CONSTITUTIONAL LAW — FOURTH AMENDMENT — FOURTH CIRCUIT HOLDS WARRANTLESS ACCESS OF AERIAL SURVEILLANCE DATA UNCONSTITUTIONAL. — *Leaders of a Beautiful Struggle v. Baltimore Police Department*, 2 F.4th 330 (4th Cir. 2021).

The Fourth Amendment safeguards "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[1] In *Carpenter v. United States*,[2] the Supreme Court held that the ability to build a comprehensive chronicle of a person's movements over an extended period of time using cell phone location data violated reasonable expectations of privacy; thus, access to such data constituted a Fourth Amendment search.[3] While *Carpenter* was widely hailed as a momentous success for privacy activists,[4] questions about its reach went unanswered. Notably, some of these unanswered questions implicate issues of racial equity — issues that have gained nationwide prominence through social movements in the recent past. Recently, in *Leaders of a Beautiful Struggle v. Baltimore Police Department*,[5] the en banc Fourth Circuit helped delineate the reach of *Carpenter*. The Fourth Circuit held the access of data that in the aggregate allowed police to deduce an individual's identity from the whole of their movements to be a search — as such, the warrantless use of such data violated the Fourth Amendment.[6] In helping determine *Carpenter*'s reach, *Beautiful Struggle* revealed a congruence with recently foregrounded social justice issues, exemplifying how social movements can inform judicial reasoning and spur constitutional change.

The Baltimore Police Department (BPD) announced in December 2019 that it had contracted with Ohio-based private contractor Persistent Surveillance Solutions (PSS) to implement the Baltimore Aerial Investigation Research (AIR) program.[7] Intended to track movements linked to serious crimes, the AIR program obtained about twelve hours of coverage of around ninety percent of Baltimore every day of the week, weather permitting, using surveillance planes that flew at least

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1 U.S. CONST. amend. IV.

2 138 S. Ct. 2206 (2018).

3 *Id.* at 2220.

4 *See, e.g.*, Nathan Freed Wessler, *The Supreme Court's Groundbreaking Privacy Victory for the Digital Age*, ACLU (June 22, 2018, 2:30 PM), https://www.aclu.org/blog/privacy-technology/location-tracking/supreme-courts-groundbreaking-privacy-victory-digital-age [https://perma.cc/2CSW-TMX4].

5 2 F.4th 330 (4th Cir. 2021) (en banc).

6 *Id.* at 333.

7 *See id.* The Professional Services Agreement limited image resolution such that people and cars would be only individually visible as blobs or blurred dots. *See id.* at 334.

forty hours a week and were equipped with aerial cameras able to capture one image of up to thirty-two square miles per second.[8] All AIR imagery data, analyzed or not, were retained for forty-five days, while reports and associated imagery data were retained indefinitely as needed for legal proceedings and until the relevant statutes of limitations had expired.[9] A group of grassroots community advocates filed suit against the defendants (the BPD and Police Commissioner Michael Harrison), on April 9, 2020, challenging the constitutionality of AIR on Fourth Amendment grounds.[10] Moving for a preliminary injunction and temporary restraining order, the plaintiffs requested the defendants be enjoined from operating AIR, which would prohibit the defendants from "collecting or accessing any images through the program."[11]

One week before the planes took flight, the district court denied the plaintiffs' request for preliminary relief.[12] The court found the plaintiffs unable to "bear[] the 'heavy burden' of making a 'clear showing that [they were] likely to succeed at trial on the merits,'"[13] reasoning that both the Supreme Court and the Fourth Circuit had historically "upheld the use of far more intrusive warrantless surveillance techniques" than Baltimore's aerial surveillance program.[14] The plaintiffs immediately filed a notice of appeal.[15] While the appeal was pending, AIR's pilot period ended.[16]

The Fourth Circuit, split, affirmed the lower court's holding, agreeing with the district court that the plaintiffs were unlikely to succeed on the merits of their Fourth Amendment claim.[17] Writing for the majority, Judge Wilkinson[18] emphasized the "doubly heavy burden" the plaintiffs faced on appeal given that a court must evaluate the denial of a preliminary injunction — an "extraordinary remedy" — under an abuse of discretion standard.[19] Judge Wilkinson reasoned that, based on *Katz v. United States*[20] and *United States v. Knotts*,[21] as "[a] cardinal rule[,] . . .

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[8] *Id.*

[9] *Id.*

[10] *Id.* at 335.

[11] *Id.* (quoting Joint Appendix at 21, *Beautiful Struggle*, 2 F.4th 330 (No. 20-1495)).

[12] *Id.*

[13] Leaders of a Beautiful Struggle v. Balt. Police Dep't, 456 F. Supp. 3d 699, 706 (D. Md. 2020) (quoting Real Truth About Obama, Inc. v. Fed. Election Comm'n, 575 F.3d 342, 351 (4th Cir. 2009)).

[14] *Id.* at 703.

[15] *Beautiful Struggle*, 2 F.4th at 335.

[16] *Id.* at 333.

[17] Leaders of a Beautiful Struggle v. Balt. Police Dep't, 979 F.3d 219, 232 (4th Cir. 2020).

[18] Judge Wilkinson was joined by Judge Niemeyer.

[19] *Beautiful Struggle*, 979 F.3d at 225.

[20] 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection.").

[21] 460 U.S. 276, 281 (1983) ("A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in [their] movements from one place to another.").

an individual has a limited expectation of privacy in his or her public movements."[22] Judge Wilkinson concluded that "the district court exercised sound equitable discretion in denying a preliminary injunction."[23] Chief Judge Gregory dissented.[24]

The Fourth Circuit, rehearing the case en banc, reversed.[25] Writing for the majority, Chief Judge Gregory[26] first addressed the question of mootness.[27] While the BPD argued its intervening decision to end AIR[28] and delete the majority of data collected[29] made the case moot, the Fourth Circuit rejected this argument. Chief Judge Gregory reasoned that there was a live controversy because the plaintiffs desired an injunction against not just the AIR program, but also the defendants' access to data collected by it, which the defendants still retained.[30] He understood the plaintiffs to have a legally cognizable interest in obtaining an injunction against the BPD, because the fourteen percent of retained AIR data constituted a not insignificant volume of information,[31] and thus the plaintiffs had a concrete interest, "however small" it may have been, in enjoining the BPD from accessing that data.[32]

Next, Chief Judge Gregory addressed the plaintiffs' likelihood of success on the merits.[33] Explaining that *Carpenter* created "a reasonable expectation of privacy in the whole of [a person's] physical movements,"[34] Chief Judge Gregory argued that *Carpenter* drew a distinction between short-term tracing of public movements and longer-term tracing that could uncover personal details through habits and patterns, such that "[t]he latter form of surveillance invade[d] the reasonable ex-

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[22] *Beautiful Struggle*, 979 F.3d at 227.

[23] *Id.* at 232.

[24] *Id.* at 234 (Gregory, C.J., dissenting). Chief Judge Gregory would have found the plaintiffs likely to succeed on their Fourth Amendment claims, leaving them irreparably harmed and entitled to a preliminary injunction that would be supported by "the balance of equities" and the public interest. *Id.* at 244–45.

[25] *Beautiful Struggle*, 2 F.4th at 333.

[26] Chief Judge Gregory was joined by Judges Motz, King, Keenan, Wynn, Floyd, Thacker, and Harris.

[27] *Beautiful Struggle*, 2 F.4th at 336–39.

[28] Because of the pilot program's mixed results, the program had been discontinued prior to rehearing. *Id.* at 335.

[29] The BPD and PSS announced on February 2, 2021, that they had deleted most of AIR's stored data because they wanted to minimize retained data "in light of the [Policing Project] report," which had found that the BPD stored AIR data more extensively than the BPD initially represented. *Id.* at 335–36 (quoting Defendants-Appellees' Motion to Dismiss the Appeal as Moot at Ex. B, *Beautiful Struggle*, 2 F.4th 330 (No. 20-1495)). The BPD retained about fourteen percent of the captured imagery data following the mass deletion. *Id.*

[30] *Id.* at 338–39.

[31] *Id.* at 336–39.

[32] *Id.* at 338 (quoting Chafin v. Chafin, 568 U.S. 165, 172 (2013)).

[33] *Id.* at 339–46.

[34] *Id.* at 341 (quoting Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018)).

pectation of privacy that individuals have in the whole of their movements and therefore require[d] a warrant."[35] Chief Judge Gregory reasoned that accessing AIR surveillance data enabled police to make deductions from the aggregate of individuals' movements — deductions that could identify individuals — and was thus a search; therefore, the act of accessing AIR data without a warrant violated the Fourth Amendment.[36] Chief Judge Gregory further explained that "[a] court abuses its discretion in denying preliminary injunctive relief when it 'rest[s] its decision on a clearly erroneous finding of a material fact, or misapprehend[s] the law with respect to underlying issues in litigation.'"[37] And because he understood the district court to have miscomprehended AIR's capabilities, he held that the court had abused its discretion; thus, he concluded, it was appropriate to reverse.[38]

Judge Wilkinson dissented.[39] He argued that the program the majority enjoined no longer existed, and thus the appeal should have been dismissed as moot.[40] Appealing to federalism principles, Judge Wilkinson explained [his] worry that the majority's holding demonstrated a clear disrespect for federalist principles.[41] Judge Wilkinson also emphasized the very strong presumption in favor of the lower court's holding given that the requested redress was a preliminary injunction, arguing that the majority went too far in overcoming the holding since in his view there was no abuse of discretion.[42]

Chief Judge Gregory[43] wrote a separate concurrence to critique the logic of the dissent, pointing out that Judge Wilkinson's argument was predicated on the assumption that "[p]olicing ameliorates violence, and restraining police authority exacerbates it."[44] Judge Wynn[45] also wrote a separate concurrence to emphasize that the majority took seriously its obligation to adhere to the law rather than determine what might be best for Baltimore, as well as to express disappointment in the "dire

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[35] *Id.* (citing *Carpenter*, 138 S. Ct. at 2218).

[36] *See id.* at 341–46.

[37] *Id.* at 339 (quoting *In re* Search Warrant Issued June 13, 2019, 942 F.3d 159, 171 (4th Cir. 2019) (alterations in original)).

[38] *Id.* at 340.

[39] *Id.* at 351 (Wilkinson, J., dissenting). Judge Wilkinson was joined in full by Judges Niemeyer, Agee, and Quattlebaum, and joined in part by Judges Diaz, Richardson, and Rushing.

[40] Judge Wilkinson also argued there would be no relief because the preliminary injunction sought by the plaintiffs allowed data collected by AIR to be used in ongoing investigations and "would not require the BPD to destroy the remaining AIR data." *Id.* at 355 (quoting *id.* at 346 n.12 (majority opinion)).

[41] *Id.* at 362–66 (Wilkinson, J., dissenting).

[42] *See id.* at 357.

[43] Chief Judge Gregory was joined by Judges Wynn, Thacker, and Harris.

[44] *Beautiful Struggle*, 2 F.4th at 348 (Gregory, C.J., concurring). Chief Judge Gregory addressed the fact that systemic, societal factors perpetuate violence — thus, responding to violence with increased policing would not itself resolve violence. *Id.* at 348–50.

[45] Judge Wynn was joined by Judges Motz, Thacker, and Harris.

rhetoric" of Judge Wilkinson's dissent.[46] Judge Niemeyer[47] and Judge Diaz[48] each wrote brief dissents.

Judicial decisionmaking does not exist in a vacuum, and much legal scholarship has demonstrated how social movements can influence judicial reasoning.[49] This societal influence can be even more pronounced in the context of the Fourth Amendment, which lends itself to normative considerations. The Fourth Circuit judges clearly embraced these dynamics in their extensive discussions of racial equity and policing issues, echoing many of the lessons of the ongoing Black Lives Matter social movement. In focusing so much attention on recently foregrounded social justice issues, *Beautiful Struggle* provides a useful case study of the impact social movements can have on judicial reasoning and constitutional development.

Social movements influence constitutional interpretation.[50] In fact, social movements have become crucial in legal theory as "key drivers of legal change."[51] Although social movements have in large part been historically disregarded by legal academics, some legal scholars have come to see them in recent decades as "engines of progressive transformation."[52] Some commentators believe, for example, that the Equal Protection Clause as we understand it today owes less to the original intent of the Fourteenth Amendment's framers than to the civil rights

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[46] *Beautiful Struggle*, 2 F.4th at 351 (Wynn, J., concurring).

[47] Judge Niemeyer viewed the majority opinion as the "most stunning example of judicial overreach that [he had] ever witnessed on th[e] court." *Id.* at 369 (Niemeyer, J., dissenting).

[48] Judge Diaz wrote a separate dissent to emphasize that the appeal should have been denied for mootness. *Id.* (Diaz, J., dissenting).

[49] *See, e.g.*, Wendy Weiser, *Shaping the Voting Rights Narrative*, *in* LEGAL CHANGE: LESSONS FROM AMERICA'S SOCIAL MOVEMENTS 9, 19 (Jennifer Weiss-Wolf & Jeanine Plant-Chirlin eds., 2015) ("Courts may pronounce the meaning of the Constitution, but the values and factual assumptions underlying constitutional decisions are profoundly shaped by social and political forces outside the courtroom.").

[50] Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 29 (2005); *see also* Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 878 (2013) (book review) ("[S]cholarship has persuasively demonstrated how the labor, civil rights, and women's movements, just to name a few, have shaped constitutional norms and in turn have been shaped by those norms.").

[51] Scott L. Cummings, *The Puzzle of Social Movements in American Legal Theory*, 64 UCLA L. REV. 1554, 1554 (2017).

[52] *Id.*; *see, e.g.*, Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1879, 1904–11 (2007) (examining the advantages and disadvantages of the approach to public interest lawyering that joins forces with resistance movements); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1323 (2006) ("To show how constitutional culture channels social movement conflict to produce enforceable constitutional understandings, I consider how equal protection doctrine prohibiting sex discrimination was forged in the Equal Rights Amendment's defeat.").

and women's liberation movements.[53] Although it might be argued that judges should disregard social movements in judicial reasoning, judges are inevitably influenced by public opinion.[54]

Fourth Amendment doctrine lends itself especially well to the influence of external social movements. Fourth Amendment doctrine is uniquely situated in terms of constitutional interpretation because of the "exceptional nature of the modern technological era," which "supports a break with judicial precedent in several ways."[55] Historically, the slower pace of technological change allowed the Fourth Amendment to be descriptive rather than normative — it asked judges only to determine whether an average person might believe an expectation of privacy was reasonable, rather than asking judges to determine what *should* be a reasonable expectation of privacy.[56] The descriptive conception of the Fourth Amendment "assign[ed] to the courts a relatively passive role in mediating the relationship between state power and the people. But when faced with the disruptive technological restructuring of power and institutions, the normative Fourth Amendment — and the court's central role in protecting and strengthening it — bec[ame] an imperative."[57] Courts grappling with questions implicating both the Fourth Amendment and new technologies thus have a unique ability to "dismiss otherwise conventional analogies."[58] Given its particular capacity for divergence from analogical reasoning as well as the idea that "[t]he Fourth Amendment is our national thermostat, recalibrating what the police can and cannot do,"[59] Fourth Amendment jurisprudence stands to be more responsive to changes in societal views, as reflected in popular social movements, than are other areas of law.

In holding that Baltimore's aerial surveillance meaningfully violated privacy expectations, the *Beautiful Struggle* court paid careful attention to racial equity and policing issues. Expressing unambiguous worry

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53 *See, e.g.*, William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 419 (2001).

54 *See, e.g.*, ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 208–09 (Sanford Levinson ed., 2d ed. 1994) (arguing that one would be hard-pressed to find a single time that the Supreme Court has taken a firm stance for an extended period of time against the tide of clear public demand); William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 752 (1986) ("I think it is all but impossible to conceive of judges who are in any respect normal human beings who are not affected by public opinion . . . .").

55 Paul Ohm, *The Many Revolutions of* Carpenter, 32 HARV. J.L. & TECH. 357, 399 (2019).

56 *See id.* at 388–89.

57 *Id.* at 389; *see, e.g.*, Matthew Tokson, *The Normative Fourth Amendment*, 104 MINN. L. REV. 741, 743 (2019) ("There is a growing recognition that the question of the Fourth Amendment's scope is inescapably normative; it requires courts to make a value judgment about when the Fourth Amendment should protect citizens' privacy rather than simply determining whether citizens generally expect privacy.").

58 Ohm, *supra* note 55, at 399.

59 *Id.* at 388–89.

about the idea of an overly broad police power, the majority appealed to constitutional values in order to emphasize that its protections are meant to be afforded to *all*.[60] Understanding that governmental intrusion may affect people differently based on their identities, the court lamented the unequal impact of the Fourth Amendment, writing: "Too often today, liberty from governmental intrusion can be taken for granted in some neighborhoods, while others 'experience the Fourth Amendment as a system of surveillance, social control, and violence, not as a constitutional boundary that protects them from unreasonable searches and seizures.'"[61] In his concurring opinion, Chief Judge Gregory scorned the dissent for overlooking the social inequalities underlying the crime statistics that the dissent cited.[62] As the court recognized, "the impact of surveillance '[is] conspicuous in the lives of those least empowered to object.'"[63]

The *Beautiful Struggle* judges' vigorous engagement with racial equity issues echoes the lessons from recent, highly popular[64] social movements. Social movements advocating for racial equity and against police violence have gained much traction in the recent past.[65] With the increased scrutiny the world is applying to issues of racial disparity, the outcome of a case such as this is all the more important — after all, mass surveillance "touches everyone, but its hand is heaviest in communities already disadvantaged by their poverty, race, religion, ethnicity, and immigration status."[66] In much the same way that "years of highly publicized civil rights demonstrations, marches, and violence" spurred the

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[60] *See Beautiful Struggle*, 2 F.4th at 347.

[61] *Id.* at 348 (quoting Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 130 (2017)).

[62] *Id.* at 348 (Gregory, C.J., concurring).

[63] *Id.* at 347 (majority opinion) (alteration in original) (quoting BARTON GELLMAN & SAM ADLER-BELL, CENTURY FOUND., THE DISPARATE IMPACT OF SURVEILLANCE 2 (2017)).

[64] Kim Parker et al., *Amid Protests, Majorities Across Racial and Ethnic Groups Express Support for the Black Lives Matter Movement*, PEW RSCH. CTR. (June 12, 2020), https://www.pewresearch.org/social-trends/2020/06/12/amid-protests-majorities-across-racial-and-ethnic-groups-express-support-for-the-black-lives-matter-movement [https://perma.cc/K3HT-CWZG].

[65] *See, e.g.*, Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/K4TH-JQNE] ("The recent Black Lives Matter protests peaked on June 6, when half a million people turned out in nearly 550 places across the United States . . . . These figures would make the recent protests the largest movement in the country's history . . . ."); Parker et al., *supra* note 64 ("As demonstrations continue across the country to protest the death of George Floyd, a [B]lack man killed while in Minneapolis police custody, Americans see the protests both as a reaction to Floyd's death and an expression of frustration over longstanding issues.").

[66] *Beautiful Struggle*, 2 F.4th at 347 (quoting GELLMAN & ADLER-BELL, *supra* note 63, at 2); *see, e.g.*, *id.* ("Because those communities are over-surveilled, they tend to be over-policed, resulting in inflated arrest rates and increased exposure to incidents of police violence."); Chaz Arnett, *Race, Surveillance, Resistance*, 81 OHIO ST. L.J. 1103, 1103 (2020) ("More daily activities are being captured and scrutinized, larger quantities of personal and biometric data are being extracted and

enforcement of constitutional rights for African Americans,[67] today's protestors seem to be spurring constitutional change that would protect minorities from one of this generation's greatest racial threats: disparate policing treatment. The Black Lives Matter movement has organized policy proposals toward this end in the "Vision for Black Lives" (the Vision).[68] The Vision proposes "shrinking the large footprint of policing, surveillance, and incarceration and shifting resources into housing, health care, jobs, and schools," thus "offer[ing] transformative, affirmative visions for change designed to address the structures of inequality."[69] The reasoning underlying *Beautiful Struggle* reflects that of the Vision, recognizing "policing as a historical and violent force in Black communities underpinning a system of racial capitalism and limiting the possibilities of Black life," as well as that "[l]aw is central to the shape and legitimation of this racialized violence and inequality."[70]

The Black Lives Matter movement has led to a social "tipping point."[71] The Fourth Circuit appeared to be responsive to this fact when it helped delineate a previously undefined boundary of Fourth Amendment law through *Beautiful Struggle* in such a way as to make clear it was considering the normative impact of its decision. By recognizing the harm of invasive digital surveillance, particularly in the lives of those who are "over-policed" and face "increased exposure to incidents of police violence,"[72] the Fourth Circuit paved the way for a more equally protective Fourth Amendment. In so doing, it exemplified the way that social movements can affect judicial reasoning and constitutional interpretation.

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analyzed, in what is becoming a deeply intensified and pervasive surveillance society. This reality is particularly troubling for Black communities, as they shoulder a disproportionate share of the burden and harm associated with these powerful surveillance measures, at a time when traditional mechanisms for accountability have grown weaker.").

[67] *The Civil Rights Act of 1964*, CONST. RTS. FOUND., https://www.crf-usa.org/black-history-month/the-civil-rights-act-of-1964 [https://perma.cc/65ZN-NMME].

[68] *See Vision for Black Lives*, MOVEMENT FOR BLACK LIVES, https://m4bl.org/policy-platforms [https://perma.cc/XV3A-GDCK].

[69] Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 406 (2018).

[70] *Id.*

[71] Buchanan et al., *supra* note 65 (quoting Stanford University professor Douglas McAdam) ("We appear to be experiencing a social change tipping point — that is as rare in society as it is potentially consequential.").

[72] *Beautiful Struggle*, 2 F.4th at 347.