No. 20-1495

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LEADERS OF A BEAUTIFUL STRUGGLE, *et al.*,

Plaintiffs–Appellants,

v.

BALTIMORE POLICE DEPARTMENT, *et al.*,

Defendants–Appellees.

On Appeal from the United States District Court
for the District of Maryland at Baltimore

PETITION FOR REHEARING EN BANC

David R. Rocah
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MARYLAND
3600 Clipper Mill Road, Suite 350
Baltimore, MD 21211
T: 410.889.8555
F: 410.366.7838
rocah@aclu-md.org

Counsel for Plaintiffs–Appellants

Brett Max Kaufman
Ashley Gorski
Nathan Freed Wessler
Ben Wizner
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
T: 212.549.2500
F: 212.549.2654
bkaufman@aclu.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION & RULE 35(B) STATEMENT

This Court should grant rehearing en banc for three reasons.

First, this proceeding involves a question of exceptional importance: whether the Fourth Amendment permits a municipal police department to deploy surveillance planes that comprehensively record, second-by-second, the daytime movements of an entire city's population. In May 2020, the Baltimore Police Department ("BPD") began an unprecedented program of aerial surveillance above Baltimore, capturing 90 percent of the city at a time for 12 hours a day, seven days a week. Immediately prior to the commencement of this "Aerial Investigation Research" ("AIR") program, Plaintiffs brought a constitutional challenge and moved for a preliminary injunction, which the district court denied. On appeal, the panel majority upheld the denial of a preliminary injunction, over Chief Judge Gregory's dissent.

If left undisturbed, the panel majority opinion will have far-reaching consequences—not only for Plaintiffs and Baltimoreans, but for Americans across the country. The BPD's system presents a radical and society-changing threat to individual privacy and free association. By blessing this system, the majority gives a green light to any police department considering a similar program of all-seeing surveillance. But a divided panel opinion—the legal conclusions of which "rest on a fundamentally warped understanding of the facts, accepting the Government's

promises about the AIR program and ignoring the plaintiffs' contrary evidence," Op. 26 (dissent)—should not provide the basis for the nationwide rollout of an immense and entirely novel spying apparatus.

Second, the majority opinion conflicts with the Supreme Court's decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), which held that government collection of information about an individual's long-term movements violates a reasonable expectation of privacy and constitutes a Fourth Amendment "search." As Chief Judge Gregory observed in dissent, *Carpenter* "controls the outcome" of this case. Op. 26. The majority erred in holding otherwise.

Third, the majority opinion conflicts with Supreme Court precedent concerning the "special needs" doctrine by permitting a warrantless search where the government's primary purpose is ordinary law enforcement.

FACTUAL BACKGROUND

Plaintiff Leaders of a Beautiful Struggle ("LBS") is a grassroots think-tank that advances the public policy interests of Black people in Baltimore through youth leadership development, political advocacy, and intellectual innovation. JA97–99. Plaintiff Erricka Bridgeford is a Black activist in Baltimore and the co-founder of Baltimore Ceasefire 365 ("Ceasefire"), a movement whose goal is to see an end to murder in Baltimore City. JA104–05. Plaintiff Kevin James is an

information technology professional and community organizer who has been involved with many grassroots movements in Baltimore. JA111–12.

Defendants are the BPD and Baltimore Police Commissioner Michael Harrison. In March 2020, the BPD entered into a contract with Persistent Surveillance Systems ("PSS") to conduct a 180-day "pilot" program of a wide-area aerial motion-imagery surveillance system, which was scheduled to launch in April. JA35; JA68–69; JA129–30.

According to the contract, the BPD authorized PSS to deploy its "experimental aerial investigation research technology and analytics," whose use in "any US City" is unprecedented and whose "effect on crime has not been analyzed and is unknown," to assist in the investigation of certain crimes in Baltimore City. JA69. While the contract represents that information collected through the AIR program is ultimately intended to be used in investigations related to only four categories of crimes—murder, non-fatal shootings, armed robberies, and carjackings—the Police Commissioner retains the unreviewable authority to approve other uses in "extraordinary and exigent circumstances" on a case-by-case basis. JA69.

The AIR program involves PSS pilots flying over Baltimore in three aircraft, each equipped with the company's "Hawkeye Wide Area Imaging System." JA70; JA130. These cameras capture images of 32 square miles of the city every

second—covering about 90 percent of the city. JA37; JA130. The planes fly 12 hours a day, weather permitting. JA130. Although the system does not employ infrared or night vision technology, it is "sensitive enough to capture images at night with ambient City lighting." JA70; *see* JA130–31. The BPD and PSS "agreed" that resolution of the surveillance cameras will be "one pixel per person," but the "technology has the ability to upgrade the [image] quality."[1]

This surveillance power is further supercharged by integration with existing BPD surveillance capabilities. Specifically, PSS employs between 15 and 25 analysts in two seven-hour daily shifts, some of whom may work out of the "BPD's Watch Center." JA70. PSS may also "integrate its imagery data analysis with BPD systems," including the BPD's centralized "CitiWatch" network of more than 800 ground-based surveillance cameras, which are predominantly located in Black neighborhoods, as well as the downtown business district. JA71; JA132; Op. 35–36 & n.9 (dissent).[2] As part of the AIR program, PSS analysts "track individuals and vehicles that pass the Baltimore CitiWatch CCTV cameras," and "access or request CitiWatch camera information to provide more detailed descriptions." JA71.

---

[1] BPD, Aerial Investigation Research Pilot Program (AIR) at 24:02, Facebook (Mar. 30, 2020), https://www.facebook.com/58771761955/videos/212014970074066 ("BPD 3/30 Facebook Live Video"); *see* JA131.

[2] *See* BPD 3/30 Facebook Live Video at 28:28.

PSS also links the images it collects to the BPD's warrantless automated license plate reader ("ALPR") network, directly allowing any "vehicles that are tracked from [a] crime scene . . . to be identified." JA71; *see* JA132. The contract explains that PSS is permitted to "integrate its iView software to accept and utilize" these and other BPD surveillance systems "to help make all of the systems work together to enhance their ability to help solve and deter crimes." JA71; JA132.

PSS analyzes the data it has collected "upon specific request by BPD or based on alerts" from the BPD's dispatch system. JA70. It then creates, within 18 hours, an "investigative briefing" that includes results of "imagery analysis, the location and timing of a crime, the observable actions at the crime scene, the tracks of vehicles and people to and from the crime scene, the location the vehicles and people from the crime[] scene visited after and before the crime." JA71; *see* JA132. Within 72 hours, PSS provides a more comprehensive report that includes "imagery of the crime scene"; "tracks" and locations of people whom PSS identifies as potential suspects or witnesses—as well as "people and vehicles that met with [those] people"—both prior to and after the crime; and CitiWatch-captured video. JA71–72; JA132. Data collected by PSS is retained for 45 days and then, if unused and unanalyzed, purportedly deleted. JA73; JA47; JA131.

On April 1, the Baltimore Board of Estimates approved the BPD's contract

with PSS by a 3-to-2 vote. JA130. The BPD's planes went up on May 1.[3] While the BPD announced that, as planned, it had grounded the planes on October 31 after six months of flight, it also made clear that the AIR program trial period has not yet ended, as the BPD "will continue to work with [its] vendor, independent evaluators and stakeholders to provide additional analysis, briefings and related activities."[4] Because the BPD continues to access data acquired through the AIR program, and because Plaintiffs seek to preliminarily enjoin this access, this appeal presents a live issue.

PROCEDURAL HISTORY

On April 9, 2020, Plaintiffs filed a complaint challenging the constitutionality of the AIR program under the Fourth and First Amendments, pursuant to 42 U.S.C. § 1983. JA7–27. The same day, Plaintiffs filed a motion for a temporary restraining order and preliminary injunction to halt the program and prohibit the BPD from accessing recordings made of Plaintiffs. JA28–29. On April 24, the district court issued an opinion and order denying Plaintiffs' motion for a

[3] *See* BPD, BPD Aerial Investigation Research (AIR) Pilot Program Launches Tomorrow, Facebook (Apr. 30, 2020), https://www.facebook.com/58771761955/posts/10156868498611956.

[4] Ryan Dickstein, *Halloween Marks the Last Day of the Baltimore Police Department's A.I.R Pilot Program*, WMAR 2 News (Oct. 30, 2020), https://www.wmar2news.com/news/local-news/halloween-marks-the-last-day-for-the-baltimore-police-departments-a-i-r-pilot-program.

preliminary injunction. JA161; JA127–60.

Plaintiffs immediately filed a notice of appeal. JA162. On September 10, this Court held a telephonic oral argument.[5]

PANEL OPINION & DISSENT

On November 5, over Chief Judge Gregory's dissent, the panel majority (Wilkinson & Niemeyer, J.J.) affirmed the district court's denial of Plaintiffs' motion for a preliminary injunction.

First, the majority held that "the AIR program does not violate a reasonable expectation of privacy" under the Fourth Amendment. Op. 10. The majority stated that it understood the AIR program to engage in only "short-term surveillance of an individual's public movements" because it tracks only outdoor movements and "cannot be used to track individuals from day-to-day." Op. 11 (emphases omitted). In this analysis, the majority represented that Plaintiffs "do not challenge" the AIR program's use of CCTV cameras and ALPR readers. Op. 11–12.[6]

Second, the majority held that the AIR program was a reasonable "programmatic search" even in the absence of a warrant or traditional "special

[5] While a motions panel granted Plaintiffs' motion to expedite the briefing schedule, ECF 23, and briefing was complete by June 5, a panel ultimately denied Plaintiffs' motion to expedite argument, ECF 37.

[6] As Chief Judge Gregory pointed out in dissent, this was incorrect. Op. 36–37 & n.10; *see infra* ARGUMENT II.

need" because it "is not being used to target particular individuals" and "is designed to serve critical government purposes" in addressing "violent crime." Op. 17–18.

Third, the majority rejected Plaintiffs' First Amendment claim because "people do not have a right to avoid being seen in public places." Op. 21.

Fourth, the majority determined that Plaintiffs had failed to satisfy the non-merits preliminary-injunction factors because "[a]llowing Baltimore's AIR program to continue is the equitable course of action and serves the public interest." Op. 21.

In a comprehensive dissent that, remarkably, went entirely unacknowledged by the majority, Chief Judge Gregory would have reversed the district court and preliminarily enjoined the AIR program. He explained that "*Carpenter* is not only relevant to this case" but "controls the outcome"—a conclusion the majority avoids by "warp[ing]" the factual record and "putting [its] head in the sand about the program's capabilities." Op. 26, 38.

Examining the record, Chief Judge Gregory concluded that "[t]he AIR program does, indeed, amount to long-term surveillance that compiles 'a detailed and comprehensive record' of a person's past movements," effecting a Fourth Amendment search. Op. 26 (quoting *Carpenter*, 138 S. Ct. at 2215–19); *see* Op. 29. Further, Chief Judge Gregory explained that the AIR program permits the BPD

to "distinguish individuals and deduce identity," noting that, "[a]fter all, that is the very purpose of the program." Op. 34. And he pointedly rejected the majority's efforts to distinguish *Carpenter*, explaining that the majority's reasoning "only hold[s] up when limiting the Fourth Amendment analysis of the AIR program to solely the photographic data its planes collect, as opposed to what information that data can reveal," and that "*Carpenter* precludes such a narrow focus."[7] Op. 32, 33–34. Further, the dissent rejected the majority's "programmatic search" analysis as incompatible with the Supreme Court's special-needs jurisprudence. Op. 44.

Finally, Chief Judge Gregory explained that "[t]he remaining preliminary injunction factors counsel in favor of plaintiffs." Op. 44. In so doing, he warned that "the consequences of the AIR program's unconstitutional nature are likely to be felt in the same overpoliced neighborhoods where BPD's discriminatory practices have already left generational legacies." Op. 48. And he concluded:

> This Court should not invoke the tragedies imparted by gun violence in Baltimore to justify its grant of sweeping surveillance powers to the BPD. This Court should not "[p]ermit[] unconstitutional governmental intrusions into these communities in the name of protecting them." [*United States v. Curry*, 965 F.3d 313, 332 (4th Cir. 2020) (en banc) (Gregory, J., concurring)]. "If merely preventing crime was enough to

[7] In particular, Chief Judge Gregory pointed out two of the majority's critical errors. First, the majority erred by ignoring an academic study in the record establishing that individuals' movements over time are uniquely identifying, even over the short term. Op. 34–35. Second, the majority erred by insisting that the BPD's use of CCTV and ALPR data to facilitate identification of Baltimoreans was irrelevant to the Fourth Amendment analysis. Op. 35–37.

> pass constitutional muster, the authority of the Fourth Amendment would become moot." *Id.* at 334.

Op. 51–52.

ARGUMENT

I. En banc rehearing is exceptionally important because the panel majority's erroneous analysis will likely spur the implementation of persistent aerial surveillance across the country.

This case concerns an issue of nationwide importance: the constitutionality of a novel form of mass surveillance, one that may soon be deployed across the country. The AIR program's persistent "eye in the sky" is the largest mass surveillance program ever implemented in an American city. If the panel majority's erroneous opinion is allowed to stand, the AIR program will serve as a template elsewhere in this Circuit and the nation—dramatically constricting the right to privacy and upending the relationship between individuals and the state.

PSS has sought to contract with numerous police departments, and is currently seeking to work with the St. Louis Police Department.[8] If the majority

[8] Emily Woodbury, *Baltimore's Aerial Surveillance Could Offer Preview for St. Louis*, St. Louis Public Radio, Sept. 21, 2020, https://news.stlpublicradio.org/show/st-louis-on-the-air/2020-09-21/baltimores-aerial-surveillance-could-offer-preview-for-st-louis; Jim Salter, *St. Louis Considers Surveillance Planes in Crime Battle*, Associated Press, July 9, 2020, http://strib.mn/3npE0xE.

Notably, this technology was originally developed for use over battlefields abroad, beyond the ordinary reach of the Fourth Amendment's warrant requirement—and PSS's founder worked on an early version of this technology as

opinion is left undisturbed, there is little question that PSS—and other companies—will seek to deploy wide-area aerial surveillance in cities throughout America, citing this Court's imprimatur. The en banc Court should not permit that to happen on the basis of a deeply flawed and divided panel opinion. *See infra* ARGUMENT II–III.

Moreover, as Chief Judge Gregory made clear in his dissent, the harms inflicted by invasive surveillance technologies like the AIR program fall almost entirely upon Black and Brown communities. "This case presents another circumstance in which '[this Court] must remind law enforcement that the Fourth Amendment protects against unreasonable searches and seizures' to prevent 'the slow systematic erosion of Fourth Amendment protections for a certain demographic.'" Op. 50 (quoting *United States v. Black*, 707 F.3d 531, 534, 542 (4th Cir. 2013)). Without reversal by the full Court, this kind of oppressive surveillance is likely to become a feature of life not just in Baltimore, but in communities of color far beyond it.

II. The panel majority opinion conflicts with the Supreme Court's decision in *Carpenter*.

As Chief Judge Gregory concluded in dissent, "*Carpenter* is not only relevant to this case" but "controls the outcome." Op. 26. The AIR program's 180-

---

a military contractor. *See* Arthur Holland Michel, *Eyes in the Sky: The Secret Rise of Gorgon Stare and How It Will Watch All of Us* 35–36 (2019).

day collection and rolling 45-day retention of location information far exceeds the seven days of cell site location information ("CSLI") collected in *Carpenter*. Like the collection in *Carpenter*, the AIR program compiles a "detailed, encyclopedic" record of "the whole of" every Baltimorean's movements in public. 138 S. Ct. at 2216–19; Op. 29. Although people are not instantaneously identifiable in any single image captured from the sky, the program exists to identify and track individuals, and it accomplishes both. Op. 34.

By rejecting *Carpenter*'s relevance, the majority erred in several respects.

First, the majority fundamentally misunderstood the nature of the AIR program and its capacity to identify individuals. Op. 11. Again, identifying people is the entire point of the BPD's mass surveillance system—otherwise, it would be useless in solving crimes—and identification can be accomplished in multiple ways.

Like the district court, the majority focused on the fact that any single image captured by the AIR program's aerial cameras would show people as unidentifiable "dots." Op. 3. But that superficial conclusion ignores the AIR program's integration of CitiWatch cameras and ALPR, both of which could easily render even a single aerial image personally identifiable. Op. 35–37 (dissent). The majority was simply incorrect when it insisted that "Plaintiffs do not challenge" the BPD's integration of CCTV and ALPR technologies as part of the AIR program.

Op. 11–12.[9]

Further, the majority's narrow focus on "dots" flies in the face of the uncontroverted evidence that "an individual's movements tend to be so unique that . . . , [b]y analyzing patterns, it is possible—and often relatively easy—to identify the person behind the pixel based on the routines it follows." Op. 35 (dissent); ECF 21 at 30; ECF 26 at 15–16. And last, majority fails to respond to the dissent's commonsense argument that merely by following an individual to a residence, "[p]olice could use any number of context clues to distinguish individuals and deduce identity." Op. 34.

The majority's errors stem from its disregard of *Carpenter*, which precludes a "narrow focus" on what the planes collect, as opposed to "what information that data can reveal." Op. 32 (dissent). As the dissent explained: "The AIR program reveals intimate details about the plaintiffs' lives because it records *where they go*, not because any single photograph in isolation is especially revealing. The fact that the database of past movements comes from aerial surveillance planes instead of,

[9] As Plaintiffs made clear, they challenge the AIR program as defined by the contract establishing it, and that contract both explicitly incorporates the BPD's on-the-ground surveillance capabilities and integrates that data with data collected from the sky to facilitate the identification of people. JA70–71; ECF 21 at 9–10; ECF 26 at 5 n.2, 16–17. "That plaintiffs do not *independently* challenge the legality of surveillance cameras and license plate readers does not mean that this Court must ignore their availability to the police and integration in the AIR program when applying *Carpenter*." Op. 36–37 (dissent) (emphasis added).

say, a cell-service provider's CSLI records is, ultimately, inconsequential." Op. 40. And as *Carpenter* makes clear, it is irrelevant under the Fourth Amendment that some degree of additional legwork may be required to make sense of data obtained through surveillance. Op. 32 & n.4 (dissent); ECF 21 at 26.

Second, the majority erred in concluding that the AIR program merely engages in "short-term surveillance" because its planes only photograph people moving about the city during the day and cannot capture their movements inside buildings. Op. 11. As an initial matter, 12 consecutive hours of location tracking is not "short term" and still constitutes a search under the logic of *Carpenter*. ECF 21 at 28 n.25; ECF 26 at 14; Op. 37 n.11 (dissent). Regardless, the AIR program's overnight "gaps" do not somehow start the constitutional clock anew with every sunrise. "That the AIR data has gaps overnight or when a suspect is indoors is no different from the gaps in *Carpenter* between phone calls or in *Jones* between car rides." Op. 37 (dissent); ECF 21 at 23–28; ECF 26 at 6–14. Moreover, because most Baltimoreans live in single-family dwellings, it would be simple for the BPD to confidently identify an individual across multiple days by rolling back the tape to trace pedestrians' paths to the homes they left in the morning, and rolling it forward to the homes they returned to at night. ECF 26 at 11–13; Op. 33–34 (dissent). Wisely, given the scores of analysts embedded with the BPD and equipped with cutting-edge technology, the BPD acknowledges that tracking

individuals across days is, in fact, possible—the BPD just argues that it would be hard. ECF 24 at 16; ECF 21 at 26–28; ECF 26 at 7–14.

Third, to justify its rejection of *Carpenter*'s significance, the majority incorrectly relied on a number of older aerial-surveillance Supreme Court cases that considered brief, targeted aerial observation of static locations, Op. 12–13—a materially different proposition than the BPD's six-month wide-area surveillance. ECF 21 at 32–36; Op. 39 & n.12 (dissent). That the Supreme Court, 30 years ago, held that people might reasonably expect aircraft to fly over them briefly in navigable airspace, perhaps with an ordinary camera, does not render *Carpenter*'s analysis inapplicable to the AIR program.[10] Indeed, the *Carpenter* Court made clear that in applying the "reasonable expectation of privacy" test to new location-tracking technologies, a court must consider the duration of surveillance—as well as whether its comprehensiveness, its indiscriminate nature, and its retrospective quality upset traditional expectations of privacy. *See* 138 S. Ct. at 2216–17; *see also id.* at 2214 (explaining that pre-digital-age Fourth Amendment precedents cannot be "mechanical[ly] interpret[ed]" to bless more invasive digital-age

[10] In only one of these cases did the government use *enhanced* aerial photography—and that involved surveillance of the area surrounding a large industrial complex, not a dense urban area or the curtilage of a home. *Dow Chem. Co. v. United States*, 476 U.S. 227, 234–37, 239 (1986) (suggesting that the investigative use of enhanced aerial photography over residential areas would require a warrant).

surveillance (quoting *Kyllo v. United States*, 533 U.S. 27 (2001))); ECF 21 at 22.

In light of the Supreme Court's holding in *Carpenter*, the panel majority opinion is untenable.

III. The panel majority opinion conflicts with Supreme Court precedent concerning the "special needs" doctrine.

Because Plaintiffs have a reasonable expectation of privacy in the whole of their long-term daytime movements, the BPD was required to obtain a warrant to conduct its AIR program surveillance. Because it did not, and because no warrant could authorize this mass surveillance, the AIR program violates the Fourth Amendment. Despite this, the panel majority concluded, in the alternative, that the AIR program's warrantless surveillance is a constitutionally reasonable "programmatic" search. Op. 15–20. This holding conflicts with Supreme Court precedent.

First, the panel majority erred by analogizing the AIR program to cases involving the limited special-needs exception to the warrant requirement. *See* Op. 17–18. As the Supreme Court has repeatedly held, the special-needs doctrine does not apply where the government has a "general interest in crime control." *City of Los Angeles v. Patel*, 576 U.S. 409, 420 (2015); Op. 43 (dissent). Here, there is no dispute that the AIR program's purpose is for ordinary law enforcement—which is why the BPD never argued in this litigation that the special-needs exception applied.

Second, perhaps recognizing the limitations of the special-needs doctrine, the majority characterized the AIR program as a "programmatic" search exempt from the Fourth Amendment's warrant requirement. Op. 15. But programmatic searches are not one of the "few specifically established and well-delineated exceptions" to the warrant requirement, *Arizona v. Gant*, 556 U.S. 332, 338 (2009)—and for good reason. If, for example, the FBI engaged in the systematic, warrantless surveillance of all email communications, it would be perverse for the government to cite the *scale* of the program as a basis for an exception to the warrant requirement. No case supports this position—yet the panel majority's analysis risks endorsing it.

Third, even if the AIR program were somehow exempt from the warrant requirement, it would be unreasonable. "No crime rate can justify warrantless aerial surveillance of an entire city, wholly unchecked by the judiciary." Op. 50 (dissent); *see* ECF 21 at 40–45 (detailing the inadequacy of the BPD's rules regulating the AIR program).

CONCLUSION

For the foregoing reasons, the Court should grant rehearing en banc.

November 19, 2020

Respectfully submitted,

/s/ *Brett Max Kaufman*

Brett Max Kaufman
Ashley Gorski
Nathan Freed Wessler
Ben Wizner
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
T: 212.549.2500
F: 212.549.2654
bkaufman@aclu.org
agorski@aclu.org
nwessler@aclu.org
bwizner@aclu.org

David R. Rocah
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MARYLAND
3600 Clipper Mill Road, Suite 350
Baltimore, MD 21211
T: 410.889.8555
F: 410.366.7838
rocah@aclu-md.org

Counsel for Plaintiffs–Appellants

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because it contains 3,881 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Date: November 19, 2020

/s/ *Brett Max Kaufman*
Brett Max Kaufman
Counsel for Plaintiffs–Appellants