NO. 23-2293

In The United States Court Of Appeals For The Fourth Circuit

OPEN JUSTICE BALTIMORE; ALISSA FIGUEROA; BRANDON SODERBERG,
Plaintiffs – Appellants,

v.

BALTIMORE CITY LAW DEPARTMENT; JAMES SHEA, in his official capacity as City Solicitor; STEPHEN SALSBURY, in his official capacity as Chief of Staff to the City Solicitor; LISA WALDEN, in her official capacity as Chief Legal Counsel; BALTIMORE POLICE DEPARTMENT; MICHAEL HARRISON, in his official capacity as Police Commissioner; MAYOR AND CITY COUNCIL OF BALTIMORE,
Defendants – Appellees,

NATIONAL POLICE ACCOUNTABILITY PROJECT,
Amicus Supporting Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AT BALTIMORE

BRIEF OF APPELLEES

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UNITED S ATES COUR OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-2293 Caption: Open Justice Baltimore et al. v. Baltimore City Law Department et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Baltimore City Law Department, James Shea, Stephen Salsbury, Lisa Walden, Baltimore Police
(name of party/amicus)

Department, Michael Harrison, Mayor and City Council of Baltimore

who is appellees, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

USCA4 Appeal: 23-2293 Doc: 9 Filed: 02/14/2024 Pg: 2 of 2

4. Is there any other publicly held corporation or other publicly held e tity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Sig ature: /s/ Michael Redmond Date: 2/14/24

Counsel for: Appellees

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TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES iii

JURISDICTIONAL STATEMENT 1

STATEMENT OF ISSUES 2

STATEMENT OF CASE 3

I. Factual Background 3

II. Procedural History 12

SUMMARY OF ARGUMENT 14

ARGUMENT 15

Standard of Review 15

Discussion 16

I. Background 16

II. The district court did not err in dismissing Appellants' First Amendment claims against the Individual Defendants and the Law Department 19

A. Appellants' claims against the Individual Defendants are duplicative of their claims against BPD and the City 19

B. The Law Department is not an entity that can be sued 20

III. BPD and the City's alleged PIA violations are not violations of the Constitution 21

IV. The district court did not err in dismissing Appellants' First Amendment viewpoint and content discrimination claims against BPD and the City 26

A. BPD and the City did not engage in viewpoint and content discrimination by denying access to information about BPD's misconduct 27

B. BPD and the City did not restrict access to public records based on the opinions or perspectives of the Appellants 30

C. There is an obvious alternative, nondiscriminatory explanation for BPD and the City's response to each of Appellants' requests 33

V. The district court did not err in dismissing Appellants' First Amendment retaliation claim against BPD and the City 38

VI. The district court did not err in dismissing Appellants' claim of municipal liability 45

VII. Appellants do not need discovery to properly plead their case 51

CONCLUSION 53

CERTIFICATE OF COMPLIANCE 54

TABLE OF AUTHORITIES

Page(s):

Cases:

ACA Fin. Guar. Corp. v. City of Buena Vista, Virginia,
917 F.3d 206 (4th Cir. 2019) 15, 16

Action Committee for Transit, Inc. v. Town of Chevy Chase,
229 Md. App. 540 (2016) 22

Ashcroft v. Iqbal,
556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) ....*passim*

Baltimore Police Dep't v. Open Just. Baltimore,
485 Md. 605 (2023) 7, 12, 16, 17

Bd. of Comm'rs of Bryan Cty. v. Brown,
520 U.S. 397 (1997)....................46, 47

Bell Atlantic Corp. v. Twombly,
550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) ....*passim*

Borkowski v. Baltimore County, Maryland,
492 F. Supp. 3d 454 (4th Cir. 2020)....................40

Carter v. Morris,
164 F.3d 215 (4th Cir. 1999) 46, 47, 49

Chambers v. N. Carolina Dep't of Justice,
66 F.4th 139 (4th Cir. 2023) 15

Citizens United v. FEC,
558 U.S. 310 (2010)....................27

City of Canton v. Harris,
489 U.S. 378 (1989).................... 46-47, 50

Connick v. Thompson,
563 U.S. 51 (2011)....................45, 46, 47, 51

Constantine v. Rectors & Visitors of George Mason Univ.,
411 F.3d 474 (4th Cir. 2005) 39, 41

Ctr. for Nat. Sec. Stud. v. U.S. Dep't of Just.,
331 F.3d 918 (D.C. Cir. 2003)...21, 22, 25

Desper v. Clarke,
1 F.4th 236 (4th Cir. 2021) 34

Exner v. FBI,
542 F.2d 1121 (9th Cir. 1976) 18

Fusaro v. Cogan,
930 F.3d 241 (4th Cir. 2019) 23, 24, 25

Glass v. Anne Arundel County,
453 Md. 201 (2017) 17, 41

Glenn v. Maryland Dep't of Health and Mental Hygiene,
446 Md. 378 (2016) 16, 32

Grayson v. Peed,
195 F.3d 692 (4th Cir. 1999) 26

Houchins v. KQED, Inc.,
438 U.S. 1 (1978)...21, 23, 25, 26

Huggins v. Prince George's County,
683 F.3d 525 (4th Cir. 2012) 20

Kentucky v. Graham,
473 U.S. 159 (1985)...20

Los Angeles Police Dep't. v. United Reporting Pub. Corp.,
528 U.S. 32 (1999)...25

Love-Lane v. Martin,
355 F.3d 766 (4th Cir. 2004) 19, 20

Lytle v. Doyle,
326 F.3d 463 (4th Cir. 2003) 46, 48

MacPhail v. Comptroller of Maryland,
178 Md. App. 115 (2008) 16, 21

Martin v. Duffy,
858 F.3d. 239 (4th Cir. 2017) 40

McCleary-Evans v. Maryland Dep't of Transp., State Highway Admin.,
780 F.3d 582 (4th Cir. 2015) 34, 35, 37

Milligan v. City of Newport News,
743 F.2d 227 (4th Cir. 1984) 45, 46

Monell v. Department of Soc. Svcs.,
436 U.S. 658 (1978).................... *passim*

Open America v. Watergate Special Prosecution Force,
547 F.2d 605 (D.C. Cir. 1976)....................18, 33

Open Justice Baltimore v. Baltimore Police Department, et al.,
Circuit Court for Baltimore City, Case 24-C-21-005650
(filed December 15, 2021) 7-8

Open Justice Baltimore v. The City of Baltimore, et al.,
Circuit Court for Baltimore City, Case 24-C-21-003745
(filed August 30, 2021)....................8

Owens v. Baltimore City State's Att'ys Off.,
767 F.3d 379 (4th Cir. 2014) 47

Pink v. Lester,
52 F.3d 73 (4th Cir. 1995) 25

Planned Parenthood of South Carolina, Inc. v. Rose,
361 F.3d 786 (4th Cir. 2004) 27

R.A.V. v. City of St. Paul, Minn.,
505 U.S. 377 (1992)....................26

Raub v. Campbell,
785 F.3d 876 (4th Cir. 2015) 38

Reed v. Town of Gilbert, Ariz.,
576 U.S. 155 (2015)..27

Riddick v. Sch. Bd. Of the City of Portsmouth,
238 F.3d 522 (4th Cir. 2000) 49, 50

Rosenberger v. Rector & Visitors of Univ. of Virginia,
515 U.S. 819 (1995)... 26-27

Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,
502 U.S. 105 (1991)..26

Spell v. McDaniel,
824 F.2d 1380 (4th Cir. 1987) 45, 46

Suarez Corp. Industries v. McGraw,
202 F.3d 676 (4th Cir. 2000) 38, 40

Tobey v. Jones,
706 F.3d 379 (4th Cir. 2013) 44

Upman v. Howard County Police Dep't,
2010 U.S. Dist. LEXIS 25007 (D. Md. Mar. 17, 2010) 20

Ward v. Rock Against Racism,
491 U.S. 781 (1989)..27

Weidman v. Exxon Mobil Corp.,
776 F.3d 214 (4th Cir. 2015) 15

Zemel v. Rusk,
381 U.S. 1 (1965)...24

Statutes:

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

42 U.S.C. § 1983 ....*passim*

BALTIMORE CITY CHARTER, art. I § 1 20

BALTIMORE CITY CODE, art. 1 § 10-1 6

MD. CODE, GEN. PROV., § 4-1A-05 18

MD. CODE, GEN. PROV., § 4-1B-04 18

MD. CODE, GEN. PROV., § 4-101, *et seq*. .... *passim*

MD. CODE, GEN. PROV., § 4-201 16

MD. CODE, GEN. PROV., § 4-202(a) 6

MD. CODE, GEN. PROV., § 4-206(e) 17, 41

MD. CODE, GEN. PROV., § 4-311 9

MD. CODE, GEN. PROV., § 4-351 9

MD. CODE, GEN. PROV., § 4-362 18

Constitutional Provisions:

U.S. Const. amend. I .... *passim*

U.S. Const. amend. IV 44

U.S. Const. amend. XIV 13

Md. Decl. Rts. art. 24 13

Md. Decl. Rts. art. 40 13

Rules:

Fed. R. App. P. 28(a)(8) 19

Fed. R. Civ. P. 8 .... 15, 16

Fed. R. Civ. P. 8(a) 15

Fed. R. Civ. P. 12(b)(6) 15, 35

MD R. ATTORNEYS 19-301.2 49

Other Authorities:

Attorney General of Maryland,
Maryland Public Information Act Manual,
(18th ed., Oct. 2023) 9, 16, 17, 21

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Policy 710, Level 3 Use of Force Investigations /
Special Investigation Response Team (SIRT),
https://www.baltimorepolice.org/transparency/bpd-policies
/710-level-3-use-force-investigationsspecial-investigation-
response-team (last visited May 20, 2024) 5

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https://www.baltimorepolice.org/transparency/bpd-policies/na-
pib-internal-operations-training-manual (last visited May 20, 2024) 4

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over Open Justice Baltimore ("OJB"), Brandon Soderberg ("Soderberg"), and Alissa Figueroa's ("Figueroa") (collectively, "Appellants") claims of federal constitutional violations pursuant to 28 U.S.C. § 1331. On August 3, 2023, the district court granted, in part, motions to dismiss filed by Michael Harrison ("Harrison"), James Shea ("Shea"), Lisa Walden ("Walden"), Stephen Salsbury ("Salsbury") (collectively, "Individual Appellees"), the Baltimore City Law Department ("Law Department"), the Baltimore Police Department ("BPD"), and the Mayor and City Council of Baltimore ("City") (together with Individual Appellees, "Appellees"). JA694. On November 17, 2023, the district court denied Appellants' motion to alter or amend judgment. JA750. Appellants noted their appeal on December 13, 2023. JA751–753. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES[1]

Issue One – Whether the district court properly dismissed Appellants' First Amendment claims for failure to state a claim upon which relief may be granted.

Issue Two – Whether the district court properly found that Appellants did not plead a First Amendment viewpoint or content-based discrimination claim.

Issue Three – Whether the district court properly found that Appellants did not plead a First Amendment retaliation claim.

Issue Four – Whether the district court properly found that Appellants did not plead a 42 U.S.C. § 1983 municipal liability claim.

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[1] Appellants' appeal is limited to issues surrounding their First Amendment claims. Appellants Br. 2. In its Memorandum Opinion, the district court held Appellants were not entitled to relief concerning six of their PIA requests because Appellants impermissibly split their claims. JA670. Appellants did not appeal or otherwise challenge the district court's holding on the issue of claim splitting. Appellants Br. 2. The district court also dismissed the claims against the Individual Appellees and the Law Department. JA666–668. Appellants did not appeal or otherwise challenge the district court's dismissal of those parties. Appellants Br. 2.

STATEMENT OF CASE

I. Factual Background

This case involves a series of requests from a community organization and journalists to inspect BPD and the City's records under the Maryland Public Information Act ("PIA"). JA012–037. However, "it is somewhat difficult to summarize the content of the various requests" given their "scope and complexity." JA643. In fact, many of Appellants' PIA requests more closely resemble overly broad and burdensome civil discovery requests than the typical, straightforward application to inspect a government record. *E.g.* JA647 (highlighting that one request was over three pages in length and devoted more than a page to the definition of the term "documents"). Appellants' barrage of PIA requests and lawsuits, both involving overlapping issues and multiple actors, created a chaotic factual background that seems beyond even their own grasp. Appellants Br. 7. ("A comprehensive accounting of the underlying facts would exhaust the page limitations of this brief, and the Amended Complaint and Exhibits provide greater detail."). In lockstep with their litigation strategy before the trial court, Appellants unload a scattershot pleading totaling hundreds of pages, and then ask the Court to find the First Amendment violations for them. *Id.* Contrary to Appellants' belief, though, a comprehensive accounting of the underlying facts is paramount because it demonstrates that they did not allege a constitutional violation beyond their own baseless conjecture.

Appellants' amended complaint concerns eighteen PIA requests made between December 2019 and June 1, 2022. Appellants Br. 3; JA012–037. Appellants broadly characterize their requests as seeking to inspect records regarding police misconduct. *Id*. And, indeed, most of their requests sought records maintained by or involving BPD's Public Integrity Bureau ("PIB"), which is tasked with investigating allegations of police misconduct.[2] JA218. Despite Appellants' characterization, however, they did not limit their requests to instances in which an officer was found to have violated BPD policy. *See infra* Statement of Case § I(A)–(C). Rather, Appellants sought several years' worth of investigatory records for every instance an officer was alleged to have not met any aspect of agency protocol. *Id*. Appellants also sought a roster of BPD employees, which cannot reasonably be characterized as pertaining to police misconduct. *See infra* Statement of Case § I(A).

Of Appellants' eighteen requests, OJB alleges they submitted thirteen (13) requests to BPD and one (1) request to the City (designated here as Requests 1-14). JA014–021. Figueroa alleges she submitted two (2) requests to BPD (Requests 15-16). JA021–022. Soderberg also alleges he submitted two (2) requests to BPD

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[2] *See* Public Integrity Bureau, Internal Operations and Training Manual, https://www.baltimorepolice.org/transparency/bpd-policies/na-pib-internal-operations-training-manual (last visited May 20, 2024).

(Requests 17-18). JA021. For clarity, abridged versions of Plaintiffs' PIA requests are summarized, chronologically, as follows:

A. *OJB's Requests (Requests 1-14)*[3]

1. December 19, 2019 – the entire file and all related documents pertaining to administrative and civilian complaints against members of the BPD that BPD had closed between January 1, 2019, and December 19, 2019 ("Request 1"). JA014.
2. December 20, 2019 – all files related to investigations of the Special Investigation Response Team ("SIRT")[4] that were closed between July 1, 2018, and December 19, 2019 ("Request 2"). JA016; JA105–108.
3. January 10, 2020 – records pertaining to citizen and administrative complaints against BPD officers that have been open for over twelve months ("Request 3"). JA016; JA052–055.
4. January 10, 2020 – all files related to SIRT investigations open for more than twelve months ("Request 4"). JA016; JA110–113.

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[3] The district court held that OJB impermissibly split their claims with respect to Requests 1 through 4, 6, and 7 because those requests are the subject of previous or concurrent state court litigation. JA670.

[4] SIRT is an investigative entity of PIB and is tasked with investigating instances of use of force. *See* Policy 710, Level 3 Use of Force Investigations / Special Investigation Response Team (SIRT), https://www.baltimorepolice.org/transparency/bpd-policies/710-level-3-use-force-investigationsspecial-investigation-response-team (last visited May 20, 2024).

5. February 3, 2020 – records of investigations of potential or alleged criminal conduct of Officer Robert Dohony since at least March 28, 2017 (“Request 5”). JA016; JA115–119.
6. December 14, 2020 – a list of all active employees of the BPD (“Request 6”). JA017; JA159–160.
7. October 1, 2021 – all files related to officer misconduct complaints closed between July 1, 2020, and June 30, 2021 (“Request 7”). JA014.
8. February 8, 2022 – the “entirety of disclosable material in Det. Jame [sic] Deasel’s personnel file, everything available including all investigations and conclusions” (“Request 8”). JA016–017; JA069.
9. February 8, 2022 – all police reports concerning arrests involving BPD Det. James Deasel (“Request 9”). JA016–017; JA121–122.
10. February 14, 2022 – the names of officers matching each case number on a list of BPD’s 2019 misconduct investigations (“Request 10”). JA015.
11. February 21, 2022 – all Civilian Review Board (“CRB”) investigations “closed in calendar year 2021, regardless of finding” (“Request 11”). JA018; JA178.[5]

[5] OJB submitted Request 11 to the CRB, an agency of the City. A request for public information must be submitted to the custodian of those public records. MD. CODE, GEN. PROV., § 4-202(a). Each governmental entity, including each Baltimore City agency, is the custodian of its own records. *See* BALTIMORE CITY CODE, art. 1 § 10-1. At the time Appellants filed this lawsuit, BPD was not an agency of the City, but an agency of the state of Maryland. JA304.

12. March 14, 2022 – all files related to officer misconduct complaints closed between July 1, 2021, and December 31, 2021 ("Request 12"). JA014; JA057–060.
13. March 31, 2022 – list of names of officers associated with misconduct investigations from 2020-2021 ("Request 13"). JA015.
14. May 26, 2022 – the full personnel files of 197 officers on the State's Attorney for Baltimore City's list of police officers with issues of integrity ("Request 14"). JA018; JA192.

OJB's fourteen requests can be distilled into three categories: (1) requests that are subject to prior or concurrent state court litigation; (2) requests that are not the subject of state court litigation, but involve the same dispute with respect to BPD's application of the PIA's fee waiver provision; and (3) requests that BPD and the City either would produce at no cost or could not legally produce at the time OJB made its request.

To that end, Requests 1 through 4 are the subject of a recent case before the Supreme Court of Maryland involving requests for misconduct investigatory records and BPD's application of the PIA's fee waiver statute. *See Baltimore Police Dep't v. Open Just. Baltimore*, 485 Md. 605 (2023); JA669. The case is currently on remand to the Circuit Court for Baltimore City. *Id*. Request 7 is the subject of *Open Justice Baltimore v. Baltimore Police Department, et al.*, Circuit Court for Baltimore

City, Case 24-C-21-005650, filed December 15, 2021, and concerns the PIA's fee waiver statute as applied to misconduct investigatory records. JA669–770. Request 6 was the subject of *Open Justice Baltimore v. The City of Baltimore, et al.*, Circuit Court for Baltimore City, Case 24-C-21-003745, filed August 30, 2021. JA669. BPD provided OJB the requested list of employees to resolve that litigation. JA230.

Requests 8, 12, and 14 are requests for misconduct investigatory records like Requests 1 through 4 and 7. *See supra* Statement of Case § I(A). Although OJB did not file separate state court lawsuits involving Requests 8, 12, or 14, the requests sought to inspect a considerable scope of misconduct investigatory records and involved the same dispute over the PIA's fee waiver provision. *Id.* Appellants did not append BPD's response to Request 14 to their amended complaint. But Appellants' exhibits show that, with Respect to Requests 7, 8, and 12, BPD granted OJB's requests to inspect the records, and granted OJB a partial fee waiver for all costs incurred by BPD and City employees. JA065; JA150; JA154; JA207. The only part of the fee that BPD did not waive was the exact amount estimated to be charged by the third-party vendor that BPD needed to hire to deal with the scope of the requests. *Id.* OJB never remitted payment for these records.

BPD produced records related to Requests 9 and 10 at no charge. JA015; JA017. The City also agreed to waive costs associated with producing all records

responsive to Request 11. JA190. Request 13 sought the same records as Request 10, but for a different date range. *See supra* Statement of Case §§ I(A)(11), (13). OJB alleges that BPD did not produce records related to Request 13; however, Request 13 sought the same type of records that BPD had already produced to OJB and BPD was actively discussing those requests with OJB when OJB filed this lawsuit. JA420. Request 5 predated the passage of the Maryland Police Accountability Act of 2021 ("Anton's Law")[6] and, as a result, the requested records were personnel records exempt from public disclosure at the time of the request. *See* n.6.

BPD also produced records of SIRT use of force investigations to OJB. JA229. Sometime around June 2020, OJB remitted payment of $21,880.00 to BPD to produce all records related to forty-eight SIRT investigations. JA020; JA229; JA339. BPD produced the requested records and returned to OJB an overpayment of approximately $8,000.00 when BPD's estimated cost exceeded the cost of production. JA229; JA339.

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[6] On October 1, 2021, the Maryland General Assembly passed Anton's Law, which, among other things, removed investigatory records concerning police misconduct from the ambit of the personnel record exemption, thus making them available to public inspection for the first time. MD. CODE, GEN. PROV., § 4-311. Investigations of police misconduct, except investigations of "technical infractions," are now treated as investigatory records, subject to MD. CODE, GEN. PROV., § 4-351. *See* Attorney General of Maryland, Maryland Public Information Act Manual, 3-12 (18th ed., Oct. 2023).

B. Figueroa's Requests (Requests 15-16)

15. April 30, 2021 – BPD's investigatory files and related records regarding the in-custody death of Tyrone West ("Request 15"). JA021; JA240–241.
16. October 1, 2021 – all records relating to misconduct investigations for ten police officers ("Request 16"). JA022; JA243.

BPD fulfilled Figueroa's requests when she either paid for them or accepted a less burdensome alternative. For Request 15, BPD maintained an open dialogue with Figueroa's assistant and, after Figueroa remitted payment of $400.00, BPD scheduled a hand delivery of the requested records. JA22; JA246–248. Request 16 sought misconduct investigatory records like OJB's Requests 1 through 4, 7, 8, 12, and 14. JA571–572. Like OJB, BPD granted Figueroa's request to inspect the records and granted a partial fee waiver for all costs incurred by BPD and City employees. *Id*. Once again, the only part of the fee that BPD did not waive was the exact amount estimated to be charged by the third-party vendor that BPD needed to engage to deal with the scope of the request. *Id*. BPD also offered summary information to Figueroa that would either fulfill the purpose of her request or help her to narrow the scope of her request. *Id*. Figueroa agreed to accept the summaries and BPD produced them to her at no cost. JA244. Figueroa did not utilize the PIA's enforcement mechanisms or otherwise express dissatisfaction with the summaries until she filed this lawsuit. JA021–022.

C. Soderberg's Requests (Requests 17-18)

17. May 5, 2022 – misconduct investigation records involving Officer Melvin Hill ("Request 17"). JA021; JA264.

18. June 1, 2022 – misconduct investigation records involving Officer Luke Shelley ("Request 18"). JA021; JA268.

Like OJB's Requests 1 through 4, 7, 8, 12, 14, and Figueroa's Request 16, Soderberg's Requests 17 and 18 also sought the inspection of misconduct investigatory records. JA264; JA268. Soderberg did not request a fee waiver for either request. *Id*. Instead, he asked that BPD inform him of the total charges prior to production. *Id*. BPD began the iterative process by informing Soderberg that the full scope of his request was likely to involve the expenditure of substantial resources, and offered summary information at little or no cost that would either fulfill the purpose of his request or help him to narrow the scope. JA237; JA565. BPD sent Soderberg the summary information for Request 17, and Soderberg filed this lawsuit less than thirty-days after making Request 18. JA266; JA002.

In sum, BPD and the City agreed to produce records related to narrow requests at no charge, and produced the records when Appellants actually paid for the cost of producing them. For broader requests, BPD provided less burdensome alternatives free of charge with the goal of either fulfilling the request or helping Appellants

narrow their request to reduce their expenses. In instances in which Appellants did not wish to narrow the scope of their requests, BPD granted a partial fee waiver and the only part of the fee that BPD did not waive was the exact amount estimated to be charged by a necessary third-party vendor to BPD.[7] The only request BPD denied was mandated by the PIA.

The gravamen of Appellants' amended complaint is that BPD and the City violated the PIA with respect to each of their requests by either not providing the requested records within the thirty-day statutory time limit or by granting a partial fee waiver. As a result, Appellants filed this lawsuit seeking an order requiring Appellees to provide the requested records, including records to be requested in the future, within the PIA's timeframes at no cost. JA043.

II. Procedural History

Appellants commenced this action on June 30, 2022, by filing suit in the Circuit Court for Baltimore City. JA002. Appellants filed their lawsuit against the entities that processed their PIA requests – BPD and the City – and their attorneys, Shea, Salsbury, Walden and the entire Law Department, along with Harrison, BPD's

[7] For Requests 1 through 4, BPD originally denied OJB's fee waiver request. *See Baltimore Police Dep't v. Open Just. Baltimore*, 485 Md. 605 (2023). However, the case is currently on remand to the Circuit Court for Baltimore City for BPD to consider the public interest factors outlined by the Supreme Court of Maryland and to either grant some, none, or all the estimated fee. *Id.*

now-former police commissioner. JA007–008. The original complaint alleged violations of the First and Fourteenth Amendments to the Constitution of the United States and, coextensively, Articles 24 and 40 of the Maryland Declaration of Rights. JA706. Appellees removed the case to the district court on August 2, 2022, because, at that point, the complaint alleged only constitutional causes of action. *Id*. After Appellees filed their initial motions to dismiss, Appellants amended their complaint to remove the due process claims and added state law claims under the PIA. *Id*. Appellees then filed motions to dismiss the amended complaint. JA284–285, JA309–311.

On August 10, 2023, the district court dismissed all of Appellants' claims against the Individual Defendants and the Law Department, and dismissed Appellants' First Amendment claims against all Appellees. JA694. The district court also held that Appellants were not entitled to any relief concerning Requests 1 through 4, 6, and 7. JA670. The district court declined to exercise supplemental jurisdiction over the remaining PIA matters and state constitutional claims and remanded the case to the Circuit Court for Baltimore City. JA694. On November 17, 2023, the district court denied Appellants' motion to alter or amend its decision. JA750. This appeal followed on December 13, 2023. JA751–753.

SUMMARY OF ARGUMENT

This is a PIA lawsuit against BPD and the City masquerading as a First Amendment case. Appellants sought a massive scope of records during a time when the law concerning those records was evolving. When "[Appellants'] numerous and broad requests exceeded [BPD and the City's] capacity to respond as quickly and inexpensively as [Appellants] demanded," Appellants launched a flurry of overlapping lawsuits demanding that Appellees review and produce all the requested records for free. JA741. Dissatisfied with the PIA's enforcement mechanisms, Appellants tried a new approach: claiming that the explicable delays, offers to produce less burdensome alternatives, and partial fee waivers were tantamount to government policy condoning First Amendment violations. JA229 ("…the PIA lacks much in the way of teeth."). By dismissing Appellants' First Amendment claims, dismissing all claims against improper parties, and remanding the matter to the state court, the district court properly found that this case should be resolved under the PIA.

ARGUMENT

Standard of Review

This Court "review[s] a grant of a motion to dismiss for failure to state a claim de novo." *Chambers v. N. Carolina Dep't of Justice*, 66 F.4th 139, 141 (4th Cir. 2023) (citing *Weidman v. Exxon Mobil Corp.*, 776 F.3d 214, 219 (4th Cir. 2015)). In so doing, the Court follows the well-settled standard for considering a motion to dismiss under Rule 12(b)(6). *ACA Fin. Guar. Corp. v. City of Buena Vista, Virginia*, 917 F.3d 206, 211 (4th Cir. 2019).

> A motion to dismiss pursuant to Rule 12(b)(6) tests the sufficiency of the claims pled in a complaint. To sufficiently plead a claim, the Federal Rules of Civil Procedure require that "[a] pleading that states a claim for relief must contain ... a short and plain statement of the claim showing that the pleader is entitled to relief ...." Fed. R. Civ. P. 8(a). This pleading standard does not require detailed factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). However, "it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id*. Labels, conclusions, recitation of a claim's elements, and naked assertions devoid of further factual enhancement will not suffice to meet the Rule 8 pleading standard. *Id*.
>
> To meet the Rule 8 standard and survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id*. (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). To contain sufficient factual matter to make a claim plausible, the factual content must "allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*.
>
> While we must accept the factual allegations in the complaint as true, we need not accept a complaint's legal conclusions. *Id*. Thus, simply reciting the cause of actions' elements and supporting them by

> conclusory statements does not meet the required standard. *Id*. The Supreme Court noted that while Rule 8 departed from the hypertechnical code-pleading requirement of a prior era, it did not "unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id*. at 678–679, 129 S. Ct. 1937.

ACA Fin. Guar. Corp., 917 F.3d at 211–12.

Discussion

I. Background

The PIA is Maryland's analog to the Freedom of Information Act ("FOIA"). MD. CODE, GEN. PROV., § 4-101, *et seq.*; Attorney General of Maryland, Maryland Public Information Act Manual, 1-2 (18th ed., Oct. 2023); *MacPhail v. Comptroller of Maryland*, 178 Md. App. 115, 119 (2008). The Maryland General Assembly enacted the PIA in 1970 to permit public inspection of records of the state government and its political subdivisions. *Glenn v. Maryland Dep't of Health and Mental Hygiene*, 446 Md. 378, 384 (2016). However, the Maryland legislature did not grant the public unfettered access to government records. *Id*. at 386; MD. CODE, GEN. PROV., § 4-201. Rather, the PIA mandates that the government's record custodians review each record, on a case-by-case basis, prior to public dissemination to determine whether one of the many statutory exceptions to disclosure applies. *Glenn*, 446 Md. at 385; MD. CODE, GEN. PROV., § 4-201. As a result, collecting, reviewing, and redacting records and can be a labor-intensive and time-consuming process. *Open Just. Baltimore*, 485 Md. at 621.

The Maryland General Assembly chose to balance the competing interests of the public's right to inspect government records with the burden on the government by permitting the official custodian to charge fees for the time and labor associated with compiling and producing requests. *Id.* at 622. The official custodian also has broad discretion to waive fees if the applicant requests a fee waiver and the official custodian determines that a waiver would be in the public interest. *Id.*; MD. CODE, GEN. PROV., § 4-206(e). The custodian may require the prepayment of fees and doing so before providing responsive records is not a denial of a request. *See Glass v. Anne Arundel County*, 453 Md. 201, 212–13, 236–37 (2017). The government may also recover vendor costs when a request exceeds the government's ability to process the request "in-house." Attorney General of Maryland, Maryland Public Information Act Manual, 1-2 (18th ed., Oct. 2023); *PIACB Decisions* 20-04, at 2.

The PIA contemplates a collaborative approach, especially when it comes to labor-intensive requests. *Open Just. Baltimore*, 485 Md. at 625. Broad requests present obvious challenges for custodians and, as a result, the Supreme Court of Maryland has encouraged an iterative process, in which the government works with the requestor to refine their request to reduce the labor and expense of searching for and producing records. *Glass*, 453 Md. at 233 ("In practice, a productive response to a PIA request is often an iterative process in which the agency reports on the type and scope of the files it holds that may include responsive records, and the requestor

refines the request to reduce the labor (and expense) of searching those records.”). Voluminous requests can also exceed the government’s capacity to respond to requestors within the thirty-day statutory time limit, requiring a “first-in, first-out” approach to fulfilling them. *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 616 (D.C. Cir. 1976) (allowing FBI to handle large volume of requests for information by fulfilling requests on a first-in, first-out basis even though statutory time limits were exceeded); *Exner v. FBI*, 542 F.2d 1121, 1123 (9th Cir. 1976).

Although the PIA governs all aspects of record production, disputes still arise between the government and the requestor. Contemplating such disputes, the PIA provides a comprehensive framework for resolving them. MD. CODE, GEN. PROV., §§ 4-362, 4-1A-05, 4-1B-04. If a requestor believes that the government failed to allow timely inspection of a document, charged unreasonable fees, or improperly denied a fee waiver request, the requestor may file a complaint with the Office of the Public Access Ombudsman, the State Information Act Compliance Board, or with the Maryland circuit courts. *Id.*

With the PIA’s rights and obligations as a backdrop, the district court correctly found that Appellants did not state a First Amendment claim against Appellees. Appellees Harrison and Shea have no connection to this lawsuit and the claims against them are otherwise duplicative of Appellants’ claims against BPD and the

City. Similarly, the claims against Salsbury and Walden are duplicative of Appellants' claims against the City, and the Law Department is not an entity that may be sued. At most, Appellants allege that BPD and the City violated the PIA, and not the First Amendment. Even if the alleged PIA transgressions could implicate the First Amendment, there is an obvious alternative explanation for BPD and the City's actions that is rooted in the PIA and does not involve discriminatory animus, retaliation, or a municipal policy condoning such behavior.

II. The district court did not err in dismissing Appellants' First Amendment claims against the Individual Defendants and the Law Department.

Appellants' opening brief presents no arguments against the dismissal of the Individual Defendants and the Law Department, and procedurally, that lack of argument itself requires that those dismissals be affirmed. *See* FRAP 28(a)(8). However, in an abundance of caution, Appellees briefly explain below why these decisions by district court were correct on the merits as well.

A. Appellants' claims against the Individual Defendants are duplicative of their claims against BPD and the City.

Claims are duplicative, and must be dismissed, when a plaintiff sues individuals in their official capacity and a municipality for the same conduct. *Love-Lane v. Martin*, 355 F.3d 766, 782 (4th Cir. 2004) ("The district court correctly held that the § 1983 claim against [the defendant] in his official capacity as Superintendent is essentially a claim against the Board and thus should be dismissed

as duplicative.”)). That is because “[o]fficial-capacity suits . . . ‘generally represent only another way of pleading an action against an entity of which an officer is an agent.’” *Kentucky v. Graham*, 473 U.S. 159, 166 (1985); *see Huggins v. Prince George's County*, 683 F.3d 525, 532 (4th Cir. 2012)). Appellants sued all the Individual Defendants in their official capacities only, as agents of their respective agencies. JA007–008. On this basis, the claims against Harrison are duplicative of the claims against BPD and the claims against Shea, Salsbury, and Walden are duplicative of the claims against the City. *Love-Lane*, 355 F.3d at 782. Appellants' allegations against the Individual Defendants, therefore, are analogous to their claims against BPD and the City and are subject to dismissal as a result. *Id.* Accordingly, the district court did not err in dismissing Appellants' claims against the Individual Defendants.

B. The Law Department is not an entity that can be sued.

The Law Department is not a party that can be sued because the Law Department is not an entity distinct from the City. *See* BALTIMORE CITY CHARTER, art. I § 1 (creating one City government that “may sue and be sued”). As an executive agency of the City, the Law Department lacks any capacity to be sued apart from the City. *See, e.g., Upman v. Howard County Police Dep't*, 2010 U.S. Dist. LEXIS 25007, at *5 (D. Md. Mar. 17, 2010) (“Maryland law is not unique as federal courts have traditionally recognized that individual government

departments lack the capacity to be sued."). As such, the Law Department was not a proper party to this lawsuit, and the district court did not err in dismissing the claims against the Law Department.

III. BPD and the City's alleged PIA violations are not violations of the Constitution.

The only two proper parties to this lawsuit are BPD and the City. *See supra* Argument §§ I–II. However, Appellants' attempt to make a federal lawsuit out of their PIA case is baseless. Appellants cite to no case that establishes a constitutional right to the prompt receipt of government documents, or that the government's failure to produce records for free is a deprivation of that right. In fact, the Supreme Court has held expressly to the contrary:

> There is no constitutional right to have access to particular government information … the Constitution itself is neither a Freedom of Information Act[8] nor an Officials Secrets Act. The Constitution, in other words, establishes the contest, not its resolution. Congress may provide a resolution, at least in some instances, through carefully drawn legislation.

Houchins v. KQED, Inc., 438 U.S. 1, 14–15 (1978).

The United States Court of Appeals for the District of Columbia Circuit has also declined to extend First Amendment protections in the context of FOIA cases. In *Ctr. for Nat. Sec. Stud. v. U.S. Dep't of Just.*, 331 F.3d 918 (D.C. Cir. 2003), a

[8] FOIA cases are persuasive authority in interpreting the PIA because PIA is similar in purpose to FOIA. Attorney General of Maryland, Maryland Public Information Act Manual, 1-2 (18th ed., Oct. 2023); *MacPhail,* 178 Md. App. at 119.

public interest group submitted a FOIA request to the Department of Justice ("DOJ"). The DOJ withheld much of the requested documents, and, in turn, the requestor filed suit under FOIA and the First Amendment. *Id*. 922. As part of its analysis, the court discussed the interplay between FOIA and the First Amendment and declined to implicate the First Amendment in the context of access to government records. *Id*. at 934. The court stated:

> The First Amendment broadly protects the freedom of individuals and the press to speak or publish. **It does not expressly address the right of the public to receive information. Indeed, in contrast to FOIA's statutory presumption of disclosure, the First Amendment does not 'mandate[ ] a right of access to government information…'**

Id. (emphasis added) (internal citations omitted). The court concluded that, other than the right to receive transcripts in a criminal proceeding, there are no federal court precedents requiring the disclosure of government records under the First Amendment. *Id*. at 935. Maryland courts have even considered viewpoint discrimination in the PIA context and resolved the issue under the PIA's dispute resolution procedure. *See Action Committee for Transit, Inc. v. Town of Chevy Chase*, 229 Md. App. 540 (2016). Although the Appellate Court of Maryland held that denying a fee waiver request based upon viewpoint violated the PIA, it did not consider the case under a First Amendment framework. *Id*. at 565 (holding that the government's decision to deny the fee waiver was arbitrary and capricious because it was based upon viewpoint discrimination).

Thus, there is a general rule that there is no First Amendment right to sources of information within the government's control, and the decision to disclose government information belongs exclusively to the political branches. *Houchins*, 438 U.S. at 14–15. In a matter of first impression, this Court carved one narrow exception to that general rule. *See Fusaro v. Cogan*, 930 F.3d 241 (4th Cir. 2019). In *Fusaro*, a Virginia resident challenged the constitutionality of a Maryland law, which placed identity-based conditions on access to Maryland's list of registered voters. *Id*. at 244–45. This Court held that the Maryland law was subject to constitutional scrutiny for three reasons: (1) because the list of registered voters was a means to engage in political speech; (2) the law imposed both content-based and speaker-based conditions on a vehicle for political speech; and (3) the Supreme Court signaled in *dicta* that certain such conditions may be subject to First Amendment scrutiny. *Id*. at 250. This Court viewed plaintiff's claims as a challenge to the conditions that Maryland imposed on the release of voter registration data, as opposed to the right to access the data. *Id*. at 249–50. However, the *Fusaro* Court cautioned "courts rightly should hesitate before intruding into areas – like the disclosure of government information – that depend on policy considerations reserved for the political branches." *Id*. at 253.

Appellants urge this court to invoke the First Amendment under the narrow exception in *Fusaro* because BPD and the City restricted or denied "access to records

that contained negative information about BPD and its officers – while not asserting any exemption for withholding the files." Appellants Br. 27. However, Appellants do not argue that BPD and the City conditioned access to any records based upon the identity of the requestor as required by *Fusaro*. Appellants Br. 27; *Fusaro*, 930 F.3d at 252. Appellants assert only that BPD and the City denied all access to certain records that portray BPD in a negative light. Appellants Br. 27. Unlike *Fusaro*, the misconduct investigatory records at issue are not a vehicle to contact voters, spread messages, garner political support for candidates and causes. *Fusaro*, 930 F.3d at 251. Nor are they a means to participate in elections. *Id*. Instead, they are government records Appellants wish to access so they can speak about them. *Id*. at 252 ("The right to speak and publish does not carry with it the unrestrained right to gather information.") (quoting *Zemel v. Rusk*, 381 U.S. 1, 17 (1965)). Moreover, the main issue in this case – who should bear the cost of producing police misconduct investigatory files – is a policy determination that is under consideration in, and that should ultimately be determined by, the Maryland legislature. JA250–251.

Ultimately, Appellants' conjecture that BPD restricted access to misconduct investigatory records is unsupported. *See infra* Argument § IV. But, even if BPD and the City had denied Appellants' requests, Appellants' allegations are insufficient to invoke First Amendment protections. The only statutory schemes for access to government records that receive constitutional scrutiny are those that limit access to

vehicles for political speech based upon the identity of the requestor, which is not present in this case. *Houchins*, 438 U.S. at 14; *Fusaro*, 930 F.3d at 250; *Ctr. for Nat. Sec. Stud.*, 331 F.3d at 934. Appellants simply have no *constitutional* right to access the misconduct investigation records they seek. *Id.*

If the Court were to hold, as Appellants urge, that any violation of the PIA with respect to a request for police misconduct records, or any request made for records meeting Appellants' nebulous standard of "containing negative information," would implicate the First Amendment, then any requestor who sought records they believed contained "negative information" about the government could prosecute a federal lawsuit (at least through discovery) for any alleged violation of a state records statute. Such an outcome is not contemplated by the PIA, nor by any of the jurisprudence concerning access to government records. *Id.*

This is not a case in which the government prohibited Appellants from conveying information that they already possess or placed insidious conditions their ability to participate in the political process. *See Los Angeles Police Dep't. v. United Reporting Pub. Corp.*, 528 U.S. 32, 40 (1999). And even if Appellants have alleged improper actions, "not all undesirable behavior by state actors is unconstitutional." *Pink v. Lester*, 52 F.3d 73, 75 (4th Cir. 1995). "[T]he Constitution is designed to deal with deprivations of rights, not errors in judgment, even though such errors may

have unfortunate consequences." *Grayson v. Peed*, 195 F.3d 692, 695–96 (4th Cir. 1999).

Instead of using any of the PIA's dispute resolution procedures, Appellants filed this lawsuit to enforce the PIA so they can access all misconduct investigatory files within thirty days for free. JA043. This is a quintessential right-to-access case that is foreclosed by *Houchins* and amounts only to a claim that BPD and the City were derelict in their duties under the PIA. As a result, Appellants' attempt to invoke the First Amendment should fail and this court should uphold the dismissal of Appellants' First Amendment claims.

IV. The district court did not err in dismissing Appellants' First Amendment viewpoint and content discrimination claims against BPD and the City.

Even if Appellants' allegations subjected BPD and the City to First Amendment scrutiny, they do not allege facts to support a viewpoint or content-based discrimination claim. The First Amendment prohibits the government from regulating speech because of disapproval for the ideas expressed. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992). As a result, discrimination based upon on the content of particular speech can run afoul of the First Amendment. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991). Viewpoint discrimination is a subset of content discrimination, which prohibits the government from regulating speech when the opinion or perspective of the speaker is the rationale for the restriction. *Rosenberger v. Rector & Visitors of Univ. of*

Virginia, 515 U.S. 819, 829 (1995). "[T]he 'principal inquiry' in assessing a claim of viewpoint discrimination 'is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.'" *Planned Parenthood of South Carolina, Inc. v. Rose*, 361 F.3d 786, 795 (4th Cir. 2004) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

A. BPD and the City did not engage in viewpoint and content discrimination by denying access to information about BPD's misconduct.

Appellants' argument that BPD and the City engaged in viewpoint and content discrimination by denying access to certain records because those records contained information about BPD's misconduct attempts to stretch the First Amendment beyond its reach. Appellants Br. 25–26. First Amendment jurisprudence concerns the government regulating the content of *speech* or the viewpoint of the *speaker*, not discriminating among the types of records it allows the public to see. *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163–64 (2015). Contrary to *Reed*, Appellants do not argue their speech was targeted based on its communicative content. *Id.* at 163. And they did not allege either BPD or the City "prevented them from speaking." *Citizens United v. FEC*, 558 U.S. 310, 366 (2010). Rather, Appellants remained free to criticize or otherwise speak about BPD and the City through their website, journalism, films, and other professional endeavors. Because Appellants do not argue that BPD or the City regulated their speech based upon its content or their viewpoint, their viewpoint and content-based discrimination claims fail.

Additionally, Appellants' position that BPD and the City restrict or deny access to records that contain negative information about BPD and its officers is undermined by the factual record. As an initial matter, Appellants conclude, without any basis, that all records they requested portray BPD in a negative light. Appellants Br. 29. However, Appellants never narrowed their overly broad requests to inspect only the investigatory files in which an officer was found to have committed misconduct, nor did they offer to eliminate any requests for innocuous records. *See, e.g. supra* Statement of Case § I. As such, many of the investigations could have portrayed BPD and its officers in a positive or neutral light, concluding that the officer under investigation acted within agency protocol. *Id.*

But even if somehow all allegations of misconduct, by their very nature, portrayed BPD negatively, Appellants' claim still fails. BPD provided OJB over forty misconduct investigatory files concerning use of force the one and only time OJB paid the fee required to cover the expense to produce them. JA229. Although BPD initially overestimated the cost of producing the records, BPD returned the overpayment to OJB. *Id.* Similarly, when Figueroa actually paid for records, BPD hand delivered the entire controversial investigatory file concerning Tyrone West's in-custody death. JA340. In the few instances in which Appellants submitted narrow requests, BPD and the City agreed to produce the requested records free of charge. JA513–518 (the City agreeing to waive approximately $637.20 worth of time and

expense to the City in response to Request 11); JA157 (BPD providing twenty-five police reports to counsel for OJB free of charge in response to Request 9). Even when Appellants submitted burdensome requests, BPD provided summary information which detailed the nature of the misconduct complaint, gave the substance of BPD's investigations as well as the outcome of those investigations, and could help Appellants narrow their requests to the investigations most important to them. *See* JA478 (explaining that Request 8 would require an excess of eighty hours to produce and detailing the pertinent information contained in the summaries).

Appellants' exhibits also detail BPD's production of records concerning misconduct investigations to other requestors, including critical media and the Office of the Public Defender. JA605. Appellants highlight a request from an attorney, Michael Fortini ("Fortini"), who sought PIB misconduct investigations for officers Jason Figueroa and Justin Trojan. JA261. Approximately six months later, BPD provided summaries to Fortini and ultimately agreed to settle a lawsuit after Fortini significantly reduced the scope of his request and agreed to dismiss his lawsuit. *Id.*

Appellants' position that BPD and the City obstructed access to police misconduct records is belied by their own pleading. Appellants simply did not plead that BPD and the City restrict or deny access to records that contain negative

information about BPD and its officers beyond their own unadorned conclusions. *Iqbal*, 556 U.S. at 678 (2009). Without the necessary "factual enhancement," Appellants viewpoint and content-based discrimination claims fail. *Id*.

B. BPD and the City did not restrict access to public records based on the opinions or perspectives of the Appellants.

To the extent this court considers Appellants' argument before the district court – that BPD and the City restrict access to public records based on Appellants' opinions or perspectives – that claim also fails.[9] JA678. Appellants previously argued that BPD is aware of their viewpoint and the content of their speech because of prior lawsuits and their professional accomplishments. JA027–029. In support, Appellants relied on an email from Walden to OJB seeking the voluntary removal of personal information of non-public-facing administrative staff from OJB's public website JA027–029; JA610.

Appellants abandoned their argument because it was wildly speculative, required unfounded logical leaps, and, again, was also undermined by their pleading. Appellants attempted to impute knowledge of their viewpoint on entire governmental agencies based on OJB's lawsuits and the professional credentials of Figueroa and Soderberg. Such speculation would require improbable omniscience

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[9] Appellants have abandoned this argument, and now rely on their allegation that BPD and the City restrict or deny access to records that contain negative information about BPD and its officers. Appellants Br. 25–26.

on behalf of the BPD and City employees who process PIA requests. Moreover, Walden's email did not suggest that BPD, as an organization, had a position on OJB's viewpoint, that her statement was made in connection with any past PIA request, or that OJB's perspective would have any bearing on any future PIA requests. JA027–029; JA610.

Conspicuously absent from the seven hundred and fifty-three-page joint appendix is any allegation that a similarly situated requestor with a different viewpoint or perspective received the same massive scope of records and received them within thirty days at no cost. JA600–602. Nor did Appellants allege that BPD or the City considered, asked about, or even knew of, the viewpoint of the requestors when responding to the PIA requests. To the extent that Appellants can point to a specific "comparator" beyond their vague allusions to "comparator" evidence, they offer the nondiscriminatory justification for "disparate" treatment. Specifically, Appellants admit that Fortini requested a substantially smaller volume of records, and that BPD provided the records to settle a lawsuit, which is, "not a perspective [Appellants] have been willing to offer." JA023.[10] Appellants also provide documentation that Fortini received summaries approximately six months after his request. JA261. Although BPD's response to Fortini also exceeded the PIA's thirty-

[10] BPD also provided OJB a narrower scope of records to resolve a lawsuit. *See* Request 6.

day deadline, Appellants received their summaries in about the same or less time than Fortini. *See supra* Statement of Case §§ I(A)(8); I(B)(16), (17).

Appellants also allude to requests made by the Office of the Public Defender and the *Daily Record* like Request 17. JA024. The Office of the Public Defender and the *Daily Record* both received their responsive summaries in six months. *Id*. Soderberg submitted Request 17 in May 2022, and received his records in less time, five months later in September 2022. *Id*. Any argument that Request 17 was already prepared for release to other requestors is undermined by the fact that all PIA requests must be reviewed on a case-by-case-basis. *Glenn*, 446 Md. at 385. As the district court properly found, the fact that BPD fulfilled one request concerning a particular officer does not mean that a distinct request, made later, must also be granted immediately. JA742. Such an outcome is at odds with the mandates of the PIA because, for example, officers can have more misconduct complaints filed against them, and investigations can change from open to closed. JA742–743.

The district court correctly found that Appellants' amended complaint contained no allegations that, if proven, would establish that Appellees considered Appellant's viewpoint or content when responding to PIA requests. JA681. Appellants' allegations amount to a bald conclusion that, by the very nature of who they are, any PIA violation must necessarily be the result of discriminatory animus. *Id*. In reality, Appellants' allegations and exhibits reveal that BPD, and the City are

aware of their obligations under the PIA and respond to requests regardless of the category of requestor. JA743 (noting that Appellants, "fulfilled requests, *inter alia*, from reporter Justin Fenton, whose book *We Own This City: A True Story of Crime, Cops, and Corruption* documented corruption rampant in the BPD's Gun Trace Task Force; *The Daily Record*; *WBAL News*; and the *Washington Post*."). Appellants' allegations, if true, would provide no basis for concluding BPD provided other media requestors with their requests because "[other media] lacked the 'critical' viewpoint [Appellants] appear to claim as uniquely their own." *Id*.

The only discernable pattern in BPD and the City's treatment of records requests is that more recent requests are likely to be fulfilled later than older ones (i.e., first-in, first-out), which is permitted under the PIA. JA748; *Open America*, 547 F.2d at 616. Appellants did not allege any plausible claims rooted in "reasonable inference that the [Appellees are] liable for the misconduct alleged." *Iqbal*, 556 U.S. at 663. This court cannot draw inferences of a discriminatory motive based on Appellants' guesswork, and as a result, Appellant's First Amendment claims fail.

C. There is an obvious alternative, nondiscriminatory explanation for BPD and the City's response to each of Appellants' requests.

There is an obvious, nondiscriminatory explanation for BPD's and the City's responses to each of Appellants' requests. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between

possibility and plausibility of entitlement to relief'" and, as a result, must be dismissed for failure to state a claim. *Id*. at 678 (quoting *Twombly*, 550 at 557). This is especially relevant when there is an "obvious alternative explanation" for the conduct that Appellants allege was taken with discriminatory intent. *Id*. at 682 (quoting *Twombly*, 550 U.S. at 567).

In *Desper v. Clarke*, 1 F.4th 236 (4th Cir. 2021), a convicted sex offender alleged that a correctional facility violated his First Amendment right to associate by denying visitation with his minor daughter. *Id*. at 239. In affirming the district court's dismissal, this court reasoned that the appellant failed to allege why the denial of his visitation was not reasonably related to a legitimate penological objective. *Id*. at 245. This court found it was obvious why the correctional facility denied appellant's visitation with his minor child: because he was a convicted of sexually abusing a minor. *Id*.

In *McCleary-Evans v. Maryland Dep't of Transp., State Highway Admin.*, 780 F.3d 582 (4th Cir. 2015), appellant sued an employer because the employer did not hire for two positions for which she applied, allegedly based upon her race and sex. *Id*. at 582. In affirming the district court's dismissal, this court found that her conclusory allegations were not entitled to deference, and the appellant failed to allege any facts that her employer failed to hire her because of her sex or race. *Id*. at 585. This court cautioned that holding otherwise would allow, "any qualified

member of a protected class who alleges nothing more than that she was denied a position or promotion in favor of someone outside her protected class…to survive a Rule 12(b)(6) motion." *Id*. at 588.

Here, relying on the standard set forth in *Twombly* and *Iqbal*, the district court correctly found that there is an obvious alternative explanation for the conduct that Appellants allege was taken with discriminatory intent. Specifically, the district court found, that Appellants' numerous and broad requests made during a changing legal landscape and COVID-19 overwhelmed BPD and the City's capacity to respond as quickly and inexpensively as Appellants demanded. JA741. Broadly speaking, BPD and the City took longer than thirty days to fulfill Appellants requests because they were inundated with voluminous requests, especially after the passage of Anton's Law. *See supra* Statement of Case § I. BPD offered summaries of the misconduct investigatory records because the Maryland Supreme Court requires the iterative process. *See supra* Argument § I. When Appellants did not narrow the scope of their requests, BPD exercised its right under the PIA to hire a vendor, and charge for those costs. *Id*. And, when Appellants sought a waiver of those fees, BPD exercised its right under the PIA to grant a partial fee waiver. *Id*. If BPD did not grant a complete fee waiver, BPD required prepayment of the fees in accordance with state guidance on the PIA. *Id*.

There are also obvious nondiscriminatory reasons for Appellees' responses to the specific requests that Appellants highlight in their brief. With respect to Request 6, which did not seek misconduct records and was already the subject of previous state court litigation, Appellants argue that BPD refused to release a roster to them. Appellants Br. 34. However, BPD initially denied OJB's request due to reasonable concerns of revealing undercover officers and ultimately provided a redacted roster in an effort to resolve the lawsuit. JA230. With respect to Request 8, Appellants argued that BPD pressured OJB into accepting summaries before investigating the scope of the request. Appellants Br. 30–31. However, BPD correctly believed that, given the request's broad scope, OJB's request sought a significant volume of records. JA124–136; JA138. BPD began the iterative process by suggesting OJB accept summary information to either fulfill the purpose of the request or help narrow the scope. *Id*. Once OJB indicated they did not wish to accept summaries, BPD provided an estimate indicating that, as suspected, production would require over eighty hours of work, JA148–151. BPD then granted a partial fee waiver for the City and BPD's time, like other requests. JA150. With respect to Request 11, Appellants argue that the City took four months to grant OJB's fee waiver request. Appellants Br. at 31. However, counsel for the City was in active communication with counsel for OJB discussing their positions on the fee waiver request and the

City ultimately agreed to grant OJB's request. JA181–190. With respect to Request 7, which is the subject of concurrent state court litigation, Appellants argue that BPD inflated its costs by stating that it would require 32,000 hours totaling over $600,000.00 to respond to a single records request. Appellants Br. 31–32. However, BPD estimated that it would take 32,000 hours to process the request because, in a single records request, OJB requested to inspect every page and recording in 3,247 investigatory files. JA390–395; JA406. Appellants also argue that BPD forced OJB to prepay $8,000.00 to receive records. Appellants Br. 32. However, BPD exercised its right under the PIA to require prepayment of fees and promptly refunded any overpayment to OJB. JA229.

There is an obvious explanation for how BPD and the City process each of Appellants' requests and that explanation is rooted in the PIA. Beyond their own legal conclusions, Appellants did not plead any facts to suggest BPD, or the City considered viewpoint or content when processing PIA requests. *McCleary-Evans*, 780 F.3d at 585. To hold otherwise would allow any requestor who is dissatisfied with the PIA's enforcement mechanisms to file a federal constitutional lawsuit for transgressions of a state records statute. *Id*. at 588. Accordingly, the district court did not err in dismissing Appellants' First Amendment viewpoint and content discrimination claims against BPD and the City.

V. The district court did not err in dismissing Appellants' First Amendment retaliation claim against BPD and the City.

Plaintiffs bringing a First Amendment retaliation claim under 42 U.S.C. § 1983 must establish (1) that their speech was protected; (2) that defendant's alleged retaliatory action adversely affected their constitutionally protected speech; and (3) that a causal relationship exists between their speech and the defendant's retaliatory action. *Suarez Corp. Industries v. McGraw*, 202 F.3d 676, 685–686 (4th Cir. 2000). However, "where a public official's alleged retaliation is in the nature of speech, in the absence of a threat, coercion, or intimidation intimating that punishment, sanction, or adverse regulatory action will imminently follow, such speech does not adversely affect a citizen's First Amendment rights, even if defamatory." *Id*. at 687. This court has also stated:

> '[I]t is not enough that the protected expression played a role or was a motivating factor in the retaliation; claimant must show that 'but for' the protected expression the [state actor] would not have taken the alleged retaliatory action.'

Raub v. Campbell, 785 F.3d 876, 885 (4th Cir. 2015) (internal citations omitted). Additionally:

> 'Knowledge alone, however, does not establish a causal connection' between the protected activity and the adverse action. There must also be some degree of temporal proximity to suggest a causal connection. 'A lengthy time lapse between the [public official's] becoming aware of the protected activity and the alleged adverse ... action ... negates any inference that a causal connection exists between the two.'

Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 501 (4th Cir. 2005).

Importantly, Appellants do not mention any instance in which they alleged the City retaliated against them. Appellants Br. 18–25. Rather, Appellants argue that BPD retaliated against OJB with respect to Request 7 and Request 8 after OJB filed this lawsuit. *Id*. at 18–19. Specifically, Appellants argue that BPD was ready to produce the full files responsive to Request 8 but, after OJB filed this lawsuit, BPD demanded that OJB pay $7,000.00 for the files. *Id*. Appellants also claim that BPD revoked its initial fee waiver with respect to Request 7 after OJB filed this lawsuit. *Id* at 19. Appellants argue that BPD retaliated against Figueroa with respect to Request 16 because BPD attempted to charge her over $40,000 and forced her to accept summaries or pay the estimated fee. *Id*. Appellants also argue that BPD retaliated against Soderberg with respect to Requests 17 and 18. Specifically, Appellants claim that BPD refused to disclose whether they would grant a fee waiver, pressured Soderberg into accepting summaries, and imposed a ten-day deadline to respond to emails or he would "risk the inability to proceed with the request." *Id*.

Appellants essentially assert that government inaction, i.e. the failure to timely produce records and grant their fee waiver requests, constitutes a retaliatory action prohibited by the First Amendment. However, cases interpreting First Amendment

retaliation claims focus on retaliatory acts or threats, as opposed to dereliction of duty, that are threatening enough chill the exercise of First Amendment rights. *Borkowski v. Baltimore County, Maryland*, 492 F. Supp. 3d 454, 476 (4th Cir. 2020) (holding that threats to stop filing applications for statement of charges, if true, constituted conduct likely to dissuade the exercise of First Amendment Rights); *Martin v. Duffy*, 858 F.3d. 239, 250 (4th Cir. 2017) (holding that being placed inside an administrative building's holding cell could deter a person of ordinary firmness from exercising their First Amendment rights.). In this case, the alleged retaliatory conduct is the failure to conform to the requirements of a state statute. The amended complaint is bereft of any threat, coercion, or intimidation required to adversely affect Appellants' First Amendment rights. *Suarez Corp. Industries*, 202 F.3d at 687.

Additionally, Appellants factual allegations are once again conclusory and undermined by their own pleading. With respect to Figueroa, Appellants did not allege any fact that BPD or the City knew, or had any reason to know, of her protected speech or that she had even engaged in any protected speech at the time she made Request 17. Appellants Br. JA010 ("[Figueroa] is a media journalist who *is producing* a documentary on police accountability.") (emphasis added). Moreover, BPD quoted Figueroa an estimated cost of $44,981.50 because she submitted a massive request to inspect every page and electronic file of every misconduct investigation involving ten different officers. JA571. Because of the

scope of the request, BPD offered Figueroa summaries, which she willingly accepted until she filed this lawsuit. *Id.*

Similarly, Soderberg claims that his protected speech was authoring a book critical of the BPD. JA028. However, Soderberg released his book in 2020, and submitted his PIA requests in 2022. JA021; JA028. Soderberg merely speculates that the BPD employees processing his PIA request were aware of his book. But, even if BPD employees were aware of Soderberg's work, the "lengthy time lapse" negates any inference that a causal connection exists between the Soderberg's protected speech and the alleged retaliation. *Constantine*, 411 F.3d at 501. Additionally, BPD did not issue a fee waiver decision with respect to Soderberg's request because he did not ask for the fee to be waived and, in that instance, the PIA does not require BPD to issue a fee waiver decision. JA264; JA268; MD. CODE, GEN. PROV., § 4-206(e) ("the official custodian may waive a fee…if the applicant asks for a waiver…."). BPD offered Soderberg summaries to begin the iterative process as outlined by the Supreme Court of Maryland. *Glass*, 453 Md. at 233. BPD also did not cause Soderberg to risk the inability to proceed with the request; but rather informed him that BPD needed more information before it could prepare a cost estimate. JA563; JA565.

Appellants' arguments with respect to OJB are equally flawed. Appellants argue that BPD retaliated against OJB by revoking the fee waiver granted in Request

7 and charging for Request 8 after OJB filed this lawsuit, which, notably, already contained a retaliation count by OJB. OJB also already filed a First Amendment lawsuit with respect to Request 7, and the Circuit Court for Baltimore City rejected that claim on August 15, 2022. JA652. As a result, the district court held, and the Appellants did not appeal, that Appellants impermissibly split their claim and were not entitled to relief with respect to Request 7. JA670.

Most importantly, though, BPD did not revoke its fee waiver. As the district court correctly found, "[Appellants'] exhibits suggest that [BPD's] purported 'refus[al] to honor' a fee waiver was, in fact, BPD's attempt to charge plaintiffs for the cost of intensive document review by outside counsel, costs that defendants had not previously agreed to waive." JA745. On October 12, 2021, in response to OJB's request to inspect every page of 3,247 investigatory records, BPD estimated that it would cost BPD $88,472.92, the Law Department $545,496.00, and the vendor $745,290.00 to fulfill the request. JA065. BPD granted a complete waiver of fees related to BPD, the Law Department, and the vendor's managing attorney. *Id*. BPD communicated to OJB that, "[t]he only cost passed on to you will be that of the outside counsel, a cost that BPD is incurring only because of your request. Thus, **your fee waiver is valued at over seven hundred and seventy thousand dollars.**" *Id*. (emphasis in original). During litigation concerning Request 7, BPD determined that fewer cases may fit the parameters of OJB's request. JA082. Assuming OJB

sought fewer files, the total cost of production was now estimated to be approximately $600,000.00. JA085. However, the request still exceeded BPD's ability to perform the work "in house." *Id*. As a result, BPD continued its position to waive "internal" cost, and not those costs incurred by the outside vendor. *Id*. BPD did not "revoke" its fee waiver as Appellants attempt to characterize it, but BPD maintained the same decision it made prior to OJB filing this lawsuit. *Id*.

Appellants' retaliation claim regarding Request 8 is equally belied by their exhibits.[11] On April 8, 2024, Salsbury informed OJB's counsel that he should be receiving a production related to Request 8 as soon as that day. JA076. Although BPD did not make its production on that day, on April 21, 2022, BPD produced the summaries related to Request 8. JA138. After follow-up from OJB's counsel, Salsbury indicated that BPD received the entire file and was reviewing it. JA126. As with other requests of similar volume, BPD then produced a cost estimate indicating that the scope of the request necessitated the use of a vendor and indicating that BPD would grant a partial fee waiver. JA477–478. The record is replete with examples that BPD provides summaries free of charge and utilizes a vendor for requests that exceed BPD's ability to complete the work "in house." *See supra* Statement of Case

[11] Unlike the other requests in this lawsuit, which explicitly state they were being made on behalf of OJB, there was no indication that the requestor was OJB. JA069. Rather, it appears Mr. Zernhelt and/or Baltimore Action Legal Team made the request. JA073 ("I made the initial request towards the beginning of February…").

§ I. And, with respect to the records sought by Appellants, BPD agreed to waive all "internal" costs incurred by BPD and the City. *Id.* BPD followed this procedure, regardless of whether OJB filed any of its many lawsuits. *Id.*

Appellants' reliance on *Tobey v. Jones*, 706 F.3d 379 (4th Cir. 2013) is misplaced. In *Tobey*, the Transportation Security Administration ("TSA") arrested appellant after he removed his sweatpants and tee shirt to reveal the text of the Fourth Amendment. *Id.* at 384. This court found that appellant's complaint survived dismissal because it was unclear whether TSA's behavior was motivated by the "disruptive" conduct or motivated by his protected protest. *Id.* at 389. Importantly, this court reasoned that appellees did not point to a single regulation or law that permits seizure and arrest for the removal of an outer layer of clothing, or a law that prohibits the display of a peaceful message. *Id.* Here, all of BPD and the City's actions are rooted in the PIA and have been consistently applied regardless of Appellants' speech.

Appellants failed to plead, beyond conclusory allegations, that the BPD's actions were connected to their protected speech or that but for their protected speech, BPD would not have taken the action that they did. Instead, they emphasize their professional achievements and abruptly conclude that, because of who they are, BPD's interpretation of the PIA must be retaliation. However, the record is clear: all of BPD's actions were consistent with its rights and obligations under the PIA and

were unrelated to any protected speech. As a result, the district court did not err when it dismissed Appellants' First Amendment retaliation claims.

VI. The district court did not err in dismissing Appellants' claim of municipal liability.

Even if Appellants' allegations invoked First Amendment scrutiny and even if Appellants pleaded viable First Amendment claims (to be clear, they did neither), the district court correctly found that Appellants did not plead sufficient facts to support a First Amendment claim directly against BPD and the City for the actions of their employees. The text of 42 U.S.C. § 1983 provides a remedy against "any person" who, under color of law, deprives another of rights protected by the United States Constitution. 42 U.S.C. § 1983. A municipality is liable under § 1983 only when "the unconstitutionally offensive acts of city employees are taken in furtherance of some municipal 'policy or custom,'" and the policy or custom causes the constitutional violation. *Milligan v. City of Newport News*, 743 F.2d 227, 229 (4th Cir. 1984) (quoting *Monell v. Department of Soc. Svcs.*, 436 U.S. 658, 694 (1978)). "Local governments are responsible only for their own illegal acts. They are not vicariously liable under § 1983 for their employees' actions." *Connick v. Thompson*, 563 U.S. 51, 60 (2011) (citations and internal quotation marks omitted). There must be an "affirmative link" between the identified policy or custom and the specific violation that is attributable to the municipality. *Spell v. McDaniel*, 824 F.2d 1380, 1389 (4th Cir. 1987).

A municipality may be found liable under a § 1983 *Monell* claim only if two elements are met: (1) an unconstitutional policy or practice must exist, and (2) the unconstitutional policy or practice was the driving force behind the alleged constitutional violation. *See Monell*, 436 U.S. at 690; *Connick*, 563 U.S. at 60; *Bd. of Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 403-04 (1997); *Lytle v. Doyle*, 326 F.3d 463, 471 (4th Cir. 2003); *Carter v. Morris*, 164 F.3d 215, 218 (4th Cir. 1999); *Spell*, 824 F.2d at 1391. To satisfy the first element, a plaintiff may show the existence of an unconstitutional "policy" or "custom" through: (1) a formal policy, regulation or ordinance; (2) an express decision of an official with "final policymaking authority;" (3) the municipality's failure to train its employees, such that the municipality was "deliberately indifferent" to the constitutional rights of its citizens; or (4) a "persistent and widespread practice" of unconstitutional conduct by municipal employees so as to become a "custom or usage" of the municipality. *See Connick*, 563 U.S. at 60-61; *Brown*, 520 U.S. at 403-04; *Lytle*, 326 F.3d at 471; *Carter*, 164 F.3d at 218; *Spell*, 824 F.2d at 1391; *Milligan*, 743 F.2d at 229.

The second element of a *Monell* claim, causation, is a high hurdle because a complaining party must prove the unconstitutional policy or custom was the "moving force" behind the violation of their rights. *See Connick*, 563 U.S.at 60-61; *see also Brown*, 520 U.S. at 404. However, liability only exists "where the municipality itself causes the constitutional violation at issue." *City of Canton v.*

Harris, 489 U.S. 378, 385 (1989) (emphasis added) (citation omitted). Federal courts apply rigorous standards of culpability and causation to § 1983 *Monell* claims, especially where a party is contending that either "inadequate training" or "widespread and persistent constitutional abuses" caused the violation of their rights. *See Connick*, 563 U.S. at 61 ("A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train") (citations omitted); *Brown*, 520 U.S. at 405 ("Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee.").

To plausibly allege *Monell* liability by condonation, a plaintiff must state facts showing "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 v. Baltimore City State's Att'ys Off.*, 767 F.3d 379, 402 (4th Cir. 2014). "Sporadic or isolated violations of rights will not give rise to *Monell* liability; only widespread or flagrant violations will." *Id*. at 403. This Court has held that a "meager history of isolated incidents" does not approach the "widespread and permanent practice necessary to establish [a] custom." *Carter*, 164 F.3d at 220.

Instead, a plaintiff must allege "'numerous particular instances' of unconstitutional conduct . . . ." *Lytle*, 326 F.3d at 473.

Appellants' First Amendment claims require rank speculation and unfounded logical leaps to support even the slightest inference that BPD or the City impermissibly considered content or viewpoint or retaliated against their protected speech. *See supra* Argument §§ IV–IV. And without a viable claim of constitutional violation, any assertion that BPD or the City caused the non-existent violation must also fail. But, even if Appellants had sufficiently plead a First Amendment claim, they did not assert more than one instance of alleged viewpoint/content-based discrimination or retaliation beyond their own allegations. Appellants alluded to several instances in which OJB sued BPD in state circuit court for violations of the PIA but cited no other state court case involving another requestor, much less *any* case in which BPD or the City was found to have violated the First Amendment in processing PIA requests. *See* JA007–043. In fact, in the state court case Appellants cited, the Circuit Court for Baltimore City rejected their First Amendment claims. JA652. Moreover, most of the misconduct records at issue in this case were not made available to the public until October 1, 2021, and concern BPD's interpretation of the PIA's fee waiver provision. *See supra* n. 6. Given the recent passage of Anton's Law and the Supreme Court of Maryland's recent decision concerning BPD's fee waiver analysis, BPD hardly had time to formulate a widespread and permanent

practice necessary to establish a custom of violating the Constitution. *Carter*, 164 F.3d at 220.

Appellants also failed to allege that a policymaker within BPD or the City had actual or constructive knowledge of any constitutional violations, or that a policymaker failed to correct the improper conduct due to deliberate indifference. A municipality can be held liable only for constitutional harms stemming from a policy or custom instituted by the official actions of municipal officials with final policymaking authority, or those officials who "have the responsibility and authority to implement final municipal policy with respect to a particular course of action." *Riddick v. Sch. Bd. Of the City of Portsmouth*, 238 F.3d 522–23 (4th Cir. 2000).

In support of their argument that policymakers condoned the constitutional violations, Appellants point to their emails with BPD and the City's attorneys, Walden and Salsbury. Appellants Br. 49–52. Appellants, however, misunderstand the role of an attorney. The fundamental role of an attorney is to advise their client and abide by their client's decision. MD R. ATTORNEYS, Rule 19-301.2. By the very nature of Walden and Salsbury's role in this case, they did not possess the "authority to implement final municipal policy with respect to a particular course of action" for BPD or the City. *Riddick*, 238 F.3d at 523.

Furthermore, Appellants baselessly conclude municipal policymakers must have been aware of ongoing constitutional violations but do not explain how they

arrived at this conclusion. Neither Harrison nor Shea were even alleged to have had any participation in or knowledge of processing PIA requests. *See* JA011; JA013; JA026. Appellants do not mention a City policymaker, or anyone beyond the City's attorneys. Appellants Br. 52. The sole reference to any decisionmaker in the amended complaint is the allegation that, "Eric Melancon denied fee waiver requests by declaring the public disclosure of BPD's internal accountability records…is not in the public interest." JA013. Beyond this statement (which lacks important details such as the time, manner, or any specificity regarding Eric Melancon's conduct – it is simply his interpretation of the PIA fee waiver provision), the amended complaint fails to assert that Melancon had any final policy making authority to create policies or make decisions with respect to PIA requests. *Riddick*, 238 F.3d at 523. Accordingly, Appellants failed to properly plead the first element under *Monell* to establish municipal liability.

Appellants further failed to plead that BPD or the City itself caused the constitutional violations at issue in this case. BPD and the City can only be liable for the alleged unconstitutional conduct if they caused the constitutional violation to Appellants. *Canton*, 489 U.S. at 385. Appellants essentially alleged that BPD and City employees violated the constitution while processing Appellants' PIA requests; therefore, BPD, as an organization, is vicariously liable. Notably absent is any allegation related to how BPD or the City as organizations were the moving force

behind their constitutional violation. *See Connick*, 563 U.S. at 60–61. Appellants' attempt to impute liability to BPD and the City for the actions of its employees is explicitly proscribed by law. As a result, Appellants also failed to properly plead the second causation element of a *Monell* claim.

Appellants reliance on conclusory allegations, along with their attempt to ascribe liability to BPD and the City for what amounts to no more than isolated actions of their employees without pleading an affirmative link or causation is prohibited under *Monell* and its progeny. The amended complaint was also bereft of any mention of a formal policy, regulation or ordinance, an express decision of an official with "final policymaking authority" or BPD and the City's failure to train its employees. *See id*. Therefore, this Court should uphold the district court's finding that Appellants failed to plead a claim of municipal liability.

VII. Appellants do not need discovery to properly plead their case.

In a desperate attempt to reverse the district court, Appellants assert that they need discovery to properly plead their case. Appellants Br. 25, 32, 39. The applicable pleading standard, though, requires Appellants to plead their case with enough factual matter to "raise a reasonable expectation that discovery will reveal evidence" of wrongdoing, and no amount of discovery will save Appellants' case. *Twombly*, 550 U.S. at 545. Appellants already have access to a trove of documents, including every communication they have had with Appellees and BPD's records concerning

other requestors, all of which they appended to their amended complaint. And Appellants freely admit, "[a] requirement to obtain a larger sample is unfeasible." JA701. There is no reason to believe that any amount of discovery will reveal evidence of a First Amendment claim beyond Appellants' own invention. *Twombly*, 550 U.S. at 545. Appellants did not, and cannot, plead municipal liability for First Amendment violations beyond "[l]abels, conclusions, recitation of a claim's elements, and naked assertions devoid of further factual enhancement." *Iqbal*, 556 at 678. Accordingly, this Court should not permit this case to proceed to discovery on Appellants' First Amendment claims and should affirm the district court's ruling.

CONCLUSION

For the reasons set forth above, Appellees respectfully request that the Court affirm the district court's dismissal.

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May 24, 2024

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