

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**

**PLAINTIFFS–APPELLANTS’ MOTION FOR
EXPEDITED ORAL ARGUMENT**

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Plaintiffs–Appellants Leaders of a Beautiful Struggle, Erricka Bridgeford, and Kevin James respectfully submit this motion, pursuant to Local Rule 12(c), to expedite oral argument of their appeal.

On May 1, 2020, this Court granted Plaintiffs’ motion for an expedited appeal, ordering all briefing to conclude by June 5, 2020. *See* ECF Nos. 22–23 (order granting motion for expedition and setting briefing schedule, but not addressing oral argument). As a result, the appeal is now fully briefed and may be set for argument on an expedited basis. Plaintiffs’ appeal challenges Defendants–Appellants’ commencement of a 180-day “pilot” program of mass aerial surveillance over Baltimore, beginning on May 1, 2020, and ending on or about October 28, 2020. If Plaintiffs are correct that Defendants’ program is unconstitutional under the Fourth and First Amendments, Plaintiffs continue to suffer ongoing and irreparable constitutional harms. This Court can only provide them effective relief through expedited consideration of their arguments, before the bulk of harms inflicted by Defendants’ surveillance (if not all of them) actually occur—and before events potentially render their appeal moot.

Accordingly, and cognizant that the Court has no regularly scheduled argument sittings until September 2020, Plaintiffs respectfully request that the Court grant their motion and set this appeal for a special remote oral argument

session (via either telephone or video conference) as soon as practicable.¹

Counsel for Defendants Baltimore Police Department (“BPD”) and Police Commissioner Michael S. Harrison oppose this motion.

BACKGROUND & PROCEDURAL HISTORY

In December 2019, Commissioner Harrison announced that the City of Baltimore would enter into a contract with a private corporation, Persistent Surveillance Systems (“PSS”), to conduct a 180-day pilot program of wide-area aerial surveillance, to be launched in the spring of 2020. *See Op.* at JA129.² As the district court held and the BPD has conceded on appeal, PSS’s involvement in the AIR program is state action attributable to the BPD under 42 U.S.C. § 1983. *See id.* at JA137; *see generally* ECF No. 24 (BPD’s response brief).

According to the contract signed by the BPD and PSS in March 2020, the BPD will authorize PSS to fly three aircraft over Baltimore City using the “Hawkeye Wide Area Imaging System.” *See Op.* at JA130. These cameras will capture images of 32 square miles of the city every second, covering about 90 percent of Baltimore. *See id.* The resolution of the AIR program’s aerial

¹ Plaintiffs’ counsel is available for oral argument on any date over the five-week period beginning today (through Friday, July 17), with the exception of June 23 to July 1, when counsel will be participating in an evidentiary hearing in a habeas action in the Western District of New York.

² The Joint Appendix is filed as ECF No. 20 on this matter’s electronic docket.

surveillance cameras will be “1 pixel per person.” *Id.* at JA131. The BPD has represented that the planes will fly 12 hours each day, seven days a week, coming down only at night and during inclement weather. *See id.* at JA127, JA131. The location data collected by the AIR program’s aerial surveillance cameras will be retained for 45 days, in a rolling log. *See id.* at JA131.

This technology will allow the BPD to amass a comprehensive record of the movements of every pedestrian and vehicle that moves about the city while the planes are aloft. There is no factual dispute that this is both the purpose and function of the AIR program. The BPD intends to use data collected under the program in investigations related to murder, non-fatal shootings, armed robberies, and car-jackings, though the Baltimore Police Commissioner retains the authority to approve other uses on a case-by-case basis. *See Contract* at JA69. According to the contract, PSS will analyze collected data “upon specific request by BPD or based on alerts” from the BPD’s dispatch system. *Id.* at JA70. It will then create reports, based on data from the aerial cameras, automatic license plate readers, and ground-based cameras, that will include “tracks” of potential suspects and witnesses to the crime, as well as “tracks” of “people and vehicles that met with [those] people,” both prior to and after the crime. *Id.* at JA71–72. Location data used in an AIR program report will be retained indefinitely. *Id.* at JA73.

On April 1, 2020, the Baltimore Board of Estimates approved the BPD's contract with PSS by a 3-to-2 vote. *See Op.* at JA130.

On April 9, Plaintiffs commenced this suit against Defendants and filed a motion for a temporary restraining order and preliminary injunction in the District Court for the District of Maryland, seeking to prohibit the operation of the AIR program before the BPD's planes took flight. JA7–29. That same day, the district court issued an order effectuating a temporary agreement by the parties to prohibit AIR program surveillance flights until the district court ruled on Plaintiffs' motion for a preliminary injunction, and setting an expedited schedule for briefing and, given court closures due to the COVID-19 pandemic, telephonic oral argument. JA116–17. On April 24, the district court denied Plaintiffs' motion. JA161. Plaintiffs filed their notice of appeal that same day. JA162.

On April 28, Plaintiffs filed a motion for an expedited appeal, *see* ECF No. 11, which Defendants opposed, *see* ECF No. 18. While that motion was pending, on April 30, Plaintiffs filed their opening brief upon receiving permission to do so from the Clerk's Office. *See* ECF No. 21. On May 1, this Court granted Plaintiffs' motion and issued an accelerated briefing order, ordering Defendants to file their response brief by June 1, and Plaintiffs to file their reply brief by June 5. *See* ECF Nos. 22–23. The parties' briefing is now complete. *See* ECF Nos. 24 & 26.

On June 12, the Clerk issued a Pre-Argument Review Order indicating that the matter was being considered for oral argument in September 2020. *See* ECF No. 27. On the morning of June 15, Plaintiffs' counsel inquired with the Clerk's Office, which indicated that it had issued the June 12 order as part of batched operations not specific to this matter or its history. Plaintiffs now file this motion in order to call the Court's attention to the urgency of these issues and the need for an order from the Court regarding an expedited oral argument.

ARGUMENT

Local Rule 12(c) provides that this Court “may expedite an appeal for briefing and oral argument.” Similarly, Federal Rule of Appellate Procedure 2 states that “a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs.” *See also* Fed. R. App. P. 2 advisory committee's note on rules—1967 (“[t]he primary purpose of this rule is to make clear the power of the courts of appeals to expedite the determination of cases of pressing concern to the public or to the litigants”).

As this Court has already found, good cause exists to expedite this appeal, which involves a matter of pressing concern to Plaintiffs and the public, including the 600,000 residents of Baltimore whose rights are implicated by the BPD's

ongoing surveillance. *See* ECF No. 22. Likewise, good cause exists to expedite the oral argument in this matter.

First, an expedited oral argument is necessary because the BPD's six-month "pilot" program is already six weeks old. If Plaintiffs' legal arguments are correct, each day that this program continues will result in substantial additional harms to Plaintiffs' Fourth and First Amendment rights. And both parties, in addition to all of Baltimore, have an extraordinary interest in this Court's assessment of the legality of the AIR program as soon as practicably possible.

Second, prompt resolution of this appeal is necessary because the BPD's AIR program, as currently conceived, is a pilot program scheduled to last 180 days. An expedited schedule is thus necessary to ensure that the bulk of harms to Plaintiffs resulting from this program do not occur before this Court's resolution of the significant constitutional questions at issue. It is also necessary to ensure that any delay does not potentially moot Plaintiffs' injunctive claims.

Third, expedited argument will not unduly burden Defendants. Defendants have been developing—and have defended the constitutionality of—wide-area aerial surveillance for years.³ Moreover, the parties have briefed and argued the

³ *See, e.g.*, Edward Ericson Jr., *Police See No Problem with Secret Surveillance*, City Paper, Aug. 30, 2016, <https://www.baltimoresun.com/citypaper/bcp-083116-mob-surveillance-20160830-story.html> (describing BPD's release of a legal memorandum defending an earlier, secret iteration of the AIR program as

precise legal questions at issue before the district court and this Court over the past two months, and there is a limited factual record in this matter.

CONCLUSION

For the foregoing reasons, and in light of the fact that the Court has no regularly scheduled argument sittings until September 2020, Plaintiffs respectfully request that the Court grant their motion and set this appeal for a special remote oral argument session (via either telephone or video conference) as soon as practicable. *See supra* note 1 (listing availability of Plaintiffs' counsel for oral argument over the next five weeks).

Respectfully submitted,

/s/ Brett Max Kaufman

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Dated: June 15, 2020

Counsel for Plaintiffs–Appellants

constitutional); BPD Presentation at JA47 (March 2020 public presentation defending the constitutionality of the AIR program).

CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 1,534 words.
2. This motion 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 15, 2020

/s/ Brett Max Kaufman
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