
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

RESPONSE IN OPPOSITION TO THE PETITION FOR REHEARING EN BANC

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ARGUMENT

This was an interlocutory appeal challenging the district court's decision not to preliminarily enjoin a six-month aerial surveillance program. The planes have since stopped flying, and litigation as to the constitutionality of the program is still pending in the district court.

Suing before any plane took flight, Plaintiffs-Appellants sought to preliminarily enjoin what they viewed as the "significant harm" that would follow if the Baltimore Police Department "[c]ompiled video of their daily movements." 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. Finding that Plaintiffs-Appellants had failed to demonstrate that they were entitled to the extraordinary remedy of an injunction based on "evidence that is less complete than in a trial on the merits," (J.A. 135) (*quoting Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)), the district court denied the motion.

The program proceeded while the Plaintiffs-Appellants pursued this interlocutory appeal. The only question before a panel of this Court was whether the district court abused its discretion in denying preliminary injunctive relief. Six months elapsed and the surveillance planes stopped flying. The panel majority found no abuse of discretion and affirmed the district court's denial of preliminary injunctive relief.

The procedural posture of this case counsels against rehearing en banc. The planes have stopped flying, with no extant plan for them to return to the skies.[1] Moreover, to the extent that Plaintiffs-Appellants seeks to permanently enjoin the implementation of any version of the disputed program, that litigation remains pending in the district court, and the issues necessary to resolving those claims must be informed by discovery, of which there has been none.

In any event, the panel majority's opinion does not present a question of exceptional importance, nor does the opinion conflict with *Carpenter v. United States*, 138 S. Ct. 2206 (2018), or the "special needs" doctrine. Accordingly, the Court should deny the petition for rehearing en banc.

I. This case does not present an issue of exceptional importance that requires the attention of the full Court.

The panel opinion resolved a very narrow question: whether the district court abused its discretion in declining to preliminarily enjoin the aerial

[1] The purpose of the pilot program was to test the technology, (J.A. 35, 42, 69), but incoming Baltimore City Mayor Brandon Scott, who will be inaugurated on Tuesday, December 8, 2020, has long opposed the aerial surveillance program. *E.g*, Rachel Aragon, "Faith leaders push to keep surveillance plane flying to help fight crime," Fox45 News, Oct. 30, 2020, *available at* https://foxbaltimore.com/news/local/faith-leaders-push-to-keep-surveillance-plane-flying-to-help-fight-crime; Emily Opilo, "What does Baltimore's mayoral inauguration look like during a pandemic? Much, much smaller," *Balt. Sun*, Nov. 23, 2020, *available at* https://www.baltimoresun.com/politics/bs-md-pol-inauguration-scott-20201123-tnya74tuv5hnpfqj3fhf47t5ga-story.html.

surveillance program. Because the last flight took place more than a month ago,[2] any request to stop the collection of aerial imagery is moot. *See, e.g.*, *Friedman's, Inc. v. Dunlap*, 290 F.3d 191, 197 (4th Cir. 2002) (noting that if "the appellate court can no longer serve the intended harm-preventing function or has no effective relief to offer, the controversy is no longer live and must be dismissed as moot"), *quoting County Motors v. Gen. Motors Corp.*, 278 F.3d 40, 43 (1st Cir. 2002).

Plaintiffs-Appellants contend that the appeal still "presents a live issue" because they also seek to preliminarily enjoin the Baltimore Police Department from *accessing* data acquired through the AIR program. Pet. for Reh'g 6. But the panel found only that the act of the planes' *photographing plaintiffs* conferred standing. *See* Op. 7 ("It is enough to confer standing that plaintiffs *are likely to be photographed*.") (emphasis added). *See also id.* (noting that "the injury plaintiffs complain of is not being *identified* by the BPD, but merely that they are being *photographed*") (emphasis added); *id*. at 25 ("I agree with the majority's standing analysis.") (Gregory, C. J., dissenting). Defendants-Appellees maintain that the

[2] The last flight was on October 31, 2020. *E.g.*, WJZ-13 CBS Baltimore, "Baltimore's Aerial Surveillance Program Will End Saturday, Police Say," Oct. 30, 2020, *available at* https://baltimore.cbslocal.com/2020/10/30/baltimores-aerial-surveillance-program-will-end-saturday-police-say/; McKenna Oxenden, "A divided federal appeals court rules Baltimore's surveillance plane is constitutional, cites city's struggles," *Balt. Sun*, Nov. 5, 2020, *available at* https://www.baltimoresun.com/news/crime/bs-md-ci-cr-surveillance-plane-constitutional-ruling-20201106-q7n7dgch7rgkbplkyqbkmc5oei-story.html.

Plaintiffs-Appellants lack standing to challenge the analysis of the imagery that has already been collected: Even if they were photographed during the six-month pilot program, they appear in the photos only as anonymous dots; Plaintiffs-Appellants can only speculate that analysts might track those particular dots' movements and, thus, identify the Plaintiffs-Appellants, making this alleged harm too uncertain to confer standing. *See* ECF 24 (Response Br.) at 18–28.[3] *Cf. Kenny v. Wilson*, 885 F.3d 280, 287 n.2 (4th Cir. 2018) (noting that "one plaintiff does not have standing to request that another plaintiff's records be expunged").

Questions of standing aside, the Plaintiffs-Appellants have not established that this appeal presents an issue of exceptional importance. Plaintiffs-Appellants concede that Baltimore's pilot program was "unprecedented," Pet. for Reh'g 1, and "novel," *id.* 2; thus, Plaintiffs-Appellants cannot show that "the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue," Fed. R. App. Proc. 35(b)(1)(B).

Plaintiffs-Appellants' fears that the panel's decision "gives a green light" to other aerial surveillance programs, Pet. for Reh'g 1, are unfounded. The panel majority took care to emphasize that its "opinion should not be overread" and concerns only Baltimore's pilot program. Op. 15.

[3] Indeed, the more time that elapses, the more unlikely it is that anyone will be identified, as identification requires cross-reference with ground-based surveillance devices that may no longer have recorded footage of the date for which analysts have tracked a dot's movements.

What is more, the opinion addresses only whether the Plaintiffs-Appellants were entitled to preliminarily enjoin the program, i.e., to "terminat[e] at its very inception a program with the potential to help" redress Baltimore's "astonishing" rates of violent crime. Op. 18, 23. As the panel majority recognized, "[a] preliminary injunction is an extraordinary remedy never awarded as of right," Op. 8, *quoting Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008), a principle that "reflects the reality that courts are more likely to make accurate decisions after the development of a complete factual record during the litigation," Op. 8, *quoting* Douglas Laycock & Richard L. Hasen, *Modern American Remedies* 453 (5th ed. 2019). If the Plaintiffs-Appellants believe the program abridged their constitutional rights, or might do so in the future, the appropriate course is to allow the district court litigation to proceed.[4] There is no need for a rehearing en banc.

II. The panel majority's opinion does not conflict with Supreme Court precedent.

Contrary to the Plaintiffs-Appellants' contention, Pet. for Reh'g 11–16, the panel majority's opinion does not conflict with *Carpenter*, a decision that the Supreme Court itself characterized as "a narrow one." *Carpenter*, 138 S. Ct. at

[4] *See, e.g.*, 11A Charles Alan Wight & Arthur R. Miller, *Federal Practice & Procedure* § 2962 (3d ed.) ("The decision of both the trial and appellate court on whether to grant or deny a temporary injunction does not preclude the parties in any way from litigating the merits of the case."). *See also Bartels ex rel. Bartels v. Saber Healthcare Grp., LCC*, 880 F.3d 668, 682 n.7 (4th Cir. 2018) (noting that any factual findings made by a district court at the preliminary injunction stage are not binding at trial), *citing Camenisch*, 451 U.S. at 395.

2220. *Carpenter*, an appeal from a criminal conviction following an unsuccessful motion to dismiss on Fourth Amendment grounds, concerned the unique issue of cell-site location information ("CSLI"), "a time-stamped record" that results "[e]ach time [a cell] phone connects to" a "set of radio antennas" called a "cell site." *Id.* at 2211.

> Cell phones continuously scan their environment looking for the best signal, which generally comes from the closest cell site. Most modern devices, such as smartphones, tap into the wireless network several times a minute whenever their signal is on, even if the owner is not using one of the phone's features.

Id. Thus, cell-site records provide an exhaustive account of a cell phone's location – in Carpenter's case, "an average of 101 data points per day," *id.* at 2212 – and, because "a phone goes wherever its owner goes," CSLI provides a "detailed, encyclopedic," and "comprehensive record of the person's movements." *Id.* at 2214, 2216–17.

Because a majority in *United States v. Jones*, 565 U.S. 400 (2012), had already found that "individuals have a reasonable expectation of privacy in the *whole* of their physical movements,"[5] *Carpenter*, 138 S. Ct. at 2217 (emphasis added), *citing Jones*, 565 U.S. at 430 (Alito, J., concurring in the judgment) and

[5] In *Jones*, also a criminal case involving a motion to suppress, police "installed a GPS tracking device on the undercarriage of" a suspect's car "while it was parked in a public parking lot." *Jones*, 565 U.S. at 403. "Over the next 28 days," police "used the device to track the vehicle's movements," acquiring "more than 2,000 pages of data over the 4-week period." *Id.*

415 (Sotomayor, J., concurring), the question in *Carpenter* was whether the Government needed a warrant to obtain cell phone records retracing some part of that whole. The Court responded "yes" – at least when the Government accesses "seven days of CSLI." *Id.* at 2217 & n.3, 2219–20. Denial of Carpenter's motion to suppress was therefore erroneous.

Even in that criminal prosecution context, the Court emphasized the narrowness of its holding. *Carpenter*, 138 S. Ct. at 2220. The decision did not "call into question conventional surveillance techniques and tools, such as security cameras," *id.*, and the Court explicitly declined to "decide whether there is a limited period for which the Government may obtain an individual's historical CSLI free from Fourth Amendment scrutiny," *id.* at 2217 n.3. Thus, the Court took great care to limit its holding to a particular quantum (at least seven days) of a particular type of technology (historical CSLI).

In light of these substantial limitations and the singularity of CSLI, the district court and the panel majority correctly concluded that *Carpenter* did not compel a finding that Baltimore's pilot program was facially unconstitutional.

A. The panel majority did not fundamentally misunderstand the nature of the pilot program.

The panel majority did not, as the Plaintiffs-Appellants contend, Pet. for Reh'g 12, fundamentally misunderstand the nature of the pilot program or its

capacity to identify individuals. The majority recognized that the planes flew only during the daytime, weather permitting, and never at night. Op. at 4. The planes could observe only movements in public. *Id.* at 2. The planes used "limited resolution cameras that identif[ied] individuals only as pixelated dots in a photograph." *Id.* at 5. If an analyst tracking movements saw a dot enter a building, the analyst could not know if a dot later leaving the building was the same person without the use of other surveillance tools, such as ground-based surveillance cameras and license-plate readers. *Id.*

Taking into account these limitations, the panel majority properly concluded that the pilot program only "enable[d] short-term tracking of public movements." Op. 11 (noting that, because the planes flew only twelve hours a day, and because their cameras recorded only movements in public, surveillance could not "be used to track individuals from day-to-day"). *See also* Op. 6 (repeating the district court's explanation that "individuals' movements could not be tracked over the course of multiple days" because "the planes can only fly twelve hours and only during the day").

Defendants-Appellees dispute the assertion by amicus curiae the Policing Project at the New York University School of Law that these conclusions rested on "an incorrect set of facts." Policing Project Br. 6. While Defendants-Appellees appreciate that amicus Policing Project "does not impugn counsel's integrity or

good faith," Policing Project Br. 11, Defendants-Appellees take issue with any suggestion that they or their counsel misled the Court or failed to fulfill a duty to "correct the record," *id.* at 2, 10–11. The very reason the Policing Project had access to information about the pilot program was because of the Defendants-Appellees' commitment to transparency, and neither the Department nor Commissioner Harrison has any interest in or intention of misrepresenting the program.

To be clear, this was an interlocutory appeal of the district court's refusal to enjoin the pilot program before it began, and counsel for the Department and Commissioner Harrison understood the record to be limited to the evidence before the district court when it made its ruling. (App. 1, ¶ 4). Counsel for Plaintiffs-Appellants clearly agreed that the case came before this Court as a facial challenge to the pilot program, recognizing at oral argument:

> We filed this lawsuit before the planes went up. *And so the record that is before the court now is the contract itself and the promises that the contract makes. Not anything that happened in the interim.*

Oral argument at 42:02–42:11, *Leaders of a Beautiful Struggle v. Baltimore Police Department*, 979 F.3d 219 (4th Cir. 2020) (No. 20-1495) (emphasis added), https://www.ca4.uscourts.gov/OAarchive/mp3/20-1495-20200910.mp3 [hereinafter "Oral argument"]. *See also* Pet. for Reh'g 13 n.9 (noting that Plaintiffs "challenge the AIR program as defined by the contract establishing it").

Plaintiffs sought a preliminary injunction based on the program's potential and, accordingly, Defendants-Appellees' counsel understood the duty of candor to require counsel to make accurate statements about the program's capabilities, as reflected in the written agreements in the record before this Court. (App. 1, ¶¶ 4–5). Counsel fully satisfied that duty.

When the Policing Project contacted Defendants-Appellees' counsel approximately one week before oral argument regarding potential inaccuracies in the record, counsel consulted with several colleagues and with staff of the Department and Persistent Surveillance Systems. (App. 1, ¶¶ 1–2, 6). Counsel reviewed the record and Defendants-Appellees' Response Brief and determined that the brief had, in fact, misstated the universe of people who could potentially be tracked and identified. (App. 1–2, ¶¶ 6–7). Although the brief had asserted that a person would have to be present at a crime scene to be tracked, the memorandum of understanding provided that analysts could also track "people and vehicles that met with people who were tracked from the crime scene and the locations they came from and went to." (J.A. 71–72). Counsel filed an *erratum* pointing out this discrepancy. ECF 44 (Erratum). While the e*rratum* referenced a getaway car, Policing Project Br. 11, counsel offered it as but one example, *see* Erratum 2 (noting that analysts could track people and vehicles that "met with" people who were at the crime scene, "*such as* a getaway car parked several blocks away from a

crime scene") (emphasis added), and in no way meant to suggest that this was the only situation in which the contract contemplated tracking a vehicle or person not physically present at the scene of a crime. (App. 2, ¶ 8).

Defendants-Appellees did not misrepresent the program's capabilities with respect to how long analysts could track an individual's movements. *See* Policing Project Br. 7–8, 10–11. At oral argument, counsel acknowledged that police could try to track an individual for several days but pointed out that any such attempt would necessarily be punctuated by gaps of at least twelve hours. Oral argument at 1:18:44–1:19:30. Because the surveillance planes did not fly at night, analysts could never discover a person's movements overnight. *Id.* And even if they suspected that an anonymous dot in an aerial image was the same person they had tracked the day before, analysts would have to validate that assumption with a ground-based surveillance device. *Id.*

The Policing Project characterizes such efforts as "multi-day tracks," Policing Project Br. 8, but in fact, the most that analysts could achieve under the best conditions is what Defendants-Appellees represented: hours-long tracks on consecutive days, broken up by periods of twelve hours or more during which a person's whereabouts cannot be determined. Oral argument at 1:18:44–1:19:30. Thus, while the Policing Project refers to one example of "tracking a vehicle's movements over the course of three days," Policing Project Br. 7, analysts actually

tracked only about eight hours *total* of the vehicle's movements: about one hour and 53 minutes of movements on July 17 (followed by a gap of about 21 hours), about five hours and 17 minutes of movements on July 18 (followed by another gap of about 3 days and 21 hours), and about one hour of movements on July 22. Policing Project Report 16. This is consistent with the Defendants-Appellees' representations in their brief and at oral argument that the program permitted only relatively short-term tracks lasting no more than several hours,[6] and any alleged discrepancy between their representations and the understanding of the Policing Project is a matter of semantics.[7]

Defendants-Appellees also did not misrepresent the retention policy for aerial imagery. *See* Policing Project Br. 9–10. As stated on page 11 of Defendants-Appellees' Response Brief, if the use of imagery led to an arrest, the program called for the imagery and related reports to be retained and shared with

[6] *See, e.g.*, Defendants-Appellees' Response Br. 1 (noting that, "[d]ue to the program's built-in limitations," "police cannot track an individual's movements beyond several hours"); *id.* at 10 ("The pilot program's limitations – including the overnight gaps in collecting imagery, and the one-pixel-per-person resolution – make it impossible to reliably track a particular individual over a period of several days."); *id.* at 13 (quoting the district court's conclusion that "[g]aps in the imagery data" "foreclose the tracking of a single person over the course of several days"); *id.* at 16 ("[D]ue to the program's built-in limitations, the longest that police could possibly track an individual's movements is a matter of hours, not days.").

[7] Indeed, this dispute over how the pilot program was actually implemented makes clear why "facts matter" and the adjudication of constitutional claims should take place on a well-developed factual record of real world events, not on the basis of abstract suppositions of how real world events will unfold.

prosecutors and defense counsel; all other imagery would be deleted. (J.A. 53, 70). The Policing Project suggests that this representation is inaccurate because, due to "a technological limitation" in the software that did not allow analysts to "retain reliably only *part* of an image, such as where tracks appear," analysts retained an entire day's worth of imagery. Policing Project Report 17 (emphasis added). But here, again, any alleged discrepancy is a matter of semantics (e.g., the meaning of the word "image"). The Policing Project's own report uses the word "image" to refer to "the seamless whole" of pictures "stitched together" from many cameras aboard each plane surveying a 32-square-mile area. Policing Project Rep. 50–51. *See also id.* at 51 (explaining that "proprietary software captures and merges each individual camera's *images* into a large, contiguous *image* of the area below the plane, and aligns the *image* onto a map of the city") (emphasis added).

Neither the Department nor Commissioner Harrison disagrees with the Policing Project's observation that novel questions regarding the proper interpretation of the Fourth Amendment are highly fact intensive and should be resolved on a well-developed record. But, if anything, this counsels in favor of allowing the district court litigation to proceed, not rehearing en banc before any discovery has taken place. *See, e.g.*, *Rumler v. Bd. of Sch. Trustees for Lexington Cty. Dist. No. One*, 437 F.2d 953, 954 (4th Cir. 1971) (per curiam) ("We are

reluctant to decide a constitutional question in a new context without a full record disclosing the facts.").

B. The panel majority properly applied *Carpenter's* reasoning to the relevant facts.

The panel majority understood *Carpenter* for the limited decision it was: a narrow holding that police must acquire a warrant before accessing seven days of CSLI. *Carpenter*, 138 S. Ct. at 2217 & n.3, 2219–20. Even the *Carpenter* Court recognized that its decision "[did] not begin to claim all the answers" about when the Government's use of technology constitutes a Fourth Amendment "search," *Id.* at 2220 n.4, and *Carpenter* did not reject the well-established principle that "relatively short term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable." *Jones*, 565 U.S. at 430 (Alito, J., concurring in the judgment), *citing United States v. Knotts*, 460 U.S. 276, 281–82 (1983). *Accord* Op. 11 (noting that, although "long-term surveillance using GPS tracking violate[s] a reasonable expectation of privacy," "*short-term* surveillance of an individual's *public* movements is less likely to violate a reasonable expectation of privacy") (emphasis in original).

Contrary to the Plaintiffs-Appellants' assertion, the panel majority did not fail to appreciate the pilot program's use of ground-based surveillance cameras and license-plate readers. *Compare* Pet. for Reh'g 12 (arguing that the majority

"ignor[ed] the AIR program's integration of CitiWatch cameras and ALPR"), *with* Op. 4 (recognizing that police could use data from the aerial imagery to "employ existing surveillance tools, such as on-the-ground surveillance cameras and license-plate readers, to identify witnesses and suspects"). The majority merely recognized that the *Carpenter* Court expressly cautioned against expanding its holding to "conventional surveillance techniques and tools, such as security cameras," *Carpenter*, 138 S. Ct. at 2220, which capture only movements in public. *See* Op. 11–12 (recognizing that the *Carpenter* Court "specifically stated that traditional surveillance tools . . . remain lawful," and plaintiffs did not separately challenge the constitutionality of those tools).

The majority understood that using both aerial images and traditional ground-based devices could allow short-term tracking of movements in public. Op. 3–5. But the majority also recognized that such tracking is far from the "near perfect surveillance" the Government can achieve by tracking "the location of a cell phone," which is "almost a 'feature of human anatomy,'" and "tracks nearly exactly the movements of its owner," regardless of whether the person is inside or in public. *Carpenter*, 138 S. Ct. at 2218, *quoting Riley v. California*, 573 U.S. 373, 385 (2014). *See also Carpenter*, 138 S. Ct. at 2218 (analogizing cell phone tracking to "attach[ing] an ankle monitor to the phone's user"). In contrast to the "all-encompassing" and "exhaustive chronicle" of movements that cell phone

tracking can reveal, *id.* at 2217, 2219, Baltimore's pilot program could reveal only relatively brief snapshots of a person's movements, and only those in public spaces during daylight hours.

C. The majority opinion does not conflict with the "special needs" doctrine.

In addition to finding that the program facially did not violate a reasonable expectation of privacy, the majority noted that the program sought "to meet a serious law enforcement need without unduly burdening constitutional rights." Op. 15. The majority did not err in observing that the Supreme Court, in the context of programmatic searches and seizures, balances the burden on constitutional rights against other law enforcement and public safety needs. *Id.* at 15–16. This alternative holding simply provided yet another reason why the district court did not abuse its discretion in denying Plaintiffs-Appellants the extraordinary remedy of a preliminary injunction.

CONCLUSION

The Baltimore Police Department and Commissioner Harrison respectfully request that the Court deny the petition for rehearing en banc.

Respectfully submitted,

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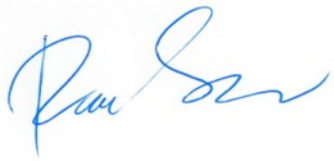
CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 35 and this Court's November 25, 2020, order requesting a response to the petition for rehearing en banc, because it contains 3,858 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief 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.



Rachel Simmonsen
Counsel for Defendants-Appellees

APPENDIX

DECLARATION OF RACHEL SIMMONSEN

1. About one week before oral argument, Farhang Heydari with the Policing Project at the New York University School of Law contacted me about potential inaccuracies in the record. Specifically, Mr. Heydari expressed concern that, since the district court had declined to preliminarily enjoin the AIR program, the program had launched and certain details and policies had evolved.

2. While Mr. Heydari did not allege any bad faith or misconduct, I took his concerns very seriously and consulted with Acting City Solicitor Dana P. Moore, former City Solicitor Andre M. Davis, and several colleagues in the Baltimore City Law Department.

3. These discussions centered on my duty of candor and the procedural posture of the case: an interlocutory appeal of the denial of a preliminary injunction.

4. Because the ruling on appeal was made without discovery and before the AIR program had begun, the record was limited to those documents that existed before the program's launch.

5. In light of the interlocutory nature of the appeal, I did not believe it was appropriate for me to attempt to expand the record beyond what the district court had considered. I did, however, believe I had a duty to ensure that statements in Defendants-Appellees' Response Brief did not misstate the program's capabilities or misrepresent the record.

6. To fulfill this duty, I reviewed the joint appendix and Defendants-Appellees' Response Brief and consulted again with my colleagues and with staff of Persistent Surveillance Systems and the police department.

7. I came to believe that our brief had misstated the universe of people who could be tracked and potentially identified as part of the program. While our brief asserted that someone would have to be present at the scene of a violent crime to ever be tracked and identified, Defendants-Appellees' Response Br. 22, 25–26, 51, I realized that the memorandum of understanding was not so restrictive: The scope of services also contemplated tracking "people and vehicles that met with people who were tracked from the crime scene and the locations they came from and went to." (J.A. 71–72).

8. I filed an erratum with this Court pointing out this discrepancy between our brief and the record. ECF 44 (Erratum). In the erratum, I included an example – "*such as* a getaway car parked several blocks away from a crime scene," Erratum 2 (emphasis added) – but my intention was not to suggest that this was the only situation in which analysts could track and potentially identify a vehicle or person that was not present at a crime scene.

9. Based on my understanding of the program, I did not believe that any other assertions in the Defendants-Appellees' Response Brief were inaccurate.

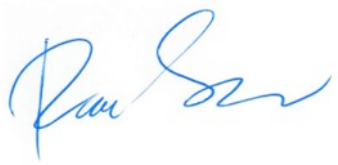
10. I did not believe that our brief misstated the program's capabilities with respect to the length of time the program could possibly track a person's movements. I understood "tracking over the course of several days," Defendants-Appellees' Response Br. 2, or a "multi-day track[]," Policing Project Br. 8, to mean a continuous, uninterrupted track for that period of time. Because the surveillance planes did not fly overnight and the cameras captured only movements in public spaces, it was my understanding that it was not possible for analysts to track someone around the clock for several days; at most, analysts were capable of intermittent tracks, each lasting no more than twelve hours.

11. I did not believe that our brief misstated the program's retention policy regarding the images captured by the planes' cameras. The brief stated that imagery used in an investigation resulting in an arrest would be saved and shared with prosecutors and defense counsel; other imagery would be deleted after 45 days. Defendants-Appellees' Response Br. 11. I believed this to be consistent with the record, (J.A. 53, 70, 123), and actual practice.

12. At oral argument on September 10, 2020, I answered all questions candidly, and I do not believe that I misrepresented any aspect of the AIR program.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 6th day of December, 2020.



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