Appellate Case No. A165040

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

HOPE WILLIAMS, NATHAN SHEARD, AND NESTOR REYES,

Plaintiffs and Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO,

Defendant and Appellee,

Appeal from the Superior Court for the County of San Francisco
The Honorable Richard B. Ulmer, Jr., Presiding Judge
Case No. CGC-20-587008

REPLY BRIEF OF PLAINTIFFS AND APPELLANTS HOPE WILLIAMS, NATHAN SHEARD, AND NESTOR REYES

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INTRODUCTION

This case is about unlawful police surveillance of racial justice protesters. Although it carries weighty public policy implications, the issue now before this Court comes down to basic rules of statutory interpretation: Courts must follow legislative text, including verb tense. Legislative history can provide examples of how to interpret legislative text. Courts should avoid interpretations that would render other provisions surplusage. While Defendant City and County of San Francisco ("CCSF") acknowledges these "cardinal rule[s] of statutory construction," Def. Br. at 38, its brief breaks them at every turn.

Plaintiffs are Black and Latinx organizers who joined protests that were surveilled by the San Francisco Police Department ("SFPD") without prior approval from the City's Board of Supervisors ("Board"). This violated the central oversight provision of the City's Acquisition of Surveillance Technology Ordinance ("Surveillance Technology Ordinance"). S.F. Admin. Code § 19B.2. Specifically, SFPD failed to get Board approval of its use of a non-city network of over 300 surveillance cameras, operated by the Union Square Business Improvement District ("USBID"), to monitor protests in San Francisco over the police murder of George Floyd. CCSF has never disputed any of this.

CCSF's only defense on the merits, below and on appeal, is that the Ordinance's grace period covered the SFPD's surveillance. *Id*. § 19B.5. But the statutory grace period does not justify the SFPD's actions for three independent reasons. First, the SFPD was not "possessing or using" the USBID camera network before the Ordinance's effective date. Second, the SFPD did not "continue" its prior use of the USBID camera network, but instead expanded it. Third, the SFPD did not satisfy the grace period's prerequisites: it did not submit a technology inventory within 60 days, and

a proposed use policy within 180 days, of the Ordinance's effective date. *Id*.

CCSF also argues that the case is moot because the Board temporarily approved the SFPD's use of non-city surveillance cameras. But the Board passed only a temporary ordinance, approving a 15-month pilot program that requires reporting and auditing. After 15 months, the parties will be right back where they started. CCSF has never attested that the SFPD will stop using the cameras without further Board approval, so this Court should decide the merits.

ARGUMENT

I. The appeal is live.

As a threshold matter, the passage of Ordinance No. 205-22[1] ("temporary camera ordinance") by the Board during the pendency of this appeal does not moot this case. The temporary camera ordinance authorizes the SFPD's use of non-city surveillance cameras like the ones at issue in this case for 15 months, subject to regular reporting and an audit. But in February 2024, after 15 months have passed, SFPD will once again lack approval to use the cameras. Thus, Plaintiffs' request for injunctive relief under the Surveillance Technology Ordinance to stop unapproved use remains a live dispute. *See* S.F. Admin. Code § 19B.2. Second, even if Plaintiffs' prayer for injunctive relief were moot, Plaintiffs are still entitled to declaratory relief because the proper interpretation of the grace period—for not just this surveillance technology but dozens of others that the Board has not approved—is a material question for the Court's determination. Third, even if this case were moot as to Plaintiffs, this Court should still

[1] This is the document for which the Court granted judicial notice. This document is also available on the Board's website: https://sfbos.org/sites/default/files/o0205-22.pdf.

rule on the merits, because they are a matter of great public concern that are capable of repetition.

A. The temporary camera ordinance does not moot this case.

"The pivotal question in determining if a case is moot is … whether the court can grant the plaintiff any effectual relief." Def. Br. at 25, quoting *Wilson & Wilson v. Redwood City*, 191 Cal. App. 4th 1559, 1574 (2011). *Accord Eye Dog Foundation v. State Guide Dog Board*, 67 Cal. 2d 536, 541 (1967). Stopping "allegedly illegal conduct … does not make the case moot" unless "the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated." *TransparentGov Novato v. City of Novato*, 34 Cal. App. 5th 140, 151-52 (2019) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953)).

For example, in *Gould v. Grubb*, the California Supreme Court held that, despite a new ordinance that stopped the defendant city's challenged practice, the case remained live because the city continued defending the practice. 14 Cal. 3d 661, 666 n.5 (1975). There, plaintiffs successfully challenged an "incumbent first" rule for listing candidates on ballots. *Id.* at 665-66. After appeal, the city "enacted a new ordinance which complie[d] with the trial court ruling." *Id.* at 666 n.5. But the city stated that the ordinance "was adopted only to insulate *interim* local elections … and d[id] not constitute an abandonment by the city of its contention" that the "incumbent first" rule was constitutional. *Id.* (emphasis added).

Similarly, in *Bullock v. Carter*, the U.S. Supreme Court held that a "temporary" law does not moot a case. *See id*. at 666 n.4 (citing 405 U.S. 134, 141-42 n.17 (1972)). There, the plaintiffs challenged a Texas election law that required candidates to pay a fee to get on the primary ballot. *Bullock*, 405 U.S. at 136. Texas responded by amending the law to allow candidates to bypass the fee, but only for a year. *Id.* at 141 n.17. The Court

ruled that "the change in the law does not render this case moot," because the permanent injunction sought by plaintiffs "would continue to have force and effect after" the temporary law expired. *Id.*

Gould and *Bullock* are directly on point here. The temporary camera ordinance will sunset in February 2024, which is 15 months after it became effective in November 2022. Ordinance No. 205-22 §§ 4, 5. CCSF could have attested that, after this sunset, the SFPD will not use non-city cameras without Board approval. Tellingly, CCSF did not. Thus, as in *Gould*, CCSF has not abandoned its defense of the SFPD's unapproved use of the non-city cameras.[2] And as in *Bullock*, the injunction sought by Plaintiffs will have force after the temporary camera ordinance sunsets.[3] Plaintiffs' injunction would require SFPD to obtain Board approval before using non-city cameras in the future, including after February 2024. 1 CT 23.

Moreover, CCSF cannot now claim that the temporary camera

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[2] Many other courts have held that a defendant must show it would not repeat the wrong after dismissal for mootness. *See, e.g., Marin Realtors v. Palsson*, 16 Cal. 3d 920, 929 (1976) ("there is no assurance that the board will not reenact [the challenged policy] in the future"); *Roger v. Riverside*, 44 Cal. App. 5th 510, 531 (2020) ("respondents have presented no evidence they have or will develop a policy" such that "errors that occurred in this case are not likely to recur"); *Robinson v. U-Haul Co.*, 4 Cal. App. 5th 304, 316 (2016) (defendant "ha[d] not taken action to bind itself legally to a violation-free future," and "changed its policy only when threatened with" litigation). *Compare TransparentGov Novato*, 34 Cal. App. 5th at 151 (case was moot where defendant city "adopted the new policy *before* [plaintiff] filed the petition," and "new policy is unequivocal" and "categorically rules out future disputes").

[3] *See also Flemming v. Florida Citrus Exchange*, 358 U.S. 153, 168 (1958) ("[I]t is proper for us now to determine the legal situation in regard to [plaintiffs] when the temporary legislation expires."); *Ashker v. Brown*, 2013 WL 1435148, *3 (N.D. Cal. 2013) ("[Defendants] have not shown that any of the program's new procedures are permanent. To the contrary, [defendant] has stated that the 'pilot program has a lifespan of two years.'").

ordinance will be reauthorized. *See generally San Francisco Tech., Inc. v. Dial Corp.*, 2011 WL 941152, *4 (N.D. Cal. 2011) (discussing "the unpredictability of the legislative process"). The Surveillance Technology Ordinance requires several contingent events before reauthorization, any of which may fail to happen. S.F. Admin. Code §§ 19B.2(b)(1)-(3), 19B.4. And the temporary camera ordinance also requires that the Budget and Legislative Analyst evaluate the efficacy of the camera program based on the SFPD's quarterly reports that must detail each live monitoring request, its justification, and its outcome. Ordinance No. 205-22 § 3(e). Finally, reauthorization will likely be hotly debated, as was the temporary ordinance: community groups opposed the measure,[4] and four Board members voted "no."[5]

CCSF notes that the grace period on which it currently relies would not continue in 15 months after the pilot program sunsets. Def. Br. at 29; S.F. Admin. Code § 19B.5(d). But Plaintiffs sued under the Surveillance Technology Ordinance's requirement that the SFPD have prior Board approval to use the non-city cameras. S.F. Admin. Code § 19B.2. Plaintiffs sought an injunction against unapproved use. That request is live. The SFPD will no longer have Board approval in 15 months, and CCSF does not attest or even suggest that the SFPD will not use the cameras. Thus, CCSF cannot show "there is no reasonable expectation that the wrong will be repeated." *TransparentGov Novato*, 34 Cal. App. 5th at 151-52 (quoting

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[4] *E.g.*, Letter from Bar Assn. of San Francisco (Sept. 1, 2022), https://sfgov.legistar.com/View.ashx?M=F&ID=11227671&GUID=EDF0E510-521E-43A7-99B8-647C5726D7F4; Letter from San Francisco Surveillance Coalition (Sept. 9, 2022), https://www.eff.org/document/sf-surveillance-coalition-letter-continued-opposition-sfpd-proposal-live-surveillance-using.

[5] Ordinance No. 205-22 at p. 8, https://sfbos.org/sites/default/files/o0205-22.pdf.

W.T. Grant Co., 345 U.S. at 632-33).

The SFPD for years has evaded Board oversight and offered conflicting accounts of its use of non-city cameras. For example, in August 2020, the SFPD claimed in a letter to the Board that the Department "did not monitor" the USBID's camera network during the George Floyd protests at issue in this case. 1 CT 37-38 ¶ 39. In fact, discovery in this case showed that an SFPD officer viewed the camera feed intermittently over eight days, including twice in the first day. 3 CT 640-41 ¶¶ 24, 27. The SFPD also claimed in its letter that exigent circumstances justified its unapproved use of these cameras. 1 CT 37-38 ¶ 39.[6] But its exigency theory was so devoid of fact that CCSF never asserted it in this case. Pl. Br. at 44 n.9. Further, the SFPD's letter violated the Surveillance Technology Ordinance's deadline for informing the Board of exigent uses. S.F. Admin. Code § 19B.7(a)(5). The letter came on the heels of a public records exposé of the SFPD's unlawful spying on the George Floyd protests.[7] While the grace period is CCSF's most recent attempt to justify SFPD's unapproved surveillance, in 15 months, that position may change once again.

Moreover, the George Floyd protests are not the only time that the SFPD used non-city cameras without Board approval: it did so two other times in 2020. 2 CT 539-42 ¶¶ 25-27, 31-32. Yet as late as December 2021, SFPD still had not submitted a proposed use policy for non-city cameras to COIT as required by the Surveillance Technology Ordinance. S.F. Admin.

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[6] On appeal, Defendant likewise argues, without evidence, that the Pride 2019 celebration "created the potential for criminal activity." Def. Br. at 43.

[7] Dave Maass & Matthew Guariglia, *San Francisco Police Accessed Business District Camera Network to Spy on Protestors*, EFF (July 27, 2020), https://www.eff.org/deeplinks/2020/07/san-francisco-police-accessed-business-district-camera-network-spy-protestors.

Code §§ 19B.2(b), 19B.5(a)-(c).[8] SFPD did not obtain Board approval until three years after the Board enacted the Surveillance Technology Ordinance, two years after Plaintiffs filed this case, and eight months after the superior court ruled.

SFPD's 15-month cessation of the challenged conduct—using non-city cameras without Board approval—cannot moot this appeal. CCSF cannot show that the Board will grant future approval to use the cameras. CCSF has also not attested that the SFPD will not resume its pattern of using the cameras absent Board approval. Plaintiffs' injunction against unapproved use will thus provide "effectual relief." *Wilson & Wilson,* 191 Cal. App. 4th at 1574.

B. Even if Plaintiffs' injunctive claim is moot, the Court should grant declaratory relief.

Even if the temporary camera ordinance moots Plaintiffs' request for an injunction, this Court should nonetheless decide the merits of Plaintiffs' request for declaratory relief. *See Bisno v. Sax,* 175 Cal. App. 2d 714, 730-31 (1959) (cases mooting an injunctive request "after the act sought to be enjoined has been performed … have no application to the declaratory features of the complaint"). Where a "plaintiff not only sought injunctive but declaratory relief … an appeal will not be dismissed where … there remain material questions for the court's determination." *Eye Dog Foundation,* 67 Cal.2d at 541. "[T]he relief thus granted may encompass future and contingent legal rights." *Id*.

Plaintiffs sued over the SFPD's unapproved use of non-city cameras,

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[8] Email from COIT to EFF (Dec. 14, 2021), https://www.eff.org/document/2021-12-14-email-coit-eff. *See also* 2 CT 537 ¶ 18, 548-49 ¶ 7 (as of October 2021, the COIT website did not have a proposed use policy for non-city cameras).

and CCSF responded with a grace period defense that would apply to many other police surveillance technologies. This opened the door to recurring disputes between the SFPD and Plaintiffs, and thus the need for declaratory relief.[9] The SFPD has a wish list of approximately forty other surveillance technologies for which it still lacks Board approval.[10] CCSF has never disputed Plaintiffs' standing to sue as protesters and organizers affected by the SFPD's unapproved surveillance. Pl. Br. at 17. The SFPD can try to apply the grace period to any of its other unapproved technologies, which would harm Plaintiffs' "future and contingent legal rights" to be free from unapproved surveillance. *See Eye Dog Foundation*, 67 Cal.2d at 541.

In cases like these, courts ask "two questions: the fitness of the issue for judicial decision and the hardship that may result from withholding court consideration." *Wilson & Wilson*, 191 Cal. App. 4th at 1582-83. The "fitness of the issue" prong is not met "[1] if the abstract posture of the proceeding makes it difficult to evaluate the issues, [2] if the court is asked to speculate on the resolution of hypothetical situations, or [3] if the case presents a contrived inquiry." *Id*. (cleaned up).

First, the posture here is clear: Plaintiffs sued to stop unapproved surveillance and CCSF defended under the grace period, of which the parties have offered conflicting interpretations. Second, the SFPD's misuse

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[9] *See Environmental Defense Project v. Sierra County*, 158 Cal. App. 4th 877, 886-87 (2008) ("Given the parties' differing interpretations of the Government Code and the county's insistence that it will continue with streamlined zoning … we do not have to guess how the county will interpret and carry out the notice provisions."); *Center for Local Govt. Accountability v. San Diego*, 247 Cal. App. 4th 1146, 1157 (2016) (even though injunctive request was moot after cessation of challenged conduct, plaintiff might plead "a viable claim for declaratory relief," as defendant "ha[d] not conceded its former practice" was unlawful).

[10] San Francisco Surveillance Technology Inventory (last updated Dec. 14, 2022), https://sf.gov/resource/surveillance-technology-inventory.

of the grace period to justify any of its many unapproved technologies is not speculative given CCSF's staunch defense of its interpretation. *See Environmental Defense Project*, 158 Cal. App. 4th at 886-87; *Center for Local Govt. Accountability*, 247 Cal. App. 4th at 1157. Third, this inquiry is not contrived: it rests on full briefing at two courts. As to the "hardship" prong, with the SFPD's history of evasion and changing stories, requiring Plaintiffs to go back to square one and sue again would be a hardship.

C. Even if this case is moot as to Plaintiffs, the Court should decide the controversy because it is of broad public interest and is likely to recur.

The merits of this case affect not just Plaintiffs, the non-city cameras, and the SFPD's wish list of forty other surveillance technologies. They also affect every other surveillance technology that every other City Department wants to use without Board approval, and the privacy of every other person "affected" by that surveillance. *See* S.F. Admin. Code § 19B.8(b).[11] The public has a strong interest in using the transparency and oversight guaranteed by the Surveillance Technology Ordinance and similar laws.[12]

"If a pending case poses an issue of broad public interest that is likely to recur, the court may exercise an inherent discretion to resolve that issue even though an event occurring during its pendency would normally render the matter moot." *Edelstein v. San Francisco*, 29 Cal. 4th 164, 172

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[11] Surveillance Technology Inventory, *supra* n.10.

[12] *See, e.g.*, J.D. Morris, *S.F. Halts 'Killer Robots' Police Policy After Huge Backlash — For Now*, San Francisco Chronicle (last updated Dec. 7, 2022), https://www.sfchronicle.com/bayarea/article/S-F-halts-killer-robots-police-policy-17636020.php, discussing Cal. Gov't Code § 7071 (requiring police to get approval of local governing body before acquiring military equipment and to post proposed use policy 30 days prior to any public hearing).

(2002).

Courts considering mootness have deemed all manner of legal questions to be of public interest.[13] For example, even though the case was "technically moot" in *People v. Pipkin*, this Court found there was public interest in the dispute because the statute at issue "ha[d] the dual purpose of protecting the public while treating severely mentally ill offenders." 27 Cal. App. 5th 1146, 1150-51 (2018). Here too, the Surveillance Technology Ordinance has the dual purpose of "robust transparency, oversight, and accountability," 2 CT 500 ¶ 5, and according to CCSF, "public health and safety," Def. Br. at 54. The Ordinance also states that "surveillance efforts have historically been used to intimidate and oppress certain communities and groups more than others." 2 CT 500 ¶ 5. Plaintiffs are Black and Latinx organizers who represent that interest in this case.

In light of CCSF's broad interpretation of the Ordinance's grace period, this dispute will likely recur. *See Cook*, 55 Cal. App. 3d at 780 ("Given the position of defendant that it has no legal obligation to disclose these procedures, and its voluntary disclosure only after litigation was commenced, we cannot say that the dispute will not recur."). The dispute will also evade review because "the duration of the [grace period] at issue is often shorter than the appellate process." *See Pipkin*, 27 Cal.App.5th at 1150. Because this case poses an issue of broad public interest that is likely to recur, the Court should decide its merits.

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[13] *See, e.g.*, *Edelstein*, 29 Cal. 4th 164 (runoff election procedures); *Eye Dog Foundation*, 67 Cal. 2d 536 (regulation of public solicitation of funds); *Marin Realtors*, 16 Cal. 3d at 929-30 (trade association membership restriction); *Robinson*, 4 Cal. App. 5th at 318-21 (non-compete contract clause); *Gilb v. Chiang*, 186 Cal. App. 4th 444, 460 (2010) (payment of state workers during budget impasse); *Cook v. Craig*, 55 Cal. App. 3rd 773, 780 (1976) (police withholding public records).

II. The Surveillance Technology Ordinance's grace period did not authorize the SFPD's surveillance of the 2020 George Floyd protests.

CCSF's only merits argument is that the SFPD's use of the USBID camera network without prior Board approval was authorized by the grace period in subsection 5(d) of the Surveillance Technology Ordinance. But the grace period does not apply for three independent reasons: (a) the SFPD was not "possessing or using" the non-city cameras before the Ordinance's effective date; (b) the SFPD did not "continue" but instead expanded its use of the cameras; and (c) the SFPD did not satisfy the grace period's prerequisites. *See* S.F. Admin. Code § 19B.5.

A. The grace period does not apply to a one-time, temporary use of a surveillance technology.

The SFPD's use of non-city cameras for 24 hours during Pride 2019 cannot trigger the Ordinance's grace period. This is made clear by the Ordinance's text, history, and purpose, and an interpretive canon of the California Constitution.

1. CCSF mischaracterizes the plain text of subsection 5(d) by ignoring the present participle.

The parties agree on the "cardinal rule" that this Court may not modify the Surveillance Technology Ordinance's plain text. *See* Def. Br. at 38. But throughout its brief, CCSF violates that rule by rewriting subsection 5(d) to authorize technologies that departments had "used," "possessed or used," "acquired," "obtained access to," and so on. *See* Def. Br. at 11, 17, 29, 30, 32, 35, 45. CCSF prefaces its arguments with phrases like "[t]he relevant section of Chapter 19B expressly states," and then follows with a clear misstatement of that text. *Compare id.* at 32 ("if a City department already *used* a particular form of surveillance technology before Chapter

19B took effect…") (emphasis added); *with* S.F. Admin. Code § 19B.5(d) ("Each department *possessing or using* Surveillance Technology before the effective date of this Chapter 19B…") (emphasis added).

In enacting the Surveillance Technology Ordinance, the Board chose the words "possessing or using." Those are present participles that only refer to "an action or state" that is "unfinished." *See Garner's Modern English Usage* at 991, 1020 (4th ed. 2016).[14] Present participles do not describe one-time, finished actions, such as how the SFPD used the USBID camera network one time, for one day, during Pride 2019. 2 CT 537–38 ¶¶ 19, 20. *See Sonitrol Northwest, Inc. v. City of Seattle*, 84 Wash. 2d 588, 594 (1974) ("The words 'operating' and 'conducting' are in present participle form which excludes in its application the one-time installation services of a local alarm system."); Pl. Br. at 23-24 (collecting cases).

For example, *Al Otro Lado v. McAleenan* held that the present participle "arriving" in an immigration statute "denotes an ongoing process," and thus includes those "crossing the international bridge" from Mexico but not yet physically present in the United States. 394 F. Supp. 3d 1168, 1200, 1204-05 (S.D. Cal. 2019) (discussing 8 U.S.C. § 1225(b)(1)(A)(ii)).[15]

Similarly, *Kinzua Res., LLC v. Oregon Dep't of Env't Quality* held that an environmental statute's "term 'controlling' is the 'present participle' construction of the verb 'control'." *See* 468 P.3d 410, 414, 416 (Or. 2020). The court construed a provision ordering persons "controlling a land

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[14] CCSF complains that words like "unfinished" are "[n]owhere in the text," Def. Br. at 38, but Plaintiffs merely use these words to define present participles. *See De Vries v. Regents of Univ. of California*, 6 Cal. App. 5th 574, 591 (2016) ("In divining a term's 'ordinary meaning,' courts regularly turn to general and legal dictionaries.").

[15] CCSF focuses on the court's construction of a second statute, 8 U.S.C. § 1158(a)(1), which is irrelevant here. *See* Def. Br. at 41 n.6.

disposal site that is closed" to comply with closure requirements. *Id*. at 414. CCSF mischaracterizes the court as holding that the present participle is not "textually significant." Def. Br. at 41 n.7 (quoting *Kinzua*, 468 P.3d at 414). But the court interpreted the present participle as indicating either "a current action" or "a current status." *Kinzua*, 468 P.3d at 414, 416.

Perkovic v. Zurich Am. Ins. Co., relied on by CCSF, Def. Br. at 42, held only that a verb tense in one sentence should not be read into another. 893 N.W.2d 322, 327-28 (Mich. 2017). The court interpreted the notice requirements of an insurance benefit statute that used the present participle "claiming." *Id*. "But this language appears in the penultimate sentence of the statute, which describes who is permitted to transmit notice; it is not a part of the final sentence that mandates the contents of the notice." *Id*. at 328. At issue was notice content and thus the final sentence. *Id*. The dissent interpreted the meaning of the present participle but the majority did not, because "[i]t is a strained reading of the statute to import into the final sentence … an additional requirement … from the preceding sentence …" *Id*.

CCSF also mischaracterizes *Wireless One, Inc. v. Mayor & City Council of Baltimore*, by quoting from its dissent and without acknowledging it as such. *See* 214 A.3d 1152, 1182 (2019) (McDonald, J., dissenting) (emphasizing "the repeated use of the present participle in the sentence"); Def. Br. at 42 (quoting this language). Like *Perkovic*, the majority in *Wireless One* held that the requirement of a verb tense in one part of a statutory provision "has no logical effect on" another. *Id*. at 1170-71.

CCSF says the Board's use of present participles is insufficiently "detailed," Def. Br. at 39, but drafters need not be verbose to be effective. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020) (categorically expanding civil rights protections even though "[t]he only statutorily

protected characteristic at issue in today's cases is 'sex'"); *District of Columbia v. Heller*, 554 U.S. 570, 581-591 (2008) (using ten pages to interpret four words). Legislators' grammatical choices are equally significant. *See, e.g.*, *People v. Van Orden*, 9 Cal. App. 5th 1277, 1291 (2017) (ruling based on placement of comma in sentence and citing *Garner*'s *Modern English Usage*); *In re Maes*, 185 Cal. App. 4th 1094, 1108-09 (2010) (ruling based on difference in verb tense between "is" and "was").

CCSF has the burden of persuading this Court, *de novo*, of an interpretation that supports its use of subsection 5(d) on summary judgment as an affirmative defense. *See Consumer Cause, Inc. v. SmileCare*, 91 Cal. App. 4th 454, 466-69 (2001). It cannot. CCSF asserts that since Section 5's title uses the phrase "existing surveillance technology," subsection 5(d) requires only that "a department already possessed or used" a technology. Def. Br. at 32, 53. CCSF does not say how it defined this phrase. Regardless, "title or chapter headings are unofficial" and CCSF cannot use them to "alter the explicit scope, meaning, or intent of a statute." *See People v. Ricci*, 18 Cal. App. 5th 526, 530 (2017) (cleaned up). Here, the Board's verb tense in "possessing or using" provides that explicit meaning.

CCSF also argues that the Board's use of present participles is "happenstance," Def. Br. at 40, but that violates the cardinal rule of interpretation. *See People v. Arias*, 45 Cal. 4th 169, 180 (2008) ("every part of a statute [is] presumed to have some effect and not be treated as meaningless"). CCSF suggests, *ipse dixit*, that present participles only describe events that "inherently occur only a single time" and "are not readily capable of being repeated episodically." Def. Br. at 40-41, 43. But

no cases or dictionaries support this assertion.[16]

Finally, CCSF points out that subsection 5(d) deals with departments "possessing *or* using" technologies. Def. Br. at 45-46. But here, the SFPD only possessed and used the USBID cameras once, for one day. 1 CT 254. SFPD was neither "possessing or using" the cameras before the Ordinance's effective date.

2. The California Constitution applies to the Ordinance and requires a narrow construction of the grace period.

Article I, Section 3 of the California Constitution, as amended by the voters in 2004 through Proposition 59, creates a public "right of access to information" about "the people's business." Cal. Const. Art. I, § 3(b)(1). It also requires "narrow[] constru[ction]" of any "statute, court rule, or other authority" that "limits the right of access." *Id.* § 3(b)(2).

This right of access canon applies to the grace period. Under CCSF's interpretation, the grace period indefinitely delays an agency's duty to submit an inventory that publicly discloses its use of surveillance technologies, Def. Br. at 53-56, limiting the right of access to government information.

Article I, Section 3 expressly extends to any "statute, court rule, or other authority," contrary to CCSF's claim that it only applies to public meetings and public records. Def. Br. at 46. Subsection 3(b)(1) creates "the right of access to information" and identifies as one application "the meetings of public bodies and the writings of public officials and agencies."

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[16] CCSF also repeats the lower court's error of disregarding the time referred to by subsection 5(d): the period "before the effective date" of the Ordinance. *See* Def. Br. at 41; 3 CT 657. Only the SFPD's temporary use during Pride 2019 falls in this period, but CCSF erroneously attempts to make hay of its later uses.

These are examples and not limitations. In any event, the inventory required by the Ordinance is a writing of a public agency.

CCSF likewise misrepresents this Court's decision in *St. Croix v. Superior Court* as holding the Constitution "does not require a narrow construction of the attorney-client relationship created under a city charter." Def. Br. at 47 (citing 228 Cal. App. 4th 434, 444 (2014)). In reality, this Court *did* apply the right of access canon, but ultimately held that the "charter's provisions … unambiguously create an attorney-client relationship … and would not be altered by adopting a narrower construction …" *St. Croix*, 228 Cal. App. 4th at 444. As to *Gerawan Farming, Inc. v. Labor Relations Bd.*, the court explained that "labor negotiations are conducted in private in order that negotiators may speak freely … and reach compromises …" 40 Cal. App. 5th 241, 274 (2019). No such concerns exist here.

Finally, CCSF does not deny that a central purpose of the Ordinance is transparency around decisions relating to surveillance technologies. Pl. Br. at 26-27, 35-36; 3 CT 635-36 ¶¶ 5(a), 5(e). Among other things, the Ordinance requires departments to report their use of these technologies "in exhaustive detail." Def. Br. at 39 (citing S.F. Admin. Code § 19B.1)).

3. The Ordinance's legislative history shows the grace period does not encompass a one-time, temporary use.

The Board's debate about the grace period focused on how departments were possessing and using four surveillance technologies: bus cameras, automated license plate readers, ShotSpotter, and police body worn cameras. 2 CT 537 ¶ 17. This indicates that similar types of possession and use of technologies fit within the grace period and dissimilar types do not. *See Briggs v. Eden Council*, 19 Cal. 4th 1106, 1127 n.1 (1999) ("[T]he report prepared by the Senate Committee on the

Judiciary describes five examples of SLAPP suits … [which] invariably involved activities violating the right of petition."); *Noori v. Countrywide Payroll, Inc.*, 43 Cal. App. 5th 957, 968-69 (2019) (construction of injury provision is "confirmed by" legislative analysis that "cited several examples" which all "involved the failure to include required information on a wage statement").

Departments were possessing and using the technologies that the Board discussed in two ways that are not shared by the SFPD's one-time, temporary possession and use of non-city cameras. First, City departments had been possessing and using these four technologies for many years prior to the Ordinance's effective date. Pl. Br. at 28-29 & n.5. Thus, immediate cessation might have caused "disruptions in the way City departments carry out their functions." Def. Br. at 36. In contrast, the SFPD had used non-city cameras only once, and for only one day. So immediate cessation of this technology could not disrupt department operations.

Second, City departments were possessing and using the four technologies without having to seek permission. But SFPD's possession and use of non-city cameras starts and stops, each time requiring new permission and access credentials, which have been denied in the past. 2 CT 533 ¶ 6, 538 ¶ 20, 540-41 ¶¶ 27-28.[17]

CCSF's only legislative history is the Legislative Digest. Def. Br. at 18, 34-35, 51 n.10. But it merely "parrots the terms of the statute" and does not "offer[] any enlightenment as to what those terms mean." *See Liparota v. United States*, 471 U.S. 419, 430 n.13 (1985).

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[17] CCSF wrongly suggests on appeal that the SFPD "uses, but does not possess" the USBID camera network, Def. Br. at 49-50, but it never disputed below that the SFPD both possessed and used the cameras. 1 CT 254.

B. Subsection 5(d) authorizes a department to "continue" but not expand its use of a surveillance technology during the grace period.

Even if the grace period applied to the SFPD's use of non-city cameras (and it does not), it is a limited permission for a department to "continue its use" of a surveillance technology. S.F. Admin. Code § 19B.5(d). Merriam-Webster defines "continue" as "remain in a place or condition."[18] Thus, the grace period allows only the "place or condition" of use that occurred prior to the Surveillance Technology Ordinance's effective date.

CCSF does not dispute Plaintiffs' showing that SFPD expanded the condition and place that it used the USBID's cameras from the Pride celebration to the George Floyd protests: from one day to eight; from one street to all 300 cameras; and from just setting up the connection to repeatedly viewing the feed. Pl. Br. at 33-34, citing 2 CT 533 ¶ 6, 539 ¶¶ 20, 23; 3 CT 637-38 ¶¶ 10, 12, 14, 17, 640-41 ¶¶ 23-24, 27. By invoking the grace period here, CCSF effectively replaces "continue" with "expand," arguing subsection (5)(d) carries no "restrictions on departments' use of surveillance technologies." Def. Br. at 50.[19]

CCSF's interpretation would also undermine the structure of the Ordinance, which the Board designed to serve transparency. Both Section 2, the Ordinance's central oversight provision, and Section 5, which contains the grace period, address "existing" surveillance technology. The

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[18] *Available at* https://www.merriam-webster.com/dictionary/continue.

[19] CCSF also wrongly asserts that the Ordinance "placed [no] meaningful limits on how a department could use surveillance technologies that the Board had [not] already acted to regulate." Def. Br. at 51. *Contra* S.F. Admin. Code § 19B.7 (limits on use during exigent circumstances without prior Board approval); *Id.* § 19B.3(b) (departments must create proposed policies for technologies not approved by Board).

applicable rule is clear: courts must "constru[e] words in their broader statutory context and, where possible, harmoniz[e] provisions concerning the same subject." *Dr. Leevil, LLC v. Westlake Health Care Ctr.*, 6 Cal. 5th 474, 478 (2018). Section 2 prohibits departments from using "existing" technology in a new "location" or "manner," absent Board approval. S.F. Admin. Code § 19B.2(a)(3). Section 5 mirrors this by using the word "continue," which, according to Merriam-Webster, only authorizes uses in the same "place or condition." Reading this limitation out of Section 5 would incentivize departments to stay in the restriction-free grace period and evade Section 2's requirement that they obtain Board approval. In CCSF's version of the grace period, departments can expand uses unilaterally and secretly—the opposite of the Ordinance's central purpose of transparency. Pl. Br. at 26, 35-36.

C. To use Section 5's grace period, a department must comply with its disclosure obligations.

Finally, SFPD cannot invoke the Ordinance's grace period because it failed to submit a technology inventory within 60 days, and a proposed use policy within 180 days, of the Ordinance's effective date. S.F. Admin. Code § 19B.5. CCSF erroneously asserts that the grace period is independent of the disclosure obligations. Def. Br. at 53. But it ignores Plaintiffs' analysis of the text and history of Section 5 and invents legislative intent from whole cloth. It wrongly tries to shift its burden to prove the SFPD's compliance onto Plaintiffs. Finally, CCSF attempts to shift blame for the SFPD's noncompliance to COIT by ignoring the Ordinance's text.

First, CCSF fails to address Plaintiffs' arguments demonstrating the connection between subsections (a)–(c) and (d). Pl. Br. at 34-37. CCSF argues that "nothing . . . links" them, Def. Br. at 53, but its

misinterpretation would turn the prerequisites in (a)–(c) into surplusage that agencies are free to ignore. This violates "the fundamental rule of statutory construction that requires every part of a statute be presumed to have some effect and not be treated as meaningless unless absolutely necessary." *See Arias*, 45 Cal. 4th at 180. CCSF ignores the fact that subsection (d), just like (a)–(c), is part of Section 5, which is titled "*Compliance* for Existing Surveillance Technology." S.F. Admin. Code § 19B.5 (emphasis added). If subsection (d) did not "concern[] the same subject" of compliance, it would not be housed under that section. *See Dr. Leevil*, 6 Cal. 5th at 478.[20] Likewise, CCSF ignores how Section 5 is tied together by its repetition of the phrase "possessing or using."

CCSF ignores statements by the Ordinance's author and a deputy city attorney explaining that the grace period is tied to Board consideration of a proposed policy. Pl. Br. at 35. CCSF emphasizes the Legislative Digest, but that is entirely silent on subsections (a)-(c) and so is of no help in assessing their connection to subsection (d). Def. Br. at 54.

CCSF also invents, without citation, an unfounded theory of why subsection (d) is a standalone: supposedly, the grace period plays "an important role[] in helping to protect health and safety," whereas subsections (a)–(c) "set forth internal procedures and timelines for the implementation of the legislation." Def. Br. at 54. This Court should not give any credence to such conjecture.

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[20] Section headings "may properly be considered in determining intent" where "there is ambiguity" in the legislative text. *Woodland Park Mgt. v. Rent Stabilization Bd.*, 181 Cal. App. 4th 915, 923 n.5 (2010). Here, there is ambiguity in the connection between (a)-(c) and (d), so the heading is relevant. On the other hand, section headings cannot "alter the explicit … meaning" of legislative text, *Ricci*, 18 Cal. App. 5th at 530, so as explained above, CCSF cannot use the section heading to alter the text's unambiguous verb tense. *Supra* Sec. II.A.1.

Second, CCSF wrongly claims that Plaintiffs did not show SFPD's failure to comply with the disclosure obligations. *Id.* at 55. In fact, Plaintiffs attested that as of October 2021, COIT's website did not have a proposed use policy for non-city cameras. Pl. Br. at 37, citing 2 CT 537 ¶ 18. *See also id.* 548-49 ¶ 7.[21]

In any event, CCSF bears the burden of proof on this point. *See Consumer Cause*, 91 Cal. App. 4th at 466-69. CCSF uses Section 5's grace period as an affirmative defense to Plaintiffs' case-in-chief that the SFPD violated Section 2.[22] CCSF has failed to show that the SFPD complied. The agency's declaration does not say when the SFPD submitted an inventory that lists non-city cameras, and it concedes that SFPD still had not submitted a draft policy. 1 CT 231 ¶¶ 6-7.

Third, CCSF wrongly attempts to blame COIT for the SFPD's failure to comply with the disclosure obligations. Def. Br. at 55–56. But nothing in the Ordinance supports CCSF's claim that "COIT sets the schedule to submit draft surveillance technology policies." *Id*. at 56 (cleaned up). Rather, the text obligates departments to submit a proposed use policy to the Board within 180 days, or seek 90-day extensions from COIT, which may only grant them "for good cause." S.F. Admin. Code § 19B.5(b)–(c).

III. CSSF has waived any argument about plaintiffs' standing or case-in-chief.

In their opening brief before this Court, Plaintiffs demonstrated that

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[21] In December 2021, COIT reported that SFPD still had not submitted a proposed use policy for non-city cameras. *See supra* n.8.

[22] Moreover, CCSF deprived Plaintiffs of an opportunity to take discovery on the SFPD's compliance with the grace period prerequisites: it first raised the issue at summary judgment, after discovery closed.

they have standing to bring this suit, and that the SFPD violated Section 2 of the Ordinance by using non-city cameras without Board approval. Pl. Br. at 38-48. Plaintiffs showed the same below. 2 CT 252-57, 259-63.

CCSF has never contested Plaintiffs' standing or Section 2 claim. Indeed, CCSF conceded that Plaintiffs have standing during oral argument below. 1 RT 3:13-23. Accordingly, CCSF has waived any defense based on standing or Section 2. *See People v. Catlin*, 26 Cal. 4th 81, 122 (2001).

CONCLUSION

This Court should reverse the superior court's grant of summary judgment to CCSF, and remand with instructions to grant summary judgment to Plaintiffs.

Dated: January 6, 2023

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I, counsel for appellants, certify pursuant to California Rule of Court 8.204(c) that this Brief is proportionally spaced, has a typeface of 13 points or more, contains 6,528 words, excluding the cover, the tables, the signature block, verification, and this certificate, which is less than the total number of words permitted by the Rules of Court. Counsel relies on the word count of the Microsoft Word word-processing program used to prepare this brief.

Dated: January 6, 2023 /s/ Mukund Rathi

CERTIFICATE OF SERVICE

I, Victoria Python, declare:

I am a resident of the state of California and over the age of eighteen years and not a party to the within action. My business address is 815 Eddy Street, San Francisco, California 94109.

On January 6, 2023, I served the foregoing documents:

REPLY BRIEF OF PLAINTIFFS AND APPELLANTS HOPE WILLIAMS, NATHAN SHEARD, AND NESTOR REYES

X BY TRUEFILING: I caused to be electronically filed the foregoing document with the court using the court's e-filing system, TrueFiling. Parties and/or counsel of record were electronically served via the TrueFiling website at the time of filing.

X BY FIRST CLASS MAIL: I placed the document in a sealed envelope for collection and mailing following our ordinary business practices and deposited it with the United States Postal Service, with postage fully paid:

San Francisco Superior Court
Attn: Hon. Richard B. Ulmer, Jr.
400 McAllister Street
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 6, 2023 at San Francisco, California.

/s/ Victoria Python