutory terms “must be construed in context.” *See Hinton v. S.C. Dep’t of Probation, Parole, and Pardon Services*, 357 S.C. 327, 332, 592 S.E.2d 335, 338 (Ct. App. 2004). IJ itself identifies that principle as the foundation of the major questions doctrine “[a]t its most basic level.” Amici Br. at 8 (quoting *W. Virginia v. Env’t Prot. Agency*, 597 U.S. at 721). Moreover, South Carolina has long applied its nondelegation doctrine to guard against the improper delegation of legislative power to

administrative agencies. *See, e.g., Cole v. Manning*, 240 S.C. 260, 264, 125 S.E.2d 621, 623 (1962). These established principles provide the tools necessary to determine the scope of SLED’s authority and evaluate the limits of any delegation of power.

Furthermore, the principal goal of statutory interpretation—ascertaining and effectuating legislative intent—is already firmly established in South Carolina law. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (“The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.”). Here, the General Assembly has repeatedly considered legislation that would expressly address SLED’s use of ALPRs. *See, e.g.,* H.R. 3366, 2023-2024 Gen. Assemb., 125th Reg. Sess. (S.C. 2023); H.R. 4675, 2025 Gen. Assemb., 126th Sess. (S.C. 2025); H.R. 4013, 2025 Gen. Assemb., 126th Sess. (S.C. 2025); S. 447, 2025 Gen. Assemb., 126th Sess. (S.C. 2025). Yet it has not enacted those proposals into law. Although legislative inaction does not conclusively establish legislative intent, it supports the inference that the General Assembly has not viewed SLED’s operation of the database under the existing statutory framework as some sort of rogue act requiring legislative correction. Rather, the specific technology neutral language used by the General Assembly has already empowered SLED to create and maintain this statewide criminal justice information and communication system.

In any event, this Court need not decide whether to adopt the major questions doctrine because that issue was not presented by the parties. IJ’s argument only underscores the point. IJ characterizes SLED’s ALPR database as presenting a major constitutional question under the Fourth Amendment.² *See* Amici Br. at 15-22. But the Fourth Amendment is not at issue in this

² Even assuming, *arguendo*, that SLED’s maintenance of an ALPR database raises a genuine constitutional concern—which it does not as confirmed in *Faile*—it still would not present the sort of extraordinary questions contemplated by the major questions doctrine. The Supreme Court’s examples include the FDA’s claimed authority to ban tobacco products, the EPA’s claimed authority to regulate greenhouse gas emissions, the Attorney General’s claimed authority to

appeal; Appellants themselves acknowledge as much. *See* Appellants' Final Reply Br. at 11 n.2. IJ therefore cannot use an amicus brief to inject a distinct constitutional question into this appeal and then invoke that question to urge adoption of a new rule of statutory construction.

CONCLUSION

For the foregoing reasons, the Court should reject the amici's efforts to expand the scope of this appeal beyond the issues presented by parties. Nevertheless, amici's policy driven arguments are ineffective. The Court should respectfully affirm judgment in favor of SLED.

Respectfully submitted,

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rescind the licenses of physicians who prescribed controlled substances to assist suicide, and OSHA's claimed authority to require millions of Americans to receive a COVID-19 vaccine or undergo weekly testing at their own expense. *W. Virginia v. Env't Prot. Agency*, 597 U.S. at 722. By comparison, a state law enforcement agency's maintenance of an ALPR database does not approach the breadth or magnitude of the asserted regulatory authority at issue in those cases.

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CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court's Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), the undersigned employee of Smith Robinson Holler DuBose and Morgan, LLC, counsel for the Respondents South Carolina State Law Enforcement Division and Mark Keel, does hereby certify that service of the **RESPONDENTS' OMNIBUS RETURN TO THE BRIEFS OF AMICI THE CATO INSTITUTE AND THE INSTITUTE FOR JUSTICE** in the above-captioned matter was made upon all counsel of record by email only this the 26th day of October, 2026, as follows:

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Attached herewith and served upon you please find the Respondents' Omnibus Return to the Briefs of Amici The Cato Institute and The Institute for Justice in regard to the above matter.

Thank you!

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