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

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

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Dated: August 15, 2022 /s/ Saira Hussain

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INTRODUCTION

This case is about the San Francisco Police Department's ("SFPD") unlawful surveillance of racial justice protests in violation of the city's Acquisition of Surveillance Technology Ordinance ("the Ordinance"). The law's central requirement that city departments obtain Board of Supervisors' ("Board") approval before acquiring or using surveillance technology applies fully to the SFPD's employment of a non-city camera network to surveil protests following the police murder of George Floyd, where Plaintiffs joined thousands of other people in San Francisco in May and June 2020. This Court must reject the SFPD's attempt to excuse its unlawful conduct based on an improper reading of the Ordinance.

For eight days at the height of the protests, the SFPD tapped into the Union Square Business Improvement District's ("USBID") network of over 300 surveillance cameras spanning several blocks of the Union Square area, including streets with many demonstrators. An SFPD officer admitted to viewing the camera feed repeatedly over the course of those eight days. The SFPD undertook these actions in circumstances that did not meet the exigency exception in the Ordinance and without prior approval from the Board, and in doing so, made Plaintiffs fearful of attending future protests and made it harder for them to organize and recruit people to participate in future demonstrations. These facts are undisputed.

In taking these actions, the SFPD violated the Ordinance. The SFPD also undermined the Ordinance's purposes: to protect marginalized communities from surveillance and to ensure public transparency of city departments' use of surveillance technology.

The lower court erred when it granted summary judgment to Defendant City and County of San Francisco ("CCSF") based solely on an unsupported reading of Section 5 of the Ordinance, which addresses

"Compliance for Existing Surveillance Technology," and its subsection 5(d), which allows a department possessing or using existing surveillance technology to continue its use while the Board considers a policy for that technology (hereinafter, "the grace period provision"). The court held that because the SFPD used a subset of the USBID cameras one time, for one day, during the 2019 Pride Parade, shortly before the Ordinance's effective date, the Ordinance authorized the SFPD's use of the USBID's full 300-camera network for eight days to monitor the 2020 George Floyd protests without Board approval.

This is reversible legal error for three independent reasons.

First, by its text, subsection 5(d) covers only a surveillance technology that the department was "possessing or using" before the Ordinance's effective date—not a technology that the department *possessed* or *used* just once, for one day. The California Constitution's mandate that exceptions to public transparency laws be narrowly construed likewise supports a reading that excludes from the grace period a department's technology that it used only one time, for one day. So does the Ordinance's legislative history, which shows the Board's focus for the grace period was to create a mechanism that would help avoid upending critical department functions by immediately shutting down the use of existing technologies that departments relied on.

Second, the Ordinance's text and structure prohibit a department from later expanding its use of a surveillance technology beyond how the department was using it prior to the law's effective date. Yet the SFPD's use of the USBID camera network to monitor the 2020 protests was far more expansive in duration, the number of cameras involved, and geographical scope than the SFPD's use of the cameras to monitor the 2019 Pride Parade.

Third, Section 5 requires a department to comply with explicit

procedures and deadlines to avail itself of the grace period. The SFPD failed to do so.

Accordingly, this Court should reverse the decision below. This Court should also remand with instructions to grant summary judgment for Plaintiffs because the undisputed record shows that the SFPD violated the Ordinance's central oversight provisions in subsection 2(a) by unlawfully acquiring and using the USBID camera network, without Board approval, to spy on the 2020 George Floyd protests.

STATEMENT OF APPEALABILITY

The superior court's order granting Defendant's summary judgment motion and denying Plaintiffs' motion is appealable as a final judgment under Cal. Code of Civ. Proc. § 904.1(a)(1).

STATEMENT OF FACTS

I. History of the Acquisition of Surveillance Technology Ordinance

In 2019, the San Francisco Board of Supervisors debated and adopted the Acquisition of Surveillance Technology Ordinance. 3 CT 635 ¶ 4;[1] *see* S.F. Admin. Code § 19B *et seq*. A central purpose of the Ordinance is to ensure that the public has an opportunity to comment on and debate city departments' plans to acquire or use surveillance technologies. 3 CT 635–36 ¶ 5. Among other things, the Ordinance generally prohibits any city department from engaging in acquiring, borrowing, sharing, or using surveillance technology without first obtaining approval of a use policy

[1] Hereinafter, the Clerk's Transcript on Appeal will be abbreviated "CT" and the Reporter's Transcript on Appeal will be abbreviated "RT."

from the Board via a separate ordinance. S.F. Admin. Code § 19B.2(a)(2)–(4).

At various points during legislative debate, Ordinance author Supervisor Aaron Peskin declared that the Ordinance was designed to address the government's historical misuse of surveillance technology against marginalized communities, including the Black Lives Matter movement. 3 CT 636 ¶¶ 6–8. Indeed, the SFPD has a long and well-documented history of spying on marginalized groups and political dissidents.[2]

Supervisors also debated Section 5 of the Ordinance, titled "Compliance for Existing Surveillance Technology." S.F. Admin. Code § 19B.5. On May 14, 2019, the Board amended Section 5 in two ways. First, in part at the request of SFPD Chief Bill Scott, the Board extended the deadline from 120 days to 180 days for a department "possessing or using" an existing surveillance technology before the Ordinance's effective date to submit a use policy for such a technology. 2 CT 536 ¶¶ 13–14; *see* S.F. Admin. Code § 19B.5(b). Second, the Board authorized such a department to "continue its use . . . until such time as the Board enacts an ordinance" that approves a use policy for that technology. 2 CT 535 at ¶ 10; *see* S.F.

[2] *See, e.g.*, Carol Pogash, *Getting Rid of 'Garbage,'* S.F. Examiner, Apr. 23, 1975 (describing files the SFPD amassed on over 100,000 civil rights demonstrators, union members, and anti-war activists during the Civil Rights era); William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 Hofstra L. Rev. 817, 835–36 (1997) (discussing the SFPD's surveillance of the LGBTQ community in the 1960s); Veena Dubal, *The Demise of Community Policing? The Impact of Post-9/11 Federal Surveillance Programs on Local Law Enforcement*, 19 Asian Am. L. J. 35, 40–42 (2012) (identifying the SFPD spying on groups challenging U.S. intervention in Central American and South African apartheid in the 1980s, and on South Asian, Muslim, and Arab communities post-9/11).

Admin. Code § 19B.5(d).

At the May 14 meeting, Supervisors and a Deputy City Attorney clarified the purpose of subsection 5(d). The Ordinance's author stated that the amended provision "allows departments to continue use of surveillance technology pending Board of Supervisors' consideration of a Surveillance Technology Policy." 2 CT 535–36 ¶ 11. Likewise, a Deputy City Attorney testified that "if a department is currently using technology, they have to draft a policy" and that "if the Board does not act on the proposed surveillance policy, the department can continue to use their surveillance technology." 2 CT 536 ¶ 12.

The Ordinance's author also repeatedly emphasized that the Ordinance would require departments to inform the Board and the public of their existing surveillance technologies. 2 CT 536–37 ¶¶ 15–16. Supervisors and a department witness also discussed four existing technologies in their discussion of the amendment: ShotSpotter, police body worn cameras, automated license plate readers, and city bus cameras. 2 CT 537 ¶ 17.

In its final form, Section 5 requires a department "possessing or using" existing surveillance technologies to send the city's Committee on Information Technology ("COIT") a list of those technologies within 60 days of the Ordinance's effective date, and either submit a use policy for each technology to the Board for its review within 180 days of the Ordinance's effective date, or seek 90-day extensions from COIT. *See* S.F. Admin. Code § 19B.5(a)–(c). During this process, the department may "continue its use" of an existing surveillance technology "until such time as the Board enacts an ordinance" that approves a use policy. *Id.* at § 19B.5(d).

II. Union Square Business Improvement District

Business improvement districts are non-city entities formed by a majority of property owners within a certain geographic area, with approval from the Board of Supervisors and in accordance with state and local law. 3 CT 637 ¶ 9. The USBID, located in downtown San Francisco, operates a network of surveillance cameras that are high definition, allow remote control of zoom and focus capabilities, and are linked to a software system that can automatically analyze content. 3 CT 637–38 ¶¶ 10–12. In May and June 2020, the USBID had over 300 surveillance cameras in its network. 3 CT 638 ¶ 14.

III. The SFPD's one-time, 24-hour acquisition and use of the USBID camera network before the Ordinance's effective date

On June 19, 2019—shortly after the passage of the Ordinance and shortly before its effective date—an SFPD officer sent an email to the USBID seeking remote live access to the USBID cameras that showed Market Street during the 2019 Pride Parade. 2 CT 537–38 ¶ 19. The USBID granted the SFPD access for a 24-hour period on June 30, 2019, the day of the Pride Parade. 2 CT 538 ¶ 20. The SFPD officer only viewed the USBID camera network to verify that the remote, real-time link was operational. 2 CT 539 ¶ 23.

IV. The SFPD's response to George Floyd protests in May and June 2020

After the police murder of George Floyd in Minneapolis, Minnesota on May 25, 2020, protests quickly spread across the country. 3 CT 638 ¶ 15. Thousands of people participated in protests in San Francisco during late May and early June 2020. *Id.* On May 31, 2020, the SFPD activated its Department Operations Center activation room. *Id.* ¶ 16. That day, on the

order of a commanding officer, SFPD Officer Oliver Lim emailed USBID Director of Services Chris Boss, requesting live access to the USBID's surveillance cameras. 3 CT 638–39 ¶¶ 18–19. Later that day, the USBID granted the SFPD access to its entire camera network for 48 hours via a remote, real-time link. 3 CT 639–40 ¶¶ 20–21, 23. SFPD Officer Tiffany Gunter viewed the USBID camera feed twice that day. 3 CT 640 ¶ 24.

On June 2, 2020, Officer Gunter emailed Mr. Boss to request an extension of access through June 7. 3 CT 641 ¶ 25. The USBID granted that extension. *Id.* ¶ 26. Officer Gunter viewed the USBID camera feed "intermittently" over the eight days that the SFPD had access. *Id.* ¶ 27. On June 10, 2020, Officer Gunter sent Mr. Boss an email thanking him for the use of the camera network. 3 CT 642–43 ¶ 31. The SFPD did not seek, nor did it receive, approval from the Board before obtaining and using the remote, real-time link to the USBID camera network. 3 CT 643 ¶ 32.

V. The SFPD's three other requests for the USBID camera network

After the Ordinance became effective, the SFPD requested remote, real-time access to the USBID's surveillance cameras three other times: (i) twice for the 2020 Super Bowl celebrations, and (ii) once for the 2020 Fourth of July celebrations. 2 CT 539–40 ¶¶ 25–26, 541–42 ¶ 31. For each of these uses, as with the 2019 Pride Parade and the 2020 George Floyd protests, the SFPD had to ask for, and the USBID had to grant, permission and new log-in credentials. 2 CT 537–42 ¶¶ 19–22, 25–26, 29–32; 3 CT 639–40 ¶ 21.

The USBID denied one of these requests. The SFPD made two requests for the 2020 Super Bowl celebrations: (1) to access Union Square area cameras on February 2, the day of the Super Bowl, and (2) to access the cameras on Market Street on February 5, the day of the scheduled parade, if the 49ers won. 2 CT 539–40 ¶¶ 25–26. The USBID denied the

former request. 2 CT 540–41 ¶¶ 27–28.

VI. Plaintiffs' standing

Plaintiffs Hope Williams, Nathan Sheard, and Nestor Reyes are activists. 3 CT 645 ¶ 39. Williams and Sheard are Black, and Reyes is Latinx. 3 CT 645–46 ¶ 40. All three helped organize and participated in the protest movement against police violence and racism in San Francisco in May and June 2020. 3 CT 646 ¶ 41.

The SFPD's violations of the Ordinance, which subjected protesters to live video camera surveillance, affected Plaintiffs in several ways. First, they have made Plaintiffs afraid to participate in future protests. 3 CT 646–47 ¶ 42. Second, they have made it harder for Plaintiffs to recruit other people to join future protests. 3 CT 647 ¶ 43. Third, the surveillance of fellow protesters is personal for Plaintiffs, who helped organize the protests. 3 CT 645–47 ¶¶ 40–41, 43. Fourth, the SFPD exposed Reyes to video surveillance. 3 CT 647 ¶ 44. Fifth, the SFPD deprived Sheard and Williams of the opportunity to publicly comment on police use of this technology as part of the Ordinance's implementation. *See* 3 CT 647–49 ¶¶ 45–48 (describing Sheard and Williams' past public comments in relation to the Ordinance and similar measures governing police use of surveillance technology).

VII. Procedural history

Plaintiffs filed their Complaint for declaratory and injunctive relief on October 7, 2020. 1 CT 14–24. The parties engaged in focused discovery. 1 CT 6. The parties filed cross motions for summary judgment on September 16, 2021. 1 CT 7–8; 1 CT 42–62; 1 CT 240–265. The superior court heard argument on January 21, 2022 and February 1, 2022. 1 CT 10; 1–2 RT.

The court granted Defendant's motion for summary judgment and denied Plaintiffs' motion on February 9, 2022. 3 CT 655–57. The court held that Section 5 allowed the SFPD to use the USBID cameras during the 2020 George Floyd protests without Board approval because the SFPD had used some of those cameras before the Ordinance's effective date—one time, for one day, to surveil the 2019 Pride Parade. 3 CT 656. The court did not reach the question of whether the SFPD violated Section 2 by acquiring and using the cameras during the 2020 George Floyd protests without Board approval.

The court entered a final judgment on March 10, 2022. 3 CT 667–68. Plaintiffs timely filed a notice of appeal on March 25, 2022. 3 CT 675–77.

STANDARD OF REVIEW

An appellate court reviews "an order granting summary judgment de novo." *Powell v. Kleinman,* 151 Cal. App. 4th 112, 121 (2007). An appellate court makes "an independent assessment" of "whether the moving party is entitled to judgment as a matter of law." *Howard Entertainment, Inc. v. Kudrow,* 208 Cal. App. 4th 1102, 1113 (2012). On review from summary judgment, "[t]he proper interpretation of a statute, and its application to undisputed facts, presents a question of law that is . . . subject to de novo review." *Canales v. Wells Fargo Bank, N.A.,* 23 Cal. App. 5th 1262, 1269 (2018) (citation omitted). *See also Bohbot v. Santa Monica Rent Control Bd.,* 133 Cal. App. 4th 456, 462 (2005) (applying the de novo review standard for statutory interpretation to local laws such as charter provisions). "[A]pplication of the interpreted statute to undisputed facts is also subject" to the appellate court's "independent determination." *San Diego Gas & Electric Co. v. City of Carlsbad*, 64 Cal. App. 4th 785, 792

(1998) (citation omitted).

ARGUMENT

Part I explains why this Court should reverse the decision below: the superior court's sole basis for granting summary judgment for Defendant was a legally erroneous interpretation of Section 5's grace period provision. Parts II and III explain why this Court should remand with instructions to grant summary judgment for Plaintiffs: the SFPD violated the Ordinance (Part II), and Plaintiffs have standing to bring this claim (Part III).

I. Section 5 did not authorize the SFPD's surveillance of the 2020 George Floyd protests.

The lower court erred in granting summary judgment to Defendant by holding that Section 5 authorized the SFPD's surveillance of the 2020 George Floyd protests. The court held that the SFPD's one-time, temporary use of the USBID cameras to surveil the 2019 Pride Parade allowed the department to "continue its use" of the cameras under subsection 5 (d). The court erred for three independent reasons. First, subsection 5(d) does not cover departments that used a surveillance technology one time, for one day, prior to the Ordinance's effective date, as the SFPD did during Pride 2019. Second, subsection 5(d) does not authorize departments to expand the duration and location of their future uses of a surveillance technology, as the SFPD did during the George Floyd protests. Third, even if the grace period applies to these cameras, the SFPD cannot utilize it because Section 5 requires departments to follow transparency requirements, which the SFPD ignored.

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

Subsection 5 (d) only authorizes a department "possessing or using" a surveillance technology prior to the law's effective date to "continue its use" pending the Board's approval of a use policy. S.F. Admin. Code § 19B.5(d). The SFPD cannot defend its unlawful surveillance based on the grace period provision, as shown by the provision's plain text, the California Constitution's mandate that exceptions to public transparency laws be narrowly construed, and the Ordinance's history and purpose.

A central purpose of the Ordinance is to ensure that the public has an opportunity to comment on and debate city departments' plans to acquire and use surveillance technologies. 3 CT 635–36 ¶ 5. Its author explained the Ordinance was designed to address historical misuses of surveillance technology, especially against people of color. 3 CT 636 ¶¶ 6–8. Consistent with these goals, and seeking to avoid disruption of department operations, the Board provided a grace period for existing surveillance technologies that departments were possessing or using prior to the law's effective date. CCSF's overbroad interpretation of the grace period is wholly untethered from avoiding disruption of department operations and undermines the Ordinance's overall purpose to ensure democratic control over surveillance technology. Indeed, CCSF's interpretation would allow a department to turn one employee's brief test of a technology into a permanent citywide surveillance program.

The text is clear. The words "possessing or using" apply only to unfinished actions and not to a one-time completed action, according to courts' consistent application of basic grammar rules. But the SFPD was not "possessing or using" the USBID cameras prior to the Ordinance's effective date. Rather, the SFPD *possessed* and *used* the USBID cameras—only once in the past, for one day, to surveil the 2019 Pride Parade.

1. The SFPD was not "possessing or using" the USBID camera network before the Ordinance's effective date, and thus did not trigger the grace period.

When construing a statute, "[w]e begin with the text" and "the use of verb tense by the Legislature is considered significant." *Dr. Leevil, LLC v. Westlake Health Care Ctr.*, 6 Cal. 5th 474, 478, 479 (2018) (internal quotation and citation omitted). *Accord Carr v. United States*, 560 U.S. 438, 448 (2010) ("Congress' use of a verb tense is significant in construing statutes."). Courts "constru[e] words in their broader statutory context and, where possible, harmoniz[e] provisions concerning the same subject." *Dr. Leevil*, 6 Cal. 5th at 478. "If this contextual reading of the statute's language reveals no ambiguity," it controls the case. *Id.* "[C]ourts may not, under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used." *In re Maes*, 185 Cal. App. 4th 1094, 1101 (2010) (internal quotation and citation omitted). Consequently, courts may not rewrite the text's verb tense. *See id.*; *Dr. Leevil*, 6 Cal. 5th at 479.

Subsection 5 (d) applies only to a department that was "possessing or using" a surveillance technology prior to the effective date of the law. "Possessing or using" operate as verbs in the grace period provision and specifically as the present participles of "possess" and "use." *See* Bryan A. Garner, *Garner's Modern English Usage* 1020 (4th ed. 2016) (defining present participle as "[a] nonfinite verb form ending in *-ing* and used in verb phrases to signal the progressive aspect"). The progressive aspect shows that "an action or state—past, present, or future—was, is, or will be unfinished at the time referred to." *Id.* at 991 (providing the example "I'm cooking dinner" as a current unfinished action).

The SFPD possessed and used the USBID cameras only once for a

single day "at the time referred to" by the Ordinance, which is "before the effective date." *Id.*; S.F. Admin. Code § 19B.5(d). This one-time, temporary action lacks the "progressive aspect" required by the words "possessing or using." *Garner* at 1020.

In *Maes*, a California appellate court provided a straightforward example of how verb tense can be decisive: the difference between "is" and "was." The court considered a law barring criminal sentencing credits to a person who "is convicted of murder." *Maes*, 185 Cal. App. 4th at 1108–09. The court held that a person "*is* convicted of murder" so long as he "*is* being held by the CDCR for such conviction." *Id.* at 1109 (emphasis added). It is only "at the point of time when the CDCR has no basis to continue holding the prisoner" for murder that the prisoner becomes "a person who '*was*' convicted" of the offense. *Id.* at 1108 (citing *In re Reeves*, 35 Cal. 4th 765 (2005) (emphasis added)).

The court below erred by rewriting the verb tense of the grace period provision. In its opinion, the court first correctly quoted the Ordinance as authorizing a department "possessing or using" a surveillance technology to continue its use. 3 CT 656. But in the very next sentence, the court erroneously held that "the police's prior *use*"—meaning the one-time, 24-hour use of the cameras for Pride 2019—satisfied the Ordinance's plain language. *See id.* (emphasis added).[3] But "using" (the Ordinance's actual word) is a present participle that describes an unfinished action, and differs materially from "use" as a singular noun or "used" as a simple past tense

[3] The court below also erred by disregarding the time referred to by subsection 5(d), which is the period "before the effective date" of the Ordinance. S.F. Admin. Code § 19B.5(d). Here, there is only one relevant event in that time period: the SFPD's one-time, 24-hour use of the USBID cameras to surveil Pride 2019. But the court mistakenly considered not just that event, but also all of the SFPD's subsequent uses, "both before and after the George Floyd protests." 3 CT 657.

verb.

Many courts have interpreted a statute's employment of the present participle to apply to ongoing and unfinished actions, and not to completed, one-time events. In *Al Otro Lado v. McAleenan*, for example, a California federal court interpreted a statute guaranteeing an asylum interview to immigrants "arriving in the United States." 394 F. Supp. 3d 1168, 1200 (S.D. Cal. 2019). The court held that this phrase included those "crossing the international bridge" from Mexico but not yet physically present in the United States, because "arriving" is a present participle that "denotes an ongoing process." *Id*. at 1200, 1204–05. In so holding, the court struck down the government's "Turnback Policy," rejecting its interpretation that an immigrant must have "*'arrive[d] in' the United States*" to be protected. *Id*. at 1200 (brackets in original and emphasis added by the court in quoting the government's brief). The court concluded the government "expressly rewr[ote] the statutory provision into the past tense to seek dismissal." *Id*. Here, the court below erroneously rewrote subsection 5 (d) in much the same way—by changing a present participle to another word.

Likewise, the Washington Supreme Court held that a present participle does not describe a one-time action in *Sonitrol Northwest, Inc. v. City of Seattle*. 84 Wn. 2d 588, 594 (1974). There, the court interpreted a Seattle ordinance that taxed "everyone engaged in the business of operating or conducting a fire alarm system." *Id.* at 589. The court held that the ordinance did not apply to "the case of a local alarm system" where "there is a one-time installation" and then "participation by the seller of the alarm is over." *Id.* at 591–92, 594. The court reasoned: "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." *Id*. at 594. Similarly, "possessing" and "using" are present participles that exclude the SFPD's one-time, temporary possession and use of the USBID

cameras prior to the Ordinance's effective date.

Numerous other state and federal courts have held that a statute's utilization of the present participle denotes an ongoing action or condition and not one that has ended. *See, e.g.*, *United States v. Bonanno*, 452 F. Supp. 743, 756 n.17 (N.D. Cal. 1978) ("'Abiding,' the present participle of the verb 'abide,' indicates a present or ongoing condition."), *aff'd*, 595 F.2d 1229 (9th Cir. 1979); *Shell v. Burlington N. Santa Fe Ry. Co.*, 941 F.3d 331, 336 (7th Cir. 2019) ("'Having' means presently and continuously. It does not include something in the past that has ended or something yet to come."); *Kinzua Res., LLC v. Oregon Dep't of Env't Quality*, 468 P.3d 410, 414 (Or. 2020) (use of present participle indicates the legislature's intent to describe either "a current action" or "a current status"); *State ex rel. Cable News Network, Inc. v. Bellbrook-Sugarcreek Loc. Sch.*, 170 N.E.3d 748, 759 (Ohio 2020) ("[A] person who attended school in the past cannot be said to be attending the school under any common usage of that word."). *See generally Al Otro Lado*, 394 F. Supp. 3d at 1200 (collecting cases).

The Board of Supervisors could have allowed departments to continue their use of any surveillance technology they "possessed" or "used" before the effective date of the Ordinance, which would have encompassed a one-time, completed action. Instead, the Board chose the present participles "possessing or using," which plainly exclude the SFPD's one-time, completed use of the USBID cameras during the 2019 Pride Parade.[4]

[4] The Ordinance also employs "-ing" words in Section 2, its central oversight provision, but in a different manner than in Section 5. Section 2 states that a department must obtain Board approval before "acquiring or borrowing," "using," or "entering" into agreements for surveillance technology. S.F. Admin. Code § 19B.2(a)(2)–(4). These "-ing" words are nouns known as gerunds, and here enumerate conditions, each of which

2. The California Constitution and the Ordinance's central purpose of transparency require narrowly construing the grace period provision.

While statutory language is "the most reliable indicator of legislative intent," courts must "analyze [it] in the context of the statutory scheme." *City of Burbank v. State Water Res. Control Bd.*, 35 Cal. 4th 613, 625 (2005). In addition, a court should also "look to the statute's purpose, legislative history, public policy and statutory scheme to select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." *People v. Zgurski*, 73 Cal. App. 5th 250, 262–63 (2021) (internal quotation omitted).

The California Constitution includes a mandate of statutory interpretation that promotes transparency and requires narrow construction of any exceptions to the Ordinance's central oversight provisions, including subsection 5 (d). In 2004, California voters approved Proposition 59, a constitutional amendment providing that: "The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." Cal. Const., art. I, § 3, subd. (b)(1). This provision further mandates that "[a] statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and

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triggers a department's obligation to obtain Board approval of its surveillance practices. *See Garner* at 429, 514. These enumerated conditions regulate *any* action that meets the conditions described. Conversely, as demonstrated above by basic grammar rules and the overwhelming weight of case law, the "-ing" words used in Section 5 are verbs known as present participles that indicate ongoing action.

narrowly construed if it limits the right of access." Cal. Const., art. I, § 3, subd. (b)(2).

This constitutional provision applies to any such "statute . . . or other authority" that "furthers" or "limits" the public's "right of access to information concerning the conduct of the people's business," not just to exemptions in public records laws. *See Nat'l Laws. Guild v. City of Hayward*, 9 Cal. 5th 488, 507 (2020) (applying provision to fees charged for records); *City of San Jose v. Superior Ct.*, 2 Cal. 5th 608, 620–21 (2017) (applying provision to definitions of "local agency" and "public record"). This mandate applies to the Ordinance. *See City of L.A. v. Belridge Oil Co.*, 42 Cal. 2d 823, 833 (1954) (statutes include municipal ordinances).

Moreover, the Ordinance's central purpose is to ensure transparency around decisions relating to surveillance technologies. 3 CT 635–36 ¶ 5. As stated in the Ordinance's first legislative finding: "It is essential to have an informed public debate as early as possible about decisions related to surveillance technology." *Id.* ¶ 5(a). *See also id.* ¶ 5(e) ("Whenever possible, decisions regarding [surveillance technology] . . . should be made only after meaningful public input has been solicited and given significant weight.").

The Ordinance's core provisions further this transparency goal by requiring departments to disclose their proposal for a surveillance technology and to obtain Board approval before acquiring or using it. S.F. Admin. Code § 19B.2(a)(2)–(4). Section 5 limits this oversight, and thus the public's access to information about a department's surveillance technology, by allowing a department to delay submission of this information for 180 days, with available extensions. *Id.* at § 19B.5(b)–(d).

An expansive interpretation of the grace period provision would violate the California Constitution's mandate and undermine the Ordinance's central purpose of transparency. Under the lower court's

construction of the grace period provision, a department could hide how it is using a surveillance technology from the Board and public—potentially for many years—by pointing to a single instance when it used that technology prior to the effective date of the Ordinance. This Court cannot let departments, by that sleight of hand, limit the public's "right of access to information concerning the conduct of the people's business." Cal. Const., art. I, § 3, subd. (b)(2).

3. The Ordinance's legislative history supports construing the grace period for its narrow purpose of not disrupting departmental operations.

A statute "must be given a reasonable and common sense interpretation consistent with the apparent purpose and intention of the lawmakers . . . which upon application will result in wise policy rather than mischief or absurdity." *DiCampli-Mintz v. Cty. of Santa Clara,* 55 Cal. 4th 983, 992 (2012); *see Zgurski*, 73 Cal. App. 5th at 262–63 (discussing importance of legislative intent).

The Ordinance's history shows, and CCSF conceded in the lower court, that the Board added the grace period to avoid disrupting departmental operations and that the legislative debate on the Ordinance's grace period focused on particular surveillance technologies that departments had been possessing and using for years.

Allowing the SFPD to claim that the grace period provision applies to the USBID cameras because of the SFPD's surveillance of Pride 2019 would lead to absurd results. It would mean that a past decision by a single department employee to use a surveillance technology on a single occasion would remove that technology from the Ordinance's general oversight requirement. For example, the SFPD could attempt to claim that the grace period provision permits the department to launch an aerial monitoring program without prior Board approval, simply because an SFPD officer

tested an unmanned aerial drone years ago.

By providing a grace period to departments that were possessing or using surveillance technologies, the Board sought to achieve a narrow purpose of avoiding the immediate disruption of departmental operations. During legislative debate, the Ordinance's author described how the grace period "allows departments to continue use of surveillance technology pending Board of Supervisors' consideration of a Surveillance Technology Policy." 2 CT 535–36 ¶ 11. Likewise, in its lower court briefing, CCSF stated that the grace period served to "avoid . . . disruption to departmental operations," 2 CT 493, ensure continuity in "how City departments were already conducting business," 1 CT 60, and avoid "immediately depriving City departments of the tools they already had come to use." 1 CT 49. *See also id.* (stating that the grace period avoids "unnecessarily upending the manner in which City departments were already conducting their operations").

During the legislative debate related to the grace period provision, Supervisors and a city witness spoke of four specific technologies: city bus cameras, automated license plate readers ("ALPRs"), ShotSpotter, and police body worn cameras ("BWCs"). 2 CT 537 ¶ 17. City departments were possessing and using these technologies for years—city bus cameras for decades, ALPRs since at least 2010, ShotSpotter since at least 2013, and BWCs since 2016.[5] This raised concerns among Supervisors that the

[5] *See, e.g.*, Justino Aguila, *Late-night Muni Driver Stabbed in Arm*, S.F. Gate (Nov. 15, 1999), https://www.sfgate.com/bayarea/article/Late-night-Muni-driver-stabbed-in-arm-3058283.php ("45 new buses are equipped with cameras"); *Automated License Plate Recognition Vehicles*, SFPD Department Bulletin, No. 10-273 (Sept. 22, 2010), https://cdn.muckrock.com/foia_files/2019/02/08/ALPR20DB20DGO20POLICIES.pdf; Heather Somerville, *ShotSpotter Has Long History with Bay Area Police,* Mercury News (Nov. 11, 2013),

forthcoming Ordinance's requirements would interfere with municipal operations reliant on these surveillance technologies. Notably, Supervisors did not discuss the grace period's application to a department's one-time, temporary use of a surveillance technology.

Before the Ordinance's effective date, the SFPD only possessed and used the USBID cameras one time, for one day. Departments may have plausibly suffered disruption if the Ordinance commanded them to immediately give up their technologies, like bus cameras, ALPRs, ShotSpotter, and BWCs, that they had been possessing and using for years. But a department suffers no such harm if it must seek Board approval for a surveillance technology that it used only once prior to the effective date of the Ordinance.

Moreover, the SFPD's use of the technologies the Board discussed during legislative debate could go on uninterrupted because the SFPD did not need case-by-case permission to use them. This was never true of the SFPD's use of the USBID cameras. The USBID permitted the SFPD only a one-time, one day use of part of the camera network during Pride 2019, after which it ended the SFPD's access to the system. 2 CT 533 ¶ 6, 538 ¶ 20. And after the Ordinance went into effect, the USBID denied the SFPD access to the system in response to a request in February 2020. 2 CT 540–41 ¶¶ 27–28. This is unlike the surveillance technologies—bus cameras, ALPRs, ShotSpotter, and BWCs —discussed at the May 14, 2019 Board

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https://www.mercurynews.com/2013/11/11/shotspotter-has-long-history-with-bay-area-police/ (". . . San Francisco also track[s] gun violence with ShotSpotter"); *SFPD Continues Rollout of Body Worn Cameras*, San Francisco Police Department (Sept. 2, 2016), https://www.sanfranciscopolice.org/news/sfpd-continues-rollout-body-worn-cameras ("As of September 1st, 279 sworn members (approximately 14 percent) have been equipped with BWCs since the Department began issuing the devices in July.").

meeting in connection with subsection 5 (d). Departments were possessing and using these technologies prior to the effective date and could freely deploy them without a third party's permission. *See* 2 CT 537 ¶ 17. Put another way, the SFPD's use of the USBID camera network was subject to recurring termination by design. For this additional reason, the USBID camera network was simply not a technology that the SFPD could have been "possessing or using" prior to the Ordinance's effective date.

B. The grace period provision does not authorize future uses that expand beyond how a department was using the technology preceding the Ordinance's effective date.

Even if the SFPD's one-time, 24-hour use of the USBID's camera network could qualify for the Ordinance's grace period (which it cannot), subsection 5 (d) also does not authorize future uses of a surveillance technology that expand in duration and location beyond the how the department was using a surveillance technology prior to the Ordinance's effective date. The Ordinance's text and structure demonstrate this limitation. As a result, subsection 5 (d) cannot authorize the temporal and geographic scope of the SFPD's use of the USBID's camera network to surveil the 2020 George Floyd protests, which greatly expanded beyond its use of a subset of cameras during the 2019 Pride Parade. For this reason alone, this Court should find that the surveillance challenged in this case falls outside the scope of the grace period.

1. The grace period provision's text only allows a department to "continue," not expand, its use of an existing technology.

By its text, the grace period provision authorizes a department only to "continue its use" of "existing" surveillance technology. S.F. Admin. Code §§ 19B.5 & (d). *Merriam-Webster* defines "continue" as "to allow to

remain in a place or condition." As a result, the grace period does not allow the SFPD to use a technology in a new or more expansive way than how the department was using it prior to the Ordinance's effective date. If the Board intended to permit more expansive uses of technologies pending Board approval of a proposed use policy, it could have explicitly done so, for example, by specifying that a department "may continue and expand" its use of the surveillance technology. However, the Board did not do so.

2. Construing the grace period provision to authorize more expansive future uses would undermine the Ordinance's structure and central oversight provisions.

The Ordinance's central oversight provision, like the grace period provision, regulates "existing" surveillance technology by authorizing its use by departments only within certain limits. S.F. Admin. Code § 19B.2(a)(3). Consistency in statutory interpretation requires that "words or phrases given a particular meaning in one part of a statute must be given the same meaning in other parts of the statute." *Wilcox v. Birtwhistle*, 21 Cal. 4th 973, 979 (1999). Consequently, the scope of the grace period for "existing surveillance technology" must be constrained by limits applying to "existing surveillance technology" found in the central oversight provision. *See Dr. Leevil*, 6 Cal. 5th at 478 (requiring courts to "construe words in their broader statutory context and, where possible, harmonize provisions concerning the same subject").

The central oversight provision imposes limits on "existing surveillance technology" by requiring a department to obtain prior Board approval via ordinance before it uses such technology "for a purpose, in a *manner*, or in a *location* not specified in a Surveillance Technology Policy ordinance approved by the Board in accordance with this Chapter 19B." S.F. Admin. Code at § 19B.2(a)(3) (emphasis added). If a department wants

to expand how it uses an existing surveillance technology, it must again go through an ordinance and Board approval process.

These use limitations on "existing surveillance technology" found in the central provision must also apply to the "*existing* surveillance technology" referenced in the title of Section 5 and that are eligible for the grace period provision. *Id.* at §§ 19B.5 & (d) (emphasis added). Just as the central provision limits a department's future uses of existing surveillance technology to those approved in a use policy, the grace period provision must also limit a department's future uses of existing surveillance technology to those it was engaging in before the Ordinance's effective date. Otherwise, the Ordinance would incentivize a department to remain in the grace period indefinitely, during which it could expand its use of a technology without public debate or Board oversight. The Ordinance would likewise disincentivize a department from seeking Board approval to avoid the risk that the Board might not approve the technology at all or otherwise place limits on the department's desired expanded use. This would undermine the Ordinance's structure by elevating the grace period over the central oversight provision and introducing multiple meanings for "existing surveillance technology," all while eroding the Ordinance's central purpose of transparency.

3. The SFPD's use of the USBID camera network during the 2020 George Floyd protests expanded upon, and did not simply "continue," its 2019 use.

Without Board approval, the SFPD significantly expanded its use of an "existing surveillance technology" by activating it during citywide protests against police violence. The SFPD's use of the USBID camera network to spy on protests for Black lives in May and June 2020 expanded significantly in "manner" and "location," *see* S.F. Admin. Code § 19B.2(a)(3), beyond its use of the system during the Pride Parade before the

Ordinance's effective date. First, the SFPD's use in May and June 2020 was different in "manner" because it spanned eight days rather than just one day, and it involved repeated viewing of the live surveillance feeds rather than simply checking the system to see if it worked. 3 CT 638 ¶ 17, 640–41 ¶¶ 24, 27; 2 CT 533 ¶ 6, 539 ¶ 23. Second, the SFPD's use in May and June 2020 was different in both "manner" and "location" because it expanded to the entirety of the USBID camera network, spanning over 300 cameras and many city blocks. 3 CT 637–38 ¶¶ 10, 12, 14, 640 ¶ 23. By contrast, during Pride 2019, the SFPD only used cameras on Market Street, the southernmost boundary of the USBID network. 2 CT 533 ¶ 6, 539 ¶ 20; 3 CT 637 ¶ 10.

Even if the grace period applied to the USBID camera network, the aforementioned structural limits in the Ordinance did not permit the SFPD to expand the manner and location of the surveillance to spy on the 2020 George Floyd demonstrations without Board approval. *See supra* Part I.B.2. These are precisely the expanded uses of surveillance technology that the Ordinance subjects to public debate and strict written safeguards rather than department discretion. *See* S.F. Admin. Code § 19B.2(a)(3).

C. The SFPD failed to comply with Section 5's disclosure obligations, so the grace period does not apply.

Section 5 requires a city department "possessing or using" a surveillance technology prior to the Ordinance's effective date to disclose information about those surveillance practices by specified deadlines, including submitting an inventory and a proposed use policy. During this process, while the Board considers the proposed policy, the department may continue its use of the technology. Here, the SFPD failed to timely submit an inventory or proposed use policy for non-city cameras. In fact, the SFPD did not submit a proposed use policy for non-city cameras for

nearly three years after the Ordinance's enactment, well after the deadlines set out in Section 5, and only after the initiation of this lawsuit and this lawsuit's full progression through the superior court. Thus, for a third independent reason, the grace period did not apply to the SFPD's use of the USBID's cameras to surveil the 2020 George Floyd protests.

1. Section 5's grace period is contingent on compliance with its disclosure obligations.

Section 5's plain language and structure demonstrate that departments must comply with the section's disclosure obligations to continue their use of a technology under the section's grace period provision. When construing statutes, courts must "harmoniz[e] provisions concerning the same subject," *Dr. Leevil*, 6 Cal. 5th at 478, and presume that "every part of a statute" has "some effect" and is not "meaningless," *People v. Arias*, 45 Cal. 4th 169, 180 (2008).

Section 5 is titled "*Compliance* for Existing Surveillance Technology" and sets out three disclosure requirements along with the grace period, which apply to a department "possessing or using" a surveillance technology prior to the Ordinance's effective date. *See* S.F. Admin Code § 19B.5 (emphasis added). Specifically, the section states that a department: (a) must submit an inventory to COIT within 60 days of the Ordinance's effective date; (b) must submit a proposed Surveillance Technology Policy ordinance to the Board of Supervisors within 180 days of the Ordinance's effective date; or (c) may seek 90-day extensions if it is unable to meet the 180-day deadline set out in (b). *Id.* at § 19B.5(a)–(c). Following these provisions, subsection (d) states that such a department "may continue its use . . . until such time as the Board enacts an ordinance regarding the Department's Surveillance Technology Policy." *Id.* at § 19B.5(d).

Here, Section 5 addresses the subject of "compliance" for "existing surveillance technology," and its provisions interrelate. First, they each refer to a department "possessing or using" a surveillance technology prior to the Ordinance's effective date. Second, subsections (b) and (c) interrelate such that if a department is unable to meet the 180-day timeline for the second requirement, it may seek 90-day extensions in writing. *Id.* at § 19B.5(b)–(c).

Section 5's legislative history also shows that the section's grace period is contingent on compliance with its disclosure obligations. At a Board meeting prior to the Ordinance's passage, its author introduced an amendment to subsection (d) and explained that it would allow a department to continue its use of an existing surveillance technology "pending Board of Supervisors' consideration of a Surveillance Technology Policy." 2 CT 535–36 ¶ 11. Thus, the Ordinance's author intended the grace period under subsection (d) to apply where the department timely submits a use policy per subsection (b) or seeks extensions for good cause per subsection (c).

A Deputy City Attorney reiterated this intention, testifying that under the amendment, "if the Board does not act on the proposed surveillance policy, the department can continue to use their surveillance technology." 2 CT 536 ¶ 12. Such contemporaneous construction of a statute by those with a duty to implement it carries great weight. *See Pennisi v. Dep't of Fish & Game*, 97 Cal. App. 3d 268, 274 (1979); *Quinn v. State of Cal.*, 15 Cal. 3d 162, 173 (1975). The Board cannot consider or act on a policy if it never receives one.

The legislative history also underscores that Section 5's requirements support the Ordinance's purposes of public transparency and Board control. The Ordinance's author repeatedly emphasized the need for the Board and the public to understand departments' inventory of

surveillance technologies. *See, e.g.*, 2 CT 536–37 ¶ 15 ("[T]hat is precisely why this legislation is important . . . this will require every department to tell us and the public what they've got."); 2 CT 537 ¶ 16 ("The thrust of this legislation . . . is about knowing, and departments knowing, and the public knowing how that technology is used."). During debate, the Board amended Section 5 to extend the deadline for departments to submit use policies to 180 days from 120 days, *see* 2 CT 536 ¶ 13, indicating that the disclosure obligations should have force. This expanded policy submission period was lobbied for by the SFPD's Chief of Police, *id.* ¶ 14, demonstrating the highest levels of the SFPD were aware that the grace period for existing technologies was not indefinite, but rather required timely compliance with Section 5's other obligations.

Finally, several interpretive canons compel this Court to read Section 5's grace period as contingent on the preceding requirements. First, this Court must "harmonize" the section by reading the grace period provision in the context of the section's subject of compliance. *See Dr. Leevil*, 6 Cal. 5th at 478. If the grace period were unrelated to the department's compliance with the transparency requirements, then the Board would not have put it in that section. Second, this Court must presume that the requirements "have some effect" by tying them to the grace period. *See Arias*, 45 Cal. 4th at 180. If the other subsections can be ignored while a department uses the grace period, they are effectively "meaningless." *See id*. Moreover, since the department failed to disclose the information required by subsections (a) and (b), a potential plaintiff under Section 8 may not even know about the department's use of the surveillance technology. *See* S.F. Admin. Code § 19B.8(b). Third, this Court should avoid the "absurd consequences" of allowing noncompliance with the disclosure requirements. *See Zgurski*, 73 Cal. App. 5th at 262–63. Otherwise, a department possessing or using an existing surveillance

technology could continue its use of that technology indefinitely and without public disclosure, long after the Ordinance is in effect. This would include the very technologies that the Board discussed, such as ALPRs, BWCs, and ShotSpotter, *see* 2 CT 537 ¶ 17, but also any technology that a department ever used prior to July 2019.

2. The SFPD ignored Section 5's disclosure obligations for nearly three years.

Here, CCSF has failed to produce evidence that the SFPD took any steps to comply with Section 5's disclosure obligations prior to its acquisition and use of the USBID camera network to surveil the 2020 George Floyd protests. Specifically, CCSF did not show that the SFPD: (1) sent COIT an inventory of its existing surveillance technology that included non-city entity surveillance cameras, within 60 days after the Ordinance's effective date; (2) submitted to the Board a use policy for non-city entity surveillance cameras, within 180 days of that date; or (3) sought and obtained from COIT any extensions of the 180-day deadline. COIT's website likewise lacked any information indicating that the SFPD attempted to comply with Section 5's obligations. 2 CT 537 ¶ 18. The very SFPD employee responsible for drafting and processing the SFPD's surveillance technology policies submitted below a threadbare declaration that was silent on these requirements. *See* 1 CT 229–31. The SFPD was well aware of these requirements, as their Chief lobbied the Board for the 180 days in subsection 5(b). 2 CT 536 ¶¶ 13–14.

The lower court erred by disregarding the Ordinance's limited role for COIT, which does not include the power to override the disclosure obligations. 3 CT 657. COIT must consider a department's proposed use policy at a public hearing and ultimately make a recommendation about it to the Board. S.F. Admin. Code § 19B.2(b)(3). However, a department that

wanted to avail itself of the grace period has an independent obligation to complete this process within 180 days, or otherwise obtain 90-day extensions for good cause from COIT. *Id.* at § 19B.5. Nothing in the Ordinance empowers COIT to override these requirements.

It is only recently, nearly three years after the Ordinance's enactment, that the SFPD has finally submitted a proposed policy on non-city surveillance cameras for Board review. S.F. Bd. of Supervisors, File No. 220606 (introduced May 17, 2022). This is well after the deadlines set out in Section 5, the initiation of this lawsuit, and this lawsuit's full progression through the superior court. The SFPD's failure to make any effort to comply with Section 5's disclosure requirements in a timely manner, and the fact that CCSF first raised its grace period defense in its opening summary judgment brief, points to a post-hoc justification rather than a reasonable belief that the grace period provision applied to the USBID camera surveillance technology. This Court should not reward the SFPD's attempts to skirt the important transparency and oversight requirements of the Ordinance.

II. The SFPD violated the Ordinance when it failed to obtain Board approval prior to acquiring and using the USBID camera network during the 2020 George Floyd protests.

The Ordinance ensures that government decisions about obtaining or deploying surveillance technologies are not made in secret by departments, but rather by the Board after a transparent process that includes the public.[6] The law's central provision limits how departments may obtain or deploy

[6] The "General Findings" of the Ordinance state that "[w]henever possible, decisions regarding if and how surveillance technologies should be funded, acquired, or used . . . should be made only after meaningful public input has been solicited and given significant weight." 3 CT 635–36 ¶ 5(e).

surveillance technologies by enumerating distinct actions for which a department generally must receive Board approval via a separate ordinance:

> (a) [A] Department must obtain Board of Supervisors approval by ordinance of a Surveillance Technology Policy under which the Department will acquire and use Surveillance Technology, prior to engaging in any of the following: [. . .]
>
> (2) Acquiring or borrowing new Surveillance Technology, including but not limited to acquiring Surveillance Technology without the exchange of monies or other consideration;
>
> (3) Using new or existing Surveillance Technology for a purpose, in a manner, or in a location not specified in a Surveillance Technology Policy ordinance approved by the Board in accordance with this Chapter 19B; [or]
>
> (4) Entering into an agreement with a non-City entity to acquire, share, or otherwise use Surveillance Technology[.]

S.F. Admin. Code § 19B.2(a)(2)–(4).

Thus, to allege a claim of an Ordinance violation under these provisions, a plaintiff must prove: (a) a city department; (b) acquired, borrowed, or used, or entered into an agreement to acquire or use; (c) a covered surveillance technology; (d) without Board approval.

A. The SFPD is a city department.

The SFPD is subject to the Ordinance. The Ordinance generally defines a covered "City Department" or "Department" as "any City official, department, board, commission, or other entity in the City." S.F. Admin. Code § 19B.1. CCSF admits that the SFPD is a city department. 3 CT 634 ¶¶ 1–2.

B. The USBID camera network and the software to access it are covered surveillance technologies.

The USBID camera network and the software used to access that network are covered surveillance technologies. The Ordinance's definition of "surveillance technology" includes "video and audio monitoring and/or recording technology, such as surveillance cameras" and "any software. . . used, designed, or primarily intended to collect, retain, process, or share . . . visual . . . information specifically associated with, or capable of being associated with, any individual or group." S.F. Admin. Code § 19B.1. *See also* 3 CT 638 ¶ 13. As CCSF admits, the USBID operates a network of surveillance cameras. 3 CT 637 ¶ 11. Moreover, CCSF admits that the SFPD installed software on a laptop to access the USBID camera network. 3 CT 640 ¶ 22.

C. The SFPD acquired, borrowed, and used the USBID camera network, and entered into an agreement to do so.

The SFPD violated three separate provisions of the Ordinance, by (i) "acquiring" and "borrowing" the USBID camera network and associated software, (ii) "using" the camera network, and (iii) "entering into an agreement" with the USBID to "acquire" and "use" its camera network. See S.F. Admin. Code § 19B.2(a)(2)–(4). As explained below, the SFPD lacked Board approval to take any of these actions.

The Ordinance does not define "acquiring," "borrowing," "using," or "agreement." *See* S.F. Admin. Code § 19B.1. Thus, this Court should turn to general and legal dictionaries to give these terms their "ordinary meaning." *Upshaw v. Superior Ct.*, 22 Cal. App. 5th 489, 504 (2018) (citation omitted).

Acquire and borrow. The SFPD acquired and borrowed the USBID camera network and associated software. *Merriam-Webster* defines

"acquire" as "to come into possession or control of often by unspecified means." Similarly, *Black's Law Dictionary* defines "acquire" as "to gain possession or control of; to get or obtain." In addition, *Merriam-Webster* defines "borrow" as "to appropriate for one's own use," and *Black's Law Dictionary* defines "borrow" as "to take something for temporary use."

The SFPD "acquired" the USBID camera network when they requested and obtained a remote, real-time link to it. 3 CT 638 ¶ 17. The link allowed the SFPD to obtain and temporarily possess camera feeds that were also in the possession of the USBID. 3 CT 638–40 ¶¶ 17, 21, 23. The SFPD also "borrowed" the network, as shown by the same facts, in addition to the temporary duration: possession was initially granted for 48 hours and then expanded to eight days. 3 CT 638–39 ¶¶ 18, 20, 641 ¶¶ 25–26.

Finally, the SFPD acquired the USBID camera network by taking temporary "possession" and "control" of computer software that enabled the SFPD to view the protests. *See Merriam-Webster* and *Black's Law Dictionary*. Here, the SFPD installed software on a laptop, which allowed Officer Gunter to monitor protesters through the USBID camera network during the eight days that the SFPD had access to it. 3 CT 639–43 ¶¶ 21–22, 27, 31.

Use. The SFPD also used the USBID camera network in at least two distinct manners. According to *Merriam-Webster*, "use" means "to put into action or service." *Black's Law Dictionary* similarly defines "use" as "to employ for the accomplishment of a purpose."

Subsequent legislation implementing the Ordinance demonstrates that "live monitoring" is a "use" of surveillance cameras. The Board's approval of a subset of city-owned surveillance cameras authorizes Departments to "use security cameras for . . . live monitoring . . . ." S.F.

Ordinance No. 116-21 § 5(b)(2).[7] Likewise, the Board-approved Surveillance Technology Policy's "authorized use cases" for these city-owned cameras includes "live monitoring." City and County of San Francisco, *Surveillance Technology Policy: Security Cameras* 1.[8]

Here, the SFPD used the USBID camera network in at least two ways. First, at least one SFPD officer monitored the USBID live camera feed. In her deposition, Officer Gunter admitted viewing the camera feed twice on May 31, 2020, the day it was set up. 3 CT 640 ¶ 24. Viewing a feed is the prototypical manner by which a person can "employ" or "put into action" a camera network. *See Merriam-Webster.* Officer Gunter also testified that she viewed the camera feed "intermittently" during the week that the SFPD had access to it. 3 CT 641 ¶ 27. She admitted that others may have viewed the camera feed, too, because the SFPD does not require documentation of such viewing. 3 CT 642 ¶¶ 29–30. Given that another CCSF ordinance identifies "live monitoring" as a "use" of a camera system, S.F. Ordinance No. 116-21, *supra*, the SFPD officer's repeated viewing of the USBID camera feed here undoubtedly constitutes "use" under the Ordinance.

Second, the SFPD used the USBID camera network when it established and ran the live camera feed. As Officer Gunter testified, an SFPD laptop was continuously running the camera feed for a week. 3 CT 641–42 ¶ 28. Afterward, she thanked the USBID for assistance with the

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[7] *Available at* https://sfgov.legistar.com/View.ashx?M=F&ID=9703161&GUID=C8C71FC6-C683-4D2B-94E5-6CC48BEA131E.

[8] *Available at* https://sf.gov/sites/default/files/%5Bdate%3Acustom%3AY%5D-%5Bdate%3Acustom%3Am%5D/Security%20Cameras%20Citywide%20Surveillance%20Technology%20Policy.pdf.

SFPD's "use of your cameras." 3 CT 642–43 ¶ 31. Thus, after the SFPD acquired and borrowed the camera network, they used it by operating that link.

Agreement. An "agreement" between two parties need not be a contract with bilateral consideration. *Black's Law Dictionary* defines "agreement" as "a mutual understanding between two or more persons about their relative rights and duties regarding past or future performances; a manifestation of mutual assent by two or more persons." Legal treatises further show that "agreement" and "contract" are not coextensive. "The term 'agreement,' although frequently used as synonymous with the word 'contract,' is really an expression of greater breadth of meaning and less technicality. Every contract is an agreement; but not every agreement is a contract." 2 Stephen's Commentaries on the Laws of England 5 (L. Crispin Warmington ed., 21st ed. 1950). *See also* 1 Samuel Williston, A Treatise on the Law of Contracts § 2, at 6 (Walter H.E. Jaeger ed., 3d ed. 1957) ("Agreement is in some respects a broader term than contract, or even than bargain or promise."). Because the Ordinance lacks any mention of "contract," "agreement" should be read more broadly.

Here, the SFPD entered into an agreement to acquire and use the USBID's network of surveillance cameras. Officer Lim initially requested access to the network, and in response, the USBID set up the remote, real-time link for the SFPD to access, initially for 48 hours. 3 CT 638–40 ¶¶ 18–22. Officer Gunter requested an extension to access the system for five more days, which the USBID granted. 3 CT 641 ¶¶ 25–26. The SFPD's requests for network access followed by the USBID's fulfillment of those requests constitute a "manifestation of mutual assent," *Black's Law Dictionary*, or an agreement.

D. The SFPD failed to obtain approval from the Board of Supervisors.

The Ordinance requires a city department to obtain approval from the Board via a separate ordinance detailing a specific use policy before engaging in any of the actions outlined in the above sections. S.F. Admin. Code § 19B.2(a)(2)–(4). The SFPD admits that it did not seek, nor did it receive, approval from the Board pursuant to the Ordinance prior to obtaining a remote, real-time link to the USBID camera network from May 31 through June 7, 2020. 3 CT 643 ¶ 32. Thus, the SFPD violated the Ordinance.[9]

III. Plaintiffs have standing because they are activists against police violence "affected" by the SFPD's unlawful surveillance.

The Ordinance broadly extends standing to sue to "any person affected" by a violation of the Ordinance. S.F. Admin. Code § 19B.8(b). Its legislative history and findings express a particular concern for surveillance of people, such as Plaintiffs, protesting in support of Black lives.[10]

[9] CCSF did not argue in the summary judgment proceedings below that it can evade the Board approval requirement, S.F. Admin. Code § 19B.2(a)(2)–(4), on grounds of "exigent circumstances," *id.* at § 19B.7(a). Nor could CCSF meet its burden of proving this affirmative defense. The Ordinance narrowly defines "exigent circumstances" as "an emergency involving imminent danger of death or serious physical injury to any person that requires the immediate use of Surveillance Technology or the information it provides." *Id*. at § 19B.1. Here, the summary judgment record is devoid of any evidence of this.

[10] In the proceedings below, CCSF did not offer any legal or factual arguments about standing, so any such arguments are waived on appeal. *People v. Catlin*, 26 Cal. 4th 81, 122–23 (2001). In fact, at oral argument, CCSF agreed that the Ordinance confers broad standing, and that Plaintiffs have standing to bring this suit. 1 RT 3:13–22.

A. The Ordinance's text, legislative history, and purpose create broad standing.

In California courts, the scope of a statutory private right of action depends on its text, history, and purpose. *Midpeninsula Citizens v. Westwood Invs.*, 221 Cal. App. 3d 1377, 1385 (1990); *Blumhorst v. Jewish Fam. Servs.*, 126 Cal. App. 4th 993, 1002 (2010). Many California laws create expansive standing. *See, e.g.*, *Weatherford v. City of San Rafael*, 2 Cal. 5th 1241, 1247–48 (2017) (discussing taxpayer standing under Cal. Code Civ. Proc. § 526a). The California and United States Constitutions do not limit standing in California courts. *Id.*; *Bilafer v. Bilafer*, 161 Cal. App. 4th 363, 370 (2008).

Here, the Ordinance's text provides broad standing. It states in relevant part: "Any alleged violation of this Chapter . . . constitutes a legally cognizable basis for relief, and *any person affected* thereby may institute proceedings for injunctive relief, declaratory relief, or writ of mandate to remedy the violation . . . ." S.F. Admin. Code § 19B.8(b) (emphasis added). The Ordinance does not define the phrase "any person affected," so dictionaries are instructive. *Upshaw*, 22 Cal. App. at 504. According to *Merriam-Webster*, to "affect" means "to act on and cause a change in." Likewise, according to *Black's Law Dictionary*, to "affect" means "to produce an effect on" or "to influence in some way." Thus, the Ordinance broadly provides standing to (in the words of the Ordinance) "any person" who (in the words of the dictionaries) is "changed" or "influenced" by a violation of the Ordinance.

In crafting the Ordinance's private right of action, the Board declined to use terms in California laws that take a narrower approach to

standing, such as "adversely affected,"[11] "aggrieved,"[12] or "injured."[13] So this Court must not add such limitations to the term the Board actually used: "any person affected."

This phrase's breadth is also shown by its usage in other CCSF ordinances. For example, the San Francisco Entertainment Commission may mediate disputes between event organizers and "persons affected." S.F. Admin. Code § 90.4(g). This would include anyone displeased by an event. Likewise, when the Recreation and Park Commission grants permits for expressive gatherings, it cannot limit the expression of "persons affected" by the permit. S.F. Park Code § 7.06(a). This would include participants, counter-protesters, and even passersby.

The Ordinance's legislative history and purposes also support broad standing, with particular concern for people like Plaintiffs. The Ordinance's author repeatedly emphasized the need to protect marginalized communities from police surveillance technologies. At a Rules Committee meeting on April 15, 2019, he explained "it is oftentimes these marginalized groups, artists, and political dissidents who are disproportionately subject to the abuses of this technology." 3 CT 636 ¶ 6. At a Rules Committee hearing a few weeks later on May 6, he explained that surveillance technologies have "often been used in abusive ways

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[11] *See, e.g.*, Cal. Bus. Code § 18897.8(a) (suit against athletic agents); Cal. Bus. Code § 22948.3(a) (suit against phishing); Cal. Civ. Code § 731.5 (suit against trail closure); Cal. Health Code § 52080(k) (suit against residential landlords).

[12] *See, e.g.*, Cal. Civ. Code § 52(c) (injunctive suit against discrimination); Cal. Gov. Code § 27203 (suit against improper recording of instrument); Cal. Lab. Code § 2699(a) (suit against violations of labor law); Cal. Pub. Res. Code § 30801 (suit against decision of agency).

[13] *See, e.g.*, Cal. Bus. Code § 17204 (suit against unfair trade practices); Cal. Bus. Code § 25602.1 (suit against alcohol sale to intoxicated minor).

against marginalized communities," including "the Black Lives Matter movement." *Id.* ¶ 7. And a week later, at a May 14 meeting of the full Board, he again emphasized surveillance of Black Lives Matter. *Id.* ¶ 8.

Likewise, the Ordinance's General Findings emphasize harms of marginalized communities: "surveillance efforts have historically been used to intimidate and oppress certain communities and groups more than others, including those that are defined by a common race, ethnicity, religion, national origin, income level, sexual orientation, or political perspective." 3 CT 635–36 ¶ 5(c). Thus, "any person affected" must include people like Plaintiffs who organize on behalf of marginalized communities, including protesters against police violence, that are subjected to unlawful police surveillance technologies.

Finally, one of the Ordinance's purposes is "[l]egally enforceable safeguards." *Id.* ¶ 5(f). Since the private right of action is the Ordinance's only method of enforcement, it must provide broad standing to be an enforceable safeguard.

B. Plaintiffs have standing.

When the SFPD violated the Ordinance by using the USBID cameras to surveil the 2020 George Floyd protests, this affected Plaintiffs in several ways.

First, Plaintiffs are fearful about attending future protests. 3 CT 646–47 ¶ 42. Second, Plaintiffs will find it more difficult to organize successful protests in the future. 3 CT 647 ¶ 43. Courts have long recognized that government surveillance will "chill" and "deter[]" First Amendment activity. *White v. Davis*, 13 Cal. 3d 757, 761, 767 (1975); *Lamont v. Postmaster*, 381 U.S. 301, 307 (1965).[14]

[14] See also Elizabeth Stoycheff, *Under Surveillance: Examining*

Third, the SFPD spied on the protest movement that Plaintiffs participated in and helped organize. This movement is personal for Plaintiffs, who are members of the "marginalized communities" that the Ordinance seeks to protect. 3 CT 635–36 ¶¶ 5–8, 645–46 ¶¶ 40–41. In the words of Plaintiff Williams, it was "an affront to our movement for equity and justice that the SFPD responded . . . by secretly spying on us." 1 CT 317:23–24.

Fourth, the SFPD exposed Plaintiff Reyes to video surveillance on May 31, 2020. That day, the SFPD used a remote, real-time link to the entire USBID camera network, 3 CT 639–40 ¶¶ 21–23, which covers Union Square and its surrounding areas including a segment of Market Street, 3 CT 637 ¶¶ 10–12. Also that day, Reyes marched with other protesters in and around Union Square, including twice on the covered segment of Market Street. 3 CT 647 ¶ 44.

Fifth, the SFPD's use of the USBID cameras without Board approval deprived Plaintiffs of the opportunity to participate in the democratic process mandated by the Ordinance. Plaintiffs Williams and Sheard have both participated in public debates concerning surveillance technology in San Francisco and would like to continue doing so. 3 CT 647–49 ¶¶ 45–48.

CONCLUSION

For the foregoing reasons, this Court should reverse the superior court's grant of Defendant-Appellee's motion for summary judgment, and

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Facebook's Spiral of Silence Effects in the Wake of NSA Internet Monitoring, Journalism & Mass Commc'ns Q. (2016), https://journals.sagepub.com/doi/pdf/10.1177/1077699016630255; Jon Penney, *Chilling Effects: Online Surveillance and Wikipedia Use*, Berkeley Tech. L. J. (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2769645.

remand with instructions to the superior court to grant summary judgment to Plaintiffs-Appellants.

Dated: August 15, 2022

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 11,549 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: August 15, 2022 /s/ Saira Hussain

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 August 15, 2022, I served the foregoing documents:

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 August 15, 2022 at San Francisco, California.

/s/ Victoria Python
Victoria Python