

No. 20-1495

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

-v-

BALTIMORE POLICE DEPARTMENT, *et al.*,
Respondents.

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

**BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS'
REQUEST FOR REHEARING EN BANC**

SHERRILYN A. IFILL
President and Director-Counsel
SAMUEL SPITAL
KEVIN E. JASON
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
40 Rector Street, 5th floor
New York, NY 10006
(212) 965-2200
sspital@naacpldf.org
**Counsel of Record*

CHRISTOPHER KEMMITT*
MAHOGANE REED
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
700 14th Street NW
Washington, DC 20005
(202) 682-1300
ckemmitt@naacpldf.org

*Counsel for Amicus Curiae NAACP
Legal Defense & Educational Fund, Inc.*

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INTERESTS OF *AMICI CURIAE*¹

Amici curiae are civil rights groups, public interest organizations, faith leaders, and community activists committed to transparent, community-based, constitutional policing practices in the City of Baltimore.

The NAACP Legal Defense & Educational Fund, Inc. (“LDF”) is the nation’s first and foremost civil rights legal organization. Since its founding in 1940, LDF has strived to secure equal justice under the law for all Americans and to break down barriers that prevent Black people from realizing their basic civil and human rights. LDF is especially concerned with policing policies and practices that target and disproportionately harm communities of color, especially Black people. Since 2015, LDF’s Justice in Public Safety Project has worked to address issues of unconstitutional police practices, to end police violence against people of color, and to eliminate racial bias and profiling by police in order to foster confidence and trust in our public institutions.

Casa de Maryland, Inc. is a nonprofit Latinx and immigration advocacy-and-assistance organization committed to creating a more just society by building power and improving the quality of life in low-income immigrant communities. Casa de Maryland advocates for fairer policing in Baltimore and has both decried the constant surveillance of its constituent communities by police and advocated for greater oversight of the Baltimore Police Department. Casa de Maryland advocates for a

¹ Amici curiae state that no party’s counsel authored this brief either in whole or in part, and that no party or party’s counsel, or person or entity other than amici curiae, amici curiae’s members, and their counsel, contributed money intended to fund preparing or submitting this brief.

fundamental restructuring of policing to stem the over-policing of traumatized neighborhoods and eradicate discriminatory practices.

Citizens Policing Project (“CPP”) is a Baltimore advocacy organization committed to creating and sustaining a community-informed policing model that creates a conduit of trust and collaboration with the Baltimore Police Department. CPP advances this goal through educating and training residents of Baltimore city in effective advocacy to ensure public safety. CPP is interested in preventing invasive, discriminatory practices by the BPD that reinforce the distrust and distress experienced in connection with Baltimore policing. The issues at stake in this case directly relate to CPP’s work in promoting public safety and ensuring the rights and protection of privacy of the residents of Baltimore City.

Equity Matters is a nonprofit network of equity practitioners and proponents of equity practice. Equity Matters has a history of advancing racial equity and community in Baltimore, including through the Campaign for Justice, Safety, and Jobs, through the process surrounding the U.S. Department of Justice Consent Decree, and through other police reform efforts. The network’s expertise also includes promoting accountability, community-involved strategic decision making, and equity in the government’s use of technology. Equity Matters opposes the implementation of technologies that are adopted without sufficient approval from the community and with outcomes at odds with the Department of Justice Consent Decree.

Rabbi Daniel Cotzin Burg is the Alexander Grass Rabinic Chair for Beth Am Synagogue of Baltimore City. He is a member of the Maryland Task Force on

Reconciliation and Equity. He serves on the board of the Institute for Islamic, Christian and Jewish Studies (ICJS) and IFO, and on the Baltimore Advisory Board of Jews United for Justice. He has been a vocal supporter in Annapolis and Baltimore of marriage equality, police reform, legislation to curtail gun violence and other important social and societal issues affecting Baltimore and Maryland.

Reverend Grey Maggiano is the Rector of Memorial Episcopal Church in Baltimore City. As faith leaders and cherished spiritual institutions in their community, Reverend Maggiano and Memorial recognize that the violent crime in Baltimore is the inevitable result of a 100-year history of segregation, over-policing, and fear. Reverend Maggiano and Memorial also recognize that the trauma of surveillance on a community can cause mental and spiritual harm, and that the State's ability to constantly surveil communities of color only dehumanizes and divides us.

SUMMARY OF THE ARGUMENT

Amici curiae support Petitioners' arguments for why this Court should grant rehearing en banc. In this brief, amici focus on important errors in the panel majority's opinion. First, the panel majority failed to consider as important context the history of racially discriminatory policing in Baltimore. For decades, the Baltimore Police Department ("BPD" or "the Department") has engaged in a pattern of discriminatory, unconstitutional policing practices in Black communities, infringing on Baltimoreans' privacy interests and other Fourth Amendment rights. This context makes BPD's aerial surveillance program (the AIR Program) especially dangerous as a potential catalyst for future violations of Black Baltimoreans' Fourth

Amendment privacy rights. Second, the panel majority invoked the “special needs” exception to the warrant requirement, but then relied on a general law enforcement need as permitting the AIR Program to continue without judicial oversight. However, the Supreme Court has long recognized that general law enforcement is not a “special need” that justifies systematic warrantless searches without probable cause like those enabled by the AIR Program. Given the reality of policing in Baltimore, the majority’s unprecedented expansion of the special-needs doctrine risks further violations of the Fourth Amendment rights of Baltimoreans. This will only exacerbate eroding community trust in BPD, deter the community-policing aims of BPD, and undermine the vision of public safety imagined by Baltimoreans. The en banc court should rehear this case and reverse the panel majority’s decision below.

ARGUMENT

I. THE PANEL MAJORITY IGNORED HISTORICAL CONSTITUTIONAL VIOLATIONS BLACK COMMUNITIES HAVE ALREADY ENDURED AT THE HANDS OF BPD AND THE EXACERBATING DISCRIMINATORY EFFECTS OF THE AIR PROGRAM.

The panel majority characterized the AIR Program as conducting short-term surveillance of public movements, and asserted that the program did not, on its own, identify a person’s race, gender, or identity. *See* Maj. Op. 5. Based largely on this characterization, the panel majority concluded that the AIR Program does not infringe on Baltimoreans’ reasonable expectations of privacy under the Fourth Amendment. Maj. Op. 9–15. This was error. As Chief Judge Gregory explained in dissent, the panel majority’s analysis of the Fourth Amendment implications ignored what information the gathered data *reveals* about Baltimoreans—the unique

movements and daily activities of all Baltimoreans—which was the focus of the Supreme Court’s inquiry in *Carpenter v. United States*, 138 S. Ct. 2206 (2018). See Gregory Op. 31–40. The panel majority also ignored BPD’s documented history of using discretionary policing policies to violate Baltimoreans’—and especially Black Baltimoreans’—Fourth Amendment rights.

As Chief Judge Gregory recognized, “dragnet law enforcement tactics are nothing new for many neighborhoods in Baltimore.” Gregory Op. 46. Quite the opposite. Just four years ago the United States Department of Justice issued a 164-page report documenting law enforcement abuses that intentionally targeted and disproportionately impacted Black communities.² Under the guise of BPD’s “zero tolerance” policing strategy, which dates back to the early 2000s and “prioritized officers making large numbers of stops, searches, and arrests . . . with . . . insufficient oversight from supervisors or through other accountability structures,” BPD officers targeted predominantly Black neighborhoods, often effecting searches and seizures without the required constitutional justification and in violation of federal antidiscrimination laws.³ The DOJ found that BPD “intrudes disproportionately upon the lives of African Americans at every stage of its enforcement activities.”⁴ And despite knowing about the racial bias that permeated its policing of Black communities, BPD failed to “take adequate steps to ensure that its enforcement

² See U.S. DEPT. OF JUSTICE, CIVIL RIGHTS DIV., *Investigation of the Baltimore City Police Department*, pp. 47–73, (Aug. 10, 2016), <https://www.justice.gov/crt/file/883296/download> (“DOJ Report”).

³ *Id.* at 5.

⁴ *Id.* at 47.

activities [were] non-discriminatory.”⁵

The DOJ's Report documenting systemic problems within BPD was just the beginning. In 2017, eight officers in Baltimore's Gun Trace Task Force were arrested for, and subsequently charged with, stealing money, drugs, guns, and terrorizing Baltimore neighborhoods.⁶ The officers' misconduct was discovered only after neighboring sheriffs' deputies investigating a drug enterprise found a GPS tracker on the underside of a suspected drug conspirator's car. The GPS tracker had been planted by a Task Force officer, who tracked the suspected conspirator's location in furtherance of the Task Force's criminal enterprise and not for any law enforcement reason.⁷

The panel majority did not reference this history, but instead focused solely on the stated aims of the AIR Program. This context is important to the Fourth Amendment analysis. The AIR Program is a Fourth Amendment “search”—it gathers and collects Baltimoreans' unique location information over 12 hours every day and retains that information for 45 days (though the information can be stored for longer periods). *See* Gregory Op. 34 n.5. It thus must be subject to the “obstacles,” to wit, judicial oversight in the form of a search warrant, to prevent “too permeating police surveillance.” *United States v. Di Re*, 332 U.S. 581, 595 (1948). But the infrastructure of BPD's AIR Program permits widespread, indefinite monitoring of all Baltimoreans

⁵ *Id.*

⁶ Tim Prudente, BALT. SUN, *How Heroin Overdoses in the Suburbs Exposed Baltimore's Corrupt Police Squad, the Gun Trace Task Force* (Mar. 16, 2018), <https://www.baltimoresun.com/news/crime/bs-md-ci-gttf-overdose-20180216-story.html>.

⁷ *Id.*

without any of the safeguards—judicial oversight, particularized and specific investigatory purposes—required by the Fourth Amendment. *See* Pet. 40–45.

This framework is fraught with the potential for future constitutional abuses like those historically doled out to Black Baltimoreans by BPD.⁸ Without these safeguards, BPD has seemingly unbridled discretion to undertake surveillance without meaningful accountability. That is, BPD is left to further “intrude[] disproportionately on the lives” of Black Baltimoreans, invading their Fourth Amendment privacy interests without impactful oversight.⁹ Given the history and reality of policing practices in Baltimore, the racially discriminatory impact of this broad deference to law enforcement is all but guaranteed to result in diminished privacy rights for Black people in Baltimore. *See* Gregory Op. 48 (BPD’s “recent history provides important context” and “counsels 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 left generational legacies”).

II. THE PANEL MAJORITY ERRONEOUSLY CONCLUDED THE AIR PROGRAM SATISFIES THE “SPECIAL NEEDS” EXCEPTION TO THE FOURTH AMENDMENT.

The panel majority also erred by recognizing general law enforcement aims as “special needs” excepting the AIR Program from the Fourth Amendment’s warrant and probable-cause requirements. *See* Maj. Op. 15. The panel majority’s analysis is not only inconsistent with Fourth Amendment jurisprudence, which characterizes

⁸ *See* DOJ Report.

⁹ *Id.* at 47.

only circumstances *beyond* routine law enforcement as “special needs”, but its conflation of law enforcement aims with circumstances warranting “special needs” could lead to further discriminatory policing practices—a possibility the panel majority ignores. The panel majority’s approach also disregards the work that Baltimore community organizers are doing to address violent crime in their own communities.

a. The Fourth Amendment Does Not Countenance the AIR Program Without Judicial Oversight or Special Needs Beyond Public Safety.

The panel majority’s decision to deny Petitioners’ preliminary injunction motion rests, in part, on its conclusion that the AIR Program meets a “serious law enforcement need without unduly burdening constitutional rights.” Maj. Op. 15. The majority invokes the “special needs” doctrine of the Fourth Amendment, which permits law enforcement to engage in systematic warrantless searches and seizures absent individualized suspicion where law enforcement can demonstrate a special need beyond routine law enforcement. *See e.g., New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) (“Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement... is a court entitled to substitute its balancing of interests.”). This doctrine has been applied only in very narrow and limited circumstances. *See e.g., United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (finding special needs at the United States border checkpoints); *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) (finding a special need at sobriety checkpoints). With good reason. If the doctrine were applied more broadly, it would swallow the protections of the Fourth Amendment, by allowing for widespread

governmental intrusions without judicial oversight. Thus, the Supreme Court has consistently held that ordinary law enforcement cannot suffice as a special need permitting suspicion-less programmatic searches and seizures. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 41 (2000) (“We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing.”).

Despite the Supreme Court’s clear guidance, the panel majority justifies the burdens of the AIR program on the privacy interests of Baltimoreans by referencing the needs of local law enforcement to respond to violent crime in the City. Maj. Op. 15–20, 22–23. For example, the panel majority concludes that “BPD has a clearly demonstrated need for this surveillance” to address an uptick in violent crimes—specifically fatal and non-fatal shootings, robberies, and carjackings—over the past five years. Maj. Op. 2, 18. The majority does not mention that Baltimore’s violent crime rate is far below the high crime rate of the 1990s.¹⁰

By relying on this justification, the majority flouts long-established Supreme Court precedent holding that routine law enforcement cannot justify a program of suspicion-less searches and seizures. *See Gregory Op.* 44 (“Because the majority does not identify a special need other than the general interest in crime control to justify the AIR program...the doctrine does not apply.” (internal citations omitted)). In *Edmond*, the Supreme Court explained why ordinary law enforcement cannot qualify

¹⁰ Ames Grawert and Cameron Kimble, BRENNAN CENTER FOR JUSTICE, *Takeaways from 2019 Crime Data in Major American Cities* (Dec. 18, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/takeaways-2019-crime-data-major-american-cities>.

as a special need: “Without drawing the line at ...the general interest in crime control, the Fourth Amendment would do little to prevent [unconstitutional] intrusions from becoming a routine part of American life.” *Edmond* 531 U.S. at 42. The Supreme Court’s premonition has come to fruition through the AIR Program.

b. Baltimore Residents Embrace a Vision of Public Safety That Extends Beyond the Majority’s Limited View of Community Violence and Policing.

The majority’s suggestion that the AIR Program can address the crisis of community violence in Baltimore is not only inconsistent with the Fourth Amendment, but also with DOJ conclusions about community trust in law enforcement.

A detrimental consequence of BPD’s history of Fourth Amendment violations in Black Baltimore communities has been a persistent erosion of public trust in the Department. In its 2016 Report documenting abuses by BPD, the DOJ observed that community relations, particularly within Baltimore’s Black neighborhoods, is one of BPD’s weakest attributes and inhibits effective law enforcement practices in Black communities.¹¹ The DOJ concluded that the divide between the police and members of the Baltimore community “is a significant impediment” to “effective policing”¹² and confirmed that BPD’s history of policing has created a community reluctance to cooperate with police officers or provide even basic information.¹³ BPD’s history of discriminatory policing continues to affect the City’s residents, whose trust in the

¹¹ DOJ Report at 156.

¹² *Id.*

¹³ *Id.* at 158.

police force is all but depleted.¹⁴

BPD's unchecked deployment and unsupervised use of the AIR Program will do little good in BPD's continued effort—and ongoing obligation—to comply with the 2016 Consent Decree between the City and DOJ. Among the obligations of that legally-binding Consent Decree are the requirements to reduce racial disparities in policing and to address BPD's relationship with the Black community in Baltimore.¹⁵ As discussed above,¹⁶ the AIR Program will only create additional opportunity to exacerbate racial disparities in policing. And rather than repair the damaged relationship between the community and BPD, the AIR Program has exacerbated existing tensions. Community groups engaged in monitoring BPD compliance with the decree uniformly opposed the AIR Program before the pilot period commenced,¹⁷ and there is still skepticism about its deployment. One community organizer with the

¹⁴ David McFadden, BALT. SUN, *In Baltimore, Public Trust in Police Force Hard to Find*, <https://www.baltimoresun.com/maryland/baltimore-city/bs-md-baltimore-police-trust-1227-story.html> (Dec. 26, 2018); *see also* DOJ Report at 47 (observing that racially discriminatory policing practices “erode[d] community trust” in Black communities).

¹⁵ Since January 2017, BPD has been under a federal consent decree with one of the stated goals being to “enhance BPD's relationship with its community.” Consent Decree at ¶ 2, *United States v. Police Dept. of Balt. City*, No. 1:17-cv-00099-JKB, (D. Md. Jan. 12, 2017), ECF No. 2-2, <https://www.justice.gov/crt/case-document/file/925036/download>.

¹⁶ *See supra* Part I.

¹⁷ *See* Monique Dixon, Commentary, BALT. SUN, *NAACP Legal Defense Fund: Spy Plane Planned for Baltimore is Unconstitutional*, <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0424-baltimore-surveillance-plane-naacp-legal-20200423-ix4bvm2r2jctbjpj7udk5ufhz4-story.html>; *see also* ACLU MD. Press Release, *ACLU and CJSJ Oppose Plan to Reinstate Permanent Surveillance of Baltimore Residents* (Dec. 20, 2019), <https://www.aclu-md.org/en/press-releases/aclu-and-cjsj-oppose-plan-reinstate-permanent-surveillance-baltimore-residents>; CBS News, *Baltimore to Begin Using Surveillance Planes* (Dec. 20, 2019), <https://www.cbsnews.com/news/baltimore-maryland-to-become-first-city-monitored-by-police-surveillance-planes/>

(“The American Civil Liberties Union of Maryland and the Coalition for Justice, Safety and Jobs in a joint statement said Harrison's decision to reverse course is a “fateful step” that will affect the privacy rights of people of color in Baltimore.”)

Peoples Power Assembly explained that the AIR Program “creates a feeling of helplessness, a feeling that you are trapped and constantly being watched, and that creates resentment. It’s all part of the constant targeting of people of color that creates resentment that builds up.”¹⁸

Given these sentiments and history, many in Baltimore’s communities, including Petitioner Erricka Bridgeford, have been actively engaging in reimagining public safety in their neighborhoods.¹⁹ Gregory Op. 50–51. Amici are among them. For example, amicus curiae the Citizens Policing Project (“CPP”) was instrumental in the DOJ investigation into BPD policing practices and has played a leading role in implementing all aspects of the resulting Consent Decree.²⁰ CPP is dedicated to educating and training Baltimoreans in effective advocacy to ensure public safety in communities of color.²¹ And amicus curiae Equity Matters advances racial equity and community in Baltimore, including through the Campaign for Justice, Safety, and Jobs (CJSJ), through implementation of the Consent Decree, and through other police reform efforts.²² Investing in dragnet surveillance systems, such as the AIR program, undermines the efforts of Baltimore communities that seek to offer a more holistic,

¹⁸ J. Cavanaugh Simpson, BALT. MAG., *Prying Eyes: Military-Grade Surveillance Keeps Watch over Baltimore and City Protests, But Catches Few Criminals* (Aug. 5, 2020), <https://www.baltimoremagazine.com/section/community/surveillance-planes-watch-over-baltimore-but-catch-few-criminals/>.

¹⁹ See Decl. of Erricka Bridgeford, *Leaders of a Beautiful Struggle v. Balt. Police Dept.*, 1:20-cv-00929-RDB (D. Md. Apr. 9, 2020), ECF No. 5, https://www.aclu-md.org/sites/default/files/field_documents/bridgeford_declaration.pdf.

²⁰ See CITIZENS POLICING PROJECT, *Our Work*, <https://cpproject.org/our-work> (last accessed Nov. 25, 2020).

²¹ CITIZENS POLICING PROJECT, *About Us*, <https://cpproject.org/about-us> (last accessed Nov. 25, 2020).

²² See EQUITY MATTERS, <https://equity-matters.org> (last accessed Nov. 25, 2020).

constitutionally-sound vision of public safety.

Social science supports the proposition that the underlying social conditions which generate community-level violence cannot be addressed exclusively through greater investments in policing.²³ The social conditions in Baltimore described by the majority are the consequence of years of targeted public divestment in essential social services that support Black neighborhoods.²⁴ This divestment occurred at the same time that spending on policing and prisons skyrocketed to rates that resulted in the modern crisis of mass incarceration. Untangling this legacy in Baltimore requires more than the AIR Program.

CONCLUSION

For the foregoing reasons, Petitioners' request for *en banc* rehearing should be granted.

²³ See generally, *The Complete Report of Mayor LaGuardia's Commission on the Harlem Riot of March 19, 1935*, MAYOR LAGUARDIA'S COMMISSION (1936), <https://harlemeducationhistory.library.columbia.edu/collection/items/show/2091>; *The Kerner Report: The 1968 Report of the National Advisory Commission on Civil Disorders*, THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS REPORT (1968); *Forward through Ferguson A Path Toward Racial Equity*, THE FERGUSON COMMISSION (2015), <https://forwardthroughferguson.org/report/executive-summary/the-commission/>; ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* (Seven Stories Press, 2003); ALEX S. VITALE, *THE END OF POLICING* (Verso, 2017).

²⁴ John Sankofa, *Disinvestment in Baltimore's Black Neighborhoods Is Foreboding but Reversible*, URBAN INSTITUTE (Sept. 29, 2020), <https://www.urban.org/urban-wire/disinvestment-baltimores-black-neighborhoods-foreboding-reversible>.

CERTIFICATE OF RULE 32 COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29 and 32(g)(1) and Circuit Rules of the United States Court of Appeals for the Fourth Circuit 29 and 32(c), I hereby certify that this brief complies with the stated type-volume limitations. The text of the brief was prepared in Century Schoolbook 12-point font, with footnotes in Century Schoolbook 11-point font. This brief consists of 2,598 words, excluding those items noted in Federal Rule of Appellate Procedure 32(f). This certification is based on the word count function of the Microsoft Office Word processing software, which was used in preparing this brief.

Dated: November 25, 2020

/s/ Christopher Kemmitt

CHRISTOPHER KEMMITT
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
700 14th Street NW
Washington, DC 20005
(202) 682-1300
ckemmitt@naacpldf.org

CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2020, I caused a true and correct copy of the foregoing to be electronically filed with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: November 25, 2020

/s/Christopher Kemmitt

CHRISTOPHER KEMMITT*
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
700 14th Street NW
Washington, DC 20005
(202) 682-1300
ckemmitt@naacpldf.org