IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

RAUL MAS CANOSA, CASE NO.: 2018-33927-CA-01

Plaintiff,

vs.

CITY OF CORAL GABLES, FLORIDA, *et al.*,

Defendants.

_______________________________________/

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT FLORIDA DEPARTMENT OF LAW ENFORCEMENT

Plaintiff, Raul Mas Canosa, moves for summary judgment against Florida Department of Law Enforcement and Commissioner Richard L. Swearingen (referred to collectively as FDLE). For the reasons set out below, this Court should grant summary judgment for Mr. Mas and against FDLE on Counts II, V and VII of his amended complaint, and issue a declaratory judgment that FDLE's Guidelines for the Use of Automated License Plate Readers are unconstitutional pursuant to the Fourth Amendment of the United States Constitution and Article I, Section 23 of the Florida State Constitution, and constitute improper rulemaking.

I. INTRODUCTION

Administrative agencies such as FDLE have an obligation to obey the law. As a law enforcement agency, FDLE arguably has a greater obligation to follow not only the letter but also the spirit of its legal obligations. Constitutional limitations bind FDLE and ensure that the agency cannot perpetrate unlawful intrusions into the most private aspects of people's lives. Statutory limitations also bind FDLE and require that the agency engage in appropriate notice and comment rulemaking before issuing binding rules. Particularly when those rules result in the kind of intrusive surveillance seen in this case, those procedural requirements serve a critical role of protecting the right of members of the public to advocate for their own interests. FDLE has not adhered to these limits, and has issued binding, yet unpromulgated rules, which have blessed Coral

Gables's unlawful surveillance of innocent motorists. This Court must therefore grant summary judgment for Mr. Mas and invalidate FDLE's rule.

II. UNDISPUTED MATERIAL FACTS

Chapter 316 of the Florida Statutes codifies the "Florida Uniform Traffic Control Law." In 2014, the Florida State Legislature passed Sections 316.0777 and 316.0778 related to "automated license plate recognition" (ALPR) systems. These provisions laid out rules governing the retention of data obtained by ALPR cameras and the disclosure of such data under public records laws. Fla. Stat. §§ 316.0777, 316.0778.

Both provisions defined automated license plate recognition as a "system of one or more mobile or fixed high-speed cameras combined with computer algorithms to convert images of license plates into computer-readable data." Fla. Stat. §§ 316.0777(1)(c), 316.0778(1). Neither section addressed enforcement of traffic laws using these readers. *See id.*

Section 316.0778(2) also tasked the Florida Department of State, "[i]n consultation with" Defendant Florida Department of Law Enforcement (FDLE), to "establish a retention schedule for records containing images and data generated through the use of an automated license plate recognition system." "The retention schedule must establish a maximum period that the records may be retained." *Id.*

After Section 316.0778 was passed in 2014, the Florida Department of State promulgated Rule 1B-24.003(1)(b), General Records Schedule 2, Law Enforcement, Correctional Facilities and District Medical Examiners, Item # 217. This rule provided the retention schedule for "license plate records created by license plate recognition systems," which "include[d], but [wa]s not limited to, images of licenses plates and any associated metadata." This rule directed, "Retain until obsolete, superseded, or administrative value is lost, but no longer than 3 anniversary years unless required to be retained under another record series."

Just prior to Section 316.0778's passage, the Criminal and Juvenile Justice Information Systems Council (CJJIS), a council located within Defendant FDLE, held a meeting where it

resolved "to review the standards to collect the data (to include retention and investigative uses) and provide recommendations to the Council no later than mid-February 2014." FDLE222.

On August 21, 2014 the CJJIS held another meeting where it discussed "privacy concerns" pertaining to ALPR systems and considered a 2009 privacy impact assessment published by the International Association of Chiefs of Police (IACP). FDLE21, 112, 233. In the report, IACP warned about the "[a]ggregation of LPR DATA," which is the "gathering together of various pieces of information about a person." FDLE21. According to IACP:

> Aggregation can cause dignitary harms because of its ability to unsettle an individual's expectations regarding how much information they actually reveal to others. In other words, personally identifiable information brought together from various source systems has the potential to reveal an individual's beliefs or ideas concerning public or social policy, as well as political, educational, cultural, economic, philosophical, or religious matters.
>
> Aggregation can also create interpretation problems where the data compilation used to judge the individual is incomplete or results in a distorted portrait of the person because the information is disconnected from the original context in which it was gathered.

FDLE21. Furthermore, IACP noted that data-retention periods heightened these concerns, as the "indefinite retention of law enforcement information makes a vast amount of data available for potential misuse or accidental disclosure." FDLE41. "[R]etaining certain types of information indefinitely can be a form of undesirable social control that can prevent people from engaging in activities that further their own self-development, and inhibit individuals from associating with others, which is sometimes critical for the promotion of free expression." FDLE41.

Nevertheless, CJJIS dismissed the concerns raised by IACP because "a license plate number identifies a specific vehicle, not a specific person. Although a license plate number may be linked or otherwise associated with an identifiable person, this potential can only be realized through a distinct, separate step (*e.g.*, an inquiry to a Secretary of State or Department of Motor Vehicles data system)." FDLE233.

The Council also considered data retention at the meeting and noted that national studies suggested that "most ALPR users store the data for 1-3 years." FDLE234. The meeting notes say,

"It should be noted that there is a possibility that the guidelines may need to go through the rule promulgation process. FDLE will verify with Department of State." FDLE234.

Final guidelines were forwarded to FDLE, although the director of CJIIS noted that personnel from the Department of State had mentioned that "rules may need to be promulgated" to implement the retention schedule. FDLE292. In December 2014, CJJIS's director then noted that the guidelines document was "scheduled to begin making its way to the rule making process in the next week." FDLE 297.

Defendant FDLE did not undertake formal rulemaking procedures related to the data-retention schedules, however. Instead, CJJIS issued its final "Guidelines for the Use of Automated License Plate Readers," pursuant to the Council's authority under Fla. Stat. § 943.08. Pedroso Exhibit 26.

Section 943.08 allows the Council to "facilitate," "guide," and "support" data collection and retention by criminal justice agencies, and it is empowered with setting out "standards" and "best practices" and "recommendations." Nevertheless, the statute does not give express rulemaking powers to the Council. Purporting to set out "uniform statewide guidelines" for the use of ALPRs, the Guidelines "are encouraged for all Florida law enforcement agencies operating under the authority of the laws of the state of Florida that own or operate one or more ALPRs, collect and maintain ALPR data, or receive or are provided access to ALPR data collected by another agency." Pedroso Exhibit 26 at 1-2. The Guidelines further require "[e]very Florida law enforcement agency that uses or possesses an ALPR" to adopt a use and data retention policy that is "consistent with these Guidelines." Pedroso Exhibit 26 at 2.

The Guidelines permit the indiscriminate collection of ALPR data from every vehicle license plate in "public view." Pedroso Exhibit 26 at 2. Such collection may be "repeated or continuous." Pedroso Exhibit 26 at 2. The stored data may be searched "by authorized persons in furtherance of an active investigation," regardless of whether the authorized person has particularized suspicion of wrongdoing by a specific individual. Pedroso Exhibit 26 at 2.

Likewise, the stored data may also be disclosed to any "criminal justice agency in the performance of the criminal justice agency's official duties," regardless of whether that agency has particularized suspicion of wrongdoing directed to an individual. Pedroso Exhibit 26 at 3. The Guidelines also purport to set out, under Section 316.0778's authority, that "ALPR data that … is gathered and retained without specific suspicion may be retained for no longer than 3 anniversary years." Pedroso Exhibit 26 at 6.

According to the City of Coral Gables, its ALPR data-retention limits were developed from FDLE's Guidelines. Gonzalez, 83:14-20. FDLE's Guidelines provide "general limits" for the City's access to ALPR data and allow access by law enforcement "for the tactical enforcement of state statutes." Pedroso 27:25-28:7; Exhibit 26. The City, in turn, allows access "for conducting ongoing or continuing criminal investigations." Pedroso 28:16-20. Neither entity requires a warrant, nor that police have probable cause, nor reasonable suspicion, nor any other specific quantum of suspicion. Pedroso 28:21-29:5. The police need only have a "legitimate law enforcement purpose" for LEARN searches. Pedroso 37:7-10. Typically, searches are conducted in order to "assist[] forensically with an investigation for a detective." Gonzalez 91:15-3, 92:8-15.

II. DISCUSSION

Pursuant to Florida Rule of Civil Procedure 1.510, a court may grant summary judgment in a movant's favor "if the pleadings and summary judgment evidence on file show that there is no genuine dispute as to any material fact and that the moving party is entitled to a judgment as a matter of law." This standard adopts the "summary judgment standard … of the federal courts[.]" *In re Amends. to Fla. Rule of Civ. Proc. 1.510*, 309 So. 3d 192 (Fla. 2020).

Under this standard, "[e]vidence is viewed in a light most favorable to the nonmoving party[.]" *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 458–59 (11th Cir. 1994). "[T]his, however, does not mean that [a court is] constrained to accept all the nonmovant's factual characterizations and legal arguments. If no reasonable jury could return a verdict in favor of the nonmoving party, there is no genuine issue of material fact and summary judgment will be granted." *Id*. (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

A. FDLE's Guidelines Are Rules Because They Set out Mandatory and Generally Applicable Statements of Law.

1. "Rules" Include Guidelines for Compliance

In Florida, "No agency has inherent rulemaking authority." Fla. Stat. § 120.54(1)(e). Instead, agencies must act pursuant to clearly delegated authority. Fla. Stat. § 120.54(1)(f). When making rules, agencies must also adhere to procedures set out in Florida's Administrative Procedure Act (APA), including notice and comment activities. Fla. Stat. § 120.54(1)(a). The APA also provides that agency action will be deemed an "invalid exercise of delegated authority" if, among other things, the "agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter," the "agency has exceeded its grant of rulemaking authority," the "rule enlarges, modifies, or contravenes the specific provisions of law implemented," the "rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency," or the "rule is arbitrary or capricious." Fla. Stat. § 120.52(8)(a).

The APA provides a variety of ways for a person "substantially affected" by agency action to challenge the action's validity. Fla. Stat. § 120.56(1)(a). When challenging agency action already in effect, a person may, "at any time," assert that the "existing rule is an invalid exercise of delegated legislative authority." Fla. Stat. § 120.56(3). A person may also argue that "an agency statement" "is an unadopted rule," and that the rule was promulgated without adhering to the procedural requirements set forth in section 120.54(1). Fla. Stat. § 120.56(4).

An "unadopted rule" is simply any "agency statement that meets the definition of the term 'rule,' but that has not been adopted pursuant to the requirements of s. 120.54." Fla. Stat. § 120.52(20). "An unpromulgated rule constitutes an invalid exercise of delegated legislative authority and, therefore, is unenforceable." *Dep't of Revenue of State of Fla. v. Vanjaria Enter., Inc.*, 675 So.2d 252, 255 (Fla. 5th Dist. Ct. App. 1996). "The proper remedy for violation of the APA … is prohibiting an agency from relying on that unpromulgated rule or forcing the agency to go through the rule-making process." *Jenkins v. States*, 855 So. 2d 1219, 1230 (Fla. 1st Dist. Ct. App. 2003).

Florida's APA defines a "rule" as "each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule." Fla. Stat. § 120.52(16).

"The breadth of the definition [of 'rule'] … indicates that the legislature intended the term to cover a great variety of agency statements regardless of how the agency designates them." *State Dep't of Admin., Div. of Pers. v. Harvey*, 356 So. 2d 323, 325 (Fla. 1st Dist. Ct. App. 1977). This definition means any "agency statement that either requires compliance, creates certain rights while adversely affecting others, or otherwise has the direct and consistent effect of law is a rule." *Vanjaria Enter., Inc.*, 675 So.2d at 255. Put differently, "[i]f the *effect* of an agency statement is to create certain rights or *adversely affect other rights*, it is a rule." *Coventry First, LLC v. State, Office of Ins. Regulation*, 38 So. 3d 200, 203 (Fla. 1st Dist. Ct. App. 2010) (emphasis added). Such statements of "general applicability," moreover, includes internal "guide[s]" and training materials for agency personnel in enforcement matters. *Vanjaria Enter., Inc.*, 675 So.2d at 255.

Even a statement of mere "agency[] policy" constitutes a "rule," so long as it is one of "general applicability." *Dep't of Highway Safety & Motor Vehicles v. Schluter*, 705 So. 2d 81, 83 (Fla. 1st Dist. Ct. App. 1997). And such policies are simply any "principle, plan, or course of action, as pursued by a government, organization, individual, etc.," and need not even be written down. *Id.* at 83-84 (quoting Webster's New World Dictionary 1102 (2d college ed. 1980)). So long as an agency applies certain criteria in a given circumstance, it is a "rule" that must go through appropriate notice and comment procedures. *Id.* at 85.

And while regulatory prohibitions obviously constitute rules, agency statements of regulatory grace do as well. *Fla. Quarter Horse Track Ass'n, Inc. v. State, Dep't of Bus. & Prof'l Regulation, Div. of Pari-Mutuel Wagering*, 133 So. 3d 1118, 1119 n. 2 (Fla. 1st Dist. Ct. App. 2014); *Jenkins*, 855 So. 2d at 1225. For example, in *Florida Quarter Horse Track Association*, the Court held that an agency policy of *issuing licenses* to certain types of horse races was an agency rule because it involved a uniform interpretation of a statute that granted rights to certain entities.

Similarly, in *Jenkins*, 855 So. 2d at 1225, the Court concluded that the Florida Department of Law Enforcement's determination that certain types of alcohol breathalyzer testing solutions would be deemed to be in compliance with accuracy limitations was a rule because it was a general grant of permission for law enforcement to use certain solutions.

2. FDLE's Guidelines Are "Rules"

Applying these standards, FDLE's Guidelines undoubtedly constitute rules under section 120.52(16). First, the Guidelines purport to set a statutory limitation on the retention of ALPR data, which was explicitly delegated by statute. Section 316.0778(2) empowers FDLE to consult with the Florida Department of State to "establish a retention schedule for records containing images and data generated through the use of an automated license plate recognition system," which "*must* establish a maximum period that the records may be retained." (emphasis added). This directive is mandatory, and suggests, of course, that data retained beyond the "maximum period" set by FDLE will not comply with the law. *See id.* And the Guidelines expressly claim to impose the limits contemplated by the statute, saying "ALPR data *shall* be retained in accordance with Florida Statute 316.0778." Pedroso Exhibit at 7 (emphasis added). The Guidelines then explain what FDLE views as being in "accordance" with the statute:

> ALPR data that are part of an ongoing or continuing investigation and information that is gathered and retained without specific suspicion may be retained for *no longer than* 3 anniversary years. Access to ALPR data for criminal investigation or intelligence purposes *is limited* to authorized Criminal Justice Agency personnel for *no longer than* 3 anniversary years and requires an agency case number or case name and logging of access. Data captured, stored, generated, or otherwise produced *shall* be accessible in the ALPR system for 30 days for tactical use.

Pedroso Exhibit at 7 (emphasis added). These statements, on their face, are assertions of what is and is not permitted by the statute as it relates to data retention under section 316.0778(2).

Nor is access to ALPR data for unauthorized Criminal Justice Agency personnel beyond the bounds of "criminal investigation or intelligence purposes." Pedroso Exhibit at 7. To the contrary, not only may ALPR data used by these agencies and officers (subject to these limitations), but these agencies "shall" make the data available, at least, "for 30 days for tactical

use." These are plainly examples of an "agency statement that either requires compliance, creates certain rights while adversely affecting others, or otherwise has the direct and consistent effect of law," because they create a clear demarcation between what FDLE believes is and is not permitted under the statute. *See Vanjaria Enter., Inc.*, 675 So.2d at 255.

Furthermore, the Guidelines adhere to FDLE's view that they are determinative of what is and is not forbidden by statute. They even say repeatedly that they are meant to "ensure that ALPRs and ALPR-generated data are used only in a manner that is lawful" and set out "uniform statewide guidelines" "provid[ing] direction to law enforcement agencies in Florida regarding the use of their ALPRs and ALPR data." Pedroso Exhibit at 1. Of course, given that "statement[s] of general applicability" are rules under section 120.52(16), the mere use of the phrase "uniform statewide guidelines" establishes that the Guidelines are indeed "rules" under the statute. The Guidelines even mandate that covered agencies "maintain records" so that the FDLE may engage in "enforcement" "to ensure strategic alignment and assessment of policy compliance." Pedroso Exhibit at 7. An agency does not contemplate "enforcement" unless its statements "require[] compliance," and thus, these Guidelines are undoubtedly "rules" for this reason, too. *See Vanjaria Enter., Inc.*, 675 So.2d at 255.

Moreover, the mere failure to specify a penalty hardly negates a rule's effectiveness. After all, FDLE no doubt believes that retaining data in contravention of the statute, Florida Statute 316.0778, is unlawful. Indeed, even though the statute never specifies a penalty for retention beyond the "maximum period that the records may be retained," Fla. Stat. 316.0778(2), it would defy logic for FDLE to claim that the *statute* was not really a rule of general application or otherwise lacked the force and effect of law. Of course, this follows from the "accepted principle that the use of the term 'shall' in a statute normally has a mandatory connotation," regardless of a specific penalty provision. *S.R. v. State*, 346 So.2d 1018, 1019 (Fla. 1977). What is true for the statute must also be true for FDLE's rules concerning what is deemed in compliance with the statute—both are mandatory, regardless of designated penalties.

Furthermore, the definition of a "rule" encompasses permissive statements, and not just prohibitory edicts. A rule need only be a statement of "agency[] policy" of "general applicability," even if it is informal and unwritten. *Schluter*, 705 So. 2d at 83. This can include decisions that regulated actions are *permitted* under a statute or regulation, so long as they are generally applicable. *Fla. Quarter Horse Track Ass'n, Inc.*, 133 So. 3d at 1119 n. 2; *Jenkins*, 855 So. 2d at 1225. The courts in *Florida Quarter Horse Track Association, Inc.*, 133 So. 3d at 1119 n. 2, and *Jenkins*, 855 So. 2d at 1225, both contemplated agency policy that considered certain actions to be permitted (horseracing and use of substitute alcohol testing solutions respectively), and both times the agency grace was determined to be a rule. By that same reasoning, merely by setting out FDLE's "uniform statewide guidelines" for what policies will be considered in "compl[iance] with Florida Statutes governing the use of ALPR data"—regardless of any enforcement or penalty provisions—FDLE has established a rule. Pedroso Exhibit at 1-2

Tellingly, Coral Gables considers the Guidelines to be rules. The City set its 3-year data-retention period in accordance with FDLE's Guidelines. Gonzalez 83:14-20. Coral Gables understands what is obvious from the Guidelines' text—that it must adhere to the outer limits set by the Guidelines.

In fact, members of the CJJIS assumed that the Guidelines were rules. At the August 21, 2014 meeting the Council wrote in the minutes, "It should be noted that there is a possibility that the guidelines may need to go through the rule promulgation process. FDLE will verify with Department of State." FDLE234. And while forwarding the final version of the Guidelines to FDLE, the director of CJIIS noted that personnel from the Department of State had mentioned that "rules may need to be promulgated" to implement the retention schedule. FDLE292. Then, in December of 2014, CJJIS's director noted that the Guidelines document was "scheduled to begin making its way to the rule making process in the next week." FDLE297. Despite that understanding, FDLE never followed through on its obligation to initiate the rulemaking process.

B. FDLE's Guidelines Permit Unconstitutional Data Gathering and Dissemination to Law Enforcement

"Any person substantially affected by an agency statement" has standing to challenge such statement as an unadopted rule. Florida Statutes § 120.56(4)(a). "In order to meet the substantially affected test … the petitioner must establish: (1) a real and sufficiently immediate injury in fact; and (2) that the alleged interest is arguably within the zone of interest to be protected or regulated." *Ward v. Board of Trustees of the Internal Improvement Trust Fund*, 651 So.2d 1236, 1237 (Fla. 4th Dist. Ct. App. 1995). Under this test, it is "unquestionable that standing may be based upon an interest created by the Constitution," which has been violated by a particular regulation. *Florida Medical Ass'n v. Department of Professional Regulation*, 426 So.2d 1112, 1116 (Fla. 1st Dist. Ct. App. 1983) (quoting *Golden v. Biscayne Bay Yacht Club*, 521 F.2d 344, 348 (5th Cir. 1975)).

FDLE's Guidelines have permitted the City to unlawfully collect protected information and disseminate it to law enforcement. The City designed its system in light of the Guidelines' establishment of a three-year data-retention period and policy of sharing information without any suspicion. *See* Gonzalez, 83:14-20. Because the City's system violates the Fourth Amendment and Article I, Section 23, so too do the Guidelines.

As set out in detail in Mr. Mas's Motion for Summary Judgment concerning the City, the City's system, which collects hundreds of millions of data points from 18 cameras throughout the City and stores that data for three years, constitutes a search for Fourth Amendment purposes. *See Carpenter v. United States*, 138 S.Ct. 2206, 2217, 2220-22 (2018); *Commonwealth v. McCarthy*, 142 N.E.3d 1090, 1103 (Mass. 2020). Furthermore, because the City shares that data with police without any particularized suspicion requirement, the policy violates the warrant requirement. *See Carpenter*, 138 S.Ct. at 2220-22.

While the City's actions violate constitutional limitations in their own right, Mr. Mas's claim against FDLE is premised on the Guidelines' grant of permission for the City to engage in unconstitutional activity. FDLE's Guidelines purport to allow municipalities like Coral Gables to indiscriminately collect ALPR data from every vehicle in "public view." Pedroso Exhibit 26 at 2. The Guidelines also allow for the stored data to "be searched by authorized persons" and "any

criminal justice agency" "regardless of whether the authorized person has particularized suspicion of wrongdoing directed to an individual." Pedroso Exhibit 26 at 2. The Guidelines also purport to set out, under Section 316.0778's authority, that "ALPR data that … is gathered and retained without specific suspicion may be retained for no longer than 3 anniversary years." Pedroso Exhibit 26 at 6.

Mr. Mas Canosa's constitutional injury thus flows from FDLE's Guidelines. The continued constitutional injury Mr. Mas suffers comes directly from the permission granted by the FDLE Guidelines to operate the ALPR system in this illegal fashion. This Court may address this real and immediate injury and enter an order declaring the Guidelines constitutionally void.

The analysis is much the same for Count V, related to Article I, Section 23. As set out in Mr. Mas's Motion for Summary Judgment against the City, the ALPR System also violates the Florida Constitution because it allows intrusion and dissemination of private information without adequate justification or limitation. As with Count II, this constitutional injury is therefore traceable to FDLE's improper conduct, and this Court should enter judgment invalidating the Guidelines for this reason as well.

III. CONCLUSION

FDLE promulgated "rules" for the use of ALPR systems throughout Florida, without following required procedures. These rules were then used to carry out direct violations of Mr. Mas's constitutional rights. This Court should therefore vacate FDLE's rules.

Dated: June 2, 2021

Respectfully,

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CERTIFICATE OF SERVICE

I CERTIFY that on this day, June 2, 2021, undersigned counsel has electronically filed the foregoing document with the Clerk of the Court using the Florida Courts E-Portal. Pursuant to Fla. R. Jud. Adm. 2.516(b), I also certify that the foregoing document has been furnished to all counsel of record and interested parties identified on the attached Service List via transmission of Notices of Service of Court Document generated by the E-Portal, or in the manner listed on the attached service list.

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