CASE 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

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

Defendants-Appellees violated the First Amendment in two ways. First, the Baltimore Police Department ("BPD"), the Baltimore City Law Department ("Law Department"), the City of Baltimore ("City"), and individual Defendants delayed or denied records requests as retaliation for the public criticisms levied by Plaintiffs-Appellants, who are journalists and a nonprofit organization advocating for police transparency. Second, by engaging in impermissible content and viewpoint discrimination in the adverse treatment of records requests that are damaging to the police department, Defendants also violated the First Amendment. Plaintiffs plausibly allege discriminatory patterns in Defendants' responses to Maryland Public Information Act ("MPIA") requests by misapplying exemptions, disregarding requests, exceeding statutorily mandated timelines, proffering exorbitant cost estimates, withdrawing cost waivers, and engaging in other adverse actions.

The discretion granted to records custodians by the MPIA does not permit discrimination — failure to apply the statute content and viewpoint neutrally to all requesters and records constitutes a First Amendment harm. Defendants' efforts to ascribe a constitutionally-sound alternative justification misses the mark: an inquiry into competing explanations is a factual dispute that is premature to resolve at the motion to dismiss stage because Plaintiffs satisfied the initial pleading requirement. As such, these claims must be subject to fact-finding and assessment at a later stage

of litigation. Additionally, Plaintiffs sufficiently stated a claim for a threshold showing of municipal liability. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978).

ARGUMENT

The First Amendment prohibits government entities from engaging in viewpoint discrimination and restricts decision-making "based on the ideas or opinions [] convey[ed]," including in the administration of the MPIA. *Iancu v. Brunetti*, 588 U.S. 388, 393 (2019). Defendants' arguments are unavailing because they hinge on factual disputes, a matter inappropriate for consideration at the motion to dismiss stage when "all reasonable inferences [should be] drawn in [Plaintiffs'] favor." *Tobey v. Jones*, 706 F.3d 379, 383 (4th Cir. 2013). "[A]ccept[ing] the factual allegations in the complaint as true," Plaintiffs "state[d] a claim to relief that is plausible on its face." *ACA Fin. Guar. Corp. v. City of Buena Vista, Va.*, 917 F.3d 206, 211 (4th Cir. 2019) ("This pleading standard does not require detailed factual allegations.") (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The "district court's dismissal of a complaint [is reviewed] de novo." *Resendiz v. Exxon Mobil Corp.*, 72 F.4th 623, 626 (4th Cir. 2023). This Court should reverse and remand because factual disputes are inappropriate for resolution at this stage of the proceedings and Plaintiffs have alleged facts sufficient to survive a motion to dismiss

on their First Amendment retaliation and discrimination claims, and to establish *Monell* liability.

I. Plaintiffs' allegations are sufficient to state a claim for retaliation and survive a motion to dismiss.

To protect the right of free expression, "public officials are prohibited from retaliating against individuals who criticize them." *Trulock v. Freeh*, 275 F.3d 391, 404 (4th Cir. 2001). Plaintiffs sufficiently alleged facts to establish: "(i) that [their] speech was protected; (ii) that . . . [the] retaliatory action adversely affected [their] constitutionally protected speech; and (iii) that a causal relationship existed between [their] speech and [Defendants'] retaliatory action." *Id*. First, the District Court implicitly assumed, and Defendants do not dispute, that 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); JA744-47, JA686-88. Second, Defendants' restrictions on access to records, which deterred and impeded Plaintiffs' ability to provide the public with information about the police department, were "retaliatory actions . . . [taken to] chill individuals' exercise of constitutional rights." *ACLU of Md. v. Wicomico Cnty., Md.*, 999 F.2d 780, 785 (4th Cir. 1993). Third, Defendants would not have restricted Plaintiffs' access to records but-for Plaintiffs' critical speech regarding police misconduct and transparency. The punitive actions taken because Plaintiffs engaged in speech and petition efforts are impermissible, as the First Amendment "not only [protects] 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); *see also Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) ("The right of access to the courts is indeed but one aspect of the right of petition."). The District Court erred by failing to credit plead facts sufficiently alleging causation and harm.

A. Plaintiffs have plausibly alleged a causal link between the exercise of their First Amendment rights and Defendants' conduct.

Plaintiffs allege the exercise of their First Amendment rights is the but-for cause of their adverse treatment: the conduct would not have been taken absent the retaliatory motive. *Nieves v. Bartlett*, 587 U.S. 391, 398 (2019). Although Defendants assert the causation requirement of a First Amendment claim is a rigorous test, they conveniently overlook that this high standard is only imposed during the summary judgment stage. *See Tobey*, 706 F.3d at 390. Plaintiffs need only reasonably *allege* but-for causation — not *prove* it — at the motion to dismiss stage. *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 318–19 (4th Cir. 2006). In *Ridpath*, this Court found that since "the Amended Complaint allege[d] that [Plaintiffs'] protected speech was the 'but for' cause of the termination of his teaching duties," the mere allegation of but-for causation "satisf[ied] the causation requirement." *Id*. at 319. The facts alleged are sufficient to establish a threshold showing of causation, precluding dismissal at the 12(b)(6) stage.

Actions that could "have multiple but-for causes" present a genuine issue of material fact that precludes granting a motion to dismiss. *Bostock v. Clayton Cnty.*, 590 U.S. 644, 656 (2020); *Bhattacharya v. Murray*, 515 F.Supp.3d 436, 459 (W.D. Va. 2021), aff'd, 93 F.4th 675 (4th Cir. 2024) (noting "[t]he record is not developed sufficiently at this [initial] stage to determine whether [Plaintiffs'] First Amendment retaliation claim fails as a matter of law"). Defendants cannot simply "point[] to their own testimony that they were motivated" by non-retaliatory reasons for their conduct, as that is a "quintessential credibility determination." *Borkowski v. Balt. Cnty.*, 583 F.Supp.3d 687, 701 (D. Md. 2021). Moreover, "fact-intensive arguments about causation are better evaluated on summary judgment." *Murray*, 515 F.Supp.3d at 459. The District Court erred by prematurely deciding that Defendants' conduct "suggest[ed] bureaucratic dysfunction," rather than a "retaliatory motive." JA746. Defendants' actual motivation is a factual question that should not be resolved on a motion to dismiss. *See Tobey*, 706 F.3d at 389.

Plaintiffs alleged a causal connection between the government's retaliatory animus — prompted by critical reporting, public advocacy, and litigation against the police department — and Plaintiffs' subsequent injury: the adverse treatment of public records requests to the same officials they publicly chastised. As in *Tobey*, to survive a motion to dismiss this Court "can infer causation based on the facts." 706 F.3d at 390. In particular, this Court has found "timing" sufficient to support an

"inference of retaliatory motive." *Trulock*, 275 F.3d at 405. Here, Defendants imposed exorbitant fees on Plaintiffs' access to files that had already been approved to be disclosed at no cost — but only *after* the records requesters filed a lawsuit and engaged in advocacy to increase police transparency. JA124-36, JA145-51, JA745-46. In February 2022, Plaintiff OJB filed an MPIA request to acquire personnel files of a single officer. Two months later, on April 8, OJB was informed that the personnel files were ready "as early as today" or "set for production next week" — without proffering a cost estimate. JA076, JA124. Having only received a personnel file summary and not the full scope of records, Plaintiffs proceeded to file this lawsuit in June 2022. JA007. In September 2022, Defendants informed Plaintiffs that to receive the full file they would be required to pay a fee over $7,000. JA145-51. The timing of the increase in cost, from no cost to over $7,000, to access files supports an inference of retaliatory motive sufficient to survive a motion to dismiss. *Trulock*, 275 F.3d at 405.

Because "competing inferences may be proven or disproven in discovery or at trial," the facts as alleged are sufficient to nudge Plaintiffs' claims from "conceivable to plausible" to survive the motion to dismiss standard. *Jackson v. Ford Motor Co.*, 842 F.3d 902, 909–10 (6th Cir. 2016) ("[C]ausal weaknesses will more often be fodder for a summary-judgment motion under Rule 56 than a motion to dismiss under Rule 12(b)(6)."); *accord Ridpath*, 447 F.3d at 318 ("Once a factual

record is developed through discovery, the evidence could support the [defendants] . . . Such a question, however, is not to be assessed under Rule 12(b)(6) but in Rule 56 summary judgment proceedings.").

B. Defendants mischaracterize the harm alleged.

This Court has found that "even minor retaliation can have a chilling effect on future expression," sufficient to constitute a violation of the First Amendment. *Kirby v. City of Elizabeth City*, 388 F.3d 440, 450 n.8 (4th Cir. 2004). Efforts to impede access to public records "would likely deter 'a person of ordinary firmness' from the exercise of First Amendment rights." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474 (4th Cir. 2015); *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013) ("In First Amendment cases, the injury-in-fact element is commonly satisfied by a sufficient showing of self-censorship, which occurs when a claimant is chilled from exercising [their] right to free expression.").

Plaintiffs' factual allegations encompass the processing of records requests and fee determinations. Defendants' purported "first in first out" approach to processing records directly contradicts Plaintiffs' well-founded assertions, and thus raises disputed questions of fact. Appellees' Resp. Br. 18. Additionally, Plaintiffs plausibly allege that the City and BPD abuse the latitude to issue records and grant fee waivers under the MPIA as a means of retaliation against parties who have engaged in First Amendment activities that negatively portray the police department.

Other parties, without Plaintiffs' history of criticizing BPD, have received fee waivers when Plaintiffs did not. JA023. Similarly, records that have been produced previously show that parties that collaborate with Defendants have, on average, lower wait times and fees. JA272-78. These allegations all raise questions of fact as to Defendants' motivations and decision-making.

Defendants attempt to distract from the key First Amendment inquiry, instead claiming that several of the requests were deficient or too large. JA015-17, JA230. However, Defendants also obstructed specific, narrower records requests. For example, Plaintiffs submitted a records request for an employee roster which Defendants refused to release, citing concerns about the disclosure of undercover officers. JA230. When Plaintiffs suggested that those names be redacted, Defendants stopped replying altogether. JA230. Likewise, Plaintiffs also submitted requests for the specific files of individual officers on two occasions. JA016. Defendants continually obstructed these requests and have yet to release the full personnel files. JA016-17. In another instance, Plaintiffs requested a "list of names of officers associated with misconduct investigations from 2020 and 2021." JA015. Defendants "took two months before responding to this request" and still have not produced the list. JA015. Therefore, even if this Court accepts Defendants' arguments that the records requests were too broad, this explanation is insufficient to discredit all of Plaintiffs' claims.

Factual disputes, including with respect to harm, cannot be resolved at the motion to dismiss stage. *See Martin v. Duffy*, 858 F.3d 239, 249–50 (4th Cir. 2017) (upholding a First Amendment retaliation claim against dismissal without weighing the defendant's alternative explanations). A contrary decision would be at odds with this Circuit's precedent. In *Occupy Columbia v. Haley*, the Fourth Circuit upheld a First Amendment claim against dismissal. 738 F.3d 107, 123 (4th Cir. 2013). The government's competing arguments could not serve as a basis for dismissal once the claimants had plausibly articulated a constitutional violation. *Id.* This Court held that "[a]t the Rule 12(b)(6) or 12(c) stage, [the plaintiffs] ha[d] sufficiently alleged a First Amendment violation notwithstanding . . . [the defendants'] contention that the statutes 'could' rightly be enforced" against the protestors. *Id*. Because dismissal was premature, Plaintiffs' claim should be reinstated. *Hall v. Putnam Cnty. Comm'n*, 637 F. Supp. 3d 381, 392 (S.D.W. Va. 2022) (recognizing that even if a claimant "might not prevail on this retaliation claim at trial," a "plausibly alleged [] retaliation [claim is] sufficient to survive dismissal").

II. The Court erred in failing to credit Plaintiffs' factual assertions alleging viewpoint and content discrimination.

The District Court erred as a matter of law in dismissing Plaintiffs' viewpoint and content discrimination claims because Plaintiffs sufficiently alleged that Defendants restricted access to records based on the requestor and content of their

request. The Supreme Court has "recognized that restrictions on the disclosure of government-held information can facilitate or burden the expression of potential recipients and so transgress the First Amendment." *Fusaro v. Cogan*, 930 F.3d 241, 254 (4th Cir. 2019) (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 569 (2011)). Plaintiffs are not arguing that the First Amendment independently gives them a right to public records; rather, Plaintiffs assert that the MPIA — the statute authorizing the disclosure of public records — be administered in a viewpoint and content-neutral way. When a right to government information is created, then it must be implemented consistent with the First Amendment. *See generally* Md. Code, Gen. Prov., §§ 4-101, et al. Because the "'First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw,'" viewpoint and content discrimination in the administration of the public records request process is sufficient to cognize a constitutional harm. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575–76 (1980) (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978)).

Denying access to records either based on their content — those painting the police department in a poor light — or the identity of the requestor — individuals and organizations critical of law enforcement — violates the First Amendment. Defendants violated Plaintiffs' constitutional rights by denying access to records

about police misconduct. Government entities are forbidden from limiting how information is distributed based on viewpoint or content, as these "circumstances indicat[e] improper interference with protected speech." *Fusaro*, 930 F.3d at 255. Accordingly, this Court has noted that "a First Amendment claim that challenges suspect conditions on access to government information must be available." *Id*. (citation omitted). "Plaintiff[s'] allegations that Defendant[s'] [] denied [their] MPIA requests . . . [or] fee waivers on the basis of Plaintiff[s'] opinion or perspective would constitute viewpoint discrimination barred by the First Amendment." *Robinson v. City of Mount Rainier*, No. GJH-20-2246, 2021 WL 1222900, at *9 (D. Md. Mar. 31, 2021). "[V]iewpoint neutrality requires not just that a government refrain from explicit viewpoint discrimination, but also that it provide adequate safeguards to protect against the improper exclusion of viewpoints." *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Schs*., 457 F.3d 376, 384 (4th Cir. 2006) (emphasis in original). This Court should not allow Defendants to "succeed in unconstitutionally suppressing particular protected speech by hiding the suppression from public scrutiny." *Child Evangelism*, 457 F.3d at 386.

Defendants cannot use statutory discretion to disguise viewpoint discrimination prohibited by the First Amendment, which permits "challenges to suspect conditions on access to government information." *Fusaro*, 930 F.3d at 255. In this case, Defendants denied records requests related to police misconduct and

then claimed they were simply exercising statutory discretion when doing so. JA017-24, JA128-33, JA227-31. "[T]here is broad agreement that . . . investing governmental officials with boundless discretion" can imperil First Amendment interests. *Child Evangelism*, 457 F.3d at 386. "[A] policy . . . that permits officials to deny access for any reason, or that does not provide sufficient criteria to prevent viewpoint discrimination, generally will not survive constitutional scrutiny." *Child Evangelism*, 457 F.3d at 387; *see also Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1064 (4th Cir. 2006) ("[U]nfettered discretion . . . presents [] a risk of viewpoint discrimination as to run afoul of the First Amendment.").

Even where "direct evidence of viewpoint discrimination" does not exist, "indirect evidence can be sufficient" to establish a claim for viewpoint discrimination. *Wang v. City of Rockville*, No. GJH-17-2131, 2019 WL 1331400, at *2 (D. Md. Mar. 22, 2019). Plaintiffs have presented sufficient evidence to state a claim and discredit Defendants' assertions that they did not unconstitutionally differentiate between records requests or requestors. Defendants were on notice about Plaintiffs' public criticism of BPD, and Defendants expressed antipathy toward Plaintiffs and their rights in these communications. JA227. To give one example: OJB has previously litigated against BPD to obtain records and the court in that case found that BPD willfully violated the MPIA and did not act in good faith.

JA018. This previous litigation ensured that BPD was aware of how Plaintiffs used the information from the records requests. *See* JA229; JA027. BPD is aware that Plaintiff maintains the BPD Watch website, which aims to hold BPD police officers accountable, and BPD has previously requested that OJB take down information from the website. JA282. Indeed, Plaintiffs attempted to resolve these records requests disputes amicably to avoid further costly litigation, but Defendants responded to these communications with disdain. JA227. For instance, Defendants stated that Plaintiffs' concerns about BPD's conduct were "hyperbole" and that Plaintiffs' communication of these concerns was "unnecessary and unhelpful." JA227. Defendants told Plaintiffs they could not "field frequent emails laden with overheated language, insults, and thinly veiled threats" of litigation. JA227. Notably, this was in response to Plaintiffs' detailing concerns about Defendants' violations of the law. JA226-227.

Moreover, a court should not "resolve factual disputes when ruling on a motion to dismiss," and Plaintiffs have provided enough evidence to at least create a factual dispute as to whether Defendants engaged in content and viewpoint discrimination. *Bosiger v. U.S. Airways*, 510 F.3d 442, 450 (4th Cir. 2007). For example, Defendants continuously obstructed OJB's efforts to obtain the file of a detective with a known history of misconduct complaints. JA128. Defendants obstructed this request — and other similar requests for misconduct records — by

attempting to provide only a summary of the file. JA128, JA339-40. Defendants also pressured Plaintiffs Soderberg and Figueroa to accept only summaries of requested records. *Id*. In contrast, Defendants provided requesters the full files of officers with minimal complaints relatively quickly. JA023-24. There is a factual dispute regarding whether Defendants released officer files with minimal complaints quickly because those files were easy to locate, or whether Defendants were more willing to release files that could not be used to criticize BPD.

Plaintiffs also offered a comparator as evidence of viewpoint and content discrimination. JA272. For instance, a private attorney who — unlike the Plaintiffs — lacks a history of public criticism toward BPD and does not have a significant internet presence to disseminate information about BPD received a complete personnel file within six months of the initial request. JA023-24, JA261-62, JA272. Nevertheless, the District Court dismissed Plaintiffs' comparator analysis, instead concluding that "[D]efendants were simply discharging their responsibility to evaluate each request individually." JA743. But it is, at minimum, a disputed question as to whether Defendants were evaluating requests individually or committing viewpoint discrimination. Indeed, the District Court did not address Plaintiffs' allegations that Defendants have "chronically obstructed" records requests that relate to BPD accountability and engaged in "documented tactics to

avoid disclosure" for years. JA227-31. These factual disputes preclude a motion to dismiss. *Tobey*, 706 F.3d at 383.

Defendants' alternative explanation for their conduct — that Plaintiffs made too numerous and broad requests, and that requests were evaluated individually — does not account for Plaintiffs' differential treatment. JA741-43. This explanation fails to account for why requesters with viewpoints critical of BPD were consistently delayed in receiving records and charged higher fees. JA024-25. Plaintiffs' Exhibits 41 and 42 include data—provided by BPD itself in discovery in prior litigation—that details the requesters, dates, information sought, fees, and responses for approximately 580 records requests. JA024, JA269-78. The data 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, JA272-78. Further, Exhibit 43 reveals discrepancies among 467 separate records requests for the production of Body Worn Camera ("BWC") Footage. JA279-80. These patterns are evidence of Defendants' broad viewpoint and content discrimination against critical requesters, including Plaintiffs. "The reasonable inference to be drawn, particularly at this stage of proceedings, is that" Defendants obstructed Plaintiffs' access to records because Defendants "disagreed with" Plaintiffs' viewpoint. *Windom v. Harshbarger*, 396 F.Supp.3d 675, 684 (N.D.W. Va. 2019).

III. Plaintiffs have adequately pled municipal liability under *Monell*.

Plaintiffs have alleged that the BPD, the Law Department, and the City, through their agents and employees, engaged in a practice of denying, delaying, and discriminating in their issuance of public records "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). Defendants established 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)). *Monell* "does not impose heightened pleading requirements, beyond the basic 'short and plain statement' requirement." JA685 (citing *Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 168 (1993)); *see also* Fed. R. Civ. P. 8(a). Plaintiffs have pled facts to support a finding of municipal liability sufficient to survive the motion to dismiss stage.

A. Plaintiffs' claims are sufficient to satisfy the pleading standard.

At the complaint stage, 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). 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). Defendants' reliance on caselaw is misplaced: the precedents to which Defendants cite assess claims at later stages of litigation, not the initial pleading threshold to survive a motion to dismiss. This is the wrong standard. In *Carter v. Morris*, this Court dismissed the claims at the summary judgment phase, after Plaintiffs had undergone discovery and failed to find evidence to prove the existence of a policy or custom. 164 F.3d at 220. In *Board of the County Commissioners v. Brown*, this Circuit did not make a definitive ruling on the *Monell* claims until an appeal from a judgment as a matter of law. *See* 520 U.S. 397, 401 (1997). Additionally, Plaintiffs "need not plead the multiple incidents of constitutional violations that may be necessary at later stages to plausibly allege causation." *McDowell v. Grimes*, GLR-17-3200, 2018 WL 3756727, at *5 (D. Md. Aug. 7, 2018) (internal citation and quotation omitted). Rather, at this stage, Plaintiffs need only allege that Defendants "w[ere] aware of [their] officers' unconstitutional behavior and that [their] failure to discipline the offending officers condoned this custom." *Id*.

B. Plaintiffs allege sufficient facts to satisfy the legal standard.

Defendants' pattern of responding to — or failing to respond to —records requests on the basis of the subject matter of the records sought and the viewpoint

of the requesters directly harmed the exercise of Plaintiffs' First Amendment rights. Though not required as early as a motion to dismiss, Plaintiffs have plausibly alleged that the custom of allowing delays, failing to respond, inflating costs, narrowing requests, and failing to fulfill records requests on the basis of a requester's identity or the information sought ultimately made the viewpoint and content discrimination suffered by Plaintiffs "reasonably probable." *Spell v. McDaniel*, 824 F.2d 1380, 1391 (4th Cir. 1987).

Plaintiffs' allegations plausibly indicate that officials have final policymaking authority and have sufficiently alleged *Monell* liability based on a condonation theory. While "[p]revailing under such a theory is no easy task . . . alleging such a claim is, by definition, easier." *Johnson v. Balt. Police Dep't*, 452 F. Supp. 3d 283, 310 (D. Md. 2020). The "'extent' of employees' misconduct" alleged by Plaintiffs — as illustrated by the "'widespread or flagrant' violations" and evidence of BPD, City Law Department, and City officials' actions — are sufficient to establish that policymakers "(1) had actual or constructive knowledge of the conduct, and (2) failed to correct it due to their 'deliberate indifference.'" *Owens v. Balt. City State's Attys. Off.*, 767 F.3d 379, 402 (quoting Spell, 824 F.2d at 1386–91). Plaintiffs adequately pled a widespread and persistent custom or practice by showing "numerous particular instances of unconstitutional conduct." *Kopf v. Wing*, 942 F.2d 265, 269 (4th Cir. 1991) (internal quotation marks omitted). In this Circuit, even just

two violations have been found sufficient for the purpose of establishing a "persistent and widespread" practice. *Owens*, 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)); *Chen v. Mayor*, L–09–47, 2009 WL 2487078, at *4 (D. Md. Aug. 12, 2009).

By plausibly establishing such a widespread and persistent practice, Plaintiffs thus also sufficiently alleged that Defendants had constructive knowledge of constitutional violations. 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," Defendants are liable. *Spell*, 824 F.2d at 1391. Defendants erroneously assert Harrison and Shea are not alleged to have participated or had knowledge regarding MPIA processing. Appellees' Resp. Br. 50. While Defendants argue that Plaintiffs did not sufficiently allege final policymaking authority on the part of the individuals with actual or constructive knowledge of ongoing violations, whether officials have final policymaking authority is a question of state and local law appropriate for the summary judgment stage, and it was not necessary for Plaintiffs to establish this authority on a motion to dismiss. *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.");

Chen, 2009 WL 2487078, at *4 ("Following the discovery period, the Court may reevaluate [Plaintiffs'] claims").

Per this Circuit's precedent, "'policymaking authority' implies authority to set and implement general goals and programs of municipal government, as opposed to discretionary authority in purely operational aspects of government." *Spell*, 824 F.2d at 1386 (citation omitted). Further, "a municipal agency or official may have final authority to make and implement policy despite a municipality's retention of powers of ultimate control over both policy and policymaker." *Id*. Maryland General Provision Section 4-104 confers broad policymaking authority to custodians charged with disclosing public records under the MPIA, stating: "Each official custodian shall adopt a policy of proactive disclosure of public records that are available for inspection." Md. Code, Gen. Prov., § 4-104. The statute defines "the official custodian" as "any other authorized individual who has physical custody and control of a public record," or "an officer or employee of the State or of a political subdivision who is responsible for keeping a public record, whether or not the officer or employee has physical custody and control of the public record." *Id*. § 4-101. Further, Section 4-201 lists the duties of official custodians, which include designating records available to the public on request and maintaining lists of the types of records that have been designated as such. *Id*. § 4-201. And under Section 4-206, official custodians have the authority to waive fees associated with records

requests. *Id*. § 4-206. These Sections of the Maryland Code appear to reflect a delegation of final policymaking authority to individuals responsible for responding to records requests and issuing or declining fee waivers. Thus, the individuals making these decisions — such as those officials deflecting legitimate requests for fee waivers to prevent access to records and arbitrarily and capriciously rejecting fee waiver requests — hold final policymaking authority. *See, e.g.*, JA009, JA013, JA081-89, JA211, JA230.

While Defendants argue that the widespread and persistent practice cannot be imputed to the City Defendants, Plaintiffs have presented sufficient evidence that City officials were also engaged in wrongdoing. JA010-13. 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." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 130 (1988). Unlike *Young v. City of Baltimore*, Plaintiffs here are not alleging mere supervisory liability on the part of the City and Law Department for Plaintiffs' harms. No. GLR-16-1321, 2017 WL 713860, at *1–2 (D. Md. Feb. 23, 2017). Rather, Lisa Walden and Stephen Salsbury were both agents of the City, in addition to BPD, who Plaintiffs alleged were aware of and actively contributed to the pattern of constitutional violations. JA010-11, JA013. Plaintiffs further plausibly alleged that Defendants had actual knowledge of

and were deliberately indifferent as to ongoing constitutional violations: Chief Legal Counsel Lisa Walden and Chief of Staff to the City Solicitor Stephen Salsbury 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).

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 trial court should be reversed, and Plaintiffs' claims should be reinstated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a) because this brief contains fewer than 6,500 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: July 12, 2024 /s/ Jennifer Safstrom

CERTIFICATE OF SERVICE

I hereby certify that on July 12, 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.

/s/ Jennifer Safstrom