



January 8, 2021

Lyda Krewson, Mayor of St. Louis  
Lewis E. Reed, President of the Board of Alders

**RE: Board Bill Number 200**

Dear Mayor Krewson, President Reed, and the Board of Aldermen,

On behalf of the Electronic Frontier Foundation,<sup>1</sup> we write to oppose Board Bill Number 200, introduced by Alderman Thomas Oldenberg on December 11, 2020. Dagnet aerial surveillance of an entire city is unconstitutional, and the Board should reject it.

At minimum, any action on this bill should be delayed until a decision is issued in *Leaders of a Beautiful Struggle v. Baltimore Police Department*—a constitutional challenge, currently pending in the U.S. Court of Appeals for the Fourth Circuit, to a functionally identical surveillance program operated by Persistent Surveillance Systems (PSS) in Baltimore.

The *Leaders of a Beautiful Struggle* litigation arises from a challenge to the Baltimore Police Department’s Aerial Investigation Research (AIR) Pilot Program. For six months, three surveillance aircrafts operated by Persistent Surveillance Systems flew over Baltimore for 12 hours every day. The planes produced images that allowed the police to track individual’s movements over multi-day periods, especially when combined with the police’s networks of more than 800 ground-based surveillance cameras and automated license plate readers. Baltimore residents and organizations, including the Leaders of a Beautiful Struggle, a grassroots think tank that advances the public policy interest of Black people in Baltimore, challenged the constitutionality of the program in federal court.

The case is currently scheduled to be reheard en banc in March. The Fourth Circuit recently withdrew a divided panel’s decision that found the program did not violate the Constitution. The entire Fourth Circuit agreed to revisit that decision.<sup>2</sup>

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<sup>1</sup> The Electronic Frontier Foundation (“EFF”) is a member-supported, non-profit organization that has worked for 30 years to ensure that technology supports freedom, justice, and innovation for all people of the world. EFF has over 37,000 dues-paying members, and represents the interests of technology users in court cases and policy debates concerning the application of law in the digital age.

<sup>2</sup> *Leaders of a Beautiful Struggle v. Baltimore Police Dep’t*, 979 F.3d 219 (4th Cir. 2020), *reh’g en banc granted*, No. 20-1495, 2020 WL 7625315 (4th Cir. Dec. 22, 2020).

Given the real possibility that the Fourth Circuit will declare Baltimore's aerial surveillance unconstitutional, the City should postpone consideration of this Bill until the Fourth Circuit has issued its decision. Aerial surveillance like the AIR program violates core First and Fourth Amendment rights that are essential to a free society. In the Supreme Court's recent decision in *Carpenter v. United States*, the Court made clear that warrantless location tracking is unconstitutional since it "provides an intimate window into a person's life, revealing not only his particular movements, but through them his familiar, political, professional, religious, and sexual associations."<sup>3</sup> That line reasoning is all the more persuasive when applied not just to the surveillance of a specific individual (which was at issue in *Carpenter*) but to the mass surveillance of an entire city.

Additionally, law enforcement has a long and disgraceful history of targeting communities of color with intrusive surveillance tactics, like the one proposed here. Indeed, police experiment with, and eventually deploy, intrusive technologies like the AIR program in cities with large communities of color. Before Baltimore, PSS operated surveillance flights above Compton, California; Philadelphia, Pennsylvania; and Dayton, Ohio.<sup>4</sup> And authorities have routinely deployed aerial surveillance technologies against individuals participating in racial justice movements, like those protesting against the police killings of George Floyd in Minneapolis,<sup>5</sup> Michael Brown in Ferguson,<sup>6</sup> and Freddie Gray in Baltimore.<sup>7</sup>

High crime rates are not a license to violate the constitutional rights of the individuals living in a major metropolitan city like St. Louis. As the Fourth Circuit's Chief Judge

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<sup>3</sup> *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018).

<sup>4</sup> Conor Friedersdorf, *Eyes over Compton: How police spied on a whole city*, The Atlantic (Apr. 21, 2014), <https://www.theatlantic.com/national/archive/2014/04/sheriffs-deputy-compares-drone-surveillance-of-compton-to-big-brother/360954/>; Denver Nicks, *New surveillance cameras can see for miles and hours*, Time (Feb. 5, 2014), <https://time.com/5307/surveillance-cameras/>.

<sup>5</sup> Zolan Kanno-Youngs, *U.S. watched George Floyd protests in 15 cities using aerial surveillance*, N.Y. Times (June 19, 2020), <https://www.nytimes.com/2020/06/19/us/politics/george-floyd-protests-surveillance.html>.

<sup>6</sup> Eric Tucker, *Comey: FBI used aerial surveillance above Ferguson*, Associated Press (Oct. 22, 2015), <https://apnews.com/article/fla797c9b286412ca72eb85b3cc35a4b>.

<sup>7</sup> Andrea Peterson, *FBI spy planes used thermal imaging tech in flights over Baltimore after Freddie Gray unrest*, Wash. Post (Oct. 30, 2015), <https://www.washingtonpost.com/news/the-switch/wp/2015/10/30/fbi-spy-planes-used-thermal-imaging-tech-in-flights-over-baltimore-after-freddie-gray-unrest>.

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Roger Gregory wrote: “No crime rate can justify [the] grant of sweeping surveillance powers.”<sup>8</sup>

The proposed aerial surveillance is unlawful and should be rejected. But, under any circumstances, the City should delay any action on this Bill until the Fourth Circuit has a considered opportunity to assess the constitutionality of an aerial surveillance program like this one.

Sincerely,

Nathaniel Sobel  
Legal Fellow  
Electronic Frontier Foundation

**Cc:**

Sharon Tyus (Ward 01),  
Lisa Middlebrook (Ward 02),  
Brandon Bosley (Ward 03),  
Dwinderlin Evans (Ward 04),  
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Christine Ingrassia (Ward 06),  
Jack Coatar (Ward 07),  
Annie Rice (Ward 08),  
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Joseph Vollmer (Ward 10),  
Sarah Martin (Ward 11),  
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Marlene E. Davis (Ward 19),  
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<sup>8</sup> *Leaders of a Beautiful Struggle*, 979 F.3d at 248 (Gregory, C.J., dissenting).

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