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**

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TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 3

I. The recording of Plaintiffs' and all Baltimoreans' movements through the AIR program's warrantless, persistent, wide-area aerial surveillance violates the Fourth Amendment. 3

A. Plaintiffs have standing to raise their Fourth Amendment claim. 3

B. The AIR program violates society's reasonable expectation of privacy and is unconstitutional. 6

1. *Carpenter* controls this case. 6

a. The AIR program's "gaps" in collection do not mean that the program escapes Fourth Amendment scrutiny. 7

b. The AIR program will identify people. 14

2. Mass aerial video surveillance of movement is far more—not far less—invasive than the brief aerial photographic observation of real property approved in prior cases. 17

3. The warrantless, long-term use of persistent, wide-area aerial surveillance is constitutionally unreasonable. 19

4. In the alternative, the rules regulating the AIR program are constitutionally unreasonable. 20

II. The indiscriminate and suspicionless recording of all daytime public movements in Baltimore violates the First Amendment. 20

A. Plaintiffs have standing to raise their First Amendment claim. 20

B. The AIR program is not narrowly tailored and is unconstitutional. 24

III. The district court erred in weighing the non-merits preliminary injunction factors against Plaintiffs. 26

CONCLUSION 27

REQUEST FOR ORAL ARGUMENT 28

CERTIFICATE OF COMPLIANCE 29

TABLE OF AUTHORITIES

Cases

ACLU v. Clapper,
785 F.3d 787 (2d Cir. 2015)....................4, 5, 21

Beck v. McDonald,
848 F.3d 262 (4th Cir. 2017)....................5, 21, 22

Carpenter v. United States,
138 S. Ct. 2206 (2018).................... passim

City of L.A. v. Lyons,
461 U.S. 95 (1983)....................5

Clapper v. Amnesty Int'l USA,
568 U.S. 398 (2013)....................5, 26

Clark v. Library of Cong.,
750 F.2d 89 (D.C. Cir. 1984)....................24, 26

Davison v. Randall,
912 F.3d 666 (4th Cir. 2019)....................20

Dep't of Commerce v. New York,
139 S. Ct. 2551 (2019)....................21

Donohoe v. Duling,
465 F.2d 196 (4th Cir. 1972)....................24

Dow Chemical Co. v. United States,
476 U.S. 227 (1986)....................19

Elrod v. Burns,
427 U.S. 347 (1976)....................24

Hassan v. City of N.Y.,
804 F.3d 277 (3d Cir. 2015)....................23, 25

Katz v. United States,
389 U.S. 347 (1967) 18

Kyllo v. United States,
533 U.S. 27 (2001) 11, 18

Laird v. Tatum,
408 U.S. 1 (1972) 22, 23

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) 24

Minnesota v. Carter,
525 U.S. 83 (1998) 5

NAACP v. Alabama,
357 U.S. 449 (1958) 26

O'Shea v. Littleton,
414 U.S. 488 (1974) 5

Roberts v. U.S. Jaycees,
468 U.S. 609 (1984) 24, 25

Sierra Club v. Dep't of the Interior,
899 F.3d 260 (4th Cir. 2018) 25

Smith v. Munday,
848 F.3d 248 (4th Cir. 2017) 12

South Carolina v. United States,
912 F.3d 720 (4th Cir. 2019) 21, 22

Susan B. Anthony List v. Driehaus,
573 U.S. 149 (2014) 5

Tatum v. Laird,
444 F.2d 947 (D.C. Cir. 1971) 22

United States v. Carpenter,
819 F.3d 880 (6th Cir. 2016)....................13

United States v. Jones,
565 U.S. 400 (2012)....................8, 9

United States v. Knotts,
460 U.S. 276 (1983)....................7, 8, 9

Wikimedia Found. v. NSA,
857 F.3d 193 (4th Cir. 2017).................... passim

Statutes

42 U.S.C. § 1983 16

INTRODUCTION

The Baltimore Police Department's ("BPD") comprehensive system of persistent, wide-area aerial surveillance will grant police a society-changing and era-defining power to invade Americans' privacy. The capacity of the BPD's planes to conduct mass, suspicionless, constant surveillance—recording the everyday movements of all Baltimoreans, just in case they later become criminal suspects—is unprecedented. So too is the legal theory upon which the AIR program rests. But if this Court accepts the BPD's arguments that the program is entirely unregulated by the Constitution, its wide-area surveillance planes will be a constant feature of life in Baltimore—at least for six months, potentially indefinitely—and then, surely, in many other cities in this Circuit and across the country.

Remarkably, the BPD itself appears to be of two minds about its own system. It argues that its mass surveillance program is so penetrating that it will help identify and track criminal suspects, but not revealing enough to even trigger (let alone violate) the protections of the Fourth or First Amendments. It argues that the resources of its partner in this venture—Persistent Surveillance Systems ("PSS"), a conceded state actor—are vast enough to quickly generate reports identifying people, but effectively useless in analyzing more than 12 hours of its recorded video at a time. And the BPD argues that the rules surrounding the system

it has put into place by contract will effectively restrain it from abusing Baltimoreans' privacy, but are constitutionally irrelevant and therefore subject to change at its whim.

The BPD has, in this litigation, suggested that there is much its wide-area surveillance system *cannot* do—but the truth is that this sophisticated system does what the BPD designed it to do. The AIR program makes video recordings of the daytime movements of hundreds of thousands of people (including Plaintiffs), every single day, and uses that data to solve crimes by identifying and tracking individuals and the people with whom they meet. The data that the program stockpiles gives the BPD a never-before-seen capacity to monitor the movements of people—from home to church, from a friend's to a protest, from work to a gay bar, and all the rest. Those movements, and the private associations they reveal, are protected by the Constitution, which clearly takes this panoptic policing tool off the table.

In their opening brief, Plaintiffs explained why the district court abused its discretion in denying Plaintiffs an injunction and allowing America's most expansive domestic mass surveillance program ever to go forward. The BPD fails to engage with many of Plaintiffs' arguments, and it is wrong about the ones it does address. This Court should bring the BPD's spy planes to the ground.

ARGUMENT

I. The recording of Plaintiffs' and all Baltimoreans' movements through the AIR program's warrantless, persistent, wide-area aerial surveillance violates the Fourth Amendment.

A. Plaintiffs have standing to raise their Fourth Amendment claim.

The district court correctly held that Plaintiffs have established standing to raise their Fourth Amendment claim. Op. at JA138–40. In arguing otherwise, the BPD makes two fundamental errors: it misapprehends the nature of Plaintiffs' standing, and it improperly conflates standing with the merits.

First, Plaintiffs' standing is predicated on the BPD's *collection* of video recordings of their movements around Baltimore City. There is no dispute that the AIR program will record Plaintiffs' movements. *See* Op. at JA139–140. The BPD contends that Plaintiffs lack standing because it is "sheer conjecture" that the AIR program will specifically "identify" them in reports. BPD Br. 22. But the BPD's collection of Plaintiffs' movements, on its own, constitutes an Article III injury.

Two cases, including a recent one from this Court, are directly on point. In the first, *Wikimedia Foundation v. National Security Agency*, 857 F.3d 193 (4th Cir. 2017), this Court held that the government's "intercepting and copying" of Internet communications constituted a cognizable injury, regardless of whether the communicants were subsequently identified. *Id.* at 209–10. There, the government had asserted that the plaintiffs had failed to state an injury because they did not

allege that the National Security Agency's ("NSA") warrantless interception of their communications involved human review. Defs. Br. at 47, *Wikimedia*, No. 15-2560, 2016 WL 1426106 (4th Cir. Apr. 11, 2016), ECF No. 49. This Court was unpersuaded. It held that "[t]he allegation that the NSA is intercepting and copying communications suffices to show an invasion of a legally protected interest." *Wikimedia*, 857 F.3d at 209.[1]

For support, the *Wikimedia* Court cited, among other cases, *ACLU v. Clapper*, 785 F.3d 787 (2d Cir. 2015), in which the Second Circuit held that the NSA's mass collection of Americans' telephone call records constituted an "injury in fact." *Id.* at 802. There, the government had argued that the plaintiffs' injuries would "occur not from the government's possession of . . . metadata, but rather only if and when government personnel were to review records of plaintiffs' calls." Defs. Br. at 21–22, *ACLU*, No. 14-42, 2014 WL 1509706 (2d Cir. Apr. 10, 2014), ECF No. 87. The Second Circuit squarely rejected this argument, holding that the plaintiffs "surely have standing to allege injury from the collection, and maintenance in a government database, of records relating to them." *ACLU*, 785 F.3d at 801.

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[1] The BPD observes that, in *Wikimedia*, the plaintiff alleged that the NSA was "intercepting, copying, *and reviewing*" its communications. BPD Br. 25 (emphasis added). But the "review" at issue involved scanning "all the international text-based communications that travel across a given link" with NSA devices, not subsequent human analysis. *Wikimedia*, 857 F.3d at 204.

The BPD's response to these cases—relying on *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983); *Clapper v. Amnesty International USA*, 568 U.S. 398, 410 (2013); *O'Shea v. Littleton*, 414 U.S. 488, 493–97 (1974); and *Beck v. McDonald*, 848 F.3d 262, 275 (4th Cir. 2017)—is misplaced, because those decisions primarily address future harms that have not yet occurred. Here, the harm is the undisputed, ongoing collection of Plaintiffs' private location information through the AIR program. Op. at JA139–140.[2]

Second, the BPD argues that Plaintiffs lack standing because its video recording of Plaintiffs' and other Baltimoreans' movements does not infringe upon a reasonable expectation of privacy. BPD Br. 22. But that is a question for the merits. *See, e.g.*, *Minnesota v. Carter*, 525 U.S. 83, 88 (1998); *see also ACLU v. Clapper*, 785 F.3d at 801; *Wikimedia*, 857 F.3d at 212.

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[2] In addition to attesting to harm from the collection of their private information, Plaintiffs Erricka Bridgeford and Kevin James have established a separate Article III injury: a substantial risk that the AIR program will develop individualized reports on their activities. *See* Bridgeford Decl. at JA107 ¶ 10; James Decl. at JA113 ¶ 6; *see, e.g.*, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014); *Amnesty*, 568 U.S. at 414 n.5; *see also* Pls.' Br. 40–45 (discussing Fourth Amendment challenge to reasonableness of AIR program's procedures); *infra* Part I.B.4 (same).

B. The AIR program violates society's reasonable expectation of privacy and is unconstitutional.

Simply put, no one reasonably expects that government cameras in the sky will record the whole movements of an entire city's population second by second and day by day. *See* Pls.' Br. 19–22. Yet that is precisely what the AIR program's surveillance is built to do, erected upon a high-tech infrastructure that enables a "too permeating police surveillance." *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018) (quotation marks omitted).

In deciding otherwise, the district court made two critical errors: it dismissed the relevance of *Carpenter* to this case, and it relied on older aerial surveillance cases involving brief, targeted observation of static locations. *See* Pls.' Br. 23–37. In its response, the BPD makes the same fundamental mistakes.

1. *Carpenter* controls this case.

The current iteration of the BPD's AIR program will record Baltimoreans' location data for 180 days and retain 45 days' worth of that data at a time.

The BPD argues that it is wrong to focus on 180 days as the duration of its surveillance, because its aerial cameras will stop recording people at night, and when they enter buildings. But the constitutional clock does not restart upon every sunrise, or every time one stops for coffee—because similar gaps in surveillance were not relevant in other location-tracking cases like *Carpenter*, and because it will be straightforward for the BPD to repeatedly track the same individual day

after day. In any event, mass aerial surveillance of people's outdoor movements, even for 12 hours, violates society's reasonable expectation of privacy.

The BPD also argues that because the AIR program's aerial cameras will not capture individuals' faces or other characteristics, the Fourth Amendment does not regulate it. But the BPD's system will unquestionably identify people—indeed, that is exactly what it has been implemented to do.

a. The AIR program's "gaps" in collection do not mean that the program escapes Fourth Amendment scrutiny.

The BPD's AIR program effectuates a Fourth Amendment search. *See* Pls.' Br. 19–22.

As an initial matter, the BPD fails to meaningfully engage with Plaintiffs' demonstration that the whole of people's physical movements, even in public places, enjoy Fourth Amendment protection. Relying primarily on *United States v. Knotts*, 460 U.S. 276, 281 (1983)—as well as scattered quotations from other cases and law review articles, all of which pre-date *Carpenter*—the BPD asserts that because the AIR "program permits police to observe only those movements that occur in public," it does not infringe on any reasonable expectation of privacy. BPD Br. 29. But even before *Carpenter*, that proposition wasn't true.

In *Knotts*, police warrantlessly tracked a criminal suspect's transport of a

canister of a chemical used to make illicit drugs, using both visual surveillance and a beeper hidden inside the canister. *See* 460 U.S. at 278–79. In upholding the surveillance, the Court explained that "[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.* at 281. But that conclusion was explicitly and narrowly cabined—it applied only to movements "from one place to another," *id.*, during what the *Carpenter* Court later characterized as "a discrete 'automotive journey,'" 138 S. Ct. at 2215 (quoting *Knotts*, 460 U.S. at 285); *see id.* at 2220 ("[T]his case is not about . . . a person's movement at a *particular* time." (emphasis added)). And the *Knotts* Court foresaw the problem addressed in *United States v. Jones*, 565 U.S. 400 (2012) (and, later, *Carpenter*), warning that if law enforcement ever did manage, in the distant future, to implement "dragnet type law enforcement practices," there would be "time enough then to determine whether different constitutional principles" applied. 460 U.S. at 284.

Thirty years later, in *Jones*, that time arrived—and a majority of the Court "found that different principles did indeed apply." *Carpenter*, 138 S. Ct. at 2215 (discussing *Jones*). While the majority opinion in *Jones* relied on a property-based theory to conclude that the use of a GPS device to track a vehicle for 28 days was a Fourth Amendment search, five Justices agreed in concurring opinions that longer-term location tracking "'impinges on expectations of privacy'—regardless whether

those movements [a]re disclosed to the public at large." *Id.* (quoting *Jones*, 565 U.S. at 430 (Alito, J., concurring), and citing *id.* at 415 (Sotomayor, J., concurring)). So when the BPD insists that "a police officer's observations of" where a person travels in public "do not constitute a 'search' for purposes of the Fourth Amendment," BPD Br. 30, it is overstating things considerably.

Moreover, as Plaintiffs explained, the AIR program's recording of location information over 180 days, and retention of that information for 45 rolling days, far exceeds the seven-day surveillance at issue in *Carpenter*. *See* Pls.' Br. 23–28. Embracing the district court's error, Op. at JA153, the BPD attempts to convert its program of 180-day mass surveillance into 180 programs of 12-hour mass surveillance—or even countless mini-programs surveilling people for the "few hours, or even minutes, it takes [them] to travel 'from one place to another,'" BPD Br. 36 (quoting *Knotts*, 460 U.S. at 281). But this slicing and dicing has no constitutional significance—and even if it did, the BPD's argument would fail.

As Plaintiffs have pointed out, Pls.' Br. 24–25, it is wrong to conclude that "gaps in collecting imagery" render *Carpenter* irrelevant here, BPD Br. 39. The cell-site location information ("CSLI") at issue in *Carpenter*, as well as the GPS data at issue in *Jones*, have significant gaps, such that the data is not always robust or continuous. *See Carpenter*, 138 S. Ct. at 2212 (CSLI logged only upon incoming or outgoing call); *Jones*, 565 U.S. at 403 (Fourth Amendment "search"

of vehicle over 28 days even when the person being tracked was not constantly using it). Indeed, the *Carpenter* Court evaluated as a single unit the government's seven-day request for private location information, *see* 138 S. Ct. at 2217 n.3, even though it only received two days' worth of records, *see id.* at 2266–67 (Gorsuch, J., dissenting). What mattered to the Court was the overall duration of the location information the government sought to collect.

The BPD's single response to this point is to assert, in a footnote and without elaboration, that "the ubiquity of cell phones and the breadth of CSLI" at issue in *Carpenter* somehow "defeat[]" the significance of the gaps in *Carpenter* and *Jones*. BPD Br. 42 n.29. But this is an evasion, not an argument. Cell phones are certainly ubiquitous, but unlike the data captured by the BPD's cameras, CSLI is not generated every second; it does not mark each person's every step outdoors; and it is not precise to the yard. *See* Pls.' Br. 26 n.25. Unlike a cell phone, the BPD's surveillance cannot be turned off or left behind. *See* Pls.' Br. 24.[3] And further, the BPD's surveillance is both daily and cumulative. The data the AIR program collects is capable of revealing each Plaintiff's and each Baltimorean's movements about the City on every single day for 180 days, and the BPD will hold 45 days of that data at a time. *See* Contract at JA69. This collection violates the

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[3] Despite this, the *Carpenter* Court still called CSLI surveillance "inescapable." 138 S. Ct. at 2223 (majority op.).

Fourth Amendment, regardless of how the BPD subsequently uses or analyzes the data it acquires.

Unable to avoid this conclusion, the BPD elects instead to focus on the post-collection phase of the AIR program—in particular, the hurdles to tracking individuals. But it overstates these hurdles and is wrong about their legal significance. It contends that because the AIR program's planes will not capture imagery at night, it is "impossible" for the program "to *reliably* track a particular individual over a period of several days." BPD Br. 10, 39 (emphasis added) (citing Op. at JA122). Given the scores of analysts embedded with the BPD and equipped with cutting-edge technology, the BPD acknowledges that tracking is, in fact, possible—the BPD just argues that it would be hard. *See* BPD Br. 16 (calling the process "laborious" and "time-intensive"). But the Supreme Court has repeatedly made clear, including in *Carpenter*, that the need for investigators to make an "inference" from information they demand or collect does not "'insulate'" that demand or collection from being a Fourth Amendment "search." *Carpenter*, 138 S. Ct. at 2218 (quoting *Kyllo v. United States*, 533 U.S. 27, 36 (2001)); *see* Pls.' Br. 26.[4]

And besides, the BPD is wrong that the AIR program's "built-in

[4] As Plaintiffs highlighted, CSLI is ordinarily obtained in connection with a number, not a name. *See* Pls.' Br. 29.

limitations," BPD Br. 16, meaningfully prevent such tracking. Tracking individuals—even assuming they are merely "anonymous dots," BPD Br. 16—across days would be relatively straightforward. Because the vast majority of Baltimoreans live in single-family homes, the fact that the planes do not operate at night is little protection against identification across days of recordings. *See* Pls.' Br. 27, 29 & n.27 (citing census data).[5] The images captured through the AIR program can be correlated with one another fairly easily, by tracing an individual's movements back home at night, and from home the next morning. While this process may yield false starts (for example, because multiple people live in the same home, *see* BPD Br. 23, 43), that friction does not mean that physical structures are an insurmountable obstacle to tracking.[6] And the BPD's assertion that "the trail runs cold" when an individual enters a building, *id.* at 43, blatantly ignores the role of hundreds of ground-based cameras and voluminous data from automated license plate readers in the AIR program—which, again, is a program

[5] This Court may take judicial notice of census data. *See, e.g.*, *Smith v. Munday*, 848 F.3d 248, 259 n.2 (4th Cir. 2017) (citation omitted).

[6] Indeed, by watching one of these "dots" for some time after they leave a residence on consecutive mornings (for example, on their daily path to work), it would be trivial for the BPD to determine with confidence that it is watching the same person over and over. *See infra* at 15–16 (discussing Study at JA89–93). Moreover, in order to locate a person in its vast database of recorded movements, all the BPD would need to know is where and when they were at any single given time—and then find that "dot" in its database, and follow it.

specifically designed to identify and track Baltimoreans. *See infra* Part I.B.1.b.

The BPD also attempts to distinguish *Carpenter* on the ground that the surveillance there was "remarkably easy" and "cheap." BPD Br. 44 (quoting *Carpenter*, 138 S. Ct. at 2218). But in fact, the government had to expend significant labor to render the data collected in *Carpenter* meaningful in the defendant's criminal case. *See* Pls. Br. 27–28 (citing *United States v. Carpenter*, 819 F.3d 880, 885 (6th Cir. 2016)). And notwithstanding that labor, the Court characterized the surveillance in that case as "easy, cheap, and efficient *compared to traditional investigative tools*." *Carpenter*, 138 S. Ct. at 2218 (emphasis added). So too, here. The AIR program generates a remarkable and unprecedented trove of data, one that can be plumbed easily, cheaply, and efficiently compared to the traditional surveillance tools at the BPD's disposal. Indeed, those traditional tools never could have granted police a virtual time machine containing an entire city's daily movements. The cost of the AIR program, and the effort required to assess the data it collects, pale in comparison to the prohibitive cost of hiring 600,000 police officers to follow each Baltimore resident during the day, record their movements on a second-by-second basis, and collate those records in a database searchable by location. That impossibly costly version of the AIR program would also include gaps in tracking. The AIR program's gaps are not a basis for avoiding Fourth Amendment scrutiny.

Finally, the BPD presumes that if the Court only considers each day's 12 hours of collection, *Carpenter* cannot apply. *See* BPD Br. 41 (asserting that the *Carpenter* Court limited its holding to a "particular quantum (at least seven days)" of location information). But that is wrong. Of course, the facts in *Carpenter* necessarily limited its precise holding, but the Court's reasoning is what extends its reach. Even the BPD acknowledges that surveillance on public thoroughfares raises Fourth Amendment issues if "it is of such a long duration that the Government learns intimate details about a person's life." BPD Br. 48. When the BPD engages in the AIR program's type of daily "short-term monitoring" en masse, through systematic and inescapable advanced technology, it captures the "privacies of life," *Carpenter*, 138 S. Ct. at 2217, and effects a Fourth Amendment "search," *see* Pls.' Br. 28 n.25.

b. The AIR program will identify people.

The BPD's consistent assertion (and the district court's consistent misimpression) that because the AIR program's cameras will not capture faces, neither *Carpenter* nor the Fourth Amendment has anything to say about it, *see, e.g.*, BPD Br. 43; Op. at JA149, is not supportable. As *Carpenter* itself illustrates, the Fourth Amendment is not only concerned with whether cameras or other surveillance tools capture faces, or recognizable identities, off the bat—it is concerned with whether those tools invade a person's constitutionally protected

privacy interest. And both *Carpenter* and the record are clear that the answer to that question here, as it relates to the whole of individual movements, is yes.

Identifying people is the entire point of the BPD's mass surveillance system—otherwise, it would be useless in solving crimes—and identification can be accomplished in multiple ways.

First, as explained previously and above, merely rolling the AIR program's tape backward and forward is likely to identify a great many Baltimoreans. *See supra* at 11–13.

Second, location tracking of even "anonymous dots" is personally identifying with just a small number of data points. Though the BPD does not substantively engage with it, a study in the record shows that collective movements are so individually unique that 95 percent of people could be reliably identified using just four points of location information. *See* Pls.' Br. 30 (citing Study at JA89–93); *see* BPD Br. 42 n.29 (reciting district court's erroneous rejection of the study without argument). Plaintiffs have explained why the district court abused its discretion in incorrectly reading the study as limited to CSLI. *See* Pls.' Br. 30. In fact, the study's conclusions relate to location information more generally; its authors explain that "even in a sparse, large-scale, and coarse mobility dataset" like CSLI—as opposed to the far more precise and far richer dataset of location information collected through the AIR program—"little outside information is

needed to re-identify the trace of a targeted individual." Study at JA92. That the BPD's contract does not overtly contemplate that it will engage in this kind of technique is irrelevant. To trigger the Fourth Amendment analysis, it is enough that the data in the BPD's hands makes such identification possible.[7]

Third, the contract establishing the AIR program explicitly incorporates the BPD's on-the-ground surveillance capabilities, and integrates that data with data collected from the sky, in order to facilitate the identification of people. *See* Contract at JA70–71; Pls.' Br. 9–10. This fact bears emphasis: the AIR program is not, as the district court concluded, just "one more investigative tool" in the form of aerial surveillance, Op. at JA154—it is a coherent system that involves aerial surveillance *and* the BPD's networks of CitiWatch surveillance cameras and automated license plate readers. *See* Contract at JA70–71. Indeed, even as the BPD appears to question whether the identification of individuals "can be done at all" through the AIR program, it explains—in the same sentence—precisely *how* it *will* be done: by putting the program's technology and analysts to work, stitching together aerially recorded data with the images and locations of people and vehicles, as captured by its other tools. BPD Br. 16; *see* Pls.' Br. 31–32. The BPD insists that the use of these other, plainly identifying (and also warrantless)

[7] On appeal, the BPD does not dispute that PSS's collection of location information pursuant to their contract is state action attributable to the BPD under 42 U.S.C. § 1983. *See* Op. at JA137; Pls.' Br. 15 n.21.

surveillance tools as part of the AIR program would come only after it requests that PSS's analysts create evidence packages. *See* BPD Br. 10–11. But, again, as state actors, PSS's analysts *are* the BPD, and they will have access to the enormous volumes of data generated by these cameras and plate readers as they go about their work. That the BPD believes that only its contract, and not the Fourth Amendment, regulates its use of AIR program data simply underscores the dangerous capacity this unified data store delivers to law enforcement.

2. Mass aerial video surveillance of movement is far more—not far less—invasive than the brief aerial photographic observation of real property approved in prior cases.

Plaintiffs previously explained why the district court erroneously relied on older aerial surveillance cases in concluding that the AIR program does not violate the Fourth Amendment. *See* Pls.' Br. 35 (summarizing why the AIR program's surveillance is "light-years beyond the single flights at issue in those cases"); *see id.* at 32–37. In discussing those cases, the BPD simply dismisses duration—here, 180 days of 12-hour-per-day persistent recording, and there, fleeting passes in helicopters or small planes—as not a "critical factor." BPD Br. 39, 44. Yet the *Carpenter* Court made clear that in applying the "reasonable expectation of privacy" test to new location-tracking technologies, a court must consider the duration of surveillance—as well as whether its comprehensiveness, its indiscriminate nature, and its retrospective quality upset traditional expectations of

privacy. *See* 138 S. Ct. at 2216–17; *see also id.* at 2214 (explaining that pre-digital-age Fourth Amendment precedents cannot be "mechanical[ly] interpret[ed]" to bless more invasive digital-age surveillance (quoting *Kyllo*, 533 U.S. at 35)); Pls.' Br. 22. Indeed, in its entire discussion of the earlier aerial surveillance cases, the BPD's lone citation to *Carpenter*—or even to a source that post-dates that decision—is a reference to the *Carpenter* Court's application of the "reasonable expectation of privacy" test from *Katz v. United States*, 389 U.S. 347 (1967). *See* BPD Br. 38. And in attempting to reframe the Fourth Amendment question posed by the AIR program as "whether the police observe[] intimate details not readily available to the public," BPD Br. 39 (quotation marks omitted), the BPD never engages with *Carpenter*'s bottom line—that "individuals have a reasonable expectation of privacy in the whole of their physical movements." 138 S. Ct. at 2217. In other words, those movements *do* reveal intimate details that society views as private, and are therefore protected by the Fourth Amendment.

Even ignoring *Carpenter*, the Supreme Court's aerial surveillance cases simply do not reach the kind of surveillance at issue here. *See* Pls.' Br. 32–37. Not only was the surveillance in those cases brief, but it was directed at property, not the movements of people. In only one of those cases did the government use enhanced aerial photography—and that case involved surveillance of the area surrounding a large industrial complex, not the curtilage of a home. *Dow Chemical*

Co. v. United States, 476 U.S. 227, 235, 239 (1986). The Court took pains to emphasize that the government has "greater latitude to conduct warrantless inspections of commercial property," *id.* at 237 (citation omitted), and strongly suggested that the investigative use of an aerial mapping camera over residential curtilage would require a warrant, *id.* at 234–36, 239 (although naked-eye observations of residential curtilage may be permitted in some instances, the curtilage surrounding a home "has long been given protection as a place where the occupants have a reasonable and legitimate expectation of privacy"). Here, the AIR program will naturally record movements within residential curtilage—in addition to, of course, the movements of virtually all of Baltimore's residents.

3. The warrantless, long-term use of persistent, wide-area aerial surveillance is constitutionally unreasonable.

As Plaintiffs have explained, the BPD's warrantless collection of their location information pursuant to the AIR program is per se unreasonable under the Fourth Amendment. *See* Pls.' Br. 32–40. No judge could lawfully issue a warrant to authorize this surveillance, because the AIR program's collection effects a wide-ranging search only possible under the historically abhorrent "general warrant." *See id.* at 37–39. The BPD does not argue otherwise, and—strikingly—its program does not even contemplate asking permission at any stage from any court. Moreover, it is undisputed that no exception to the warrant requirement could apply here. *Id.* at 39–40. For these reasons, the AIR program violates the Fourth

Amendment.

4. In the alternative, the rules regulating the AIR program are constitutionally unreasonable.

If the Court concludes that the BPD may, consistent with the Fourth Amendment, engage in the mass collection Plaintiffs' location information without a warrant, it must still evaluate whether the AIR program's procedures comport with the Fourth Amendment's reasonableness requirement. *See* Pls.' Br. 40–45. While the BPD recites a number of those procedures, *see* BPD Br. 5–6, it does not defend their reasonableness under the Fourth Amendment.

II. The indiscriminate and suspicionless recording of all daytime public movements in Baltimore violates the First Amendment.

A. Plaintiffs have standing to raise their First Amendment claim.

As the district court correctly held, Plaintiffs have standing to raise their First Amendment claim. Op. at JA144. Contesting that standing, the BPD attempts to cast Plaintiffs' injuries as "speculative." BPD Br. 21–22. But there is nothing speculative about the AIR program's ongoing collection of Plaintiffs' movements, which constitutes an Article III injury. *See supra* Part I.A. The BPD also ignores controlling case law holding that "standing requirements are somewhat relaxed in First Amendment cases, particularly regarding the injury-in-fact requirement." *Davison v. Randall*, 912 F.3d 666, 678 (4th Cir. 2019) (quotation marks omitted).

Regardless, Plaintiffs have established three distinct First Amendment injuries, each of which is sufficient to confer standing.

First, the BPD's collection of Plaintiffs' sensitive information is an injury sufficient to establish First Amendment standing. *See, e.g.*, *ACLU*, 785 F.3d at 802 (holding that the government's collection of plaintiffs' metadata implicated their "interests in keeping their associations and contacts private," thus conferring standing to assert a First Amendment violation); *Wikimedia*, 857 F.3d at 211. The AIR program substantially impairs Plaintiffs' First Amendment rights because it exposes virtually all of their associations to government monitoring and scrutiny.

Second, the AIR program will require Plaintiffs to take several measures to protect the privacy of their associations from the BPD's surveillance. For example, LBS will "alter[] the means by which [they] travel" and the "timing of certain meetings," thus diverting resources from other organizational work. LBS Decl. at JA101 ¶ 13; *see* Bridgeford Decl. at JA108–09 ¶ 15. It is well-established that these harms confer standing. *See, e.g.*, *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019).

Citing *Beck*, 848 F.3d 262, and *South Carolina v. United States*, 912 F.3d 720, 727–28 (4th Cir. 2019), the BPD contends that Plaintiffs' protective measures cannot constitute injuries-in-fact. BPD Br. 21–22. But these cases simply hold that mitigation costs cannot confer standing where they are incurred in response to a

"speculative threat"—a "highly attenuated chain of possibilities." *South Carolina*, 912 F.3d at 727 (citation omitted); *see Beck*, 848 F.3d at 272. Here, of course, the threat is not speculative; it is ongoing, and it is undisputed that Plaintiffs are subject to it.

Third, the BPD's program will chill Plaintiffs and the individuals they associate with, burdening Plaintiffs' political advocacy and community engagement. *See* LBS Decl. at JA100–02 ¶¶ 12–16; Bridgeford Decl. at JA107–09 ¶¶ 11–13, 15–16; James Decl. at JA113–14 ¶¶ 5–8; *see also, e.g.*, *Wikimedia*, 857 F.3d at 211 (recognizing that the government's collection of a plaintiff's information has a "chilling effect" sufficient to confer First Amendment standing).

Contrary to the BPD's claim, see BPD Br. 27–28, Plaintiffs' specific allegations of chill are nothing like the allegations rejected by the Court in *Laird v. Tatum*, 408 U.S. 1 (1972). In *Laird*, the plaintiffs alleged that they were "chilled by the mere existence, *without more*, of a governmental investigative and data-gathering activity." *Id.* at 10 (emphasis added). Notably, the plaintiffs presented "'no evidence of illegal or unlawful surveillance activities,'" *id.* at 9 (quoting *Tatum v. Laird*, 444 F.2d 947, 953 (D.C. Cir. 1971))—presumably because the "principal sources of information" for this surveillance program were "the news media and publications in general circulation," *id.* at 6. The plaintiffs also failed to explain the "precise connection between the mere existence of the challenged

system and their own alleged chill," and "cast considerable doubt on whether they themselves [we]re in fact suffering from any such chill." *Id.* at 13 n.7. In reaching its holding, the Court emphasized that its conclusion was "a narrow one," based on the paltry record before it. *Id.* at 15.

Unlike in *Laird*, Plaintiffs here have not merely alleged that the BPD's program chills their First Amendment rights—they have presented extensive "evidence of illegal or unlawful surveillance activities." *Id.* at 9; *see supra* Part II.B; *see also Hassan v. City of N.Y.*, 804 F.3d 277, 292 (3d Cir. 2015) (holding *Laird* inapplicable where plaintiffs challenged surveillance on due process grounds in addition to First Amendment ones). Moreover, the harms to Plaintiffs here flow from more than the "mere existence" of the AIR program, *Laird*, 408 U.S. at 10; instead, they flow from the certainty that Plaintiffs and their associations are in fact subject to this comprehensive surveillance. And Plaintiffs have explained why the government's collection of information about them and their associations would objectively chill and burden their First Amendment activities. LBS Decl. at JA100–02 ¶¶ 12–16; Bridgeford Decl. at JA107–09 ¶¶ 10–16; James Decl. at JA113–14 ¶¶ 5–8.[8]

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[8] The BPD also errs in suggesting that Plaintiffs must establish that their chill is the result of "regulat[ion]" by the BPD. BPD Br. 28. No such requirement exists. *See Wikimedia*, 857 F.3d at 211 (plaintiff challenging government surveillance—which did not involve direct regulation—adequately alleged First Amendment chill).

The BPD's reliance on *Donohoe v. Duling*, 465 F.2d 196 (4th Cir. 1972), is similarly misplaced. *See* BPD Br. 26–28. The defendants in *Donohoe* "denied that any of the plaintiffs had been inhibited in the exercise of their First Amendment rights by any action on their part; and no plaintiff testified to the contrary." *Id.* at 199. Here, in contrast, Plaintiffs have attested to concrete and specific First Amendment injuries flowing from the BPD's program.

B. The AIR program is not narrowly tailored and is unconstitutional.

The BPD raised no argument below concerning the merits of Plaintiffs' First Amendment claim, and as Plaintiffs have explained, the district court's cursory analysis of the issue was incorrect. *See* Pls.' Br. 46–51; Op. at JA156–57. The BPD's recording of Plaintiffs' movements substantially impairs their right to associate privately. *See, e.g.*, *Local 1814, Int'l Longshoremen's Ass'n, AFL-CIO v. Waterfront Comm'n of N.Y. Harbor*, 667 F.2d 267, 270–72 (2d Cir. 1981). This surveillance cannot survive exacting scrutiny, because it is not the least restrictive means of achieving the BPD's law enforcement objectives. *See Elrod v. Burns*, 427 U.S. 347, 363 (1976); *Clark v. Library of Cong.*, 750 F.2d 89, 94–95 (D.C. Cir. 1984).[9] Accordingly, it violates the First Amendment.

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[9] In *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984), the Supreme Court explained that infringements on the right to associate may be justified only where compelling state interests "cannot be achieved through means significantly less restrictive of associational freedoms." Regardless of whether the *Jaycees* or *Elrod*

The BPD's belated arguments to the contrary are baseless.

First, the BPD contends that Plaintiffs have not invoked the right to "expressive association"—the "'right to associate for the purpose of engaging in . . . speech, assembly, petition for the redress of grievances[.]'" BPD Br. 49 (citation omitted). But Plaintiffs' expressive association is precisely what's at issue here. *See* LBS Decl. at JA97–102 ¶¶ 4–10, 12–14, 16; Bridgeford Decl. at JA 105–09 ¶¶ 4–16; James Decl. at JA112–14 ¶¶ 3, 5–8; *see also Jaycees*, 468 U.S. at 622 (describing "wide variety" of protected associational pursuits). Through uncontroverted declarations, Plaintiffs have established that the AIR program substantially burdens their associational rights.[10] *See* LBS Decl. at JA100–02 ¶¶ 12–14, 16; Bridgeford Decl. at JA107–09 ¶¶ 10–16; James Decl. at JA113–14 ¶¶ 5–6, 8.[11]

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test applies, the AIR program's indiscriminate collection cannot pass constitutional muster. Indeed, the BPD does not dispute that if exacting scrutiny applies, the AIR program violates the First Amendment.

[10] Contrary to the BPD's suggestion, *see* BPD Br. 50 n.32, the AIR program's comprehensive collection of LBS's location information differs in degree and kind from other BPD monitoring. *See* LBS Decl. at JA101–02 ¶¶ 13–16; *see also Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 284 (4th Cir. 2018) (challenged conduct need not be the sole cause of injury).

[11] Plaintiffs' declarations also explain that third parties in Baltimore will be chilled in associating with them, further burdening Plaintiffs' right to associate and receive information. *See* LBS Decl. at JA101–02 ¶ 14, 16; Bridgeford Decl. at JA108–09 ¶¶ 12–13, 16; James Decl. at JA114 ¶ 8. Because these third parties are also subject to ongoing surveillance by the AIR program, their fears of surveillance are not

Second, the BPD rehashes its Fourth Amendment argument that the AIR program "is incapable of revealing anything more than a person's movements in public over a very short period of time (in no case more than several hours)." BPD Br. 50–51. Again, this is wrong. *See supra* Part I.B.1.

Third, the BPD contends that the cases cited by Plaintiffs are "inapposite" simply because they happen to concern different sets of facts. BPD Br. 51. But these cases stand for the straightforward proposition that when the government substantially burdens freedom of association, exacting scrutiny applies. *See, e.g.*, *Clark*, 750 F.2d at 94–95, 99 (FBI field investigation into a person's associations did not satisfy exacting scrutiny). While many of the associational privacy cases involve the compelled disclosure of associations, neither their reasoning nor the First Amendment is so limited. *See NAACP v. Alabama*, 357 U.S. 449, 461–62 (1958) (explaining that "varied forms of governmental action" may violate the right to association). In any event, the result of the AIR program is indistinguishable from compelled disclosure. Pls.' Br. 49.

III. The district court erred in weighing the non-merits preliminary injunction factors against Plaintiffs.

As Plaintiffs explained, the district court tied its evaluation of the last three prongs of the preliminary injunction inquiry to its erroneous conclusion that

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"based on . . . conjecture," *Amnesty*, 568 U.S. at 417 n.7, and they accordingly provide additional support for Plaintiffs' claims.

Plaintiffs are not likely to succeed on the merits. *See* Pls.' Br. 51–55. The BPD does not address these factors.

CONCLUSION

For the foregoing reasons and those in Plaintiffs' opening brief, this Court should reverse the district court and remand with instructions to enter a preliminary injunction to halt the AIR program, specifically prohibiting the BPD from collecting or accessing any images of Baltimoreans through wide-area aerial surveillance.

June 5, 2020

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Due to the novel and significant legal issues in this case, Plaintiffs–Appellants respectfully request oral argument pursuant to Local Rule 34(a).

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,441 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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

Date: June 5, 2020

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