IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

SHANNON SCHEMEL,	)	
STEPHEN OVERMAN,	)	
and **MICHAEL TSCHIDA,**	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 2:22-cv-00079**
	)	
CITY OF MARCO ISLAND, FLORIDA,	)	**Declaratory**
50 Bald Eagle Drive	)	**Relief Requested**
Marco Island, FL 34145,	)	
	)	
Defendant.	)	
	)	

FIRST AMENDED COMPLAINT

Plaintiffs Shannon Schemel, Stephen Overman, and Michael Tschida, through undersigned counsel, allege as follows:

NATURE OF THE ACTION

1. Plaintiffs bring this suit to stop the ongoing violation of their Fourth Amendment rights by the City of Marco Island, Florida. The Fourth Amendment to the U.S. Constitution prohibits the government from engaging in "unreasonable searches and seizures." The Fourth Amendment has a strong preference for warrants, and government searches are presumptively unlawful unless the police first obtain a judicial warrant supported by probable cause.

2. Despite that constitutional protection of personal privacy, and a similar provision of the Florida Constitution, Defendant City of Marco Island has been conducting continuous searches of Schemel, Overman, Tschida, and other Marco Island residents since April 23, 2021. On that date, Defendant deployed at least three automated license plate recognition ("ALPR") systems at strategic locations in the City.

3. The ALPRs photograph and record the license plate information of every vehicle that passes by. By mounting ALPRs at each of the three bridges by which one can enter or exit Marco Island, Defendant records and stores the license plate information of *every* vehicle that enters and exits Marco Island, as well as the time and date of entry and exit.

4. Defendant retains data collected by ALPRs for three years. Plaintiffs Schemel, Overman, and Tschida and many other local residents pass over at least one of those bridges nearly every day, with the result that Defendant has now recorded and stored a vast quantity of information about the daily life of Plaintiffs and their fellow citizens—including, for example, precise information regarding when they are in the City and when they are away.

5. When the government uses pole cameras to take isolated photographs of events occurring at a particular location, it does not engage in a "search" within the

meaning of the U.S. and Florida Constitutions. But by systematically collecting data from multiple locations about individual citizens for an extended period of time and retaining that information for up to three years, Marco Island is able to paint a detailed picture of their lives—by exposing the whole of their physical movements. By doing so, Marco Island intrudes on reasonable expectations of privacy and thus is engaged in a search that is subject to constitutional limitations. Such searches are unlawful in the absence of a judicial warrant.

6. Defendant's long-term surveillance is not exempt from scrutiny under the United States and Florida Constitutions simply because it all takes place along public roads. Privacy expectations for travel on public roads vary depending on the nature of the scrutiny. Although the U.S. Supreme Court holds that travelers lack a reasonable expectation that their movement will not be directly scrutinized by individual police officers, they *do* possess a reasonable expectation that "the whole of their physical movement" will not be subject to long-term electronic surveillance using modern technologies capable of gathering information in quantities vastly exceeding what law enforcement personnel could gather. *Carpenter v. United States*, 138 S. Ct. 2206 (2018); *United States v. Jones*, 565 U.S. 400, 430 (2012) (Alito, J., concurring in judgment); *id.* at 415 (Sotomayor, J., concurring).

JURISDICTION AND VENUE

7. The Court has jurisdiction under 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1367 (supplemental jurisdiction).

8. The Court may award injunctive and declaratory relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02.

9. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b).

THE PARTIES

10. Plaintiff Shannon Schemel is a citizen of Florida who has resided within the City of Marco Island for many years.

11. Plaintiff Stephen Overman is a citizen of Florida who has resided within the City of Marco Island for many years.

12. Plaintiff Michael Tschida is a citizen of Florida who has resided within the City of Marco Island for many years.

13. Schemel's, Overman's, and Tschida's principal means of transportation are their cars and trucks. They regularly drive their vehicles in connection with their everyday activities; *e.g.*, commuting to work, shopping, visiting friends, and attending meetings of groups with which they are affiliated. That driving causes them to enter and exit Marco Island virtually every day.

14. Indeed, they could not complete their daily responsibilities without using their respective vehicles.

15. Defendant City of Marco Island (the "City") is a municipality located within Collier County, Florida with a population of about 18,000. It is situated on an island off of Florida's Gulf Coast, the largest of the barrier islands along the southwest coast with land area of just over 12 square miles.

16. Three bridges connect the mainland to Marco Island. It lacks any commercial train or airline service, and thus virtually the only means of entering or exiting the island is to drive a vehicle across one of the three bridges.

FACTUAL BACKGROUND

Automatic License Plate Recognition Systems

17. ALPRs are high-speed cameras capable of recording images of the license plates of all motor vehicles that come within their field of vision. They can be operated while mobile (*e.g.*, placed on a moving police car) or while placed at a fixed location. A single ALPR is capable of recording thousands of license plate images per minute.

18. ALPR cameras are connected to systems that convert the images of license plates into computer-readable data; the license plate number as well as the date, time, and location of the observation are recorded.

19. Proponents of ALPRs argue that ALPRs can serve important law-enforcement functions. For example, if an ALPR reads the license plate of a vehicle whose registration has expired or whose owner's driver's license has been suspended, police claim that they can use the system to locate the vehicle, stop the driver, and issue a citation.

20. However, ALPRs also pose a threat to privacy interests. ALPRs, by aggregating location information for a single vehicle over extended periods of time, can reveal detailed information about the whole of the physical movements of the driver of that vehicle.

21. The threat to privacy interests is reduced considerably if license-plate data are retained for no more than a few days.

22. ALPRs are generally operated by local police departments. Even though the overwhelming majority of data generated by ALPRs has absolutely no connection with criminal activity, those departments frequently share all information about innocent motorists gleaned from their ALPRs with other law enforcement agencies.

23. That data sharing significantly increases the potential threat to privacy interests.

ALPRs Come to Marco Island

24. Marco Island began using its first ALPR in 2015—a mobile unit mounted on a squad car. The ALPR was capable of comparing captured images to Marco Island's data base in real time.

25. During the next five years, this single unit captured images of almost 1,000,000 license plates.

26. At a "capital budget workshop" on June 8, 2020, Police Chief Tracy Frazzano proposed to the Marco Island City Council the purchase of three additional ALPRs. She proposed that two of the new ALPRs be placed on the S.S. Jolley Bridge (so as to separately capture northbound and southbound traffic) and that the third one be placed on another bridge.

27. She stated that the number of images captured *annually* by the three cameras would be far greater than those captured by the mobile unit—probably numbering in the millions.

28. Frazzano presented the City Council with no evidence indicating that this new surveillance system was necessary to combat threats to public safety. Marco Island in 2020 was ranked as one of the three safest cities in the State of Florida (out of 129 cities reporting data). See *Safest Cities in Florida*,

Alarms.org, January 19, 2020, *available at* https://www.alarms.org/safest-cities-in-florida/. *Ibid.*

29. The City Council voted to approve the budget proposal.

30. The New Civil Liberties Alliance (NCLA), an organization whose attorneys are representing Plaintiffs in this suit, submitted a letter to City Council members on June 17, 2020, alleging that the proposed ALPR system violated privacy rights and urging the City Council to reconsider approval of the new ALPR purchases. A copy of the June 17 letter is attached hereto as Exhibit A.

31. NCLA received no response to its June 17, 2020 letter.

Marco Island Installs Three New ALPRs

32. On April 22, 2021, the Marco Island Police Department announced that the new ALPRS were set to be deployed, effective the next day. A copy of the press release is attached as Exhibit B.

33. The press release states that at least three new ALPRs were installed and suggests that a fourth new ALPR may also have been installed.

34. An ALPR was installed on each of the two spans of the Jolley Bridge.

35. A third ALPR was installed on San Marco Road (at its intersection with Stevens Landing Drive) on the approach to the Gober Bridge.

36. By installing ALPRs on or near the three bridges, the City ensured that *every* vehicle entering and exiting the island is being photographed, 24 hours a day, seven days a week.

37. Indeed, the press release makes clear that a desire to ensure 100% coverage was the reason for placing ALPRs on or near the bridges. The press release stated:

> Marco Island is geographically the optimal location to place stationary ALPR devices due to our unique nature. Unlike a city with countless streets entering its jurisdiction, all our vehicular traffic enters and leaves via three bridges (Jolley, Minozzi, and Goer). Our bridges, as focal points, allow for a minimum of four cameras.

38. The press release indicates that the City plans to use its ALPR system not only to investigate and uncover criminal activity but also to "deter" misconduct that has not yet taken place. The press release quotes Police Chief Frazzano as saying, "The system has a strong deterrent value which improves community safety and helps us probatively reduce crime and traffic incidents before they occur."

Plaintiffs Are Photographed

39. In the years since Defendants began operating the three stationary ALPRs, Plaintiffs Schemel, Overman, and Tschida have driven across the island's three bridges on thousands of occasions.

40. Because the ALPRs are designed to photograph and record the license plate of *every* vehicle that crosses one of the three bridges, on information and belief Plaintiffs and their vehicles have already been photographed on thousands of occasions, and the numbers will continue to increase on a daily basis.

41. Such photographs are in addition to the many occasions they likely have been photographed by the City's mobile ALPR.

42. The City is rapidly accumulating a large database that provides a detailed picture of the whole of Plaintiffs' physical movements. Based on the frequency and times of day of their bridge crossings, Defendants can easily draw that detailed picture.

43. For example, the City can determine at all times whether Plaintiffs are on or off the island—24 hours per day, 365 days per year. The mobile ALPR further allows the City to determine where and about how long Plaintiffs' vehicles are parked within City limits.

44. The City has no plans to expunge any of that data regarding innocent and lawful conduct in the foreseeable future. Indeed, Police Chief Frazzano has indicated that her department intends to maintain those records for at least three years.

45. Members of the Florida legislature have stated that retention of such data creates privacy concerns. In 2014, the legislature adopted a statute seeking to limit data retention. *See* Fla. Stat. § 316.0778(2) (requiring state officials to "establish a retention schedule for records containing images and data generated through use of an [ALPR] system. The retention schedule must establish a maximum period that the records may be retained.").

46. In response, Florida's Criminal and Juvenile Justice Information System Council issued "Guidelines for the Use of Automated License Plate Readers." *See* https://www.fdle.state.fla.us/cjjis/documents/cjjis-council-alpr-guidelines.

47. Included within the Guidelines is a provision stating that "information that is gathered without specific suspicion may be retained for no longer than 3 anniversary years." Guidelines, § 6(e).

48. The Guidelines specify no *minimum* period for record retention and make no recommendations regarding how long data *should be* retained.

CLAIM I

Violation of the Fourth Amendment

49. Plaintiffs Schemel, Overman, and Tschida repeat and incorporate by reference the allegations of Paragraphs 7 through 48 of the Complaint.

50. The Fourth Amendment to the U.S. Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The "basic purpose" of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 528 (1967).

51. The government engages in a "search" subject to Fourth Amendment controls whenever it intrudes upon something an individual seeks to preserve as private, so long as society is prepared to recognize the privacy interest as reasonable.

52. Among the privacy interests to which the Supreme Court has extended Fourth Amendment protection is the expectation of privacy in the whole of one's physical movements. People do not surrender that privacy right simply because they are moving along public roads or are otherwise venturing into the public sphere. Although those traveling in public must accept that other individuals (including police officials) may be watching them for some portion of their travels, they may legitimately expect that (in the absence of probable cause) they will not be subject to constant electronic monitoring.

53. Thus, in *Carpenter*, 138 S. Ct. 2206, the Supreme Court held that government collection of an individual's cell phone records (records from which the government could deduce the individual's approximate location) over a seven-day period constituted a "search" for Fourth Amendment purposes. In *Jones*, 565 U.S. 400, five justices concluded that the government conducted a Fourth Amendment "search" when it monitored the movement of an individual's car for 28 days by using a Global-Positioning-System (GPS) tracking device. 565 U.S. at 430 (Alito, J., concurring in the judgment); *id.* at 415 (Sotomayor, J., concurring).

54. The more information the government collects about an individual's movements, the greater the intrusion upon the individual's expectations of privacy. Government collection of cell phone and GPS data for more than a brief time period constitutes a Fourth Amendment search because it "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*, 138 S. Ct. at 2217 (quoting *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring)).

55. *Carpenter* declined to specify precisely how much cell phone data the government may collect before its efforts constitute a search subject to the Fourth Amendment. It held merely that collecting an individual's cell phone data for a

seven-day period sufficed to constitute a Fourth Amendment search. *Id.* at 2217 n.3.

56. This type of search by law-enforcement officials violates the Fourth Amendment unless they first obtain a judicial warrant supported by probable cause, or unless it falls within a specific exception to the warrant requirement. *Id.* at 2221.

57. None of the exceptions to the warrant requirement applies here.

58. By strategically placing ALPRs on each of the bridges leading into and out of Marco Island and operating them continuously since April 23, 2021, the City has succeeded in logging the location of Plaintiffs and their vehicles every day on multiple occasions, thereby providing the City with detailed information regarding the whole of their movements for years on end.

59. The City intends to retain that information and all the similar information about Plaintiffs that it will continue to record daily, for three years from the date of the original recording. It also intends to share that information with the Federal Bureau of Investigation and other law enforcement personnel throughout Florida.

60. Rather than simply await evidence that a traffic infraction or crime has been committed, and then search its data for evidence to assist with its response,

the City states that it intends to use its data to "probatively reduce crime and traffic incidents before they occur." Exhibit B.

61. On information and belief, the City also may query the ALPR data it has collected without any particularized showing of suspicion.

62. By collecting detailed information about Plaintiffs and their daily movements for an extended period of time, the City is conducting a "search" within the meaning of the Fourth Amendment.

63. By gathering data regarding the whole of Plaintiffs' movements, the City is provided an intimate window into each Plaintiff's life. It permits the City to discern not only their movements but also to infer detailed information about where and when they work, whether they are in town or away on vacation, and with whom they associate.

64. For example, if several houses of worship are located on the far side of one of the bridges, the City can reasonably infer that an individual is attending one house of worship if an individual crosses the bridge at 8:45 a.m. every Saturday morning and crosses back at 10:45 a.m., and that the individual is attending a different house of worship if the crossing occur at those same times on a Sunday morning.

65. The information collected by the City regarding Plaintiffs is already far more detailed than the cell-site information at issue in *Carpenter*. In that case, the Supreme Court held that a police department's collection of cell-site information constituted a Fourth Amendment "search," even though the information covered seven days only and could provide only an approximation of the target's location. That is, it could only place the target within a "wedge-shaped sector ranging from one-eighth to four square miles." *Carpenter*, 138 S. Ct. at 2218.

66. In contrast, the City has been collecting location information about Plaintiffs for several years, and the information discloses their precise location—not a mere approximation.

67. Because the Supreme Court held that the data collection in *Carpenter* constituted a Fourth Amendment search, *a fortiori* the City's more detailed collection of data regarding Plaintiffs' movements must also be deemed a Fourth Amendment search.

68. Plaintiffs have not voluntarily waived their right to privacy simply by driving their vehicles on public roads that are visible to all in the vicinity of their travels. Refraining from driving on the City's streets is not an option for Plaintiffs; daily travel in their vehicles is the only means by which Plaintiffs can

commute to their places of employment and complete the other activities essential to their day-to-day existence.

69. The fact that law enforcement personnel are free to engage in in-person observation of Plaintiffs as they drive into and out of the City does not make its long-term use of ALPRs any less a "search" for Fourth Amendment purposes. The Supreme Court held in *Carpenter* that "individuals have a reasonable expectation of privacy in *the whole of* their physical movements." 138 S. Ct. at 2217. The City's continuous monitoring of Plaintiffs' movements, a monitoring that it would have been unable to undertake before the development of modern electronic equipment, impinges on their reasonable expectations of privacy in the whole of their physical movements.

70. By alleging a violation of their "reasonable expectations of privacy in the whole of their physical movements," Plaintiffs are referring to the privacy expectations recognized and upheld by the U.S. Supreme Court in *Carpenter*.

71. The City engages in a Fourth Amendment search by collecting and retaining three years of movement data and thereby infringing Plaintiffs' "reasonable expectations of privacy in the whole of their physical movements." Indeed, any collection and retention of data for a period exceeding 30 days constitutes a Fourth Amendment search.

72. The City may not engage in such monitoring without first obtaining a judicial warrant supported by probable cause.

73. The City has not obtained a judicial warrant authorizing it to record Plaintiffs' movements for an extended period of time, nor does it possess probable cause for engaging in such a search. Accordingly, the City has injured Plaintiffs by violating their Fourth Amendment rights to be secure against unreasonable searches.

CLAIM II

Violation of Article I, Section 12

74. Plaintiffs Schemel, Overman, and Tschida repeat and incorporate by reference the allegations of Paragraphs 7 through 48 of the Complaint.

75. Article I, section 12 of the Florida Constitution states that "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated."

76. The privacy protections afforded by Article I, section 12 closely parallel those afforded by the Fourth Amendment. Indeed, it contains a conformity clause, which requires that "[t]his right shall be construed in

conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court."

77. Even before the U.S. Supreme Court's *Carpenter* decision addressed the Fourth Amendment implications of government collection of cell phone data, the Florida Supreme Court held that collection of such data constituted a government "search," stating that an individual has "a subjective expectation of privacy in the location signals transmitted solely to enable the private and personal use of his cell phone, *even on public roads*, and that he d[oes] not voluntarily convey that information to the service provider for any purpose other than to enable use of his cell phone for its intended purpose." *Tracey v. State*, 152 So. 3d 504, 525 (Fla. 2014) (emphasis added).

78. For the same reasons that the City's recording and retention of Plaintiffs' movements constitutes a "search" for Fourth Amendment purposes (as set forth in Paragraphs 65-71), it also constitutes a "search" within the meaning of Article I, Section 12.

79. Under Article I, section 12, the City may not engage in such monitoring without first obtaining a judicial warrant supported by probable cause.

80. The City has not obtained a judicial warrant authorizing it to record Plaintiffs' movements for an extended period of time, nor does it possess probable

cause for engaging in such a search. Accordingly, the City has injured Plaintiffs by violating their rights under Article I, section 12 to be secure against unreasonable searches.

CLAIM III

Violation of Article I, Section 23

81. Plaintiffs Schemel, Overman, and Tschida repeat and incorporate by reference the allegations of Paragraphs 7 through 48 of the Complaint.

82. Article I, section 23 of the Florida Constitution, entitled "Right of Privacy," states that "[e]very natural person has the right to be let alone and free from government intrusion into the person's private life except as otherwise provided herein."

83. The Florida Supreme Court has explained that the right to privacy protected by Article I, section 23 is "no less fundamental" than other rights protected by the Florida Constitution, *Weaver v. Myers*, 229 So. 3d 1118, 1130 (Fla. 2017), and is "broader, more fundamental, and more highly guarded than any federal counterpart." *Id.* at 1125.

84. If an individual possesses a legitimate expectation of privacy in the information at issue, then Article I, section 23 shifts the burden of proof to the government to show that (a) there is a "compelling state interest" warranting an

intrusion into the individual's privacy for the purpose of collecting the information; and (b) the compelling interest is satisfied "through use of the least intrusive means." *Winfield v. Division of Pari-Mutual Wagering*, 477 So. 2d 544, 547 (Fla. 1985).

85. Florida voters added Article I, section 23 to the Florida Constitution in 1980.

86. The then-Chief Justice of the Florida Supreme Court explained that the amendment was prompted by "a public concern about how personal information concerning an individual citizen is used," particularly in light of technological changes that facilitate collection and "easy distribution by computer operated information systems." *Rasmussen v. South Fla. Blood Service, Inc.*, 500 So. 2d 533, 536 (Fla. 1987) (quoting speech by Overton, C.J., to Florida's 1977-78 Constitution Revision Commission).

87. The "principal aim" of Article I, section 23 is "to afford individuals some protection against the increasing collection, retention, and use of information relating to all facets of an individual's life." *Ibid.*

88. Among the aspects of a person's "private life" that are protected from government intrusion by Article I, section 23 is the whole of that person's physical movements. In asserting an Article I, section 23 privacy interest in "the whole of

a person's physical movements," Plaintiffs are referring to the privacy expectations recognized and upheld by the U.S. Supreme Court in *Carpenter*.

89. The Florida legislature has recognized that ALPR data implicates privacy concerns. ALPR data are *exempt* from Florida's public records law, meaning that they are protected from disclosure by state actors. *See* Fla. Stat. § 316.0777.

90. The government intrudes upon the privacy interests protected by Article I, section 23 by collecting and retaining information about an individual's movements for an extended period of time, regardless whether the government publicly discloses the retained information or makes any other specific use of the information.

91. The City has no compelling interest in collecting and retaining information about Plaintiffs' movements for an extended period of time.

92. The City contends that the collection and retention of its ALPR information—consisting of millions of license-plate images, categorized by date and location of each image—serves a law-enforcement purpose. But the City has never articulated publicly what that law-enforcement purpose is and why it is "compelling."

93. Even if the City's alleged law-enforcement purpose could satisfy the "compelling state interest" requirement imposed by Article I, section 23, the City's ALPR system does not seek to satisfy that interest "through use of the least intrusive means."

94. The City retains its records of Plaintiffs' movements for at least three years—and even longer if it claims that continued retention serves a valid investigatory purpose. A far less intrusive means of satisfying whatever interest the City has in recording Plaintiffs' daily movements would be to limit retention of those records to no more than a very short period of time, after which the City would destroy all such records.

95. Because the City cannot demonstrate: (1) that it has a compelling interest in retaining for three or more years its records of Plaintiffs' movements; and (2) that retention serves its valid interests through use of the least intrusive means, the City has injured Plaintiffs by violating their rights under Article I, section 23.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Shannon Schemel, Stephen Overman, and Michael Tschida respectfully pray that this Court award the following relief:

A. A declaration that Defendant is violating Plaintiffs' rights under the Fourth Amendment to the U.S. Constitution and Article I, sections 12 and 23 of the Florida Constitution by using ALPRs to record detailed information about their daily movements and by retaining that information for three or more years;

B. An injunction prohibiting Defendant from retaining for more than a brief period information it gathers through ALPRs regarding Plaintiffs' movements by car;

C. An injunction requiring Defendant to delete all such information gathered by Defendant.

D. An injunction requiring Defendant to direct other law enforcement agencies with whom it has shared such information to delete the information, and prohibiting Defendant from sharing information regarding Plaintiffs with other law enforcement agencies unless those agencies agree to abide by the terms of the Court's judgment as it applies to Defendant.

E. Such other relief as the Court deems just and proper, including an award of attorneys' fees and costs.

Dated: March 7, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amended Complaint was served by electronic filing on March 7, 2022, on all counsel of record:

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