
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

BRIEF OF DEFENDANTS-APPELLEES

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 20-1495 Caption: Leaders of Beautiful Struggle v. Baltimore Police Department

Pursuant to FRAP 26.1 and Local Rule 26.1,

Baltimore Police Department
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Rachel Simmonsen Date: April 28, 2020

Counsel for: Baltimore Police Department

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Michael S. Harrison
(name of party/amicus)

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Signature: /s/ Rachel Simmonsen Date: April 28, 2020

Counsel for: Michael S. Harrison

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INTRODUCTION

Plaintiffs seeking preliminary injunctive relief must show more than a "grave or serious *question* for litigation"; they must satisfy the "far stricter" requirement of clearly demonstrating that they "will *likely succeed* on the merits." *The Real Truth About Obama, Inc. v. F.E.C.*, 575 F.3d 342, 346–47 (4th Cir. 2009) (emphasis in original), *cert. granted, judgment vacated*, 559 U.S. 1089 (2010), *and adhered to in part sub nom. The Real Truth About Obama, Inc. v. F.E.C.*, 607 F.3d 355 (4th Cir. 2010). The Plaintiffs-Appellants failed to shoulder this "heavy burden." *Id.* at 349.

The Aerial Investigation Research ("AIR") program is a six-month pilot project that involves planes flying intermittently over Baltimore City and taking low-resolution aerial photographs, from which police hope to develop leads to solve the city's most serious violent crimes. Standing alone, the aerial images are incapable of identifying individuals or vehicles, which appear only as dots. But analysts can track the movement of those dots over time to identify routes of potential suspects and witnesses. Using existing ground-based tools – such as surveillance cameras and license-plate readers – police can then try to identify those individuals and their movements before and after the crime. Due to the program's built-in limitations, however, police cannot track an individual's movements beyond several hours (and in many cases for far less time).

The pilot program cannot track everyone in the city.

It cannot track anyone's movement over the course of several days.

It cannot track anyone inside a building or otherwise outside of public view.

Thus, while the AIR program involves a novel use of technology, it fully comports with Supreme Court precedents, which recognize the limited expectation of privacy that people have in public spaces, and the right of law enforcement to conduct warrantless surveillance from public airspace. The Court's narrow decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), involving detailed cell phone records and the user's movements over many days, does not prohibit police from exploring whether sequential aerial photographs can help them solve the city's intractable violent crime problem.

Although the Plaintiffs-Appellants may disagree with the policy of using this technology, they have failed to show an injury in fact, or that the use of the technology likely violates the Fourth or First Amendments. Accordingly, the district court did not abuse its discretion in denying their motion for a preliminary injunction, and this Court must affirm.

ISSUES PRESENTED

Whether the district court properly exercised its discretion in declining to preliminarily enjoin the Baltimore Police Department's AIR program, which produces sequential aerial photographs representing individuals and vehicles as mere dots, allows analysts to review the imagery only when investigating a particular violent crime, requires police to use existing ground-based surveillance tools to identify individuals, allows police to retrace no more than several hours of an individual's public movements, and requires deletion, after 45 days, of any imagery that does not lead to an arrest.

I. Whether the Plaintiffs-Appellants failed to establish an injury in fact sufficient to confer Article III standing to seek a preliminary injunction.

II. Whether the Plaintiffs-Appellants failed to make a clear showing that they would likely prove at trial that the AIR program violates the Fourth and First Amendments.

STATEMENT OF THE CASE

"[E]ven a pandemic cannot slow the pace of the killings" in Baltimore City. Transcript p.74, Apr. 21, 2020 (remarks of J. Bennett). As of April 21, the day of the district court's hearing, the City had experienced 82 homicides in 2020, a rate of about one homicide every thirty-two-and-a-half hours, and one more homicide than the City had experienced by the same date in 2019.[1] This, despite the arrival of Covid-19 and a statewide emergency order requiring residents to stay at home except to carry out essential activities.[2]

Violent crime has "become the context of daily life in" Baltimore City,[3] which ended 2019 with 348 killings and its worst homicide rate ever: 57 killings

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[1] *Compare* Balt. City Info. & Tech., *Baltimore Homicide Map*, https://data.baltimorecity.gov/Public-Safety/Baltimore-Homicide-Map/6e8m-yzf5 (click on "filter" and enter "Jan. 1, 2020" and "Apr. 21, 2020" for "Crime date is between"), *with id.* (click on "filter" and enter "Jan. 1, 2019" and "Apr. 21, 2019") (last visited May 19, 2020).

[2] *See* Gov. of the State of Md., Order No. 20-03-30-01, Mar. 20, 2020, *available at* https://governor.maryland.gov/wp-content/uploads/2020/03/Gatherings-FOURTH-AMENDED-3.30.20.pdf (last visited May 19, 2020). *See also* Phillip Jackson, "Baltimore homicides pass the 100 mark as violence spikes heading into Ceasefire weekend," *Balt. Sun*, May 8, 2020, www.baltimoresun.com/news/crime/bs-md-ci-cr-100-homicides-baltimore-20200508-xrfxz72zrbaxzafulleaqql32a-story.html (noting that "[c]oranavirus has ground Baltimore to a halt . . . and upended nearly every aspect of life in the city," "[b]ut the [p]ace of killing has not slowed one bit").

[3] Alex McGillis, "The Tragedy of Baltimore," *N.Y. Times Magazine*, Mar. 12, 2019, www.nytimes.com/2019/03/12/magazine/baltimore-tragedy-crime.html.

per 100,000 people.[4] Sadly, the violence is nothing new. Last year was the fifth consecutive year that the City suffered at least 300 homicides.[5] In 2017, Baltimore City recorded 342 murders, "more than double Chicago's, far higher than any other city of 500,000 or more residents and, astonishingly, a larger absolute number of killings than in New York, a city 14 times as populous." McGillis, "The Tragedy of Baltimore," *supra* n.3. Compounding this grim reality, BPD detectives cleared just 32.1 percent of homicide investigations in 2019, "one of its lowest rates in the last three decades."[6]

Determined to stem the relentless pace of violence, the Baltimore Police Department (the "Department or the "BPD") this year partnered with the private company Persistent Surveillance Systems ("PSS") to study the effectiveness of a potential new investigative tool: sequential aerial photos captured by small planes

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[4] Tim Prudente, "2019 closes with 348 homicides in Baltimore, second-deadliest year on record," *Balt. Sun*, Jan. 1, 2020, www.baltimoresun.com/news/crime/bs-md-ci-cr-2019-homicide-final-count-20200101-jnauuumukbdh3edsyypspsm3he-story.html. The total count was second only to that of 1993, "when the city suffered 353 killings and had nearly 125,000 more people." *Id.*

[5] Christine Zhang, McKenna Oxenden, and Lillian Reed, "Baltimore hits 500 homicides for fifth year in a row," *Balt. Sun*, Nov. 14, 2019, www.baltimoresun.com/news/crime/bs-md-ci-cr-300-homicides-2019-20191114-zwu7nn5dpjf2nf5h6u5jxpqrh4-story.html.

[6] Jessica Anderson, "Baltimore ending the year with 32% homicide clearance rate, one of the lowest in three decades," *Balt. Sun*, Dec. 30, 2019, www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-crime-policy-20191230-zk2v2auuhbgq3f7zsh3t7rt6cm-story.html.

flying over Baltimore City. (J.A. 50). At a resolution of roughly one pixel per person, the imagery would be incapable of discerning personal, identifying characteristics of people or automobiles. (J.A. 37, 39–40, 50). But analysts would be able to track movements of individuals and vehicles to and from the scene of a crime. (J.A. 38). Detectives could then employ long-established, ground-based tools, such as surveillance cameras and license-plate readers, to attempt to identify potential suspects and witnesses. (J.A. 46, 70).

The Department, under a prior commissioner, first partnered with PSS in 2016, when the company conducted about 300 hours of aerial surveillance.[7] But the program was not subject to the same safeguards in place now. BPD did not disclose the 2016 surveillance flights to the public, Baltimore's elected officials, or even the city solicitor: Fully funded by private donors, the program did not require approval by the City's spending board, and then-commissioner Kevin Davis said he wanted "to see if it worked" before he brought it before the city council.[8] An

[7] Kevin Rector, "Baltimore officials pitched on putting three surveillance planes in the sky at once, covering most of city," *Balt. Sun*, Sept. 19, 2019, www.baltimoresun.com/news/crime/bs-md-ci-cr-surveillance-pitch-20190919-dkurugpjdretrjzcevzlc7eabu-story.html.

[8] Luke Broadwater, "Baltimore police commissioner defends undisclosed surveillance plane on 'Square Off,'" *Balt. Sun*, Aug. 26, 2016, www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-davis-square-off-20160826-story.html.

article in Bloomberg Businessweek disclosed the program after it was already underway, and the program ended after complaints about its secrecy.[9]

Today, operating under a federal consent decree[10] and a different commissioner,[11] the Department is approaching the testing of aerial surveillance "with more thought and care."[12] In the five months since the BPD announced its

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[9] Justin Fenton and Talia Richman, "Baltimore Police back pilot program for surveillance planes, reviving controversial program," *Balt. Sun*, Dec. 20, 2019, www.baltimoresun.com/news/crime/bs-md-ci-cr-baltimore-police-support-surveillance-plane-20191220-zfhd5ndtlbdurlj5xfr6xhoe2i-story.html. *See also* Monte Reel, "Secret Cameras Record Baltimore's Every Move From Above," *Bloomberg Businessweek*, Aug. 23, 2016, www.bloomberg.com/features/2016-baltimore-secret-surveillance/.

[10] In January 2017, Baltimore City and the Department of Justice signed a consent decree to resolve DOJ findings that BPD had engaged in a pattern or practice of unconstitutional actions, including the use of excessive force. Consent Decree, *United States v. Police Department of Baltimore City, et al.*, No. 1:17-cv-00099-JKB, Jan. 12, 2017 (D. Md.), *available at* www.justice.gov/opa/file/925056/download (last visited May 20, 2020). In April 2017, the consent decree was entered as an order of the United States District Court for the District of Maryland. *Id.*; City of Baltimore, "City of Baltimore Consent Decree," https://consentdecree.baltimorecity.gov/ (last visited May 20, 2020).

[11] Davis was fired in January 2018. Kevin Rector, "Baltimore Police commissioner Kevin Davis fired by Mayor Pugh, citing rising crime," *Balt. Sun*, Jan. 19, 2018, www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-davis-replaced-20180119-story.html. Michael Harrison became commissioner in March 2019. Kevin Rector, "Baltimore Police Commissioner Harrison, empowered by council confirmation, now has runway to launch agenda," *Balt. Sun*, Mar. 11, 2019, www.baltimoresun.com/news/crime/bs-md-ci-harrison-confirmation-20190311-story.html.

[12] Emily Opilo, "Baltimore spending board approves surveillance plane pilot

intent to resume the pilot program,[13] the Department has invited the public to an in-person meeting and two Facebook Live events; videos of these three events have generated about 30,000 views.[14] The Department has publicized its contract with PSS and posted a public educational presentation on the BPD's website. *See* Balt. Police Dep't, "New Technology Initiatives," www.baltimorepolice.org/transparency/newtechnologyinitiatives (last visited May 20, 2020). The Department has also discussed the program with members of the consent decree oversight team, *see* Fenton and Richman, "Baltimore Police back pilot program," *supra* n.9, and obtained the approval of the City's spending

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program to capture images from city streets," *Balt. Sun*, Apr. 1, 2020, https://www.baltimoresun.com/news/crime/bs-md-ci-baltimore-surveillance-plane-approved-20200401-sskjob7dgrevpjfyygrlgitnqi-story.html (summarizing Commissioner Harrison's comments).

[13] Harrison has said that poor recordkeeping and communication in 2016, before he was commissioner, requires more testing to determine whether the aerial surveillance is effective. Opilo, *supra* n.12.

[14] Balt. Police Dep't, Video, Community Information Presentation on AIR Pilot Program, Mar. 11, 2020, www.facebook.com/watch/live/?v=1062399994125598&ref=watch_permalink; Balt. Police Dep't, Video, Facebook Live Community Information Presentation on AIR Pilot Program, Mar. 23, 2020, https://www.facebook.com/watch/live/?v=3400646286628872&ref=watch_permalink; Balt. Police Dep't, Video, Facebook Live Community Information Presentation on AIR Pilot Program, Mar. 30, 2020, www.facebook.com/watch/live/?v=212014970074066&ref=watch_permalink.

board,[15] even though private philanthropists continue to cover the costs of the $3.69 million, six-month pilot project, *see* Opilo, *supra* n.12; (J.A. 52, 54, 78).

In addition to providing more transparency, the BPD has imposed substantial limits on the collection, use, and retention of aerial images. With respect to taking photographs:

- The PSS planes fly a minimum of forty hours per week, but only if weather permits, and in no case more than about twelve hours a day. (J.A. 70, 120). The planes fly only during daylight hours, not overnight. (J.A. 120).
- The cameras' limited resolution means neither an individual nor a vehicle is identifiable as anything more than a single dot in a photo. (J.A. 70). This resolution makes it impossible to discern any identifiable characteristics, like a person's ethnicity, gender, or clothing, or a vehicle's color, make, model, or license plate. (J.A. 70). If a dot representing a person or vehicle is seen entering a structure, it is beyond the capability of the technology to know whether a dot later seen leaving that structure is the same person or vehicle. (J.A. 122).
- The cameras do not use zoom, telephoto, or infrared technologies. (J.A. 120).

[15] The board is comprised of the mayor, the president of the city council, the comptroller, the city solicitor, and the director of public works. Balt. City Comptroller, "About the Board of Estimates," https://comptroller.baltimorecity.gov/boe (last visited May 23, 2020).

The cameras transfer the images from the aircraft to ground stations staffed by about fifteen to twenty-five analysts, who can neither track individuals in real time nor access the images to "seek out" criminal activity. (J.A. 60–61, 70, 121). The terms of the pilot program permit analysts to access the imagery only after receiving an incident number or other notification related to the investigation of a specific murder, non-fatal shooting, armed robbery, or carjacking. (J.A. 121).[16]

Tracking the movements of individuals and automobiles is a laborious process. Analysts examine images and "tag" vehicles or individuals at or near the crime scene around the time of the crime's commission. (J.A. 70, 121). Analysts then manually track the "tagged" dots to and from the crime scene, a process that takes about one hour for every two hours' worth of images. (J.A. 121). The pilot program's limitations – including the overnight gaps in collecting imagery, and the one-pixel-per-person resolution – make it impossible to reliably track a particular individual over a period of several days. (J.A. 122).

Within eighteen hours after beginning to track movements, analysts can provide detectives an investigative briefing on the location and timing of the crime, observable actions at the crime scene, and tracks of vehicles and people to and from the crime scene. (J.A. 122). Within seventy-two hours, analysts can provide

[16] The only exception is for extraordinary and exigent circumstances, such as a chemical spill or a train derailment. (J.A. 69). An independent firm will audit the program to verify that analysts access aerial imagery only as part of the investigation of a particular violent crime. (J.A. 82).

a more detailed report including information about relevant ground-based cameras along the tracks, and any available and useful video images from those cameras. (J.A. 122).

If the use of imagery leads to an arrest, the photos and any related briefings and reports will become part of the case file, to be shared with prosecutors and defense counsel. (J.A. 53, 70). All other imagery collected in the pilot program will be deleted after forty-five days. (J.A. 123).[17]

The whole purpose of the AIR pilot program is to test the technology. To that end, the BPD has invited several independent research partners to rigorously scrutinize the program. The RAND Corporation will evaluate how often investigators use the program data and how it affects crime and clearance rates and the success of prosecutions. (J.A. 79). The Policing Project at New York University School of Law will evaluate potential civil rights and civil liberties concerns. (J.A. 80–81). The University of Baltimore will survey and assess residents' perceptions of the AIR program and how, if at all, it impacts perceptions of police legitimacy. (J.A. 80).[18] These independent audits will help inform the Department's assessment of the AIR program and its performance with respect to

[17] An independent firm will verify that images are deleted after 45 days. (J.A. 82).

[18] The Department has also asked Morgan State University to evaluate the program. (J.A. 42, 50).

four measures of success: its impact on officers' ability to identify criminals, its impact on officers' ability to apprehend those criminals, public support of the program, and its potential to deter crime. (J.A. 41).

Even before the first plane took flight, the AIR program enjoyed widespread community support. Proponents include Governor Larry Hogan and dozens of victims and community groups,[19] the business advocacy group Greater Baltimore Committee,[20] and the United Baptist Ministry Convention, which includes more than 100 churches. (J.A. 126). Despite this widespread support, the BPD did not launch the AIR program until after the district court had considered and denied the Plaintiffs-Appellants' motion for a preliminary injunction.[21]

In denying the motion, the district court correctly articulated the Plaintiffs-Appellants' "heavy burden" to demonstrate that: (1) they were likely to succeed on the merits, (2) they were likely to suffer irreparable harm absent preliminary relief, (3) the balance of equities favored preliminary relief, and (4) an injunction would

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[19] Fenton and Richman, "Baltimore Police back pilot program," *supra* n.9.

[20] Greater Balt. Committee, "Statement on Public Safety in Baltimore and Support of the Use of Aerial Surveillance in Baltimore," Oct. 15, 2019, https://gbc.org/statement-on-public-safety-in-baltimore-and-support-for-the-use-of-aerial-surveillance/.

[21] Flights began on May 1, 2020, one week after the district court's ruling. WJZ-CBS Baltimore, "Baltimore Police Launch Surveillance Plane Pilot Program," May 1, 2020, https://baltimore.cbslocal.com/2020/05/01/baltimore-police-launch-surveillance-plane-pilot-program/.

be in the public interest. *Compare* (J.A. 134), *with Accident, Injury & Rehab., PC v. Azar*, 943 F.3d 195, 201 (4th Cir. 2019). The court concluded that the Plaintiffs-Appellants failed to satisfy this test because they could establish neither a Fourth Amendment "search" nor a burden of their First Amendment speech activities. (J.A. 135).

In support of its ruling, the court found that the pilot program's "surveillance capabilities are quite limited." (J.A. 157). The aerial images "only depict individuals as miniscule dots moving about a city landscape," and tracking the movement of those dots requires "significant labor." (J.A. 135). "Gaps in the imagery data" "foreclose the tracking of a single person over the course of several days," and the program "cannot produce a comprehensive log of a person's associations." (J.A. 135, 157). Thus, "in a city plagued by violent crime and desperately in need of police protections," the court denied a preliminary inunction "blocking [a] constitutionally sound police program[]." (J.A. 159).

STANDARD OF REVIEW

"[P]reliminary injunctions are extraordinary remedies involving the exercise of very far-reaching power to be granted only sparingly and in limited circumstances." *MicroStrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001) (internal quotation marks omitted). *Accord Munaf v. Geren*, 553 U.S. 674, 689–90 (2008) ("A preliminary injunction is an extraordinary and drastic

remedy.") (internal quotation marks omitted). Even when a plaintiff satisfies the four conditions for preliminary relief, "whether to grant the injunction still remains in the equitable discretion of the court," *Christopher Phelps & Assocs., LLC v. Galloway*, 492 F.3d 532, 543 (4th Cir. 2007) (internal quotation marks omitted), as a preliminary injunction "may never be awarded 'as of right,'" *Mountain Valley Pipeline, LLC v. W. Pocahontas Properties Ltd. P'ship*, 918 F.3d 353, 366 (4th Cir. 2019), *quoting Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 24 (2008).

"The inquiry upon appeal from a . . . denial of a preliminary injunction is limited to the question whether the court abused its discretion." *First-Citizens Bank & Tr. Co. v. Camp*, 432 F.2d 481, 483 (4th Cir. 1970). *Accord Centro Tepeyac v. Montgomery County*, 722 F.3d 184, 192 (4th Cir. 2013) (en banc) ("[W]here a preliminary injunction is under an interlocutory examination, determining whether the district court abused its discretion 'is the extent of [the] appellate inquiry.'"), *quoting Doran v. Salem Inn, Inc.*, 422 U.S. 922, 934 (1975). The Court reviews factual findings for clear error and legal conclusions de novo, *e.g.*, *Washington Post v. McManus*, 944 F.3d 506, 513 (4th Cir. 2019), and will reverse "only when the judge's discretion was improvidently exercised," *Synanon Found., Inc. v. California*, 444 U.S. 1307, 1307 (1979) (internal quotation marks omitted).

Because "[t]he trial court has considerable discretion in determining whether the situation requires the issuance of . . . a temporary . . . injunction," "the fact that the appellate court reaches a contrary conclusion does not warrant a reversal." 11A Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc.* § 2962 (3d ed. 2008). *Accord Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel*, 872 F.2d 75, 78 (4th Cir. 1989) (noting that "[t]he decision to issue or deny a preliminary injunction is committed to the sound discretion of the trial court" and "[t]hat decision will not be disturbed on appeal unless the record shows an abuse of that discretion, regardless of whether the appellate court would, in the first instance, have decided the matter differently"). "[A] district court abuses its discretion only where it has acted arbitrarily or irrationally, has failed to consider judicially recognized factors constraining its exercise of discretion, or when it has relied on erroneous factual or legal premises." *United States v. Welsh*, 879 F.3d 530, 536 (4th Cir. 2018) (internal quotation marks, brackets, and ellipsis omitted), *cert. denied*, 139 S. Ct. 1168 (2019).

SUMMARY OF THE ARGUMENT

The Plaintiffs-Appellants' claims proceed from a fundamental misunderstanding about the design and capabilities of the AIR pilot program. It is neither a "virtual, visual time machine," Appellants' Br. 19, nor is it capable of compiling "a comprehensive record of the movements and activities of every

Baltimore resident each time they leave their home," *id.* at 3. The program produces low-resolution sequential aerial photographs, which portray people and automobiles as nothing more than anonymous dots. Attempting to identify individuals, if it can be done at all, is a laborious, time-intensive process that requires investigators to track the dots' movements and then look to existing ground-based devices, such as surveillance cameras. And due to the program's built-in limitations, the longest that police could possibly track an individual's movements is a matter of hours, not days. The AIR program simply cannot "amass a comprehensive record of the movements of every pedestrian and vehicle that moves about the city." *Id.* at 7.

The district court did not abuse its discretion in declining to preliminarily enjoin this thoughtfully designed six-month pilot project, from which police hope to develop investigative leads that will begin to stem the rising tide of violent crime in Baltimore City. The Plaintiffs-Appellants can point to no injury in fact sufficient to confer Article III standing to seek relief of any kind, much less the extraordinary remedy of a preliminary injunction.[22] And they have failed to clearly show that they are likely to prevail on the merits at trial, a prerequisite for preliminary relief.

[22] Although the district court found that the Plaintiffs-Appellants established Article III standing, this Court may affirm the judgment "on any ground appearing in the record, including theories not relied upon or rejected by the district court." *Scott v. United States*, 328 F.3d 132, 137 (4th Cir. 2003).

With respect to their Fourth Amendment claim, the Plaintiffs-Appellants failed to clearly show that the AIR program likely violates a reasonable expectation of privacy. The program permits police to observe only movements that occur in public and is far less invasive than other examples of aerial surveillance that the Supreme Court has upheld. The Court's narrow decision in *Carpenter* does not suggest any constitutional infirmity with the AIR pilot program.

As for their First Amendment claim, the Plaintiffs-Appellants fail to assert a type of association protected by the Constitution, and fail to cite a single case that is even remotely similar to the facts here. Accordingly, the district court did not err in concluding that they failed to make a clear showing that they would likely prove at trial that the AIR program impermissibly burdens their right to freedom of association.

At bottom, this lawsuit is driven by Plaintiffs' different – in their view, better – ideas of how BPD should respond to the epidemic of violent crime in Baltimore. But what tactics BPD should use are policy decisions properly entrusted to Commissioner Michael Harrison. Thus, the district court did not abuse its discretion in denying the Plaintiffs-Appellants' invitation to supplant his judgment, and this Court must affirm the denial of a preliminary injunction.

ARGUMENT

The district court did not abuse its discretion in declining to preliminarily enjoin the Baltimore Police Department's AIR pilot program.

I. The Plaintiffs-Appellants are not entitled to any relief because their alleged injuries are too speculative to establish Article III standing.

Article III of the Constitution "limits the judicial power of the United States to 'Cases' and 'Controversies.'" *Griffin v. Dep't of Labor Fed. Credit Union*, 912 F.3d 649, 653 (4th Cir. 2019). *Accord* U.S. Const. art. III, § 2. "Embedded in this limitation is a 'set of requirements that together make up the irreducible constitutional minimum of standing.'" *Griffin*, 912 F.3d at 653 (some internal quotation marks omitted), *quoting Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125 (2014).

"First and foremost" of the requirements of standing is "injury in fact." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998) (describing the other two standing requirements as causation and redressability). A plaintiff must allege (and ultimately prove) "an invasion of a legally protected interest that is concrete and particularized and actual or imminent . . . ." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). An asserted injury is "imminent" when it is "certainly impending." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 345 (2006).

"Abstract injury is not enough." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983).

> The plaintiff must show that he [or she] has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical.

Id. at 101–02 (internal quotation marks omitted).

"The Supreme Court has repeatedly held that an alleged harm is too 'speculative' to support Article III standing when the harm lies at the end of a 'highly attenuated chain of possibilities.'" *South Carolina v. United States*, 912 F.3d 720, 727 (4th Cir. 2019) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013)), *cert. denied*, 140 S. Ct. 392 (2019). For example, in *Clapper v. Amnesty International USA*, the Court considered a challenge to a section of the Foreign Intelligence Surveillance Act, which "authorize[es] the surveillance of individuals who are not 'United States persons' and are reasonably believed to be located outside the United States." *Amnesty Int'l USA*, 568 U.S. at 401. The plaintiffs – "attorneys and human rights, labor, legal, and media organizations" – alleged that their work required them to "engage in sensitive international communication with individuals who they believe are likely targets of surveillance" under the Act, making it reasonably likely that the government would intercept the plaintiffs' communications. *Id.* at 401. But the Supreme Court found this insufficient to establish a concrete injury in fact, because a "series of

hypothetical events would have to occur before the government would intercept any particular plaintiff's communications." *South Carolina*, 912 F.3d at 727 (discussing *Amnesty Int'l USA*).

> The Court held that among other steps, the government would have to decide to invoke its [statutory] authority to target a non-U.S. person with whom a plaintiff communicated, a panel of federal judges would have to "conclude that the Government's proposed surveillance procedures satisfy [the statute's] many safeguards and are consistent with the Fourth Amendment," and the government would have to succeed in intercepting one of the target's communications with the plaintiff.

Id., *quoting Amnesty Int'l USA*, 568 U.S. at 410–15. Such a "highly attenuated chain of possibilities" did "not satisfy the requirement that threatened injury must be certainly impending." *Amnesty Int'l USA*, 568 U.S. at 410.

Similarly, in *City of Los Angeles v. Lyons*, the Court found that a plaintiff lacked standing to seek an injunction barring Los Angeles police from using control holds (aka "chokeholds"). 461 U.S. 95, 97–98, 105 (1983). Although the plaintiff alleged that police had previously applied a control hold to him, and that police regularly used the technique, *id.* at 98, the Court found that neither allegation established "a real and immediate threat that [the plaintiff] would again be stopped . . . by an officer . . . who would illegally choke him." *Id.* at 105. *See also O'Shea v. Littleton*, 414 U.S. 488, 493–97 (1974) (finding that plaintiffs' claims that they had been subject to discriminatory enforcement of criminal law, including the imposition of harsher sentences, was insufficient to establish an

injury in fact in an action for injunctive relief, because the prospect of future injury rested "on the likelihood that [plaintiffs] [would] again be arrested for and charged with violations of the criminal law and [would] again be subjected to bond proceedings, trial, or sentencing before [the defendants]," and such a threat was not "sufficiently real and immediate to show an existing controversy").

This Court has also found standing lacking when the alleged injury in fact is too speculative. In *Beck v. McDonald*, the Court held that plaintiffs who received treatment at a medical center that suffered a data breach failed to establish standing when their theory of injury rested on the mere risk of experiencing identity theft and the cost of protecting against such theft. 848 F.3d 262, 275 (4th Cir. 2017). This Court found that both alleged injuries were too speculative to confer standing.

> As to the alleged increased risk of identity theft, in particular, [the Court] explained that plaintiffs' theory of injury required [the Court] to "assume that the thie[ves] targeted the stolen items for the personal information they contained" and that the thieves would "then select, from thousands of others, the personal information of the named plaintiffs, and attempt successfully to use that information to steal their identities."

South Carolina, 912 F.3d at 727–28, *quoting Beck*, 848 F.3d at 275. "This 'attenuated chain,'" the Court held, "cannot confer standing." *Beck*, 848 F. 3d at 275. The Court also rejected the plaintiffs' "costs of mitigation theory," characterizing is as "a 'repackaged' version of their first theory of standing" and a futile "effort to recoup 'costs they incurred in response to a *speculative*

threat.'" *South Carolina*, 912 F.3d at 727–28 (emphasis in original), *quoting Beck*, 848 F.3d at 276.

Like the plaintiffs in *Amnesty International USA*, *Lyons*, *O'Shea*, and *Beck*, the Plaintiffs-Appellants here have failed to assert any non-speculative injury arising out of the AIR program. They assert that the program infringes upon their "reasonable expectation of privacy in the whole of [their] movements" as well as their "exercise of associational freedoms." (J.A. 25–26). But both claims assume that the pilot program will not only identify the Plaintiffs-Appellants but "reveal personally identifiable details of [their] movements over time," thus "captur[ing] information about the privacies of [their] li[ves]." (J.A. 25).

That is sheer conjecture.

The AIR program's analysts track the movements of only those people and vehicles at the scene of a serious violent crime at the time the crime is committed. (J.A. 121). Whether that tracking reveals identifiable characteristics depends largely on other factors, such as an individual's route, his or her attire, and traffic conditions. Because people and vehicles are identifiable only as anonymous dots in aerial photos, (J.A. 70), police cannot even begin to piece together an identity unless the person or vehicle passes a ground-based device – like a surveillance camera or a license-plate reader – and that device captures a sufficiently clear and unobstructed image of the individual or automobile. This may prove difficult if,

for instance, the individual being tracked is wearing a hat or a hood that obscures his or her face, or the vehicle being tracked is obstructed by another automobile as it passes a ground-based camera.

The Plaintiffs-Appellants err in suggesting that police could simply deduce a person's identity by "roll[ing] back the tape to trace pedestrians' or vehicles' paths to the homes they left in the morning, and roll[ing] it forward to the homes they returned to at night." Appellants' Br. 29. This argument either assumes an uncertainty – that the person being tracked would enter no other structures along their commute – or simply ignores that the resolution of the aerial imagery makes it impossible to determine if a dot leaving a structure is the same dot that entered that structure earlier that day. (J.A. 122).

In any event, one can only speculate that over the remaining few months of the pilot program the Plaintiffs-Appellants will be present at a homicide, serious non-fatal shooting, armed robbery, or carjacking and, thus, potentially have their movements in public tracked by PSS analysts. But the likelihood is almost certainly low, given the mayor's ongoing shelter-at-home order in response to the coronavirus pandemic.[23] *Cf. O'Shea*, 414 U.S. at 497 (assuming, as part of the

[23] The Plaintiffs-Appellants have given no indication that they intend to defy the mayor's order, which, as of May 28, 2020, required Baltimore City residents to stay at home except when carrying out essential activities, such obtaining groceries or medical care. *See* Mayor Bernard C. "Jack" Young, Executive Order: Continuation of Governor's Stay At Home Order, May 15, 2020, *available at*

standing analysis, that the plaintiffs would "conduct their activities within the law and so avoid . . . exposure to the challenged course of conduct").

Contrary to the district court's conclusion, neither *ACLU v. Clapper*, 785 F.3d 787 (2d Cir. 2015), nor *Wikimedia Foundation v. NSA*, 857 F.3d 193 (4th Cir. 2017), supports a finding of standing here. In the Second Circuit case of *Clapper*, the plaintiffs challenged

> the legality of the bulk telephone metadata collection program . . . under which the National Security Agency ('NSA') collects in bulk 'on an ongoing daily basis' the metadata associated with telephone calls made by and to Americans, and aggregates those metadata into a repository or data bank that can later be queried.

ACLU, 785 F.3d at 792. In finding Article III standing, the court reasoned that the plaintiffs had alleged a government seizure of their metadata, i.e., records containing a "startling amount of detailed information" about the plaintiffs' phone calls. *Id.* at 793–94, 801. The plaintiffs did not need to show if or how the government would use or otherwise *search* that data; it was enough that the government had *seized* the metadata, which can reveal "civil, political, or religious affiliations," "social status" and details about one's "intimate relationships." *Id.* at

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https://mayor.baltimorecity.gov/sites/default/files/05152020155718-0001.pdf (last visited May 29, 2020). Beginning May 29, 2020, the mayor allowed restaurants to resume outdoor dining, subject to severe seating and hygiene restrictions, but continued to prohibit most other activities outside the home. Christina Tkacik and Alison Knezevich, "Baltimore City, surrounding counties to allow outdoor dining as coronavirus restrictions life statewide," *Balt. Sun*, May 28, 2020, www.baltimoresun.com/coronavirus/bs-fo-baltimore-outdoor-dining-20200528-3fs52crkcrekphia6yh63opg34-story.html.

794.

Similarly, this Court held that the lead plaintiff in *Wikimedia Foundation* had standing to challenge Upstream surveillance, an electronic surveillance program operated by the NSA. *Wikimedia Found.*, 857 F.3d at 200. Wikimedia alleged that the NSA was intercepting, copying, and reviewing at least some of Wikimedia's communications. *Id.* at 209.

ACLU and *Wikimedia Foundation* are readily distinguishable from the case here. Plaintiffs-Appellants have alleged no seizure of any sensitive documents or communications that might reveal intimate details about their lives. The AIR program unquestionably takes and stores aerial photographs; but none will ever identify Plaintiffs-Appellants as anything more than anonymous dots. Indeed, Plaintiffs-Appellants do not claim any harm arising out of the aerial photography in and itself. Instead, they allegedly fear that the BPD will use the imagery to "generate information," (J.A. 102) – i.e., "individualized report[s] about" the Plaintiffs-Appellants, (J.A. 107, 113) – that "*could* be weaponized against" them in the future, (J.A. 102) (emphasis added). These hypothetical "individualized" reports – not the bare aerial images themselves – are the analogues to the metadata in *ACLU* and the intercepted communications in *Wikimedia Foundation*. But, as already noted, the production of such reports would depend on "a highly attenuated chain of possibilities," *Amnesty Int'l USA*, 568 U.S. at 410, beginning with the

Plaintiffs'-Appellants' presence at the scene of a serious violent crime, and culminating with the BPD's use of traditional, ground-based investigative tools to obtain an image clear enough to identify the Plaintiffs-Appellants. Such a scenario is purely hypothetical and, thus, incapable of conferring Article III standing.

That the Plaintiffs-Appellants allegedly have modified their behavior to avoid the program's aerial photography does not change the equation. In *Laird v. Tatum*, the Supreme Court emphasized that any

> "chilling" effect of executive actions, falling short of a direct restraint of First Amendment rights, [does] not give rise to a justiciable cause if it [arises] "merely from the individual's knowledge that a governmental agency [is] engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some *other* and additional action detrimental to that individual."

Donohoe v. Duling, 465 F.2d 196, 201–02 (4th Cir. 1972) (emphasis in original), *quoting Laird*, 408 U.S. 1, 11 (1972).

In *Laird*, the plaintiffs challenged the Army's use of "sophisticated electronic methods of surveillance" and secret agents' infiltration of political meetings to target activists and gather information about their activities, which was then broadly distributed to federal, state, and local government officials. *Donohoe*, 465 F.2d at 201 (discussing *Laird*). *See also Laird*, 408 U.S. at 2. The *Laird* plaintiffs alleged that

> the purpose and effect of the collection, maintenance and distribution of the information on civilian political activity . . . [was] to harass and

> intimidate plaintiffs and others similarly situated and to deter them from exercising their rights . . . protected by the First Amendment by invading their privacy, damaging their reputations, [and] adversely affecting their employment . . .

Brief for Respondents, *Laird v. Tatum*, No. 71-288 (S. Ct.), 1972 WL 135682, *7–8. The plaintiffs further alleged that they were harmed by "fear that they [would] be made subjects of reports in the Army's intelligence network," *Id.* at *8 (bracket omitted), and, in fact, "most if not all . . . ha[d] been the subject of Army surveillance reports and their names ha[d] appeared in the Army's records," *Tatum v. Laird*, 444 F.2d 947, 956 n.17 (D.C. Cir. 1971), *rev'd*, 408 U.S. 1.

While recognizing that "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of direct prohibition against the exercise of First Amendment rights," the *Laird* Court nonetheless reaffirmed that a plaintiff must show "that he [or she] has sustained, or is immediately in danger of sustaining, a direct injury as the result of that action." *Laird* 408 U.S. at 11, 13 (internal quotation marks and ellipsis omitted). Because the plaintiffs had failed to do so in *Laird*, they lacked standing to proceed.

Likewise, in *Donohoe v. Duling*, this Court considered the propriety of a police department routinely surveilling demonstrations and public meetings, photographing participants, and compiling files on them to be shared with other law enforcement agencies. *Donohoe*, 465 F.2d 196, 197 (4th Cir. 1972). Noting that local police authorities enjoy a greater right to conduct domestic surveillance

than the Army had in *Laird*, the *Donohoe* court held that plaintiffs had no justiciable claim. *Id.* at 202–03.

Here, as in *Laird* and *Donohoe*, the Plaintiffs-Appellants do not assert that BPD is directly regulating their movements, meetings, or associations, but rather that the AIR pilot program's mere existence has a chilling effect on their right to association. But as already noted above, *see supra* pp.22–23, 25–26, the Plaintiffs-Appellants' fears rest on sheer speculation that BPD *might* generate reports identifying the Plaintiffs-Appellants and their movements in public, or that the BPD might somehow "weaponize" that data. Because such conjecture is incapable of establishing an injury in fact, the Plaintiffs-Appellants have failed to demonstrate Article III standing, and that failure is sufficient in and of itself for this Court to affirm the denial of preliminary injunctive relief.

II. The Plaintiffs-Appellants failed to clearly establish that they will likely succeed on the merits at trial.

A. The Plaintiffs-Appellants failed to make a clear showing that they will likely prove at trial that the AIR program violates the Fourth Amendment.

"In determining whether a particular form of government-initiated electronic surveillance is a 'search' within the meaning of the Fourth Amendment, [the] lodestar is" the "reasonable expectation" test from *Katz v. United States*, 389 U.S.

347 (1967). *Smith v. Maryland*, 442 U.S. 735, 739 (1979).[24] Under Justice Harlan's "oft-quoted concurrence" in *Katz*, "a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33 (2001), *citing Katz*, 389 U.S. at 361.

In this case, the Plaintiffs-Appellants failed to clearly show that the AIR program likely violates a reasonable expectation of privacy. The pilot program permits police to observe only those movements that occur in public, where individuals have a limited expectation of privacy. Although the program employs sophisticated technology, it is far less invasive than other examples of aerial surveillance that the Supreme Court has found to fall outside the scope of the Fourth Amendment. And, despite the Plaintiffs-Appellants' arguments to the contrary, the narrow decision in *Carpenter* does not suggest any constitutional infirmity with the AIR pilot program.

[24] Although the Supreme Court has recently revived principles of common law trespass in determining whether a "search" has occurred, the Court has not abandoned the *Katz* analysis in cases of electronic surveillance. *See United States v. Jones*, 565 U.S. 400, 404–06, 412 (2012) (concluding, under trespass principles, that police conduct a search when they physically attach a GPS monitoring device to a car, but noting that "achieving the same result through electronic means, without an accompanying trespass," may be "an unconstitutional invasion of privacy" under *Katz*).

1. The AIR program allows police to track movements for only a short period of time, in public spaces where individuals have a limited expectation of privacy.

The Supreme Court has long held that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz*, 389 U.S. at 351. Thus, "[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *United States v. Knotts*, 460 U.S. 276, 281 (1983). As the person travels, he or she

> voluntarily convey[s] to anyone who want[s] to look the fact that he [or she] [is] travelling over particular roads in a particular direction, the fact of whatever stops he [or she] ma[kes], and the fact of his final destination when he [or she] exit[s] from public roads onto private property.

Id. at 281–82. A police officer's observations of these facts do not constitute a "search" for purposes of the Fourth Amendment. "As a general proposition, the police may see what may be seen from a public vantage point where they have a right to be." *Florida v. Riley*, 488 U.S. 445, 449 (1989) (internal quotation marks and brackets omitted). *See also, e.g.*, Rachel Levinson-Waldman, *Hiding in Plain Sight: A Fourth Amendment Framework for Analyzing Government Surveillance in Public*, 66 Emory L.J. 527, 541 (2017) (recognizing that "surveillance in public areas typically has been deemed not to be a Fourth Amendment search in the first place").

That police employ technology to aid in their observation does not per se convert the surveillance into a Fourth Amendment search. The Supreme Court has "never equated police efficiency with unconstitutionality," *Knotts*, 460 U.S. at 284, and "no one would expect police to continue to operate via teletypes and punch-card machines," Levinson-Waldman, *Hiding in Plain Sight*, 66 Emory L.J. at 565–66. *See also Kyllo*, 533 U.S. at 33–34 ("It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.").

"It is the exploitation of technological advances that implicates the Fourth Amendment, not their mere existence." *United States v. Karo*, 468 U.S. 705, 712 (1984). Police invade reasonable expectations of privacy only when they use "sense-enhancing technology" to obtain information that is not available to the public, at least where "the technology in question is not in general public use." *Kyllo*, 533 U.S. at 34 (holding that police needed to obtain a warrant before using a "thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home"). Thus, police did not need a warrant to track a vehicle through public streets with visual surveillance aided by an electronic beeper attached to a container in the vehicle. *Knotts*, 460 U.S. at 281–82. But they *did* need a warrant when they used a beeper to track a can of ether's movement into a private residence. *Karo*, 468 U.S. at 708–10, 714. In the latter

case, the police could not visually verify that the can was inside the house, so using the beeper to monitor the can's movement violated the occupants' reasonable expectation of privacy in the home. *Id.* at 714–17.

More recently, in *United States v. Jones*, a majority of the Supreme Court addressed what effect the duration of government surveillance may have on the reasonable expectation of privacy in "a person's movements on public streets." 565 U.S. 400, 430 (2012) (Alito, J., concurring in the judgment). Five justices recognized that, while "relatively short-term monitoring . . . accords with expectations of privacy that our society has recognized as reasonable," "the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy." *Id.* (Alito, J., writing for himself and three other justices); *id.* at 415 (Sotomayor, J., concurring) (agreeing that "longer term GPS monitoring" raises constitutional concerns).

In *Jones*, police "installed a GPS tracking device on the undercarriage of" a suspect's car "while it was parked in a public parking lot." *Jones*, 565 U.S. at 403. "Over the next 28 days," police "used the device to track the vehicle's movements," acquiring "more than 2,000 pages of data over the 4-week period." *Id.* Justice Scalia, writing for the Court, applied common-law trespass principles to conclude that the government's installation of the GPS device, and the subsequent monitoring, constituted a Fourth Amendment "search." *Jones*, 565 U.S. at 404–11.

He expressly declined to respond to the Government's contention that Jones had no reasonable expectation of privacy in the underbody of his vehicle, or in the locations of the vehicle on public roads. *Id.* at 406. While recognizing that *Katz* and subsequent cases "ha[d] deviated from [an] exclusively property-based approach" to the Fourth Amendment, *id.* at 405, Justice Scalia noted that the "reasonable-expectation-of-privacy test ha[d] been *added to,* not *substituted for,* the common-law trespassory test," *id.* at 409 (emphasis in original).

Endorsing what some courts and scholars have called the "mosaic theory," five justices in two concurring opinions recognized that nearly a month of GPS monitoring also raised constitutional concerns under the *Katz* reasonable-expectation-of-privacy test.[25] Justice Alito, writing for himself and three other

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[25] *See, e.g.*, Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment,* 111 Mich. L. Rev. 311, 313 (2012) (noting that the "concurring opinions signed or joined by five of the justices endorsed some form of the D.C. Circuit's mosaic theory"). The theory first arose in *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010), the case that the Supreme Court renamed and reviewed in *Jones*. *Id.* at 320.

> The mosaic theory requires courts to apply the Fourth Amendment search doctrine to government conduct as a collective whole rather than in isolated steps. Instead of asking if a particular act is a search, the mosaic theory asks whether a series of acts that are not searches in isolation amount to a search when considered as a group. The mosaic theory is therefore premised on aggregation: it considers whether a set of nonsearches aggregated together amount to a search because their collection and subsequent analysis creates a revealing mosaic.

Id.

justices, rejected the Court's trespass theory, arguing that only the *Katz* standard governed. Applying that test, he said it was unnecessary to "identify with precision the point at which the tracking of [Jones's] vehicle became a search, for the line was surely crossed before the 4-week mark." *Jones*, 565 U.S. at 430. He observed that "society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period." *Id.*

Justice Sotomayor, writing only for herself, agreed with Justice Scalia that "the trespassory test" was "an irreducible constitutional minimum" sufficient to decide the case. *Jones*, 565 U.S. at 414. But she agreed with Justice Alito that "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy." *Id.* at 415. She argued that any reasonableness analysis should consider the "unique attributes of GPS surveillance," which permits police to surreptitiously and relatively inexpensively obtain, store, and mine "a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, political, professional, religious, and sexual associations." *Id.* at 415–16. Nonetheless, in *Jones*, the Government's physical trespass in placing the GPS monitoring device on the vehicle was sufficient to establish a Fourth Amendment search without having the reach the "difficult

questions" about when exactly government surveillance intrudes upon a reasonable expectation of privacy. *Id.* at 418.

Read in harmony, *Knotts*, *Karo*, and *Jones* establish that a person has no reasonable expectation of privacy in his or her movements in public over a brief period of time. Accordingly, short-term surveillance of a person's movements in public does not constitute a "search" for purposes of the Fourth Amendment. Only when police monitor a person's movements in public over a longer period of time – for example, the 28 days at issue in *Jones* – does surveillance intrude upon any reasonable expectation of privacy.

Under these principles, the AIR program does not invade any reasonable expectation of privacy. The pilot program allows police to observe individuals' movements in public spaces, using images captured from public airspace. Although the program involves the use of sophisticated technology, it does not permit police to see inside homes or other buildings that are beyond the public's view. Moreover, the program's limitations allow police to monitor movements for only a brief period of time. The absence of overnight surveillance flights necessarily limits police to twelve hours, but the one-person-per-pixel resolution means monitoring will often be of a much shorter duration: Because it is impossible to tell if a dot entering a structure is the same dot that later leaves the structure, the realty is that the AIR program often will allow police to track an

individual only for the few hours, or even minutes, it takes the person to travel "from one place to another." *Knotts*, 460 U.S. at 281. Accordingly, the AIR program is entirely consistent with *Katz*, *Knotts*, *Karo*, and *Jones*.

2. The Supreme Court has held that aerial surveillance far more intrusive than that used in the AIR program does not violate the Fourth Amendment.

The pilot program not only comports with the foundational cases on one's reasonable expectation of privacy in public but with a series of cases approving of warrantless aerial surveillance. The Supreme Court has said that police do not need a warrant to:

- fly a plane 1,000 feet above a home in order to look into and photograph the contents of a fenced-in backyard within the curtilage, *California v. Ciraolo*, 476 U.S. 207, 209 (1986);
- repeatedly fly over a chemical plant at altitudes of 12,000, 3,000, and 1,200 feet to take aerial photographs that show objects as small as a half-inch in diameter, *Dow Chem. Co. v. United States*, 476 U.S. 227, 239 (1986); *Dow Chem. Co. v. United States ex rel. Burford*, 749 F.2d 307, 309 (6th Cir. 1984); or
- circle a home in a helicopter 400 feet in the air to look through the partially open roof and sides of a greenhouse within the curtilage, *Florida v. Riley*,

488 U.S. 445, 447–48, 450–51 (1989).[26]

In each of these cases, involving aerial surveillance far more intrusive than the AIR program, the Supreme Court found that the police actions did not constitute a "search" and, thus, did not trigger the Fourth Amendment's protections.

In upholding the right of police to conduct warrantless aerial surveillance, the Supreme Court reiterated that "the touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy,'" *Ciraolo*, 476 U.S. at 211, *quoting Katz*, 389 U.S. at 360, and "[w]hat a person knowingly exposes to the public . . . is not subject to Fourth Amendment protection," *id.* at 213, *quoting Katz*, 389 U.S. at 351. *See also Riley*, 488 U.S. at 449 (noting that "police may see what may be seen from a public vantage point where they have a right to be") (internal quotation marks and brackets omitted); *Dow Chem.*, 476 U.S. at 238 (noting that "what is observable by the public is observable without a warrant, by the Government inspector as well") (bracket omitted). Even when officers use vision-enhancing technology, aerial surveillance

[26] *See also United States v. Breza*, 308 F.3d 430, 433–35, 437 (4th Cir. 2002) (holding that police officers' warrantless surveillance from a helicopter flying 200 feet above a garden on private property near a home did not violate the Fourth Amendment); *Giancola v. State of W. Va. Dep't of Pub. Safety*, 830 F.2d 547, 548, 550 (4th Cir. 1987) (noting that the Fourth Amendment does not prohibit "warrantless, physically nonintrusive observation of the curtilage of a residence from an aircraft lawfully operating within public navigable air space," and finding that police officers did not violate this standard when they flew a helicopter 100 feet above a property).

does not necessarily "give rise to constitutional problems," *Dow Chem.*, 476 U.S. at 238,[27] provided that police remain in "public navigable airspace" and conduct their surveillance "in a physically nonintrusive manner," *Ciraolo*, 476 U.S. at 213.

Contrary to the Plaintiffs-Appellants' assertion, the district court did not err in relying on *Ciraolo*, *Dow Chemical*, or *Riley* to deny the preliminary injunction. Appellant's Br. 16, 32–36. That the decisions are "decades-old," Appellants' Br. 16, is immaterial. They faithfully applied the *Katz* reasonableness standard, which itself is decades old yet still controls. *See, e.g.*, *Carpenter*, 138 S. Ct. at 2213 (discussing the enduring relevance of *Katz*). Moreover, the Supreme Court has repeatedly and "strongly reaffirmed the concept that visual surveillance from a lawful vantage point is not a search at all." Brandon Nagy, *Why They Can Watch You: Assessing the Constitutionality of Warrantless Unmanned Aerial Surveillance by Law Enforcement*, 29 Berkeley Tech. L.J. 135, 168 (2014) (discussing *Jones* and *Kyllo*). *See also Jones*, 565 U.S. at 406 (citing *Ciraolo* for the proposition that a Fourth Amendment violation occurs when the government invades a person's reasonable expectation of privacy), *and* 412 (noting that the Court has

[27] In *Dow Chemical*, the police hired a private company to take pictures using a "floor-mounted, precision aerial mapping camera," *Dow Chem.*, 476 U.S. at 229, which "saw a great deal more than the human eye could ever see, *id.* at 249–50 (Powell, J., concurring in part). The use of this "sophisticated photographic equipment," *Dow Chem.*, 749 F.2d at 310, undermines the Plaintiffs-Appellants' assertion that the Supreme Court's aerial surveillance cases involved only "crudely unsophisticated equipment." Appellants' Br. 33.

"not deviated from the understanding that mere visual observation does not constitute a search"); *Kyllo*, 533 U.S. at 33 (citing *Ciraolo* and *Riley* for the proposition that "aerial surveillance of private homes and surrounding areas does not constitute a search").

Similarly, it matters not that the earlier cases involved surveillance of a more limited duration. *See* Appellants' Br. 32–33, 35 (characterizing the surveillance in *Ciraolo*, *Dow Chemical*, and *Riley* as "brief," "limited," "transitory," "short-term," and "fleeting"). The critical factor then – as it is today – was whether the police observed "intimate details" not readily available to the public. *Dow Chem.*, 476 U.S. at 235–36, 238. The planes here unquestionably fly for longer intervals than did the aircraft in *Ciraolo*, *Dow Chemical*, and *Riley*; but the images they capture reveal no "intimate details" that give rise to "constitutional concerns." *Dow Chem.*, 476 U.S. at 238. The AIR program's limitations – the overnight gaps in collecting imagery and the one-pixel-per-person resolution that makes it impossible to continue tracking someone after they enter a building – mean police cannot see anything other than an individual's short-term movements, which are readily observable to all from publicly accessible spaces. Accordingly, the AIR program fully comports with the Supreme Court's precedents authorizing warrantless aerial surveillance.

3. The Supreme Court's narrow decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), does not prohibit an aerial surveillance program that allows police to reliably track a person's movements for only several hours.

The Supreme Court's decision in *Carpenter* – which the Court itself characterized as "a narrow one," *Carpenter*, 138 S. Ct. at 2220 – does not suggest any constitutional problems with the AIR program. *Carpenter* concerned the unique issue of cell-site location information ("CSLI"), "a time-stamped record" that results "[e]ach time [a cell] phone connects to" a "set of radio antennas" called a "cell site." *Id.* at 2211.

> Cell phones continuously scan their environment looking for the best signal, which generally comes from the closest cell site. Most modern devices, such as smartphones, tap into the wireless network several times a minute whenever their signal is on, even if the owner is not using one of the phone's features.

Id. at 2211. Thus, cell-site records provide an exhaustive account of a cell phone's location – in Carpenter's case, "an average of 101 data points per day," *id.* at 2212 – and, because "a phone goes wherever its owner goes," CSLI provides a "detailed, encyclopedic," and "comprehensive record of the person's movements." *Id.* at 2214, 2216–17.

Because a majority in *Jones* had already found that "individuals have a reasonable expectation of privacy in the *whole* of their physical movements," *Carpenter*, 138 S. Ct. at 2217 (emphasis added), *citing Jones*, 565 U.S. at 430

(Alito, J., concurring in the judgment) and 415 (Sotomayor, J., concurring), the question in *Carpenter* was whether the Government needed a warrant to obtain cell phone records retracing some part of that whole. The Court responded "yes" – at least when the Government accesses "seven days of CSLI," which, the Court concluded, invades a reasonable expectation of privacy, and, thus, "constitutes a Fourth Amendment search." *Id.* at 2217 & n.3, 2219–20.[28]

The Court emphasized the narrowness of its holding. *Carpenter*, 138 S. Ct. at 2220. The decision did not "call into question conventional surveillance techniques and tools, such as security cameras," *id.*, and the Court explicitly declined to "decide whether there is a limited period for which the Government may obtain an individual's historical CSLI free from Fourth Amendment scrutiny," *id.* at 2217 n.3. Thus, the Court took great care to limit its holding to a particular quantum (at least seven days) of a particular type of technology (historical CSLI).

In light of these substantial limitations and the singularity of CSLI, the district court correctly concluded that "*Carpenter* does not implicate the AIR pilot program." (J.A. 151). The technologies are remarkably different, as are the nature of the data they produce, the quantity, and the manner in which police use them. The foremost concern of *Carpenter* was the potential for police, "[w]ith just the

[28] The Court also considered and rejected the Government's argument that, because cell service providers maintain CSLI, the third-party doctrine applied. *Carpenter*, 138 S. Ct. at 2216–17.

click of a button," to acquire a "deep repository of historical location information" about a specific person whose identity they already knew. *Carpenter*, 138 S. Ct. at 2218. A cell phone – "almost a 'feature of human anatomy,'" *Carpenter*, 138 S. Ct. at 2218, *quoting Riley v. California*, 573 U.S. 373, 385 (2014) – "tracks nearly exactly the movements of its owner," "faithfully follow[ing]" him or her "beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales," *id.* *See also Riley*, 573 U.S. at 395 (noting that "nearly three-quarters of smart phone users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower"). As such, tracking "the location of a cell phone . . . achieves near perfect surveillance, as if [the Government] had attached an ankle monitor to the phone's user." *Carpenter*, 138 S. Ct. at 2218.[29]

By contrast, the AIR program is of no use to police who already know the identity of a suspect. The purpose of the program is not to reveal the movements of an identified person but, rather, to reveal the identity of a person whose movements have been photographed in public. Even if police wanted to look up

[29] This recognition of the ubiquity of cell phones and the breadth of CSLI defeats the Plaintiffs-Appellants' contention that the data in *Carpenter* had "plenty of gaps," or that the location information at issue in the AIR program is "even richer" or "more precise." Appellants' Br. 24–25, 26 n.23. It also bolsters the district court's sound conclusion that the Plaintiffs-Appellants failed to show how a 2013 study involving "*mobility* traces" has any application to the AIR program. (J.A. 153–54) (finding no relevance in the study, reproduced on pages 89–93 of the joint appendix, and cited on page 30 of Appellants' Brief).

the past movements of a known suspect, there would be no way to do it: The aerial imagery is not precise enough to identify people or vehicles, which appear only as dots.

What little location data the AIR program does produce is far from the "all-encompassing" and "exhaustive chronicle" of movements that the government obtained in *Carpenter*. *Carpenter*, 138 S. Ct. at 2217, 2219. Assuming that police can identify one of the dots in an aerial image, AIR can provide only a relatively brief snapshot of that person's movements. The longest possible period of time the police could retrace is twelve hours, the daily maximum a plane flies and takes photos. But the reality is that police will probably be limited to a much shorter window. Because the technology cannot determine whether a dot entering a structure is the same dot later seen leaving, analysts can track movements for only as long as the person remains in public view; the moment the individual enters a building, the trail runs cold. Thus, the Plaintiffs-Appellants grossly mischaracterize the program by suggesting it provides "a comprehensive record of the movements and activities of every Baltimore resident each time they leave their home," Appellants' Br. 3, and allows police to "reconstruct[] an entire city population's movements," *id.* at 22.

The limited duration for which police can track a person's movements distinguishes the AIR program from historical CSLI, which can provide "a detailed

chronicle of a person's physical presence compiled every day, every moment, over several years." *Carpenter*, 138 S. Ct. at 1222. AIR does not – indeed, could not – produce such "a comprehensive chronicle of [a person's] past movements." *Id.* at 2211. The relevant time period is not, as the Plaintiffs-Appellants repeatedly claim, the180-day duration of the pilot program or the 45-day period for retaining imagery. *See, e.g.*, Appellant's Br. 28 (arguing that "the AIR program involves the daily collection of Plaintiff's movements, down to the yard, for 180 days, retained for 45 days at a time" and "far exceeds the seven days at issue in *Carpenter*"). The only relevant time period is that revealing the movements of a particular, identified individual. After all, "Fourth Amendment claims are brought by" specific litigants; accordingly, "there must be an identifiable" plaintiff "(be it an individual or a group) who is surveilled for a long enough period that it gives rise to a Fourth Amendment injury." Levinson-Waldman, *Hiding in Plain Sight*, 66 Emory L.J. at 563–64. In the case of the AIR program, the longest the police could possibly track a person's movements is several hours – far less than the week of movements the Supreme Court found problematic in *Carpenter*.

The effort involved in deriving location information also distinguishes the AIR program from the government's acquisition of historical CSLI. AIR is neither "remarkably easy" nor "cheap." *Carpenter*, 138 S. Ct. at 2217–18. As even the Plaintiffs-Appellants concede, tracking movements under the AIR program is

"labor-intensive" and "more resource-intensive than what was at issue in *Carpenter*." Appellants' Br. 27–28. The program requires one to three planes to collect aerial imagery and fifteen to twenty-five analysts to "tag" and track any people and vehicles that appear in the images. (J.A. 70, 121). An analyst must work one hour to track two hours' worth of movements. (J.A. 121). AIR thus allows police to track an unidentified individual or automobile for only "a brief stretch," much like "law enforcement might have pursued a suspect" "[p]rior to the digital age" when surveillance "'for any extended period of time was difficult and costly and therefore rarely undertaken.'" *Carpenter*, 138 S. Ct. at 2217, *quoting Jones*, 565 U.S. at 429 (opinion of Alito, J.). The considerable time and effort required to reduce raw data to usable location information makes it impossible for the BPD to track each of the hundreds of thousands of people who travel throughout Baltimore City, much less to identify each person in order to "amass a comprehensive record of the movements of every pedestrian and vehicle that moves about the city." Appellants' Br. 7.

Unable to make a convincing case that the AIR program violates the Fourth Amendment in its current iteration, the Plaintiffs-Appellants argue that the analysis must take into account "existing technologies that could further enhance the government's capabilities," such as "[c]ameras with far more precision and detail than those the BPD plans to use during its 180-day trial" and "cameras with night

vision and infrared capabilities, [which] are just an upgrade away." Appellants' Br. 30–31 n.28. But "Fourth Amendment cases must be decided on the facts of each case, not by extravagant generalizations," *Dow Chem. Co.*, 476 U.S. at 239 n.5, or speculation that police might someday abuse their power, *Knotts*, 460 U.S. at 283–84. The Supreme Court has "never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment." *Karo,* 468 U.S. at 712.

To summarize, *Carpenter*'s holding was "a narrow one" – that the Government invades a reasonable expectation of privacy when it accesses seven days' worth of CSLI. *Carpenter* did not reject the well-established principle that "relatively short term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable." *Jones*, 565 U.S. at 430 (Alito, J., concurring in the judgment), *citing Knotts*, 460 U.S. at 218–82. *Carpenter* merely confirmed what Justice Alito presciently observed in *Jones*: that only the use of "longer term" monitoring "impinges on expectations of privacy." *Id.*

Because the AIR program involves surveillance from public airspace and makes it impossible for police to reliably track an individual's movements for more than several hours, the program does not invade any reasonable expectation

of privacy.[30] Accordingly, the district court did not err in concluding that the Plaintiffs-Appellants failed to make a clear showing that they will likely succeed at trial in establishing a Fourth Amendment violation.

To be clear, the BPD does not dispute that the AIR program is "novel" and "unprecedented," Appellants' Br. 3, 7, 11, 21, and that "different principles [may] indeed apply" to "more sophisticated surveillance," *Carpenter*, 138 S. Ct. at 2215. But this Court has expressed reluctance "to decide a constitutional question in a new context without a full record," *Rumler v. Bd. of Sch. Trustees for Lexington Cty. Dist. No. One*, 437 F.2d 953, 954 (4th Cir. 1971) (per curiam),[31] and even the *Carpenter* Court recognized that its decision "[did] not begin to claim all the answers" about when the Government's use of technology constitutes a Fourth Amendment "search," *Carpenter*, 138 S. Ct. at 2220 n.4. What the high court *has* said is that people have a limited expectation of privacy in public, *e.g.*, *Knotts*, 460 U.S. at 281, the government can lawfully conduct warrantless aerial surveillance

[30] Indeed, even the petitioner in *Carpenter* conceded that a person has no reasonable expectation of privacy in the sum of one's movements over a period of a day or less. *See* Reply Brief, *Carpenter v. United States*, No. 16-402 (S. Ct.), 2017 WL 4838412 (arguing for "a bright-line rule allowing law enforcement agents to request no more than 24 hours of an individual's historical CSLI without triggering the warrant requirement").

[31] *See also Dalmo Sales Co. v. Tysons Corner Reg'l Shopping Ctr.*, 429 F.2d 206, 208–09 (D.C. Cir. 1970) (affirming the denial of a motion for preliminary injunction in a case involving "novel legal issues"); *Bowers v. Columbia Gen. Corp.*, 336 F. Supp. 609, 613 (D. Del. 1971) (noting that "a court should ordinarily decline to decide novel questions of law on less than a complete record").

from public airspace, *Ciraolo*, 476 U.S. at 209; *Dow Chem. Co.*, 476 U.S. at 239; *Riley*, 488 U.S. at 447–48, 450–51; and surveillance of an individual's movements on public thoroughfares does not raise constitutional questions unless it is of such a long duration that the Government learns intimate details about a person's life, *Carpenter*, 138 S. Ct. at 2217 n.3; *Jones*, 565 U.S. at 430 (Alito, J., concurring in the judgment); *id.* at 415 (Sotomayor, J., concurring). Because the AIR pilot program violates none of these principles, the Plaintiffs-Appellants failed to shoulder their "heavy burden" of clearly showing that they will likely prove at trial that the program violates the Fourth Amendment. *The Real Truth About Obama, Inc.*, 575 F.3d at 349.

B. The Plaintiffs-Appellants failed to make a clear showing that they will likely prove at trial that the AIR program violates the First Amendment.

The district court also did not err in concluding that the Plaintiffs-Appellants are unlikely to prove at trial that the AIR program violates the First Amendment by "infring[ing] on [their] exercise of associational freedoms through constant and inescapable monitoring by the BPD." (J.A. 26).

"Freedom of association, although not explicitly enumerated in the First Amendment, is a right included within the 'penumbra' of the First Amendment." 16A Am. Jur. 2d Constitutional Law § 580 (updated May 2020). But the First Amendment protects only two types of association: "intimate association and

expressive association." *Iota Xi Chapter Of Sigma Chi Fraternity v. Patterson*, 566 F.3d 138, 146 (4th Cir. 2009), *citing Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18 (1984). "[I]ntimate association consists of the choice to 'enter into and maintain an intimate human relationship,'" whereas "expressive association" is "the 'right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion.'" *Id.*, *quoting Roberts*, 468 U.S. at 617–18.

The Plaintiffs-Appellants invoke neither type of association protected by the First Amendment. They do not allege, for example, that the AIR program in any way affects their personal affiliations that "attend the creation and sustenance of a family," such as marriage, childbirth, "the raising and education of children," or "cohabitation with one's relatives." *Roberts*, 468 U.S. at 619 (discussing intimate association). Nor do they assert that the AIR program interferes with their right "to speak, to worship, [or] to petition the government for the redress of grievances." *Id.* at 622 (discussing expressive association).

Instead, the Plaintiffs-Appellants make only vague assertions that the AIR program "exposes their associations to government monitoring and scrutiny." Appellants' Br. 48. For example, Dayvon Love, the public policy director for Leaders of a Beautiful Struggle, does not claim that the AIR program threatens his

group's ability "to associate with others and organize politically,"[32] only its ability to do so "free from unwarranted government scrutiny." (J.A. 100). "As a basic matter, however, individuals have not traditionally enjoyed protection against being observed by law enforcement . . . ." Levinson-Waldman, *Hiding in Plain Sight*, 66 Emory L.J. at 604.[33]

Regardless, even if the Plaintiffs-Appellants had invoked a right of association protected by the First Amendment, they nonetheless failed to clearly demonstrate that they will likely prove a violation of that right at trial. They make only the conclusory assertion that the AIR program "plac[es] a record of all their sensitive movements into the hands of police." Appellants' Br. 48. Such an assertion, utterly devoid of any factual support, betrays the Plaintiffs-Appellants' lack of understanding of the AIR program's operations and capabilities. As repeatedly noted above, *see supra* pp.22–23, 25–26, the pilot program is incapable of revealing anything more than a person's movements in public over a very short

[32] Indeed, Love asserts that his group's "public events are already subject to BPD monitoring," (J.A. 100), suggesting that the AIR program will not, in fact, interfere with any of the group's activities.

[33] Neither *Carpenter* nor *Jones* said otherwise. *See* Appellants' Br. 47 (arguing that *Carpenter* and *Jones* "made clear that . . . sustained surveillance of individuals threatens freedom of association"). These cases simply recognized that when government surveillance is long-term and comprehensive, it may reveal information, including details of a person's associations, that renders the Government action a search. But the Government's discovery of an intimate relationship does not per se establish an interference with that relationship.

period of time (in no case more than several hours). And only those individuals who are at the scene of a serious violent crime will ever be subject to tracking or the possibility of identification. Thus, one can only speculate that the AIR program will reveal anything about the movements of these particular Plaintiffs-Appellants, much less that the program will *probably* produce "a record of all their sensitive movements." Appellants' Br. 48.

Tellingly, the Plaintiffs-Appellants cite not one case in which a court found that aerial surveillance impermissibly infringed upon one's right to association. Instead, they cite inapposite cases involving compelled disclosures of memberships and associations,[34] the Federal Election Campaign Act of 1971,[35] a background investigation of a federal employee,[36] and a border search.[37] Because none of these cases is remotely similar to the case here, the district court did not err in concluding that the Plaintiffs-Appellants failed to clearly demonstrate that they will likely establish a First Amendment violation at trial.

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[34] *NAACP v. Alabama*, 357 U.S. 449 (1958); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539 (1963); *Local 1814, Int'l Longshoremen's Ass'n, AFL-CIO v. Waterfront Comm'n of N.Y. Harbor*, 667 F.2d 267 (2d Cir. 1981); *In re Grand Jury Proceedings*, 776 F.2d 1099 (2d Cir. 1985).

[35] *Buckley v. Valeo*, 424 U.S. 1 (1976).

[36] *Clark v. Library of Congress*, 750 F.2d 89 (D.C. Cir. 1984).

[37] *Tabbaa v. Chertoff*, 509 F.3d 89 (2d Cir. 2007).

The Plaintiffs-Appellants' failure to clearly show that they will likely prevail on the merits at trial was enough to defeat their motion for a preliminary injunction, and the district court did not abuse its discretion in denying them this "extraordinary and drastic remedy." *Munaf*, 553 U.S. at 689–90.

That the Plaintiffs-Appellants believe that other strategies will more effectively redress Baltimore City's persistent crime problem is immaterial. Neither the BPD nor Commissioner Harrison disagrees with the Plaintiffs-Appellants that addressing the root causes of crime necessarily requires reinvesting in – and rebuilding relationships with – historically underinvested communities. *See, e.g.* (J.A. 109) (Decl. of Erricka Bridgeford) (asserting that "the City of Baltimore and the BPD should invest in" "community building," "healing strategies," and "programs to address the root causes of violence"). But the Plaintiffs-Appellants are not entitled to use the courts to usurp the BPD's policy judgment simply because they would have taken a different approach to combatting crime. "The responsibilities for assessing the wisdom of . . . policy choices and resolving the struggle between competing views of the public interest are not judicial ones." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984).

Facing an unprecedented rise in violence, Commissioner Harrison and the BPD have agreed to a six-month, carefully controlled study of a novel approach to

investigating crimes, at no cost to taxpayers. Only after considering the community's views and consulting with the City's legal advisors did the Department embark on this limited pilot program. Absent a clear showing that it likely violates the Constitution, the district court did not abuse its discretion in refusing to preliminarily enjoin the use of this potentially game-changing law enforcement tool by a city beleaguered by violence.

CONCLUSION

The Baltimore Police Department and Commissioner Harrison respectfully request that the Court affirm the denial of preliminary injunctive relief.

Respectfully submitted,

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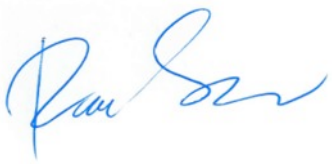

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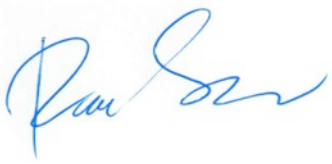

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