THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

South Carolina Public Interest Foundation, and
John Sloan, individually and on behalf of all others
similarly situated,……Plaintiffs-Petitioners

v.

South Carolina State Law Enforcement Division, and
Mark Keel, in his official capacity as Chief of
the South Carolina State Law Enforcement
Division…….....Defendants-Respondents

PETITION FOR ORIGINAL JURISDICTION

Petitioners the South Carolina Public Interest Foundation and John Sloan petition this Court for Original Jurisdiction pursuant to South Carolina Appellate Court Rule 245, Article V, Section 5, of the South Carolina Constitution, and Section 14-3-310 of the South Carolina Code. A proposed Complaint is attached as Exhibit A and incorporated herein by reference, along with its eight (8) Exhibits.

INTRODUCTION

Without any legislative authorization, the South Carolina State Law Enforcement Division (SLED) has created and currently operates a statewide surveillance program that relies on automated license plate readers ("ALPRs") to maintain a database of **hundreds of millions** of photos of vehicle license plates that are stamped with the exact time and location they were taken. Those photos are collected indiscriminately from vehicles traveling South Carolina roads and highways. SLED stores every image it collects for three years, regardless of whether the vehicle

or owner is suspected of, or associated with, any legal wrongdoing. Federal, state, and local agencies may search the database to generate travel and location dossiers on South Carolina residents—the sort of information the United States Supreme Court has warned "provides an intimate window into a person's life, revealing not only his particular movements, but through them his familial, political, professional, religious, and sexual associations." *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018) (internal quotation marks omitted).

SLED's ALPR surveillance program is proliferating rapidly.[1] In 2021, SLED recorded 150,738,105 license plate reads—up from 135,368,308 the previous year, and 26,451,216 in 2014.[2] As of July 13, 2022, the database contained over four-hundred million (400,000,000) license plate reads.[3] And the database will continue to expand as municipalities add new ALPR cameras, all of which may feed into it.[4]

This case is not about whether such a system is wise, or how best to balance the legitimate needs of law enforcement against individual privacy interests—those are questions for the General Assembly to answer, as representatives of the people of South Carolina. Nor is this case about whether SLED's program infringes upon constitutional privacy protections. Rather, this case is about whether an administrative agency may implement such an extensive surveillance program without *any* legislative authorization, and without any concomitant restraints on how it exercises

[1] Although SLED created its ALPR surveillance database years ago, Petitioners only recently learned of its existence as ALPRs began to rapidly proliferate across the state. *See* Exhibit A, Complaint [hereinafter "Complaint"], at n.2. That proliferation shed light on the SLED program that has long operated in the shadows and escaped widespread public awareness.

[2] *See* Complaint Exhibit 1, Freedom of Information Act Request # 2022-0118 and Response from SLED (August 3, 2022) [hereinafter "Complaint Ex. 1, 2022 FOIA Response"], at 4; Complaint Exhibit 6, SLED's Response to Freedom of Information Act Request # 2015-153 (March 5, 2015), at 6.

[3] *See* Complaint Ex. 1, 2022 FOIA Response, at 4.

[4] *See* Complaint, at n.2.

its discretion. The cornerstone of our constitutional system—the separation of powers—requires legislative authorization. Established rules of administrative law require formal regulations. This program has neither.

First, administrative agencies like SLED have "only such powers as have been conferred by law and must act within the authority granted for that purpose." *Bazzle v. Huff*, 319 S.C. 443, 445, 462 S.E.2d 273, 274 (1995) (citing *Triska v. Dep't. of Health & Env't Control*, 292 S.C. 190, 355 S.E.2d 531 (1987)). There is no provision in the South Carolina Code that authorizes SLED, or any state agency, to operate a statewide ALPR program. Second, if SLED's generic enabling statutes *could* be stretched so broadly as to authorize such an expansive surveillance network, one that depends on technology not even contemplated at the time those statutes were drafted, then those statutes provide no constraints on SLED's discretion and therefore run afoul of the nondelegation doctrine. *See Bauer v. S.C. State Hous. Auth.*, 271 S.C. 219, 232-34, 246 S.E.2d 869, 876-77 (1978). Finally, even if SLED's ALPR program were legitimately authorized, which it is not, SLED's creation and implementation of the program failed to comply with the notice-and-comment rulemaking requirements of the State Administrative Procedures Act (APA). *See Joseph v. S.C. Dep't of Lab., Licensing & Regul.*, 417 S.C. 436, 454, 790 S.E.2d 763, 772 (2016); *id.* at 456-66, 790 S.E.2d at 773-78 (Kittredge, J., concurring). SLED has not promulgated any formal regulations to implement or circumscribe its ALPR program. Instead, the agency's guiding document is an informal internal policy—Policy 13.40.[5]

The lack of legislative authorization for SLED's ALPR program stands in stark contrast to other statewide law enforcement databases that the legislature *has* authorized. Take, for example,

[5] *See* Complaint Exhibit 3, SLED Policy 13.40: Automated License Plate Recognition [hereinafter "Complaint Ex. 3, Policy 13.40"].

SLED's DNA database. Nearly thirty years ago, the General Assembly enacted a statute authorizing SLED to establish a statewide DNA database and prescribing specific rules for its operation. *See* S.C. Code Ann. §§ 23-3-600 *et seq.* (1994). The General Assembly also has enacted statutes that authorize and constrain the operation of the statewide criminal justice information center, criminal gang database, and body-worn camera database, among other programs. *See* S.C. Code Ann. §§ 23-3-110 (1962); 16-8-330 (2007); 23-1-240 (2015). In addition, SLED has conducted public, administrative rulemaking to implement many of these legislatively authorized programs, including the state DNA database. *See* S.C. Code Ann. Regs., 73-61 (1999).

Here, Petitioners request only the political process that the South Carolina Constitution requires. SLED is South Carolina's premier law enforcement agency. If SLED is to operate a statewide ALPR surveillance program, then the elected representatives of the people must authorize it.

No South Carolina court has addressed SLED's surveillance program. This Court's exercise of its original jurisdiction is critical to curtail SLED's ongoing usurpation of legislative authority and affirm the bedrock democratic principle of separation of powers.

FACTUAL BACKGROUND

Petitioners detail the relevant factual background in their proposed verified Complaint, which is attached as Exhibit A and incorporated here as if set forth verbatim. The operative facts alleged are a matter of public record, and no discovery is necessary to resolve the legal questions the case presents.

To summarize the factual record, SLED maintains a database of hundreds of millions of photos of vehicle license plates, each stamped with the exact time and location they were taken. ALPR cameras automatically capture those photos across the state. The cameras can be: mounted

in a permanent location (such as a highway overpass); mobile (such as a camera attached to a vehicle); or portable (such as a trailer that can be temporarily installed). Some are owned by SLED. Some are owned by local jurisdictions and feed images into the SLED database.

REASONS TO EXERCISE ORIGINAL JURISDICTION

Pursuant to Article V, Section 5, of the South Carolina Constitution, and Rule 245 of the South Carolina Appellate Court Rules, this Court may exercise its original jurisdiction "[i]f the public interest is involved." *Doe v. State*, 421 S.C. 490, 497, 497 n.5, 808 S.E.2d 807, 810, 810 n.5 (2017) (quoting S.C. App. Ct. R. 245(a)). To determine whether original jurisdiction is appropriate, the Court specifically looks to the nature of "the public interest involved and the need for prompt resolution." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 80, 753 S.E.2d 846, 853 (2014).

This case presents issues of significant public interest that require prompt resolution. A sprawling and unauthorized government program circumvents the constitutional lawmaking process and undermines the separation of the executive and legislative powers. That program is rapidly proliferating, with the potential to cause irreversible damage to both citizens and the state unless this Court promptly addresses it.

Accordingly, this case falls squarely within the line of cases in which the Court has exercised its original jurisdiction to address unlawful executive and administrative overreach. *See, e.g.*, *Adams v. McMaster*, 432 S.C. 225, 851 S.E.2d 703 (2020) (challenging the Governor's allocation of federal education funding); *Senate by & through Leatherman v. McMaster*, 425 S.C. 315, 821 S.E.2d 908 (2018) (challenging Governor's appointment to the Board of Directors for the Public Service Authority); *Amisub of S.C., Inc. v. S.C. Dep't of Health & Env't Control*, 407 S.C. 583, 757 S.E.2d 408 (2014) (challenging state agency's ability to suspend administration of

program); *S.C. Pub. Int. Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013) (challenging constitutionality of the state transportation infrastructure bank); *Sloan v. Hardee*, 371 S.C. 495, 640 S.E.2d 457 (2007) (challenging legality of appointment of agency commissioners).

The Court similarly should exercise its jurisdiction here.

I. The Public Interest in Petitioners' Case Is Manifest.

Unauthorized agency action "presents a threat to our civil society." *Joseph*, 417 S.C. at 465, 790 S.E.2d at 778 (Kittredge, J., concurring) (from section III of the concurrence). In *Joseph,* the Court's opinion "embrace[d] completely the excellent comprehensive analysis of administrative rulemaking set forth in sections I, II, and III of Justice Kittredge's concurring opinion." *Id.* at 455 n.3, 790 S.E.2d at 773 n.3; *see also West Virginia v. EPA*, 142 S.Ct. 2587, 2608-09 (2022) (emphasizing the need for clear legislative authorization for significant agency action). The public has a fundamental interest in ensuring that executive agencies operate within the bounds of the law. That interest is especially prominent here, where the unauthorized agency action at issue implicates the privacy and liberty interests of millions of South Carolinians. *See Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 668 (2022) (Gorsuch, J, concurring) ("If administrative agencies seek to regulate the daily lives and liberties of millions of Americans … they must at least be able to trace that power to a clear grant of authority from Congress.").

A. SLED's License Plate Surveillance Program is *Ultra Vires.*

An agency or executive officer cannot act without legislative authorization. *See Gilstrap v. S.C. Budget & Control Bd.*, 310 S.C. 210, 212-14, 423 S.E.2d 101, 103 (1992) (an agency's proposed budget plan "exceeded the authority granted to [the agency] by the Legislature"); *State*

ex rel. Condon v. Hodges, 349 S.C. 232, 245-46, 562 S.E.2d 623, 630-31 (2002) (the Governor exceeded his legislative authority in transferring certain funds); *Hampton v. Haley*, 403 S.C. 395, 409, 743 S.E.2d 258, 265 (2013) (an executive agency "violated the separation of powers by acting beyond its statutory authority and infringing upon the General Assembly's power to make policy determinations"). "[A]n agency, as a creature of statute, is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged." *Edisto Aquaculture Corp. v. S.C. Wildlife & Marine Res. Dep't*, 311 S.C. 37, 40, 426 S.E.2d 753, 755 (1993) (internal quotations and alterations omitted). When an agency exceeds those powers, as SLED does here, its actions are invalid as *ultra vires*. *See, e.g.*, *S.C. Pub. Int. Found. v. S.C. Dep't of Transp.*, 421 S.C. 110, 123-24, 804 S.E.2d 854, 861-62 (2017) (Department of Transportation bridge inspections in a private gated community were *ultra vires* because they were not statutorily authorized).

No South Carolina statute mentions ALPR technology, or anything resembling the extensive, location-tracking database SLED has compiled. This is quite unlike the explicit statutory authorization governing other SLED databases. For example, the General Assembly has enacted statutes that authorize, oblige, and constrain SLED's operation of the statewide DNA database, S.C. Code Ann. §§ 23-3-610 *et seq.*; the statewide criminal justice information center, S.C. Code Ann. §§ 23-3-15(A)(4), 23-3-110 *et seq.*; the collection and retention of fingerprint data, S.C. Code Ann. §§ 23-3-40, 23-3-45, 23-3-120, 37-22-270; the sex offender registry, S.C. Code Ann. §§ 23-3-400, *et seq.*; the statewide criminal gang database, S.C. Code Ann. § 16-8-330; a non-prescription drug database, S.C. Code § 23-3-1200; and a body-worn camera database, S.C. Code Ann. § 23-1-240, amongst others.

SLED's generic enabling statutes do not authorize the ALPR program. In its communication with local law enforcement agencies, SLED has cited South Carolina Code Section 23-3-15(A)(1) as the ALPR program's empowering statute.[6] Section 23-3-15(A)(1) vests SLED with authority over "the investigation of organized *criminal* activities or combined state-federal interstate *criminal* activities, all general *criminal* investigations, *arson* investigation and emergency event management *pertaining to explosive devices*." S.C. Code Ann. § 23-3-15(A)(1) (emphasis added).

This statute authorizes criminal investigations. It does not encompass the collection—and three-year storage—of license plate data from South Carolina motorists suspected of no criminal act, who have done nothing to warrant the attention of law enforcement. "Court[s] should give words 'their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.'" *State v. Taylor*, 436 S.C. 28, 34, 870 S.E.2d 168, 171 (2022) (quoting *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010)). "Agencies have only those powers given to them by Congress, and 'enabling legislation' is generally not an 'open book to which the agency [may] add pages and change the plot line.'" *West Virginia v. EPA*, 142 S.Ct. at 2609 (citation omitted); *see also id.* at 2622 (Gorsuch, J., concurring) (Congress must provide a "clear statement" authorizing the agency action, and agencies may not "seek to hide 'elephants in mouseholes'" of statutory authorization) (citation omitted)); *Joseph*, 417 S.C. at 465-66, 790 S.E.2d at 778 (Kittredge, J., concurring) ("If the executive branch, through unelected bureaucrats and seemingly countless administrative agencies, is going to set policies having the force of law, the judicial branch must insist on clear delegation from the legislative branch ….").

[6] *See* Complaint Exhibit 7, South Carolina Law Enforcement Division, "Memorandum of Understanding Pertaining To The Establishment Of The South Carolina Law Enforcement Division Automated License Plate Reader," at 2.

SLED's enabling statute could be read to authorize the ALPR program, SLED would have virtually unlimited power to create unilaterally whatever mass surveillance systems it chooses. Surely, that is not what the legislature intended.

Circumventing the legislative process is not simply a problem of form. It compromises the very nature of, and reasons for, a representative government. Legislation inevitably involves tradeoffs by the people's elected representatives. These are not decisions for unelected administrative officials. Novel and dramatic technological developments that implicate fundamental privacy rights especially require legislative authorization. *See United States v. Jones*, 565 U.S. 400, 429-30 (2012) (Alito, J., concurring) ("In circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative. A legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way.") (internal citations omitted)). Indeed, these same concerns about "the emergence of new electronic technologies that increase[] the government's ability to conduct searches" prompted South Carolinians to add a right to privacy provision to our state constitution. *State v. Forrester*, 343 S.C. 637, 647, 541 S.E.2d 837, 842 (2001).

Governance of the state's DNA database is instructive. A statute specifically prescribes the limited circumstances under which DNA may be collected; sets forth permissible uses of the database; establishes confidentiality requirements; limits access to the database; creates criminal penalties for abuses; establishes expungement procedures by which individuals can have their DNA sample removed from the database; and conditions the continued force of the statute upon SLED's promulgation of numerous regulations and the legislature's continued annual appropriations. *See* S.C. Code Ann. §§ 23-3-600 *et seq*. Over the years, the legislature has amended the statute several times. *See* H.R. 3120, 2000 Leg., 113th Sess. (S.C. 2000); S. 492, 2001 Leg.,

114th Sess. (S.C. 2001); H.R. 3594, 2004 Leg., 115th Sess. (S.C. 2004); S. 429, 2008 Leg., 117th Sess. (S.C. 2008). To enact the latest amendments to this statute, which expanded DNA collection, the General Assembly had to override the Governor's veto. *See* S. 429, 2008 Leg., 117th Sess. (S.C. 2008); *see also* Veto Message from Governor S. 429, R-429 (July 2, 2008) (expressing concern over the "further encroachment on our civil liberties and privacy rights"). This sort of careful legislative management of the tradeoffs in any law enforcement database is altogether absent from SLED's ALPR program.

In states where ALPR databases have been legislatively authorized, the databases differ in important ways from SLED's. Retention periods are measured in days, not years. *See, e.g.*, N.C. Gen. Stat. Ann. § 20-183.32. Use is limited to the investigation of enumerated criminal and traffic offenses. *See, e.g.*, Mont. Code Ann. § 46-5-117(d)(V). Captured license plate data may only be compared with specific hotlists. *See, e.g.*, Ark. Code Ann. § 12-12-1803(b). Access to the database is restricted to officials with specialized training. *See, e.g.*, Md. Code Ann., Public Safety § 3-509(c)(2). Privacy protections ensure that information in the database is treated confidentially. *See, e.g.*, Fla. Stat. Ann. § 316.0777(2). Sharing license plate data with private entities is prohibited. *See, e.g.*, Minn. Stat. Ann. § 13.824 (Subdivision 2). Detailed reports concerning collection and use must be published. *See, e.g.*, Neb. Rev. Stat. Ann. § 60-3206(3). Failure to comply with statutory requirements is grounds for exclusion of evidence. *See, e.g.*, Ark. Code Ann. § 12-12-1805(b)(4)(B). Individuals harmed by data breaches are armed with a private right of action. *See, e.g.*, Cal. Civ. Code § 1798.90.54.[7]

[7] The statutory provisions listed in this paragraph are not unique to the states cited as examples for each provision. Different state statutory schemes often share the same types of restrictions on their respective ALPR programs. Almost all states, for instance, impose data retention limits. Like North Carolina, several states limit retention periods to days. *See, e.g.*, Ark. Code Ann. § 12-12-1804(a);

Petitioners do not presume to say what a legislatively authorized ALPR database would or should look like in South Carolina. That is a question for our elected representatives to answer. But SLED cannot short-circuit that process and make these policy decisions by fiat. Unless and until our representatives speak, SLED's creation and maintenance of its ALPR enforcement-and-surveillance system is *ultra vires.*

B. If SLED's License Plate Surveillance Program Were Deemed to Be Authorized, SLED's Enabling Legislation Would Violate the Nondelegation Doctrine.

Even if SLED's generic enabling statutes could be read so broadly as to authorize the agency's creation and implementation of a statewide ALPR surveillance program—a program that both implicates the most basic privacy interests of South Carolinians and depends on technology not even contemplated at the time the statutes were drafted—then those statutes violate the nondelegation doctrine. Nearly 70 years ago, it already was "well settled" that the constitutional principle of separation of powers precludes "the legislature [from] delegate[ing] its power to make laws." *S.C. State Highway Dep't v. Harbin*, 226 S.C. 585, 594, 597, 86 S.E.2d 466, 470, 472 (1955) (holding that a statute "authorizing the Highway Department to suspend or revoke a driver's license 'for cause satisfactory' to it, is an unconstitutional delegation of legislative power").

To withstand constitutional scrutiny, a statute that vests authority in an administrative agency like SLED must, at a minimum, contain "limitations" and "standard[s] to guide" the agency's exercise of that authority. *Id.* at 595, 86 S.E.2d at 470-71. As described above, *supra*, at 8, SLED's generic enabling statute vests it with authority over matters such as "the investigation

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Calif. Veh. Code § 2413(b); Me. Rev. Stat. Ann. Tit. 29-A, §2117-A(5); Minn. Stat. Ann. § 13.824 (Subdivision 3); Mont. Code Ann. § 46-5-118(1); Neb. Rev. Stat. § 60-3204(1); Tenn. Code Ann. § 55-10-302(b). In New Hampshire, data retention is limited to 3 minutes. *See* N.H. Rev. Stat. Ann. § 261:75-b(VIII).

of organized criminal activities," "combined state-federal interstate criminal activities," and "all general criminal investigations." Thus, the legislature has limited SLED's general authority to *criminal* matters. Yet, SLED is collecting the time-stamped, geo-located data of South Carolinians for whom there is no suspicion of unlawful conduct whatsoever. If the organic statute's authorization to conduct criminal investigations empowers SLED to operate any surveillance program with merely the potential to aid criminal investigations, then the limitation to criminal matters is hollow. SLED's generic enabling statute would be the very type of blank check that the nondelegation doctrine proscribes, giving SLED unrestrained power to create mass surveillance systems using ever more invasive and previously uncontemplated technologies.

C. If SLED's License Plate Surveillance Program Were Deemed Lawfully Authorized, it Would Violate the South Carolina Administrative Procedures Act.

Even if SLED's organic statutes could be read to authorize the agency's ALPR surveillance program, and even if this Court determined such a vague delegation of authority did not violate the nondelegation doctrine, SLED's implementation of the program violates the state's Administrative Procedures Act ("APA"). *See* S.C. Code Ann. § 1-23-310 *et seq.* SLED is an "agency" under the terms of the APA. *See* S.C. Code Ann. § 1-23-10(1) (defining agencies as "each state board, commission, department, executive department or officer … authorized by law to make regulations or to determine contested cases"). As such, the APA requires SLED to provide the public with notice and an opportunity to comment before promulgating any regulation. *See Joseph*, 417 S.C. at 454, 790 S.E.2d at 772.

The APA defines "regulation" broadly: "Regulation means each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency." S.C. Code Ann. § 1-23-10(4). "Whether a particular agency creates a regulation

or simply announces a general policy statement depends on whether the agency action establishes a 'binding norm.'" *Joseph*, 417 S.C. at 454, 790 S.E.2d at 772 (quoting *Home Health Serv., Inc. v. S.C. Tax Com'n*, 312 S.C. 324, 328, 440 S.E.2d 375, 378 (1994)). "[W]hen there is a close question whether a pronouncement is a policy statement or a regulation, the agency should promulgate the ruling as a regulation in compliance with the APA." *Id.* (citation and alteration omitted).

Here, SLED's policy governing its ALPR program—Policy 13.40—constitutes a regulation subject to the APA's requirements. *See* Complaint Ex. 3, Policy 13.40. By its plain terms, the Policy establishes binding "guidelines" with which all users of SLED's ALPR systems must "abide." *Id.* at 1; *see also id.* at 3-4. Specifically, Policy 13.40 regulates who may use ALPR systems, *id.* at 3 (Subsection C), how the systems may be used, *id.* at 2-3 (Subsections A and C), and who may access SLED's ALPR database, *id.* at 4 (Subsection E). It also establishes a binding rule for SLED's retention of images generated by ALPR systems. *Id.* at 4 (Subsection F) ("SLED will maintain data and images submitted to [SLED's database] for a period of three years.").

If there were any doubt as to whether Policy 13.40 establishes a "binding norm," municipal police departments themselves have stated their express understanding that the SLED policy is binding on them. For example, Myrtle Beach Police Department Regulation # 276 provides that the department "shall adhere to SLED policy and guidelines related to the storage and/or retrieval of ALPR data as per South Carolina Law Enforcement Division Policy Statement 13:40, Automated License Plate Recognition."[8]

Finally, SLED's policy, and the program implemented pursuant to it, bind the public generally: individuals cannot escape the ALPR cameras while traveling on many South Carolina

[8] Complaint Exhibit 8, Myrtle Beach Police Department, Administration Regulations and Operating Procedures # 276, Section C.2.

roads, nor can they prevent their data from being stored in the database for three years. *See generally Elec. Priv. Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 6 (D.C. Cir. 2011) (holding that a technological change to TSA's airport screening protocol was a regulation requiring notice-and-comment because it "substantively affect[ed] the public to a degree sufficient to implicate the policy interests animating notice-and-comment rulemaking").

Accordingly, SLED was required to provide notice and an opportunity for public comment before implementing its ALPR surveillance program. SLED *has* undertaken notice-and-comment rulemaking to promulgate regulations for a host of similar law enforcement programs—including its DNA database (SLED Regulation 73-61, specifying standards for sample collection, identification, and testing, among others); breathalyzer testing (SLED Regulations 73-3, 5); and Uniform Crime Reporting (SLED Regulation 73-30). *See* S.C. Code Ann. Regs. Ch. 73, *available at* https://www.scstatehouse.gov/coderegs/Chapter%2073.pdf.

SLED's failure to engage in that same process here exacerbates the dearth of legislative authorization for this program. Under the APA, formal regulations must be submitted to the General Assembly for legislative approval or disproval, with few (inapposite) exceptions. *See* S.C. Code Ann. § 1–23–120 (2015); *Joseph*, 417 S.C. at 461, 790 S.E.2d at 776 (Kittredge, J., concurring) (noting that, "[i]n South Carolina, to preserve some semblance of the separation of powers we once held sacred, an administrative agency may not make law without legislative oversight and approval"). Yet rather than promulgating and submitting ALPR regulations to the legislature, SLED has tried to govern its entire statewide ALPR program with what it calls an **internal** policy. By failing to subject its ALPR program to the lawful regulatory process, SLED has insulated itself further from legislative review, foreclosed the availability of either post hoc legislative approval or democratic guardrails, and continues to grow the Leviathan.

In sum, SLED continues to operate its ALPR program without any legislative authorization or compliance with the most basic principles of administrative rulemaking. This ongoing attack on the doctrine of separation of powers makes this a matter of great public significance.

II. The Issues This Case Presents Are Urgent and Require Prompt Resolution.

The questions of significant public interest that this case raises require prompt resolution; SLED's unlawful and unaccountable surveillance program presents an ongoing, and growing, violation of the South Carolina Constitution and administrative law. As with other cases over which this Court has exercised its original jurisdiction, this case concerns illegitimate government action with the potential to cause irreversible damage to both citizens and the state, including through the expenditure of unrecoverable taxpayer dollars. *See supra,* at 5-6 (listing cases); *see also Am. Petroleum Inst. v. S.C. Dep't of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009*), holding modified by S.C. Pub. Int. Found. v. Lucas*, 416 S.C. 269, 786 S.E.2d 124 (2016)*; Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005), *abrogated on other grounds by Am. Petroleum Inst. v. S.C. Dep't of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009). The scope of this illegal government action and its potential for damage are rapidly expanding as SLED's ALPR surveillance system proliferates unchecked, as described above. *See supra*, at 2.

Finally, how the Court decides these issues will provide critical guidance for future state programs that may rely on a host of other emerging surveillance technologies, such as facial recognition, stingrays (used to track cell phone contacts and location), spyware, and drones.[9] State agencies need prompt and clear judicial guidance on what authorization is required to deploy these

[9] *See, e.g.*, Matthew Feeney, *Facial Recognition Technology is Getting Out of* Control, CATO INST., (Mar. 9, 2020), *available* at https://www.cato.org/commentary/facial-recognition-technology-getting-out-control; Adam Bates, *Stingray: A New Frontier in Police Surveillance*, CATO INST., (Jan. 25, 2017), *available* at https://bit.ly/3WvjNsH.

technologies going forward. Litigating those issues in the trial courts would prevent their prompt resolution and cause prolonged legal uncertainty for law enforcement. At the same time, citizens need judicial assurance that vast statewide law enforcement programs involving new surveillance technologies will be subject to legislative oversight.

Only swift and final judicial disposition can mitigate these harms and provide the necessary guidance. Swift resolution is possible here, as the case presents only legal questions that do not require further factual development and discovery. The issues are questions of constitutional law and statutory interpretation. There is no question as to whether SLED's ALPR program exists. The only question is whether that program is authorized by law. That issue is well-positioned to be decided by this Court in its original jurisdiction.

CONCLUSION

For the foregoing reasons, the Court should grant this Petition for Original Jurisdiction and issue an expedited briefing schedule on the merits of Petitioners' complaint.

Dated: November 17, 2022

Respectfully submitted,

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