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' OPPOSITION TO DEFENDANTS–APPELLEES' MOTION TO DISMISS APPEAL AS MOOT

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Shortly before an en banc hearing in this Court, the Baltimore Police Department ("BPD") moves to dismiss this appeal as moot based on its voluntary decision to "terminate" its contract with its third-party surveillance vendor, Persistent Surveillance Systems ("PSS"). This appeal is not moot. The BPD's motion mischaracterizes the relief Plaintiffs seek and fundamentally misapprehends the mootness doctrine. This Court should deny the BPD's motion and proceed to consider Plaintiffs' constitutional claims at the scheduled en banc argument session on March 8.

I. Plaintiffs can still obtain effective relief from this Court.

The central premise of the BPD's motion—that this Court can no longer afford Plaintiffs relief—is wrong. The BPD still retains access to images collected through the Aerial Investigation Research ("AIR") program, and Plaintiffs' motion for a preliminary injunction seeks to enjoin that access.

A lawsuit becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Porter v. Clarke*, 852 F.3d 358, 363 (4th Cir. 2017) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). But mootness applies "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (citation omitted); *accord N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 302 (4th Cir. 2020). "As long as the parties have a concrete interest,

however small, in the outcome of the litigation, the case is not moot." *Id.* (citation omitted).

Here, Plaintiffs have an ongoing interest in their request for preliminary relief. Contrary to the BPD's repeated suggestion, Plaintiffs' motion does not merely seek to keep the BPD's AIR program from *collecting* aerial images. *See* BPD Mot. 2, 5 (selectively quoting from Plaintiffs' district court briefing and petition for rehearing). Rather, Plaintiffs' motion also specifically seeks to prohibit the BPD from *accessing* any images collected during the litigation of the motion. *See* Proposed Order Granting Pls.' P.I. Mot., *Leaders of a Beautiful Struggle v. Balt. Police Dep't*, No. 20-cv-929 (D. Md. Apr. 9, 2020), ECF No. 8 (seeking to enjoin the BPD and others acting in active concert with them from "accessing any stored images created by" the AIR program); Br. for Pls.–Appellants at 55, ECF No. 21 (requesting that this Court remand with instructions to prohibit the BPD from "accessing any images" collected through the AIR program); Pls.' Mem. in Supp. of P.I. Mot. at 35, *Leaders of a Beautiful Struggle v. Balt. Police Dep't*, No. 20-cv-929, ECF No. 2-1 (same); *see also* JA27 (complaint) (same).[1]

Even after the BPD's unilateral decision to destroy some of the data it had collected, the BPD still retains access to roughly 14 percent "of the captured

[1] Later in its motion, the BPD acknowledges that Plaintiffs seek to preliminarily enjoin the BPD's access to data collected through the AIR program. *See* BPD Mot. 5.

imagery data." BPD Mot. Ex. B at 1. It also retains access to the imagery embedded in the 200-plus "investigation briefings" created over the past year, which PSS transmitted to the BPD. *Id.* at 1. Should this Court grant Plaintiffs' requested relief, it would prohibit the BPD from accessing the data it unconstitutionally collected throughout the course of the program, providing Plaintiffs with effective preliminary redress.[2]

Although the BPD emphasizes that *PSS* is the entity retaining 14 percent of "captured imagery data," BPD Mot. 6; BPD Mot. Ex. B at 1, that fact is irrelevant. PSS is a conceded state actor in this context. JA136–37; *see* Reply Br. for Pls.–Appellants at 16 n.7, ECF No. 26. The BPD's "termination" of its contract with PSS in no way alters that analysis, and the BPD's motion to dismiss the appeal does not argue otherwise (nor could it). Because PSS continues to operate as an extension of the BPD, PSS's retention of data collected through the AIR program is legally attributable to the BPD. Moreover, in its "termination" announcement, PSS (now doing business as the "Community Support Program," or "CSP")

[2] The BPD does not argue that it has expunged all images of Plaintiffs retained through the AIR program. Moreover, the undisputed record establishes that Plaintiffs Erricka Bridgeford and Kevin James were at substantial risk that the AIR program's investigation briefings would reveal their movements, given their work in high-crime neighborhoods. *See* Bridgeford Decl. at JA107 ¶ 10; James Decl. at JA113 ¶ 6; Reply Br. at 5 n.2.

Even if the BPD were to somehow expunge all images of Plaintiffs, though, this Court should still not dismiss the appeal as moot. *See infra* Section II.

expressly acknowledges that it "will maintain the retained imagery in accordance with" the parties' contract "to allow BPD to meet its commitment" to disclosure in ongoing criminal prosecutions. BPD Mot. Ex. B at 1. Thus, even if it were legally relevant that PSS, rather than the BPD, physically maintains the data, there is no question that the BPD is permitted to access that data "to provide . . . disclosure" in criminal prosecutions. *Id.*

Nevertheless, the BPD contends that the appeal is moot because it "has no intention of accessing the data to track and potentially identify individuals." BPD Mot. 6. The BPD is wrong.

For the reasons discussed at length below, *see infra* Section II, an unsworn, non-binding statement of "intention" in a party's brief is insufficient to trigger mootness pursuant to the "voluntary cessation" doctrine.

But even if the BPD had offered more than its good intentions, its representation would be insufficient to moot this appeal. Plaintiffs seek to preliminarily enjoin the BPD from accessing unlawfully collected imagery. That request for relief is not limited to enjoining the BPD's access for a particular purpose, such as the creation of new tracks of individuals' movements. Even after the parties' "termination" of some provisions of their contract, the BPD maintains the ability to access this imagery in several ways: (1) through the possession of 14 percent of AIR program data by PSS, a state actor, *see* BPD Mot. Ex. B. at 1; (2)

by preserving the contractual right to access the remaining AIR program imagery to "support future prosecution and defense team analysis requests," *id.*; and (3) by possessing AIR program imagery embedded in investigation briefings transferred from PSS to the BPD, *see id.*

Plaintiffs' requested preliminary relief, and this appeal, continue to present a live issue.[3]

II. Regardless, this Court should deny the BPD's motion because two exceptions to mootness doctrine apply.

Irrespective of whether the BPD's formal termination of the AIR program contract and its destruction of evidence in this case technically moots this appeal, the BPD's bid for dismissal must fail because two exceptions to mootness doctrine apply. First, the case fits within the voluntary cessation exception. And second, it fits within the exception that applies to cases involving claims that are capable of repetition yet evading review. *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.*, 528 U.S. 167, 189–92 (2000) (describing these two "long-recognized exceptions to mootness"). As Chief Justice Rehnquist observed, "[t]he logical conclusion to be drawn from [prior Supreme Court] cases,

[3] Perplexingly, the BPD suggests that Plaintiffs could continue to litigate their constitutional claims in the context of a declaratory judgment claim in the district court, BPD Mot. 8–9, without acknowledging that it has unilaterally deleted evidence that would presumably be relevant to any such litigation. In any event, because Plaintiffs do not seek damages, the BPD would surely make the same mootness arguments on remand that it advances here.

and from the historical development of the principle of mootness, is that while an unwillingness to decide moot cases may be connected to the case or controversy requirement of Art. III, it is an attenuated connection that may be overridden where there are strong reasons to override it"—in particular, in connection with voluntary cessation doctrine and claims capable of repetition yet evading review. *Honig v. Doe*, 484 U.S. 305, 331 (1988) (Rehnquist, C.J., concurring).

A. The voluntary cessation doctrine applies here.

First, litigants may not avoid appellate review by voluntarily ceasing unlawful conduct. In line with this principle, this Court has repeatedly concluded that supposedly moot claims remain live when a government defendant revises its own challenged policy but (a) retains the capacity to return to the challenged policy, (b) does not concede that the challenged policy was illegal, or (c) does not provide any evidence that it will not reinstate the challenged policy in the future. *See Porter*, 852 F.3d at 364; *Wall v. Wade*, 741 F.3d 492, 498 (4th Cir. 2014); *Pashby v. Delia*, 709 F.3d 307, 316–17 (4th Cir. 2013); *see also L.A. Cnty. v. Davis*, 440 U.S. 625, 631 (1979) (a court may find mootness notwithstanding voluntary cessation only where there is "no reasonable expectation that the alleged violation will recur" and "interim relief or events have *completely and irrevocably* eradicated the effects of the alleged violation" (quotation marks and alterations omitted) (emphasis added)); *Norman Bloodsaw v. Lawrence Berkeley Lab.*, 135

F.3d 1260, 1274 (9th Cir. 1998). A defendant's voluntary cessation of challenged conduct will excuse mootness when that cessation is "at least somewhat related" to the litigation, even where it is motivated by other concerns, too. *Wall*, 741 F.3d at 498 n.8.

The BPD's actions here present a classic case of voluntary cessation. Far from conceding the illegality of the program, the BPD continues to defend it on the merits; its motion merely insists that by the passage of time and its recent actions, it should escape this Court's judgment on the question of the program's constitutionality. Moreover, this Court has made clear that "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Porter*, 852 F.3d at 364 (quoting *Laidlaw*, 528 U.S. at 190); *accord 6th Cong. Dist. Repub. Comm. v. Alcorn*, 913 F.3d 393, 407 (4th Cir. 2019) ("The mootness doctrine ordinarily does not extend to situations where a party quits its offending conduct partway through litigation."). The BPD has not met that burden here.

Whatever the effect of its recent decisions and pronouncements, the BPD is certainly free to engage in a newly constituted AIR program again. It has not made an "unconditional and irrevocable" promise not to restart the program. *Already, LLC v. Nike, Inc.*, 568 U.S. 85 (2013); *Porter*, 852 F.3d at 364. It has not submitted

a sworn declaration memorializing that supposed promise—and, regardless, even affidavits are not alone sufficient to escape the voluntary cessation doctrine and meet a litigant's burden to show mootness. *See, e.g.*, *Heyer v. U.S. Bureau of Prisons*, 849 F.3d 202, 219 (4th Cir. 2017) (rejecting affidavit as "[b]ald assertion[]" not to "resume a challenged policy" (second alteration in original) (quotation marks omitted)). There is no new statute or other legislative enactment that prohibits the AIR program from restarting. *Cf. Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 116 (4th Cir. 2000). What's more, the BPD's belated assurances in legal briefing that it will not imminently revive the program are largely based on the long-time opposition of Baltimore City's new mayor,[4] but politicians commonly change their minds, and new elections could eventually put the AIR program back on the City's agenda. Indeed, with respect to this very program, the BPD already backtracked on a similar promise once before: in 2016, the BPD "halted" a version of its AIR program in response to public backlash, only to resume it years later. JA10–11. Even accounting for the BPD's promises, it is obviously "free to return to [its] old ways." *Laidlaw*, 528 U.S. at 170.

[4] Emily Opilo, *Spy Plane Not Likely to Fly Over Baltimore Again, Mayor Says*, Balt. Sun, Dec. 28, 2020, https://www.baltimoresun.com/politics/bs-md-pol-brandon-scott-interview-20201228-ti75hqctsffgrbyggpzdz2xtgm-story.html; *see also* BPD Mot. 7 n.6.

This Court's decision in *Wall* is instructive. There, the defendants argued that the voluntary cessation doctrine should not apply because they had stopped their conduct for non-litigation reasons. 741 F.3d at 498 n.8. This Court rejected their argument, observing that the defendants had changed their challenged policy only after the plaintiff's complaint was filed and explaining that the timing of the defendants' policy change "strongly indicate[d] that [it] was at least somewhat related to" the litigation. Those circumstances were enough for the voluntary cessation doctrine to apply. *Id.*

Here, the BPD has hardly even disguised its strategy to preserve its prior victories in this case while hastening mootness in order to avoid en banc review. It is worth noting that the BPD's planes came down, ending any new collection of images, at the end of October, *see* Resp. Opp. Pet. Reh'g 3, ECF No. 61—before the panel even issued its decision in this case. And the BPD "stopped asking PSS analysts to track movements and potentially identify individuals and vehicles on December 8." BPD Mot. 5. Yet the BPD did not move to dismiss this appeal as moot in late October, or even mid-December. This Court granted en banc review on December 22. ECF No. 63.

Shortly thereafter, the BPD telegraphed that it would take a step like last week's formal "termination." At the end of December, the then–Acting City Solicitor told the media, in response to this Court's grant of rehearing en banc, that

the BPD was "going to press" the argument that "procedurally, the matter is moot."[5] And in connection with last week's decision, Baltimore's current City Solicitor, Jim Shea—who also sits on the very Board of Estimates that has now voted to terminate the contract—explicitly indicated that doing so would enable the BPD to moot this appeal.[6] What's more, the BPD has clarified that its contractual "termination," just months before the contract would have naturally expired, JA50, JA54, JA130, is not remotely as definitive as its motion suggests. As explained above, the BPD continues to retain and maintain access to data collected under the program. BPD Mot. Ex. B at 1 (PSS "will maintain the retained imagery date in accordance with" the parties' contract). In effect, it seems, this "termination" only hastened the deletion of a subset of data already collected under the AIR program. The BPD's fig-leaf justification for taking this surprise step now—that doing so would be more "transparent" than simply letting the contract run its course[7]—is neither credible nor relevant. *See Wall*, 741 F.3d at 498 n.8 (doctrine applies when

[5] *See* Colin Campbell, *Baltimore Police Threatened to End Spy Plane Program in November, Claiming 'Disturbing' Leaks of Information*, Balt. Sun, Dec. 30, 2020, https://www.baltimoresun.com/news/crime/bs-pr-md-ci-cr-bpd-spy-plane-letter-20201230-kxzofgo7l5bghcgahx3p4jzksy-story.html.

[6] *See* Emily Opilo, *Baltimore Spending Board Votes Unanimously to Cancel Surveillance Plane Contract*, Balt. Sun, Feb. 3, 2021, https://www.baltimoresun.com/politics/bs-md-pol-plane-canceled-20210203-ha3ixtgiyfg4rpgmfftrsd6uwu-story.html.

[7] *Id.* (quoting BPD counsel).

relevant action is "at least somewhat related to" the litigation). The voluntary cessation doctrine exists to prevent precisely these types of efforts to thwart judicial review. *See Porter*, 852 F.3d at 364.

B. The "capable of repetition yet evading review" doctrine applies here.

Second, this case is plainly one in which the exception to mootness for issues "capable of repetition yet evading review" applies. That exception applies where "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Fed. Election Comm'n v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 462 (2007) (citing *Spencer v. Kemna*, 523 U.S. 1, 17 (1998); *accord Lux v. Judd*, 651 F.3d 396, 401 (4th Cir. 2011).

As discussed above, *see supra* Section II.A, the BPD has not met its burden to demonstrate that it is unreasonable to expect this Court will be presented with the constitutionality of the AIR program again. The BPD has not conceded its illegality, PSS continues to seek to sell its technology,[8] there is no new statute

[8] *See, e.g.*, Eoin Higgins, *St. Louis Consider Spy Planes to Survey the City 18 Hours A Day*, The Nation, Feb. 4, 2021, https://www.thenation.com/article/society/st-louis-spy-planes; *see* Pet. Reh'g 10 n.8, ECF No. 49.

prohibiting it, and the BPD has in the recent past "ended" a similar program, only to restart it later, JA10–11.

And with respect to the relevant duration of the challenged activity, it is critical to appreciate that Plaintiffs diligently pursued this litigation, and the relief that remains pending before the full Court, from the start. The BPD's contract to engage in AIR Program surveillance—the one it has now claimed to terminate—was approved on April 1, 2020. JA130. Eight days later, on April 9, Plaintiffs filed this suit and their motion for preliminary relief. JA7–27, JA28–29. On April 24, the district court denied Plaintiffs' motion, JA161, and the same day, Plaintiffs filed a notice of appeal. JA162. On April 28, Plaintiffs filed a motion in this Court to accelerate case processing, requesting an expedited briefing schedule and oral argument. ECF No. 11. Even before that motion was granted (and it was, on May 1, ECF No. 22), Plaintiffs filed their opening merits brief with the permission of this Court's Clerk. ECF No. 21. At that point, the BPD's planes had *still* not even left the ground—and the six-month clock on the AIR program's collection of data had not yet begun ticking.

Per the Court's briefing order, the BPD filed its response brief on June 1, ECF No. 24, and Plaintiffs filed their reply on June 5, ECF No. 26. On June 15, Plaintiffs again filed a motion seeking expedited oral argument and decision in the case. ECF No. 28. The Court ordered the BPD to respond, which it did on June 18,

ECF No. 32, and Plaintiffs filed a reply the same day, ECF No. 33. A month later, on July 17, with a decision on that motion still pending, Plaintiffs filed a letter urging the Court to schedule oral argument and providing additional dates for counsel's availability. ECF No. 36. On July 20, the Court denied Plaintiffs' motion. ECF No. 37.

The appeal was eventually scheduled for argument on September 9. ECF No. 45. The panel issued its decision in favor of the BPD, over Chief Judge Gregory's dissent, on November 5. ECF No. 47. On November 19, Plaintiffs filed their petition for en banc review, ECF No. 49, which was ultimately granted by this Court on December 22, ECF No. 63.

Plaintiffs recount this history to emphasize that, despite their sustained efforts (some of which this Court agreed with) to accelerate appellate review of their motion for preliminary relief, a decision by the full Court is unlikely to arrive until a full year of litigation has passed. If this case is somehow moot, but does not fall within the "capable of repetition yet evading review" exception (or the "voluntary cessation" one) to mootness, litigants like the BPD could simply structure policies or contracts in such a way as to "expire" within a year—or just decide to "terminate" them early—effectively preventing any request for preliminary relief to enjoy full litigation before this Court. That is the kind of

jurisdictional shenanigan the doctrinal exceptions to mootness are intended to forbid.

Respectfully submitted,

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Dated: February 8, 2021

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CERTIFICATE OF COMPLIANCE

1. This response complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 3,201 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.

Dated: February 8, 2021

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