No. 20-1495

IN THE 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 THE POLICING PROJECT AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY AND IN SUPPORT OF REHEARING OR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae is a nongovernmental corporate party at New York University School of Law. It has no parent company and no publicly held corporation owns 10 percent or more of its stock.

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INTEREST OF THE *AMICUS*

The mission of the Policing Project at New York University School of Law is to partner with communities and police to promote public safety through transparency, equity, and democratic engagement. The interpretation by courts of the Fourth Amendment is of particular concern to the Policing Project, given the impact of those interpretations on public safety and individual rights alike.

The Policing Project has unique insights into the workings of the Aerial Investigation Research Program ("AIR"). The Memorandum of Understanding ("MOU") between the Baltimore Police Department ("BPD") and its vendor Persistent Surveillance Systems ("PSS"), approved by the Baltimore Board of Estimates on April 1, 2020, commissioned the Policing Project to conduct a civil rights and civil liberties audit of AIR and to issue a public report. Our final report, released today, is appended to this brief. *See* POLICING PROJECT, CIVIL RIGHTS & CIVIL LIBERTIES AUDIT OF BALTIMORE'S AERIAL INVESTIGATION RESEARCH (AIR) PROGRAM (2020) ("Report").

Pursuant to Fed. R. App. P. 29(a)(4)(E), counsel for *amicus* states that no counsel for a party authored the brief in whole or in part, and no person other than *amicus* made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

This case presents novel, and deeply consequential, issues regarding the proper interpretation of the Fourth Amendment as it relates to emerging surveillance technologies. Resolution of these issues necessarily turns on the particularities of Baltimore's AIR program. *Amicus* was given extraordinary access to AIR's operations as the independent evaluator commissioned to assess its civil rights and civil liberties implications. Based on what *amicus* has learned, both the District Court and panel opinions rely on a state of facts that bear an insufficient resemblance to the reality of how AIR operates. *Amicus* alerted counsel for Defendants to these deficiencies prior to oral argument, believing counsel would correct the record, but counsel did not. Because getting the facts regarding the operation of AIR is critical to the sound development of Fourth Amendment law, *amicus* urges this Court to vacate the District Court's preliminary injunction order and the panel opinion and judgment.

ARGUMENT

A. This Case Presents Novel, Consequential Constitutional Issues

This case presents deeply significant, and potentially momentous, issues of Fourth Amendment law. In a time of rapidly-expanding surveillance technologies, getting the balance right regarding permissible uses of these technologies will have profound implications both for public safety and constitutional liberty. *See Carpenter v. United States*, 138 S. Ct. 2206, 2223 (2018) ("[T]he Court is obligated—as '[s]ubtler and more far-reaching means of invading privacy have become available to the Government'—to ensure that the 'progress of science' does not erode Fourth Amendment protections." (quoting *Olmstead v. United States*, 277 U. S. 438, 473–474 (1928) (Brandeis, J., dissenting))).

The central question in this case—the constitutionality of aerial tracking of particular individuals—is unique. There are precedents from the Supreme Court involving aerial surveillance, but unlike the present case they involved one or two flyovers of an area already suspected of unlawful activity. *See Florida v. Riley*, 488 U.S. 445, 448 (1989); *California v. Ciraolo*, 476 U.S. 207, 209 (1986); *Dow Chemical Co. v. United States*, 476 U.S. 227, 229 (1986). There also are location tracking cases, *e.g.*, *Carpenter*, 138 S. Ct. 2206; *United States v. Jones*, 565 U.S. 400 (2012), but—as is evident—there is wide room for disagreement as to how those precedents apply.

Closely tied to the central question are two others that ultimately will have to be resolved, if not in this case, then in others. The first: in analyzing whether government conduct constitutes a search under the Fourth Amendment, does one isolate the various technologies employed and analyze the constitutionality of each individually? Or does one evaluate an integrated system in the aggregate? *Compare* Op. at 11–12 (indicating Plaintiffs challenge only the aerial component of AIR), *with* Dissent at 36–37 (emphasizing integration of aerial and ground components). In a world of not only emerging, but merging, technologies, this question will move to the fore.

Second, what does constitutional law say about the mass collection and storage of data regarding countless people, so that data can be used at some future time to conduct surveillance on a very few? The panel majority focused on the targeted tracking of individuals, *see* Op. at 13–15; *but cf. id.* at 15–20 (recognizing "programmatic" elements of this case), while the dissent expressed concern more broadly about mass data collection. Dissent at 40–44. *No* Supreme Court opinion ever has dealt with this issue. Yet, in a world increasingly drenched in CCTV, license plate readers, facial recognition technology, and more biometrics to come, this question is destined to become paramount.

B. Like Many Questions Under the Fourth Amendment, the Resolution of these Issues is Extremely Fact Bound

Questions regarding the constitutionality of government conduct under the Fourth Amendment are highly fact bound. That particularly is true of cases that involve reasonable expectations of privacy, which are "by definition related to time, place and circumstance." *United States v. Ramapuram*, 632 F.2d 1149, 1154 (4th Cir. 1980). Similarly, what is reasonable, and what is not, turns on precisely what the government did. *See Skinner v. Ry. Lab. Execs. Ass'n.*, 489 U.S. 602, 619 (1989) (reasonableness "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself").

The panel majority and the dissent were deeply conscious of the fact-based inquiry here. The majority stated clearly it was *this* program, and no other, that it upheld. *See* Op. at 15 ("We only address the AIR program, which has built-in limitations designed to minimize invasions of individual privacy."); *see also id*. at 17–18 (upholding AIR under the "special needs" doctrine, based on AIR's particular capabilities and limitations). Yet, in the dissent's assessment, the majority's decision rested on "a fundamentally warped understanding of the facts." *Id.* at 26.

The differing legal conclusions of the majority and dissent turned largely on their radically different understanding of the facts. The panel majority saw AIR as "a carefully limited program of aerial observations" that "has been progressively circumscribed to meet the thoughtful objections of civil libertarians." *Id.* at 3.

The dissent, on the other hand, viewed AIR as "warrantless dragnet surveillance" capable of compiling "a detailed and comprehensive record of a person's past movements." *Id.* at 25–26 (quotation marks omitted).

C. The Panel Majority Resolved This Case on An Incorrect View of the Facts

Unfortunately, the momentous issues in this case have been decided on an incorrect set of facts. The panel majority relied heavily on the terms of the MOU and the representations by counsel for Defendants about how AIR functions. Yet, as *amicus* explains in its Report, critical aspects of the AIR Program operate quite differently. Of special note, after the MOU was approved, and after AIR commenced operations, counsel for BPD approved of what BPD calls "Supplemental Requests," which (as the word "supplemental" suggests) plainly took AIR beyond the MOU's bounds.

The panel majority's conclusion that AIR does not infringe an individual's reasonable expectation of privacy rested in part on an understanding that the AIR program only "enables the *short-term* tracking of public movements." Op. at 11, 14 ("AIR can only be used to track someone's outdoor movements for twelve hours at most."). The panel further understood AIR as limited to tracking vehicles and individuals to and from crime scenes, in order to identify them. Op. at 3–4 (noting analysts report "the tracks of people and vehicles to and from the crime scene, and

the locations the individuals at the crime scene visited before and after the crime"); *id.* at 14–15 (distinguishing *Carpenter* on ground that AIR used only "to identify suspects and witnesses to crimes"); *id.* at 17 (stating "[a]n individual will not have his public movements tracked unless he happens to be at the scene of one of these violent crimes").

The panel believed things to be so, because that is what it was told. *See* Gov't Br. at 43 ("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."); *id.* at 10, 42 (stating AIR tracks individuals "to and from the crime scene" and is used only "to reveal the identity of a person," not "the movements of an identified person"); *see also* JA74 (indicating, in the "Privacy Protection" section of the MOU, that AIR analysis is based on "[t]racks of individuals to and from crime scenes").

The actual facts are quite different. AIR *is* used to track individuals to and from crime scenes, but under the Supplemental Request procedure, certain AIR investigations do more. For example, one AIR investigation entailed monitoring the home of a suspect's mother over the course of two days and tracking the individuals who came and went. Report at 16. And AIR analysts can and do track individuals across multiple days. *Id*. In one case, for example, analysts prepared a report detailing a vehicle's movements over the course of three days, listing eleven

locations at which the vehicle stopped, and noting the interactions the driver had with other individuals. *Id.*

This distinction between short-term tracking of people and vehicles to and from a crime scene, and the other actual uses of AIR, is of consequence. The "crime scene" nexus inherently limits BPD's discretion regarding when and how it can ask PSS to monitor individuals, and it is a simple matter to confirm after the fact that the tracking did originate at a crime scene. The broader uses of AIR, beyond the terms of the MOU, place considerable discretion in BPD's hands as to who is monitored, and for how long. The bases for such decisions cannot easily be ascertained or audited.

The ability to perform multi-day tracks arises in large part because AIR is not simply a program of aerial surveillance, but a surveillance program reliant on integrated technologies. The panel had limited basis for understanding the extent to which analysts use the ground and aerial components in tandem. Analysts use aerial surveillance to create tracks, but identification of the individual or vehicle being tracked often depends on ground surveillance. Similarly, ground surveillance is used to identify starting points of tracks when they do not begin or end at a crime scene—such as with the multi-day tracks, of which the panel was unaware. *See* Report at 14–15 (explaining how integration of technologies enables AIR's tracking capabilities).

It is because of this additional tracking, wholly dependent on the combination of aerial and ground surveillance, that some uses of AIR bear closer resemblance to the sort of location tracking analyzed in *Carpenter* than the panel recognized. To be clear, AIR often is used only for a short period to track a car or individual to or from a crime scene, as the MOU states, and this Court was told. But, to be equally clear, this is not the only use of AIR. In some cases, multi-device, and indeed multi-day, tracking gives AIR analysts access to the "privacies of life." *Carpenter*, 138 S. Ct. at 2217 (quotation marks omitted). One report detailed a woman's movements as she visited a shopping mall, a food market, and finally a gas station. In another investigation, an analyst noted that "the person that lives in the house . . . [drove] to [a local] University," and flagged that "there are no classes going on currently." Report at 14.

Finally, in assessing the constitutional burdens imposed by AIR, the panel majority emphasized the "important limitations" on the program—among them a requirement that "[u]nless photographs are being used in a prosecution, they are discarded after forty-five days." Op. at 18; *accord* Gov't Br. at 11 (stating while imagery leading to an arrest is retained, "[a]ll other imagery collected in the pilot program will be deleted after forty-five days"). But this is not the case either. For every day that PSS receives a request from BPD and is able to obtain any potentially relevant aerial imagery, PSS retains all of the imagery, for all of the neighborhoods

within AIR's aerial coverage, for the entire day. Consequently, the majority of aerial imagery data is retained indefinitely, and remains available for use in other investigations.

D. The Panel or This Court Should Vacate the Panel Decision

The purpose of the foregoing is not to take a position on the important constitutional questions presented in this case. The Court may well conclude these new facts do not impact the panel's reasoning. As *amicus* explains in the attached Report, the constitutional questions are weighty and complicated ones. The recommendations *amicus* makes in its Report ultimately are in the realm of policy and legislative imprimatur, not constitutional law. *See* Report at 25 (citing *Jones*, 565 U.S. at 429–30 (Alito, J., concurring) (calling for legislative regulation of surveillance technology)).

Rather, the reason for filing as *amicus* is only to urge that these weighty issues be resolved on an accurate record. *See Rumler v. Bd. of Sch. Trustees for Lexington Cty. Dist. No. One*, 437 F.2d 953, 954 (4th Cir. 1971) ("We are reluctant to decide a constitutional question in a new context without a full record disclosing the facts.").

Prior to oral argument, *amicus* notified counsel for Defendants of the inaccuracies in its briefing by phone and in writing. Given the potential importance of some of these facts, *amicus* fully expected counsel would correct the record. *See*

United States v. Shaffer Equip. Co., 11 F.3d 450, 458 (4th Cir. 1993) (advocates have continuing duty to apprise the Court "of any development *which may conceivably affect the outcome* of the litigation"). Regrettably, counsel did not do so. After receiving *amicus*'s letter, counsel for Defendants filed an Erratum with the Court. But that Erratum continued to suggest that AIR only was being used to track people and vehicles at the scene of the crime, or people and vehicles that met with people who were tracked from the crime scene. *See* Erratum, ECF Doc. No. 44 at 2 (referring to tracking the movements of "a getaway vehicle parked several blocks away from a crime scene"). *Amicus* does not impugn counsel's integrity or good faith; factual misunderstandings happen. Still, government attorneys have distinctive access to information and concomitant responsibilities. *Compare* Letter from Michael R. Dreeben, Deputy Solicitor General, *Nken v. Holder*, S. Ct. No. 08-681 (Apr. 24, 2012) (recognizing the Government's "special obligation to provide . . . reliable and accurate information at all times"). This, too, counsels in favor of vacatur.

As all members of the panel recognized, this case sits squarely at the juncture of public safety and constitutional liberty. Baltimore does have a profound problem with gun violence, endangering many in the population. And Baltimore has experienced equally profound difficulties in the way it has been policed. Striking the balance correctly is of the utmost importance—not only for Baltimore but for the

course of Fourth Amendment law—and that only can be done on an accurate record. *See United States v. Curry*, 965 F.3d 313, 316 (4th Cir. 2020) (stating that Fourth Amendment analysis "must be grounded on an accurate understanding of the facts").

CONCLUSION

For these reasons, *amicus* urges the panel or the Court to vacate the district court's preliminary injunction order and the panel opinion.

November 27, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because it contains 2,570 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that 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 font.

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CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2020, I electronically filed the foregoing brief with the Clerk of Court using the CM/EFC system. Counsel for all parties are registered CM/ECF users and will be served with the foregoing motion by the Court's CM/ECF system.

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