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 RESPONSE TO DEFENDANT CITY OF CORAL GABLES' MOTION FOR SUMMARY JUDGMENT

Plaintiff Raul Mas Canosa files this response to Defendant City of Coral Cables' (the "City") motion for summary judgment. For the reasons set out below, the City has not established that a grant of summary judgment in its favor is appropriate. This Court should deny the City's motion and grant Mr. Mas's corresponding motion for summary judgment.

I. INTRODUCTION

The City's motion for summary judgment reveals just how dangerous its approach is to the individual liberty that both the United States and Florida Constitutions safeguard from governmental intrusion. In the City's view, no one can have an objectively reasonable expectation of privacy whenever they are in a public space, and no one can have a subjective expectation of privacy if they have prior knowledge that the government intends to infringe the citizenry's privacy rights. If accepted, either of these theories would eviscerate the constitutional right to privacy in the digital age. Taken together, the City's theories promise a Big Brother society under pervasive governmental surveillance unobstructed by the Constitution because the government could defeat any legitimate expectation of privacy just by announcing how it plans to monitor every facet of our lives.

Fortunately, the City's theories misconstrue relevant jurisprudence. As set out below and detailed in Mr. Mas's own motion for summary judgment, the Supreme Court's recent decisions on digital surveillance compel the conclusion that the City's ALPR surveillance program is unconstitutional.

Finally, the City's invasion of Mr. Mas's privacy violates the more stringent protections provided by Article I, Section 23 of the Florida State Constitution. Not only does the City's ALPR system collect an astounding quantity of private information about Mr. Mas, and every other innocent person who has the temerity to enter the City, it does so for no good reason. After collecting more than 106,053,551 images in the first three years of the system's operations, the City can point to *five* instances where it thinks the system has proven useful. Section 23 does not allow this kind of systematic and ultimately pointless surveillance.

II. ARGUMENT

A. The City's Use of Technology to Chronicle Mr. Mas's Movements over Time Violates an Objectively Reasonable Expectation of Privacy Under the Fourth Amendment

The Supreme Court already "confront[ed] … how to apply the Fourth Amendment to … the ability to chronicle a person's past movements through the record of his cell phone signals." *Carpenter v. United States*, 138 S. Ct. 2206, 2216 (2018). "Much like GPS tracking of a vehicle," the Court concluded, tracking a person's movement based on cell-site data reveals information about the person's movement that "is detailed, encyclopedic, and effortlessly compiled." *Id.* The same is true for the City's use of a network of traffic cameras to track movements over time, cataloguing these movements in a searchable database for three years. The government's use of such "surveillance technology" is unconstitutional because "an individual maintains a legitimate expectation of privacy in the record of his physical movements[.]" *Id.* at 2217. Society is prepared to recognize that expectation of privacy as reasonable because "a central aim of the Framers" in adopting the Fourth

Amendment "was 'to place obstacles in the way of a too permeating police surveillance.'" *Id.* at 2214 (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)).

The City seeks to avoid this straightforward application of the Fourth Amendment by simply misrepresenting the cases on which it relies. Take *Bailey v. State*, 311 So.3d 303 (Fla. 1st DCA 2020), for instance, a case that the City cites for the proposition that "no reasonable expectation of privacy existed in GPS tracking data that showed the movements of a vehicle[.]" City MSJ, at 23; *see also id.* at 3 (citing *Bailey* as if it stated a general rule against an objective expectation of privacy in a car's movements). Although the First District Court of Appeal applied *United States v. Knotts* rather than *Carpenter* to Bailey's case, as the City mentions, the court did not adopt some generally applicable rule that there is no legitimate expectation of privacy on public roads. Instead, the Court grappled with whether *Carpenter* altered the way the third-party doctrine applies to a person's expectation of privacy while driving *for one night* in *someone else's car* when that vehicle was *already equipped* with a GPS tracking device that the owner had *consented* to attaching on the car. *Id.* at 314-15. Dealing with the particular facts before it, the court reasoned that Bailey "chose to operate a car on public roads—a car owned by another who consented to GPS tracking. The police played *no role* in the recording of the information and simply availed themselves of the advantages." *Id.* at 315 (emphasis added). The court concluded that the third-party doctrine applied to defeat Bailey's expectation of privacy, despite *Carpenter*'s refusal to apply the third-party doctrine to cell-phone data, because "[n]othing forced [Bailey] to use the Honda owned by his girlfriend, and any number of other means of travel were available which were not being tracked. *Use of a car owned by another* to traverse public streets renders Appellant's purported expectation of privacy unreasonable." *Id.* (emphasis added); *see also id.* at 314 ("Adding further consideration of third-party principles, the consent to tracking on the part of the car owner further dilutes the argument that the precedent of *Carpenter* controls.").

As if all those unique facts supporting the court's application of the third-party doctrine were not enough to distinguish *Bailey* from this case, the First District Court of Appeals also based its holding on the finite duration that police tracked Bailey's girlfriend's car: "Although the Court in *Carpenter* forbid the government from warrantlessly accessing seven days of historical CSLI from a target's wireless carriers, it refused to address whether one's 'reasonable expectation of privacy in the whole of his physical movements' extends to shorter periods of time or to other location tracking devices." *Id.* (quoting *Carpenter*, 138 S. Ct. at 2217 n.3, 2219). The court held that the police's tracking of Bailey's location over the course of one night while he drove someone else's car that was already equipped with a tracking device did not violate the Fourth Amendment. *Id.*

In so holding, the *Bailey* Court also recognized that the *Knotts* decision is much more limited than the City would have this Court believe. The City claims that *Knotts* is "blackletter law" that controls here "as a matter of law" (City MSJ, at 4, 11), because both *Knotts* and this case involve the expectation of privacy in a car. *But see Tracey v. State*, 152 So.3d 504, 513 (Fla. 2014) ("[T]he holding in *Knotts* was not a blanket holding for all future circumstances when electronic-type tracking occurs in public areas."). As *Bailey* pointed out, though, even *Knotts* recognized the temporal limitations on its holding: "We acknowledge the [*Knotts*] Court's statement that the '*limited* use which the government made of the signals from this particular beeper' during a *discrete* 'automotive journey' and *reserved* the question of whether 'different constitutional principles may be applicable' *if 'twenty-four hour surveillance of any citizen of this country [were] possible.*'" *See* 311 So.3d at 314 (quoting *Knotts*, 460 U.S. at 283-85) (emphasis added); *Carpenter*, 138 S. Ct. at 2215 (distinguishing the "rudimentary tracking facilitated by the beeper" in *Knotts* from "more sweeping modes of surveillance" in *Carpenter* because the tracking in *Knotts* was for a limited, discrete use during a single journey); *Tracey*, 152 So.3d at 513 ("The Court [in *Knotts*] noted that the officers simply augmented their sensory faculties of observation of the vehicle by use of the beeper. … The Court specifically left open the question of the application of the Fourth

Amendment to longer term surveillance, stating 'if such dragnet-type law enforcement practices … should eventually occur, there will be time enough then to determine whether different constitutional principles apply.").

It turns out that 24-hour surveillance of every citizen is now possible and, to make matters worse, the City can catalogue, map, and review the movements of all citizens not only for 24 hours but for up to three years. *Cf. Carpenter*, 138 S. Ct. at 2218 (concluding that the "newfound tracking capacity" affected almost everyone in the country, not just "persons who might happen to come under investigation"). *Knotts* did not rule that such a blanket, long-lasting, and unreasonable intrusion on privacy is constitutional. To the contrary, the Supreme Court explicitly reserved on the issue that the City now claims is settled black-letter law. Since *Knotts*, "five Justices" have "concluded that 'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy'—regardless whether those movements were disclosed to the public at large." *Carpenter*, 138 S. Ct. at 2215 (citing the Alito and Sotomayor, JJ., concurrences in *Jones*); *id.* at 2219-20 ("[W]hen confronted with more pervasive tracking [than that in *Knotts*], five Justices agreed that longer term GPS monitoring of *even a vehicle traveling on public streets* constitutes a search.").

Next, the City's insistence that "courts *routinely* and *consistently* hold that one does not have a reasonable expectation of privacy in images of his or her plainly visible license plate" (City MSJ, at 12) betrays the City's persistent refusal to appreciate the difference between a limited search in a single instance and the pervasive and ongoing intrusion into what individuals wanted to maintain as private. The City did not take a single photograph of Mr. Mas's vehicle or read his VIN number during an isolated traffic stop. Rather, the City erected a "geo-fence" of cameras around its "main point[s] of entry" and "critical borders," designed to capture "whatever comes through" at every moment of every day, data which the City then chronicles for three years. *See* Nelson Gonzales Dep. 47:21-48:2, 48:11-15, 49:7-13, 50:1-5, 50:13-18, 52:8-17, July 31, 2020. In the City's view, however, the continuous

and aggregated nature of the search is a distinction without a difference—the law prefers clean rules and what rule could be cleaner than the government always wins? *See* City MSJ, at 14. But the Fourth Amendment imposes a rule of reasonableness, and what may be reasonable for one moment can easily become unreasonable over time. *Cf. Bailey*, 211 So.3d at 311 ("[C]ourts must examine every *Katz* suppression claim on a case-by-case basis to determine whether a search occurred.") (citing *Carpenter*, 138 S. Ct. at 2213-14).[1]

The difference between a search lasting five minutes and one lasting three years is a distinction that would strike most people as meaningful (which informs why society is prepared to recognize a privacy expectation against three-year searches as reasonable). *See Carpenter*, 138 S. Ct. at 2217 ("For that reason, '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.'") (quoting *Jones*, 565 U.S. at 430 (Alito, J., concurring)). For its part, the Supreme Court has repeatedly focused on temporal distinctions in determining the reasonableness of a search. *See id.* at 2217, n.3 (declining to decide "whether there is a limited period for which the Government may obtain an individual's historical CSLI free from Fourth Amendment scrutiny, and if so, how long that period might be."). As was the case in *Carpenter*, "this case is not about 'using a phone' *or a person's movement at a particular time*. It is about a detailed chronicle of a person's physical presence compiled every day, every moment, over several years." *Id.* at 2219-20 (emphasis added).

[1] Although the Court in *Tracey* declined to adopt the "mosaic" theory (and applied a "normative" theory instead), the Court did so without the benefit of *Carpenter*, which the Supreme Court would not decide for another four years. As explained throughout this brief, the Court in *Carpenter* held expressly held that the Fourth Amendment protects against the use of "surveillance technology" to monitor and compile data on an individual's physical movements over time. 138 S. Ct. at 2217-20.

Additionally, the Court in *Carpenter* explicitly qualified its holding to the seven-day period at issue: "we need not decide whether there is a limited period for which the Government may obtain an individual's historical CSLI free from Fourth Amendment scrutiny, and if so, how long that period might be." *Id.* at 2217 n. 3. More than just the sheer length of time over which the search occurs, the Court has also warned against the retrospective nature of searches that compile location data over time:

> [T]he retrospective quality of the data here gives police access to a category of information otherwise unknowable. In the past, attempts to reconstruct a person's movements were limited by a dearth of records and the frailties of recollection. With access to CSLI, *the Government can now travel back in time to retrace a person's whereabouts*, subject only to the retention policies of the wireless carriers, which currently maintain records for up to five years. *Critically, because location information is continually logged … this newfound tracking capacity runs against everyone. Unlike with the GPS device in Jones, police need not even know in advance whether they want to follow a particular individual, or when.*

Id. at 2218 (emphasis added). "Whoever the suspect turns out to be," when a crime occurs, the City's surveillance system has already "tailed" the suspect "every moment of every day for [three] years, and the police may—in the Government's view—call upon the results of that surveillance without regard to the constraints of the Fourth Amendment." *Id.*

The City, however, would have this Court believe that there is no Fourth Amendment right to privacy once a person leaves their home. That's simply not true. The *Katz* test, which the City purports to apply to this case, famously comes from a case holding that a person has a reasonable expectation of privacy while using a public phone booth. *See Katz v. United States*, 389 U.S. 347, 351 (1967) ("[T]he Fourth Amendment protects people, not places."). *Carpenter* and *Jones* also dealt with long-term surveillance on public roads. The City attempts to avoid these undeniable facts, however, by pointing out that Carpenter *also* carried his cell phone into his home. *See* City MSJ, at 20 (emphasizing that "the digital data at issue [in *Carpenter*] gave the government 'near perfect surveillance' of the defendant's comings and goings in public *and private* places"). But nothing in *Carpenter* suggests in any way that the Court's holding turned on or was limited by the fact that the government's search

crossed beyond the threshold of Carpenter's home. Indeed, only one brief paragraph in the opinion even mentions the privacy interests inherent indoors. *See id.* at 2218. The Court's opinion stressed repeatedly that "[a] person does not surrender all Fourth Amendment protection by venturing into the public sphere. … A majority of this Court has already recognized that individuals have a reasonable expectation of privacy *in the whole of their movements*." 138 S. Ct. at 2217 (citing *Jones*, 565 U.S. at 415, 430 (Alito and Sotomayor, JJ., concurring)); *see also Tracey*, 152 So.3d at 526 ("[W]e conclude that such a subjective expectation of privacy of location as signaled by one's cell phone—*even on public roads*—is an expectation of privacy that society is now prepared to recognize as objectively reasonable[.]") (emphasis added).

Nor is that expectation of privacy limited to trespass-type governmental instructions, as *Carpenter*'s repeated reliance on *Jones* demonstrates. *See also Tracey*, 152 So.3d at 525 (noting that neither *Jones* nor *Knotts* foreclosed that surveillance without a trespass is still a Fourth Amendment search). As technology continues to advance, it is incumbent on courts to protect that reasonable expectation of privacy against the government's attempts to erode the Fourth Amendment's protections. The City's arguments are not just wrong on the law—they aggressively threaten individual liberty.

B. Mr. Mas Has Testified that He Has a Subjective Expectation of Privacy in His Movements over Time Sufficient to Invoke the Fourth Amendment's Protection

The City tries unconvincingly to claim that Mr. Mas has not demonstrated a subjective expectation of privacy in his movements over time because the City's ALPRs are right there in plain sight for all to see. City MSJ, at 25. To support its argument, the City quotes selective excerpts from Ms. Mas's deposition. *Id.* at 26. Conveniently, the City's excerpts omit the portion of Mr. Mas's testimony when he testified explicitly that the City's ALPR system "[a]bsolutely" invades his privacy before he then compared the City's monitoring system to the East German Secret Police. Raul Mas Canosa Dep. at 42:14-43:17, Mar. 4, 2021. Mr. Mas explained further:

> When I saw those approximately 80 pages of documents that the city sent me of my vehicle movements over a five-month period of time it became very obvious to me that the city had an exceptionally good idea of what my daily routine was[.] Because those images captured me going to the supermarket, to the drycleaner, to doctors[']appointments, to … the veterinarian with my dog, to a meeting with a client, to … a city commission meeting, to lunch with friends at a restaurant[.] … [Y]ou can put the pieces together and it really pretty much tells you what the daily routine of Raul Mas is on a day-to-day basis from some of these images.

Mas 42:20-43:8. That testimony is proof positive of Mr. Mas's subjective expectation of privacy.

The factual inaccuracies, however, were not the only problems with the City's subjective-expectation arguments. Additionally, the City attempts to use Mr. Mas's lacking expectation of privacy in his license plate at any single given moment to negate his legitimate expectation of privacy in his movements over time. *See* City MSJ, at 26 (highlighting that Mr. Mas knows that a member of the public could photograph his car while it is on a public road). This logical fallacy fails at the subjective level for the same reasons it fails in regard to Mr. Mas's objective expectation of privacy. *See* Section II.A (discussing the unreasonableness of searches that continue over time). There is a constitutionally material difference between the government's photographing someone's location at a single moment versus the government tracking one's movements across the city on a 24-hour basis over three years. *Cf. Carpenter*, 138 S. Ct. at 2217 (holding that an individual maintains an expectation of privacy in the chronicling of their movements over time); *Tracey*, 152 So.3d at 525 (holding that an individual has a subjective expectation of privacy in their cell-phone's location "even on public roads"). Accepting a limited governmental intrusion as reasonable does not equate to accepting a constant and persistent intrusion as equally reasonable.

Second, the City suggests a rule that would allow the government to defeat any citizen's subjective privacy expectations by simply publicizing privacy intrusions before committing them. *See* City MSJ, at 21 ("Unlike the situations in *Jones* and *Carpenter*, which involved 'secret monitoring,' here, the public has of course been made aware of the City's ALPR program from its inception."); City MSJ, at 22 ("In fact, Plaintiff himself knew about the ALPR program, and he was even able to be part of

the public debate surrounding the program."). An expectation of privacy is measured, in part, objectively, depending on whether "society [is] willing to recognize that expectation as reasonable[.]" *California v. Ciraolo*, 476 U.S. 207, 211 (1986). Whether or not the target of a search is actually aware that the search might occur is not relevant to this question. *Id.* After all, a person subject to an illegal frisk has suffered a constitutional injury all the same, despite being well aware of an officer's roving hands. *See, e.g.*, *Arizona v. Johnson*, 555 U.S. 323, 334 (2009).

The City's novel theory would empower the government to defeat anyone's expectation of privacy merely by announcing in advance that it plans to conduct an unreasonable search. *Cf. Tracey*, 152 So.3d at 525 (citing *Katz* to reject the idea that the scope of the Fourth Amendment can be left to the discretion of the police). One's knowledge or advance knowledge of unreasonable governmental action, however, does not negate an ongoing expectation that the government will abide by the law and conduct only reasonable searches supported by probable cause. *Cf. id.* at 522 ("Simply because the cell phone user knows or should know that his cell phone gives off signals that enable the service provider to detect its location for call routing purposes … does not mean that the user is consenting to use of that location information by third parties for any other unrelated purposes."). The same is true for Mr. Mas. Despite the City's alarming arguments in this case, Mr. Mas continues to expect that the state and federal constitutions will protect his constitutional right against unreasonable governmental intrusion.

C. Mr. Mas Suffered a Fourth Amendment Injury When the City Acquired Data of His Movements over Time

The City's third defense of its blanket surveillance program once again depends on its misunderstanding of the Fourth Amendment. According to the City, its constant monitoring and cataloging of Mr. Mas's movements throughout Coral Gables for over three years do not implicate

the Fourth Amendment because the City has not yet used those records it has obtained to prosecute Mr. Mas for a crime. But that's not how the Fourth Amendment works.

As mentioned above, the Court in *Knotts* warned that a different rule might apply to surveillance of every citizen as opposed to the discrete search of a suspect's movements from Point A to Point B. *See* 460 U.S. at 283-85; *see also Tracey*, 152 So.3d at 5252 ("In the *Knotts* era, high tech tracking such as now occurs was not within the purview of public awareness or general availability. Thus, we conclude that we are not bound to apply the holding in *Knotts* to the current, and different, factual scenario."). And in *Carpenter*, the Court "found that *the acquisition* of Carpenter's CSLI was a search." 138 S. Ct. at 2221 (emphasis added); *see also Ferrarri v. State*, 260 So.3d 296, 305 (Fla. 4th DCA 2018) ("[T]he *acquisition* of the CSLI records without a warrant based upon probable cause violated Ferrari's Fourth Amendment rights.") (emphasis added). The Court's concern was the cataloging of an individual's movements: "Such a chronicle implicates privacy concerns far beyond those considered in [cases applying the third-party doctrine]." *Id.* at 2219-20. Indeed, in its motion for summary judgment, the City admits that *Carpenter* "held that the Government's warranted *acquisition* of location records …, which secretly *catalogued* the defendant's movements for a period of 127 days, was a violation of the Fourth Amendment." City MSJ, at 19 (emphasis added). The same is true here.

The Fourth Amendment secures the privacy of *people* in their *persons* and effects. Those protections attach regardless of whether an individual is under criminal investigation and regardless of how the government uses the information it collects without a warrant. It is undisputed in this case that the City has already photographed Mr. Mas's movements for three years—chronicling so many of his movements that it compiled an 80-page dossier on Mr. Mas's movements over time. *See* Gonzalez 121:13-18; Gonzalez Exhibit 16. The City has already conducted its search for Fourth Amendment purposes. That the City may or may not have yet queried or used that information is simply of no moment.

D. The City's ALPR System Violates Article I, Section 23 Because It Gathers Masses of Private Information Without Any Judicial Oversight and with an Abysmal Record of Success

The City's ALPR system also violates Florida's unique constitutional protections. Rather than engage with this feature of law, the City has tried to brush aside Article I, Section 23's unique role in Florida law by simply declaring, wrongly, that without a violation of the Fourth Amendment "there can be no violation of one's right to privacy under Article I, section 23." City MSJ, at 34. But the City relies on cases that address the conflict between Article I, Section 23 and Article I, Section 12 in *criminal cases*, when the remedy of suppression is at issue. While the City is correct that Section 23 provides no special protection in criminal prosecutions, that is clearly *not* the case, where, as here, innocent and law-abiding citizens are involved.

Florida has *two* distinct state constitutional protections for privacy rights. In addition to the right of privacy set out in Section 23, Article I, Section 12 protects against "unreasonable searches and seizures," and even provides that "[a]rticles or information obtained in violation of this right shall not be admissible in evidence[.]" This provision "shall be construed in conformity with the 4th Amendment to the United States Constitution." Fla. Const. Art. I, section 12.

Section 12 is specifically limited to provide only as much protection as provided by the Fourth Amendment. In 1982, two years after Section 23 was adopted, Section 12 was amended to add the "conformity amendment," which limited court interpretation of Section 12 to the extent that it granted greater privacy protection than the Fourth Amendment. *Limbaugh v. State*, 887 So.2d 387, 391-92 (Fla. 4th Dist. Ct. App. 2004); *see also State v. Hume*, 512 So.2d 185, 188 (Fla. 1987) (Section 23 "does not modify the applicability of article I, section 12"). Thus, Article I, Section 23 "has no application to searches and seizures complying with Article I, section 12," which governs searches and seizures by law enforcement. *Limbaugh*, 887 So.2d at 392. This simply means that "the *applicability* of article I, section 12, is not displaced or affected by the privacy amendment. The propriety of a search warrant

is measured by the requirements of article I, section 12, not by article I, section 23." *Id.* at 396 (emphasis in original). "[T]he constitutional right of privacy does not further restrict the State's powers of search and seizure in the *criminal* context beyond those requirements imposed by article I, section 12, and the Fourth Amendment." *Id.* at 397 (emphasis added); *see also L.S. v. State*, 805 So. 2d 1004, 1008 (Fla. 1st DCA 2001) ("In circumstances like the one at issue, *involving search and seizure issues*, the Florida Constitution's right of privacy provision, Article I, section 23, does not modify the applicability of Article I, section 12, so as to provide more protection than that provided under the Fourth Amendment[.]") (emphasis added).

Section 23, however, operates independently from Section 12, and prevents state encroachment into privacy. *See, e.g.*, *Shaktman*, 553 So.2d at 150 (Section 23 provided a "freestanding" protection from law enforcement pen register searches); *State v. Crumbley*, 143 So.3d 1059, 1069 (Fla. 2nd DCA 2014) (Section 23 prohibited law enforcement from collecting private information from innocent "third parties" pursuant to search warrant authorized against criminal defendant). Section 23 still applies independently in criminal cases, it just lacks the remedy of suppression. *See State v. Johnson*, 814 So.2d 390, 393-94 (Fla. 2002) (search of criminal defendant's medical records violated Article I, Section 23, but suppression of the evidence was not an appropriate sanction). Thus, independent of Section 12, Section 23 "embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution," even when it involves searches by state actors. *State v. J.P.*, 907 So.2d 1101, 1112 (Fla. 2004) (internal citation and quotation marks omitted).

The City also wrongly argues that, in any event, the "threshold requirement" of an expectation of privacy is the same under Section 23 as under the Fourth Amendment. City MSJ at 34-35. Yet again, the City ignores relevant case law. While the cases applying Section 23 do employ a discussion of the *legitimate* expectation of privacy, it is not the same test as used for the Fourth Amendment.

Indeed, "[t]he words 'unreasonable' or 'unwarranted' harken back to the federal standard of 'reasonable expectation of privacy,' which protects an individual's expectation of privacy only when society recognizes that it is reasonable to do so. The deliberate omission of such words from article I, section 23, makes it clear that the Florida right of privacy was intended to protect an individual's expectation of privacy regardless of whether society recognizes that expectation as reasonable." *Shaktman*, 553 So. 2d at 153 (Ehrlich, J., concurring). Hence, the test is *not* the same.

After all, Florida courts have often found Section 23 to protect interests that were plainly *not* protected by the Fourth Amendment. For example, the "names and contact information" of "Hotel guests" "are constitutionally protected, private details." *Josifov v. Kamal-Hasmat*, 217 So.3d 1085, 1087 (Fla. 3rd DCA 2017). Similarly, financial records have been deemed protected by Section 23, *Inglis v. Casselberry*, 200 So.3d 206, 212 (Fla. 2nd DCA 2016), as have an individual's Social Security Number, *Thomas v. Smith*, 882 So.2d 1037, 1043 (Fla 2nd DCA 2004), and even the names and addresses of blood donors have been protected from intrusion. *Rasmussen v. S. Fla. Blood Serv., Inc.*, 500 So.2d 533, 536 (Fla. 1987). It seems that the Florida Supreme Court meant what it said when it reminded the State that Section 23 "embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution." *J.P.*, 907 So.2d at 1112.

Striking out on the law, the City repackages its failed argument about Mr. Mas's expectation of privacy and asserts that he has none, and thus that he has nothing to complain about. City MSJ at 35. Of course, as discussed, Mr. Mas has a *reasonable* expectation of privacy that implicates the Fourth Amendment. But he certainly also has a *legitimate* expectation of privacy—*i.e.*, a purely individual expectation that the State would not track his movements for years on end. *See* Mas Depo. Tr., at 42:14-43:17.

E. The City's Policy Does Not Serv a Compelling Interest by the Least Intrusive Means

Finally, the City argues that it can nevertheless justify its actions because it has a "compelling state interest" in crime reduction, which is can "accomplish through the use of the least intrusive means" using the ALPR system. City MSJ at 35. This argument is almost laughable—the City's ALPR program has been a resounding failure, and the lack of *any limitations* or controls cannot rationally be viewed as the least intrusive method *possible* for controlling crime.

First, it is the City's burden to "demonstrate[e] that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means." *Rasmussen*, 500 So. 2d at 536. Granting that solving crime is a legitimate governmental function, the City has failed completely to show that ALPR data helps accomplish this goal. The grand total of the City's "successes" is found in two undated "progress briefing" reports presenting "select success stories" from the ALPR system, as evidence of its efficacy. CG903-942. These briefings discuss five cases that resulted in charges, although it is unclear whether they resulted in convictions. And the cases involved a "stolen vehicle," vandalism, "theft of used cooking oil," burglary and credit card fraud. But even accepting these sporadic arrests as successes, they represent *five* instances of success after collecting more than 106,053,551 images. *See* Nelson Gonzalez Dep. 115:20-116:1, 117:2-4, July 31, 2020; Gonzalez Exhibit 15. How the City can maintain its approach constitutes the "least intrusive means" to solve these *five crimes* defies any understanding. Even "few and far between" would be a vast overstatement of the system's ability to identify criminal suspects. Simply, the system has no "clear connection" between any illegal activity and invading the privacy of the millions of affected motorists. *See Shaktman*, 553 So.2d at 152.

Realizing that *its* program has been a spectacular failure, the City also relies on rank speculation. It says that other programs "have also reportedly assisted in investigating and solving numerous other crimes." City MSJ at 35-36. But it cites a series of *press releases*, without citations or

sources, promoted by the City's ALPR vendor, Vigilant Solutions. *See* City's Statement of Facts, Exhibit I. Aside from being completely irrelevant to the success of Coral Gables' system, these reports are also inadmissible evidence that cannot be considered on this motion. "[I]t is apodictic that summary judgments may not be granted ... absent the existence" of admissible evidence in the record. *TRG–Brickell Point NE, Ltd v. Wajsblat*, 34 So.3d 53, 55 (Fla. 3d DCA 2010). These reports are inadmissible hearsay, as they have been offered to prove that ALPRs have solved crimes nationwide—the truth of the matter asserted. *See* Fla. Stat. §§ 90.801, 90.802. Furthermore, Major Pedroso, the witness who seeks to introduce these reports lacks any personal knowledge about these matters, and thus his suppositions about the use of ALPR systems outside the City are inadmissible for this reason as well. *See* Fla. Stat. § 90.604.

Third, the City's arguments about available limits are preposterous. This Court need not look far to see what options are available to the City to limit the intrusion. The duration of data retention and the lack of any necessary showing of suspicion are what make the system unlawful and intrusive. The City plainly *could* adopt limits that would address these concerns. Indeed, in *Shaktman*, the Supreme Court blessed certain law enforcement practices *only* because they adhered to strict "procedural safeguards which, at a minimum, necessitate[d] judicial approval prior to the state's intrusion into a person's privacy." 553 So. 2d at 152. With no such judicial safeguards, the City's program fails strict scrutiny.

III. CONCLUSION

The City has failed to demonstrate that it is entitled to summary judgment. For the reasons stated above, as well as those in Mr. Mas's motion for summary judgment, this Court should deny the City's motion and grant judgment against the City in Mr. Mas's favor.

Dated: June 23, 2021

Respectfully,

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CERTIFICATE OF SERVICE

I CERTIFY that on this day, June 23, 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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