

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FILED
U.S. DISTRICT COURT
DISTRICT OF MARYLAND
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LEADERS OF A BEAUTIFUL
STRUGGLE, *et al.*,

Plaintiffs,

v.

BALTIMORE POLICE
DEPARTMENT, *et al.*,

Defendants.

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Civil Action No. RDB-20-0929

* * * * *

MEMORANDUM OPINION

Earlier this month, after a period allowing for public comment, the Baltimore City Board of Estimates approved a contract between the Baltimore Police Department ("BPD") and Persistent Surveillance Systems ("PSS") to conduct an initiative known as the Aerial Investigation Research ("AIR") pilot program. This program is to run for approximately six months, during which time PSS will fly three aircraft over Baltimore City approximately 12 hours per day during daylight hours.

Plaintiffs Leaders of a Beautiful Struggle, a Baltimore-based organization, and Erricka Bridgeford and Kevin James, Baltimore City residents (collectively, "Plaintiffs"), seek a preliminary injunction which would prohibit the operation of the AIR program. On April 9, 2020, Plaintiffs commenced this lawsuit against the BPD and Baltimore Police Commissioner Michael S. Harrison (collectively, "Defendants") and filed a Motion for a Temporary Restraining Order & a Preliminary Injunction (ECF No. 2), alleging that the AIR program violates their rights under the First and Fourth Amendments to the United States Constitution.

On that same day, this Court conducted a telephone conference and issued an Order which effectuated a temporary agreement reached by the parties pursuant to which the BPD agreed that no surveillance flights would occur until this Court issued a decision on the preliminary injunction motion. On April 21, 2020, this Court conducted a public telephone conference and heard arguments on the motion.¹

The Plaintiffs contend that the technology in the AIR program will be so precise as to invade the individual liberties of Baltimore citizens. The BPD contends that, though a potentially useful investigative tool, the AIR pilot program has significant limitations. The Defendants contend that the program cannot provide real-time surveillance and that images captured by the program will depict individuals as a single pixel—essentially, a dot on the map. Accordingly, the Defendants contend that individual physical characteristics will not be observable. The resolution of this factual dispute must await discovery in this case.

Plaintiffs have not met their heavy burden to show that they are entitled to a preliminary injunction in this matter. The United States Supreme Court and the United States Court of Appeals for the Fourth Circuit have long upheld the use of far more intrusive warrantless surveillance techniques than the AIR program. The Plaintiffs place great reliance on the United States Supreme Court's recent opinion in *United States v. Carpenter*, 138 S. Ct. 2206 (2018), which addressed the use of historical cell site location information. The Supreme Court in that case specifically stated that its opinion did not “call into question conventional

¹ Pursuant to Standing Order 2020-07 of this Court, normal court operations have been postponed and continued through June 5, 2020. The parties agreed to proceed with the hearing on the Motion for a Preliminary Injunction by way of a teleconference which was made accessible to the public.

surveillance techniques and tools, such as security cameras.” *Id.* at 2220. Accordingly, for the reasons set forth below, Plaintiffs’ Motion for a Preliminary Injunction (ECF No. 2) is DENIED and the AIR pilot program may proceed.

BACKGROUND

Plaintiffs seek a preliminary injunction prohibiting the operation of an aerial surveillance project known as the Aerial Investigation Research (“AIR”) pilot program. The program is to be conducted by the Baltimore Police Department (“BPD”) with the assistance of Persistent Surveillance Systems (“PSS”), an Ohio-based private contractor. The AIR pilot program has been the subject of public discourse for some time. In August 2016, news reports revealed that the BPD had collaborated with PSS to conduct aerial surveillance over the City of Baltimore for several months.² Ultimately, this initial program was discontinued. In December 2019, Commissioner Harrison announced that the City would resume its collaboration with PSS after holding a series of community meetings to inform the public about the program.³

In March 2020, the Baltimore Police Department conducted three public meetings to discuss how the AIR pilot program would operate.⁴ As a result of the exigent circumstances presented by the COVID-19 Pandemic, two of these meetings were conducted through

² Monte Reel, *Secret Cameras Record Baltimore’s Every Move From Above*, Bloomberg Businessweek, Aug. 23, 2016, <https://www.bloomberg.com/features/2016-baltimore-secretsurveillance>; Kevin Rector & Luke Bridgewater, *Report of Aerial Surveillance by Baltimore Prompts Questions, Outrage*, Balt. Sun, Aug. 24, 2016, <https://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-secret-surveillance-20160824-story.html>.

³ Justin Fenton & Talia Richman, *Baltimore Police Back Pilot Program for Surveillance Planes, Reviving Controversial Program*, Balt. Sun, Dec. 20, 2019, <https://www.baltimoresun.com/news/crime/bs-md-ci-cr-baltimore-police-support-surveillance-plane-20191220-zfh5ndt1bdurlj5xfr6xhoe2i-story.html>.

⁴ See Eddie Kadhim, *Baltimore Police met with the community to give insight on pilot program*, WMAR, Mar. 11, 2020, <https://www.wmar2news.com/spyplane>.

Facebook Live.⁵ Consistent with the BPD's obligations under a Consent Decree issued in *United States v. Baltimore Police Dep't, et al.* (JKB-17-0099), the BPD announced the AIR pilot program on its website, which provided public educational materials describing the AIR program's objectives.⁶ On April 1, 2020, the Baltimore City Board of Estimates authorized the execution of a Professional Services Agreement between the Baltimore Police Department and Persistent Surveillance Systems for the purpose of implementing the AIR pilot program. (Professional Services Agreement ("PSA"), ECF No. 3-2.)

Pursuant to the Professional Services Agreement, Persistent Surveillance Systems will fly three aircraft over Baltimore City using the "Hawkeye Wide Area Imaging System." (*Id.* at 22.) The planes will cover about 90 percent of the City, capturing about 32 square miles of the City per image every second. (*Id.*; Community Education Presentation, ECF No. 3-1.) Each of the three planes will fly for a "minimum" of forty hours per week, resulting in total coverage of about 12 hours per day for a period of six months, weather permitting. (PSA 22; Decl. of Ross McNutt, Ph.D ¶ 5, ECF No. 30-1.) The Baltimore Police Department hopes to use these images to solve violent crimes, specifically: homicides and attempted murder, shootings resulting in injury, armed robbery, and carjacking (the "Target Crimes"). (PSA 21.)

The AIR program's observational capabilities are limited. PSS cannot provide real-time surveillance. (McNutt Decl. ¶ 8; PSA 22-24.) The on-board technology does not have

⁵ March 11 meeting available at <https://www.facebook.com/BaltimoreCityPolice/videos/1062399994125598/>; March 23 meeting available at <https://www.facebook.com/BaltimoreCityPolice/videos/3400646286628872/>; March 30 meeting available at <https://www.facebook.com/BaltimoreCityPolice/videos/212014970074066/>.

⁶ Baltimore Police Department, New Technology Initiatives, <https://www.baltimorepolice.org/transparency/newtechnologyinitiatives>.

zoom, telephoto, night vision, or infrared capabilities. (McNutt Decl. ¶ 5; PSA 22.) The imagery is limited to “1 pixel per person”—essentially, a single dot on the map. (PSA 22.) Accordingly, an individual’s characteristics are not observable in the images. (*Id.*) As the planes will not fly at night or during inclement weather, significant gaps in the imagery data will emerge. (McNutt Decl. ¶ 14.) These gaps in the record prevent the monitoring of a person’s movements over the course of multiple days. (*Id.*)

Images collected by the aircraft will be transmitted to ground stations operated by Persistent Surveillance Systems and stored in its servers. (PSA 22; ECF No. 3-1 at 13.) Unanalyzed data will be stored for up to 45 days during the pilot program. (PSA 25.) Data that is analyzed in connection with a crime will be compiled into packets and become a permanent part of the case file. (Letter from Michael S. Harrison to the Honorable President and Members of the Board of Estimates, dated Mar. 17, 2020, ECF No. 3-2.) PSS analysts will only access the data after “receiving an incident number or other notification related to a murder, non-fatal shooting, armed robbery, or car jacking.” (McNutt Decl. ¶ 10.) In those circumstances, the PSS analysts will use the imagery data “to locate crimes, track individuals and vehicles from a crime scene and extract information to assist BPD in the investigation of target crimes.” (PSA 22.) This is a labor-intensive process. Analysts must “tag” the individuals and vehicles appearing in the images, which appear as dots, and manually track the tagged dots to and from the incident location. (McNutt Decl. ¶ 12.) Using this process, PSS analysts will require about 1 hour to track 2 hours’ worth of movements made by a single vehicle. (*Id.*)



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