In The

Supreme Court of Virginia

RECORD NO. _____

HARRISON NEAL,

Petitioner – Appellant,

v.

FAIRFAX COUNTY POLICE DEPARTMENT and CHIEF OF POLICE COLONEL EDWIN C. ROESSLER, JR.,

Respondents – Appellees.

PETITION FOR APPEAL

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This error was preserved throughout Neal's Memorandum in Opposition to FCPD and Col. Roessler's Cross-Motion for Summary Judgment; throughout the September 8, 2016 hearing on the Cross Motions for Summary Judgment; and in Neal's objections noted on the November 22, 2016 Order.

2. The Trial Court Erred by Denying Neal's Motion for Summary Judgment Because the Trial Court Misconstrued the Meaning and Application of "Personal Information" under the Government Data Collection and Dissemination Practices Act, Va. Code §§ 2.2-3800 *et seq.*

This error was preserved throughout Neal's Memorandum in Support of his Motion for Summary Judgment; throughout the September 8, 2016 hearing on the Cross Motions for Summary Judgment; and in Neal's objections noted on the November 22, 2016 Order.

STATEMENT OF THE CASE

This case turns on the meaning of "personal information" under the Government Data Collection and Dissemination Practices Act, Va. Code §§ 2.2-3800 *et seq.* (the "Data Act") and its application to the Fairfax

County Police Department's ("FCPD") program of mass collection, storage, and use of Automated License Plate Reader ("ALPR") records capturing the time, place, direction, photographs, and registration of Plaintiff Harrison Neal ("Neal") and hundreds of thousands of others who drive their cars on the roads and highways of Fairfax County. Neal brought his complaint seeking relief in the form of injunction or mandamus, *see* Va. Code § 2.2-3809, to prevent Defendants[1] from the collection, storage, or use of ALPR records that reveal the date, time, location, and surroundings of his automotive travels within Fairfax County. FCPD demurred on the ground that the ALPR data it stores and uses does not fall within the statutory definition of "personal information" under the Data Act. After briefing and argument, Judge Grace Burke Carroll ruled in favor of Neal, concluding that ALPR records pertaining to Neal's automotive travels are indeed "personal information" as defined in the Data Act and must be collected, maintained, and used only in conformity with its requirements. Pltf's Mem. in Supp. of Mot. for Summ. J. Ex. 10; Order Denying Demurrer (Aug. 28, 2015) and Demurrer Hr'g Tr. 31:19-20 (Aug. 28, 2015).

[1] The Parties have stipulated that named defendants Fairfax County Police Department and its chief of police, Colonel Edwin C. Roessler, Jr., are the appropriate "party or agency" answerable under the provisions of the Data Act. References to "FCPD" are intended to include either or both defendants.

Following discovery, the parties filed and briefed cross-motions for summary judgment. Judge Robert Smith heard arguments on September 8, 2016. In his November 18, 2016 letter opinion, Judge Smith decided that Neal's ALPR records were not "personal information;" he therefore granted FCPD's motion for summary judgment and denied Neal's. A final order was entered on November 22, 2016. Neal's Notice of Appeal was timely filed on December 20, 2016.

STATEMENT OF MATERIAL FACTS

An ALPR is a device that captures a picture of every license tag number that comes within its field of vision. It converts the image to a searchable, alphanumeric format and it stores that tag number and the date, time, and location of the picture in a searchable database. Defs' Mem in Supp. of Summ. J. Ex. 2. ALPRs are typically mounted on police vehicles or on stationary objects, where they may record thousands of license tag numbers a day, (Compl. ¶ 6), as many as 3,600 captures per minute. Defs' Mem in Supp. of Summ. J. Ex. 3. Once collected, without any particularized suspicion or justification, hundreds of thousands of such individual data sets become available for whatever purpose the law enforcement agency prescribes – or no purpose at all – to take advantage of the "things done by

or to" the vehicle and its owner and the "record of his presence." Va. Code § 2.2-3801.

In enacting the Data Act our General Assembly declared: "An individual's privacy is directly affected by the extensive collection, maintenance, use and dissemination of personal information"; that "[t]he increasing use of computers and sophisticated information technology has greatly magnified the harm that can occur from these practices"; and that "[a]n individual's opportunities to secure employment, insurance, credit, and his right to due process, and other legal protections are endangered by the misuse of certain of these personal information systems." Accordingly, "[i]n order to preserve the rights guaranteed a citizen in a free society" the legislature promulgated the Act to "establish procedures to govern information systems containing records on individuals." Va. Code § 2.2-3800(B)(4)(1)-(4).

ALPR data, including but not limited to a searchable database of unique automobile registration numbers assigned to specific vehicle owners by the Department of Motor Vehicles ("DMV"), are used by police to identify individual vehicles and their likely operators (the vehicle owner) to "describe[ ], locate[ ], and index[ ]", Va. Code § 2.2-3801, an automobile

and its owner in a "record of [an individual's] presence." *Id.;* Defs' Mem. in Supp. of Summ. J. Ex. 5.; Pltf's Mem. in Supp. of Mot. for Summ. J. Ex. 6.

The ALPR "information system" collects voluminous records of information for whatever use the police choose to make of the presence and "identifiable particulars" of the "data subject." *Id.*[2] In addition, FCPD regularly shares ALPR data with law enforcement agencies in nearby jurisdictions. Compl. ¶ 12; Pltf's Mem. in Supp. of Mot. for Summ. J. Exs. 1 and 4.

In 2013, in response to an inquiry from the State Police, then-Attorney General of Virginia Kenneth Cuccinelli, II, determined that the Data Act governs law enforcement agencies' collection and storage of information using ALPRs. 2013 Op. Va. Att'y Gen. at 7, Compl. Ex. C, the "AG Opinion".

> The General Assembly enacted the Data Act in response to concerns about potentially abusive information-gathering practices by the government, including enhanced availability of personal information through technology. The Data Act serves to guide state agencies and political subdivisions in the collection and maintenance of personal information. The Data Act seeks to protect individual privacy, by placing strictures upon the governmental collection, maintenance, use and dissemination of personal information.

2013 Op. Va. Att'y Gen. at 2.

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[2] The statute identifies a "Data subject" as "an individual about whom personal information is indexed or may be located under his name, personal number, or other identifiable particulars, in an information system." *Id.*

The inquiry from the State Police described two different ways of using ALPR data: "an 'active' manner, whereby law enforcement collects, evaluates, and analyzes the LPR data in real time to determine the relevance to an ongoing case or emergency, and, alternatively, a 'passive' manner, whereby law enforcement collects unanalyzed data for potential future use if a need for the collected data arises respecting criminal or terroristic activities." *Id.* at 1-2. Neal does not challenge "active use."

The AG Opinion concluded that ALPR information constitutes "personal information" as defined in Va. Code § 2.2-3801:

> Data collected utilizing LPR technology falls within this statutory definition, as, for example, it may assist in locating an individual data subject, documenting his movements, or determining his personal property holdings. The collection of such information may adversely affect an individual who, at some point in time, may be suspected of and or charged with a criminal violation. Accordingly, data collected by an LPR generally meets the definition of "personal information" and thus falls within the scope of the Data Act.

The Attorney General found that "data collected by an LPR . . . not otherwise relating directly to law enforcement investigations and intelligence gathering respecting criminal activity, is subject to the Data Act's strictures and prohibitions." *Id.* at 3. Ultimately, the Attorney General opined that law enforcement agencies violate the Data Act's requirements

when they engage in the "passive" use of ALPRs: that is, the persistent maintenance and use of hundreds of thousands of images for up to a year for some speculative future criminal activity. Compl. Ex. C at 4.[3]

In direct response to the AG Opinion, the State Police changed their policy, banning "passive use" by purging ALPR records after 24 hours. Compl. ¶ 30.[4] FCPD refused to do likewise; it maintains all of its ALPR data - even the vast preponderance of those records like Neal's which are not tied by reasonable suspicion or articulable relevance to criminal investigation - for up to one year. Compl. Ex. A at 5.[5]

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[3] The AG Opinion also rejected an argument that the data needs to be maintained "for potential future use if a need for the collected data arises respecting criminal or terroristic activities": "Its future value to any investigation of criminal activity is wholly speculative. Therefore, with no exemption applicable to it, the collection of LPR data in the passive manner does not comport with the Data Act's strictures and prohibitions, and may not lawfully be done." Compl. Ex. C at 4; Letter Op. at 4.

[4] *See also,* Tom Jackman, *Despite Cuccinelli's advice, N.Va. police still maintaining databases of license plates,* Washington Post, Jan. 16, 2014, https://www.washingtonpost.com/local/despite-cuccinellis-advice-nva-police-still-maintaining-databases-of-license-plates/2014/01/16/055ec09a-7e38-11e3-9556-4a4bf7bcbd84_story.html?utm_term=.6e2ac4d424ff.

[5] FCPD's SOP allows for storage of ALPR data for 364 days. However, FCPD has at times stored ALPR data for up to 730 days as a result of incorrect computer storage settings. Pltf's Mem in Supp. Of Summ. J. Ex. 5.

ALPR images of Neal's personal automobile and Virginia license tag information were captured and stored[6] on two separate occasions. Those data were converted into searchable form by the ALPR system, ready to be queried, retrieved, read, and associated with other data at the discretion of FCPD officers at any time during the ensuing 364 days.[7]

The parties stipulated below that if Neal's ALPR records come within the scope of the Data Act, making him a "data subject" as provided in Va. Code § 2.2-3806,[8] then he would be entitled to injunction or mandamus under Section 2.2-3809. Defs' Opp. to Pltf's Mot. for Summ. J. Ex. 1.

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[6] FCPD's response to Neal's FOIA request, described at Compl. ¶¶ 13-14, is attached to the Complaint as Exhibit B; Defs' Mem. in Supp. of Mot. for Summ. J. Exhibit 9. FCPD refers to the vehicle "ADDCAR" as Neal's and the FOIA response includes two sheets of paper, each of which contains two pictures of Neal's vehicle and a chart indicating the precise time, date, and location at which the photographs were taken.

[7] FCPD has never disputed that Neal's ALPR records pertain to his private automobile, that he was driving his vehicle at the time the ALPR data were captured, and that FCPD has no reason to suspect Neal or his car to be connected to any criminal activity. Defs' Mem. in Supp. of Summ. J. Exs. 4, 8, and 9.

[8] In their summary judgment papers, FCPD also asserted -- and Neal contradicted – that its passive use of Neal's ALPR data was exempt from the Data Act as information "related directly to law enforcement investigations and intelligence gathering respecting criminal activity." Va. Code §2.2-3800(C)(2). In the briefs and at oral argument, Neal directly challenged FCPD to identify any connection between Neal or his vehicle and any specific criminal investigation. FCPD was unable to do so, and acknowledged as much in its responses to Neal's discovery requests. *See* Defs' Mem. in Supp. of Summ. J. Ex. 1. The trial court did not reach (or mention) this question in its disposition of the cause.

AUTHORITIES AND ARGUMENT

I. STANDARD OF REVIEW

Summary judgment under Rule 3:20 of the Rules for the Supreme Court of Virginia is appropriate when there are no material facts in dispute. *Thurmond v. Prince William Prof'l Baseball Club*, *Inc.*, 265 Va. 59, 64, 574 S.E.2d 246, 250 (2003). A grant of summary judgment may be based upon undisputed facts established by the pleadings, the orders made at a pretrial conference, and the admissions in the proceedings. *Turner v. Lotts*, 244 Va. 554, 556, 422 S.E.2d 765, 766-67 (1992).[9] The filing of cross-motions for summary judgment does not, in itself, resolve the question whether material facts remain genuinely in dispute with respect to either or both motions. *Town of Ashland v. Ashland Inv. Co.*, 235 Va. 150, 154, 366 S.E.2d 100, 103 (1988); *Cent. Nat'l Ins. Co. v. VA Farm Bureau Mut. Ins. Co.*, 222 Va. 353, 356, 282 S.E.2d 4, 6 (1981). The fact that opposing parties each believe the undisputed evidence warrants summary judgment in its own favor "does not relieve the trial judge of the responsibility and

[9] *See also, Renner v. Stafford*, 245 Va. 351, 353, 429 S.E.2d 218, 220 (1993). "The burden of establishing the nonexistence of a genuine issue of fact is on the party moving for summary judgment, and the court must view the facts and inferences in a light most favorable to the nonmoving party." W. Hamilton Bryson, Virginia Civil Procedure, § 6.07 (4th ed. 2005) (citing *Carson v. LeBlanc*, 245 Va. 135, 427 S.E.2d 189, 9 Va. Law Rep. 908 (1993)).

duty to make an independent evaluation of the record on that issue." *Town of Ashland v. Ashland Inv. Co.*, 235 Va. 150, 154, 366 S.E.2d 100, 103 (1988). The court has an abiding "duty to ascertain whether facts remain in dispute or whether there are sufficient facts to decide the question presented." *Id.* While admissions made by a party may be used in support of such a motion by its party-opponent, a party may not rely on its own statements (or those of third parties, *see e.g.*, Va. Code § 8.01-420) for that purpose.

"In an appeal from a circuit court's decision to grant or deny summary judgment this Court reviews the application of law to undisputed facts *de novo*." *Va. Fuel Corp. v. Lambert Coal Co.*, 291 Va. 89, 97, 781 S.E.2d 162, 166 (2016) *citing Deutsche Bank Nat'l Trust Co. v. Arrington*, 290 Va. 109, 114, 772 S.E.2d 571, 573 (2015) (*quoting St. Joe Co. v. Norfolk Redevelopment & Hous. Auth.*, 283 Va. 403, 407, 722 S.E.2d 622, 625 (2012)). This Court reviews the record in the light most favorable to the party against whom summary judgment was granted. *Klaiber v. Freemason Assocs.*, 266 Va. 478, 481-82, 587 S.E.2d 555, 556 (2003). *See also: Wilby v. Gostel*, 265 Va. 437, 440, 578 S.E.2d 796, 797 (2003).

Neal also raises questions of statutory interpretation. An issue of statutory interpretation is a pure question of law which an appellate court

reviews *de novo*. When the language of a statute is unambiguous, the appellate court is bound by the plain meaning of that language and must give effect to the legislature's intention as expressed by the language used. If a statute is subject to more than one interpretation, the appellate court must apply the interpretation that will best carry out the legislative intent. *Conyers v. Martial Arts World of Richmond*, *Inc.*, 273 Va. 96, 99 (2007). *See also*, *Osman v. Osman*, 285 Va. 384, 389 (2013).

II. THIS COURT SHOULD GRANT THE APPEAL IN ORDER TO CORRECT THE CIRCUIT COURT'S ERRONEOUS INTERPRETATION OF THE DATA ACT.

This Court should grant this petition because the trial court's construction of "personal information" is inconsistent with the plain text, intent and purpose of the Data Act. The General Assembly intended for the statute to regulate government agencies in all aspects of collection, storage, and dissemination of information traceable to an individual. FCPD's ALPR program does just that: it collects and stores data that can be searched and readily traced to Neal and his automobile for at least a year, without any reason to believe that this personal information is relevant to any crime.

The trial court's conclusion that Neal's ALPR records are not "personal information" under the Data Act was erroneous. In reaching that

conclusion, the trial court failed to apply traditional rules of statutory construction to all of the words of the statute or to the overall meaning and purpose behind the Data Act. Had the lower court applied the proper analysis of the statute's text and manifest purpose, it would have concluded that Neal's ALPR records do comprise "personal information" within the reach of the Data Act. Unless reversed by this Court, the consequence of this ruling will be to allow FCPD and other law enforcement agencies to exercise unbridled discretion to continue to amass millions of such records – creating a map of where, when, and how car owners drive their automobiles – not subject to the carefully prescribed rules and limitations that the Data Act was designed to establish throughout the Commonwealth. Only by reversing this erroneous decision, one squarely at odds with well-reasoned opinions of the Attorney General of Virginia and another Fairfax County Circuit judge, can this Court prevent the threat of continued indiscriminate, unwarranted, and unregulated monitoring of the travel activities of millions of Virginia car owners and drivers.

The Data Act defines "personal information" as:

> "*all* information that (i) describes, *locates* or *indexes anything about an individual* including, *but not limited* to his social security number, driver's license number, *agency-issued identification number*, student identification number, real or personal property holdings derived from tax returns, and his education, financial

> transactions, medical history, ancestry, religion, political ideology, criminal or employment record; or (ii) affords a basis for inferring personal characteristics, such as finger and voice prints, photographs, or things done by or to such individual; *and the record of his presence*, registration, or membership in an organization or activity, or admission to an institution."

Va. Code § 2.2-3801 (emphasis added).

The General Assembly designed the Data Act to protect the rights of a "data subject," that is, "an individual about whom personal information is indexed or *may be located* under his name, *personal number*, or *other identifiable particulars*, in an *information system*. Va. Code § 2.2-3801 (emphasis added).

Further, an "information system" is:

> *the total components* and operations of a record-keeping process, including information collected or managed by means of *computer networks* and the *Internet*, whether automated or manual, containing personal information and the name, *personal number*, *or other identifying particulars* of a data subject.

Va. Code § 2.2-3801 (emphasis added).

Instead of accepting the deliberately broad definition of "personal information" in the Data Act, the lower court unreasonably and too narrowly excluded ALPR records from the statute's definition. As discussed below, the inclusion of ALPR records within the Data Act's definition of "personal information" would match the broad, inclusive language placed in the statute and further the highly remedial purposes behind it. The ALPR

process that included Neal's captured travel activities fit the "personal information" statutory definition and, contrary to the lower court's conclusion, are no less "private" or "personal" than many of the examples expressly included in the statute. Granting summary judgment to Neal would have been consistent with the well-established meaning, within the field of information management and security, of the closely-related concept of "personally identifiable information." Neal submits that FCPD's records of his vehicular travels are entitled to the protections of the Data Act because he is a "data subject" about whom FCPD kept a record of his presence and photographic evidence of his driving activities within an "information system" of law enforcement components connected by powerful electronic networks and the internet.

This Court "will not apply an unreasonably restrictive interpretation of a statute that would subvert the legislative intent expressed therein." *Brown v. Commonwealth*, 284 Va. 538, 542 (2012) (quoting *Armstrong v. Commonwealth*, 263 Va. 573, 581 (2002). Additionally, this Court construes a statute "with reference to its subject matter, the object sought to be attained, and the legislative purpose in enacting it; the provisions should receive a construction that will render it harmonious with that purpose rather than one which will defeat it." *Brown v. Commonwealth*, 284 Va. 538,

542, 733 S.E.2d 638, 640 (2012) citing *Esteban v. Commonwealth*, 266 Va. 605, 609, 587 S.E.2d 523, 526 (2003).

Though a license tag number is not expressly included in the definition, it is within the bounds of the general definition and analogous to several of the specific examples within the statute's list of "personal information." Moreover, the statutory definition was deliberately drafted to be non-exhaustive, as clearly expressed by use of the phrase "but not limited to." It is axiomatic that "[u]se of those words [but not limited to] manifests a legislative intent that the statute not be given an '*expressio unius*' construction." *Surles v. Mayer*, 48 Va. App. 146, 164 (2006) quoting *City of Santa Ana v. City of Garden Grove*, 100 Cal. App. 3d 521, 528 (1979).

The Data Act is designed to be comprehensive, encompassing "all information" that describes, locates, or indexes "*anything* about an individual" or allows *any* inference about an individual's "personal characteristics," activities, or associations. Va. Code § 2.2-3801 (emphasis added). "[T]he primary objective of statutory construction is to ascertain and give effect to legislative intent." *Conger v. Barrett*, 280 Va. 627, 630 (2010) (alteration in original) (quoting *Turner v. Commonwealth*, 226 Va. 456, 459 (1983)). "'When the language of a statute is unambiguous, we are bound

by the plain meaning of that language.'" *Commonwealth v. Morris*, 281 Va. 70, 76 (2011) (quoting *Conyers v. Martial Arts World of Richmond*, *Inc*., 273 Va. 96, 104 (2007)). And "'[i]f a statute is subject to more than one interpretation, we must apply the interpretation that will carry out the legislative intent behind the statute.'" *Id*. (quoting *Conyers*, 273 Va. at 104). *Commonwealth v. Amerson*, 281 Va. 414, 418-19 (2011).

The Data Act's purpose has always been to combat abuse and consequent loss of liberty as a result of unwarranted mass surveillance of the community. The trial court failed to recognize the treasure trove of information revealed about a person through a license tag number. Revealingly, FCPD has consistently stressed that its ALPR program is a vital "investigative tool to aid in the detection or investigation of terrorism or a series of related crimes." FCPD SOP 11-039, Compl. Ex. A at 5. To be useful in solving crimes, an investigative tool must lead to a criminal, *i.e.*, a "person."

Faithful adherence to the language and purposes of the Data Act, requires inclusion of ALPR records as "personal information." As discussed in greater detail below, the ALPR record, including but not limited to the photographs of the subject vehicle, "describes, locates or indexes" a vehicle, but not a vehicle alone. That vehicle inevitably is registered to an

owner, and it is a fair inference that the vehicle is being driven by that owner (or someone associated with him). But the record entails more than a photograph; it is searchable by a license tag number, a unique identifying tag issued by a state agency, the DMV, to a specific owner. In this case, Neal is such an owner. The ALPR data therefore constitutes evidence of the presence, activities, travels, and property of that owner (who is very likely, and in this case was, driving his own car).

III. THE TRIAL COURT FAILED TO GIVE DUE CONSIDERATION TO ATTORNEY GENERAL CUCINELLI'S OPINION ON ALPRs

The Attorney General analyzed this very issue in painstaking detail in 2013 and concluded, as does Neal, that information collected by ALPRs and accessible in the context of "information systems" are personal information within the meaning of the Data Act. The Attorney General astutely recognized that this persistent, long-term storage and maintenance of data with no need "clearly established in advance" and no connection to "criminal intelligence information," or *i.e.*, "passive use", violates the statute. Va. Code § 2.2-3800(C)(2); § 52-48.

The trial court relegated its discussion of the Attorney General's thorough opinion to one footnote. Letter Op. at 5, n.5. It conceded that the Attorney General opinion "conclude[d] that license plate numbers do fall

within the definition of personal information," but did not explain why, nor did it cite any distinguishing fact, circumstance, or rationale, stating only that such an opinion "is not controlling." "Although instructive and helpful…this case differs from the situation reviewed by the Attorney General." *Id.* The lower court's failure to provide any specific analysis of the AG Opinion, or to respond to its rationale, suggests that, in fact, the trial court did not give the AG Opinion the "due consideration" to which it is "entitled." *Twietmeyer v. City of Hampton*, 255 Va. 387, 393, 497 S.E.2d 858, 861 (1998).

Nothing in the letter opinion – and no pleadings or admissions by Neal – explain or support the conclusion that the instant case "differs from the situation reviewed by the Attorney General." The only conceivable explanation is that the lower court improperly relied on FCPD's own conclusory, self-serving, argumentative, and inadmissible discovery responses to support its motion for summary judgment. The evidence appropriate for consideration on summary judgment clearly established that there is no material difference between the "situation reviewed by the Attorney General," and the instant case. If, as seems possible, the trial

court considered anything beyond Neal's own ***pleadings*** and ***admissions*** in granting summary judgment to FCPD, this itself was reversible error.[10]

IV. THE TRIAL COURT FAILED TO GIVE DEFERENCE TO JUDGE CARROLL'S INTERPRETATION OF PERSONAL INFORMATION

Earlier in this same case, on August 28, 2015, Judge Grace Burke Carroll overruled FCPD's demurrer, deciding, as a matter of law, that Neal's ALPR record is personal information governed by the Data Act: "this Court finds that that information is personal information…Otherwise what would be the point of holding that information?" Pltf's Mem. in Supp. of Mot. for Summ. J. Ex. 10; Order Denying Demurrer (Aug. 28, 2015) and Demurrer Hr'g Tr. 31:19-20 (Aug. 28, 2015).

The factual record did not change on this issue between the time of the demurrer and summary judgment. Yet, Judge Smith ignored Judge Carroll's demurrer ruling in his letter opinion.[11] A ruling from a previous stage of the proceedings is not clothed with the full protection of the "law of

[10] Neal vigorously and repeatedly objected to the use of this "evidence," which was offered in support of FCPD's cross-motion. *See, e.g.,* Pltf's. Mem. In Opp. to Defs' Cross Mot. for Summ. J. at 2-4.

[11] Judge Carroll did not issue a written opinion. However, the demurrer pleadings, oral argument transcript and bench ruling concluding that the data is "personal information" under the statute were submitted and underscored in Neal's briefs and arguments on the cross-motions for summary judgment. Pltf's Mem. in Supp. of Mot. for Summ. J. at 11-13; Order Denying Demurrer (Aug. 28, 2015) and Demurrer Hr'g Tr. 31:19-20 (Aug. 28, 2015).

the case," until the losing party has had an opportunity to appeal. *Robbins v. Robbins*, 48 Va. App. 466, 474, 632 S.E.2d 615, 619 (2006). On the other hand, such prior rulings are, if not clearly erroneous, entitled to respect and consideration. For prudential reasons of judicial economy and fairness, once a court decides a rule of law, that decision should ordinarily govern the same issues in subsequent stages of the same matter. *Arizona v. California*, 460 U.S. 605, 618-19; *see also*, *Fisher v. Right Aid Corp.*, 2012 U.S. Dist. LEXIS 22720 at 7, (D. Md. Feb. 23, 2012) ("Such a rule promotes the finality and efficiency of the judicial process by protecting against the agitation of settled issues.").

Although trial courts have the power of self-contradiction, they generally will not exercise it. *Rawls v. Smith*, 2001 Va. Cir. LEXIS 26 (Southampton County 2001). To do so would compromise the goal of finality and opens the door for judge shopping. *Id.* at 5 ("[I]f one trial judge felt free to revisit another's prior rulings—at least on any routine basis—the specter of judge shopping would become all too real. A better recipe for strife and inefficiency could hardly be imagined." *Id.*[12] For these reasons,

[12] *See also Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1516 (10th Cir. 1991) ("When an action is transferred, it remains what it was; all further proceedings in it are merely referred to another tribunal, leaving untouched what has already been done…Accordingly, traditional principles of law of the case counsel against the transferee court reevaluating the rulings of the transferor court…").

trial courts will generally decline to reverse earlier rulings by another judge unless such determinations were clearly erroneous. *Thomas v. Commonwealth*, 62 Va. App. 104, 111, 742 S.E.2d 403, 407 (2013).

Despite Judge Carroll's determination, Judge Smith provided no explanation for his departure from judicial deference or the particulars of his disagreement with Judge Carroll's determination. Admittedly, this omission alone does not render Judge Smith's ruling erroneous, but it does undermine judicial fairness and the soundness of his reasoning. The trial court seems to have failed to justify its rejection of the only Virginia legal authorities to have considered the "salient issue": *i.e.*, the AG Opinion and Judge Carroll's demurrer ruling.

V. PROPER ANALYSIS OF THE DATA ACT WOULD HAVE LED THE TRIAL COURT TO GRANT NEAL'S MOTION FOR SUMMARY JUDGMENT

A. The Trial Court Misdefined the Salient Issue in the Case

One misstep that appears to have affected the trial court's analysis and ultimate conclusion arose from its misdefinition of the determinative question before it. The court below framed (and repeatedly referenced throughout its opinion) what it called the "one salient issue" too narrowly, stating the only question to be decided was: "is a license plate number personal information?" Letter Op. at 1. As the pleadings, evidence, and

admissions of FCPD themselves show, Neal's ALPR record includes information well beyond just his license tag number. Specifically, the record includes precise information regarding where, when, and how Neal was using his automobile and most visual aspects of the automobile's occupancy, make, model, color, condition, and surroundings. *See e.g.*, Pltf's Mem. in Opp. to Defs' Cross Mot. for Summ. J. at 9-11. The record also includes all other information – whether from readily accessible links to the internet, or law enforcement networks (*e.g.*, the State Police, DMV, NCIC, VCIN) – that forms the entire "information system," *i.e*., the ***total record-keeping process***. FCPD's own documents, including many from the system's manufacturer, boldly tout how effective the ALPR system is as an investigative tool for solving cases and making arrests. *See e.g.*, Pltf's Mem. in Supp. of Mot. for Summ. J. Exs. 6, 7, 8, and 9; Pltf's Mem. in Opp. to Defs' Cross Mot. for Summ. J. Exs. 6, 7, 9, and 11; Defs' Mem. in Supp. of Summ. J. Ex. 5. Because it ignored the implications of these significant admissions by FCPD, the trial court framed the "one salient issue" too narrowly and reached the erroneous conclusion that Neal's ALPR records are not "personal information."

B. A License Tag Number is an "Agency-Issued Identification Number"

The Data Act specifically enumerates "agency-issued identification number[s]" as "personal information." Va. Code § 2.2-3801. It is difficult to understand how the license tag number assigned by the DMV, a state agency, in connection with Neal's auto registration, is anything other than an "agency-issued identification number." Like a driver's license number or a social security number, Neal's license tag number is a unique "identification number" which has been "assigned" by a state agency to both Neal ***and*** his automobile. The trial court did not mention, nor apparently even consider, whether Neal's ALPR record fit within that rubric when it concluded "a license plate number is not included in the definition [of personal information]". Letter Op. at 5.

C. The Data Act Refers to More than Just an Individual Person

Another essential underpinning for the trial court's rulings was its erroneous observation that "[a]ll the information included in the statute refers to an individual person." Letter Op. at 5. This is only true if one ignores a large portion of the categories of "personal information" set forth in Va. Code § 2.2-3801. Looking at part (i) of the statute, this assertion is not invariably true with respect to "real or personal property holdings," "education, financial transactions, … ancestry, religion, or political

ideology." *Id.* No less than a license tag number - assigned by DMV in the familiar registration process to both a motor vehicle and its owner or owners - these attributes do ***not*** always refer to a single individual; indeed, these statutory categories are widely shared and frequently apply to large groups. Real and personal property can be titled to an LLC or multiple individuals and many characterizations – such as the Muslim, Jewish, or Christian religion; or Chinese, Russian, or Mexican ancestry; or socialist, libertarian, or conservative political ideology, or a Harvard, Ohio State, or UCLA education – are ***always*** common to many individuals. While a license tag number refers to a single automobile, it is ***always*** assigned by DMV to one or more individuals such as a husband and wife as it is here.

D. Neal's Vanity Plate was Issued to Him as An Owner of His Automobile

Part (ii) of Va. Code § 2.2-3801 states that information that "affords a basis for inferring personal characteristics" is "personal information". This Court, like the trial court, can and should take judicial notice that "ADDCAR," the tag number assigned by the DMV to Neal's automobile (and to Neal and his wife), is a vanity plate, chosen and paid for by the car's owner to express some personal feeling, interest, or idea. This expression is certainly one that "affords a basis for inferring personal characteristic[]" that is, in fact, specific to Neal. *Id.*

E. ALPR Records Reveal Information About an Individual

Though license plate information alone is sufficient to constitute "personal information," FCPD's own letter of May 15, 2014 and the ALPR documents themselves establish that Neal's ALPR records captured on April 26 and May 11 of 2014 and thereafter stored depict much more about Neal and his property. It shows an individual whom we now know to be Neal driving his silver 2011 Hyundai Accent GLS 4-door sedan with the license tag number "ADDCAR". Further, the four images (two in color, one in black-and-white) disclose the dimensions, contours, trim, make, model, year, physical condition, and state of registration (Virginia) of Neal's personal automobile. *See* FCPD FOIA Response, Comp., Ex. B. They also show a plethora of details about Neal's surroundings, including the roadway, road markings, medians, vegetation, street signs, traffic and weather conditions, as well as other vehicles and even nearby homes and buildings. *Id.* The associated GPS-calibrated map shows the precise latitude and longitude at which Neal was then present and operating his car. *Id.* Furthermore, although the contents are not clearly legible in Neal's two ALPR records, it is apparent from the data captured that Neal's vehicle contains three bumper stickers. As the Court may judicially notice, bumper stickers often express messages that are highly personal to the individual driver.

Although FCPD is correct that the ALPR record did not ***in and of itself*** identify Neal *by name*, that is not dispositive. Most of the types of records specifically included in the Act's definition of "personal information" – *i.e.*, "social security number, driver's license number, ***agency-issued identification number***, student identification number, real or ***personal property holdings*** derived from tax returns – may exist in records that do not expressly include the data subject's name. Moreover, the details about Neal's preferences, property, habits, traits, and activities that may be gleaned from the information about his vehicle and travels kept for at least a year by Defendants, plainly fit within the categories of "***personal characteristics of an individual***, such as finger and voice prints, ***photographs***, or ***things done by or to such individual."*** Defendants do not even bother trying to explain why driving a car registered in his name on Route 236 is not among the "things done by . . . such individual," nor a "record of his presence . . . in an . . . activity." Va. Code § 2.2-3801.

In short, although FCPD protests that its ALPR program "does not house any of the types of information listed within the Attorney General's examples of personal information" (*i.e.*, locating a data subject, documenting his movements or determining his personal property

holdings), those conclusory assertions are belied by their own documents. Indeed, the types of information listed in the AG's Opinion are ***precisely*** the sole intended and useful purpose, albeit an entirely speculative and unproven purpose, of FCPD's long-term storage of Neal's ALPR Data. As Judge Carroll trenchantly observed, "[o]therwise, what would be the point of holding that information?" Pltf's Mem. in Supp. of Mot. for Summ. J. Ex. 10, at 32.

VI. THE TRIAL COURT ERRONEOUSLY LIMITED THE DATA ACT'S BROAD DEFINITION OF "PERSONAL INFORMATION" BY USING THE HIGHER "PRIVACY INTEREST" STANDARD UNDER THE FOURTH AMENDMENT

The trial court correctly acknowledged that the Data Act's definition of "personal information" is different from "the context of the Fourth Amendment and privacy," see Letter Op. at 5, which is "always in a different context from our specific question." *Id.* The Court inappropriately framed the statutory construction question as: "if certain information does not enjoy a ***privacy interest***, how could it be said that the information is personal?" Through that unduly narrow lens, the court reached the wrong conclusion.

The Data Act was not intended to mirror Fourth Amendment "privacy interests." Instead, as this Court observed in *Hinderliter v. Humphries*, 224 Va. 439, 297 S.E.2d 684 (1982), the Data Act was adopted to prohibit the

accumulation and stockpiling of thousands of bits of personal information by government agencies. The trial court ignored this vital distinction.

The General Assembly recognized that some data can be readily traced back to an individual or group: "proliferation in the use of automated data processing equipment, especially the electronic computer . . . has enabled government and private industry to compile detailed information on individuals in every area of personal activity." *Id.* at 685 (internal citation omitted). The overriding purpose of the Data Act was "to obviate the possibility of the emergence of cradle-to-grave, detailed dossiers on individuals, the existence of which dossiers would, 'at the push of a button,' lay bare to anyone's scrutiny, every detail, however intimate, of an individual's life." *Id.* at 685-86 (internal citation omitted). "[T]he Act 'is an important initial step towards safeguarding Virginia citizens against abusive information-gathering practices.'" *Id.* (quoting 62 Va. L. Rev. 1357, 1358 (1976)).

Further evidence of the distinction between Fourth Amendment privacy interests and "personal information" for purposes of the Data Act distinction is that the name of the Act was changed in 2001 from the "Privacy Protection Act of 1976" to the "Government Data Collection and Dissemination Practices Act":

> The Virginia Code Commission feels that the new chapter name is more descriptive and will clarify existing misunderstanding of what is covered by the Privacy Protection Act. The Privacy Protection Act is in fact a data collection and dissemination statute and does not protect privacy. This recommendation is supported by a 1982 Virginia Supreme Court case, *Hinderliter v. Humphries*, 224 Va. 438, which held that the Privacy Protection Act "[d]oes not render personal information confidential. Indeed, the act does not generally prohibit the dissemination of information. Instead, it requires certain procedural steps to be taken in the collection, maintenance, use, and dissemination of such data."

The goal of the statute was, as this Court recognized in *Hinderliter*,

> to set a basis for minimum standards for personal data collection, storage, and dissemination in the Commonwealth. The General Assembly would be well advised to avoid potential gross abuse of the power of intercommunicating data banks by setting reasonable, easily implemented standards of conduct. Well managed, responsible, data systems industries and support systems are as essential to the orderly and efficient operation of modern business, industry, and government as uncontrolled, unrestricted gathering of total information dossiers about total populations are antithetical to a free society. *Id.* at 686 (internal citation omitted).

The trial court erred in limiting the scope of regulation under the Data Act to Fourth Amendment "privacy interests." Rather, the Data Act's broader scope applies to any bit of data that anyone with access could use to develop a "dossier" on a person or a class of persons. In order to address that need, "personal information" under the Data Act extends to interconnected, searchable databases like the ones that FCPD maintains. Any other interpretation leads to dangerous consequences. With a few

keystrokes or mouse-clicks, anyone with access could create a dossier about targeted persons, organizations, groups, properties, activities, travels, beliefs, associations, registrations, accounts, memberships, ancestries, allegiances, or whereabouts. Under the trial court's reasoning, if each individual bit of data in its "record-keeping process" is not entitled to protection under the trial court's concept of "privacy interests", then FCPD has the final and only say. Such an interpretation is not in keeping with the words or purposes of the General Assembly and must be rejected.

CONCLUSION

For the foregoing reasons, Plaintiff Harrison Neal respectfully requests that this Court grant his petition for appeal.

Respectfully Submitted,

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CERTIFICATE PURSUANT TO RULE 5:17(i) OF THE RULES OF THE SUPREME COURT OF VIRGINIA

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(2) On this 22nd day of February, 2017, seven copies of the foregoing Petition for Appeal were hand-filed with the Clerk of the Supreme Court of Virginia and one copy of the same was served, via UPS Ground Transportation, to counsel listed above.

(3) Appellant desires to state orally to a panel of this Court the reasons why the petition for appeal should be granted. Appellant desires to do so in person.

4) I further certify that the foregoing Petition for Appeal does not exceed 35 pages/or 6,125 words pursuant to Rule 5:17(i).

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