
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

DEFENDANTS-APPELLEES' REPLY IN FURTHER SUPPORT OF THE MOTION TO DISMISS

In opposing the motion to dismiss, the Plaintiffs-Appellants attack a straw man. The Defendants-Appellees do not seek to dismiss the entire case as moot, only this interlocutory appeal. Dismissing the appeal – which asks only whether the district court abused its discretion in declining to enjoin the program before it began – does not end the litigation; it merely allows the case to proceed in the district court, where the Plaintiffs-Appellants seek a declaratory judgment, a

permanent injunction, the expungement of records, attorneys' fees and litigation costs, and such other relief as the district court may find proper. (J.A. 8–9, 27).[1] Thus, the granting of the motion to dismiss does not mean that the police department will "escape this Court's judgment on the question of the program's constitutionality." Opp'n to Mot. to Dismiss 7. It simply means that, for now, this Court must reserve judgment to allow the possibility of discovery and trial on a fully developed record. And this can only aid in the proper resolution of a novel constitutional question. *See, e.g.*, *Thournir v. Buchanan*, 710 F.2d 1461, 1465 (10th Cir. 1983) (dismissing an interlocutory appeal from the denial of a

[1] *See, e.g.*, *Bogaert v. Land*, 543 F.3d 862, 864 (6th Cir. 2008) (noting that "[d]ismissal of . . . preliminary-injunction appeals" did "not render moot the underlying district court litigation"); *Indep. Party of Richmond Cty. v. Graham*, 413 F.3d 252, 256 (2d Cir. 2005) (dismissing as moot an interlocutory appeal of a preliminary injunction ruling, but recognizing that the plaintiff's requests for declaratory relief and a permanent injunction, raising the same underlying legal questions, remained pending before the district court); *Animal Legal Def. Fund v. Shalala*, 53 F.3d 363, 366 (D.C. Cir. 1995) (dismissing as moot an appeal from the denial of a motion for a preliminary injunction and "remand[ing] the case for consideration of the merits"); *Ethredge v. Hail*, 996 F.2d 1173, 1175–76 (11th Cir. 1993) (recognizing that, upon dismissal of an interlocutory appeal from the denial of a preliminary injunction, the plaintiff's requests for a permanent injunction and declaratory judgment were still pending). *See also In Def. of Animals v. U.S. Dep't of Interior*, 648 F.3d 1012, 1013 (9th Cir. 2011) (per curiam) (distinguishing between the mootness of an interlocutory appeal from the denial of a preliminary injunction and the mootness of an entire case, and recognizing that the plaintiffs could still "prevail on the merits of their claims" in the district court); 16 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure Jurisdiction* § 3921 (3d ed.) ("Possible mootness of the *interlocutory* relief questions . . . does not of itself affect the final judgment and requests for permanent relief.") (emphasis added).

preliminary injunction and noting that an "important and difficult question of constitutional law" "should not be determined without thorough preparation and deliberation by the parties and the trial court").

I. This interlocutory appeal is moot because the Plaintiffs-Appellants cannot obtain effective relief from this Court.

Despite their protests to the contrary, this Court can no longer grant the Plaintiffs-Appellants the relief they sought in their motion for a preliminary injunction. A court can grant only the injunctive relief that a movant requests, and that relief must be "framed to remedy the harm claimed." *Aviation Consumer Action Project v. Washburn*, 535 F.2d 101, 108–09 (D.C. Cir. 1976) (noting also that injunctive relief must be "narrowly tailored to remedy the specific harm shown"), *citing Hartford-Empire Co. v. United States*, 323 U.S. 386, 410 (1945), *Davis v. Romney*, 490 F.2d 1360, 1370 (3d Cir. 1974), *and Consolidated Coal Co. v. Disabled Miners of West Virginia*, 442 F.2d 1261, 1267 (4th Cir. 1971).

In this case, the Plaintiffs-Appellants sought only to preliminarily enjoin the collection and "accessing" of aerial surveillance data. Memo. in Supp. of Mot. for Prelim. Inj. 33, Leaders of a Beautiful Struggle v. Balt. Police Dep't, No. 1:20-cv-00929-RDB (D. Md. Apr. 9, 2020), ECF 2-1; Proposed Order. The complaint and memorandum in support of the motion clarified what the Plaintiffs-Appellants meant by "accessing" the data: using it to track and identify individuals and produce detailed reports about their movements. *See* Mem. in Supp. of Mot. for

Prelim. Inj. 1–2 (asking the district court to "stop [the] program," which Plaintiffs-Appellants described as the "collection of information" and subsequent use by analysts, who would "link that information to other BPD-operated surveillance systems (including ground-based video cameras and automatic license plate readers)" to "deliver reports to the BPD that comprehensively detail[ed] the movements of individuals"); *id.* at 25–26 (asserting that BPD would "*access*[] *the data* it collects to build detailed dossiers about Baltimoreans," and arguing that such access required a search warrant) (emphasis added); J.A. 14 (alleging in the complaint that analysts would use the "AIR program data, as well as data from other BPD surveillance technologies, to produce reports for the BPD"). Indeed, the alleged harm that the Plaintiffs-Appellants sought to prevent was having analysts discover the "privacies" of their lives by identifying and tracking the Plaintiffs-Appellants' movements in the data. *See* Mem. in Supp. of Mot for Prelim. Inj. 12–13.

Although analysts have stopped accessing data to produce reports on individuals' movements, *see* Mot. to Dismiss 5–6, the Plaintiffs-Appellants nonetheless argue that the appeal is not moot simply because PSS has retained a fraction of the total program data, *see* Opp'n to Mot. to Dismiss 2–3, 4–5. But this data *has already been analyzed*, and there will be no further analysis of this data on behalf of the BPD: the Department issued a directive prohibiting further requests

for analysis, Mot. to Dismiss, Ex. A, and the BPD has terminated its contract with PSS.[2] The company retained only the data that was used to produce the approximately 200 investigative reports that came out of the pilot program, in case those reports are used in future criminal prosecutions. Mot. to Dismiss, Ex. B at 1–2.

If the Plaintiffs-Appellants seek the destruction of these data or the investigative reports that have already been created, they must pursue that remedy in the underlying district court litigation (assuming that upon remand they can establish their standing to do so). The Plaintiffs-Appellants made no such request in their motion for a preliminary injunction and, accordingly, this Court cannot order that relief. *See Aviation Consumer Action Project*, 535 F.2d at 108–09.

II. No exception to the mootness doctrine applies.

Neither the voluntary cessation doctrine nor the exception for claims capable of repetition yet evading review applies to this interlocutory appeal.

The voluntary cessation doctrine "seeks to prevent a manipulative litigant immunizing itself from *suit* indefinitely, altering its behavior long enough to secure a dismissal and then reinstating it immediately after." *Porter v. Clarke*, 852 F.3d 358, 364 (4th Cir. 2017) (emphasis added), *quoting ACLU of Mass. v. U.S.*

[2] Emily Opilo, "Baltimore spending board votes unanimously to cancel surveillance plane contract," *Balt. Sun*, Feb. 3, 2021, *available at* https://www.baltimoresun.com/politics/bs-md-pol-plane-canceled-20210203-ha3ixtgiyfg4rpgmfftrsd6uwu-story.html.

Conference of Catholic Bishops, 705 F.3d 44, 54–55 (1st Cir. 2013). But dismissing this interlocutory appeal does not insulate the Defendants-Appellees from suit. It merely permits the district court litigation to proceed. Accordingly, the voluntary cessation doctrine has no application.

Similarly unavailing is the Plaintiffs-Appellants' invocation of the exception for cases capable of repetition yet evading review. *See* Opp'n to Mot. to Dismiss 11. Because litigation is still pending in the district court, the constitutionality of the BPD's pilot program is still subject to review – first by the district court, and then by this Court. *See, e.g.*, *Indep. Party of Richmond Cty.*, 413 F.3d at 256 (dismissing an interlocutory appeal from a preliminary injunction ruling and finding "no reason to believe that the issues raised by the [plaintiff's] request for permanent relief [could] not be fully litigated before" the district court and, "in due course," "reviewed on appeal"). *See also Parker v. Winter*, 645 F. App'x 632, 634–35 (10th Cir. 2016) (recognizing that, upon the dismissal of an appeal from the denial of a preliminary injunction, review is "not only possible but also likely to occur" if claims for either a permanent injunction or declaratory relief remain pending in the district court).

To summarize, the Department has ended the pilot program that the Plaintiffs-Appellants sought to preliminarily enjoin. The BPD is no longer collecting or accessing aerial surveillance images to track and potentially identify

individuals or vehicles. Because this Court cannot grant the preliminary relief the Plaintiffs-Appellants sought, this interlocutory appeal of the denial of the preliminary injunction is moot. None of the exceptions to the mootness doctrine applies. Accordingly, the Court must grant the motion to dismiss.

Respectfully submitted,

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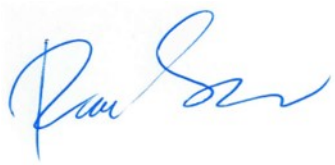

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CERTIFICATE OF COMPLIANCE

1. This reply in further support of the motion to dismiss complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 1,494 words.
2. This reply complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Date: February 10, 2021

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