

**IN THE SUPREME COURT
OF THE STATE OF OREGON**

AMERICAN CIVIL LIBERTIES
UNION OF OREGON, INC., an
Oregon non-profit benefit
corporation,

Plaintiff-Respondent
Cross-Appellant,
Respondent on Review,

and

PROTESTER #1, an individual

Plaintiff-Respondent
Respondent on Review,

v.

CITY OF PORTLAND, an Oregon
municipal corporation,

Defendant-Appellant
Cross-Respondent,
Petitioner on Review.

Multnomah County Circuit Court
No. 20CV27116

CA No. A178539

SC No. S071887

**BRIEF ON THE MERITS OF PETITIONER ON REVIEW
CITY OF PORTLAND**

Review of the decision of the Court of Appeals on an appeal from the
Judgment of the Circuit Court for Multnomah County,
the Honorable Thomas M. Ryan, Judge.

Opinion Filed March 12, 2025
Panel opinion by Mooney, Senior Judge, joined by Hellman,
Presiding Judge, and Lagesen, Chief Judge.

November 2025

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TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE.....	1
Nature of the Action & Relief Sought	1
Nature of the Judgment of the Circuit Court	2
Nature of the Judgment of the Court of Appeals.....	2
Legal Question Presented.....	3
Proposed Rule of Law	3
Summary of Argument	4
Statement of Facts.....	8
ARGUMENT	21
Watching live footage of a public event occurring in a public place, without more, does not “collect” protected “information” about the First Amendment conduct of anyone seen in that live footage within the meaning of ORS 181A.250.	
I. The legislature enacted ORS 181A.250 to bar law-enforcement agencies from selectively gathering and bringing into their files intelligence about the First Amendment conduct of persons for an unauthorized purpose.....	23
1. Text and context evince no legislative intent to bar law-enforcement agencies from watching live footage of public events, without more.	24
2. Legislative history confirms that ORS 181A.250 was intended to bar police from creating files or databases about persons’ First Amendment conduct absent a legitimate law-enforcement purpose for doing so.	29

- II. PPB did not use any of the 2020 livestreams to selectively gather and bring into its files any information about any person’s First Amendment conduct for an unauthorized purpose..... 41
 - 1. Transmitting live footage of public protests to the PPB Incident Command Post for situational awareness did not violate ORS 181A.250. 42
 - 2. Even if PPB’s use of YouTube for the first four livestreams raises a closer question, the subsequent livestreams transmitted over Wowza complied with ORS 181A.250..... 44
 - 3. That the livestreams were made transparent to the public does not mean that PPB thereby collected prohibited intelligence about people’s First Amendment conduct..... 46
- III. The incidental and momentary “caching” of digital inputs that occurs internally as a normal part of operating any computerized device, without more, does not violate ORS 181A.250. 52
- CONCLUSION..... 65

TABLE OF AUTHORITIES

	Page(s)
State Cases	
<i>ACLU of Oregon, Inc. v. City of Portland</i> , 338 Or App 750, 567 P3d 1067 (2025)	<i>passim</i>
<i>Carlson v. Myers</i> , 327 Or 213, 959 P2d 31 (1998)	62
<i>Halperin v. Pitts</i> , 352 Or 482, 287 P3d 1069 (2012)	23
<i>Marks v. McKenzie High Sch. Fact-Finding Team</i> , 319 Or 451, 878 P2d 417 (1994)	65
<i>McKean-Coffman v. Emp. Div.</i> , 312 Or 543, 824 P2d 410, <i>adh'd to on recons</i> 314 Or 645 (1992)	61
<i>Osborn v. Psychiatric Sec. Review Bd.</i> , 325 Or 135, 934 P2d 391 (1997)	28
<i>PGE v. Bureau of Labor & Indus.</i> , 317 Or 606, 859 P2d 1143 (1993)	23
<i>State v. Clemente-Perez</i> , 357 Or 745, 359 P3d 232 (2015)	63
<i>State v. Clowes</i> , 310 Or 686, 801 P2d 789 (1990)	60, 62
<i>State v. Gaines</i> , 346 Or 160, 206 P3d 1042 (2009)	23, 24
<i>U.S. West Communications v. City of Eugene</i> , 336 Or 181, 81 P3d 702 (2003)	23

Federal Statutes

U.S. Const amend I..... 25

State Statutes

Colo. Rev. Stat. Ann. § 24-33.5-1620..... 64

D.C. Code § 5-333.11..... 64

1977 Ind. Acts, PL 50, § 1..... 31, 34, 39

N.H. Rev. Stat. § 651-F:5..... 64

ORS 133.741 62, 63

ORS 174.010 50, 51

ORS 181A.010..... 17, 24, 39

ORS 181A.250..... *passim*

ORS 181.010 34, 38, 39

ORS 181.575 31, 39

ORS 192.660 49

18 Pa. Stat. § 9106..... 64

Va. Code Ann. § 2.2-3803..... 64

State Rules

OEC 201 60

Federal Regulations

28 CFR 23.20(b) (1981)..... *passim*

28 CFR 23.20 (2025)..... 41

45 Fed Reg 61614 (1980)..... 32

Other Authorities

<i>Black’s Law Dictionary</i> 238 (5th ed 1979)	26
Body Cameras for Police FAQ, MOTOROLA SOLUTIONS, https://www.motorolasolutions.com/en_us/solutions/body-cameras-for-police-faq.html (last visited on Nov 4, 2025).....	62
Cache, WIKIPEDIA, https://en.wikipedia.org/wiki/Cache_(computing)# (last visited Nov 4, 2025)	60
<i>Compact Edition of the Oxford English Dictionary</i> 274 (1st ed 1971)	27
<i>Compact Edition of the Oxford English Dictionary</i> 620 (1st ed 1971)	26
HB 2682 (1981)	32, 35, 39
PPB Directive 0635.10 § 4.3	11
S. Rep. No. 94-755 (1976)	30
Tom Lininger, <i>Sects, Lies, and Videotape: The Surveillance and Infiltration of Religious Groups</i> , 89 Iowa L Rev 1201 (2004) ...	29, 31
<i>Webster’s Third New Int’l Dictionary</i> 444 (1981 unabridged ed)	26
<i>Webster’s Third New Int’l Dictionary</i> 1160 (1981 unabridged ed)	26

**BRIEF ON THE MERITS OF PETITIONER ON REVIEW
CITY OF PORTLAND**

STATEMENT OF THE CASE

Nature of the Action & Relief Sought

This case is on review from a decision of the Oregon Court of Appeals that affirmed in part a circuit-court judgment granting declaratory relief to plaintiff Protester #1 (“plaintiff”). *ACLU of Oregon, Inc. v. City of Portland*, 338 Or App 750, 567 P3d 1067 (2025). Plaintiff sued the city of Portland (“the City”) asking, *inter alia*, for a declaration that ORS 181A.250—which bars law-enforcement agencies from collecting or maintaining “information about the political, religious or social views, associations or activities” of persons for a purpose unrelated to a criminal investigation—bars the Portland Police Bureau (“PPB”) from watching or transmitting a livestream of a public demonstration. On cross-motions for summary judgment, the trial court sided with plaintiff on that request and issued an order and general judgment

containing declarations to that effect. The City appealed, and the Court of Appeals affirmed that portion of the trial court's judgment.¹

Nature of the Judgment of the Circuit Court

The trial court's general judgment declares in pertinent part that, "[a]lthough brief and incidental, the 'caching' of data" that occurs as a normal part of livestreaming means that "at least portions" of the livestreams in this case "violated ORS 181A.250," regardless of whether the livestreams were "streamed to the public" or watched by "the PPB incident command center." (ER-245).

Nature of the Judgment of the Court of Appeals

A three-judge panel of the Court of Appeals affirmed the trial court's declaration that livestreaming contravenes ORS 181A.250. The court reasoned that, "[w]hile a livestream that is not retained does not permanently digitize or archive [prohibited] information,

¹The underlying case also involved a similar request for declaratory relief by plaintiff ACLU, but the Court of Appeals affirmed the trial court's conclusion that the ACLU lacked standing for that claim. *ACLU of Oregon*, 338 Or App at 767–72. The ACLU also brought a separate contract claim against the City, which the Court of Appeals rejected on the merits. *Id.* at 764–67. Those rulings are not on review before this court, and the City accordingly focuses on plaintiff Protester #1's request for declaratory relief under ORS 181A.250—the only live issue remaining in this case.

the livestream involves a collection of video and audio data that is ‘cached’ on a device” for a few instants, thereby violating ORS 181A.250. *ACLU of Oregon*, 338 Or App at 763. The Court of Appeals held that it is irrelevant “that ‘caching’ is temporary storage” or that the City “did not retain recordings” of any footage. *Id.* at 763–64.

Legal Question Presented

Under ORS 181A.250, a law-enforcement agency cannot “collect or maintain information about the political, religious or social views, associations or activities” of persons for a purpose unrelated to a criminal investigation. Is the incidental and momentary “caching” of digital inputs that occurs as a normal part of operating any computerized device, without more, a prohibited collection of information about persons’ First Amendment conduct for an improper purpose under that statute?

Proposed Rule of Law

To unlawfully “collect” information about persons’ First Amendment conduct under ORS 181A.250 means to selectively gather and consolidate such intelligence for a purpose unrelated to a criminal investigation. It does not include the incidental and

momentary “caching” of digital inputs that occurs as a normal part of operating any computerized device, absent selective gathering and consolidation into police files or databases of prohibited intelligence, for an unauthorized purpose, from that passing stream of raw inputs.

Summary of Argument

On approximately ten occasions in 2020, the Portland Police Bureau used live audiovisual transmissions through the Internet—a process known as “livestreaming”—to maintain “situational awareness” over large and tumultuous public protests then occurring in the City. Those transmissions were watched live in the PPB Incident Command Post, and it is undisputed that PPB did not keep or review any recordings of those live transmissions after the fact, or use those live transmissions to create any files or logs about any participants in the protests. Rather, the transmissions were used to provide PPB’s Incident Command with a real-time view of the dynamic situation on the ground. In addition, those same live transmissions were made viewable by the public in real time through a link on PPB’s Twitter (now “X”) page for transparency purposes

and to give the public a fuller picture of the situation and PPB's responses to it.

Plaintiff brought the underlying suit against the City, claiming in pertinent part that those live transmissions constituted an improper collection by a law-enforcement agency of information about the “political, religious or social views, associations or activities” of persons in violation of ORS 181A.250. Both the trial court and the Court of Appeals agreed, concluding that the livestreams contravened that statute regardless of which platform was used for the livestreams and of whether they were viewed by PPB Incident Command or by the public. Both courts based that conclusion on the technical fact that, owing to how livestreaming technology works, some digital inputs necessarily were “cached”—however briefly and incidentally—on a computerized device within PPB's control during the livestreams. This court should correct the lower courts' overly broad construction of ORS 181A.250, which goes beyond text, context, and legislative history, and would effectively outlaw most computer use by law-enforcement agencies.

As explained below, the text, context, and legislative history of ORS 181A.250 establish that it was intended to bar law-enforcement agencies from selectively gathering and bringing into their files or databases information about the First Amendment conduct of persons for an unauthorized purpose. That prohibition has no application to the mere real-time watching of public events taking place in public spaces, without more. Here, there is no dispute that PPB did not keep or review any recordings of the live transmissions after the fact, use those live transmissions to create any files or logs about any participants in the protests, or otherwise use those live transmissions to harvest and compile any information about the First Amendment conduct of any person who might have been seen in those live transmissions. PPB therefore did not engage in any of the conduct that ORS 181A.250 prohibits.

That livestreaming technology involves some transient and incidental “caching” of digital inputs inside the cache memory of the devices of anyone who conducts—or just watches—a livestream does not compel a different conclusion. As explained below, “caching” in this context means the temporary storage of instructions or data in

inside a computerized device to enable smooth transmission and viewing. That automatic process goes on throughout a livestream, with small bundles of digital inputs being successively saved and overwritten in almost real time. Such “caching” is internal and momentary, lasting only seconds or fractions of seconds inside the device before one small bundle of digital inputs is erased by the next incoming bundle.

That internal process alone—absent any selective gathering and consolidation into police files or databases of any prohibited intelligence from that passing stream of raw inputs—does not constitute the “collecting” by a law-enforcement agency of information about any person’s First Amendment conduct, let alone for an improper purpose. To hold otherwise would stretch the plain meaning of ORS 181A.250 beyond reason or plausibility, would conflict with or nullify law governing police body-worn cameras (which, in effect, are livestreaming cameras worn on the person), and would effectively render illegal most use of electronic or computerized devices by law enforcement.

This court should use this case of first impression to clarify the scope of the ORS 181A.250 prohibition on law-enforcement agencies “collecting” information about the “political, religious or social views, associations or activities” of persons for a purpose unrelated to a criminal investigation. And it should hold that ORS 181A.250 does not ban the incidental and momentary “caching” of digital inputs that occurs as a normal part of operating any computerized device, absent selective gathering and consolidation into police files or databases of prohibited intelligence from that passing stream of raw inputs by the law-enforcement agency for an improper purpose. For those reasons, as explained below, this court should reverse in part the judgment of the Court of Appeals.

Statement of Facts²

For many months beginning in May 2020, tens of thousands of people participated in large protests in Portland in reaction to the murder of George Floyd by police in Minneapolis, Minnesota. (ER-84-85). While many demonstrated peacefully, groups of protesters also

² Unless otherwise stated, this statement of fact is based on the parties’ Joint Statement of Stipulated Facts, which are included in the Excerpt of Record to the present brief.

“lit fires, broke windows, defaced buildings,” and otherwise engaged in criminal activities. (ER-85). This included breaking into and setting fires inside the Justice Center, throwing aerial mortars and pyrotechnics at the Multnomah County Courthouse, breaking the windows of public and private buildings, and “throwing dangerous projectiles including explosives” at police officers. (*Id.*).

PPB personnel responding to those “complex situations” were given a difficult job: while trying to keep people safe and address crimes occurring in large crowds, officers had “rocks, glass bottles, fireworks, bricks, paint, frozen water bottles, mortar rounds,” and other objects thrown at them. (*Id.*). Moreover, that chaotic situation could make it “difficult for officers on the ground to report via traditional radio” to the PPB Incident Command Post—which in turn could lead to “delays in relaying information” and “impact decision making and resource deployment.” (ER-88). This impaired “situational awareness” also could affect the Incident Command Post’s ability to “release public safety information” quickly and “make decisions to deploy resources that increase safety for all.” (*Id.*).

“Situational awareness in the context of managing large protests” includes keeping track of numerous fast-changing factors: “the behavior of the crowd and individuals within the crowd, whether weapons are present, crowd size, the direction and movement of the crowd, * * * whether members of the crowd are attempting to start fires, launch projectiles, break windows,” or “vandalize buildings,” among others. (*Id.*) It also includes monitoring “the status of individual and/or groups of officers who may be under stress,” and “actions which might impair officers’ vision” of the larger situation in the ground. (*Id.*)

The “common tool used by law enforcement nationally” to maintain situational awareness in these chaotic and dynamic situations is to transmit “[l]ive audio and video footage” to Incident Command. (ER-87–88). This “provides the incident commander with firsthand knowledge of what is happening on the ground,” thereby allowing for faster release of “public safety information” and for better use and deployment of personnel and resources. (ER-88). Doing so is safer for all involved—both police and members of the

public—and ultimately “help[s] reduce the need for force or other physical intervention by PPB.” (ER-88–89).

Using live footage “to provide situational awareness” to Incident Command (“IC”) during large public protests is consistent with official PPB policies. These provide that any such transmission must be live only and “will not be recorded unless and until a member has reasonable suspicion that a crime is being committed”:

Demonstrations may be broadcast to Bureau facilities by live video feed to provide situational awareness to the IC. In accordance with ORS § 181A.250, the broadcast will not be recorded unless and until a member has reasonable suspicion that a crime is being committed, at which time the member will communicate this information up the chain of command to the IC, who will make the decision whether to authorize recording to commence. * * * [T]he IC will not authorize recording for the purposes of monitoring individuals or groups based solely on political associations or religious or social views.

(ER-87–88) (quoting PPB Directive 0635.10 § 4.3).

Separately from the “situational awareness” concerns noted above, PPB in 2020 was also looking for “new ways to provide the public with transparent, real-time information about PPB’s handling of the demonstrations.” (ER-86). After considering several options, PPB concluded that allowing the public to view the same live footage

as Incident Command “would provide more reliable and complete information from the public” by allowing them “to see what was occurring in real time from the perspective of the officers on the ground” in an unedited form. (ER-86–87). PPB believed that making that live feed visible to the public would further “a legitimate government interest in improving transparency of PPB’s handling of the demonstrations.” (ER-87).

PPB eventually decided to use “livestreaming” technology to transmit live audiovisual footage of the 2020 protests and PPB’s responses thereto to Incident Command for situational awareness, while also making the same live transmission visible to the public for transparency. (ER-87). As stipulated by the parties, “livestreaming” is the “act of transmitting live video and audio data over the internet in real time or nearly real time, *with as low a latency as technology allows.*” (ER-14) (emphasis added). In essence, a “livestream” is a modern version of a live television feed—the only difference being that the live transmission is carried over the Internet rather than the airwaves.

PPB conducted such live transmissions on approximately ten occasions in 2020. (*See* ER-17–25). The dates, times, and context of each are set out in detail in the parties’ Joint Statement of Stipulated Facts attached at ER 13–114, but followed the following general timeline:

- June 6, 2020 → Beginning at 10:06 p.m., Justice Center
- June 7, 2020 → Beginning at 10:05 p.m., Justice Center
- June 9, 2020 → Beginning at 10:38 p.m., Justice Center
- June 10, 2020 → Beginning at 11:03 p.m., Justice Center
- July 4, 2020 → Beginning at 11:12 p.m., downtown Portland
- July 13, 2020 → Beginning at 10:17 p.m., north Portland
- July 16, 2020 → Beginning at 8:25 a.m., downtown Portland near Chapman and Lownsdale squares; and again beginning at 10:04 p.m., Justice Center
- July 18, 2020 → Beginning at 01:25 a.m., Justice Center; and again beginning at 10:51 p.m., north Portland
- July 26, 2020 → Beginning at 01:33 a.m., downtown Portland

- July 30, 2020 → Beginning 05:22 a.m., downtown Portland near Chapman and Lownsdale squares.

(ER-17–25). Those transmissions were watched in real time by personnel in PPB’s Incident Command Post “for increased situational awareness,” consistently with PPB rules. (ER-87). They were also made accessible to the public via a link on PPB’s official Twitter page. (ER-87).

Those livestreams “were unedited and provided a live, real-time, audio and visual account of events which were occurring in the public space.” (ER-87). They accordingly showed a wide array of behaviors occurring in public—from lawful protest activities to “criminal activity occurring in the public place and law enforcement’s response to that activity[.]” (ER-17–24, 87). They similarly showed the actions of law enforcement, including the issuance of dispersal orders, warnings about criminal conduct, declarations of unlawful assemblies and subsequent orders to disperse, and PPB’s crowd-control responses. (*Id.*). Because these were public protests, the parties agreed and stipulated that, “by streaming the protests and law enforcement response” thereto, the livestreams necessarily

showed “activity that concerned the political and social views, associations, and activities of the individuals” seen in those live transmissions. (ER-17-25).

PPB used two platforms to transmit those livestreams. At first, PPB transmitted live over YouTube—this was done on only the first four occasions, during the late-night and early-morning hours of June 6, 7, 9, and 10, 2020. (ER-17–20). An unavoidable feature of YouTube, however, is that it automatically records audio and video data during the course of any livestream. (*Id.*). YouTube does not “allow a user to turn off its automatic storage feature.” (ER-20). As a result, “[a]fter [each] livestream ended, as soon as practicable, [PPB personnel] manually deleted the livestream data stored on YouTube.” (ER-17–20). In this case, the parties agreed and stipulated that “PPB did not at any point access any livestream data stored by YouTube” before deleting it. (*Id.*). The parties further agreed that “PPB did not record, copy, review, maintain, or otherwise save any of the YouTube livestreams, and it did not create any logs or files about participants in the activities depicted in the livestreams.” *ACLU of Oregon*, 338 Or App at 754; (ER-17–19).

Nevertheless, to avoid the issue above, after June 10, 2020, PPB decided to stop transmitting live over YouTube in favor of doing so over a livestream-focused platform hosted by Wowza Media Systems, LLC (“Wowza”). (ER-20, 89). Unlike YouTube, Wowza allows users to select, before beginning a livestream, whether to “record the livestream such that the user can watch it again following its conclusion.” (ER-20). Transmitting over Wowza eliminated the need for PPB personnel to manually delete any recording of livestreams on the streaming platform’s servers after a live transmission, since no such recording was made. (*See id.*). PPB used the Wowza platform for all livestreams conducted after June 10, 2020, for a total of eight such livestreams. (ER-20–23). In this case, the parties agreed and stipulated that PPB always selected the “no recording” option when using Wowza. (*Id.*). The parties further agreed that “PPB did not record, copy, review, maintain, or otherwise save the Wowza livestreams, and it did not create any logs or files about participants in the activities depicted in the livestreams.” *ACLU of Oregon*, 338 Or App at 754–55; (ER-19–23).

Regardless of the platform used, “PPB did not use the

livestreams” to harvest “any information regarding the political, religious or social views, associations or activities of any individual protesters, groups, their associations, organizations, corporations, businesses, partnerships, or any other affiliations.” (ER-89). Indeed, as the Court of Appeals noted, “[b]ecause no copies of the livestreams were made or retained, neither the trial court nor this court had the ability to review them.” *ACLU of Oregon*, 338 Or App at 755.

In response to the livestreams, plaintiff Protester #1—whom the parties stipulated had appeared in at least one of the live feeds—filed a complaint alleging in pertinent part that, by conducting livestreams that showed “protesters demonstrating in public places,” PPB had violated ORS 181A.250. (ER-5–6). That statute provides that a “law enforcement agency” cannot “collect or maintain information about the political, religious or social views, associations or activities” of persons for a purpose unrelated to a criminal investigation:

No law enforcement agency, as defined in ORS 181A.010, may collect or maintain information about the political, religious or social views, associations or activities of any individual, group, association, organization, corporation, business or partnership unless such information directly relates to an investigation of criminal activities, and there

are reasonable grounds to suspect the subject of the information is or may be involved in criminal conduct.

ORS 181A.250. Plaintiff alleged that the livestreams in this case violated that statute and asked for a declaratory judgment to that effect. (ER-5–6).

The case was submitted to the trial court on cross-motions for summary judgment based on the parties’ stipulations. *ACLU of Oregon*, 338 Or App at 757. The trial court eventually concluded that the City had violated ORS 181A.250 because, “very briefly, and very incidentally,” digital data necessarily was “cached” on a computerized device under PPB’s control at some point during the livestreams:³

Although brief and incidental, the ‘caching’ of data caused by the PPB-initiated livestreams identified in the [Joint

³ As stipulated below, “caching” means the “temporary storage” of “instructions or data” in a “cache memory” as part of data processing inside a computerized device. (ER-14 n 1). In the context of livestreaming, this enables a viewer to see a smooth video with “minimal latency.” (ER-42–43). That automatic process goes on throughout a livestream, with small bundles of digital inputs being successively saved and overwritten inside the computerized device in almost real time. (See ER 14–16, 43–45) (describing “caching”). Watching a livestream “requires the user’s device to store the video and audio data comprising the livestream at least temporarily” in this manner. (ER-16). Such “caching” of digital inputs is momentary, its purpose being to ensure live transmission “with as low a latency as technology allows.” (ER 14).

Statement of Stipulated Facts], both when streamed to the public as well as when streamed to the PPB incident command center, amounted to a collection, but not maintenance, of information, about the political, religious or social views, associations or activities of individuals, groups, associations, organizations, corporations, businesses or partnerships prohibited by ORS 181A.250.

(ER-239, 245). This was so, the trial court held, regardless of whether YouTube or Wowza was used as a platform, and regardless of whether the live feed was “streamed to the public” or just watched by “the PPB incident command center” for situational awareness. (*Id.*). The trial court did, however, “stay[] any effect of this ruling” on internal livestreaming to PPB Incident Command only “pending resolution of an appeal[.]” (ER-240).

The City appealed, and the Court of Appeals affirmed. Like the trial court, the Court of Appeals based its holding on the technical fact that transmitting or watching a livestream necessarily involves some brief and incidental “caching” of digital inputs inside a computerized device:

Here, we conclude that a livestream by law enforcement of a lawful protest collects information about protesters’ political views and activities and therefore, constitutes conduct prohibited by ORS 181A.250. While a livestream that is not retained does not permanently digitize or archive that information,

the livestream involves a collection of video and audio data that is “cached” on a device within the PPB’s control.

ACLU of Oregon, 338 Or App at 763. The court held that it is irrelevant that such “caching” is transitory or occurs only inside the device for mere “seconds or fractions of seconds”:

That the parties stipulated that “caching” is temporary storage, and that the PPB did not retain recordings of the stream does not compel the opposite conclusion. * * *

[W]e reject the City’s argument that, “[a]t most, what was being ‘collected’ was disembodied bits of digital data inside an electronic device, for seconds or fractions of seconds, without the broadcaster having any control or access to them before they were erased by the next incoming bit of digital data.” * * * *[W]e see no practical distinction between the data inside the electronic device and the livestream itself.*

Id. at 763–64 (emphasis added).

The Court of Appeals also seemed to suggest that a material problem with the livestreams in this case was their having been viewable by to “any member of the public” as opposed to just “PPB Incident Command.” *See id.* at 763–64 (stating that transmitting “directly to the public” implicates “the same type of harm the legislature sought to avoid by enacting ORS 181A.250”).

Nevertheless, it is unclear whether that transparency was part of the

court’s holding—that is, it is unclear whether the Court of Appeals would have reached the opposite conclusion if the livestreams had *not* been viewable by “any member of the public,” but only by PPB’s Incident Command. *Id.* at 764. The City petitioned for review, which this court granted.

ARGUMENT

Watching live footage of a public event occurring in a public place, without more, does not “collect” protected “information” about the First Amendment conduct of anyone seen in that live footage within the meaning of ORS 181A.250.

The facts of this case are undisputed and were largely stipulated to by the parties. (*See* ER 13–114) (Joint Statement of Stipulated Facts). In particular, it is undisputed that the live feeds all involved public protests taking place in public streets and squares in Portland. (*See* ER-17–25) (stipulated times and places of livestreams). It is also undisputed that PPB’s Incident Command only *watched* those live audiovisual feeds in real time for “situational awareness”—the parties agree that “PPB did not record, copy, review, maintain, or otherwise save any of the YouTube livestreams” or “Wowza livestreams, and it did not create any logs or files about

participants in the activities depicted in the livestreams.” *ACLU of Oregon*, 338 Or App at 754–55 (noting that fact).

The question for this court, therefore, is whether *the transitory internal workings* of a computerized device—namely, the automated successive “caching” and overwriting of brief bundles of digital impulses during the course of a live transmission, over which a user has no meaningful control—constitute an unlawful “collection” by a law-enforcement agency of information about persons’ First Amendment conduct for an improper purpose under ORS 181A.250. The answer to that question, a pure matter of statutory construction, is “no.” The Court of Appeals mistakenly concluded otherwise in a holding that lacks a discernable limiting principle and has grave statewide implications for law enforcement. This court should take this opportunity to clarify the meaning and application of ORS 181A.250, and hold that “caching” alone does not contravene that statute.

I. The legislature enacted ORS 181A.250 to bar law-enforcement agencies from selectively gathering and bringing into their files intelligence about the First Amendment conduct of persons for an unauthorized purpose.

This court interprets statutes by following the approach laid out in *PGE v. Bureau of Labor & Indus.*, 317 Or 606, 859 P2d 1143 (1993) (superseded in part by statute), and *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). The “paramount goal” of that approach is “discerning the legislature’s intent.” *Gaines*, 346 Or 160 at 171. Because “there is no more persuasive evidence of the intent of the legislature than the words by which [it] undertook to give expression to its wishes,” the analysis looks primarily to statutory text and context. *Id.* (internal quotation marks and citations omitted). This court also may consider legislative history “where that legislative history appears useful to the court’s analysis.” *Id.* at 172. While legislative history cannot be used to “rewrite” a statute, it may be used either “to identify or resolve ambiguity in legislation.” *Halperin v. Pitts*, 352 Or 482, 495, 287 P3d 1069 (2012) (citing *U.S. West Communications v. City of Eugene*, 336 Or 181, 188, 81 P3d 702 (2003)). Finally, “If the legislature’s intent remains unclear after examining text, context, and legislative history, the court may resort

to general maxims of statutory construction to aid in resolving the remaining uncertainty.” *Gaines*, 346 Or 160 at 172.

1. *Text and context evince no legislative intent to bar law-enforcement agencies from watching live footage of public events, without more.*

Here, ORS 181A.250 states that a “law enforcement agency” cannot “collect or maintain information about the political, religious or social views, associations or activities” of persons for a purpose unrelated to a criminal investigation:

No law enforcement agency, as defined in ORS 181A.010, may collect or maintain information about the political, religious or social views, associations or activities of any individual, group, association, organization, corporation, business or partnership unless such information directly relates to an investigation of criminal activities, and there are reasonable grounds to suspect the subject of the information is or may be involved in criminal conduct.

ORS 181A.250. There is no dispute that PPB is a “law enforcement agency” under that statute. *See* ORS 181A.010(7)(a) (defining “law enforcement agency” in pertinent part as “[c]ounty sheriffs, municipal police departments, * * * and state police”). There also seems to be no dispute that PPB did not “maintain” any information

about anyone’s First Amendment conduct⁴ within the meaning of the law. *See ACLU of Oregon*, 338 Or App at 759 (noting that “the parties’ arguments center on the meaning of ‘collect’” rather than “maintain”). Rather, the dispute centers upon what constitutes “collecting” such “information” by a law-enforcement agency.

While the remaining terms of ORS 181A.250 are not defined by statute, dictionaries define the verb “to collect” in relevant part as the selective gathering and bringing together into one body of a specific kind of thing from out of a larger, heterogeneous whole:

col·lect \kəˈlekt\ *vb* -ED/-ING/-S [ME, adj., collected, fr. L. *collectus*] *vt* **1 a** : to bring together into a band, group, assortment, or mass : GATHER <~ an army> <~ all the available chairs> <~ing facts about immigration> **b** : to receive, gather, or extract from a number of persons or other sources < the Congress shall have the power to lay and ~ taxes on incomes, from whatever source derived — *U.S. Constitution*> * * * **4** : to bring together esp. in accordance with a principle of selection or an informative or profitable end : come to own as a collection or part of a collection : include as part of one’s experience <a volume of 122 ballads ... which he had ~ed in the mountains — *Amer. Guide Series: N.C.*> <having spent some months in

⁴ For convenience, the City refers to information about “the political, religious or social views, associations or activities” of persons as information about “First Amendment conduct.” That shorthand accurately describes the kinds of conduct listed in ORS 181A.250, which all relate to the First Amendment freedoms of religion, speech, the press, association, and to petition the government. *See* U.S. Const amend I.

successfully *~ing* and arranging my materials — Mary W. Shelley> <in the matter of *~ing* books — I mean owning them — J.C. Powys> <I tried to *~* lakes — O.S.J. Gogarty> * * *

Webster's Third New Int'l Dictionary 444 (1981 unabridged ed)⁵.

Collect (kə'le kt), *v.* * * * **1. trans.** To gather together into one place or group; to gather, get together. * * *

Compact Edition of the Oxford English Dictionary 620 (1st ed 1971).

Collect. To gather together; to bring scattered things (assets, accounts, articles of property) into one mass or fund; to assemble. * * *

Black's Law Dictionary 238 (5th ed 1979).

And they define “information” in relevant part as knowledge or intelligence gained about a particular thing:

in·for·ma·tion \,infə(r)'māshən\ *n* -s *often attrib* [ME *informacioun*, fr. *enfourmen*, *informen* to inform + *-acioun* -ation — more at INFORM] * * * **2** : something received or obtained through informing: as **a** : knowledge communicated by others or obtained from investigation, study, or instruction **b** : knowledge of a particular event or situation : INTELLIGENCE, NEWS, ADVICES <latest *~* from the battle front> <securing *~* about conditions in the upper atmosphere> <*~* bureau> * * *

Webster's Third New Int'l Dictionary 1160.

⁵ Because, as explained below, the statute now codified at ORS 181A.250 was adopted in 1981, the City cites to dictionary definitions current at the time.

Information (infə'rmēi'ʃən) * * * **3.** Knowledge communicated concerning some particular fact, subject, or event; that of which one is apprised or told; intelligence, news. * * *

Compact Edition of the Oxford English Dictionary 274.

As a textual matter, therefore, ORS 181A.250 bars a law-enforcement agency from selectively gathering and bringing together into one body knowledge or intelligence about the “political, religious or social views, associations or activities” of any identifiable “individual, group, association, organization, corporation, business or partnership” unless it does so for a legitimate law-enforcement purpose—that is, unless the target’s protected personal information “directly relates to an investigation of criminal activities,” and the agency has “reasonable grounds to suspect the subject of the information is or may be involved in criminal conduct.”

Context supports that reading. The second clause of the statute refers to “*the* subject of *the* information” when discussing the permissible purpose for collecting information about First Amendment conduct. ORS 181A.250 (emphases added). That wording confirms that both the target of the selective gathering *and* the information about First Amendment conduct must be identifiably

tied to each other. *See Osborn v. Psychiatric Sec. Review Bd.*, 325 Or 135, 142, 934 P2d 391 (1997) (concluding that definite article “the” indicated legislative intent to refer to previous part of the statute). Put differently, random or anonymized data are not the subject of the statute.

Moreover, the protected personal “information” at issue—that is, the specific “knowledge” tied to an identifiable person—must be knowledge *by* the law-enforcement agency *about* that person’s “political, religious or social views, associations or activities.” This stems from the text of the statute itself, which states only that a “law enforcement agency” cannot harvest such intelligence, while not affecting third parties’ ability to do so. And it is supported by the context of the second clause, which provides that such intelligence *can* be collected if a law-enforcement agency has a legitimate purpose for wanting that knowledge.

In sum, as a matter of text and context, ORS 181A.250 bars law-enforcement agencies from selectively gathering and bringing together into their files intelligence about persons’ First Amendment conduct for an unauthorized purpose. That prohibition has no

application to the live transmissions of public events at issue here, where it is undisputed that “PPB did not record, copy, review, maintain, or otherwise save” any of the live transmissions, and that it “did not create any logs or files about participants in the activities” seen in those live transmissions. *ACLU of Oregon*, 338 Or App at 754–55.

2. *Legislative history confirms that ORS 181A.250 was intended to bar police from creating files or databases about persons’ First Amendment conduct absent a legitimate law-enforcement purpose for doing so.*

Legislative history confirms the above text and context. The statute now codified at ORS 181A.250 was adopted over forty years ago as part of a nationwide trend stemming from “outrage[at] the excesses of J. Edgar Hoover,” the FBI’s “infiltration and surveillance of political and religious groups,” and “the Watergate hearings[] reveal[ation] that the FBI had taken part in the Nixon Administration’s break-in and wiretapping at the Democratic National Headquarters.” Tom Lininger, *Sects, Lies, and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 Iowa L Rev 1201, 1214 (2004). In particular, the Senate Church Committee’s

much-publicized report about “Intelligence Activities and the Rights of Americans” had concluded in pertinent part,

Too many people have been spied upon by too many Government agencies and *too much information has been illegally collected*. The Government has often undertaken the secret surveillance of citizens on the basis of their political beliefs, even when those beliefs posed no threat of violence or illegal acts on behalf of a hostile foreign power. The Government, operating primarily through secret and biased informants, but also using other intrusive techniques, such as wiretaps, microphone ‘bugs’, surreptitious mail opening, and break-ins, has swept in vast amounts of information *about the personal lives, views, and associations of American citizens*. * * * Groups and individuals have been assaulted, repressed, harassed and disrupted because of their political views, social beliefs and their lifestyles. *Investigations have been based upon vague standards whose breadth made excessive collection inevitable*.

S. Rep. No. 94-755, Book II at 5 (1976) (emphases added).

In response to those concerns, just before the Church Committee report was published, the FBI in 1976 adopted internal guidelines that “imposed restrictions on the infiltration and surveillance of political and religious groups.” Lininger, 89 Iowa L Rev at 1214. Several cities and states—including Oregon—also adopted similar laws to limit law enforcement’s power to probe “First Amendment conduct” absent “a particularized basis for suspecting

criminal activity.” *Id.* at 1214–15, 1215 n 60 (citing *former* ORS 181.575, now recodified at ORS 181A.250, and similar Indiana and Pennsylvania statutes). Thus, in 1977, Indiana adopted a statute worded almost identically to ORS 181A.250:

No criminal justice agency shall collect or maintain information about the political, religious or social views, associations or activities of any individual, group, association, business, or partnership unless such information directly relates to an investigation of past or threatened criminal acts or activities and there are reasonable grounds to suspect the subject of the information is or may be involved in criminal acts or activities.

1977 Ind. Acts, PL 50, § 1⁶. And in 1980, the federal government adopted similar language to govern law-enforcement agencies’ participation in intelligence-sharing databases:

No records shall be maintained or collected about political, religious or social views, associations or activities of any individual group, association, corporation, business or partnership unless such information directly relates to an investigation of criminal activities, and there are reasonable grounds to suspect the subject of the information is or may be involved in criminal conduct.

⁶This document is included in the appendix to this brief at APP-1–2.

45 Fed Reg 61614 (1980)⁷ (subsequently codified at 28 CFR 23.20(b) (1981)⁸).

Oregon joined that trend the following year. The statute now codified at ORS 181A.250 was adopted in 1981 as Section 8 of House Bill (“HB”) 2682. (*See* ER-115–19). That bill amended several existing statutes governing criminal-offender information and its disclosure. (*Id.*). As one supporter explained, the “main purpose of the bill [was] to provide for access to the criminal histories of individuals for those with a legitimate need to know them.” (ER-120) (testimony of Donald J. Sterling, Jr., on behalf of Oregon Newspaper Publishers Association).

HB 2682 was supported by employers and members of the press, who wanted access to criminal-offender information. (*See* ER-120–24, 125–28). Others, however, were concerned about the “uncontrolled disclosure and accessibility to arrest records”—especially “stale arrest records.” (*See* ER-134) (March 20, 2025 testimony of Sen. Kulongoski before House Judiciary Subcommittee). Senator Kulongoski thus noted that “uncontrolled disclosure and

⁷ This document is included in the appendix to this brief at APP-3–5.

⁸ This document is included in the appendix to this brief at APP-6–9.

accessibility” of such records—as “where there’s been an arrest but there’s been no action on it for a year”—could affect “an individual’s status -- whether it’s in school, his or her employment, professional licensing, things like that.” (*Id.*). Effectively, “each of us [*sic*] has a computerized dossier on ourselves” but “that information is often inaccurate. It’s incomplete. And many, many times that -- it’s just untruthful.” (*Id.*). Moreover, “this information, via the computer, is accessible to employers, credit agencies, schools, licensing boards, and just a mult -- multitude of other agencies.” (ER-134–35). In Senator Kulongoski’s view, this meant that “the computer, it becomes a records prison,” and one “way that people have to remove themselves from this prison” is to “prohibit its disclosure.” (ER-135). Senator Kulongoski acknowledged “a very strong argument with the press * * * to have access to that information.” (*Id.*). But despite the press’s interest in transparency, “stale arrest records should not be subject to disclosure.”⁹ (*Id.*).

⁹ Notably, Senator Kulongoski’s testimony pertained only to when arrest or conviction records *should be disclosed*—he expressed no opinion as to what records should be kept in the first instance. (See ER-130–39).

The ACLU of Oregon initially opposed the bill. (*See* ER-133) (noting that fact). It indicated, however, that it would drop its opposition if the legislature also addressed the ACLU's concern about "intelligence file[s]" allegedly "collected and maintained" by law-enforcement agencies about the First Amendment conduct of law-abiding individuals and organizations. (*See* ER-145–47) (testimony of ACLU Executive Director Stevie Remington).

To address that issue, the ACLU proposed that Section 8 be added to the bill. (ER-155, 164). The initial draft language was:

SECTION 8. No law enforcement agency, as defined in ORS 181.010, shall collect or maintain information about the political, religious or social views, associations or activities of any individual, group, association, organization, corporation, business or partnership unless such information directly relates to an investigation of criminal activities, and there are reasonable grounds to suspect the subject of the information is involved in criminal conduct.

(ER-164). That verbiage was nearly identical to the 1977 Indiana law cited previously. *See* 1977 Ind. Acts, PL 50, § 1. The then-Executive Director of the ACLU of Oregon, Stevie Remington, testified that this language had also "been adopted in the federal regs that govern only federally funded information centers"—a direct reference to 28 CFR

23.20(b) cited above. (ER-145). Remington explained that, under existing law, police departments lacked standards to regulate “how they decided to *collect an intelligence file*, nor once it was collected, who might have access to it for what reasons.” (ER-146) (emphasis added). She proposed Section 8 as a compromise that, if adopted, “would give [the ACLU] reason to go along with” the balance of HB 2682 regarding “access to conviction records.” (ER-145).

Remington described the purpose of that proposed provision in similar terms on several occasions. At a March 20, 1980 hearing before the House Judiciary Subcommittee, she explained that it “deals with *intelligence information*, criminal investigatory material, if you will, but perhaps not even that,” collected by law enforcement. (ER-168) (emphasis added). Remington used as an example the so-called “Captain Brown’s Red Squad in the ‘20s, ‘30s, and 40’s in the City of Portland,” which had “*collected card files* on thousands of individuals suspected of being subversive,” including “the YWCA Adelle Pickle club” and “a number of prominent citizens” at the time. (*Id.*) (emphasis added). She stated that “Captain Brown’s Red Squad” would use the files they had collected to “g[i]ve information to

employers and warn[] them against hiring these kinds of people.”

(*Id.*). Remington concluded,

And I think the time is ripe for considering a State law that says that you cannot collect or maintain -- or maintain and disseminate information about a person's political, social, and political [*sic*] views unless you have reasonable reason to believe that they are engaged in criminal activity, and that kind of information is necessary to pursue it. But we have no guidelines on this now.

(*Id.*).

At an April 6, 1981 work session before the House Judiciary Subcommittee, Remington testified as quoted above that the ACLU's proposal stemmed from its concern that law-enforcement agencies lacked guidelines for “how they decided *when to collect an intelligence file, nor, once it was collected*, who might have access to it for what reasons.” (ER-152) (emphases added). She used as an example a “file on the America [*sic*] Civil Liberties Union *that was collected* and maintained by the Portland Police.” (*Id.*) (emphasis added). That “intelligence file” included individual names, cross-references to other intelligence files, and newspaper clippings that had been collected by the police. (ER-152–54). Remington's repeated use of the verb “collect” in conjunction with the noun “file” in her multiple days

of testimony is significant: it shows that, consistently with the definitions quoted above, she used “collect” in its sense of selectively gathering and bringing together into one body (a “file”) a specific thing (information about peoples’ First Amendment conduct) from out of a larger, heterogeneous whole (the outside world, including press reports).

On May 11, 1981, Remington again testified before the House Judiciary Subcommittee about instances in which “enormous files on individuals” had been “collect[ed]”—once more using “collect” in conjunction with “files”—despite “no allegation even that the individuals had ever been involved in any type of criminal activity.”¹⁰ (ER-174). She stated that there were “historically a lot of abuses in this,” and that the language in Section 8 had “been long-suggested as

¹⁰ Remington also discussed a pending “enormous federal lawsuit” related to information allegedly collected by law enforcement about the Socialist Workers Party. (ER-175–76). Not only did police allegedly “collect all kinds of information” about the party and its members, but it also “went out and informed landlords that this man is a member of the Socialist Workers Party, and you ought to kick him out of your house, and they have been.” (ER-176). Other people allegedly were “fired from employment because of law enforcement agencies collecting this data and urging private individuals to take action.” (*Id.*). Again, that discussion is consistent with meanings of “collect” and “information” discussed above.

a matter of dealing with it.” (*Id.*).

Notably, Remington testified that, under proposed Section 8, “the standard *is the same* as has been [used] for some time now in the FBI and CIA controlling the intelligence agencies there.” (*Id.*) (emphasis added). She added that the same language “*has substantially, in this form, been adopted as* [federal] regulations of the Department of Justice that applies only to those agencies that are having -- are federally funded for the maintenance of their records.” (ER-174) (emphasis added). Again, this was an express reference to 28 CFR 23.20(b).

Dave Frohnmayer, the Attorney General of Oregon at the time, voiced concerns about Section 8 as drafted prohibiting law enforcement from collecting any information about First Amendment conduct at all, since police may not know the value of that information until they have had a chance to evaluate it. (ER-200, 228–29). To address that concern, the Senate Justice Committee voted to add the words “or may be” to the final sentence of section 8. (ER-228–32). As amended, the proposed language now read:

No law enforcement agency, as defined in ORS 181.010, shall collect or maintain information about the political,

religious or social views, associations or activities of any individual, group, association, organization, corporation, business or partnership unless such information directly relates to an investigation of criminal activities, and there are reasonable grounds to suspect the subject of the information is *or may be* involved in criminal conduct.

(See ER-119) (Enrolled House Bill 2682) (added text in italics). That amendment brought Section 8 in line with the Indiana law and federal regulation cited previously, which both include similar wording. See 1977 Ind. Acts, PL 50, § 1 (allowing collection if “there are reasonable grounds to suspect the subject of the information is or may be involved” in criminal conduct); 28 CFR 23.20(b) (allowing collection if “there is reasonable suspicion that the subject of the information is or may be involved” in criminal conduct).

The amended bill was passed by the Senate on July 29, 1981, and by the House on July 30, 1981. (ER-119). The text of section 8 above was codified at *former* ORS 181.575 and renumbered as ORS 181A.250 in 2015.¹¹ Aside from renumbering, the operative text of the statute has remained unchanged since it was adopted in 1981.

¹¹ That renumbering included changing the statute’s cross-reference from *former* ORS 181.010 to ORS 181A.010.

That legislative history confirms what text and context already showed: by enacting ORS 181A.250, the legislature intended to bar law-enforcement agencies from selectively gathering and bringing into their files information about people’s First Amendment conduct absent a legitimate law-enforcement purpose for wanting that information. That was the understanding communicated to the legislature by the ACLU, who proposed Section 8 to limit law-enforcement agencies’ power to “collect an intelligence file” on peoples’ First Amendment activities. (ER-146). And it was confirmed by the ACLU’s repeated representation to the legislature that Section 8 was functionally identical to the federal standard set by 28 CFR 23.20(b). (*See* ER-145,174) (stating that the same language had “been adopted in the federal regs” and had “substantially, in this form, been adopted as [federal] regulations”). Significantly, that federal regulation referred to collecting “records” about people’s First Amendment conduct, thereby emphasizing that, consistently with the dictionary definitions above, a collection does not occur unless the pertinent information has been gathered and brought together into one body—namely, the agency’s “records.” 28 CFR 23.20(b)

(1981). Indeed, while 28 CFR 23.20(b) has since been amended to read more similarly to ORS 181A.250,¹² federal guidance continues to state that information is not considered to have been “collected” under that provision until it has been submitted or entered into the law law-enforcement agency’s own intelligence database. (*See* APP-10) (explaining that “collection” means the “[s]ubmission/entry” of intelligence information into an agency’s “criminal intelligence system”). The legislative record is devoid of any legislator voicing any contrary, different, or more sweeping understanding of the intended purpose and effect of Section 8.

II. PPB did not use any of the 2020 livestreams to selectively gather and bring into its files any information about any person’s First Amendment conduct for an unauthorized purpose.

As an initial matter, it is important to note that plaintiff’s claim implicates several aspects of the 2020 livestreams, each of which involves distinct considerations—as the trial court itself

¹² “A project shall not collect or maintain criminal intelligence information about the political, religious or social views, associations, or activities of any individual or any group, association, corporation, business, partnership, or other organization unless such information directly relates to criminal conduct or activity and there is reasonable suspicion that the subject of the information is or may be involved in criminal conduct or activity.” 28 CFR 23.20 (2025).

recognized by staying its ruling against internal transmissions to PPB Incident Command but not against public access to those same transmissions. Specifically, this court must review whether and to what extent each of the following implicates ORS 181A.250: (1) internal transmission of live footage to PPB Incident Command only, (2) the use of YouTube as opposed to Wowza as the vehicle for those live transmissions, and (3) the public's ability to view those same live transmissions in real time. The City addresses each one of those aspects in turn.

1. *Transmitting live footage of public protests to the PPB Incident Command Post for situational awareness did not violate ORS 181A.250.*

First, the uncontroverted facts are dispositive of plaintiff's contention that PPB violated ORS 181A.250 by using livestreaming technology to enable PPB Incident Command to see the 2020 protests in real time for "situational awareness." Quite simply, it is undisputed that these protests were public events taking place in public streets and squares, and that "PPB did not record, make a copy of, review, maintain, or otherwise save" any of the live

transmissions in this case.¹³ (ER-17–24). The uncontroverted facts further establish that “PPB did not use the livestreams to create any files or logs about participants in the protests.” (ER-24, 89) (emphasis added). Finally, it is undisputed that that “PPB did not use the livestreams to collect or maintain any information regarding the political, religious or social views, associations or activities of any individual protesters, groups, their associations, organizations, corporations, businesses, partnerships, or any other affiliations.” (*Id.*) (emphasis added). In short, PPB did not use the livestreams to the Incident Command Post to selectively gather and bring into its files or databases any information about the First Amendment conduct of any person.

Rather, PPB personnel in the Incident Command Post merely watched a *live* feed of events as they occurred in public and in real time, without gathering, consolidating, or retaining any information

¹³ As explained further below, the City concedes that, in the case of the first four livestreams, which were transmitted over YouTube, a recording was made by YouTube. But even if this court were to conclude that the four transmissions over YouTube contravened ORS 181A.250 because recordings of those transmissions existed briefly and were at least theoretically within PPB’s control, this court should still hold that the remaining live transmissions over Wowza complied with the statute.

whatsoever with respect to anything that occurred during that live feed. This was no more “collecting” intelligence about the First Amendment conduct of persons than an officer walking around a neighborhood and watching events as they occur in public, or that same officer watching a live report of a public demonstration on the local news. Put differently, by simply transmitting a live feed of public events to the Incident Command Post in real time, PPB did not selectively gather and bring together into one body any intelligence regarding the “political, religious or social views, associations or activities” of plaintiff or any other person. PPB therefore did not engage in any of the conduct that ORS 181A.250 prohibits.

2. Even if PPB’s use of YouTube for the first four livestreams raises a closer question, the subsequent livestreams transmitted over Wowza complied with ORS 181A.250.

Notwithstanding the above, the City recognizes that an argument can be made that the first four transmissions in this case—which were conducted over YouTube before PPB switched to Wowza—did result in at least a technical collection of information of a type covered by ORS 181A.250. This is because, as noted

previously, YouTube automatically makes and saves a recording of any livestream regardless of the operator's wishes. (ER-17–20). That non-optional feature required PPB to manually go into YouTube to delete that recording “as soon as practicable” after each transmission ended. (*Id.*). The City concedes that, for the short time between the end of a live transmission and PPB's deletion of the YouTube recording of that transmission, PPB technically had control over an audiovisual recording that included at least some footage of people's First Amendment conduct. (*See* ER-17–19) (stipulating that YouTube livestreams showed such conduct). On that basis, this court could conclude that the livestreams conducted over YouTube contravened ORS 181A.250 in at least a notional sense.

The City nevertheless suggests that a more-correct conclusion would be that ORS 181A.250 does not encompass such a technical violation. As explained above, ORS 181A.250 bars a “law enforcement agency”—as opposed to other entities—from selectively gathering and compiling intelligence about peoples' First Amendment conduct for an unauthorized use. Here, PPB complied with its statutory obligations as to the livestreams conducted over

YouTube because those four livestreams did not result in PPB—the “law enforcement agency” under the statute—collecting any intelligence about any person’s First Amendment conduct for an unauthorized use. Rather, it was YouTube, not PPB, that briefly kept a record of the transmissions, and PPB ensured that YouTube promptly destroyed those records without ever accessing them.

In any event, even if this court were to conclude that the livestreams transmitted over YouTube contravened ORS 181A.250, the livestreams conducted after PPB switched to Wowza still complied with ORS 181A.250. As noted above, Wowza made no recording of any of the livestreams, nor did PPB gather and bring into one body any intelligence about anyone who might have appeared in any of those live transmissions. This court should therefore reverse, at least in part, the opinion of the Court of Appeals on that basis.

3. *That the livestreams were made transparent to the public does not mean that PPB thereby collected prohibited intelligence about people’s First Amendment conduct.*

The third aspect of the livestreams at issue in this case is their having been made visible to the public via links on PPB’s official Twitter page. (ER-87). To be clear, what was posted to PPB’s Twitter

page were just *links* to view *live* transmissions of public events—links that, at least after the City switched from YouTube to Wowza, no longer worked the moment those transmissions concluded. (See ER-20–24, 29). Nevertheless, both the trial court and Court of Appeals seemed to view the transparency of the 2020 livestreams to the public as especially problematic. (See ER-240, 264). The City acknowledges that discomfort, but it is not a proper basis for concluding that the City contravened ORS 181A.250.

Quite simply, ORS 181A.250 is not a secrecy statute, nor does it apply to third parties who are not law-enforcement agencies. Rather, as explained above, it is a prohibition on the selective gathering and bringing together into one body of intelligence about persons' First Amendment conduct *by a law-enforcement agency* for an unauthorized purpose. Allowing the public to view live footage of public events occurring in the public square in real time does not implicate that prohibition. By way of analogy, a law-enforcement agency does not violate ORS 181A.250 when its officers discuss a public protest over police radios merely because a third party might be able to listen in on a police scanner. Similarly, PPB did not violate

ORS 181A.250 merely because it allowed the public to see in real time the same live footage as the Incident Command Post.

The City recognizes that the parties stipulated that the 2020 livestreams, at least in part, showed “activity that concerned the political and social views, associations, and activities of the individuals” appearing in them.¹⁴ (ER-17–24). The City also acknowledges that the purpose for the livestreams being made publicly accessible was qualitatively different from the purpose for the internal-facing livestreams to the Incident Command Post.

Whereas the internal-facing livestreams were used by PPB only for “situational awareness” in managing the sometimes-violent 2020 protests, their being made publicly accessible was done for “transparency” and to counter incomplete or inaccurate information. (See ER-86–87). As the Court of Appeals noted, that transparency does raise, at least in theory, some of the concerns underlying the enactment of ORS 181A.250—namely, that peoples’ First Amendment conduct might be seen and used against them by ill-

¹⁴ As noted previously, that was not the only thing the livestreams showed—they also depicted various kinds of criminal activity and the police responses thereto. (See ER-17–21, 87).

intentioned third parties. (ER-264). On the above bases, an argument might be made that, by acting as a conduit by which some peoples' First Amendment conduct could be seen in real time and potentially recorded by any member of the public, PPB effectively engaged in the "simultaneous" gathering and dissemination of raw data that included peoples' First Amendment conduct, in contravention of ORS 181A.250.

But while public transmission may implicate some of the legislative concerns undergirding ORS 181A.250, reading the statute to prohibit such transmission would be strained and overly broad. The legislature knows how to limit transparency when it wishes to do so. *See, e.g.*, ORS 192.660 (regulating when the governing body of a public body "may hold an executive session" closed to the public). Indeed, the legislature did so in a different section of the very bill that enacted ORS 181A.250. (*See* ER-117) (barring disclosure of "compiled criminal offender information on [an] individual [that] consists only of nonconviction data" one or more years old). By focusing its prohibition on the collection of information about persons' First Amendment conduct by law-enforcement agencies

only, the legislature evinced no broader intent to ban third parties from using publicly available raw data to make their own collections. This court should decline to read a secrecy requirement into ORS 181A.250 where none exists. *See* ORS 174.010 (in construing a statute, courts are “not to insert what has been omitted”).

This is especially so as transparency serves important public interests in a time of rampant misinformation. Before the livestreams at issue in this case, the 2020 protests were often broadcast “by demonstrators in the crowd” who “often used cell phones rather than professional video equipment.” (ER-86). Those private livestreams were “frequently picked up by more mainstream media” to inform their own reporting. (*Id.*). Yet there were significant gaps in the information “being shown to the public by some of these livestreams.” (*Id.*). Things such as “reasonable warnings given by PPB, and the criminal activity which precipitated police responses in the first place were frequently omitted.” (*Id.*). Some of this “appeared to be intentional.” (*Id.*). For example, some private livestreamers “would shift their camera away when criminal activity was occurring” or would use “objects like umbrellas * * * to block the view

of criminal activity from cameras, apparently in an attempt to protect those engaged in the criminal activity from public scrutiny or to portray PPB's response as disproportionate and unjustified." (*Id.*). "As these livestreams gathered more public attention, they presented a legitimate public relations and communications concern for PPB." (*Id.*). Under those circumstances, PPB reasonably believed that making its livestreams viewable by the public in real time would further "a legitimate government interest in improving public transparency of PPB's handling of the demonstrations." (ER-87). Construing ORS 181A.250 to prohibit such transparency would place state and local law-enforcement agencies at a disadvantage *vis-à-vis* actors who operate outside such constraints.

For those reasons, this court should hold that allowing the public to view the 2020 livestreams in real time did not constitute an unlawful "collection" by PPB of "information about the political, religious or social views, associations or activities" of any person for an improper purpose under ORS 181A.250. In the alternative, even if this court were to construe ORS 181A.250 to prohibit the simultaneous gathering and public dissemination by law

enforcement of raw data that includes some people’s public First Amendment conduct, it still should hold that live internal transmission to the Incident Command Post for situational awareness alone does not contravene the statute.

III. The incidental and momentary “caching” of digital inputs that occurs internally as a normal part of operating any computerized device, without more, does not violate ORS 181A.250.

The lower courts’ conclusion that the 2020 livestreams violated ORS 181A.250 rested on the faulty premise that the internal workings of a computerized device—*i.e.*, the buffering of a live audiovisual transmission—necessarily meant that PPB thereby collected information about the First Amendment conduct of any person who appeared in that live transmission. Specifically, the trial court held that, “[a]lthough brief and incidental, the ‘caching’ of data” that occurs inside a computerized device during a livestream “amounted to a collection, but not maintenance” by PPB of “information about the political, religious or social views, associations or activities” of persons “prohibited by ORS 181A.250.” (ER-239, 174). Similarly, the Court of Appeals concluded that the livestreams violated ORS 181A.250 because “video and audio data

[was] ‘cached’ on a device within the PPB’s control” for at least a few instants as the transmissions occurred. *ACLU of Oregon*, 338 Or App at 763-64. Those conclusions cannot be squared with the text, context, and legislative history of ORS 181A.250, and would lead to absurd, indeed troubling, results.

As explained above, “caching” in the context of livestreaming means the “temporary storage” of “instructions or data” in the “cache memory” of a computerized device as part of data processing. (ER-14 n 1). The process of using any digital camera necessarily involves “video capture” by the camera, which necessitates the ongoing “caching” and overwriting of a stream of digital inputs “at least temporarily” in the camera itself:

[T]he camera itself creates the video and audio data to be livestreamed. In doing so, it stores the data at least temporarily on the device itself.¹ * * *

* * * * *

¹ In the world of computers, such temporary storage is often referred to as “caching.”

(ER-14). Such “caching” and overwriting of successive small bundles of digital inputs also occur downstream of the camera—specifically, at the “compression and encoding stage”—where those small bundles

of digital inputs are “stored at least temporarily on the device that carries out the encryption and encoding” as they are received from the camera, before being sent over the Internet to a livestreaming service such as Wowza.¹⁵ (ER-14-15). Finally, watching a livestream similarly “requires the user’s device to store the video and audio data comprising the livestream at least temporarily” in the cache memory of that user’s computer. (ER-16). The purpose of the “caching” process in livestreaming is to ensure a smooth live transmission “with as low a latency as technology allows.” (ER 14).

That automated process goes on throughout a livestream, with small bundles of electronic inputs being successively saved and overwritten in essentially real time. As the City explained in the trial court, caching during a livestream occurs within “an infinitesimal, brief period” before one small bundle of inputs is “wiped out as soon as the next pixel comes in”:

¹⁵ Some “caching” also may occur at the level of the livestreaming service. A service may use content-delivery networks—geographically distributed servers that act as intermediaries—to avoid “bottlenecks” and provide a live feed with “minimal lag time.” (See ER-15–16, 43–45). This enables a viewer to experience “the live stream closer to real-time even though the cached data is a few seconds behind” the broadcaster. (ER-43).

[THE CITY] * * * Those terms [*i.e.*, “collect or maintain”] imply something more permanent than an infinitesimal, brief period of caching data for the brief purpose of transmitting it. And I think an important—

[THE COURT] Why—why—why do they suggest that? Why do those terms suggest more than infinitesimal putting together?

[THE CITY] Well, what are we talking about when we talk about caching? Caching is, essentially, you point a video camera—could be a phone or anything else—at a scene. It sees—the phone, I guess you could say, for lack of a better word, sees what’s occurring. And in order to transmit it, those pixels have to be put into a form that is transmittable.

[THE COURT] So they order them, right?

[THE CITY] Correct. And so, those pixels are stored as data points, ones and zeros inside the phone. And then they’re transmitted. But those data points are wiped as soon as the next pixel comes in. And that’s the nature of these live streams.

(Tr, Vol III at 35). Both the trial court and Court of Appeals held that it is irrelevant that such “caching” is transitory or occurs inside a computer for just seconds or fractions of seconds. But, as explained previously, ORS 181A.250 bars law-enforcement agencies from

selectively gathering and bringing together into one body “information about the political, religious or social views, associations or activities” of identifiable persons for an unauthorized purpose. That prohibition is not implicated by the mere automated caching and near-instant overwriting of digital inputs inside a computerized device, without more.

First, caching on its own involves no “principle of selection” on the part of the law-enforcement agency to selectively gather information about persons’ First Amendment conduct from among the mass of heterogenous raw footage transmitted live to the Incident Command Post. *See Webster’s Third New Int’l Dictionary* 444 (defining “collect” in part as involving “a principle of selection” on the part of the person doing the collecting). As the Court of Appeals noted, the livestreams in this case showed all kinds of behaviors by all manner of people, some of it lawful and some of it not: they “showed people engaged in public protest as well as related law enforcement activity, including declarations of riot, declarations of unlawful assembly, the closure and clearance of certain public spaces, and orders to disburse [sic].” *ACLU of Oregon*, 338 Or App at

754. While some of those behaviors reflected “the political and social views, associations, and activities of the individuals they depicted,” others did not, and there was no selective gathering of information about First Amendment conduct by PPB for an improper purpose from that live footage. *Id.* (noting that PPB “did not record, copy, review, maintain, or otherwise save [the livestreams], and it did not create any logs or files about participants in the activities depicted in the livestreams.”). PPB Incident Command simply watched those events in real time for general “situational awareness’ in managing the protests, and it no more “collected” prohibited information about people’s First Amendment conduct than an officer watching the same events in person would have.

Relatedly, because the “caching” in this case was “brief and incidental,” *Id.* at 757, lasting only seconds or fractions of seconds inside a computer for the purpose of buffering a live audiovisual transmission, it did not result in PPB bringing together into one body—*e.g.*, a police file or database—intelligence about any identifiable protestors’ First Amendment conduct that could be put to

unauthorized use by PPB.¹⁶ *See Webster's Third New Int'l Dictionary* 444 (defining “collect” in part as “to bring together” for “an informative or profitable end” by the person doing the collecting). To constitute a prohibited “collection” of information about persons’ First Amendment conduct by a law-enforcement agency under ORS 181A.250, something more than merely watching a public demonstration in a public place in real time must occur. If “caching” does not result in the acquisition by the law-enforcement agency of any qualitatively different information than an officer present on-scene could have viewed in person, then no prohibited “collection” of personal information within the meaning of ORS 181A.250 has occurred.

Here, the lower courts focused narrowly on the fact that “caching” means that small bundles of digital inputs were successively saved and erased in close to real time inside a computer, implying that something was “collected” by the computer, however

¹⁶ As noted previously, the City concedes that the recordings of the first four livestreams that were made and kept by YouTube before their prompt deletion by PPB raise a closer question. But the issue of those four recordings is separate from the technical issue of “caching” during the course of any livestream, on which the trial court and Court of Appeals both based their holdings.

“briefly” and “incidentally.” (Tr, Vol III at 54). But that narrow focus missed the forest for the trees: the “something” being briefly and incidentally cached inside the computer was not *knowledge by PPB* about *the political, religious or social views, associations or activities* or any person.

At most, what was being “cached” was incoming bits of digital inputs inside an electronic device, for seconds or fractions of seconds, without PPB having any control or access to them before they were erased by the next incoming bit of digital inputs. This is no more a “collection” by law enforcement of knowledge about people’s First Amendment conduct than an old-fashioned telephone cable “collecting” electrons at one end and expelling them out the other. If a contrary construction of ORS 181A.250 were correct, then a police officer talking to a community member over the telephone about a non-criminal matter likewise would be engaging in an unlawful “collection” of information, since a cellular phone similarly works by “collecting” the necessary digital data at one end and transmitting it to the other in nearly real time. The statewide implications on the ability of law enforcement to do its job would be drastic.

Moreover, as construed by the lower courts, ORS 181A.250 would bar most use of computers by law-enforcement agencies, since “caching” is simply how computers work.¹⁷ Such a construction would hinder the ability of law-enforcement officers at all levels of government to perform everyday legitimate functions. It would make it unlawful for a police officer to, for instance, visit the public website of a group organizing an upcoming protest in her city to identify where it will take place—even if that protest is publicly advertised on that website—because doing so would result in brief and incidental “caching” of some data relating to that group’s First Amendment conduct on the officer’s computer. Similarly, it would

¹⁷ Most computers “since the 1980s have used one or more caches, sometimes in cascaded levels; modern high-end embedded, desktop and server microprocessors may have as many as six types of cache (between levels and functions).” Wikipedia, Cache (computing), at [https://en.wikipedia.org/wiki/Cache_\(computing\)#](https://en.wikipedia.org/wiki/Cache_(computing)#) (last visited November 4, 2025). Those “caches” permit “buffering,” which reduces “latency for access” and “allows for higher throughput from the underlying resource[.]” *Id.* This court may take judicial notice of these “legislative facts” to “determine the context of the law” and “exercise its judgment or discretion in determining what course of action to take[.]” *State v. Clowes*, 310 Or 686, 692 n 7, 801 P2d 789 (1990) (holding that “[j]udicial notice of legislative facts is not governed by the provisions of OEC 201, and the limitations and standards of OEC 201 do not control notice of legislative facts.” (citation omitted)).

make it unlawful for a police officer to watch an *outside* livestream of a public event—for example, a CBS News live broadcast of a political demonstration—because, as in this case, some digital data relating to that transmission would briefly be “cached” on the officer’s computer during the livestream. (See ER-16) (watching a livestream “requires the user’s device to store the video and audio data comprising the livestream at least temporarily” in the cache memory of that user’s computer). The same would be true of listening to a live audio broadcast, or browsing someone’s public X (formerly Twitter) feed, or looking at any other public information on the Internet. Indeed, it would even make it unlawful for a police officer to exchange emails with a person planning to organize a public event in her City, or to hold a Zoom call with that person, since those emails or data from that Zoom call would incidentally be “cached” on the officer’s computer at least briefly. Nothing in the text, context, or legislative history of ORS 181A.250 supports the proposition that the legislature would have intended such an unreasonably sweeping—indeed, absurd—result. See *McKean-Coffman v. Emp. Div.*, 312 Or 543, 549, 824 P2d 410, *adh’d to on recons* 314 Or 645 (1992) (when

possible, courts should construe statutes to avoid “absurd or unreasonable result.”).

Such a construction of ORS 181A.250 also would create otherwise-avoidable conflicts with other law. *See Carlson v. Myers*, 327 Or 213, 226, 959 P2d 31 (1998) (when possible, this court should “avoid the statutory interpretation that would produce irreconcilable conflict”). Notably, ORS 133.741 regulates Oregon law-enforcement agencies’ use of body-worn cameras by setting parameters for the “use, storage and retention of video and audio recordings resulting from the operation of” such cameras. But body-worn cameras carried by law-enforcement officers are continually “caching” data—that is, they “are technically always recording,” although footage “is not uploaded into evidence” and permanently saved unless the officer “presses record on his body camera[.]”¹⁸ Motorola Solutions, Body Cameras for Police FAQ, at https://www.motorolasolutions.com/en_us/solutions/body-cameras-for-police-faq.html (last visited on November 4, 2025). Functionally, a body-worn camera is simply a

¹⁸ As previously explained in footnote 12, this court may take notice of such “legislative facts” to “determine the context of the law” and “exercise its judgment or discretion” in this case. *Clowes*, 310 Or at 692 n 7.

livestreaming camera worn on the person. If ORS 181A.250 outlawed “caching” absent a direct nexus to a criminal investigation, then body-worn cameras effectively would be unlawful, and it would have been unnecessary for the legislature to adopt ORS 133.741. That statute would conflict with ORS 181A.250 or, at a minimum, be inoperative surplusage. *See State v. Clemente-Perez*, 357 Or 745, 755, 359 P3d 232 (2015) (“As a general rule, we also assume that the legislature did not intend any portion of its enactments to be meaningless surplusage.”).

Similarly, construing “caching” alone to violate ORS 181A.250 would be inconsistent with national practice. As explained previously, Oregon’s statute was adopted as part of a nationwide trend in reaction to excessive surveillance and infiltration of groups by the FBI, was based explicitly on 28 CFR 23.20(b), and was worded similarly to a preexisting Indiana statute. It is uncontroverted that transmitting “live video and audio footage [that] provides the incident commander with first-hand, real-time knowledge of what is happening on the ground * * * is a common tool used by law enforcement nationally.” (ER-88). Yet the City has been unable to

find any other jurisdiction that has construed “caching” alone to constitute “collecting” under its counterpart to ORS 181A.250.¹⁹ On the contrary, as noted above, information is not considered to have been collected within the meaning of 28 CFR 23.20(b) unless it has been entered into a law-enforcement database. This court should not construe ORS 181A.250 so broadly as to ban “a common tool used by law enforcement nationally,” (ER-88), when other jurisdictions have not done so under their own versions of that statute, and absent a compelling textual, contextual, or legislative-historical reason to do

¹⁹ In addition to the federal government and Indiana, jurisdictions with similar laws include the District of Columbia, Pennsylvania, Colorado, Virginia, and New Hampshire. *See* D.C. Code § 5-333.11 (police “shall not collect or maintain information about the political, religious, social, or personal views, associations, or activities” of persons for unauthorized purpose); 18 Pa. Stat. § 9106 (“Intelligence information may not be collected or maintained * * * concerning participation in a political, religious or social organization, or in the organization or support of any nonviolent demonstration, assembly, protest, rally or similar form of public speech” for an unauthorized purpose); Colo. Rev. Stat. Ann. § 24-33.5-1620 (“A law enforcement agency shall comply with the requirements set forth in 28 CFR part 23 with regard to the collection, maintenance, and use of intelligence information”); Va. Code Ann. § 2.2-3803 (agencies shall “[c]ollect no personal information concerning the political or religious beliefs, affiliations, and activities” of persons “unless authorized explicitly by statute or ordinance.”); N.H. Rev. Stat. § 651-F:5 (law enforcement “shall not collect or maintain criminal intelligence information about the political, religious, or social views, associations, or activities” of persons for unauthorized purpose).

so. *See, e.g., Marks v. McKenzie High Sch. Fact-Finding Team*, 319 Or 451, 457, 878 P2d 417 (1994) (looking to other jurisdictions to construe the term “public body” because “we believe that the legislature would have intended” it “to be applied in a manner consistent with the application of those comparable laws in other jurisdictions upon which the Oregon law was modeled.”).

CONCLUSION

As explained above, the text, context, and legislative history of ORS 181A.250 demonstrate that it was enacted to bar law-enforcement agencies from selectively gathering and bringing together into their files or databases intelligence about the First Amendment conduct of persons for an improper purpose. This court should expressly hold as much and correct the overly broad holding of the Court of Appeals, which sweeps so expansively as to effectively outlaw most uses of electronic devices by law enforcement.

Applying that holding to the facts of this case, this court should conclude that the 2020 livestreams did not violate ORS 181A.250 because the undisputed facts establish that PPB did not use them to gather and consolidate any prohibited intelligence for an improper

purpose. This is so regardless of any ongoing “caching” and overwriting of small packets of digital inputs that might have occurred briefly and incidentally inside computerized devices during livestreaming—transient electronic impulses that memorialized no “knowledge” by PPB about the First Amendment conduct of any person, and that PPB could not independently access for any further use. At a bare minimum, even if this court were to determine that the first four livestreams transmitted over YouTube technically contravened ORS 181A.250, or that making the livestreams visible to the public was inconsistent with the legislature’s intent, it should still conclude that internal livestreaming to the PPB Incident Command Post over Wowza complied with the statute.

On those bases, this court should reverse in part the judgment of the Court of Appeals concluding that the 2020 livestreams violated ORS 181A.250, and remand the matter to the trial court for entry of a corrected declaratory judgment in favor of the City.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to ORAP 5.05 and ORAP 9.05(3), I certify that the word count of the present brief is 13,016 words, and that the size of the type is not smaller than 14 point for both the text of the brief and the footnotes.

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INDEX OF EXCERPT OF RECORD

Complaint for Declaratory & Injunctive Relief.....	ER-1–12
Joint Statement of Stipulated Facts	ER-13–114
Exhibits 1–12 to Declaration of Mallory Beebe in Support of Motion for Summary Judgment.....	ER-115–236
Order Granting in Part & Denying in Part the Parties’ Cross-Motions for Summary Judgment	ER-237–243
General Judgment	ER-244–247
A178539 Opinion	ER-248–276