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IN THE SUPREME COURT OF VIRGINIA

Record No. _____

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

Petitioners,

v.

HARRISON NEAL,

Respondent.

PETITION FOR APPEAL

On Petition for Appeal from the
Circuit Court of Fairfax County (Case No. CL-2015-5902)

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INTRODUCTION

The Court remanded this case last year for additional fact-finding about the automated license plate reader ("ALPR") technology used by the Fairfax County Police Department (the "Department") in its law-enforcement activities. *Neal v. Fairfax Cty. Police Dep't*, 295 Va. 334 (2018) (*Neal I*). The Court specifically tasked the circuit court with determining whether "the ALPR record-keeping process" constitutes an "information system" subject to the Government Data Collection and Dissemination Practices Act (the "Data Act"), Va. Code Ann. §§ 2.2-3800–3809 (2017 & Supp. 2019). *Neal I*, 295 Va. at 350. According to the Court, that determination turns on whether the "total components and operations of the ALPR record-keeping process" provide a "means"—"as part of the . . . process"—for a "link" to be "readily made" between a license-plate number and the owner of the vehicle. *Id.* at 348.

The evidence on remand showed conclusively that no such link exists within the ALPR system. It is *impossible* to learn the identity of the vehicle owner from the ALPR system itself because that information is simply not part of the Department's ALPR record-keeping process. But despite this Court's clear instruction to focus on the ALPR system, the circuit court improperly considered how the Department might use information in the ALPR system in conjunction with *other* information systems maintained by *other* agencies. Regardless of what

information is maintained in those other agencies' databases, what matters is whether the ALPR record-keeping process *itself* provides a ready link between a license-plate number and the identity of the vehicle's owner. Because the trial court found that that information was not part of the ALPR system, it erred in holding that the ALPR system is an "information system" under the Data Act.

The circuit court compounded that error by issuing an injunction that prohibits creating a database that is allowed by the Data Act. The Data Act does not enable individuals to preclude government agencies from engaging in data collection that is necessary to protect the public; it merely requires those agencies to protect the interests of data subjects when the database constitutes an "information system."

Review is warranted here, not only because the circuit court clearly erred in its interpretation of the Data Act, but because the ruling hobbles the use of a law-enforcement tool that is vital to protecting the public interest, in situations ranging from locating missing children and lost senior citizens to responding to active criminal and terrorist threats.

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

A. Proceedings before remand.

On May 5, 2015, Plaintiff Harrison Neal filed a complaint seeking injunctive and mandamus relief against the Department. R. 1–28. On August 4, 2016, the

parties filed cross-motions for summary judgment. *See generally* R. 194–95, 198–329 (Department's motion, memorandum, and supporting exhibits); R. 196–97, 330-498 (Neal's motion, memorandum, and supporting exhibits). The trial court granted summary judgment to the Department, concluding that the license-plate numbers stored as part of the ALPR record-keeping process are not "personal information" under Code § 2.2-3801. *See* R. 643–48.

This Court granted Neal's petition for appeal and reversed. *See generally Neal I*, 295 Va. 334. The Court agreed that "a license plate number stored in the ALPR database would not be personal information [under Code § 2.2-3801] because it does not describe, locate, or index anything about an individual." *Id.* at 346. The Court concluded, however, that "the pictures and data associated with each license plate number constitute 'personal information.'" *Id.* (citation omitted).

The Court then considered whether the ALPR record-keeping process constituted an "information system" under Code § 2.2-3801. Although the record indicated that the Department's officers had "read[y] access" to DMV's database, *id.* at 341, the Court concluded that the record was insufficient to decide "whether the total components and operations of the ALPR record-keeping process provide a means through which a link between a license plate number and the vehicle's

owner may be readily made," *id.* at 348. So the Court remanded the case for the trial court to conduct additional fact-finding to address that question. *Id.*

The Court went on to consider whether the ALPR record-keeping process would be exempt from the Data Act if the circuit court concluded on remand that the process constitutes an "information system." *Id.* at 348–50. If the ALPR record-keeping process were an "information system," the Court held, the ALPR system would not be exempt from the Data Act. *Id.* The Court reasoned that, because the "ALPR information . . . ha[d] not been deemed part of any specific law enforcement investigation or purpose" at the time that the data was recorded and stored, the Data Act's exemption for information systems involving "investigations and intelligence gathering related to criminal activity" did not apply. *Id.* (internal quotation marks omitted).

B. Proceedings after remand.

In December 2018, the circuit court conducted a two-day hearing to take evidence about the ALPR record-keeping process and whether it allows for a link between the license-plate number and the vehicle's owner to "be readily made." *Id.* at 350; R. 1405–1845. On April 1, 2019, the circuit court issued a letter opinion concluding that the ALPR record-keeping process was an "information system" under Code § 2.2-3801. R. 862–66. It did so despite finding that "the ALPR record-keeping process does not *itself* gather or directly connect to

'identifying particulars' of a vehicle owner." R. 866 (emphasis in original). On May 31, 2019, the court entered its final order and "permanently enjoined [the Department] from the passive collection, storage and use of [ALPR] data." R. 1299–1300.

On June 14, 2019, the Department noticed its appeal of the final order. R. 1301–02.

ASSIGNMENTS OF ERROR

1. The circuit court erred in concluding that the Department's ALPR system is an "information system" under the Data Act because the ALPR system does not itself contain "the name, personal number, or other identifying particulars of a data subject." Va. Code Ann. § 2.2-3801. The ALPR system does not become "a record-keeping process" under the Data Act simply because police officers have the ability take a license-plate number stored in the ALPR system and manually enter it into other databases, not maintained by the Department, to discover the identity of the vehicle owner.[1] If the ALPR system is construed to include information that the Department could potentially access through the NCIC, VCIN, and the DMV databases, which can only be accessed with a valid criminal justice purpose, then the Court should decide anew, based on the changed factual

[1] The arguments raised here were made and the error preserved at: R. 842–51, 1136–38, 1300. Ruled on: R. 866, 1299, 1945.

predicate, whether the ALPR system is exempt under Code § 2.2-3802(7) notwithstanding *Neal I*'s contrary conclusion.[2]

2. The circuit court erred in ruling that the Department's creation of an "information system" consisting of passively acquired ALPR data violates the Data Act.[3]

3. The circuit court erred in enjoining the Department from creating and maintaining an information system that consists of information captured by ALPR cameras.[4]

STATEMENT OF FACTS

A. The Department's ALPR system is a closed information system with its own hardware, software, and servers.

The Department began using ALPR technology in 2010. R. 863. The technology captures license-plate numbers along with an image of the vehicle and the date, time, and GPS location where the information was recorded. *Id.* The

[2] *See* Rule 5:17(c)(1) (requiring assignment of error to list either where the error was preserved below "or the specific existing case law that should be overturned, extended, modified, or reversed").

[3] The arguments raised here were made and the error preserved at: R. 1158–62, 1300, 1916–28. Ruled on: R. 866, 1299, 1945, 1992–93.

[4] The arguments raised here were made and the error preserved at: R. 1158–62, 1300, 1916–28. Ruled on: R. 1299, 1945, 1992–93.

ALPR record-keeping process has three components: a hardware component, a software component, and a server component. R. 865; *see also* R. 1772–73.

The hardware component includes the license-plate readers themselves and the computers that process and display the data the readers capture. The license-plate readers are sophisticated cameras mounted on a police car or on a stationary structure. R. 863; *see also* R. 2162. The hardware also includes "a computer in the trunk of a police cruiser that converts the images of license plates, taken by the cameras, into letter/number combination sequences." R. 865. Through an Ethernet cable, the computer relays the converted data "to the laptop computer . . . in the front of the cruiser." *Id.*

The software component is a "program that is accessible on" the laptop. R. 865. The program is called "Mobile Plate Hunter 900" and requires a unique login credential and password, which are assigned only to officers who have completed the required training. *See id.*; *see also* R. 2022. To search for a license-plate number in the data collected by the ALPR system, "an officer must log into the software on the [laptop] and enter the license plate number into the search field." R. 865. If the search returns a hit, then "the officer will be able to view the following information on the [laptop] screen: a photograph of the license plate, the license plate number, and the date, time, and GPS location of the photograph capturing the license plate." *Id.*

Significantly, "the ALPR record-keeping process does not *itself* gather or directly connect to 'identifying particulars' of a vehicle owner . . . ." R. 866 (emphasis in original); *see also* R. 20–21 (depicting all of the information retained as part of the ALPR record-keeping process when a license plate is captured). As described further below, that identifying information can be obtained only from other databases that authorized officers must separately access.

The server component of the ALPR system is housed in Fairfax County's Government Center and is called the Operation Center Server (also referred to as "EOC" in the record). R. 865; *see also* R. 2132 (graphic showing how the server controls the overall ALPR system). "All information collected from the ALPR cruiser cameras are stored in the [server]." R. 865. Information is purged from the server after 364 days unless it has been "identified as part of a criminal investigation." *Id.* No other software or services use the server component. *Id.*; *see also* R. 1801 ("Q. Is there any other Fairfax County Police Department software on that operations center software server? A. No.").

The components comprising the ALPR technology operate within a closed system with no direct interfaces to any other hardware, software, or servers. R. 865 ("The [server] and the computer processor in the trunk of the cruiser only contain ALPR information and are separate from all other databases.").

B. The Department engages in "active" and "passive" use of ALPR technology for public-safety and law-enforcement purposes.

Once the license-plate number and accompanying information have been recorded, the ALPR system has two distinct capabilities, only one of which is at issue in this case.

First, the computer system "automatically crosschecks captured license plates against a list of known license plates associated with suspected criminal activity—the Virginia State Police (State Police) 'hot list.'" R. 863. Thus, the system can notify police if nearby vehicles have been involved in past or ongoing crimes. This real-time alerting function of the ALPR system is considered "active use," which Neal does not challenge. *See id.*; *see also Neal I*, 295 Va. at 339 n.1.

Second, the computer system stores the license-plate number and accompanying information on a server, where the information is retained for 364 days before being purged. R. 863. The Department relies on the database of stored license-plate information both to assist in criminal investigations and to protect public safety. *See* R. 1798–1800. For example, if a child is reported abducted or a senior citizen is reported missing, an officer could enter a license-plate number reported by a witness into the ALPR system. *See* R. 1798–99 (describing abduction scenario); *see also* R. 2012 (noting that the ALPR system also is used for "missing person[s]"). That search may yield a location or locations

where the vehicle had been during the past 364 days, allowing "that officer [to] actually go back to the location to find the vehicle[,] which subsequently may lead to an arrest or at least investigative leads." R. 1799. The search of the ALPR system would not identify who owns the vehicle, however, since the system does not contain that information. R. 865; *see also* R. 1810 ("Q. Does the Fairfax County Police Department's license plate program, the total components of it, provide a way for [a] certified user—for the police department to discover the registered owner of a vehicle with the license plate number? A. No.").

This is the so-called "passive use" of the ALPR system that Neal challenges here.

C. There is no link between the ALPR system and the NCIC, VCIN, and DMV databases, all of which are maintained by other agencies.

Although this case is about only the Department's passive use of the ALPR system, *see* R. 1–2—and that is the only record-keeping process enjoined under the circuit court's order, R. 1299–1300—the circuit court based its decision on the Department's ability to access three other government databases: the National Criminal Information Center (NCIC) database; the Virginia Criminal Information Network (VCIN) database; and the Department of Motor Vehicles (DMV) database. *See* R. 865–66. Three undisputed facts about those other databases are relevant here.

First, the Department does not operate or maintain any of those databases. R. 1762–63. The NCIC database is maintained by the Federal Bureau of Investigation; the VCIN database is maintained by the Virginia State Police; and the DMV database is maintained by the Virginia Department of Motor Vehicles. R. 865, 1762–63.

Second, there is no direct connection or interface between the ALPR record-keeping process and the NCIC, VCIN, or DMV databases. R. 865–66; *see also* R. 1785 ("Q. Is there any interface between the I/Mobile software on the laptop in the cruiser and the Fairfax County Police Department LPR software? . . . . The Witness: There [is] no link whatsoever."). "[W]hile an officer can access all [of those] databases from the same computer, human intervention is required to match personal, identifying information from one database with the license plate number in the ALPR database." R. 865.

If "an officer acquires a license plate number from the ALPR software on the [laptop]" and wishes to search that information in the NCIC, VCIN, or DMV databases, several further steps are necessary. *Id.* To begin with, the officer would be required to "clos[e] out of the ALPR software." *Id.* Then "an officer must log into a separate software program called I/MOBILE with a unique state-issued user ID, which is separate from the Fairfax County user ID." *Id.* Once an officer has logged into I/MOBILE, "[t]here is a tab [they] would click on that would bring up"

access to those databases. R. 1784. All told, "no less than two computer programs and three passwords" are required before an officer could take information maintained in the ALPR system and use it to obtain "the name, personal number, or other identifying particulars of a data subject." R. 866 (internal quotation marks and citation omitted).

Third, access to the NCIC, VCIN, and DMV databases is restricted. Only Department officers who have completed the necessary training and obtained the required certification can search the databases, and those officers must have a legitimate criminal justice purpose for doing so. *See* R. 1763–64. Accessing the NCIC, VCIN, or DMV databases without a legitimate criminal justice purpose is a criminal violation. Va. Code Ann. § 18.2-152.5; *see also Ramsey v. Commonwealth*, 65 Va. App. 694, 701 (2015) (affirming conviction for a state police officer under § 18.2-152.5 for accessing VCIN records for non-law-enforcement reasons).

STANDARD OF REVIEW

Although not challenged here, the circuit court's factual findings are reviewed "with the highest degree of appellate deference" and "in the light most favorable to . . . the prevailing party at trial." *Palmer v. R.A. Yancey Lumber Corp.*, 294 Va. 140, 158–59 (2017). "The circuit court's findings of fact . . . will

not be disturbed unless they are plainly wrong or without supporting evidence." *Chamberlain v. Marshall Auto & Truck Ctr., Inc.*, 293 Va. 238, 242 (2017).

On the other hand, how to interpret the definition of "information system" in Code § 2.2-3801 is "an issue of statutory interpretation" that constitutes "a pure question of law," which this Court reviews "de novo." *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104 (2007); *Chamberlain*, 293 Va. at 242 (reviewing "the circuit court's application of law to undisputed facts de novo").

This Court reviews a trial court's decision to grant an injunction for an abuse of discretion. *May v. R.A. Yancey Lumber Corp.*, 297 Va. 1, 18 (2019). But the trial court "abuses its discretion if . . . its action or its decision was based on erroneous legal conclusions." *Id.* (citation and internal quotation marks omitted).

ARGUMENT

I. Because the circuit court correctly found that the ALPR system lacks owner information, it erred as a matter of law in concluding that a "read[y]" "link" connected license-plate numbers in the ALPR system to vehicle-owner information in unrelated systems (Assignment of Error No. 1).

The Department's ALPR system is the only record-keeping process relevant to this case. The Data Act is laser-focused on "a"—singular—"record-keeping process." Va. Code Ann. § 2.2-3801. And this Court's remand order directed the circuit court to focus on "the"—singular—"ALPR record-keeping process." *Neal I*, 295 Va. at 348. Accordingly, the circuit court erred as a matter of law by

not focusing only on the "total components and operations" of the ALPR system and looking, instead, beyond the ALPR system to the "total components and operations" of separate record-keeping processes managed by *other* government agencies. Because it is undisputed that the Department's ALPR system provides no method for linking a license-plate number with the owner of a vehicle, the circuit court's judgment should be reversed and judgment entered in favor of the Department.

A. Code § 2.2-3801 applies to information within an agency's own record-keeping process—not to extrinsic information maintained by other agencies.

Statutory interpretation begins with the plain language chosen by the General Assembly. "[C]ourts apply the plain language of a statute unless the terms are ambiguous, or applying the plain language would lead to an absurd result." *Boynton v. Kilgore*, 271 Va. 220, 227 (2006) (citations omitted); *see also Grethen v. Robinson*, 294 Va. 392, 397 (2017) ("The 'primary objective of statutory construction is to ascertain and give effect to legislative intent. A related principle is that the plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction.'") (citation omitted).

Here, the key phrase in Code § 2.2-3801 is "a record-keeping process." The use of that phrase shows that the General Assembly was focused on *individual* databases maintained by an agency.

First, to constitute an "information system" under the Data Act requires that the system be "*a* record-keeping process" that contains *both* "personal information," on the one hand, "*and*" a person's "name, personal number, or other identifying particulars," on the other. Va. Code Ann. § 2.2-3801 (emphasis added). The combination of these two elements is critical. If the singular "record-keeping process" has only an item of "personal information," but not the person's "name, personal number, or other identifying particulars," then it is not "a record-keeping process" and not an "information system" within the meaning of the Data Act.

Although the general rule is that "the singular includes the plural," Va. Code Ann. § 1-227, that rule gives way when, as here, it is "inconsistent with the manifest intention of the General Assembly," Va. Code Ann. § 1-202. Here, the General Assembly plainly intended for the Data Act to apply to an individual (singular) "information system" constituting "a record-keeping process"—not an amalgamation of systems that, only when separately accessed and viewed in combination, supplies "the name, personal number, or other identifying particulars of a data subject."

"This Court has long recognized that 'statutes are not to be considered as isolated fragments of law, but as a whole, or as parts of a great connected, homogeneous system, or a single and complete statutory arrangement.'" *Miller &*

Rhoads Bldg., L.L.C. v. City of Richmond, 292 Va. 537, 543 (2016) (citation omitted); *see also Loch Levan Land Ltd. P'ship v. Bd. of Supervisors*, No. 181043, 2019 WL 3949265, at *4 (Va. Aug. 22, 2019) ("[C]ourts have a duty to interpret the several parts of a statute as a consistent and harmonious whole so as to effectuate the legislative goal. A statute is not to be construed by singling out a particular phrase.") (alteration in original) (citation and internal quotation marks omitted). Interpreting an "information system" or "a record-keeping process" as somehow cobbling together separate databases to form a collective system would violate that canon of interpretation.[5]

Doing so would also make the Data Act's requirements unpredictable, frustrating the good-faith efforts of governmental bodies to comply with it. For example, under Code § 2.2-3803, "the" agency "maintaining an information

[5] The plain meaning of the phrase "a record-keeping process" likewise supports limiting the definition to each individual system. The word "process" is best understood as referring to "a particular method or system of doing something, producing something, or accomplishing a specific result." *Webster's Third New Int'l Dictionary* 1808 (1976). The noun "record" is best understood as referring to "a body of known, recorded, or available facts about something: the sum of something done or achieved or the body of data known, recorded, or available about something." *Id.* at 1898; *accord id.* ("cumulative data usu[ally] consisting of written, systematically arranged notes relating to an individual's or group's activities . . . ."). And, lastly, the verb "keep" is defined as "to maintain a record in (as of daily occurrences or transactions)." *Id.* at 1235. So combining these terms, a "record-keeping process" is a method or system for maintaining data known, recorded, or available about something or someone.

system that includes personal information" must take a number of actions; the agency must:

- "[m]aintain information in the system with accuracy, completeness, timeliness, and pertinence as necessary to ensure fairness in determinations relating to a data subject," Va. Code Ann. § 2.2-3803(4);
- "[m]aintain a list of all persons or organizations having regular access to personal information in the information system," Va. Code Ann. § 2.2-3803(6); and
- "[m]aintain for a period of three years or until such time as personal information is purged, whichever is shorter, a complete and accurate record, including identity and purpose, of every access to any personal information in a system . . . ." Va. Code Ann. § 2.2-3803(7).

Meeting those obligations obviously requires that the agency have control over all of the "components and operations of the record-keeping process." *See, e.g.*, Va. Code Ann. § 2.2-3806(A)(5)(a) (referencing "[t]he agency maintaining the information system"); *id.* § 2.2-3806(A)(5)(e) (same). If "a record-keeping process" includes not only the agency's *own* data but data in *other* government databases maintained by other agencies, then the agency no longer has the ability to satisfy those requirements. Put simply, the Department is not the custodian of

the data in the NCIC, VCIN, and DMV databases, so it cannot discharge any Data Act duties with regard to those databases.

Indeed, the circuit court's sweeping interpretation of what constitutes an "information system" under the Data Act leads to plainly absurd results. Unless exempt under Code § 2.2-3802, every agency database that maintains anything constituting "personal information" could be considered an "information system" if officials with access to the database can also use a computer connected to the internet that can access any *other* databases containing "the name, personal number, or other identifying particulars of a data subject." Va. Code Ann. § 2.2-3801; *see also* R. 1912–13 (noting that the trial court's expansive interpretation of "information system" would apply to "a camera system outside the courthouse," which passively "collects the license plate numbers of vehicles that drive past the courthouse"). That unbounded reading would eviscerate the requirement in § 2.2-3801 that the information system (or the singular "record-keeping process" in question) contain *both* an item of "personal information" "*and*" "the name, personal number, or other identifying particulars of a data subject. *Id.* (emphasis added). Such an absurd result should not be countenanced. *E.g.*, *Miller v. Commonwealth*, 180 Va. 36, 41 (1942) ("Where a particular construction of a statute will result in an absurdity, some other reasonable construction which will not produce the absurdity will be found."); *see also Loch Levan*, 2019 WL

3949265, at *5 (explaining that an interpretation is "absurd" when "the law would be internally inconsistent or otherwise incapable of operation").

In other words, the Data Act expressly contemplates that an "information system" will be "a record-keeping process"—a singular process—under the management of a single agency. The circuit court's conclusion destroys that requirement and mandates that any internet-connected database be treated as part of the agency's own system whenever the agency can access it.

Second, even if the General Assembly had intended for "information system" to be interpreted in a way that lumps together multiple, independent record-keeping systems maintained by other agencies, the circuit court's decision would still be incorrect as a matter of law. As the undisputed facts show, the "total components and operations of" the Department's ALPR record-keeping system do not provide a direct link between the recorded license-plate information and the vehicle's owner. Nor is there a sufficiently direct link between the ALPR system and other agencies' databases to conclude that there is a "read[y]" "means" by which a license-plate number stored in the ALPR system could identify the vehicle's owner. *Neal I*, 295 Va. at 350.

To the contrary, the evidence established that:

- The ALPR record-keeping process is a closed system with no direct interfaces to any other hardware, software, servers, or databases. R. 865.
- As license-plate images are recorded by the ALPR cameras, the computer in the trunk "converts the images . . . into letter/number combination sequences." *Id.* The images and converted information are accessible to officers only after they have logged into the ALPR-specific software, which requires login credentials different from the officer's laptop login and from other logins used by officers. *Id.* ("Only certified ALPR users, who are issued a unique user ID and password, can access the ALPR system.").
- Once an officer has logged into the ALPR software program, the officer can "enter the license plate number into the search field." *Id.* If the license plate has been captured by an ALPR camera, then the officer will be able to view the following information: "a photograph of the license plate, the license plate number, and the data, time, and GPS location of the photograph capturing the license plate." *Id.*
- To acquire additional information about the license-plate number, the officer must "clos[e] out of the ALPR software, then sign[] into the I/MOBILE software and enter[] the license plate number." *Id.*

In short, "no less than two computer programs and three passwords" are required before a license-plate number maintained in the ALPR system can be used to identify a vehicle's owner. R. 865–66. The trial court erred by finding that such an attenuated connection between the license-plate number and the owner's identity could suffice to render the ALPR record-keeping process an "information system" under Code § 2.2-3801.

Third, this Court made clear in *Neal I* that it is not enough that officers have merely the ability to access a *different* database that connects a license-plate number to the vehicle's owner. *See* 295 Va. at 341, 347–48. It was "undisputed" that the Department's officers had "read[y] access" to the DMV database, which does link a license-plate number to the vehicle's owner. *Id*. at 341. Yet the Court remanded the case for additional fact-finding. *Id.* at 348. If "read[y] access" to the DMV database (or any other government database where a license-plate number is linked to the vehicle owner's identity) were sufficient alone to extend the Department's "record-keeping process" to encompass other government databases, no remand would have been needed.

B. The circuit court's expansive definition of "information system" conflicts with *Neal I*'s conclusion that the ALPR system is not exempt from the Data Act; although there is not a specific investigative purpose when such information is collected, the name of the vehicle's owner may only be accessed for criminal justice purposes.

The circuit court's expansive interpretation of "information system" is inconsistent with this Court's holding in *Neal I* that, "if the ALPR database is determined to be an information system, it is not exempt from the operation of the Data Act." *Id*. at 350. As the Data Act makes clear, "information systems . . . that deal with investigations and intelligence gathering related to criminal activity" are exempt from the Data Act. Va. Code Ann. § 2.2-3802(7) (emphasis added). The Court found that that exemption would not apply to the ALPR record-keeping process because the Department does not have an ongoing criminal investigation or related purpose when the ALPR information is initially collected. Fair enough—the Department is not asking the Court to revisit that aspect of *Neal I*.

But if the trial court is right that the ALPR "record-keeping process" expansively includes any information that the Department could potentially access through the NCIC, VCIN, and DMV databases, that contradicts the Court's understanding of the Department's use of the ALPR system. *Neal I* took as its starting point that the Department did not collect the information to "'deal[] with investigations and intelligence gathering related to criminal activity.'" 295 Va. at

349. But officers can access the NCIC, VCIN, and DMV databases *only* when they have a legitimate criminal justice purpose for doing so. Indeed, Code § 18.2-152.5 makes it a crime for an officer to access such computer databases without a "criminal justice purpose." *Ramsey*, 65 Va. App. at 701.[6]

Neither *Neal I* nor the trial court addressed the requirement that an officer have a "criminal justice purpose" before taking license-plate data gleaned from the ALPR system and running it through the NCIC, VCIN, and DMV databases to discover the owner's identity. Va. Code Ann. § 2.2-3801. So if the trial court is right that the ALPR record-keeping process encompasses information accessible in those databases, the Court would need to decide anew, based on the changed factual predicate, whether the ALPR "information system" is exempt from the Data Act under Code § 2.2-3802(7).

II. The circuit court erred by ruling that the Department's maintenance of an information system consisting of passively collected ALPR information violates the Data Act (Assignment of Error No. 2).

Even if the ALPR system could be defined as an "information system" under Code § 2.2-3801, the circuit court's ruling in this case is still erroneous. Neal never proved that passive retention of ALPR information is a per se violation of

[6] It is no answer to assert that officers might access such databases illegally. "There is a presumption that public officials will obey the law." *Hinderliter v. Humphries*, 224 Va. 439, 448 (1982).

the Data Act. "[I]t is a paradigm of civil trials that the burden of proof falls upon the plaintiff." *Majorana v. Crown Cent. Petroleum Corp.*, 260 Va. 521, 531 (2000). Because Neal failed to meet his burden to show that the Data Act categorically bans such data collection, the court erred in finding that the "Department's 'passive use' of the ALPR system . . . violates the Data Act." R. 866.

The Data Act does not prohibit agencies from collecting information or maintaining an information system. The Act expressly contemplates that agencies will create such information systems. It simply imposes requirements on them when they do so. *See supra* at 17–18; *Carraway v. Hill*, 265 Va. 20, 23 (2003) ("The [Data] Act does not make such personal information confidential but establishes certain practices which must be followed in the collection, retention, and dissemination of that information.").[7] In short, merely maintaining an "information system" does not violate the Data Act. Because the trial court never identified an actual violation of the Act, the court's order should be vacated.

[7] The General Assembly's failed attempts to revise the Data Act further highlight that the Act does not currently bar agencies from maintaining an information system consisting of passively acquired license-plate data. The Governor vetoed a bill, for example, that would have added license-plate numbers to the Data Act and would have limited the retention of collected images to no more than seven days. *See* S.B. No. 965 (Va. 2015), https://lis.virginia.gov/cgi-bin/legp604.exe?151+ful+SB965ER.

III. The circuit court erred by enjoining the Department from maintaining an information system that stores information captured by ALPR cameras (Assignment of Error No. 3).

The circuit court's injunction is also fatally flawed.[8] To be sure, the trial court was "not required to establish the traditional prerequisites, *i.e.*, irreparable harm and lack of an adequate remedy at law," before issuing an injunction under Code § 2.2-3809. *See Va. Beach S.P.C.A., Inc. v. S. Hampton Rds. Veterinary Ass'n*, 229 Va. 349, 354 (1985). But the court's injunction must be specific and tailored to remedy an actual violation of the statute. Va. Code Ann. § 2.2-3809 (authorizing an injunction against "acts or practices in violation of this chapter"). In short, "an injunction must be specific, be no more than necessary, and not be solely a command to comply with the law." *Tran v. Gwinn*, 262 Va. 572, 585 (2001).

[8] The fact that this Court denied the Department's petition for review of the injunction under Code § 8.01-626, Record No. 190775, does not preclude the Department from challenging the injunction here. Rule 1:6 of the Supreme Court of Virginia does not apply because this is not a "second or subsequent civil action." Nor does the law-of-the-case doctrine apply, *see Miller-Jenkins v. Miller-Jenkins*, 276 Va. 19, 26–28 (2008), because the injunction issues were not "decided finally" by any appellate court prior to this petition, *see id.* at 28. This Court denied the petition in Record No. 190775, but in each case where this Court has applied the law-of-the-case doctrine, there was an appellate decision on the merits. *See, e.g.*, *id.* at 26–28 (describing and citing prior appellate decision); *Kemp v. Miller*, 160 Va. 280, 283–84 (1933) (similar). The Department is aware of no reported case in which a refused petition for review was treated as a preclusive "decision" under the law-of-the-case doctrine.

The trial court's injunction fails all three of those requirements. First, for the reasons given above, *supra* Part II, the injunction is improper because there is no legal basis on which to prohibit the Department from creating and using the ALPR database. The injunction reads: "Defendants Fairfax County Police Department and Chief Roessler are hereby permanently enjoined from the passive collection, storage and use of [ALPR] data." R. 1299. The circuit court's injunction should be vacated because it prevents the creation and use of a database that is not prohibited by the Data Act.

Second, on the facts of this case, there was no basis to enjoin the creation of the database. Even when authorized by statute, injunctions remain "an extraordinary and drastic remedy." *Hale v. Wash. Cty. Sch. Bd.*, 241 Va. 76, 81 (1991) (internal quotation marks omitted). There was no need for such extraordinary relief to respond to Neal's complaint. The license-plate information from Neal's vehicle has not been stored in the ALPR system since May 10, 2015; the Department informed Neal of that fact in its January 13, 2016 response to his second FOIA request. R. 2214–16. With respect to Neal, the circuit court's injunction serves no purpose. And because Virginia does not permit class actions, there was no basis to award relief beyond what was necessary to address any harm to Neal. *See Tran*, 262 Va. at 585 (vacating injunction that "was not tailored to the offensive activities, was overbroad, and exceeded the authority of the trial court").

Lastly, the injunction amounts to an improper command simply to follow the law. Given the lack of any ongoing harm to Neal and the Department's stated acceptance of the circuit court's ruling, *see* R. 1162, the court's injunction serves no purpose. *Tran*, 262 Va. at 584 ("[I]njunctions cannot issue merely to enjoin 'all possible breaches of the law.'") (citation omitted); *see also Nageotte v. Bd. of Supervisors of King George Cty.*, 223 Va. 259, 269–70 (1982) ("[The Court was] unwilling to impose a restraining order against a governing body which in good faith committed unsubstantial violations based on an erroneous construction of the Act.").

At a minimum, therefore, the injunction should be vacated.

CONCLUSION

The petition for appeal should be granted. The circuit court committed legal error by concluding that the ALPR record-keeping process constitutes an "information system" under Code § 2.2-3801 even though there is no way to determine who owns the vehicle using only the ALPR system. And even if the ALPR system were an "information system" for purposes of the Data Act, the circuit court erred by entering a permanent injunction against creating and maintaining the system. Every day that the court's injunction remains in place hampers the Department's law-enforcement capabilities and jeopardizes its ability to protect the public.

The Court should grant review, reverse, and enter final judgment.

Respectfully submitted,

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CERTIFICATE UNDER RULE 5:17

1. The parties and their counsel are as follows:

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2. On August 29, 2019, a copy of this Petition for Appeal was sent by email and U.S. mail to:

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3. Seven copies of this Petition for Appeal were filed on August 29, 2019, by hand-delivery to the Clerk of the Court.

4. Counsel for Petitioner desires to state orally and in person why this Petition for Appeal should be granted.

Stuart A. Raphael (VSB No. 30380)