No. 23-2293

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

OPEN JUSTICE BALTIMORE, et al.
Plaintiffs-Appellants,

v.

BALTIMORE CITY LAW DEPARTMENT, et al.
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

OPENING BRIEF OF APPELLANTS

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JURISDICTIONAL STATEMENT

This case involves efforts to obstruct Plaintiffs-Appellants'—Open Justice Baltimore ("OJB"), Brandon Soderberg ("Soderberg"), and Alissa Figueroa ("Figueroa") (collectively, "Plaintiffs")—access to records relating to police misconduct from the Baltimore City Police Department ("BPD") and the Baltimore City Law Department ("Law Department") in contravention of Plaintiffs' First Amendment rights under the United States Constitution. The United States District Court for the District of Maryland had subject matter jurisdiction under 42 U.S.C. § 1983 and on August 10, 2023, entered an order dismissing Plaintiffs' claims against BPD, the Law Department, the Mayor and City Council of Baltimore (the "City"), City Solicitor James Shea, Chief of Staff to the City Solicitor Stephen Salsbury, Chief Legal Counsel Lisa Walden, and Police Commissioner Michael Harrison (collectively, "Defendants") pursuant to Rule 12(b)(6) and declined to exercise supplemental jurisdiction over the remaining state law claims. Fed. R. Civ. P. 12(b)(6); JA692. On September 4, 2023, Plaintiffs moved to alter or amend the Court's opinion pursuant to Rule 59(e). Fed. R. Civ. P. 59(e); JA695. The District Court denied Plaintiffs' motion to alter or amend on November 17, 2023. JA720. Plaintiffs timely appealed on December 13, 2023. JA751. This Court has jurisdiction under 28 U.S.C. § 1291 to review this final decision from the District Court.

STATEMENT OF ISSUES

1. Whether the District Court erred as a matter of law in dismissing Plaintiffs' First Amendment retaliation claim when the alleged facts plausibly show Defendants' responses to records requests were improperly based on Plaintiffs' prior criticism and litigation.

2. Whether the District Court erred as a matter of law in dismissing Plaintiffs' claims when the alleged facts plausibly show unconstitutional content and viewpoint discrimination in violation of the First Amendment.

3. Whether the District Court erred as a matter of law in finding that Plaintiffs did not sufficiently plead municipal liability under *Monell* when the alleged facts plausibly show that Defendants had a policy or custom of denying records requests based on the viewpoint of the requesters and the content of records requested.

STATEMENT OF CASE

I. Factual Background

Plaintiffs OJB, Soderberg, and Figueroa each use information obtained from Maryland Public Information Act ("MPIA") records requests to keep the public informed about misconduct within BPD. Defendants have obstructed Plaintiffs' access to records that portray the police department in an unfavorable light to suppress speech critical of BPD by individuals and organizations that have previously spoken out against police misconduct.

Plaintiffs collectively made eighteen records requests over three years for public records to BPD and the Law Department regarding police misconduct. JA009. Plaintiff OJB, a nonprofit organization that "combines the power of community action with technology to create data-driven projects that help the community better understand, challenge, and change the criminal justice system," made fourteen records requests to Defendants. JA010. OJB posts information it receives from these records requests on its website, bpdwatch.com, which is "a public, searchable database of Baltimore law enforcement officers." JA010. BPD is aware of the BPD Watch page and has previously requested that OJB take down information from the website. JA282. OJB has also previously submitted many public information requests to BPD, which has led to prior litigation between the parties and increased Defendants' familiarity with OJB and its work. JA010. Plaintiff Soderberg, a

journalist who has co-authored a book shedding light on police corruption within BPD, made two records requests to obtain information about officer misconduct within BPD. JA010, JA021. Plaintiff Figueroa is a media journalist who is producing a documentary on police accountability. JA016. She made two records requests to obtain police records regarding officer accountability. JA021-022.

To each of these records requests for information relevant to the public interest, Plaintiffs "received a constitutionally . . . deficient response" from Defendants. JA012. Defendants undertook various actions to obstruct the disclosure, including: making "constant and often egregious [MPIA] time violations, sometimes of over a year"; disregarding records requests entirely; knowingly misapplying disclosure exemptions; deflecting legitimate requests for fee waivers to prevent access to records; arbitrarily and capriciously rejecting fee waiver requests; accepting payment and withholding records for extended periods of time; inflating costs to coerce requesters into accepting fewer records than they are entitled to; and sending incomplete or nonresponsive information to evade disclosure of requested records. JA009, JA013, JA072, JA330, JA333, JA071-072.

OJB has attempted to obtain records through multiple narrowed inquiries, yet Defendants have either failed to produce any records for these requests, failed to produce the full records and attempted to substitute summaries, or have significantly delayed production beyond the statutory time limits. OJB has attempted to narrow

its records requests, including by: limiting the temporal scope to less than a year, JA332; only seeking a list of names for officers with misconduct investigations, JA333-334; and asking for the personnel files of individual officers involved in police misconduct, JA335-336. Despite BPD's repeated attempts to impede OJB's requests, OJB eventually limited their requests to "smaller sample[s] of files" due to Defendants' history of refusal and delay. JA016. These attempts were also met with roadblocks. JA016.

For instance, on February 8, 2022, OJB submitted two MPIA records requests pertaining to Detective James Deasel, seeking the complete information accessible from his personnel file and also information from "thirty-five specified criminal incident reports written by [Detective] Deasel that aroused public suspicion." JA016-017. OJB submitted this request because Defendants had previously concluded that releasing police misconduct records is of "overwhelming public interest" and would warrant a fee waiver. JA017. OJB sought a response from Defendants on several occasions about this request: March 24, 2022, JA128; March 31, 2022, JA073; May 19, 2022, JA125; and June 15, 2022, JA136. Despite stating that OJB would receive Detective Deasel's personnel file "as early as today" and that incident reports were "nearly complete and set for production next week" on April 8, JA124, Defendants only produced a summary of "over 80 pages," rather than a complete personnel file, for Detective Deasel on April 21, 2022—nearly three

months after the initial request. JA023, JA138-139. Defendants neither produced the full requested records nor provided a legitimate reason for their failure to do so, JA042, JA362, but still sent Plaintiffs a fee demand for Detective Deasel's file on October 8, 2022. JA147-157. Defendants provided only twenty-five of the requested thirty-five criminal incident reports on October 21, 2022—nearly nine months after OJB's February request. JA017.

Additionally, Defendants pressured Plaintiffs Soderberg and Figueroa to accept only summaries of requested records, and when both Plaintiffs continued to request the full documents, they were met with exorbitant fees and "the Law Department impos[ing] arbitrary response deadlines." JA339-340. The Law Department completely ignored Soderberg's fee waiver request and set restrictive response timelines for him that had no statutory basis. JA021. Figueroa was charged for records that had already undergone review for public production, and BPD still "withheld information regarding internal affairs investigations as to some of the officers whose records were requested." JA022.

Despite Defendants' failure to adequately produce documents for Plaintiffs, Defendants previously produced a complete personnel file for Officer Justin Trojan within six months after the initial request. JA023-024, JA261-262, JA272. The files were produced at no cost for Attorney Michael Fortini of Ponds Law Firm, a private attorney who lacks a history of public criticism towards BPD and does not have a

significant internet presence. JA023. Officer Trojan is no longer with BPD and had a minimal history of complaints. JA023. And two of Soderberg's requests—for a summary of Officer Melvin Hill's file and records regarding Officer Luke Shelley—had previously been produced by Defendants to The Daily Record and the Office of the Public Defender. JA024, JA263-266, JA268, JA272. Soderberg did not receive the Hill summary until September 2022, and his request for the Shelley file remains unanswered. JA024, JA263-266, JA268, JA272. Additionally, through prior litigation between OJB and BPD, OJB has received data detailing the requesters, dates, information sought, fees, and responses for approximately 580 records requests. JA269-279. The data revealed that longer wait times and higher fees for records requests tend to correlate with media, citizen, and public defender requesters, while law enforcement and district/state attorneys, who tend to work collaboratively with Defendants, enjoy the lowest average wait times and fees. JA024, JA272-278.

These facts are merely a summary of some of Plaintiffs' attempts to obtain access to public records regarding BPD misconduct. A comprehensive accounting of the underlying facts would exhaust the page limitations of this brief, and the Amended Complaint and Exhibits provide greater detail.

II. Procedural History

On June 30, 2022, Plaintiffs initiated this action by filing suit in the Circuit Court for Baltimore City, alleging First and Fourteenth Amendment violations as well as claims under Articles 24 and 40 of the Maryland Declaration of Rights. JA637. Asserting federal question jurisdiction, Defendants removed the case to the District Court for the District of Maryland on August 2, 2022. JA636. Plaintiffs amended their complaint on October 24, 2022, which preserved their First Amendment allegations. JA037-042. Defendants filed their amended motion to dismiss on November 7, 2022. JA284-285, JA309-311.

By Memorandum Opinion and Order entered on August 10, 2023, the District Court dismissed Plaintiffs' First Amendment claims, declined to exercise supplemental jurisdiction with respect to Plaintiffs' remaining state law claims, and remanded the case to the Circuit Court for Baltimore City. JA637. In dismissing Plaintiffs' claims based on viewpoint and content discrimination, the District Court simply stated: "[T]he Amended Complaint contains no allegations that, if proven, would establish that defendants considered plaintiffs' viewpoints or content when responding to the requests." JA681. The District Court concluded that "even assuming that [D]efendants have delayed or denied plaintiffs access to public records on the basis of viewpoint or content-based discrimination," Plaintiffs had still failed to establish municipal liability under *Monell*. JA681-686. In dismissing

Plaintiffs' retaliation claim, the District Court held that Plaintiffs "fail[ed] to allege which specific actions" constituted retaliation. JA687.

Pursuant to Rule 59(e), Plaintiffs moved to alter or amend the District Court's judgment on September 4, 2023, arguing primarily that the Court failed to consider factual allegations supporting their claim that Defendants violated the First Amendment. JA695-702. Defendants responded to this motion in separate filings on October 16, 2023. JA703-704, JA713-714. On November 17, 2023, the District Court denied the motion. JA720, JA750. The District Court denied Plaintiffs' viewpoint and content discrimination claims, reasoning that there was an obvious alternative explanation for Defendants' conduct: "[P]laintiffs' numerous and broad requests exceeded [D]efendants' capacity to respond as quickly and inexpensively as [P]laintiffs demanded." JA741. As to Plaintiffs' First Amendment retaliation claim, the District Court determined that Defendants' conduct suggested "bureaucratic dysfunction," not a "retaliatory motive." JA746. Finally, the District Court held that Plaintiffs failed to adequately plead municipal liability under *Monell* because they had not alleged there was a "practice of disfavoring requesters on the basis of their viewpoint," and Plaintiffs did not allege there was a policymaker aware of the wrongdoing. JA748-749. Accordingly, Plaintiffs filed a notice of appeal on December 13, 2023, and this appeal followed. JA751.

SUMMARY OF ARGUMENT

Defendants' denials of Plaintiffs' records requests violate the First Amendment. Limiting access to public records because of the subject matter of the records sought and impeding requesters that have expressed a viewpoint critical of Defendants each constitute an independent constitutional violation. The obstruction of Plaintiffs' access to police misconduct records deterred Plaintiffs from engaging in protected expression in contravention of the First Amendment. The District Court erred in dismissing Plaintiffs' First Amendment causes of action for failure to state a claim by not drawing all reasonable inferences in favor of Plaintiffs, and by insufficiently crediting the factual allegations presented in the Amended Complaint. Defendants' repeated failure to timely respond and provide full disclosure of requested records to Plaintiffs demonstrates a clear pattern and practice of obstructing disclosure and that Defendants acted with a retaliatory motive violating Plaintiffs' First Amendment rights. The Court's analysis contains three fatal flaws.

First, the District Court erred as a matter of law in dismissing Plaintiffs' claim for retaliation because the District Court based its dismissal on disputed issues of fact, reaching conclusions that were premature at the motion to dismiss stage. Plaintiffs allege Defendants retaliated against them by denying access to records and imposing exorbitant fees as a barrier to records. The District Court erred in making a factual conclusion that this conduct was a result of dysfunction at BPD, rather than

retaliation. Defendants have offered no explanation for why files they were ready to produce at no cost prior to this litigation suddenly required thousands of dollars for production following Plaintiffs' filing of their Amended Complaint. Defendants did not prove by a preponderance of the evidence that they would have taken these actions absent Plaintiffs' critical speech, thus the District Court failed to apply the requisite burden-shifting framework. The District Court was wrong to draw a factual conclusion about Defendants' conduct as Plaintiffs stated a plausible claim for First Amendment retaliation, which fulfills the pleading requirements for a motion to dismiss.

Second, the District Court erred as a matter of law in dismissing Plaintiffs' claims for viewpoint and content discrimination in violation of the First Amendment. When taken as true, Plaintiffs' alleged facts sufficiently state a plausible First Amendment violation based on Defendants' failure to produce records regarding police misconduct. Defendants were more willing to provide records that did not reference misconduct—and thus could not be used to criticize BPD—but were unwilling to disclose records that portrayed BPD negatively. This selective access constitutes impermissible viewpoint and content discrimination, and the District Court erred by not drawing all factual inferences in favor of Plaintiffs in this regard.

Third, the District Court erred in finding that Plaintiffs did not adequately plead municipal liability under *Monell*. Plaintiffs provided ample evidence

demonstrating that constitutional violations by BPD, the Law Department, and the City in responding to records requests are "widespread and flagrant" as to both Plaintiffs and others who are not parties to the suit. Likewise, Plaintiffs plausibly alleged that policymakers were both aware of ongoing constitutional violations and failed to correct the violations due to their deliberate indifference. Thus, it was premature for the District Court to find at the motion to dismiss stage that Plaintiffs had not sufficiently pleaded *Monell* liability.

STANDARD OF REVIEW

The District Court's "decision to dismiss under Rule 12(b)(6)" is reviewed de novo. *Matrix Cap. Mgmt. Fund, LP v. BearingPoint, Inc.*, 576 F.3d 172, 181 (4th Cir. 2009) (reviewing motion to dismiss de novo even when Rule 59(e) motion was denied). "Ordinarily, a complaint should not be dismissed for failure to state a claim . . . unless it appears beyond all doubt that [ ] [Plaintiffs] can prove no set of facts in support of [their] claim that would entitle [them] to relief." *Trulock v. Freeh*, 275 F.3d 391, 405 (4th Cir. 2001). "[T]he facts set forth are from the vantage point of [Plaintiffs], with all reasonable inferences drawn in [their] favor." *Tobey v. Jones*, 706 F.3d 379, 383 (4th Cir. 2013).

Even though the denial of a Rule 59(e) motion is reviewed for abuse of discretion, this Court should review "the record de novo" regarding "the district court granting [Defendants'] Fed. R. Civ. P. 12(b)(6) motion[ ] to dismiss." *Taccino*

v. Min. Cnty. Comm'n, 848 F.App'x 141, 141 (4th Cir. 2021); *see Gilbert v. Residential Funding LLC*, 678 F.3d 271, 274, 281 (4th Cir. 2012) (reviewing motion to dismiss de novo, reversing and remanding case after de novo review without addressing denial of Rule 59(e) motion); *Moore v. Life Ins. Co. of N. Am.*, 278 F.App'x 238, 239 (4th Cir. 2008) (reviewing 12(b)(6) motion to dismiss de novo even when Rule 59(e) motion was filed); *Lisotto v. New Prime, Inc.*, 647 F.App'x 259, 262–63 (4th Cir. 2016) (reviewing dismissal of complaint de novo after Rule 59(e) motion denied).

ARGUMENT

The First Amendment, which applies to states through the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I; *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). The purpose of the First Amendment is "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Connick v. Myers*, 461 U.S. 138, 145 (1983). Further, the First Amendment is "[p]remised on mistrust of governmental power" and "stands against attempts to disfavor certain subjects or viewpoints." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010). The First Amendment thus prohibits the government from discriminating against speech "based on the ideas or opinions it conveys." *Iancu v. Brunetti*, 588 U.S. 388, 393 (2019). Plaintiffs sufficiently alleged facts

demonstrating BPD's retaliation, as well as content and viewpoint discrimination, in violation of their First Amendment rights. Additionally, Plaintiffs' allegations are also sufficient for a threshold showing of municipal liability under *Monell*.

I. The District Court erred in denying Plaintiffs' First Amendment retaliation claim.

The District Court erred as a matter of law in finding that Plaintiffs failed to state a claim, because Plaintiffs alleged facts that, if taken as true, plausibly state a claim for retaliation. Specifically, Plaintiffs publicized information about misconduct within BPD, and, as a result, BPD took steps to retaliate against Plaintiffs and suppress further expression protected by the First Amendment. The First Amendment "guarantees an individual the right to speak freely, including the right to criticize the government and government officials." *Trulock*, 275 F.3d at 404 (citations omitted). And to protect the exercise of free expression, "public officials are prohibited from retaliating against individuals who criticize them." *Id.* The right to free speech "includes not only the affirmative right to speak, but also the right to be free from retaliation by a public official for the exercise of that right." *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 685 (4th Cir. 2000).

Plaintiffs sufficiently pled their claim for retaliation by alleging facts that establish: "(i) that [their] speech was protected; (ii) that [Defendants'] alleged retaliatory action adversely affected [their] constitutionally protected speech; and (iii) that a causal relationship existed between [their] speech and [Defendants']

retaliatory action." *Trulock*, 275 F.3d at 404. First, Plaintiffs' speech, including the publication of websites, books, and documentaries, is protected speech under the First Amendment. *See 303 Creative LLC v. Elenis*, 600 U.S. 570, 587 (2023). Second, Defendants' restrictions on access to records deterred and impeded Plaintiffs' ability to provide the public with information about BPD. Finally, Defendants would not have restricted Plaintiffs' access to records but for Plaintiffs' critical speech regarding BPD.

A. Plaintiffs engaged in protected expression that was critical of BPD.

"All manner of speech—from 'pictures, films, paintings, drawings, and engravings,' to 'oral utterance and the printed word'—qualify for the First Amendment's protections." *Id.* (citation omitted). Moreover, the Supreme Court has already established that "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers," which is relevant here as each Plaintiff criticized BPD. *City of Hous. v. Hill*, 482 U.S. 451, 461 (1987). Plaintiffs thus engaged in protected speech by having a website "conveyed over the [i]nternet" about BPD's conduct, producing documentaries on police accountability, and authoring books about corruption within BPD. *See 303 Creative*, 600 U.S. at 587.

Additionally, "[c]itizens have a First Amendment right 'to appeal to courts and other forums established by the government for resolution of legal disputes.'"

Garcia v. Montgomery Cnty., 145 F.Supp.3d 492, 514 (D. Md. 2015) (quoting *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011)); *Rogers v. Harnett Cnty.*, No. 5:22-CV-00208-BO-RN, 2022 WL 18779920, at *6 (E.D.N.C. Dec. 20, 2022) ("Federal courts have held that filing a lawsuit is protected speech."). The Fourth Circuit has held that the "filing of a lawsuit carries significant constitutional protections, implicating the First Amendment right to petition the government for redress of grievances, and the right of access to courts." *ACLU of Md., Inc. v. Wicomico Cnty.*, 999 F.2d 780, 785 (4th Cir. 1993). Thus, the records requesters here also engaged in protected speech by filing this lawsuit and prior claims against Defendants.

Each of the Plaintiffs used information obtained from their records requests to publicly criticize misconduct within the BPD, and Defendants were aware of this speech. OJB runs "a website, bpdwatch.com, where known misconduct of Baltimore police officers [is] hosted online for the public." JA010. The process of OJB attempting to request records from BPD has previously led to litigation, which has ensured that Defendants know about OJB's website and viewpoint. JA010. The stated purpose of the BPD Watch website is to "improve civilian oversight of the Baltimore Police Department," and the "project is a response to the lack of

transparency and justice in policing."[1] Prior to the commencement of this litigation, BPD had previously requested OJB remove information from the BPD Watch website, demonstrating that Defendants were aware of the manner in which OJB used information from prior records requests. JA282.

"Brandon Soderberg is a journalist and author who recently published a book about Defendant BPD shedding light on police corruption in Baltimore." JA010. His records request attempted to gain information about officer misconduct within BPD. JA268. Similarly, "Alissa Figueroa is a media journalist who is producing a documentary on police accountability." JA010. Her records requests also attempted to obtain information about police officer accountability within BPD. JA010.

Defendants' refusal to produce official records as required by the MPIA not only punishes Plaintiffs for past critical statements against BPD, but obstructs Plaintiffs' ability to engage in future constitutionally protected speech. The District Court implicitly assumed the speech was protected, instead concluding the causation prong of the retaliation claim was lacking. JA744-747, JA686-JA688. Plaintiffs therefore demonstrated that they engaged in protected speech sufficient to fulfill the first element of a retaliation claim.

[1] BPD WATCH, Open Justice Baltimore, https://bpdwatch.com/about (last visited Mar. 11, 2024); *see also* JA010.

B. By restricting or limiting Plaintiffs' access to records regarding police misconduct, Defendants adversely affected Plaintiffs' protected speech.

Plaintiffs alleged facts, which must be taken as true, showing "that the [Defendants'] actions had some adverse impact on the exercise of the [claimants'] constitutional rights." *Suarez*, 202 F.3d at 685. An action has an adverse impact if "the resulting actions would likely deter a person of ordinary firmness from the exercise of First Amendment rights." *Snoeyenbos v. Curtis*, 60 F.4th 723, 730 (4th Cir. 2023). This is an "objective inquiry" that is conducted "on a case-by-case basis." *Id.* at 730–31. This Court should consider the response of "a person of ordinary firmness" to the retaliatory conduct, rather than Plaintiffs' "actual response." *Martin v. Duffy*, 858 F.3d 239, 250 (4th Cir. 2017).

For a motion to dismiss, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The District Court erred as a matter of law in dismissing Plaintiffs' retaliation claims because Plaintiffs alleged sufficient facts to show that Defendants engaged in retaliatory conduct as a result of Plaintiffs' protected speech. For instance, BPD was ready to provide OJB with Detective Deasel's personnel file at no cost before this lawsuit. JA076. However, after the filing of this claim, BPD withheld the file and demanded that OJB pay a fee of approximately $7,000 for the

records. JA032, JA145-151. Additionally, Plaintiffs alleged that BPD urged OJB "to reduce their request in fear of costs." JA071. BPD has a practice of not acknowledging fee waiver requests, which stymies requesters' ability to access records. JA185-190. In another example, BPD overestimated the costs of producing records and granted OJB a fee waiver of over $700,000. JA085. Upon realizing the records would cost less to produce and that this fee waiver would result in OJB obtaining the records for free, BPD refused to honor the fee waiver subsequent to the filing of this lawsuit. JA081-089 (noting the lawsuit was filed on June 30, 2022, and the fee waiver was subsequently revoked on August 11, 2022).

After the release of Soderberg's book, which examined BPD's Gun Trace Task Force, BPD refused "to disclose whether they would grant Soderberg a fee waiver[,] . . . pressured Soderberg into only requesting summaries of officers' disciplinary reports instead of full reports, and imposed an additional requirement that Soderberg needed to respond to emails within 10 days or risk the inability to proceed with the request." JA235-237, JA700. In response to Figueroa's records request for misconduct investigations regarding BPD officers, BPD attempted to charge her over $40,000, and Figueroa was forced to accept only summaries of the files because she could not pay this fee. JA243-244. Further, Figueroa still had to expend considerable resources, including money and time, over the next six months to even receive the summaries from BPD. JA243-244.

The District Court found that the factual allegations "suggest bureaucratic dysfunction" and not "that defendants acted with retaliatory motive"; however, this analysis improperly discounts the factual allegations in the Amended Complaint and contradicts this Court's approach to the analysis of First Amendment retaliation claims. *See Tobey*, 706 F.3d at 389; JA746.

At the motion to dismiss stage, this Court in *Tobey* declined to make "factual conclusion[s]" even though the defendants argued that their conduct was a lawful response under agency guidelines. *Id.* In *Tobey*, this Court rejected the defendants' alternative explanations for their conduct and found the plaintiff's claim survived a motion to dismiss because it was unclear whether the defendants acted reasonably or with a retaliatory motive. *Id.* This Court concluded that "[i]t may be that discovery will reveal there is no genuine issue of material fact. Should this be the case, [defendants] can move for summary judgment." *Id.* at 393. Because the plaintiff in *Tobey* had a complaint with "legal conclusions" that were "well supported by the facts," this Court found the complaint survived a motion to dismiss for failure to state a claim. *Id.*

In general, this Court imposes a low threshold for First Amendment retaliation claims to survive a motion to dismiss for failure to state a claim. *See Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 501 (4th Cir. 2005); *Shaw v. Foreman*, 59 F.4th 121, 131 (4th Cir. 2023). In *Constantine*, for example, this

Court held that a First Amendment retaliation claim survived a motion to dismiss even though the complaint described the chronology of the events "somewhat vaguely." 411 F.3d at 501. Likewise, in *Shaw*, this Court found that a First Amendment retaliation claim survived even when the plaintiff's evidence was "convoluted and slightly tenuous." 59 F.4th at 131. The District Court's finding that Defendants' conduct constituted bureaucratic dysfunction rather than retaliation that adversely affected Plaintiffs' speech is premature at the motion to dismiss stage, in light of Plaintiffs' allegations. Like the plaintiff in *Tobey*, Plaintiffs' Amended Complaint includes "legal conclusions" that are "well supported by the facts." 706 F.3d at 393. And unlike the plaintiffs in *Constantine* and *Shaw*, Plaintiffs alleged specific, clear, and straightforward facts that support their retaliation claim. *See Constantine*, 411 F.3d at 501; *Shaw*, 59 F.4th at 131. Accordingly, Plaintiffs provided a robust factual record, which must be taken as true, showing that Defendants' conduct adversely affected Plaintiffs' speech.

A person of ordinary firmness would be deterred from participating in their expression if they knew exorbitant fees were going to be imposed in order for them to engage in future speech. In retaliation for criticizing BPD and litigating records requests complaints, BPD attempted to impose thousands of dollars in costs upon Plaintiffs, in addition to burdensome timelines for responses. These acts adversely affected Plaintiffs by discouraging them from seeking more records from BPD, and

by denying them access to the records they sought about police misconduct. The District Court erred by not following this Court's approach in *Tobey*, which is to deny a motion to dismiss when it is unclear whether Defendants acted reasonably or with a retaliatory motive. 706 F.3d at 389. Further, Plaintiffs also engaged in protected expression by filing this and other lawsuits. In response to litigation, Defendants withheld records they were previously ready to release. At minimum, these allegations undermine Defendants' claim that they were acting in good faith, and plausibly suggest that they were instead acting with a retaliatory motive based on Plaintiffs' public, critical speech against Defendants. The District Court erred in drawing these factual conclusions about Defendants' motivations in contravention of the motion to dismiss standard.

C. Defendants would not have limited or restricted Plaintiffs' access to records but for Plaintiffs' public criticism of BPD.

Plaintiffs plausibly alleged that there is a causal connection between their protected speech and Defendants' retaliatory conduct because of the timing and subject matter of the requests and Plaintiffs' critical coverage of BPD. "[T]his Court applies the burden-shifting framework of the same-decision test," where a plaintiff, as here, has the prima facie burden to show that the "protected activity was 'a substantial or motivating factor' in the defendants' action." *Shaw*, 59 F.4th at 130–31 (citation omitted). "The burden then shifts to the defendants to prove by a

preponderance of the evidence that they would have taken the same action in the absence of the plaintiff's protected activity." *Id.*

To meet their prima facie burden, Plaintiffs here must show that Defendants were aware of the protected speech and that there was "some degree of temporal proximity to suggest a causal connection" between Plaintiffs' critical speech and Defendants' conduct. *Constantine*, 411 F.3d at 501. The timing of Defendants' retaliatory conduct is critical given that this Court has found temporal proximity to create an inference of retaliation. For instance, in *Trulock*, "the timing of the search raise[d] an inference of retaliatory motive." 275 F.3d at 405 ("All of these factors, when viewed together and accepted as true, raise a reasonable inference that the interrogation and search were retaliatory. We cannot conclude beyond all doubt that [plaintiff] can prove no set of facts in support of [their] claim that would entitle [them] to relief.").

Here, the timing of Defendants' efforts to obstruct Plaintiffs' access to records creates an inference of retaliatory motive because Defendants attempted to impose exorbitant fees only after Plaintiffs filed this lawsuit, and Defendants became aware of Plaintiffs' public criticism of officer misconduct. In April and May of 2022, before the filing of this lawsuit in June 2022, Defendants told Plaintiffs they were ready to turn over the full file for Detective Deasel at no cost. JA124-126 (stating that the file was ready to be released on April 8, 2022, and again on May 24, 2022).

The District Court incorrectly stated that these communications were about only the summary of the file because Defendants told Plaintiffs "[w]e have received the entire file and our review is ongoing." JA126, JA745-746. After the filing of this lawsuit, Defendants withheld the file and then demanded a fee of approximately $7,000 to receive the file, which Defendants had told Plaintiffs would be released in April 2022. JA124-136, JA145-151. Defendants have not shown "by a preponderance of the evidence" that they would have taken this action without Plaintiffs engaging in the protected speech of criticizing BPD and filing a lawsuit. *Shaw*, 59 F.4th at 130–31. Further, it is at least contested whether Defendants were exercising their statutory authority or—as Plaintiffs contend—imposing fees in a retaliatory manner. Because these facts are sufficiently alleged in the Amended Complaint and disputed by the parties, the District Court erred in granting a motion to dismiss before the factual record could be fully developed. *Tobey*, 706 F.3d at 389.

Additionally, the District Court erred as a matter of law in making factual conclusions about the "but for" cause of Defendants' conduct. When analyzing Plaintiffs' retaliation claim, the District Court primarily examined the rigorous causation requirement, finding that Plaintiffs must allege the "retaliatory motive was the 'but for' cause of" Defendants' conduct. JA745. But the District Court "conveniently overlook[ed]" that this rigorous causation requirement is imposed at the summary judgment stage. *Tobey*, 706 F.3d at 390. Indeed, this Court can "infer

causation" at the motion to dismiss stage because of the timing of Defendants' conduct. *Id.* at 390–91 ("Again, it may turn out after further discovery that [a plaintiff] cannot meet this 'rigorous' requirement, but without further discovery, we are unable and unwilling to speculate as to the outcome."). Thus, the District Court erred by not allowing further discovery on the issue of causation related to Plaintiffs' First Amendment retaliation claim.

II. The District Court erred in dismissing Plaintiffs' viewpoint and content discrimination claims.

The District Court erred as a matter of law in denying Plaintiffs' viewpoint and content discrimination claims because Plaintiffs provided evidence that Defendants restricted access to records based on content. Denying access to records based on content violates the First Amendment, and Defendants thus violated Plaintiffs constitutional rights by denying access to records about police misconduct. "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). Further, the government cannot "favor one speaker over another" or discriminate "against speech because of its message." *Id.* "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.* at 829 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992)).

"Viewpoint discrimination is thus an egregious form of content discrimination." *Id.* Targeting speech because Defendants disagree with the message expressed and do not want the information "disseminated" is viewpoint discrimination. *Rossignol v. Voorhaar*, 316 F.3d 516, 521 (4th Cir. 2003) (finding viewpoint discrimination when sheriff's deputies seized newspapers that criticized the sheriff). Accordingly, Defendants violated the First Amendment by restricting Plaintiffs' access to records based on the content of the records being about misconduct within BPD.

A. Defendants' denial of records because of their content or viewpoint violates the First Amendment.

Plaintiffs have adequately pleaded a First Amendment claim because Defendants limited and restricted access to records based on the content of those records. This Court has held that "when the government has decided to make certain information available, there are 'limits to its freedom to decide how that benefit will be distributed.'" *Fusaro v. Cogan*, 930 F.3d 241, 255 (4th Cir. 2019) (citation omitted). Moreover, this Court has specifically cautioned against "the risk of viewpoint discrimination, which contravenes the First Amendment in any context thus far addressed by the Court," in restricting access to government information. *Id.* Plaintiffs do not contend that they have a "general First Amendment right to access" these records, but as this Court has noted, "a First Amendment claim that challenges suspect conditions on access to government information must be

available, at least where the plaintiff alleges circumstances indicating improper interference with protected speech." *Id.* at 249, 255.

Consistent with this Court's precedent, the Ninth and Tenth Circuits have "come to similar conclusions in finding that speaker-based or content-based restrictions on access to government-controlled information are 'susceptible to a First Amendment challenge.'" *Boardman v. Inslee*, 978 F.3d 1092, 1107 (9th Cir. 2020) (citing *Fusaro*, 930 F.3d at 255). This position stems, in part, from the Supreme Court's "recogni[tion] that restrictions on the disclosure of government-held information can facilitate or burden the expression of potential recipients and so transgress the First Amendment." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 569 (2011). This Court has thus found that "invidious viewpoint discrimination in the provision of government-controlled information" gives rise to a First Amendment claim. *Boardman*, 978 F.3d at 1109.

Therefore, by restricting or denying access to records that contained negative information about BPD and its officers—while not asserting any statutory exemption for withholding the files—Defendants engaged in impermissible content and viewpoint discrimination in direct contravention of the First Amendment. *Fusaro*, 930 F.3d at 249.

B. Defendants engaged in impermissible viewpoint and content discrimination when they denied Plaintiffs' requests for records based on whether those records contained information about police misconduct.

The District Court improperly denied Plaintiffs' First Amendment claims by discounting Plaintiffs' alleged facts that "plausibly give rise to an entitlement to relief" regarding Defendants' viewpoint and content discrimination. *Iqbal*, 556 U.S. at 679. The District Court's admission that it "did not mention every factual allegation contained in the Amended Complaint" would not be incurable, except that it neglected key factual assertions and misinterpreted evidence proffered by Plaintiffs that is dispositive at the motion to dismiss stage. JA733. Defendants engaged in viewpoint and content discrimination by denying access to records about police misconduct, and there are no obvious alternative explanations to account for Defendants' alleged unlawful activity.

"[I]n a free speech case, where 'the reaches of the First Amendment are ultimately defined by the facts it is held to embrace,'" this Court is "obliged to 'make a fresh examination of crucial facts' and an 'independent examination of the whole record' to ensure that there is no 'forbidden intrusion on the field of free expression.'" *Billups v. City of Charleston*, 961 F.3d 673, 682 (4th Cir. 2020) (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 567–68 (1995)). Because Plaintiffs alleged First Amendment violations here, this Court "has an obligation to 'make an independent examination of the whole record"

to ensure that "the judgment does not constitute a forbidden intrusion on the field of free expression." *In re Morrissey*, 168 F.3d 134, 137 (4th Cir. 1999) (quoting *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 499 (1984)). An independent examination of Plaintiffs' factual allegations shows that Plaintiffs plausibly stated a claim for First Amendment violations in this regard.

i. Defendants denied or restricted access to the records that Plaintiffs requested because those files showed BPD misconduct.

Defendants engaged in viewpoint and content discrimination by restricting or denying Plaintiffs' access to certain records because those records contained information about misconduct committed by BPD. JA023-JA025. In comparison, Defendants were willing to quickly grant access to records that did not include information about police misconduct. For example, Plaintiffs attempted to obtain the file of Detective James Deasel, a police officer with a known history of complaints. JA128. Defendants attempted "to deflect and only provide the summary" of this file, prompting Plaintiffs to question if Defendants were purposefully attempting to not disclose this record. JA128. Plaintiffs contend that Defendants' "actions pose[d] a sudden hurdle to obtaining records of a known problematic officer." JA129. In their communications with Defendants, Plaintiffs acknowledged that they were seeking records relating to "police misconduct." JA187. Plaintiffs were either never provided the records or were provided only limited records after months of continuous delay,

often with no explanation provided by Defendants. JA181-190 ("I again beg you please provide [a] response so that we can avoid unnecessary court challenges and lost time and community resources."). In comparison, Defendants provided requesters the full files of officers with minimal complaints relatively quickly. JA023-024.

While the District Court was correct that "the law does not require a court to 'mention' every nonconclusory factual allegation," the District Court here neglected the robust factual allegations Plaintiffs proffered regarding Defendants' viewpoint and content discrimination. JA733. Instead, the District Court focused on the length of Plaintiffs' exhibits and commented: "Simply put, it was a challenge to wade through the 238 pages in search of particular exhibits." JA636. Plaintiffs enclosed numerous exhibits, including extensive correspondence between the parties, which demonstrate the full extent of Defendants' ongoing participation in viewpoint discrimination through repeated evasions and delays.

Additionally, "the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression." *Rosenberger*, 515 U.S. at 828. Here, Defendants used their ability to impose fees for records requests in a way that made it more difficult to obtain records related to police misconduct. When attempting to obtain the entire personnel file for Detective James Deasel—a file that contained many instances of police misconduct—

Defendants urged Plaintiffs to instead accept a summary of Detective Deasel's file or else the costs for producing the records might increase. JA070. In response to these tactics, Plaintiffs cautioned Defendants that "pushing requesters to reduce their request in fear of costs is shameful" and "it is in bad faith to hold fees out in the air to urge someone to lessen their request." JA071-072. In this instance, Defendants even admitted that they had "not yet investigated the scope of [this] particular request" before threatening to impose a financial burden on Plaintiffs. JA070. Thus, the only information Defendants knew about this request when they determined to impose more fees was the content of the request and viewpoint of the requester. In another example, where Plaintiffs requested records related to "police misconduct," Defendants never acknowledged Plaintiffs' fee waiver request and instead stated that a fee of over $600 would need to be paid before any records were released. JA185-190. Plaintiffs spent another four months repeatedly requesting this fee be waived, as it was a barrier to obtaining the misconduct records. JA189. Only after those four months—including an entire month of no communication whatsoever from Defendants—did Defendants agree to provide responsive records. JA189-190. To date, Defendants have produced only one file related to this request, and Defendants removed all the police officer names in the file produced. JA018.

Defendants also "provide[d] wildly arbitrary cost estimates for fee waivers that have no reasonable correlation to the size or number of files requested." JA019.

For instance, Defendants offered differing estimates for the average cost per file or page across requests for similar types of records. JA019. Defendants also inflated cost estimates that did not reflect the work required, but deterred access. JA020. For one request, "OJB was forced to prepay" an excess of $8,000, "50% more than the actual production cost to get the records." JA020. Defendants' total hours estimates for producing records are wildly disconnected from the work requested—in one example, Defendants stated that it would require nearly 32,000 hours of work by ten different individuals totaling over $600,000 to respond to a single records request. JA062-067. These facts, at minimum, give rise to an inference of misconduct sufficient to advance to the discovery stage of litigation.

ii. There are no obvious alternative explanations for Defendants' repeated refusals to provide records, particularly in light of Plaintiffs' comparator evidence.

The District Court erred as a matter of law in granting a motion to dismiss when there was no obvious constitutional alternative explanation for *all* of Defendants' alleged misconduct. This Court has held that there must be "an 'obvious alternative explanation' for each of the actions alleged that suggests lawful conduct" to grant a motion to dismiss. *Int'l Ass'n of Machinists & Aerospace Workers v. Haley*, 482 F.App'x 759, 764 (4th Cir. 2012) (citation omitted). Defendants' proffered explanations are not only legally insufficient, but also inconsistent with the factual record. Moreover, Plaintiffs sufficiently pled facts alleging comparator

evidence of viewpoint discrimination, and the District Court erred in its analysis regarding why the comparator was treated more favorably than Plaintiffs.

The District Court's conclusion that there was an obvious alternative explanation erroneously discounts Plaintiffs' allegations of misconduct contrary to this Court's precedent. To find an alternative explanation "obvious," Plaintiffs' allegations of misconduct must be completely insufficient. *See Desper v. Clarke*, 1 F.4th 236, 245 (4th Cir. 2021); *McCleary-Evans v. Md. Dep't of Transp.*, 780 F.3d 582, 588 (4th Cir. 2015). For example, in *Desper*, the Court found that there was an "obvious alternative explanation" for alleged First Amendment violations because the plaintiff only provided *one* sentence to support his argument that First Amendment violations had occurred. 1 F.4th at 245 (noting a single "statement . . . [wa]s not enough to move [Plaintiffs'] complaint 'from conceivable to plausible'" (citation omitted)). Similarly, in *McCleary-Evans*, the Court found that there was an "obvious alternative explanation" for the alleged discrimination because the plaintiff's complaint "allege[d] nothing more than that she was denied a position or promotion in favor of someone outside her protected class." 780 F.3d at 588. Notably, a crucial defect of the plaintiff's claim in *McCleary-Evans* was that "[s]he did not offer any comparison between herself and the individual who was hired." *Woods v. City of Greensboro*, 855 F.3d 639, 647–48 (4th Cir. 2017)

(analyzing the *McCleary-Evans* case in light of "the Supreme Court's decisions in *Iqbal* and *Twombly*" establishing the motion to dismiss pleading standard).

By contrast, Plaintiffs here provided a robust record of exhibits demonstrating Defendants' viewpoint and content discrimination, and Plaintiffs proposed a comparator as evidence of viewpoint discrimination. The District Court rejected Plaintiffs' proposed comparator analysis because it found that "an 'obvious alternative explanation' for [D]efendants' alleged shortcomings in responding to [P]laintiffs' requests" was that "[P]laintiffs' numerous and broad requests exceeded [D]efendants' capacity to respond as quickly and inexpensively as [P]laintiffs demanded." JA741. However, even assuming this alternative explanation is accurate, it fails to explain why Defendants continued to obstruct Plaintiffs' narrow requests, or why Defendants did not want to fulfill Plaintiffs' requests even when Defendants had not actually reviewed the requests in the first place.

In one instance, Plaintiffs submitted a narrow records request for an employee roster. JA230. Defendants refused to release the roster due to concerns about the disclosure of undercover officers, but when Plaintiffs suggested that those names be redacted, Defendants stopped replying to Plaintiffs altogether. JA230. In another example, when Defendants suggested that Plaintiffs accept summaries of files rather than the requested records in full, Defendants admitted that they had "not yet investigated the scope of [the] particular request." JA070. Therefore, pressuring

Plaintiffs to accept summaries could not have been based on the scope of the request but rather suggests that Defendants wanted to limit access to negative information about BPD. In another incident, Plaintiffs expressed to Defendants that they were "honestly confused about the months-delayed complications for producing a simple list of names." JA125. Thus, the District Court's alternative explanation is inadequate to explain all of Defendants' behavior because some requests were narrow and, in some instances, Defendants had not even reviewed the requests before opting to withhold the full records.

While the District Court correctly noted that Defendants sometimes suggested Plaintiffs narrow their search requests, it remains true that Plaintiffs at that point did not believe requesting single files would be successful because they "previously requested single files and [Defendants] ha[d] refused to provide any." JA089, JA742. The breadth of some of Plaintiffs' searches is not an obvious alternative explanation for Defendants' continued delays and impediments to accessing records. Rather, as Plaintiffs allege, Defendants have a "practice of not disclosing police records" that are damaging to BPD. JA125.

Plaintiffs also included a comparator analysis as evidence of Defendants' viewpoint discrimination. Again, the District Court rejected Plaintiffs' comparator analysis in light of two "obvious alternative explanations"—Plaintiffs' requests were too numerous and broad as compared to other requesters, and Defendants were

evaluating each request individually. JA741-743. The question is not "whether there are more likely explanations for the City's action," but whether Defendants have an "irrefutably sound and unambiguously nondiscriminatory" reason for denying Plaintiffs' requests. *Woods*, 855 F.3d at 649. Here, Defendants had extreme delays in responding to Plaintiffs' requests, and in some instances never attempted to provide *any* records in response to Plaintiffs' lawful requests. JA014-022. While the District Court denied Plaintiffs' comparator analysis, preferring the explanation that "[D]efendants were simply discharging their responsibility to evaluate each request individually," it is at least a disputed question as to whether Defendants were evaluating requests individually or committing viewpoint discrimination. JA743. The District Court did not address Plaintiffs' allegations that Defendants have "chronically obstructed" records requests that relate to BPD accountability, or that Plaintiffs have "years of history of documented tactics to avoid disclosure." JA227-231.

The District Court erred by failing to consider whether there was an obvious alternative explanation for *each* of the alleged unlawful actions taken by Defendants, as is required under *Haley*. 482 F.App'x at 764. Indeed, Plaintiffs alleged eighteen instances of First Amendment violations by Defendants, which are unlike the one-sentence allegation that was deemed insufficient in *Desper*. 1 F.4th at 245; JA701. Plaintiffs' allegations are sufficient to dispute Defendants' claim that they were

acting in good faith because of Defendants' continued obstruction in accessing records. JA181-190. In Plaintiffs' communications with Defendants, Plaintiffs expressed that Defendants' ongoing denial of records related to police misconduct showed bad faith. JA223-232. Plaintiffs' allegations, if taken as true, therefore state a plausible claim for viewpoint and content discrimination that should survive a motion to dismiss.

III. Plaintiffs have sufficiently pleaded municipal liability under *Monell*.

Under *Monell* and its progeny, a plaintiff alleging a constitutional injury may bring a suit under Section 1983 against a municipality[2] for the unconstitutional actions of its agents and employees when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Spell v. McDaniel*, 824 F.2d 1380, 1385 (4th Cir. 1987) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978)). Plaintiffs here identified a "policy" or "custom" of viewpoint and content discrimination in responding to records requests regarding potentially damaging documents and by disfavored requesters, which are both fairly attributable to BPD, the Law Department, and the City (collectively, "municipal Defendants"), and are

[2] The District Court correctly acknowledged that BPD is a municipal entity for the purposes of this litigation. JA674-675; *e.g.*, *Wilcher v. Curley*, 519 F.Supp. 1, 4–5 (D. Md. 1980); *Washington v. Balt. Police Dep't*, 457 F.Supp.3d 520 (D. Md. 2020).

also affirmatively linked to Defendants' violation of Plaintiffs' First Amendment rights in failing to meaningfully fulfill Plaintiffs' records requests. *See Spell*, 824 F.2d at 1389.

To survive a motion to dismiss, the "recitation of facts" in support of a plaintiff's *Monell* claim "need not be particularly detailed, and the chance of success need not be particularly high." *Owens v. Balt. City State's Attys. Off.*, 767 F.3d 379, 403 (4th Cir. 2014). As the District Court correctly acknowledged, *Monell* "does not impose heightened pleading requirements, beyond the basic 'short and plain statement' requirement of Fed. R. Civ. P. 8(a)." JA685 (citing *Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 168 (1993)). There "is no requirement that [a plaintiff] detail the facts underlying [their] claims, or that [they] plead the multiple incidents of constitutional violations that may be necessary at later stages to establish the existence of an official policy or custom and causation." *Jordan by Jordan v. Jackson*, 15 F.3d 333, 338 (4th Cir. 1994). The District Court, however, erred in determining that Plaintiffs failed to present "enough factual matter (taken as true) to suggest" BPD, the Law Department, and the City, through their agents and employees, engaged in a pattern and practice of unconstitutional viewpoint and content discrimination in violation of the First Amendment. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

A. Plaintiffs have sufficiently alleged a policy or custom of viewpoint and content discrimination in reviewing records requests attributable to municipal Defendants.

Plaintiffs here plausibly alleged a municipal policy or custom asserting that BPD, the Law Department, and the City, through their agents and employees, engaged in a "practice that is so 'persistent and widespread' as to constitute a 'custom or usage with the force of law.'" *Lytle v. Doyle*, 326 F.3d 463, 471 (4th Cir. 2003) (citation omitted). Plaintiffs emphasized a condonation theory based on the facts known at the time of the Amended Complaint and without discovery, but their assertion of a *Monell* policy or custom on this basis does not preclude other legal arguments or theories of liability. Plaintiffs can also establish a "policy or custom" through the "decisions of a person with final policymaking authority" or "through an omission . . . 'that manifest[s] deliberate indifference to the rights of citizens.'" *Id.* (quoting *Carter v. Morris*, 164 F.3d 215, 217 (4th Cir. 1999)). As discussed in Section III.A.ii, Plaintiffs have provided facts sufficiently alleging that individuals with policymaking authority not only knew of, but also committed violations themselves and failed to stop or correct violations. This indicates that there plausibly exists a "policy or custom" either stemming from the decisions of officials who committed violations themselves, *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (A plausible claim for relief can also "be inferred from a single decision taken by the highest officials responsible for setting policy in that area of the government's

business."), or rooted in the deliberate indifference of such officials who failed to correct violations, *Garcia v. Montgomery Cnty.*, JFM-12-3592, 2013 WL 4539394, at *5 (D. Md. Aug. 23, 2013) (denying motion to dismiss because the plaintiff alleged that the defendant was aware of violations "but chose to ignore such behavior"). These facts permit a reasonable inference that a threshold showing of *Monell* liability is satisfied.

Plaintiffs have shown a "persistent and widespread practice[ ] of municipal officials, the 'duration and frequency' of which indicate that policymakers (1) had actual or constructive knowledge of the conduct, and (2) failed to correct it due to their 'deliberate indifference.'" *Owens*, 767 F.3d at 402 (quoting *Spell*, 824 F.2d at 1386–91). Both of these elements, knowledge and indifference, "can be inferred from the 'extent' of employees' misconduct," but "[s]poradic or isolated violations of rights will not give rise to *Monell* liability; only 'widespread or flagrant' violations will." *Id.* (quoting *Spell*, 824 F.2d at 1387, 1391).

The District Court erred in holding that Plaintiffs can prove no set of facts that, construed in a light most favorable to Plaintiffs, could support a plausible claim of a persistent and widespread practice of unconstitutional viewpoint and content discrimination by municipal officials. Even without discovery, Plaintiffs have provided ample evidence demonstrating that constitutional violations by BPD, the Law Department, and the City in records requests are "widespread and flagrant" as

to both Plaintiffs and others who are not parties to the suit, and that policymakers both were aware of ongoing constitutional violations and failed to correct them due deliberate indifference. *Spell*, 824 F.2d at 1387; *see Owens*, 767 F.3d at 403.

i. Plaintiffs have alleged sufficient facts indicating that viewpoint and content discrimination in responding to records requests is persistent and widespread.

A policy or custom sufficient to establish *Monell* liability arises "if a practice is so persistent and widespread and so permanent and well settled as to constitute a custom or usage with the force of law." *Lytle*, 326 F.3d at 473 (quoting *Carter*, 164 F.3d at 218). Plaintiffs sufficiently pleaded a custom or practice by showing "numerous particular instances of unconstitutional conduct." *Id.* (citing *Kopf v. Wing*, 942 F.2d 265, 269 (4th Cir. 1991)) (internal quotation marks omitted). In *Owens*, this Court determined that the plaintiff's two factual allegations—that "reported and unreported cases" and that "motions filed and granted" revealed that BPD withheld and suppressed exculpatory information on multiple occasions and thus reflected a "persistent and widespread" practice—were sufficiently "numerous" to survive a motion to dismiss. 767 F.3d at 403–04; *Washington v. Balt. Police Dep't*, 457 F.Supp.3d 520, 535 (D. Md. 2020) ("In *Owens*, the plaintiff . . . plausibly alleged the BPD's *Monell* liability by condonation through *two* factual allegations." (emphasis added)). Similarly, in *Chen v. Mayor*, the district court denied a motion to dismiss because the plaintiff cited "two separate incidents" in alleging the City of

Baltimore had a "policy, practice and custom to seize and raze private property without due process of law." L–09–47, 2009 WL 2487078, at *4 (D. Md. Aug. 12, 2009). And in *Washington*, the district court determined the plaintiff plausibly alleged a BPD policy of fabricating evidence and suppressing exculpatory evidence by "buttress[ing] these factual allegations with *a* specific example from 1981, and *three* examples from 1988." 457 F.Supp.3d at 536 (emphasis added).

Courts have certainly found an impermissible practice based on a larger sample size of constitutional violations, *see, e.g.*, *Jones v. Jordan,* GLR-16-2662, 2017 WL 4122795, at *11 (D. Md. Sept. 18, 2017) (denying motion to dismiss when the plaintiff relied, in part, on a DOJ report detailing over seven thousand pedestrian stops as a factual basis for constitutional violations in pedestrian stops by BPD), but the volume of facts need only "len[d] credence to the claim that policymakers encouraged, or at least tolerated an impermissible practice." *Owens*, 767 F.3d at 403–04 (internal quotation marks omitted) (citation omitted); *see also McDowell v. Grimes*, GLR-17-3200, 2018 WL 3756727, at *5 (D. Md. Aug. 7, 2018) (denying motion to dismiss based on plaintiff's assertions of regular occurrences of excessive force, "[a]lthough the factual allegations in the Complaint [we]re somewhat brief").

Even absent discovery, Plaintiffs have compiled significant evidence of numerous instances of unconstitutional viewpoint and content discrimination by municipal Defendants. Plaintiffs' eighteen unfulfilled requests alone are certainly

more "numerous" than the "two" allegations by the plaintiffs in *Owens*, 767 F.3d at 403–04, and *Chen*, 2009 WL 2487078, at *4, or the four specific examples in *Washington*, 457 F.Supp.3d at 536. Beyond these eighteen requests, Plaintiffs have revealed Defendants' efforts to restrict access to public records by repeatedly delaying disclosure and failing to respond to Plaintiffs,[3] inflating costs,[4] and attempting to narrow Plaintiffs' records requests beyond their original scope.[5] These eighteen unfulfilled requests also follow on the heels of litigation by OJB against BPD regarding records requests. JA010, JA027, JA029-030, JA270; *see also* JA229 ("[W]e have only gotten meaningful responses to other PIA requests after filing litigation."). Plaintiffs' allegations are further supported by data compiled as to approximately 580 records requests, JA272-274, revealing that municipal Defendants engaged in a pattern of viewpoint and content discrimination in fulfilling records requests writ large based on the requester and substance of the request. JA022-026, JA272-280. These allegations of Defendants' delays, failures to respond, inflated costs, and attempts to narrow the scope of requests; the previous

[3] *See* JA009, JA013, JA014-018, JA022-025, JA027, JA030, JA032, JA034-036, JA038-040, JA068-076, JA080-103, JA123-146, JA158-176, JA180-193, JA199-203, JA222-233, JA242-244, JA267-268.
[4] *See* JA009, JA013-014, JA016, JA018-022, JA025, JA027, JA030, JA032-033, JA035-040, JA061-067, JA077-079, JA120-122, JA143-154, JA180-190, JA194-233, JA242-244.
[5] *See* JA021-022, JA024, JA027, JA029-030, JA032-036, JA039, JA068-076, JA123-146, JA199-203, JA234-238, JA242-244, JA263-266.

litigation between OJB and BPD; and the data indicating discrepancies in responses to records requests generally are all factual allegations and not mere assertions of wrongdoing. *See Owens,* 767 F.3d at 403. If true, they plausibly allege a persistent and widespread practice by municipal Defendants warranting reversal of the dismissal and reinstatement of Plaintiffs' claims, because they "tend to buttress [Plaintiffs'] legal conclusion." *Id.* at 403–04. Plaintiffs will have to prove this practice going forward, but they have certainly stated a plausible claim for relief warranting discovery regarding the allegations and analysis on the merits. *Id.*

While there is "no case law indicating that a custom cannot be inferred from a pattern of behavior toward a single individual," *Oyenik v. Corizon Health Inc.,* 696 F.App'x 792, 794 (9th Cir. 2017), district courts have occasionally dismissed *Monell* claims based on a condonation theory on a motion to dismiss where the practice was "supported by factual allegations involving [the] [p]laintiff alone." *Robinson v. City of Mount Ranier*, GJH-20-2246, 2021 WL 1222900, at *17 (D. Md. Mar. 31, 2021) (dismissing *Monell* claim where the plaintiff alleged that the denials of her nine MPIA requests were part of the defendant's "consistent policies of refusing to comply with the requirements of the" MPIA but did not "point to any other instances of the [c]ity's discriminatory conduct or otherwise allege that its discrimination extends beyond herself"); *see also Corbitt v. Balt. City Police Dep't*, RDB-20-3431, 2021 WL 3510579, at *7 (D. Md. Aug 10, 2021) (dismissing *Monell* claim where

the plaintiff alleged no facts in support of the practice and no other similar incidents). Generally, plaintiffs also "cannot rely upon scattershot accusations of unrelated constitutional violations" to establish a plausible claim for relief under *Monell*. *Carter*, 164 F.3d at 218–20 (affirming summary judgment for the city defendant when the plaintiff, suing for an unlawful arrest and search of her home, proffered evidence of excessive force and discouragement of citizen complaints because this evidence was not relevant to her specific claims of misconduct).

Unlike the sole plaintiff in *Robinson*, alleging nine requests as to herself, or the sole plaintiff in *Corbitt*, alleging no similar instances, this case presents three separate Plaintiffs alleging eighteen unfulfilled records requests. *See Robinson* 2021 WL 1222900, at *17; *Corbitt*, 2021 WL 3510579, at *7. Plaintiffs here have also presented facts revealing Defendants' history of restricting Plaintiffs' access to public records with delays, failures to respond, inflated costs, and attempts to narrow the scope of requests, as well as prior litigation between OJB and BPD. JA014 (referencing Circuit Court for Baltimore City, No. 24-C-20-001269, filed March 2, 2020).

Beyond the facts alleged as to constitutional violations committed against Plaintiffs themselves, Plaintiffs presented facts plausibly indicating that municipal Defendants engaged in viewpoint and content discrimination in fulfilling records requests in general based on the identity of the requester. JA022-026, JA272-280.

Exhibits 41 and 42 include data—provided by BPD itself in discovery in prior litigation with OJB—that details the requesters, dates, information sought, fees, and responses for approximately 580 records requests. JA024, JA269-278. The data also reveals that longer wait times and higher fees for records requests tend to correlate with media, citizen, and public defender requesters, while law enforcement and district/state attorneys tend to enjoy the lowest wait times and fees. JA024, JA272-278. Further, Exhibit 43 reveals discrepancies among 467 separate records requests for the production of Body Worn Camera ("BWC") Footage. JA279-280.

Plaintiffs also alleged multiple specific instances in which their requests were treated differently than those by requesters with a more neutral media presence or those for officers with a more limited misconduct history. Plaintiffs revealed a discrepancy in the treatment of OJB's 2022 request for Detective Deasel's personnel file, which is still pending, and the Ponds Law Firm's request for Officer Trojan's personnel file, which was fulfilled entirely within six months. JA023, JA261-262, JA272. In drawing all inferences in the light most favorable to Plaintiffs, these discrepancies can be attributed to differences in the content requested and the requesters; Officer Trojan has a more limited complaint history than Detective Deasel, and the Ponds Law Firm lacks any internet presence and did not have a history of disseminating information, while Defendants are aware that OJB would use the information to shed light on BPD misconduct. JA023-024, JA028. Plaintiffs

also revealed a discrepancy in the wait time for the summary of Officer Hill's personnel file; despite having already fulfilled an identical request for The Daily Record, a neutral media outlet, and the Office of the Public Defender in April 2022, Defendants did not release the summary to Soderberg until September 2022. JA024, JA263-266. And the same thing happened with Soderberg's request for the records of Officer Shelley, which was produced to the Office of the Public Defender in April 2022, while Soderberg's request was never answered. JA024, JA268. Together, the BPD data and specific instances of differential treatment in the timeliness of Defendants' responses to records requests demonstrate that it is possible for municipal Defendants to respond to records requests more quickly. But they did so selectively and instead created longer delays for critical requesters, evincing Plaintiffs' alleged pattern of discrimination based on the viewpoint of the requester and content of the request.

These facts indicate far more than a single instance of unconstitutional conduct—rather, they include eighteen pending, unfulfilled requests and an analysis of discrepancies among approximately 580 more. They reveal a widespread practice of unconstitutional viewpoint and content discrimination culminating in violations of Plaintiffs' First Amendment rights. *See Carter*, 164 F.3d at 219–20. As such, the District Court erred in granting a motion to dismiss at this stage—Plaintiffs' burden was not to *prove* a widespread and persistent practice but to state a plausible claim

for relief. *See Owens,* 767 F.3d at 403. If these facts are construed in the light most favorable to Plaintiffs, it cannot be that *no set of facts* could support Plaintiffs' claims. *Mylan Lab'ys, Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993).

ii. Municipal officials were aware of ongoing constitutional violations and did not take action to stop or correct them.

Defendants' actual and constructive knowledge of their practice of constitutional violations, when paired with their deliberate indifference, provides a basis for a custom sufficient to establish *Monell* liability. *See Owens*, 767 F.3d at 402 (quoting *Spell*, 824 F.2d at 1386–91). At the motion to dismiss stage, Plaintiffs need only plausibly allege that municipal Defendants were "aware of ongoing constitutional violations" and "did nothing to stop or correct those actions, thereby allowing an unconstitutional pattern to develop." *Smith v. Aita*, CCB-14-3487, 2016 WL 3693713, at *4 (D. Md. July 12, 2016); *Garcia*, 2013 WL 4539394, at *5 (denying motion to dismiss because plaintiff alleged that defendant was aware of violations "but chose to ignore such behavior"); *see also Owens,* 767 F.3d at 403 ("If (but only if) the duration and frequency of this conduct was widespread and recurrent, the [defendant's] failure to address it could qualify as deliberate indifference." (citations omitted) (internal quotation marks omitted)). Plaintiffs also need not prove that the individuals with actual or constructive knowledge of ongoing violations held "final policymaking authority" to survive a motion to dismiss; whether officials have final policymaking authority is a question of state and local

law appropriate for the summary judgment stage. *Chen*, 2009 WL 2487078, at *4 ("Following the discovery period, the Court may reevaluate [plaintiff's] claims"); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989) ("[W]hether a particular official has 'final policymaking authority' is a question of state law.").

Like the plaintiff in *Smith*, who survived a motion to dismiss by alleging that the city defendant "knew that its police officers . . . had a pattern of using excessive force, and . . . did nothing to stop the unconstitutional conduct," Plaintiffs' allegations in the instant matter provide a sufficient basis to deny a motion to dismiss. *Smith*, 2016 WL 3693713, at *4. BPD and the Law Department not only had actual knowledge of failures in the records request process because there are "recorded reports to" Defendants, including litigation, they also had constructive knowledge of these shortcomings based on "the widespread extent of the practices, general knowledge of their existence, manifest opportunities and official duty of responsible policymakers to be informed, or combinations of these." *Spell*, 824 F.2d at 1387, 1391.

Plaintiffs have offered ample facts tending to support their allegations that BPD, the Law Department, and City officials were actually aware of frequent violations and did nothing to address them. *See id.*, 824 F.2d at 1387; *see, e.g.*, JA013. Plaintiffs communicated concerns about ongoing violations explicitly with the Law Department, including Walden and Salsbury, on multiple occasions. JA010-

11, JA013, JA020-021, JA026-027, JA032-033. Walden was copied on all communications regarding the Deasel personnel file, and after OJB repeatedly flagged Defendants' "pattern of noncompliance," specifically the lack of timely disclosure and inflated costs, OJB directly asked Walden, "[B]eing aware of this issue, can you please change this practice?" JA072. When Walden did not respond, OJB stated, "[w]e are at a loss as your office has a chronic disregard for the law," and "[w]e are unsure how to proceed or what options we have to get your office to perform its basic duties." JA072. Again, Walden did not respond nor address the underlying issue, and OJB subsequently forwarded all communications to Salsbury. JA072-073.

Walden also directly communicated with OJB regarding the fee waiver for MPIA 20-0063. JA222-233. In the course of their correspondence, after Walden declined to respond to OJB when they flagged Defendants' "egregious violations" and "bad faith toward transparency," OJB stated:

> In the many PIA requests we have made, BPD has never gone without violation, be it timeliness of disclosure or outright egregious use of exemptions. In the instance before us, you claim that records of lesser seriousness are accepted as being in the public interest when they conveniently are behind a fee wall of a $600k contractor (which is in and of itself littered with issues). But when records that are in the same category, and focused on greater seriousness and police criminal conduct, but happen to not have that third-party-contractor fee wall tactic, you somehow do not constitute the records to be of a public interest.

JA226-227. Walden finally responded to OJB's concerns but dismissed them as "hyperbole." JA227. In response, OJB clarified that they "have never engaged BPD in a PIA request without BPD violation," that OJB has been "over-charged . . . by over one-million dollars" and "forced to litigate a request that directly mirrored language of Maryland caselaw," and that they "have gotten no response to PIA requests whatsoever." JA229. OJB also stated:

> Most community organizations and requesters lack the resources to enforce the PIA. And when enforced, the PIA lacks much in the way of teeth. So, BPD has little reason to act in accordance with the law and we have seen BPD simply wait to be challenged. BPD knows worst case scenario they will have to turn over what they would have had to turn over to begin with, but much delayed, and gamble on attorney's fees (and attorney's fees are not as advantageous to us as better utility of our time). The law department has observed this and has also facilitated BPD's violation of the law. I understand this is a strong claim, but we have been watching and engaging for years . . . . For instance, denying a fee waiver which leaves a fee wall to transparency over records of manifest public interest is a patent transgression.

JA229. Walden again did not respond, and after another email from OJB noting Defendants' violations, Walden finally responded, stating only "I have relayed your renewed request for a fee waiver in MPIA 20-0063 to BPD, which has refreshed its analysis and denied the request." JA230. OJB also emailed Walden directly to address "a BPD policy" of inflating costs for police reports, an issue OJB identified as a "long running problem." JA121.

As stated above, Salsbury was copied on the email correspondence regarding Detective Deasel's personnel file. JA073. Despite OJB's frequent communication

copying Salsbury regarding the deficiencies in the summary produced, delays, and inflated costs, JA068-076, JA090-103, JA123-146, Salsbury has done "nothing to stop or correct those actions, thereby allowing an unconstitutional pattern to develop," and Defendants have yet to meaningfully fulfill the request for the Deasel file. *Smith*, 2016 WL 3693713, at *4; JA016-017. Both Walden and Salsbury were also copied on various other communications in which OJB explicitly flagged both specific violations and a larger pattern of Defendants' missing deadlines and neglecting to respond to Plaintiffs' communications. JA094-103, JA180-193, JA222-233.

Further, Plaintiffs have offered extensive facts indicating that municipal Defendants are engaged in a persistent and widespread practice of constitutional violations. The eighteen unfulfilled requests, Defendants' delays, failures to respond, inflated costs, and attempts to narrow the scope of requests; the previous litigation between OJB and BPD; and the data indicating discrepancies in responses to records requests generally reveal a practice so widespread that BPD, Law Department, and City officials with policymaking authority—including Lisa Walden, Stephen Salsbury, Michael Harrison, and James Shea—must have been aware of the ongoing constitutional violations. *Praprotnik*, 485 U.S. at 130 (Plaintiffs can establish a plausible claim for relief by alleging a widespread practice arising from the conduct of lower-ranking officials "if a series of decisions by a

subordinate official manifested a 'custom or usage' of which the supervisor must have been aware."); JA010-011, JA013.

Despite the sheer magnitude of the violations and repeat communications from Plaintiffs clearly identifying this pattern of violations, delays, inflated costs, and failures to respond have persisted. Municipal Defendants' deliberate indifference as to these constitutional violations is only further evinced by the fact that Defendants still have not fulfilled the entirety of Plaintiffs' eighteen requests.

At the motion to dismiss stage, it is enough that Plaintiffs alleged municipal Defendants were "aware of ongoing constitutional violations" and "did nothing to stop or correct those actions." *Smith*, 2016 WL 3693713, at *4. Not only was the practice of violations so widespread that BPD, Law Department, and City officials with policymaking authority must have been on notice of the ongoing constitutional violations, Plaintiffs repeatedly copied municipal officials onto communications alerting them of the persistent violations. Plaintiffs also provided sufficient factual allegations that Defendants failed to meaningfully address the violations. Thus, the District Court erred in finding that Plaintiffs failed to assert municipal officers had actual or constructive knowledge of the unconstitutional conduct at issue.

B. Plaintiffs have identified an "affirmative link" between the denial and obstruction of Plaintiffs' requests and municipal Defendants' policy or custom sufficient to survive a motion to dismiss.

In "alleg[ing] that the municipality was aware of ongoing constitutional violations by the municipality's officers and that the municipality's failure to discipline its officers allowed a custom, policy, or practice of unconstitutional violations to develop," Plaintiffs have pled sufficient facts to meet *Monell*'s causation requirement on a motion to dismiss. *Jones*, 2017 WL 4122795, at *10 ("When reviewing the Complaint under Rule 12(b)(6), however, a plaintiff 'need not "plead the multiple incidents of constitutional violations" that may be necessary at later stages' to allege causation plausibly." (citation omitted)); *see e.g.*, *McDowell*, 2018 WL 3756727, at *5; *Garcia*, 2013 WL 4539394, at *5.

In *McDowell*, the district court denied municipal defendant's motion to dismiss because the plaintiff alleged that "BPD was aware of its officers' unconstitutional behavior and that its failure to discipline the offending officers condoned this custom." 2018 WL 3756727, at *5. Similarly, the district court in *Garcia* found it "enough that [the plaintiff] ha[d] alleged that [the municipal defendant] was aware of ongoing constitutional violations by [its] officers and that the [municipal defendant's] failure to supervise and discipline its officers allowed a pattern and/or practice of unconstitutional actions to develop" and allowed the claim to proceed to discovery. 2013 WL 4539394, at *5.

Like the claimants in *McDowell* and *Garcia*, Plaintiffs have plausibly alleged that municipal Defendants were "aware of ongoing constitutional violations" yet failed to address those ongoing violations. 2018 WL 3756727, at *5; 2013 WL 4539394, at *5. The practice of constitutional violations, reflected in Plaintiffs' eighteen, unfulfilled records requests and discrepancies among approximately 580 requests is so widespread that BPD, Law Department, and City officials with policymaking authority must have been aware of them, and Plaintiffs repeatedly copied municipal officials onto communications alerting them of the ongoing violations, all without any meaningful response or change in behavior on the part of Defendants. *See supra* III.A.ii. Though not required as early as a motion to dismiss, Plaintiffs have also plausibly alleged that the custom of allowing delays, failing to respond, inflating costs, narrowing requests beyond their original scope, and failing to fulfill records requests on the basis of a requesters identity or the information sought ultimately made the viewpoint and content discrimination suffered by Plaintiffs "reasonably probable." *Spell*, 824 F.2d at 1391. Because of these allegations, the District Court erred in granting a motion to dismiss Plaintiffs' *Monell* claims against Defendants.

CONCLUSION

The District Court erred as a matter of law in dismissing Plaintiffs' claims, making premature factual and legal conclusions that contravened this Court's standards for reviewing a motion to dismiss. Accordingly, the judgment of the District Court should be reversed, and Plaintiffs' claims should be reinstated.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants hereby respectfully request oral argument before this Court because this appeal raises serious constitutional questions regarding the pleading standards for First Amendment claims as well as municipal liability. The factual and legal issues presented are sufficiently fact intensive and complex such that oral argument would aid this Court in its deliberation. If oral argument is granted, Plaintiffs-Appellants intend to request leave of Court to permit a student advocate to deliver argument.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a) because this brief contains fewer than 13,000 words, excluding the parts of the brief exempted by Rule 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: March 25, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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