

AUTOMATED LICENSE PLATE READERS:
A GOVERNMENT TOOL WHEN LEFT UNCHECKED WILL
PROLIFERATE THE POWER OF THE NANNY STATE BY
UNCONSTITUTIONALLY INTRUDING ON OUR PRIVACY
IN ASSOCIATIONS

*Mark Atwood**

INTRODUCTION

In the United States Supreme Court decision, *Kansas v. Glover*, an officer's use of Automated License Plate Readers (ALPRs) led to an African American's arrest and eventual conviction for possessing a revoked license.¹ An underlying issue questioning whether there was a constitutional "search" implicates privacy interests under the Fourth Amendment right against "unreasonable searches and seizures."² Circuits that have addressed this issue have collectively held that automated license plate checks are not considered "searches" under the Fourth Amendment because, on public roads, plates are in "plain view," and thus a person does not possess a "reasonable expectation" of privacy.³ In *United States v. Jones*, Justice Sotomayor's concurrence suggests global positioning system (GPS) tracking fundamentally alters the relationship between citizens and the government.⁴ Although the majority opinion focused on reviving the Fourth Amendment trespass test, the concurrences posited that the *Katz* reasonable expectation of privacy test should be exclusive and dispositive.⁵ Justice Sotomayor's observation flows nicely into Justice Alito's

* George Mason University Antonin Scalia Law School, J.D. expected, 2022.

¹ *Kansas v. Glover*, 140 S. Ct. 1183, 1191 (2020) ("Under the totality of the circumstances, of this case, Deputy Mehrer drew an entirely reasonable inference that Glover was driving while his license was revoked.").

² U.S. CONST. amend. IV.

³ *United States v. Miranda-Sotolongo*, 827 F.3d 663, 668 (7th Cir. 2016); *United States v. Diaz-Castaneda*, 494 F.3d 1146, 1150 (9th Cir. 2007) ("[W]e hold that a license plate check does not qualify as a search under the Fourth Amendment."); *United States v. Ellison*, 462 F.3d 557, 561-63 (6th Cir. 2007); *United States v. Matthews*, 615 F.2d 1279, 1285 (10th Cir. 1980) ("Because they are in plain view, no privacy interest exists in license plates.").

⁴ 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring).

⁵ See *id.* at 411 (majority opinion).

“pervasive and prolonged” approach, to which four Justices signed on, agreeing that long-term, intrusive GPS tracking of location and association information is constitutionally unwarranted.⁶ In *Carpenter v. United States*, the Court applied a similar approach to Justice Alito’s opinion in *Jones*.⁷ The Supreme Court held that obtaining historic cell site location information over a prolonged period, in this case 127 days, without a warrant revealed pervasive, intimate details of one’s associative encounters, rising to the level of unconstitutionality.⁸ The prolonged use of ALPRs, which can reveal a similar breadth of information, could be considered a “search” depending on the nature and extent of an officer’s investigation.⁹

A less-settled issue raised by *Kansas v. Glover* is the technological advancement and proliferation of the ALPR devices, which can take thousands of photographs per minute capturing plates, vehicles, and drivers.¹⁰ The recording of every American’s movements on roads and city streets raises First Amendment concerns, especially with respect to freedom of association.¹¹

In 1997, when ALPRs were used less frequently than today, a D.C. police lieutenant extorted money from a group of men who frequented a “gay bar,” threatening to reveal their sexuality to the public by recording the men’s license plates using an ALPR.¹² The police

⁶ *Id.* at 430 (Alito, J., concurring).

⁷ 138 S. Ct. 2206, 2218 (2018). *Cf. Jones*, 565 U.S. at 430-32 (Alito, J., concurring).

⁸ *Carpenter*, 138 S. Ct. at 2218. *Cf. Jones*, 565 U.S. at 430 (Alito, J., concurring).

⁹ *Jones*, 565 U.S. at 419-20 (Sotomayor, J., concurring); *see also* *Commonwealth v. McCarthy*, 484 Mass. 493, 506 (2020) (“With enough cameras in enough locations, the historic location data from an ALPR system in Massachusetts would invade a reasonable expectation of privacy and would constitute a search for constitutional purposes.”); *Commonwealth v. Augustine*, 467 Mass. 230, 254 (2014).

¹⁰ *See* Brief for Respondent at 49, *Kansas v. Glover*, 2019 WL 4167080 (2019); Brief of Amici Curiae Electronic Privacy Information Center (EPIC) and Twenty-Two Technical Experts and Legal Scholars in Support of Respondent at 20-22, *Kansas v. Glover*, 140 S. Ct. 1183 (2020) (No. 18-556) (urging the Court not to adopt a rule that allows for ALPRs to be used as reasonable suspicion, but ultimately the Court decides not to answer the question of ALPRs); Bill Siuru, *Fighting Crimes with ALPRs*, P&SN (Sept. 18, 2019), <https://policeandsecuritynews.com/2019/09/18/fighting-crime-with-alprs/> (“The latest camera technology can capture about 2,000 license plates a minute on vehicles traveling up to 120 mph.”).

¹¹ *See Automated License Plate Readers: Street-Level Surveillance*, ELEC. FRONTIER FOUND., <https://www EFF.org/pages/automated-license-plate-readers-alpr> (last visited Jan. 2, 2020) (“Taken in the aggregate, ALPR data can paint an intimate portrait of a driver’s life and even chill First Amendment protected activity.”).

¹² Avis Thomas-Lester & Toni Locy, *Chief’s Friend Accused of Extortion*, WASH. POST, (Nov. 26, 1997) <https://www.washingtonpost.com/wp-srv/local/longterm/library/dc/dcpolice/stories/stowe25.htm> (last visited Jan. 4, 2020).

lieutenant abused his power and threatened to use personal information to deter the men's freedom of association out of fear of being ostracized by society and friends.¹³ Abuses and threats of this nature, including the targeting of political and religious minorities, multiply as the number of ALPRs increase.¹⁴ The rise in abuses and threats to associative freedom comes partially because existing statutory law allows the recording of such information to be stored from three minutes upwards to 150 days.¹⁵ Even more devastating is that many states have placed no restrictions on law enforcement's use of ALPRs.¹⁶ In the past seven years, the number of states with no restrictions has decreased from 45 to 33, which potentially signals a growing public policy concern with ALPRs and their use as an encroachment by state governments and law enforcement officers.¹⁷ There is a genuine privacy concern of balancing proper law enforcement practice with an individual's right to freely associate as addressed by the Supreme Court.¹⁸ As the Court in *NAACP v. Alabama ex rel. Patterson* notes, there is a substantial connection between the right to associate and one's expectation of privacy in associating with groups free from government surveillance.¹⁹

In the Background Section, this Comment will examine the history of ALPRs, the application of ALPRs in a few states, and the development of the First Amendment's freedom of association in both its expressive and intimate forms. The Analysis Section will apply the

¹³ See *id.*

¹⁴ See *McCarthy*, 484 Mass. at 504-07 ("A detailed account of a person's movements, drawn from electronic surveillance, encroaches upon a person's reasonable expectation of privacy because the whole reveals far more than the sum of the parts.").

¹⁵ See N.H. REV. STAT. ANN. § 261:75-b (repealed 2016, but effective Jan. 1, 2027), <http://www.gencourt.state.nh.us/rsa/html/XXI/261/261-75-b.htm> ("[R]ecords of number plates read shall not be recorded or transmitted anywhere and shall be purged from the system within 3 minutes of their capture."); see also ARK. CODE ANN. § 12-12-1804 (West 2016) ("[P]rohibits data from being preserved for more than 150 days.") (these two statutes were chosen to indicate the extremes of the shortest retention time to the longest retention time).

¹⁶ Catherine Crump, *You are Being Tracked: How License Plate Readers are Being Used to Track Americans' Movements*, AM. CIVIL LIBERTIES UNION at 31 (2013), https://www.aclu.org/sites/default/files/field_document/071613-aclu-alprreport-opt-v05.pdf.

¹⁷ See *id.*; see also *Automated License Plate Readers: State Statutes*, NAT'L CONF. OF STATE LEGISLATURES (Feb. 2, 2022), <https://www.ncsl.org/research/telecommunications-and-information-technology/state-statutes-regulating-the-use-of-automated-license-plate-readers-alpr-or-alpr-data.aspx> (showing that 33 states currently do not have restrictions).

¹⁸ *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).

¹⁹ See *id.* (recognizing "the vital relationship between freedom to associate and privacy in one's associations").

legal precedent of the First Amendment's freedom of association in the context of ALPRs. This Section argues that using ALPRs to track one's location raises genuine First Amendment concerns of keeping one's associations private and therefore violates the Constitution, especially when coupled with the fact that such technology can compile a detailed chronicle of one's daily life. Lastly, the Analysis Section proposes and supports a few policy recommendations for states to enact to ensure their state actors do not violate the right of citizens to freely associate.

BACKGROUND

First, the Background Section will begin by exploring the development of ALPRs, the distinctive capabilities of such devices when used in law enforcement situations, and how their use is limited in a few states. Second, the Background Section will lay out the constitutional development of the First Amendment's right to freedom of association and its connection with genuine privacy interests.

I. WHAT ARE AUTOMATED LICENSE PLATE READERS?

This Section starts with the history of ALPRs, showing their development from large, clunky cameras into smaller, high-speed cameras that automatically capture passing cars and their plates.²⁰ Section I, Part B addresses the various uses in which law enforcement employs ALPRs to catch criminals through designated hot lists,²¹ geofencing,²² or to survey ordinary Americans who forgot to pay for

²⁰ See *The History of the ANPR*, ANPR INT'L, <http://www.anpr-international.com/history-of-anpr/> (last visited Dec. 10, 2020); see also Crump, *supra* note 16, at 4 ("Automatic license plate readers are made up of high-speed cameras designed to capture a photograph of each and every passing license plate, combined with software that analyzes those photographs to identify the license plate number.").

²¹ See INT'L ASS'N OF CHIEFS OF POLICE, *Privacy Impact Assessment Report for the Utilization of License Plate Readers*, Alexandria, VA, September 2009, 2, 25-26, <http://web.archive.org/web/20131024095529/http://www.theiacp.org/LinkClick.aspx?fileticket=N%2BE2wvY%2F1QU%3D&tabid=87> (explaining that ALPR's purpose is to signal to a law enforcement officer that a particular wanted vehicle displaying its license plate number is in the vicinity of the camera. The hot lists also serve a public safety purpose and are controlled by each local law enforcement agency).

²² See Crump, *supra* note 16, at 6 (defining geofencing as "law enforcement or private companies can construct a virtual fence around a designated geographical area, to identify each vehicle entering that space").

their parking tickets.²³ Section I, Part C addresses two states, New Hampshire and Utah, that have placed strict restrictions on law enforcement's use of ALPRs.²⁴ Section I, Part D addresses states on the opposite extreme, Arkansas and New Jersey, which attempt to place relaxed limits on law enforcement.²⁵ It is important to note that New Jersey's bill is proposed legislation that stalled in the state legislature; it is narrowly used in this Comment to serve as a cautionary example for states that may attempt to implement similar measures. These states provide for longer retention rates and extensive use of ALPR data to law enforcement, from controlling traffic and transportation areas to obtaining evidence in general criminal investigations.²⁶ Lastly, Section I, Part E addresses two states, New York and Virginia, that currently have no restrictions on law enforcement use. This is particularly concerning because these states grant law enforcement unfettered access to ALPR data without a set expiring retention rate.²⁷ Even further, despite the New York Police Department targeting Muslim protesters in 2012, the New York Senate has not taken action to place any restrictions on law enforcement use of ALPRs.²⁸ This Part then briefly concludes with Alexis de Tocqueville's fear that unrestrained government action is detrimental to American democ-

²³ David J. Roberts & Meghann Casanova, *Automated License Plate Recognition (ALPR) Systems: Policy and Operational Guidance for Law Enforcement*, DEP'T OF JUST. at 4 (2012) <https://www.ncjrs.gov/pdffiles1/nij/grants/239604.pdf> (addressing several law enforcement uses of ALPR including searching for stolen vehicles, following vehicles thought to be connected with terrorist activities, looking for failed parking tickets and lack of insurance or registration, and finding missing persons through such AMBER and BOLO alerts).

²⁴ See N.H. REV. STAT. ANN. § 261:75-b; UTAH CODE ANN. § 41-6a-2003 (2014).

²⁵ See ARK. CODE ANN. §§ 12-12-1803 (b)(4)(A)-(B), 12-12-1804 (2013); S. 3415, 217th Leg. at 1 (N.J. 2017), <https://legiscan.com/NJ/text/S3415/2016> (showing the proposed text of the New Jersey bill).

²⁶ *Id.*

²⁷ VA. CODE ANN. § 2.2-3802 (2006); see also *Neal v. Fairfax Cnty. Police Dep't.*, 299 Va. 253, 269 (2020) (finding that the ALPR system data can be restored and held in a database for over a year and would not violate state privacy laws unless it included additional information like addresses and phone numbers); Brad Kutner, *Virginia High Court Restores License Plate Data Collection*, COURTHOUSE NEWS SERV., <https://www.courthousenews.com/virginia-high-court-restores-license-plate-data-collection/>.

²⁸ See S. 7254 (New York, Apr. 18, 2019) (an in-assembly bill calling to amend the general business law and executive law concerning the use of ALPRs by emphasizing that non-law enforcement use of such data is prohibited. However, the law does not place any restrictions on law enforcement's access to the data).

racy and the protection of individual liberties, such as the right to association.²⁹

A. *General Background of ALPRs*

Automated license plate readers were invented and developed in Britain at the Police Scientific Development Branch in 1976.³⁰ Initially, as with most technological inventions, the first model consisted of a large, clunky frame and a high price tag of production.³¹ As computer software and digital technology progressed throughout the last two decades of the twentieth century, the cameras became smaller, less expensive, and more advanced, allowing modern ALPRs to be systematically placed across public roadways.³² Their smaller frame makes it easier to fix them on top of police cars, bridges, or streetlights.³³ Their lower cost has led to increased use by law enforcement and a higher number of cameras installed, which in turn increases the amount of information and images collected.³⁴ Their high speed allows for the capturing of thousands of images of not only the vehicle but also the surrounding area, and sometimes drivers themselves.³⁵

²⁹ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* V. I, 88 (H.C. Mansfield & D. Winthrop eds., 2002) (demonstrating concern with an ever-growing surveillance state that will emerge if Americans do not properly restrain or check the government).

³⁰ *The History of the ANPR*, ANPR INT'L, <http://www.anpr-international.com/history-of-anpr/>. In the United Kingdom, the devices are referred to as "automatic number-plate recognition devices." *Id.*

³¹ *Id.*

³² See ELEC. FRONTIER FOUND., *supra* note 11 ("ALPRs are high-speed, computer-controlled camera systems that are typically mounted on street poles, streetlights, highway overpasses, mobile trailers, or attached to police squad cars.").

³³ Crump, *supra* note 16, at 4 ("The devices have been proliferating around the country at worrying speed. Mounted on patrol cars or placed on bridges or overpasses, license plate readers combine high-speed cameras that capture photographs of every passing license plate with software that analyzes those photographs to identify the plate number.").

³⁴ Federal Signal, *PAGIS ALPR Software Data Sheet* (2010), Public Records Responses, at 18537-38, <http://www.aclu.org/files/FilesPDFs/ALPR/new-jersey/18537-18538%20Vineland%20OPRA%20Response%2024.pdf> (explaining how the Police ALPR Graphical Interface System (PAGIS), the highly advanced cheaper ALPR system, benefits the police with its four dual-channel cameras connected to a trunk-monitored processor and an in-car officer software); see also *NDI's License Plate Readers*, NDI RECOGNITION SYSTEMS, <https://www.ndi-rs.com/how-alpr-works/> (showing Florida NDI ALPRs can be used to constantly monitor an area when mounted to a fixed area such as a bridge, streetlight, or overpass).

³⁵ Crump, *supra* note 16, at 4-6; see Brief for Respondent at 7-10, *Kansas v. Glover*, 140 S. Ct. 1183 (2020) (No. 18-556) (showing that the photographs can sometimes reveal the drivers themselves); see also Roberts & Casanova, *supra* note 23, at 4 ("The user interface allows the officer to compare the ALPR OCR interpretation of the license plate number to ensure the

The portion of the image with the license plate is converted into machine-readable text that is stored in a database accessible to law enforcement and, in some states, certain agencies.³⁶

B. Law Enforcement Use of ALPRs

Law enforcement officers widely use ALPRs to locate stolen vehicles and possibly ensure the enforcement of quarantine laws during a pandemic.³⁷ When the ALPR scans the license plate, the information is transfigured into its alphanumeric code and stored in a third-party database.³⁸ Police and federal agencies, such as the United States Customs and Border Protection, utilize these devices to match the license plates to other databases that keep track of drug trafficking, stolen vehicles, AMBER alerts, wanted criminals on “hot lists” for felony arrest warrants, and so on.³⁹ Such devices have proven effective in finding and apprehending wanted criminals. For example, an ALPR system helped law enforcement officials catch a Kansas City criminal who conducted nine shootings on a Kansas City highway in

accuracy of the ‘read,’ and to see the larger, contextual image to help the officer identify the specific vehicle of interest.”); Angel Diaz & Rachel Levinson-Waldman, *Automatic License Plate Readers: Legal Status and Policy Recommendations for Law Enforcement Use*, BRENNAN CENTER FOR JUST. (Sept. 10, 2020) (“Using ALPRs to record the movements of all vehicles in a municipality goes far beyond the limited information that is revealed by an isolated capture of license plate data. It also goes beyond what an ordinary person could observe on a public road.”).

³⁶ AM. CIVIL LIBERTIES UNION, *supra* note 16, at 4; *see also* NDI RECOGNITION SYSTEMS, *supra* note 34 (explaining that Florida NDI ALPRs are used in industries concerning parking management, geo monitoring gas stations, gated communities (meaning for the private use of a group of individuals), and in restaurants).

³⁷ Roberts & Casanova, *supra* note 23, at 4 (discussing the various ways in which law enforcement uses ALPRs); Federal Signal, PAGIS ALPR Software Data Sheet (2010), Public Records Responses, at 18537-38, <http://www.aclu.org/files/FilesPDFs/ALPR/new-jersey/18537-18538%20Vineland%20OPRA%20Response%2024.pdf>; *see also* Prashant Gopal and Brian K. Sullivan, *Rhode Island Police to Hunt Down New Yorkers Seeking Refuge*, BLOOMBERG NEWS, (Mar. 27, 2020), <https://www.bloomberg.com/news/articles/2020-03-27/rhode-island-police-to-hunt-down-new-yorkers-seeking-refuge> (explaining that Rhode Island quarantine laws direct law enforcement officers to check license plate readers as they pass into Rhode Island looking for incomers from high-density COVID areas, such as New York.); Brian A. Reaves, *Local Police Departments, 2013: Equipment and Technology*, Bureau of Justice Statistics, U.S. Dep’t of Just., Washington, D.C., July 2015, 4, <https://www.bjs.gov/content/pub/pdf/lpd13et.pdf> (showing that about 2,000 police departments used ALPRs in 2013).

³⁸ Crump, *supra* note 16, at 4-5.

³⁹ *Id.* at 5; Roberts & Casanova, *supra* note 23, at 4.

2014.⁴⁰ The officers who caught the dangerous killer credited an eyewitness and the use of ALPRs which scanned the criminal's license plate on four separate occasions.⁴¹ The data from the license plate reader, coupled with GPS technology, led officers to connect the plate to locations in the vehicle's surrounding vicinity in the digital images, leading to a specific address and subsequently the suspect.⁴² Another way officers have used ALPRs is through geofencing, a software program developed for the police, which creates a virtual fence around a certain geographic area, so police know when a particular plate on a "hot list" passes through.⁴³

There are undoubtedly law enforcement benefits to using ALPRs, including ferreting out crime at a faster rate through almost instantaneous matching capabilities.⁴⁴ However, the databases and the matching capabilities do not always result in an accurate match, leading to arrests of innocent citizens.⁴⁵ Thus, like any novel government enforcement tool that can potentially lead to a constitutional search or seizure, there is a question of balancing individual rights along with due process concerns for officer discretion against a government interest.⁴⁶

Although the license plate readers are non-discretionary, meaning that they will capture a photograph of "each and every passing

⁴⁰ Eric Adler, *Are License Plate Readers Protecting the Public or Prying?*, GOVTech (Apr. 28, 2014), <https://www.govtech.com/public-safety/Are-License-Plate-Readers-Protecting-the-Public-or-Prying.html>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Crump, *supra* note 16, at 6 ("Law enforcement or private companies can construct a virtual fence around a designated geographical area, to identify each vehicle entering that space.").

⁴⁴ *Id.* at 5 (noting that the ALPR system and databases provide an instant, non-discretionary alert to law enforcement if a match or hit appears).

⁴⁵ Pam Greenberg, *Automated License Plate Readers*, 23 LEGISBRIEF No. 8 (Feb. 2015) ("[I]naccuracies in databases used with ALPRs could lead to false matches of license plate readers to innocent individuals."); see also Roberts & Casanova, *supra* note 23, at 4-5 (explaining that officers may check the photograph and the larger contextual image to confirm the plate number and its criminal affiliation); ELEC. FRONTIER FOUND., *supra* note 11 ("Officers are instructed to visually confirm that a plate number is a match. Failure to manually confirm, combined with machine error, has caused wrongful stops.").

⁴⁶ *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2179 (2016); *Skinner v. Ry Lab. Exec's.*, 489 U.S. 602, 619 (1989); see also *United States v. Martinez-Fuerte*, 428 U.S. 543, 557, 559 (1976) (explaining that fixed checkpoints, a government enforcement tool, do not intrude on privacy rights because individuals are not surprised by a fixed checkpoint and the officer's discretion was sufficiently limited because state border patrol agents defined the location for vehicles to be stopped).

license plate,” the officers possess discretion to manually confirm license plates and to access past database records of one’s location movements.⁴⁷ Thus, police departments and state governments argue that the amount of crime detected and prosecuted in a fraction of the time justifies lower restrictions on ALPR use. To the contrary, privacy and interest group advocates argue that the focus should be on government intrusion and the chronicle of personal information that can be revealed from ALPR images and tracking.⁴⁸

One of the most controversial uses of ALPRs is when the police utilize the data to trace a person’s past movements to verify that a suspected person was in a certain location at a particular time.⁴⁹ The underlying issue with the government tracing a person’s location movements was raised in *Carpenter v. United States*.⁵⁰ The *Carpenter* Court feared that a “detailed chronicle of a person’s physical presence compiled every day, every moment over several years,” as in that case captured by cellular site location information (CSLI), provides law enforcement with too much discretion to invade a citizen’s Fourth Amendment privacy rights.⁵¹ The Court required that the police

⁴⁷ Crump, *supra* note 16, at 4, 7 (“[L]icense plate readers are typically programmed to retain the location information and photograph of *every vehicle* that crosses their path, not simply those that generate a hit.”); ELEC. FRONTIER FOUND., *supra* note 11 (“Officers are instructed to visually confirm that a plate number is a match. Failure to manually confirm, combined with machine error, has caused wrongful stops.”).

⁴⁸ Marnie Eisenstadt, *License plate tracking nabs criminals, keeps tabs on thousands of innocent people*, (updated Mar. 22, 2019), https://www.syracuse.com/news/2014/03/license_plate_tracking_nabs_criminals_keeps_tabs_on_thousands_of_innocent_people.html. Compare with John Agar, *Grand Rapids Police say automatic license-plate reader leads to crime suspects, parking scofflaws*, updated Apr. 3, 2019), <https://www.mlive.com/news/grand-rapids/2013/11/grand-rapids-police-say-automa.html> (this second article features the police arguing that the catching and prosecuting of dangerous criminals and thieves outweighs the rare occurrence that the government will harm an innocent individual).

⁴⁹ Crump, *supra* note 16, at 7-8 (noting license plate readers, as a result of increased installation throughout the public thoroughfares, have led to tracking of past movements to the point that images can reveal a driver’s locations outside church, the doctor’s, or school, which can lead to a report of one’s daily life and associations). The fear from privacy groups is the tracing or tracking of past movements, not necessarily the ALPRs capture of a particular moment in time; this points to the need to restrain officer discretion – for example, the officer could request a limited amount of data to a specified time. The timespan of requested information, therefore, should be as narrowly tailored as possible. See *Carpenter*, 138 S. Ct. at 2218 (suggesting that 127 days and 12,898 location points were unreasonable, and perhaps a narrower scope of the requested data could have been warranted).

⁵⁰ *Carpenter*, 138 S. Ct. at 2219-20.

⁵¹ *Id.* at 2220. Cf. *United States v. Maynard*, 615 F.3d 544, 562 (D.C. Cir. 2010) (“A person who knows all of another’s travels can deduce whether he is a weekly churchgoer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment,

obtain a warrant before accessing the historic CSLI from the wireless phone carriers which retained the information.⁵² Lastly, the Court recognized that the “detailed chronicle” tangentially burdened the right of citizens to be private in their associations.⁵³ Therefore, the Court’s ruling weighed on the side of the advocates for privacy and constitutional rights in location information and, by extension, associative rights.⁵⁴

C. *Most Restrictive States: New Hampshire and Utah*

Not all states have imposed restrictions on ALPRs.⁵⁵ But, of the 17 states that have attempted to pass legislation restricting the use of ALPRs,⁵⁶ New Hampshire⁵⁷ and Utah⁵⁸ prove to be the most restrictive, while Arkansas’s⁵⁹ and New Jersey’s⁶⁰ longer time limits on retention rates make them facially less stringent on law enforcement use.⁶¹ Utah strictly limits law enforcement’s use of ALPRs to the purpose of protecting public safety or obtaining evidence in a criminal investigation.⁶² The statute also limits the retention to nine months for police

an associate of particular individuals or political groups—and not just one such fact about a person, but all such facts.”). Though *Maynard* discusses the inherent dangers of GPS trackers, the same fear applies to the use of ALPRs when the technology can reveal similar associational behaviors and patterns.

⁵² *Carpenter*, 138 S. Ct. at 2217.

⁵³ *Id.* at 2217, 2220.

⁵⁴ *Id.* at 2219-20.

⁵⁵ *Automated License Plate Readers: State Statutes*, NAT’L CONF. OF STATE LEGISLATURES (June 23, 2020), <https://www.ncsl.org/research/telecommunications-and-information-technology/state-statutes-regulating-the-use-of-automated-license-plate-readers-alpr-or-alpr-data.aspx> (last visited Jan. 1, 2021); see AM. CIVIL LIBERTIES UNION, *supra* note 16, at 31 (noting that at the time of publication, 2013, there were only five states with laws regulating ALPRs).

⁵⁶ See NAT’L CONF. OF STATE LEGISLATURES, *supra* note 55.

⁵⁷ N.H. REV. STAT. ANN. § 261.75-b VIII (repealed 2016, now effective Jan. 1, 2027).

⁵⁸ UTAH CODE ANN. § 41-6a-2003 (2014).

⁵⁹ ARK. CODE ANN. § 12-12-1804 (West 2016).

⁶⁰ S. 3415, 217th Leg., at 1 (N.J. 2017) (note that the bill is considered “dead,” and has not left committee since 2017. The references to this NJ bill are used as a cautionary tale to future legislatures and the retention times are merely proposals).

⁶¹ NAT’L CONF. OF STATE LEGISLATURES, *supra* note 55.

⁶² UTAH CODE ANN. § 41-6a-2003 (2020) (listing out the restrictions on the use of ALPR systems; including accepted purposes such as controlling access to a secured area, collecting an electronic toll, enforcing motor carrier laws, public transit district uses to conduct traffic pattern analysis to assess parking needs). Note that the restrictive phrase for both public safety and obtaining evidence is that it must be *in furtherance of a criminal investigation*. *Id.*

but only thirty days for private providers that request the information for a specified purpose approved by a warrant or other court order.⁶³

Similarly, New Hampshire places strict limits on how law enforcement and the government can use the data and images captured by ALPR systems.⁶⁴ New Hampshire explicitly prohibits the use of a license plate reader to capture images of persons and surroundings.⁶⁵ Thus, its system can only capture the license plate number and convert it to readable text to store it in the database.⁶⁶ The statute further details requirements for law enforcement actors.⁶⁷ The requirements include registering the device with the safety department, gaining approval from the safety commissioner, and implementing officer training to prevent abuses of discretion.⁶⁸ Another unique limitation is: “A positive match by an LPR device alone shall not constitute reasonable suspicion as grounds for a law enforcement officer to stop the vehicle. The officer shall develop independent reasonable suspicion for the stop”⁶⁹ If Kansas enacted a statute with the referenced limitation in New Hampshire’s statute, the *Kansas v. Glover* decision may have come out a different way because the LPR device is what prompted the officers to initially pull over the suspect.⁷⁰

Lastly, similar to Utah, New Hampshire provides explicit guidance for what constitutes an acceptable law enforcement purpose and places a three-minute temporal limitation to purge the data unless

⁶³ UTAH CODE ANN. § 41-6a-2004 (2014) (noting limitations such as the government not being allowed to sell captured plate data nor being able to share the data with any agency not specified by the statute in § 41-6a-2003(2)); see also NAT’L CONF. OF STATE LEGISLATURES, *supra* note 55.

⁶⁴ N.H. REV. STAT. ANN. § 261:75-b I (2007, amended to be effective in 2027).

⁶⁵ See *id.* (stating “[a]n LPR shall be installed for the sole purpose of recording and checking license plates and shall not be capable of photographing or recording or producing images of the occupants of a motor vehicle”). This statute shows the importance of not allowing ALPR systems to store the vehicle’s contextual image, which suggests New Hampshire recognizes some privacy in a vehicle but not in the license plate number. *Id.*

⁶⁶ *Id.*

⁶⁷ N.H. REV. STAT. ANN. § 261:75-b III (2016).

⁶⁸ *Id.*; see also Rilwan Balogun, *New Orleans ordinance, if passed, could limit license plate readers*, <https://www.fox8live.com/2020/07/08/new-orleans-ordinance-if-passed-could-limit-license-plate-readers/> (explaining a proposed New Orleans ordinance would be similar in requiring city agencies and law enforcement to request the installation of more cameras through city council; according to an ACLU representative, the request would set forth “a clear statement on how it’s intended to be used, what the scope and purpose is and what the anticipated impacts are”).

⁶⁹ N.H. REV. STAT. ANN. § 261:75-b VI (2016).

⁷⁰ 140 S. Ct. at 1183-84.

there is an instantaneous match with one of the “hot list” databases.⁷¹ Because both statutes place significant limitations on law enforcement through short retention rates and narrowing the scope of acceptable purposes, law enforcement is sufficiently limited in their discretion to access ALPR data.

D. *Least Restrictive States: Arkansas and New Jersey*

Arkansas and New Jersey pursue a different approach in regulating ALPRs through extended retention times.⁷² Through its legislation, Arkansas evinces a legislative concern for potential law enforcement abuse by restricting the use of ALPRs to law enforcement agencies, parking enforcement entities, and agencies that have a stated purpose of controlling area access.⁷³ The statute’s legislative history shows that it has recently expanded the purposes to include controlling access to areas by the Arkansas Highway Police Division and the Arkansas Department of Transportation.⁷⁴ This potentially suggests the Arkansas legislature is, in response to the increased proliferation of the devices, relaxing restrictions rather than tightening them. In addition, the temporal limitation of 150 days retention time has not changed since the statute’s enactment in 2013.⁷⁵ The unchanged retention time indicates that the legislature has not been inclined to follow states like New Hampshire or Utah, which favor privacy and individual rights at the expense of law enforcement’s ability to prosecute crime.⁷⁶

⁷¹ N.H. REV. STAT. ANN. § 261:75-b V (2016) (listing the official law enforcement purposes including identifying stolen vehicles, vehicles associated with wanted or missing persons, vehicles involved in case-specific criminal investigative surveillance, vehicles involved in homicides, shootings, and other major crimes or incidents); *see also* N.H. REV. STAT. ANN. § 261:75-b VIII (2016) (“[R]ecords of number plates read by each LPR shall not be recorded or transmitted anywhere and shall be purged from the system within 3 minutes of their capture in such a manner that they are destroyed and are not recoverable, unless an alarm resulted in an arrest, a citation, or protective custody, or identified a vehicle that was the subject of a missing person or wanted broadcast . . .”).

⁷² ARK. CODE ANN. § 12-12-1804 (2013); S. 3415, 217th Leg., at 1 (N.J. 2017) (emphasis that this bill has not passed).

⁷³ ARK. CODE ANN. § 12-12-1803 (2013).

⁷⁴ ARK. CODE ANN. §§ 12-12-1803 (b)(4)(A)-(B) (recently amended in 2017 to expand the use of the ALPRs for these purposes).

⁷⁵ ARK. CODE ANN. § 12-12-1804 (2013).

⁷⁶ *See* N.H. REV. STAT. ANN. § 261:75-b V (2016); N.H. REV. STAT. ANN. § 261:75-b VIII (2016); UTAH CODE ANN. § 41-6a-2004 (2014).

Arkansas's 150-day limit consistently remained the longest retention time until New Jersey's bill was reintroduced in July 2017.⁷⁷ The purpose of the New Jersey bill was to impose requirements for law enforcement officials.⁷⁸ However, despite penalizing law enforcement \$1,000 for wrongfully authorizing the use of ALPR devices, the proposed bill requires a two-year retention rate of license plate reader data, which provides law enforcement officials and agencies with an extensive catalog of information.⁷⁹ The longer retention rates raise privacy concerns in violation of the First Amendment right to freedom of association and concerns similar to those found in Justice Alito's concurrence in *United States v. Jones*.⁸⁰ This is because as the number of ALPRs in the streets grows, the police or state actors have the capability for more intrusive, prolonged tracking of an individual's past location movements.⁸¹ These states, contrasted with Utah and New Hampshire, therefore favor the need to retain data for lawful enforcement over the genuine privacy and liberty interests of individuals.

E. *The Danger of Having No Restrictions: New York and Virginia*

Even though the restrictions are somewhat lenient in Arkansas and New Jersey, most states have no laws governing ALPRs.⁸² Not having such legislation allowed the New York Police Department

⁷⁷ ARK. CODE ANN. § 12-12-1804 (2013); S. 3415, 217th Leg. at 1 (N.J. 2017) (even though the bill has not passed, the text of the bill serves as a cautionary example to future legislatures attempting to pass similar legislation).

⁷⁸ S. 3415, 217th Leg. at 1 (N.J. 2017).

⁷⁹ *Id.* at 3.

⁸⁰ 565 U.S. at 419 (Alito, J., concurring) (arguing that technological advancements, such as GPS, intruding on privacy interests should be judged by their long-term monitoring; police surveillance is a "search" and infringes on reasonable privacy interests if it is pervasive and prolonged since prolonged surveillance can tell the government more than a casual citizen tracking someone can); *see also Jones*, 565 U.S. at 416 (Sotomayor, J., concurring) ("awareness that the Government may be watching chills associational and expressive freedom"); *see also United States v. Cuevas-Perez*, 640 F.3d 272, 285 (7th Cir. 2011); Crump, *supra* note 16, at 7 ("Longer retention periods and more widespread sharing allow law enforcement agents to assemble the individual puzzle pieces of where we have been over time into a single, high-resolution image of our lives. This constant monitoring and permanent recording violates our privacy in a number of respects.").

⁸¹ Crump, *supra* note 16, at 7-8 (noting LPRs, as a result of an increased installation throughout the public roadways, have led to tracking of past movements to the point that images can reveal a driver's locations outside church, the doctor's, or school, which can lead to a report of one's daily life and associations).

⁸² *See generally* NAT'L CONF. OF STATE LEGISLATURES, *supra* note 55.

(NYPD) to target Muslim protesters in 2012.⁸³ Following a publication including an inflammatory cartoon of the Prophet Muhammed, Muslims residing in New York City congregated at a mosque in Brooklyn to peacefully protest, pray, and assemble.⁸⁴ However, the police responded by using ALPR cameras to capture images and collect plate numbers to preserve the information in a database to survey protesters, potential terrorists, and political dissidents.⁸⁵

In a similar circumstance, Virginia police used ALPRs to record plate numbers at President Barack Obama's inauguration and political rallies in 2008.⁸⁶ During this time, the local Virginia Police Department that recorded the plate numbers set its system to automatically purge the data collected within 24 hours unless there was a direct hit on a criminal or car involved in a specific, ongoing investigation.⁸⁷ This purging practice prevented the misuses of the ALPR data with respect to tracking one's political associations or affiliations with the Democratic Party.⁸⁸ However, Virginia's state-wide statutory scheme does not place such a restriction on law enforcement use by requiring automatic purging practices.⁸⁹ Virginia allows for the collection of ALPR system data to remain in the database for over a year.⁹⁰ Virginia law places a limitation only on whether the retainment of specific information, such as addresses or phone numbers, would otherwise violate state privacy laws.⁹¹ The statute does not mention

⁸³ Adam Goldman & Matt Apuzzo, *With cameras, informants, NYPD eyed mosques*, THE ASSOCIATED PRESS, (Feb. 23, 2012), <https://www.ap.org/ap-in-the-news/2012/with-cameras-informants-nypd-eyed-mosques>.

⁸⁴ *Id.*; Crump, *supra* note 16, at 7-8 (explaining the chilling effect of ALPRs on associative freedom such as in religious congregations).

⁸⁵ Goldman & Apuzzo, *supra* note 83; Crump, *supra* note 16, at 7-8.

⁸⁶ Mark Bowes, *Police Recorded License Plates at Obama Inauguration*, RICHMOND TIMES-DISPATCH (August 18, 2013), http://www.timesdispatch.com/news/local/crime/article_32678a59-f9e1-5e46-8336-d5f4ba076cb7.html; Diaz & Levinson-Waldman, *supra* note 35 ("Law enforcement agencies have a history of misusing license plate surveillance to monitor First Amendment-protected activity. During the 2008 presidential election, the Virginia State Police recorded the license plate numbers of attendees at political rallies for Barack Obama and Sarah Palin – and subsequently at President Obama's inauguration . . .").

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ VA. CODE ANN. § 2.2-3802 (2018); *see also* Neal, 299 Va. at 269 (finding that the ALPR system data can be restored and held in a database for over a year and would not violate state privacy laws unless it included additional information like addresses and phone numbers); Kutner, *supra* note 27.

⁹⁰ *Id.*

⁹¹ *Id.*

protections on such surveillance with respect to political associations and affiliations.⁹² Therefore, a danger of Virginia's statute is that it does not place any meaningful restrictions on law enforcement use, especially if local police can track and record license plate readers of ordinary Americans attending a presidential inauguration.⁹³

A more recent concern with a lack of regulation comes in the form of private companies offering ALPR technology to average citizens to survey their communities by logging plate numbers of approved cars to enter the neighborhoods.⁹⁴ This is deeply troublesome because when private companies can retain all this data, they can use it for any purpose.⁹⁵ A similar concern is that with a rise of citizens obtaining ALPRs, regulated by private companies collaborating with police, there will be an expanding network of information that the government can access.⁹⁶ This concern resembles Alexis de Tocqueville's fear of the "nanny state:"

What does it matter to me, after all, that there should be an authority always on its feet, keeping watch that my pleasures tranquil, flying ahead, of my steps to turn away every danger without my needing to think about it, if this authority, at the same time that it removes the least thorns on my path, is absolute master of my freedom and my life⁹⁷

⁹² VA. CODE ANN. § 2.2-3802 (2018).

⁹³ Bowes, *supra* note 86.

⁹⁴ See Alfred Ng, *This company could turn every home's camera into a license plate reader*, C-NET (Jan. 30, 2020), <https://www.cnet.com/news/this-company-could-turn-every-homes-camera-into-a-license-plate-reader/>.

⁹⁵ *Id.*; see also *United States v. Yang*, No. 18-10341 (9th Cir. 2020) (a case dealing with a private company LEARN that maintained an aggregate database, which was not covered by state statutes).

⁹⁶ Ng, *supra* note 94. See e.g., *About Rekor: Providing Revolutionary Intelligence*, Open ALPR (last visited Jan. 1, 2021) (an example of a private company that is collaborating with the government and the police to expand the network of ALPRs. The company's website shows a photograph that tracks the make, model, year, license plate, and direction of every single vehicle on the highway, not just vehicles that display an alert on a hot list); Gil Aegerter, *License plate data not just for cops: Private companies are tracking your car*, NBC News (July 19, 2013, 4:44 AM); Vigilant Solutions, National Vehicle Location Service FAQs, http://nvls-lpr.com/nvls/nvls_faqs.html?pp=1#ans9 (leading private company collaborating with the police departments).

⁹⁷ See TOCQUEVILLE, *supra* note 29 (suggesting that a surveillance state that infringes on privacy rights and individual liberties is incompatible with a free and democratic society. It also shows that Americans should not be aloof to rising government power and should be adamant in protecting their constitutional and individual rights).

Tocqueville's fear could be realized in the context of ALPRs if the police obtain a broad, expansive network of cameras and location information derived from the proliferation of such devices without meaningful restrictions in place.

II. FIRST AMENDMENT RIGHT TO FREEDOM OF ASSOCIATION

This Section will trace the history of the First Amendment's derivative right of freedom of association by first addressing Alexis de Tocqueville's political theory. Tocqueville explains why freedom in civic and political associations is vital to American democracy.⁹⁸ Next, this Section will discuss the Supreme Court's interpretation of the freedom of association in the landmark case, *National Association for the Advancement of Colored People (NAACP) v. Alabama ex rel. Patterson*, which found in favor of enforcing individual privacy rights so that Americans can freely associate absent fear of government backlash.⁹⁹

Among the enumerated rights in the First Amendment of the Constitution is freedom of association.¹⁰⁰ The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech . . . the right of the people to peaceably assemble, and to petition the Government for a redress of grievances."¹⁰¹ The importance of association is ingrained in the history of America.¹⁰² Alexis de Tocqueville, in his seminal text, emphasizes the importance of voluntary associations because they help protect democracy from its shortcomings and potential pitfalls, such as mob rule and unchecked centralized government power.¹⁰³ Political associations formed by minorities in high numbers serve as a direct check on the majority's power and moral weight to ensure that the omnipotence of the majority or the

⁹⁸ *Id.* at 281.

⁹⁹ 357 U.S. at 462.

¹⁰⁰ U.S. CONST. amend. I.

¹⁰¹ *See id.*

¹⁰² *See id.*; *NAACP*, 357 U.S. at 460-61 (finding that freedom of association is an essential component of freedom of speech and assembly).

¹⁰³ *See* TOCQUEVILLE, *supra* note 29, at 181; *see also* Oliver Zunz, *Alexis De Tocqueville on Associations and Philanthropy*, HistPhil, <https://histphil.org/2015/07/13/alexis-de-tocqueville-on-associations-and-philanthropy/> (last visited Mar. 4, 2022) ("Americans of all ages, all conditions, and all minds learned how to guard against such democratic perils as excessive individualism, the tyranny of the majority, and the stifling effects of administrative centralization simply by constantly joining together in groups.").

government does not supersede the rights of private individuals.¹⁰⁴ Civic associations were viewed by Americans “as the sole means they have of acting” because in a democracy the people are independent and weak by themselves; but, there is power in numbers.”¹⁰⁵ Tocqueville’s influential analysis of America conclusively demonstrates how associations are essential to democracy and helps explain why the freedom to assemble is protected as a fundamental, sacred right, even in modern times.¹⁰⁶

The Supreme Court, well aware of the significance for Americans to freely and peacefully assemble, has repeatedly upheld this liberty.¹⁰⁷ Freedom of association first came to the Court’s attention in the 1950s with the landmark case *NAACP v. Alabama ex rel. Patterson*.¹⁰⁸ In that case, Alabama wanted to curb the activities of the NAACP, a New York non-profit membership corporation, which had a stated purpose of advancing the welfare and economic position of African Americans.¹⁰⁹ An Alabama statute required a foreign corporation to “qualify before doing business in the state by filing its corporate charter and designating a place of business and an agent to receive process.”¹¹⁰ Using this provision, the lower court issued an *ex parte* restraining order preventing further NAACP-related business in Alabama and requesting a list of members in the organization.¹¹¹ The Supreme Court considered whether the subpoena mandating mem-

¹⁰⁴ *Id.* at 183, 482-85 (in Tocqueville’s book, he introduces the concept of “individualism” and discusses how the United States has combatted the concept with free institutions).

¹⁰⁵ *Id.* at V. II, 490.

¹⁰⁶ *Id.*; see also ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2007) (a modern political theorist that reinforces the significance of the freedom to assemble peacefully in contemporary society, exploring his theory known as social capital that posits social networks, connections, and reciprocity have essential value measured in terms of productivity, confidence, and companionship); Aurelian Craiutu, *From the Social Contract to the Art of Association: A Tocquevillian Perspective*, 25 SOC. PHIL. & POL’Y 263, 265-67 (2008) (noting the influential analysis of Tocqueville’s writings on understanding American democracy and life).

¹⁰⁷ *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995); *Roberts v. United States Jaycees*, 468 U.S. 609, 627-29 (1984) (finding that intimate associations are sacred, but must be balanced against the government interest; in that case, the state interest was to eliminate gender discrimination); *NAACP*, 357 U.S. at 462-63; *United States v. Rumley*, 345 U.S. 41, 56-57 (1953); *Am. Communications Ass’n v. Douds*, 339 U.S. 382, 403 (1950).

¹⁰⁸ 357 U.S. 449, 458 (1958).

¹⁰⁹ *Id.* at 451-52.

¹¹⁰ *Id.* at 451.

¹¹¹ *Id.* at 452-53.

bership lists violated the First Amendment's right to freedom of association and the Due Process Clause of the Fourteenth Amendment.¹¹² The unanimous Court ruled in favor of the NAACP, noting the inherent private component of political associations.¹¹³ The Court stated, "immunity from state scrutiny of petitioner's membership lists is here so related to the right of petitioner's members to pursue their lawful private interests privately and to associate freely with others in doing so"¹¹⁴ As evinced by the quote, the *NAACP v. Alabama* Court affirmed that Americans have the freedom to privately engage, if they so choose, in any association that will advance their beliefs and ideas without fear of state coercion.¹¹⁵

The Court further recognized "the vital relationship between freedom to associate and privacy in one's associations" and did not desire to protect only political associations.¹¹⁶ These political associations include the right to associate in a civil advocacy group such as the NAACP.¹¹⁷ This vital relationship is protected through the Court's emphasis that any government action which curtails the freedom to associate is subject to the "closest scrutiny."¹¹⁸ Scholars have found that the "closest scrutiny" is the modern-day equivalent of the "strict scrutiny" test, which requires the statute to be narrowly drawn to achieve a compelling government interest.¹¹⁹ In some circumstances, the strict scrutiny test includes a "least restrictive means"

¹¹² *Id.* at 458-59.

¹¹³ *Id.* at 462-63, 467.

¹¹⁴ *NAACP*, 357 U.S. at 466.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 461-62 ("[O]f course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state actions which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."). See also Randy L. Dryer & S. Shane Stroud, *Automatic License Plate Readers: An Effective Law Enforcement Tool or Big Brother's Latest Instrument of Mass Surveillance? Some Suggestions for Legislative Action*, 55 JURIMETRICS J. 225, 244-45 (Winter 2015).

¹¹⁷ *Id.* at 160-61; cf. TOCQUEVILLE, *supra* note 29, at V. I, 181 (discussing that a political association consists of three parts: members of the community assenting on a particular topic, then meeting, and finally uniting in electoral bodies or pushing forward a political agenda through public protests or other forms of advocacy).

¹¹⁸ *NAACP*, 357 U.S. at 460-61; see also M.R. Schermer, *Freedom of Association: NAACP v. Alabama?*, 41 OHIO L. J. 823, 835-36 (1980) (discussing that the Court applied the "so-called" strict scrutiny test that requires a compelling state rationale for the particular statute that discourages the freedom of association); *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 340 (2010) (defining the highest level of First Amendment scrutiny as requiring "the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest'").

¹¹⁹ Schermer, *supra* note 118, at 835-36.

inquiry, which asks whether there is a less restrictive alternative that can achieve the government interest.¹²⁰ The least restrictive means test places the burden on the government, but today this inquiry is not applied to all First Amendment cases.¹²¹ In short, *NAACP v. Alabama* stands for a constitutional right to expressive association against government action, which provides the right to freely associate for political purposes, such as NAACP members gathering to further the rights of people of color.¹²²

Another associative freedom that the Court has upheld is known as “intimate association,” which combines privacy concerns with the right of association to prevent state interference in intimate relationships such as marriage, religious faith, political parties, or familial interactions.¹²³ In *NAACP v. Alabama*, the Court recognized this connection: “[I]nviolability of privacy in group association may in many circumstances be indispensable to [the] preservation of freedom of association, particularly where a group espouses dissident beliefs.”¹²⁴ There, the Court compares the protection of privacy in

¹²⁰ *McCutcheon v. Federal Election Comm’n*, 572 U.S. 185, 197, 218 (2014); *United States v. Playboy Entm’t Group*, 529 U.S. 803, 813-14 (2000).

¹²¹ *Playboy Entm’t Group*, 529 U.S. at 814; see Alan O. Sykes, *The Least Restrictive Means*, 70 U. CHI. L. REV. 403, 403 (2003) (“Despite the extensive use of least restrictive means requirements in the law, their meaning has rarely been explored with care. Precisely how does one determine whether some regulatory policy is a less restrictive alternative (or not)? One class of cases seems clear-when an alternative regulation unquestionably achieves a clearly stipulated regulatory objective at equal or lower cost to regulators while imposing a lesser burden on some other valued interest (free speech, free trade, or the like), the alternative is ‘less restrictive.’”). This article also examines whether the least restrictive means would become a broader cost-benefit analysis or balancing approach. *Id.* at 403-04. See also *City of Boerne v. Flores*, 521 U.S. 507, 535-36 (1997) (rejecting the least restrictive means approach in the context of religious freedom); but see *Holt v. Hobbs*, 574 U.S. 352, 363-64 (suggesting that the least restrictive means approach applies to content-based freedom of speech cases).

¹²² *NAACP*, 357 U.S. at 462-63.

¹²³ See Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L. J. 624, 656-57 (1980); see e.g., *Jaycees*, 468 U.S. at 627-29 (an example of intimate association where the Court found gender discrimination in a male-dominated group as outweighing any associative personal liberty right. This case suggests a balancing test between any dissident belief made by an association with the state’s interest in eradicating unnecessary evils such as discrimination. The case also stands for the following proposition: there is a diminished personal liberty in a public association, when the association is discriminating based on gender). See also *Jaycees*, 468 U.S. at 617-18 (“In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty.”).

¹²⁴ 357 U.S. at 462.

group associations with the freedom of the press, where it is important to protect the orthodox and unorthodox views.¹²⁵ In an earlier case, *United States v. Rumley*, the Court noted a privacy concern in requiring a publisher to disclose the identities of those who purchased his books, pamphlets, or papers; the Court feared that this would be the "beginning of the surveillance of the press" by the government.¹²⁶ The Court highlighted an expectation of privacy in particular associations, like when reading a pamphlet or certain newspaper, that could reveal one's political preferences or unorthodox views that may counter the government.¹²⁷

Similarly, in *American Communications Association v. Douds*, the Court emphasized a privacy expectation in certain group memberships, such as political parties and religious sects.¹²⁸ The Court suggested that "[u]nder some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect . . . as imprisonment, fines, injunctions or taxes. A requirement that adherents of particular religious faiths or political parties wear identifying armbands, for example, is obviously of this nature."¹²⁹ The hypothetical of the government requiring the wearing of armbands to identify affiliation with the Democratic Party would be an unconstitutional encroachment into one's freedom of association.¹³⁰ Thus, in the aggregate, these cases suggest there are genuine privacy interests in not having one's affiliations with associations publicly divulged to the government without voluntary consent.¹³¹

The Court is restrained in expanding political participation with respect to privately funded or controlled establishments. For instance, the Court held that a Massachusetts public accommodations statute violated the First Amendment by compelling private citizens to include a group of persons imparting a message that the majority of the organizers in a St. Patrick's Day Parade did not support.¹³² In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,

¹²⁵ *Id.* at 461.

¹²⁶ 345 U.S. at 57.

¹²⁷ *Id.* Compare with TOCQUEVILLE, *supra* note 29, V. I at 87-88 (discussing the rise of a surveillance state and its detrimental effect on American life and privacy. The fear of the rising power in government is present in both).

¹²⁸ 339 U.S. at 402.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ See *NAACP*, 357 U.S. at 463; *Rumley*, 345 U.S. at 57-58; *Douds*, 339 U.S. at 402-04.

¹³² *Hurley*, 515 U.S. at 576-77.

Inc., the Group was an association created to march in the parade to forward equality for Irish LGBTQ+ individuals, but the South Boston Allied Wars Veterans Council refused to include the minority group.¹³³ This case demonstrates that the constitutional liberty to freely associate is not absolute when outside the realm of the Constitution's jurisdiction.¹³⁴ The Court found that the Council, as part of its authority in organizing the parade, possessed exclusive autonomy over choosing the content of its message.¹³⁵

The clear precedent set forth is that private associations are not required to allow anyone to participate, especially those who counter the position of the overall demonstration.¹³⁶ Thus, even though the freedom of association, as presented in *NAACP v. Alabama, Douds*, and *Rumley*, may seem absolute, the *Hurley* case demonstrates the outer limits of this area of law.¹³⁷ This development in First Amendment jurisprudence is significant because it highlights a thin line between private and public protections, which is raised within the context of ALPRs.¹³⁸ As discussed below, First Amendment legal precedent applies to the government and not necessarily to private companies. For this reason, the Analysis Section focuses on the limitations on government use of ALPRs and how the lack of limitations enacted in certain states violate the Constitution.

ANALYSIS

The use of ALPRs by the government or law enforcement without proper limitations unconstitutionally encroaches on citizens' freedom of association, especially when such devices can reveal

¹³³ *Id.* at 561.

¹³⁴ *Id.*

¹³⁵ *Id.* at 576 ("Thus, when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised.").

¹³⁶ See *Boy Scouts of America v. Dale*, 530 U.S. 640, 654-56 (2000) (holding "laws that prohibit discrimination against certain protected groups in public accommodations do not prevent private organizations from expelling members based on a protected class such as sexual orientation").

¹³⁷ *Hurley*, 515 U.S. at 572-73, 577-78, 580-81.

¹³⁸ Ng, *supra* note 94; Yang, 958 F.3d at 861-62; Diaz & Levinson-Waldman, *supra* note 35 ("Law enforcement use of ALPR data is not limited to reads captured by departments' own devices; many departments have contracts with vendors that grant them access to private databases containing scans from private ALPRs and from other local and federal law enforcement agencies.").

information that, in the aggregate, compiles a detailed narrative of one's daily life.¹³⁹ In this analysis, Part I argues that the government's use of ALPRs infringes on an individual's right to freely join an expressive, political association. It also proposes recommendations for a proper statute: lowering retention times, restraining uses of ALPRs by the government, and ensuring officer discretion is limited. Part II argues that using ALPR technology to track one's location to reveal information regarding "intimate associations"¹⁴⁰ violates the First Amendment.

I. EXPRESSIVE ASSOCIATION: APPLYING *NAACP v. ALABAMA* TO ALPRs

Under the precedent outlined in *NAACP v. Alabama*, a statute or government action that curtails the freedom to associate is subject to the "closest scrutiny," or strict scrutiny.¹⁴¹ For a state action to be constitutional under strict scrutiny, it must be both "narrowly tailored" and the least restrictive means¹⁴² to achieve a compelling gov-

¹³⁹ See ELEC. FRONTIER FOUND., *supra* note 11 ("Taken in the aggregate, ALPR data can paint an intimate portrait of a driver's life and even chill First Amendment protected activity. ALPR technology can be used to target drivers who visit sensitive places such as health centers, immigration clinics, gun shops, union halls, protests, or centers of religious worship."); *McCarthy*, 484 Mass. at 506 (discussing the importance of taking into account how many cameras are implemented and how dense their presence is in particular areas in the analysis of constitutional implications). Compare with *Carpenter*, 138 S. Ct. at 2217 ("As with GPS information, the time-stamped data 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.'").

¹⁴⁰ See Karst, *supra* note 123, at 654-58 (for a helpful discussion on what an intimate association is and why it is coined that term—intimate associations tend to be more communal, personal and tied to the family).

¹⁴¹ See *NAACP*, 357 U.S. at 460-61 ("... state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny"); Schermer, *supra* note 118, at 835-36 ("The import of the right at issue is that the Court correspondingly identified the right of freedom of association in a 'close nexus' with the freedoms of speech and assembly and then treated association as a fundamental right, subjecting to the 'closest scrutiny' any action by the state that might curtail that right.").

¹⁴² Note that the Supreme Court has not developed precedent or jurisprudence requiring the application of the least means alternative to cases involving Freedom of Association. *But see Flores*, 521 U.S. at 535 (rejecting the least restrictive means approach in the context of religious freedom); *Holt*, 574 U.S. at 364-65 (suggesting that the least restrictive means approach applies to content-based freedom of speech cases). Therefore, the least restrictive means test will not be applied in this Comment, especially because there is no current case in the context of ALPRs for the government to prove its burden and the Court has not spoken on its application in association cases.

ernment interest.¹⁴³ The Supreme Court addressed whether there is a privacy interest in not wanting to disclose one's membership in particular organizations that may be dissident to the government or the democratic majority.¹⁴⁴ In *NAACP v. Alabama*, the Court found an inherent right of privacy in membership shielded from the government as essential to one's freedom of association.¹⁴⁵ With such an inherent right, the Court unanimously struck down a government-sanctioned subpoena mandating NAACP membership lists to be handed over to the lower court.¹⁴⁶ The general rule deduced from this landmark case is that individuals have the right to expressive association, providing them the right to freely associate absent the fear that the government is aware of their participation in a group that may be unpopular or partisan.¹⁴⁷

As the police departments consistently and accurately suggest, the legitimate or compelling government interest is the prosecution of criminals that pose a danger to society.¹⁴⁸ There are undoubtedly lawful uses for ALPRs by government officials, but a constitutional issue regarding freedom of association arises when their use is not properly checked.¹⁴⁹ This is because, when not properly restricted, the government can compile a chronicle of one's daily life, movements, and affiliated associations.¹⁵⁰

¹⁴³ See *Citizens United*, 558 U.S. at 340 (defining the highest level of First Amendment scrutiny as requiring "the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'"); *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017); *United States v. Alvarez*, 567 U.S. 709, 725-26 (2012); *Burson v. Freeman*, 504 U.S. 191, 197 (1992) (upholding as constitutional, under the "narrowly tailored" test, a 100-foot boundary restriction zone around a voting booth to prevent voter fraud or confusion).

¹⁴⁴ *NAACP*, 357 U.S. at 462.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 466.

¹⁴⁷ *Id.* at 465-66.

¹⁴⁸ See *Roberts & Casanova*, *supra* note 23, at 6 (for Table 11 and Table 12 showing the primary law enforcement purposes of ALPR implementation including the business value of "solving more crimes"); *Greenberg*, *supra* note 45 ("ALPR systems that store data for longer periods, however, can be used to identify patterns of crime and to locate possible suspects or areas of criminal activity. Police can target their investigations to more serious crimes, such as drug trafficking, burglaries or terrorist activities."); *Diaz & Levinson-Waldman*, *supra* note 35; *Crump*, *supra* note 16, at 5.

¹⁴⁹ See *Goldman & Apuzzo*, *supra* note 83; see also *Thomas-Lester & Locy*, *supra* note 12.

¹⁵⁰ *Lauren Fash, Automated License Plate Readers: The Difficult Balance of Solving Crime and Protecting Individual Privacy*, 78 Md. L. Rev. 63, 77, 89-90 (2019); *Crump*, *supra* note 16, at 7-8.

The privacy concern with law enforcement's access to location data every day for months or years was considered unconstitutional and unacceptable by the Court in *Carpenter v. United States*.¹⁵¹ There, the Court balanced officer discretion against individual rights and found that citizens' privacy in location movements and, by extension, in associations should be favored.¹⁵² In other words, the Court limited access to only the wireless carriers, unless law enforcement obtains a warrant, preventing unfettered government access to historic cell site location information.¹⁵³ The amount of data, images, and tracking information in most public and private ALPR databases is comparable to third-party phone databases that can reveal a detailed location log over an extended period.¹⁵⁴ For instance, as the ACLU feared, a police department conceded that with the ALPR database it can pinpoint the exact location and address of citizens, preferably criminals, for extended amounts of time.¹⁵⁵ The real fear is that law enforcement can pinpoint every citizen's, not just criminals', exact location, address, and frequent places of visitation, including churches, Alcoholics Anonymous meetings, political rallies, and doctor visits.¹⁵⁶

State statutes regulating ALPRs such as Arkansas's statute and the proposed New Jersey bill arguably are not "narrowly tailored." In the context of ALPRs, it is undisputed that there is a substantial government interest in detecting and prosecuting crimes such as theft, abduction, murder, and terrorism.¹⁵⁷ The most practical way to "nar-

¹⁵¹ 138 S. Ct. at 2220 (finding that a "detailed chronicle of a person's physical presence compiled every day, every moment over several years" provides law enforcement with too much discretion to invade a citizen's individual rights). See also *Maynard*, 615 F.3d at 562 (noting that GPS tracking and similar technology unconstitutionally encroach on privacy rights when the government has access to "all such facts" of a person's every movement).

¹⁵² *Carpenter*, 138 S. Ct. at 2220.

¹⁵³ *Id.* at 2221 ("[W]e also conclude that the Government must generally obtain a warrant supported by probable cause before acquiring such records.").

¹⁵⁴ *Crump*, *supra* note 16, at 7-8.

¹⁵⁵ See *Adler*, *supra* note 40 (where officers noted they used ALPR database of images and location data to pinpoint the exact address of a suspect).

¹⁵⁶ *Maynard*, 615 F.3d at 562. The technology can also be used in some states for minor traffic violations such as running a red light or having a suspended license; that raises a question of whether or not minor offenses should be used by the police as a gateway to access tracking location and association information. See ARK. CODE ANN. §§ 12-12-1803 (b)(4)(A)-(B), 12-12-1804 (2013); S. 3415, 217th Leg., at 1 (N.J. 2017) (note again this is proposed legislation that has not passed the state legislature); Siuru, *supra* note 10 ("While some police departments are only using ALPR for felony investigations, others are using this technology for lesser infractions such as suspended licenses, vandalism and even failure to pay fines.").

¹⁵⁷ *Id.*

rowly tailor” a statute regulating ALPRs is to set a constitutional guideline on how long the information in a database can remain accessible by the government or law enforcement.¹⁵⁸ The Supreme Court is not a stranger to placing and affirming numerical limits on state statutes in the First Amendment context.¹⁵⁹ Of the 17 states that regulate ALPRs, the range for retention time is three minutes¹⁶⁰ to two years.¹⁶¹ With a retention time of two years, New Jersey’s proposed bill would likely be unconstitutional following the Court’s reasoning in *Carpenter*, where a detailed chronicle over a span of “years” would provide officers too much discretion in private associative information.¹⁶²

Also, New Jersey’s proposed legislation is arguably not “narrowly tailored” given the nature of the ALPR systems—when the camera scans a license plate, it is automatically matched to a “hot list” database to reveal criminal activity.¹⁶³ Requiring verification and manual confirmation by the police officers would help “narrowly tailor” state statutes by decreasing the probability of inaccurate matching and convictions of innocent individuals.¹⁶⁴ The New Hampshire

¹⁵⁸ Completely banning the passive and private use of ALPRs (limiting it to official use only) may not be as practical because it would be the “strictest regulation in the nation” and may not be necessary. See Julia M. Brooks, *Drawing the Lines: Regulation of Automatic License Plate Readers in Virginia*, 25 RICH. J.L. & TECH. 1, 41 (2019) (“Barring the passive use of ALPRs would be the strictest regulation in the nation. A handful of states have passed regulations on ALPRs that have proven effective at minimizing opportunities for abuse while preserving the devices’ investigative capacities.”).

¹⁵⁹ *Burson*, 504 U.S. at 208 (upholding a restricted zone of 100 feet around a voting area to stifle speech as not to cause confusion or fraud at the booths). Similarly, if a justiciable case involving the constitutionality of ALPRs arises before the Court, it could place a numerical limit on retention time for ALPR databases.

¹⁶⁰ N.H. REV. STAT. ANN. § 261.75-b VIII.

¹⁶¹ S. 3415, 217th Leg., at 1 (N.J. 2017) (bill is considered dead or stalled in the legislature, the bill’s text and retention time is used as an example of a text that likely would be found unconstitutional).

¹⁶² *Carpenter*, 138 S. Ct. at 2220.

¹⁶³ *Crump*, *supra* note 16, at 5 (noting the instant alert to law enforcement of a match); ELEC. FRONTIER FOUND., *supra* note 11 (last visited Jan. 4, 2021) (“Officers are instructed to visually confirm that a plate number is a match. Failure to manually confirm, combined with machine error, has caused wrongful stops.” This quote shows that the instantaneous match is not always absolute or accurate and implores the need for officer discretion to be questioned and for double checking to confirm both the machine and the officer’s suggestion that a particular license plate is involved in criminal activity.).

¹⁶⁴ *Id.*; see e.g., ARK. CODE ANN. § 12-12-1804 (2013). See also Diaz & Levinson-Waldman, *supra* note 35 (“[L]aw enforcement agencies should enact policies that require both independent verification of the information yielded from a hot list and real-time updating of hot list data.”). This suggestion by the Brennan Center may not be enough and that is why this Comment is

statute recognizes the rapidity of the technology by providing a three-minute retention time.¹⁶⁵ The New Hampshire legislature's rationale is that the urgency to detect crime is outweighed by privacy interests in not providing the government access to association information of citizens for an extended amount of time.¹⁶⁶ Thus, state databases that retain the ALPR information for extended amounts of time, like 150 days in Arkansas and the proposed two years in New Jersey, unconstitutionally encroach on citizens' right to privacy in expressive associations.¹⁶⁷ This is because an extended retention time allows an overly broad time span that more easily leads to police developing a detailed chronicle of one's life over several months or even years.¹⁶⁸

Not all regulations on ALPRs will be unconstitutional. Only those not narrowly tailored or those that do not serve the compelling government interest of law enforcement or prosecution of crime will be unconstitutional.¹⁶⁹ From the analysis of New Jersey's proposed bill, it follows that states with no restrictions would likely be unconstitutionally infringing on First Amendment rights when blindly tracking one's associational behaviors without a warrant or other mandated procedure.¹⁷⁰ This is because the retainment of private associative information, such as membership with a civil advocacy group, would be in effect infinite, and the officer's discretion would be left unchecked.¹⁷¹

On the other hand, statutes similar to New Hampshire's and Utah's will likely survive a strict scrutiny examination by the Court because those statutes bar the passive use of ALPRs and have short,

recommending for the state legislature to restrict the officer discretion through amendments that require independent verification checking both the officer and the database.

¹⁶⁵ N.H. REV. STAT. ANN. § 261.75-b VIII.

¹⁶⁶ *Id.*

¹⁶⁷ *NAACP*, 357 U.S. at 461-63 (discussing the right to pursue lawful private interests in certain political and intimate associations).

¹⁶⁸ *Cf. Carpenter*, 138 S. Ct. at 2220.

¹⁶⁹ *NAACP*, 357 U.S. at 460-61 (noting that in this area, laws that burden freedom of association are analyzed under the closest scrutiny, or strict scrutiny).

¹⁷⁰ *See e.g.*, Diaz & Levinson-Waldman, *supra* note 35 ("During the 2008 presidential election, the Virginia State Police recorded the license plate numbers of attendees at political rallies for Barack Obama and Sarah Palin – and subsequently at President Obama's inauguration . . ."); Bowes, *supra* note 86 (for a situation in which officers in a State without meaningful restrictions on officer discretion and retention limits most likely infringed on First Amendment privacy rights in political associations, such as rallies and supporting a Democratic President at an inauguration); Goldman & Apuzzo, *supra* note 83 (for an example of a state with no restrictions with officers tracking religious associational behavior at a mosque).

¹⁷¹ *Id.*

almost automatic purging times.¹⁷² The New Hampshire statute not only provides stringent restrictions on data collection and storage, but also requires the information to be purged within three minutes if there is no positive match to a “hot list” database.¹⁷³ The statute also requires officer training on proper use of that collected information and that an officer must have independent reasonable suspicion when stopping a vehicle.¹⁷⁴ Requiring independent reasonable suspicion solves the issue present in the New Jersey bill and Arkansas statute where the police officers do not have to manually confirm the license plate.¹⁷⁵ Together, these limitations advanced by New Hampshire serve to protect individual privacy and constitutional rights from unfettered officer discretion, access, and prosecution. The strict limitations would be favored in a “narrowly tailored” analysis if the statute was brought before the Supreme Court. The New Hampshire statute also lists acceptable law enforcement purposes, which reveals the legitimate, compelling government interest in uncovering crime.¹⁷⁶ Because this statute provides for a limited scope of prosecuting criminals, and places stringent limitations on the use of sensitive information, it would most likely satisfy strict scrutiny. In short, states with no restrictions or broadly tailored regulations should look to New Hampshire as having a model statute that would be constitutional in the context of regulating ALPRs.¹⁷⁷

This Comment will apply the reasoning in *NAACP v. Alabama* to the situation where the NYPD used ALPR technology to track Muslim worshippers at a Brooklyn mosque because there is no clear pre-

¹⁷² See Roberts & Casanova, *supra* note 23, at 6 (advocating for states to restrict the use of passive ALPR use by defining the ALPR system and its data as “for official use only”); N.H. REV. STAT. ANN. § 261.75-b VIII (three minutes if there is no instantaneous match to a hot list database); UTAH CODE ANN. § 41-6a-2003 (2014) (nine months for law enforcement, but thirty days for private providers).

¹⁷³ N.H. REV. STAT. ANN. § 261.75-b VIII. *Contra* ARK. CODE ANN. §§ 12-12-1803 (b)(4)(A)-(B) (expanding the use of ALPRs for purposes of highway and transportation related infractions; the Arkansas legislature in its recent amendment is taking the opposite approach of New Hampshire, which is limiting the law enforcement purposes for ALPRs).

¹⁷⁴ N.H. REV. STAT. ANN. § 261:75-b VI.

¹⁷⁵ Without this limitation, the police are blindly trusting technology to track any given citizen whose plates may be inaccurately matched to one in the database. Thus, in the context of ALPRs there is a double-sided individual rights concern with faulty matching capabilities *and* with police having too much power or discretion.

¹⁷⁶ N.H. REV. STAT. ANN. § 261:75-b V.

¹⁷⁷ Emphasis on the following lessons or takeaways from New Hampshire’s statute: lowering retention times, restraining uses of ALPRs by the government and ensuring officer discretion is limited.

cedent on point for ALPRs.¹⁷⁸ This example is particularly concerning because it occurred in a state with no statutory restrictions and shows the necessity of having retention limits and restraints on officer discretion.¹⁷⁹ Here, it is apparent that such an unrestrained encroachment would be unconstitutional because the government would have an exhaustive membership list and a detailed narrative of each individual tracked at the mosque.¹⁸⁰ The use of the images and collection of license plates for surveying protesters and “political dissidents” is unwarranted because those purposes are not compelling government interests.¹⁸¹ Even the law enforcement’s justification that these individuals were potential terrorists is outweighed by *NAACP v. Alabama*’s precedent furthering the right to freely associate with religious groups without fear of undue state interference or surveillance.¹⁸²

Similarly, the privacy and individual rights in associations protected by restricting ALPR data will likely outweigh any political gain or crime detection acquired at a presidential inauguration or political rally.¹⁸³ The case of President Barack Obama’s inauguration, regardless of the state actor’s intent, begs the question of whether Americans desire a society where the government possesses unchecked discretion in tracking political or religious endeavors.¹⁸⁴ Through judicial precedent, it is clear that Americans have a degree of privacy in their political and expressive associations, which is affirmed by

¹⁷⁸ See Goldman & Apuzzo, *supra* note 83.

¹⁷⁹ There is a proposed bill stalled in the New York State Senate, Consumer Protection Committee. *An Act to amend the general business law and executive law, in relation to the use of automated license plate reader systems*, N.Y. S. 40 (pre-filed, Jan. 9, 2019), <https://www.nysenate.gov/legislation/bills/2019/s40>.

¹⁸⁰ See *NAACP*, 357 U.S. at 462, 465-66 (finding a privacy interest in membership lists).

¹⁸¹ Goldman & Apuzzo, *supra* note 83 (“The NYPD Intelligence Division snapped pictures and collected license plate numbers of congregants as they arrived to pray. Police mounted cameras on light poles and aimed them at mosques. Plainclothes detectives mapped and photographed mosques and listed the ethnic makeup of those who prayed there.”).

¹⁸² *Id.* (interviewing a civil rights attorney who argues that police officers should use means other than racial pretext to determine whether individuals are “potential terrorists”); *cf.* *NAACP*, 357 U.S. at 465-66.

¹⁸³ Diaz & Levinson-Waldman, *supra* note 35 (arguing that “[l]aw enforcement agencies have a history of misusing license plate surveillance to monitor First Amendment-protected activity. During the 2008 presidential election, the Virginia State Police recorded the license plate numbers of attendees at political rallies for Barack Obama and Sarah Palin – and subsequently at President Obama’s inauguration – and kept the data for more than three years . . .”).

¹⁸⁴ Note that Americans, through their political voice and behavior, could influence their state legislatures to adopt these necessary restrictions on ALPRs. Tocqueville’s teachings can be relevant here because he posited that Americans should assemble in political associations to influence and form electoral bodies. See TOCQUEVILLE, *supra* note 29, at 284-87.

NAACP v. Alabama.¹⁸⁵ Now is the time to reaffirm Alexis de Tocqueville's and the *NAACP v. Alabama* Court's emphasis on a constitutionally mandated privacy in expressive associations by restricting ALPR use by the government and protecting the right to be free from state interference in political and religious affairs.¹⁸⁶

II. INTIMATE ASSOCIATION: APPLYING *AMERICAN COMMUNICATIONS ASSOCIATION V. DOUDS* TO ALPRs

Privacy in intimate associations is similarly protected under the First Amendment, and therefore any ALPR-related statute that allows undue state interference violates the Constitution.¹⁸⁷ The Court has consistently found a genuine privacy interest in not having one's affiliations with associations publicly divulged to the government without voluntary consent.¹⁸⁸ The Court noted privacy concerns in requiring a publisher to disclose the identities of those who purchased his books, pamphlets, or papers.¹⁸⁹ In *Rumley*, the Court feared that requiring disclosure would invade the privacy interests of citizens not desiring the government to possess information regarding their political beliefs, especially those that are unorthodox or counter to the government.¹⁹⁰

Similarly, in *Douds*, the Court set forth a precedent that suggested "indirect discouragements" from the government may have a

¹⁸⁵ *NAACP*, 357 U.S. at 465-66; see also TOCQUEVILLE, *supra* note 29, V. I, at 88 (expressing fear of a nanny state in which the government regulates and tracks every citizen to the point where Americans will not have any privacy in associations).

¹⁸⁶ *Id.*; TOCQUEVILLE, *supra* note 29, V. II, at 145; see also PUTNAM, *supra* note 106 (a political theorist who reinforces the significance of the freedom to assemble peacefully in modern society. He posits his theory known as social capital that asserts that social networks, connections, and reciprocity have essential value measured in terms of productivity, confidence, privacy and companionship. This social capital is the strongest when not infringed or surveilled by the government).

¹⁸⁷ See *NAACP*, 357 U.S. at 462; *Rumley*, 345 U.S. at 56-58; *Douds*, 339 U.S. at 402-03.

¹⁸⁸ *Id.*

¹⁸⁹ *Rumley*, 345 U.S. at 56-58.

¹⁹⁰ *Id.* The latter phrase of protecting privacy in associations "counter to the government" may be more prevalent today in America's perceived highly partisan state. This is because "counter to the government" could be seen as just being on the opposite political aisle. See Katherine Schaeffer, *Far more Americans see "very strong" partisan conflicts now than in the last two presidential election years*, PEW RES. CTR. (Mar. 4, 2020), <https://www.pewresearch.org/fact-tank/2020/03/04/far-more-americans-see-very-strong-partisan-conflicts-now-than-in-the-last-two-presidential-election-years/> (presenting a recent survey showing that 91% of U.S. adults say there is a strong or very strong partisan divide, a percentage which has grown in modern times).

coercive effect to reveal membership affiliation, which facially violates privacy in associations.¹⁹¹ There, the Court proposed that if a government required persons to wear armbands identifying affiliation with either a political party or a religious group, then it would violate the First Amendment's right of privacy in associations.¹⁹² Wearing armbands as a means of identifying one's affiliation with a political party is comparable to attending a particular political rally; showing support through membership or participation in a partisan group or rally can be as indicative of one's political association.¹⁹³

As the ACLU points out, not only can law enforcement agencies abuse the information in ALPR databases, but also anyone with access can use it to identify and target groups such as political minorities, LGBTQ+ individuals, or women visiting an abortion clinic.¹⁹⁴ With minimal to no restrictions on ALPR databases, the government can easily find out that innocent individuals are attending certain religious or political meetings through expansive networks and collected images.¹⁹⁵ If the government uses the ALPR systems to track religious congregates, it would counter *Rumley* because, similar to the disclosure of purchases for particular news pamphlets, attending political meetings or rallies can reveal one's party preferences that are expected to remain private if desired.¹⁹⁶ Although such abuse seems unlikely, it happened in Brooklyn, where the NYPD tracked Muslims

¹⁹¹ *Douds*, 339 U.S. at 402-03.

¹⁹² *Id.* at 402.

¹⁹³ *Id.* See *NAACP*, 357 U.S. at 462, 465-66 (finding privacy in membership lists by not rejecting a court-sanctioned order to reveal members of the NAACP). If the government is able to track and survey citizens unrestrained then there would be no protection under the *NAACP* holding, because law enforcement would not need to obtain a membership list; they could just look at past ALPR data to determine members or participants. Diaz & Levinson-Waldman, *supra* note 35.

¹⁹⁴ See *Crump*, *supra* note 16, at 9 ("An agent could target the owners of vehicles parked at political meetings, gay bars, gun stores, or abortion clinics.").

¹⁹⁵ See Diaz & Levinson-Waldman, *supra* note 35; see also *Crump*, *supra* note 16, at 13 (noting that the majority of individuals are innocent and only 1% of plates result in a hit on the database); *About Rekorder: Providing Revolutionary Intelligence*, Open ALPR, <https://www.openalpr.com/about> (last visited Jan. 29, 2022) (showing that private companies are collaborating with the government and the police to expand the network of ALPRs, which greater threatens our privacy in associations).

¹⁹⁶ *Rumley*, 345 U.S. at 57; Diaz & Levinson-Waldman, *supra* note 35 (arguing that "[l]aw enforcement agencies have a history of misusing license plate surveillance to monitor First Amendment-protected activity. During the 2008 presidential election, the Virginia State Police recorded the license plate numbers of attendees at political rallies for Barack Obama and Sarah Palin – and subsequently at President Obama's inauguration – and kept the data for more than three years until it was purged . . .").

attending a mosque and racially profiled them as potential terrorists for protesting.¹⁹⁷

Similar to *Douds*'s reasoning, ALPR technology, when left unchecked or minimally restricted, provides an indirect "discouragement" for citizens to attend political or religious meetings in their cars that are easily tracked by the government.¹⁹⁸ Although ALPR tracking and its databases are not as noticeably affiliated with associations as wearing an armband with a political insignia, there is discouragement if the public is aware the government can track their associational behavior.¹⁹⁹ In this highly polarized climate, perhaps some attendees of the presidential inauguration in 2008 may not have attended if they knew their political affiliations could have been revealed to all community members.²⁰⁰ This potential fear, coupled with the ALPRs' capability to compile a detailed narrative of one's life, would most likely qualify as an indirect discouragement from the government. Thus, the ability of ALPRs to paint an intimate portrait of a driver's life, including who the driver spends time with, invades First Amendment protected activity in intimate associations.²⁰¹

¹⁹⁷ See Goldman & Apuzzo, *supra* note 83.

¹⁹⁸ *Douds*, 339 U.S. at 402-03; *McCarthy*, 484 Mass. at 506. Bowes, *supra* note 86. Tiburon, California takes this approach, and retains data for thirty days. See Cyrus Farivar, *Your Car, Tracked: The Rapid Rise of License Plate Readers*, *Ars Technica* (Sept. 27, 2012), <http://arstechnica.com/tech-policy/2012/09/your-car-tracked-the-rapid-rise-of-license-plate-readers/>.

¹⁹⁹ Cf. *Douds*, 339 U.S. at 402-03. See also Crump, *supra* note 16, at 2, 7-8; INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 21, at 13 ("[T] risk is that individuals will become more cautious in their exercise of their protected rights of expression, protest, association and political participation because they consider themselves under constant surveillance.").

²⁰⁰ Bowes, *supra* note 86; Diaz & Levinson-Waldman, *supra* note 35; Schaeffer, *supra* note 190 (Jan. 2022 survey of U.S. adults showing that there is a stronger partisan divide in recent years). Also, note that New York does not have any ALPR restrictions, so private companies can also access this information and willingly share it to the police or any other government entity without a warrant; this suggests in this technological world American citizens actually may not have such privacy in associations affirmed in *NAACP*. See *An Act to amend the general business law and executive law, in relation to the use of automated license plate reader systems*, N.Y. S. 40 (pre-filed, Jan. 9, 2019), <https://www.nysenate.gov/legislation/bills/2019/s40> (showing that New York does not have a current statute that places any ALPR restrictions including for businesses/private companies).

²⁰¹ See ELEC. FRONTIER FOUND., *supra* note 11; see also *McCarthy*, 484 Mass. at 506 (discussing the importance of taking into account how many cameras are implemented and how dense their presence is in particular areas in the analysis of constitutional implications).

CONCLUSION

Automated license plate readers raise genuine First Amendment constitutional issues. Since the 1950s, the Court has consistently held that the right to freely associate and assemble is coupled with a corresponding privacy right not to have affiliation be disclosed to the government without consent.²⁰² To mitigate negative consequences caused by the ability of ALPR systems to create a detailed narrative of one's life for an extended time, some states have enacted legislation to restrict government use of ALPRs. But, unfortunately, most have not.²⁰³

With 17 states having enacted ALPR legislation, it is clear that appropriate, constitutional legislation must properly balance state interests against the rights of individuals. The government has a compelling interest to ensure swift and accurate prosecution of crime. However, there is a fine limit when use of such technology encroaches on privacy in associational freedoms because it starts resembling a governmental "nanny state." Thus, state legislatures need to ensure their respective statutes have not only a limited retention time but also provide limitations on which purposes and officer uses are proper. Only then can a statute be constitutional with respect to freedom of association within the context of ALPRs. In closing, this Comment recommends that states adopt ALPR legislation that lowers retention times, restrains uses of ALPRs by the government, and ensures officer discretion is sufficiently limited. By doing so, the states will adequately protect the constitutional rights of its citizens and prevent the rise of "nanny state" that Alexis de Tocqueville rightfully feared.

²⁰² See *NAACP*, 357 U.S. at 462; *Rumley*, 345 U.S. at 56-58; *Douds*, 339 U.S. at 402-03.

²⁰³ *Crump*, *supra* note 16, at 31; see also NAT'L CONF. OF STATE LEGISLATURES, *supra* note 55.