No. 24-

IN THE

Supreme Court of the United States

OPEN JUSTICE BALTIMORE, BRANDON SODERBERG, AND ALISSA FIGUEROA,

Petitioners,

v.

BALTIMORE POLICE DEPARTMENT AND THE MAYOR AND CITY COUNCIL OF BALTIMORE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Rules of Civil Procedure set forth a liberal pleading standard. Fed. R. Civ. P. 8(a). This Court has clarified that the Rules create a plausibility pleading standard, meaning that the complaint must allege "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). When faced with a motion to dismiss, courts are bound to accept well-pleaded facts as true and draw all reasonable inferences in favor of the nonmoving party. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A complaint can survive a motion to dismiss "even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Id.* at 556 (citation omitted). A defendant may prevail on a motion to dismiss when an obvious alternative explanation exists; however, courts cannot simply credit a proffered justification over a plaintiff's allegations because of the overarching requirement that courts consider allegations as a whole, accept well-pleaded facts as true, and draw all reasonable inferences in favor of the nonmoving party. *Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 195–97 (2024) (citing *Twombly* 550 U.S. at 570 and *Iqbal*, 556 U.S. at 678). Accordingly, the question presented is:

Whether a defendant who offers a competing alternative explanation for conduct alleged in a plaintiff's complaint bears the burden of showing that their alternative explanation renders the plaintiff's theory of liability implausible.

PARTIES TO THE PROCEEDING

Petitioners are Open Justice Baltimore ("OJB"), Brandon Soderberg, and Alissa Figueroa, who were plaintiffs-appellants in the Fourth Circuit.

Respondents are the Baltimore Police Department ("BPD") and the Mayor and City Council of Baltimore ("City of Baltimore"). Respondents were defendants-appellees in the Fourth Circuit.

Also party to the proceedings below were the 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; and Michael Harrison, in his official capacity as Police Commissioner. Each of these parties was dismissed by the United States District Court of Maryland.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners Open Justice Baltimore, Brandon Soderberg, and Alissa Figueroa are, respectively a nonprofit organization and individuals. There is no parent corporation or publicly held company that owns 10% or more of their stock.

LIST OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Open Just. Balt. v. Balt. City Law Dep't*, No. 22-cv-01901-ELH (decision and order granting in full defendants' motion to dismiss issued August 10, 2023; decision and order denying plaintiff's motion to alter or amend judgment issued November 17, 2023); and

- *Open Just. Balt v. Balt. City Law Dep't*, No. 23-2293 (opinion affirming district court's dismissal and ordering entry of judgment for defendants issued December 20, 2024).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, OJB, Soderberg, and Figueroa, respectfully seek a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fourth Circuit is unpublished and available at 2024 WL 5182408. The district court's two decisions are unpublished and available at 2023 WL 5153654 and 2023 WL 8004885.

JURISDICTION

The Fourth Circuit entered judgment on December 20, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1). This Court granted an extension to file Petitioners' writ until April 3, 2025.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

42 U.S.C. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be

subjected, any . . . person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured."

Federal Rule of Civil Procedure 8(a) provides: "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."

Federal Rule of Civil Procedure 12(b)(6) allows a defendant to move for dismissal for plaintiff's "failure to state a claim upon which relief can be granted."

INTRODUCTION

This petition presents an important and recurring question about which party bears the burden of either substantiating or negating a proffered obvious alternative explanation in a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). This Court's review is warranted for three reasons.

First, the Fourth Circuit's decision deepens a split within the circuits as to which party bears the burden regarding obvious alternative explanations at the pleading stage, aligning the Fourth Circuit more with the Ninth Circuit's defendant-friendly standard—placing the burden on plaintiffs to exclude the possibility that a defendant's alternative explanation is correct—than the Second, Eighth, and D.C. Circuits' plaintiff-friendly standard—correctly placing the burden on defendants to directly undermine the plausibility of a complaint's allegations. The remaining circuits have unevenly applied

varying standards, resulting in confusion for litigants. The obvious alternative explanation standard permits hidden evaluative judgments from courts, and it substantially limits a plaintiff's ability to bring a claim past the pleading stage.

Second, the Fourth Circuit's decision is wrong and should be overturned. When evaluating alternative explanations, the Fourth Circuit refused to acknowledge multiple factual allegations made by Petitioners which showed that similarly situated parties were treated more favorably and that Respondents had repeatedly denied access to records for parties with critical viewpoints. Petitioners made numerous factual allegations, which carried reasonable inferences of Respondents' liability for each claim, and Respondents' alternative explanations failed to undercut those inferences. Nevertheless, the Fourth Circuit credited Respondents' explanations over Petitioners' allegations. In doing so, the Fourth Circuit placed the burden on Petitioners and effectively required them to disprove Respondents' proffered explanations instead of drawing reasonable inferences from well-pleaded facts in Petitioners' favor, consistent with this Court's precedent. The Fourth Circuit's misapplication of the obvious alternative explanation standard in the present case furthers a restricted view of plausibility pleading, requiring plaintiffs' allegations to exclude potential alternative explanations for liability or face dismissal. This decision favors a defendant's pretextual explanations at the expense of factual allegations that courts must accept as true.

Third, the question presented concerns a significant procedural issue that is important and recurring, and

this petition provides an ideal vehicle for this Court can resolve it. Obvious alternative explanations can apply in any case brought in civil court across the country. Uneven standards amongst the circuits create uncertain pleading requirements and varying access to judicial remedies for litigants based on geographic location, encouraging forum shopping. The present case illustrates how the lack of a clear standard for which party bears the burden of addressing alternative explanations at the motion to dismiss stage can lead to outcomes that are out of step with this Court's undisputed requirement to accept well-pleaded facts as true and draw all reasonable inferences in favor of the nonmoving party. If the Fourth Circuit's holding persists, unreviewed by this Court, all future plaintiffs defending their rights will be encumbered in claims ranging from constitutional litigation to contract disputes.

The Fourth Circuit's refusal to accept Petitioners' well-pleaded facts as true and draw all reasonable inferences therefrom—blatantly violating this Court's precedent—along with the entrenched split and deep confusion among the circuits, necessitate this Court's intervention.

STATEMENT OF THE CASE

Petitioners—Maryland nonprofit OJB, and journalists Brandon Soderberg and Alissa Figueroa—each attempted to use the Maryland Public Information Act ("MPIA") to request records from Respondent, BPD, through BPD's records custodian, the Baltimore City Law Department ("Law Department"), an arm of the other Respondent, the City of Baltimore. Am. Compl. ¶¶ 8–11.

Petitioners alleged that Respondents violated their First Amendment rights by engaging in content-based discrimination, viewpoint discrimination, and retaliation. *Id.* at ¶¶ 61, 77, 94. Specifically, Petitioners alleged that their records requests were delayed, denied, or made prohibitively and unlawfully expensive on the basis of their critical viewpoint of BPD, on the basis of the content of records sought, and in response to their constitutionally protected speech. *Id.* at ¶¶ 127–47.

First, with respect to viewpoint discrimination, Petitioners alleged that Respondents went to great lengths to prevent the release of records to individuals and organizations that are critical of police misconduct. *Id.* at ¶ 130. Petitioners alleged that Respondents denied proper MPIA requests, disregarded MPIA statutory deadlines, imposed prohibitively high fees, and failed to grant fee waivers when statutorily required. *Id.* Petitioners also alleged that despite their repeated communications to Respondents calling these unlawful deficiencies to Respondents' attention, Respondents failed to correct their conduct. *Id.* Furthermore, Petitioners alleged that Respondents explicitly voiced disapproval of how Petitioners have used the limited information they have received, evidencing bias against Petitioners' critical viewpoint. *Id.* at ¶ 131. Finally, Petitioners alleged that Respondents have shown a tendency to be more generous in terms of quicker response times and lower fees for requests submitted by less critical requesters. *Id.* at ¶ 133. This allegation was supported by a statistical analysis of over 580 individual requests. *Id.* at ¶ 54; Exs. 41–42.

Second, regarding content-based discrimination, Petitioners alleged that Respondents made substantial

efforts to prevent the release of records to individuals and organizations based on the content of the records requested. Am. Compl. ¶¶ 138–39. Petitioners alleged that the very same evasive actions—such as denying proper MPIA requests, disregarding statutory deadlines, imposing high fees, and denying required fee waivers—were used to discriminate against Petitioners based on the content of Petitioners' requests. *Id.* at ¶¶ 138–41. Petitioners alleged that Respondents selectively ignored requests and charged exorbitant fees based on how controversial or detrimental the content of the requested records was to BPD. *Id.* Petitioners alleged that preferential treatment was given to requests made for content that posed fewer issues for BPD. *Id.* at ¶¶ 86, 141. Petitioners specifically alleged that Respondents displayed a practice of granting records requests for files of officers with minimal misconduct complaints compared to those with numerous complaints. *Id.* at ¶¶ 13l, 141.

Third, pertaining to retaliation, Petitioners alleged that Respondents placed restraints on their access to public records in response to Petitioners' constitutionally protected speech—both in response to critical public statements about BPD and the filing of this lawsuit. *Id.* at ¶¶ 94–107, 146–47. Petitioner OJB maintained a website documenting police misconduct, and journalists Soderberg and Figueroa engaged in critical reporting. *Id.* at ¶¶ 70, 95, 99, 103. Additionally, Petitioners alleged that OJB made an MPIA request for a BPD officer's file, and initially, Respondents did not demand any fee for production of the records, stating that the records were ready to be turned over. *Id.* at ¶¶ 94, 96. However, after this lawsuit was filed and OJB criticized Respondents for their refusal to follow legal mandates, Respondents reacted

by demanding payment of approximately $7,000 for the same records. *Id.* at ¶ 96. Petitioners further alleged that during the timeframe of Respondents' adverse reaction to this lawsuit, another requester obtained two full officer files at no cost. *Id.*

Petitioners also alleged that the Circuit Court for Baltimore City had previously found that Respondents knowingly and willfully violated the MPIA and failed to act in good faith. *Id.* at ¶¶ 24, 33, 63, 79. Petitioners alleged that the chief counsel for the Law Department contacted OJB, expressed disapproval of the use of public information on OJB's website, and asked OJB to remove public information that was critical of BPD from their website. *Id.* at ¶¶ 59–60. Petitioners alleged that Respondents had previously voiced a desire to contain disclosures and limit future liability. *Id.* at ¶¶ 66, 68, 72, 75, 83–85, 89, 92. Thus, Petitioners alleged that Respondents' evasive and unconstitutional actions were tactics to punish and suppress Petitioners' protected speech and guard against further liability. *Id.*

For all claims, Petitioners supplied extensive comparator data, which showed clear differential treatment, leading to a reasonable inference of liability. *Id.* at ¶¶ 54, 133, 139–41; Am. Compl. Exs. 41–42. Using approximately 580 datapoints (obtained in separate litigation) regarding requests for single officer files, Petitioners alleged that it takes Respondents eight times longer to respond to media requesters than to attorneys or law enforcement. Am. Compl. ¶ 54; Exs. 41–42. Within that data, Petitioners alleged further stratifications, showing that state attorneys, as a group, received records within the timeframe provided by the MPIA, while media

requesters, like Petitioners, did not. *Id.* Petitioners alleged that this showed it was possible to handle requests within the statutory timeframe, but Respondents only did so for favored requesters. *Id.* The longest law enforcement ever had to wait was fifty days, nearly a month shorter than the quickest response to any media requester. *Id.* at ¶ 55.

Despite these well-pleaded allegations, on August 10, 2023, the district court granted Respondents' motion to dismiss, finding more likely explanations for the allegedly unconstitutional conduct. *See* App. 56a, 140a. The district court stated that no allegations established that Respondents considered viewpoint or content in responding to requests. *Id.* at 122a–123a. Failing to credit the statistical data showing trends that disfavored media and other critical requests, the court found that the alleged constitutional violations only extended to Petitioners and thus were insufficiently widespread. *Id.* at 123a. Even though the court found that BPD was aware of its MPIA obligations, the court credited the alternative explanation that the deficient responses resulted from Petitioners filing multiple broad requests at a time when the MPIA was amended.[1] *Id.* at 125a–126a.

On September 4, 2023, Petitioners moved to alter or amend the district court's judgment, but that motion was denied on November 17, 2023. *See id.* 16a, 55a. Again, despite Petitioners' robust factual

1. The MPIA was amended to favor requesters through the Maryland Police Accountability Act of 2021 ("MPAA"), which established that records relating to administrative or criminal investigations of misconduct by law enforcement officers are disclosable public records unless narrow exceptions apply. Am. Compl. ¶ 19.

allegations, the court concluded that there were "obvious alternative explanations" for Respondents' conduct: the amount and breadth of Petitioners' requests could have exceeded Respondents' capacity to respond quickly and inexpensively, and Petitioners may have experienced slow responses because Respondents reviewed requests individually. *Id.* at 45a–47a.Petitioners appealed the district court decisions to the Fourth Circuit, which affirmed dismissal on December 20, 2024. *See id.* 1a, 14a. The court of appeals adopted the findings of the district court and held that the number and scope of Petitioners requests provided an "obvious alternative explanation" for Respondents' alleged conduct: that the delays and deficiencies resulted from "bureaucratic dysfunction" rather than a constitutional violation. *Id.* at 11a–12a.

ARGUMENT

I. The Circuits Are Split with Respect to Evaluating a Motion to Dismiss When a Defendant Offers a Competing Obvious Alternative Explanation for the Conduct Alleged in a Plaintiff's Complaint.

In 2007 and 2009, this Court set forth the modern standard for evaluating a Rule 12(b)(6) motion to dismiss. *Twombly*, 550 U.S. at 547; *Iqbal*, 556 U.S. at 678. The disposition of each case turned on the evaluation of an obvious alternative explanation for the plaintiff's theory of liability, but the cases included little guidance on how lower courts should weigh a competing explanation offered by a defendant at the motion to dismiss stage.

These cases have left gaps in the pleading standard that lower courts have filled. In doing so, lower courts

have created substantial variation and disparity for plaintiffs across the country. In the Second, Eighth, and D.C. Circuits, courts have adopted a plaintiff-friendly standard, which allows a defendant's 12(b)(6) motion to prevail based on an obvious alternative explanation only when that explanation renders the plaintiff's theory of liability implausible. *See L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 430 (2d Cir. 2011); *McDonough v. Anoka Cnty.*, 799 F.3d 931, 953–54 (8th Cir. 2015); *Strike 3 Holdings, LLC v. Doe*, 964 F.3d 1203, 1211 (D.C. Cir. 2020). Conversely, the Ninth Circuit has adopted a defendant-friendly standard that allows dismissal whenever the plaintiff's allegations fail to exclude the possibility that the defendant's alternative explanation is correct. *See In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013). The remaining circuits have not clearly accepted either framework, which has led to unpredictable results and left plaintiffs uncertain of their burdens at the motion to dismiss stage. *See infra* Section I.B.3. Because the Fourth Circuit fits in this third category, Petitioners' complaint was improperly dismissed based on an alternative explanation. In making that assessment, the trial and appellate courts below did not accurately apply this Court's precedents. *See Twombly*, 550 U.S. at 547; *Iqbal*, 556 U.S. at 678.

A. *Twombly* and *Iqbal* Created the Modern Standard for Evaluating a Rule 12(b)(6) Motion to Dismiss.

When deciding a motion to dismiss for failure to state a claim, courts evaluate whether the plaintiff has alleged facts which, accepted as true, are sufficient to state a plausible claim to relief on the face of the

complaint. *Twombly*, 550 U.S. at 570; *Iqbal*, 556 U.S. at 678. A complaint is said to have facial plausibility if "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). Notably, this plausibility standard is distinct from a probability requirement: "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Twombly*, 550 U.S. at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). That said, the plausibility standard does entail "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678.

Although both *Twombly* and *Iqbal* identify an obvious alternative explanation for the conduct alleged, neither case provides a substantive definition of what constitutes an obvious alternative explanation or when an explanation is sufficiently obvious to warrant dismissal.[2] Despite the lack of clear guidance on evaluating alternative explanations, each case does at least suggest that when such an alternative explanation carries a successful motion to dismiss, that explanation fatally undercuts the plausibility of the plaintiff's complaint. In *Twombly*,

2. Judges have suggested that permitting alternative explanations to prevail at the motion to dismiss stage inherently conflicts with the duty to draw inferences in favor of the nonmoving party. *See Doe v. Samford Univ.*, 29 F.4th 675, 696 (11th Cir. 2022) (Jordan, J., concurring) (explaining that the modern framework is unworkable, particularly in discrimination cases because "it conflicts with our obligation to draw reasonable inferences in the plaintiff's favor at the Rule 12(b)(6) stage even when the competing inferences are equally plausible").

this Court explained that the defendants' parallel conduct did not suggest conspiracy because there was an alternative explanation for the noncompetition alleged, as it was independently advantageous for the defendants to act as they did. *See* 550 U.S. at 567–68. Independently advantageous conduct rendered an inference of an illicit agreement implausible because such an agreement would be redundant. *See id.* Similarly, in *Iqbal*, this Court found that the defendants had nondiscriminatory motivation for their allegedly discriminatory conduct because they were responding to safety concerns in the wake of the September 11 terrorist attacks by detaining individuals potentially connected to the attacks. *See* 556 U.S. at 682. This safety-motivated policy rendered the inference of unconstitutional discrimination implausible because it "would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims." *Id.*

Last term, this Court evaluated an "obvious alternative explanation" in the First Amendment context. *Vullo*, 602 U.S. at 195. This Court found that the defendant's purported "obvious alternative explanation" for the plaintiff's allegations did not hold up against the Court's "obligation to draw reasonable inferences in the [plaintiff's] favor and consider the allegations as a whole." *Id.* At the motion to dismiss stage, courts are required to "assume[] the truth of 'well-pleaded factual allegations' and 'reasonable inference[s]' therefrom." *Id.* at 181 (quoting *Iqbal*, 556 U.S. at 678–79). Importantly, this Court stated that it "cannot simply credit" the defendant's asserted justification for their actions as "an 'obvious alternative explanation' . . . that defeats the plausibility of any coercive threat raising First Amendment concerns." *Id.* at 195

(quoting *Iqbal*, 556 U.S. at 682). This Court acknowledged that the complaint must survive dismissal even though "discovery . . . might show that the allegations of coercion are false, or that certain actions should be understood differently in light of newly disclosed evidence." *Id.* Once the Court accepted all well-pleaded factual allegations as true and drew all reasonable inferences in the plaintiff's favor, the obvious alternative explanation did not render the plaintiff's allegations implausible, and the complaint survived the motion to dismiss. *See id.* at 195–97.

B. There Is Significant Variation Between the Circuits in Evaluating Purported Obvious Alternative Explanations.

Courts have acknowledged that "[t]he Supreme Court has not defined the phrase 'obvious alternative explanation,'" which has led to trial and appellate courts reaching definitions of their own. *N.J. Carpenters Health Fund v. Royal Bank of Scotland Grp., PLC*, 709 F.3d 109, 121 n.5 (2d Cir. 2013) (quoting *Iqbal*, 556 U.S. at 682; *Twombly*, 550 U.S. at 567); *see also Hughes v. Nw. Univ.*, 63 F.4th 615, 629 (7th Cir. 2023) (noting that obvious alternative explanations are distinct from possible alternative explanations, but providing no additional detail regarding what makes a given explanation obvious). The lack of a clear rule on this issue allows courts to cherry pick broad language from *Twombly* and *Iqbal*, creating unpredictability and variation across the circuits for litigants.

Circuit courts are split on the question of which party bears the burden of substantiating or negating purported obvious alternative explanations at the motion

to dismiss stage. The Second, Eighth, and D.C. Circuits place the burden on defendants to undermine a complaint's plausibility with an obvious alternative explanation. *See L-7 Designs, Inc.* 647 F.3d at 430; *McDonough*, 799 F.3d at 953–54; *Strike 3 Holdings, LLC*, 964 F.3d at 1211. The Ninth Circuit places the burden on plaintiffs to rule out alternative explanations. *See In re Century Aluminum Co.*, 729 F.3d at 1108. The remaining circuits do not clearly place the burden on either party, resulting in confusion and ambiguity for courts and litigants:

> [Y]ou can't assess the plausibility of an inference in a vacuum. The reasonableness of one explanation for an incident depends, in part, on the strength of competing explanations. (How reasonable is it to infer that it rained last night from the fact that my lawn is wet? It depends, among other things, on whether I own a sprinkler.) Where, as here, the complaint alleges facts that are merely consistent with liability . . . as opposed to facts that demonstrate discriminatory intent . . ., the existence of obvious alternative explanations simply illustrates the unreasonableness of the inference sought and the implausibility of the claims made.

16630 Southfield Ltd. P'ship v. Flagstar Bank, F.S.B., 727 F.3d 502, 505 (6th Cir. 2013). The Sixth Circuit's hypothetical illustrates the uncertainty surrounding obvious alternative explanations by failing to identify which party carries the burden.

Expanding on this hypothetical, if a plaintiff alleged that it rained by stating that their lawn was wet, and

a defendant moved for dismissal based on an obvious alternative explanation that the plaintiff owns a sprinkler, the mere fact that the plaintiff owns a sprinkler should not stop a court from inferring that it rained. If the defendant carries the burden of demonstrating that their alternative explanation is so obvious as to render the plaintiff's theory implausible, then the sprinkler alone is insufficient. The defendant would need to undermine the plaintiff's rain inference, perhaps by showing that neighboring lawns were not also wet. If, however, the plaintiff carries the burden of refuting alternative explanations, then they would have to rule out the possibility that the sprinkler caused the wet lawn, perhaps by alleging that the sprinkler was broken at the relevant time. Which party carries the burden can be dispositive, and without a unified rule on where the burden rests, parties are encouraged to forum shop. Those in circuits without a clear rule and no choice in forum are left with mere hope that judicial common sense is on their side when the motion is heard.[3]

3. This is precisely what some judges have cautioned against. *See McCauley v. City of Chi.*, 671 F.3d 611, 625 (7th Cir. 2011) (Hamilton, J., dissenting) (noting that the reliance on judicial common sense creates "highly subjective and inconsistent results," and lamenting that "an uncritical reading of the Court's 'obvious alternative explanation' reasoning seems to invite judges to weigh competing explanations for alleged conduct and dismiss cases merely because they believe one explanation over another," which creates a situation where "plaintiffs who already face the uphill battle of proving secret intent must now contend with the possibility of pre-discovery dismissal whenever the alleged pretext asserted by defendants in their motion to dismiss sounds plausible to the common sense of the particular judge").

1. The Second, Eighth, and D.C. Circuits Have Developed a Plaintiff-Friendly Standard that Places the Burden on Defendants to Substantiate Their Proffered Obvious Alternative Explanations in Order to Prevail on a Motion to Dismiss, Consistent with This Court's Precedent.

As described above, the Second, Eighth, and D.C. Circuits have developed a plaintiff-friendly construction of the obvious alternative explanation standard.

Courts in the Second Circuit have carefully considered what might constitute an obvious alternative explanation—plausibility "depends on a host of considerations: the full factual picture presented by the complaint, the particular cause of action and its elements, and the existence of alternative explanations *so obvious that they render plaintiff's inferences unreasonable*." *L-7 Designs, Inc.*, 647 F.3d at 430 (emphasis added); *see, e.g.*, *Fink v. Time Warner Cable*, 714 F.3d 739, 741 (2d Cir. 2013); *Kominis v. Starbucks Corp.*, 692 F. Supp. 3d 236, 245 (S.D.N.Y. 2023).

Additional courts in the Second Circuit have explained that "the existence of other, competing inferences does not prevent the plaintiff's desired inference from qualifying as reasonable unless at least one of those competing inferences rises to the level of an obvious alternative explanation." *N.J. Carpenters Health Fund*, 709 F.3d at 121 (internal quotations omitted). A defendant's proffered alternative explanation for the alleged conduct will not prevail in dismissing a complaint unless that explanation is "so obvious" as to "render plaintiff's inferences unreasonable." *L-7 Designs, Inc.*, 647 F.3d at 430. Otherwise,

those competing explanations and inferences should not be credited because "on a Rule 12(b)(6) motion it is not the province of the court to dismiss the complaint on the basis of the court's choice among plausible alternatives"; instead, that choice "will be a task for the factfinder." *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 190 (2d Cir. 2012).

In the Eighth Circuit, courts have articulated a similar standard for when a defendant's purported obvious alternative explanation overcomes a plaintiff's allegations. A defendant's alternative explanation must be "so obvious as to render [plaintiff's] claim . . . implausible." *McDonough*, 799 F.3d at 953–54. The burden lies with the defendant seeking to dismiss a plaintiff's complaint, which is appropriate given the requirement to accept a complaint's factual allegations as true and draw all reasonable inferences in favor of the nonmoving party. *See id.* at 945. The Eighth Circuit acknowledges that "not every potential lawful explanation for the defendant's conduct renders the plaintiff's theory implausible." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 (8th Cir. 2009). If courts required plaintiffs to rule out all possible lawful explanations for challenged conduct, it would violate the requirement to construe complaints favorably to the nonmoving party and "would impose the sort of 'probability requirement' at the pleading stage which *Iqbal* and *Twombly* explicitly reject." *Id.* (quoting *Iqbal*, 556 U.S. at 678).

Placing the burden on the defendant ensures that purported obvious alternative explanations are not credited more than a plaintiff's well-pleaded factual allegations unless the obvious alternative explanations

directly undercut the plaintiff's allegations and establish that the plaintiff has failed to clear the plausibility bar. Eighth Circuit courts have applied this framework when there are compelling alternative explanations for the conduct alleged. In *Wilson v. Arkansas Department of Human Services*, an employee alleged retaliation for her dismissal under Title VII. 850 F.3d 368, 370 (8th Cir. 2017). The employee's complaint alleged that her supervisor complained about her work performance and later placed her on a performance improvement plan. The employee even disclosed her own statement, "I was told that I was discharged for performance and for getting a second warning during a performance improvement period." *Id.* at 373. The court explained that "[t]he supervisor's criticism of [employee] is not an 'obvious alternative explanation' to [employee's] complaint," and "[t]o construe [employee's] placement on a [performance improvement plan] as an allegation of poor performance, and not as part of the retaliation, would 'invert the principle that the complaint is construed most favorably to the nonmoving party.'" *Id.* at 374 (quoting *Braden*, 588 F.3d at 597). Although the factual allegations were "consistent with termination for poor performance, they [were] not an obvious alternative explanation that render[ed] [employee's] claim implausible." *Id.* (internal quotations omitted).

The D.C. Circuit has evaluated alleged "obvious alternative explanations" similarly: an alternative explanation "must be so obvious as to render [plaintiff's] claim against the [defendant] facially implausible." *Strike 3 Holdings, LLC*, 964 F.3d at 1211. The D.C. Circuit has noted that where complaints were successfully dismissed for failure to state a claim, the meritorious

"obvious alternative explanations" have been "necessarily incompatible with the plaintiffs' versions of events." *In re U.S. Off. of Pers. Mgmt. Data Sec. Breach Litig.*, 928 F.3d 42, 57 (D.C. Cir. 2019) (citing *Iqbal*, 556 U.S. at 682 and *Twombly*, 550 U.S. at 567–68).

In the D.C. Circuit, a complaint will survive a motion to dismiss when there are two plausible explanations, one advanced by the plaintiff and the other advanced by the defendant. *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015). Plausibility is a lower bar than probability, so necessarily, there may be multiple plausible explanations for a defendant's conduct. "Discovery may show that one of [defendant's] alternate explanations is in fact correct. But it may also vindicate [plaintiff's] theory, and 'our role is not to speculate about which factual allegations are likely to be proved after discovery.'" *VoteVets Action Fund v. U.S. Dep't of Veterans Affs.*, 992 F.3d 1097, 1106 (D.C. Cir. 2021) (quoting *Harris v. D.C. Water & Sewer Auth.*, 791 F.3d 65, 70 (D.C. Cir. 2015)).

2. The Ninth Circuit Has Imposed a Defendant-Friendly Pleading Requirement, Which Runs Counter to *Twombly* and *Iqbal*.

In stark contrast to the rules developed by the Second, Eighth, and D.C. Circuits, the Ninth Circuit has put forward an opposite rule for the relationship between a complaint and an obvious alternative explanation. The Ninth Circuit requires the plaintiff's complaint to "exclude the possibility" that the proffered obvious alternative explanation is true. *In re Century Aluminum Co.*, 729 F.3d at 1108. In describing this rule, the Ninth Circuit explained that "when faced with two possible explanations,

only one of which can be true and only one of which results in liability, plaintiffs cannot offer allegations that are 'merely consistent with' their favored explanation but are also consistent with the alternative explanation." *Id.* (quoting *Iqbal*, 556 U.S. at 678). The court explains that "[s]omething more is needed, such as facts tending to exclude the possibility that the alternative explanation is true in order to render plaintiffs' allegations plausible within the meaning of *Iqbal* and *Twombly*." *Id.* (citation omitted).[4] If the plaintiffs' complaint does not "tend to exclude the possibility" that the defendant's alternative explanation is true, then the "plaintiffs' allegations remain stuck in 'neutral territory,'" and the "allegations are insufficient to withstand a motion to dismiss." *Id.* at 1108–09 (quoting *Twombly*, 550 U.S. at 557). This rule places the burden on plaintiffs to rule out opposing explanations before discovery.

The Ninth Circuit's overly broad extension of the "tending to exclude the possibility" language has made it much more challenging for plaintiffs to survive motions to dismiss, especially in contexts where there may be

4. The "tending to exclude the possibility" language can be found in *Twombly*, but it originated from two Sherman Act claims where plaintiffs had alleged only parallel conduct and thus were not entitled to directed verdicts or summary judgments without "tending to exclude the possibility of independent action." *Twombly*, 550 U.S. at 554 (citing *Monsanto Co. v. Spray–Rite Serv. Corp.*, 465 U.S. 752 (1984) and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)). The fact that *Iqbal* neither cites the language nor analogizes to such a requirement bolsters a narrow reading of *Twombly*. *See also Llacua v. W. Range Ass'n*, 930 F.3d 1161, 1179–80 (10th Cir. 2019) (tying the "tending to exclude the possibility" language from *Twombly* explicitly to the antitrust parallel conduct context).

pretextual explanations behind which defendants can hide. The standard has been used in many circuit and district court cases, in contexts ranging from *Bivens* claims of unlawful seizure and arrest under the Fourth Amendment, *Rueda Vidal v. Bolton*, 822 F. App'x 643, 644 (9th Cir. 2020), to alleged violations of the False Claims Act, *Integra Med Analytics LLC v. Providence Health & Servs.*, 854 F. App'x 840, 841 (9th Cir. 2021).

This framework has kicked out even compelling complaints based on meager alternative explanations. A Ninth Circuit district court recently used the defendant-friendly standard to dismiss a discrimination claim under 42 U.S.C. § 1981. *See Prieto Auto., Inc. v. Volvo Car USA, LLC*, No. 1:21-CV-01085-KES-EPG, 2024 WL 3011170, at *8 (E.D. Cal. June 14, 2024). In *Prieto Automotive, Inc.*, Volvo was looking to franchise dealerships, and it chose a less-experienced white-owned dealer who was offering an inferior location on the same asset purchase agreement terms as the more experienced plaintiffs—who were Hispanic, owned multiple successful franchises for other major manufacturers, and had a track record for reviving struggling dealerships. *Id.* at *1–2, *7. The complaint also alleged that Volvo had a pattern and practice of refusing to do business with minority-owned dealership operators and that there was only one minority Volvo dealer in the state of California. *Id.* at *2. The court found that although the complaint plausibly alleged that Volvo knew plaintiffs were Hispanic when it considered them as potential franchisees, it failed to plausibly allege discriminatory intent. *Id.* at *7. The court construed the allegation that Volvo only had one minority dealership in California as a "single data point" that failed to make discrimination plausible. *Id.* at *8. Additionally, the court found that

despite the allegations that the white applicant owned fewer dealerships, offered a less advantageous facility, and agreed to the same exact asset purchase agreement terms as plaintiffs, the complaint

> could conceivably be consistent with plaintiffs' conclusion that [the white applicant] was less qualified. But it is also possible, consistent with the [complaint's] allegations, that Volvo found [the white applicant] more qualified given these circumstances or considered other factors under which [the white applicant] was more qualified. The [complaint] fails to exclude alternative, non-discriminatory possibilities.

Id. Because the plaintiffs' allegations did not exclude all possible non-discriminatory explanations for the defendant's conduct, the court granted the motion to dismiss. *See id.*

3. Other Circuits Have Not Clearly Articulated or Consistently Applied a Standard for Evaluating Obvious Alternative Explanations, Resulting in Uncertainty Around Pleading Standards.

The remaining circuits—First, Third, Fourth, Fifth, Sixth, Seventh, Tenth, and Eleventh—have not clearly aligned with either the Second, Eighth, and D.C. Circuits' plaintiff-friendly articulation or the Ninth Circuit's defendant-friendly interpretation. These appellate courts string together various pieces of *Twombly* and *Iqbal* holdings and dicta in different ways; the outcome in each circuit is uneven and discordant at both the district and

circuit court levels. The First and Eleventh Circuits illustrate this phenomenon.

a. The First Circuit's Jurisprudence Illustrates the Uncertainty Facing Litigants.

In *Frith v. Whole Foods Market, Inc.*, the First Circuit articulated a defendant-friendly standard for evaluating an obvious alternative explanation as the basis for a successful motion to dismiss. *See* 38 F.4th 263, 276 (1st Cir. 2022). Faced with competing explanations in a Title VII employment discrimination case, the court sided with the defendants: because plaintiffs "ha[d] not pleaded any factual allegations pointing . . . away from the 'obvious alternative explanation' [the court] ha[d] identified," the motion to dismiss was granted.[5] *Id.* (quoting *Air Sunshine, Inc. v. Carl*, 663 F.3d 27, 37 (1st Cir. 2011)). Effectively, the First Circuit required the plaintiffs to affirmatively rule out nondiscriminatory explanations, rather than simply supply a plausible theory of discrimination. *Id. Contra Iqbal*, 556 U.S. at 678 (instructing courts to evaluate motions to dismiss by determining "whether the plaintiff has alleged facts, accepted as true, which are sufficient to state a plausible claim to relief on the face of the complaint").

However, the First Circuit is not always so defendant-friendly. In *Ocasio-Hernández v. Fortuño-Burset*, the

5. The defendant enforced a dormant uniform policy to punish some employees. The plaintiffs alleged that this was racially motivated given suspect timing and selective enforcement, and the defendant argued it was enforcing the policy to prohibit the display of a controversial message. *Id.* at 272–73, 275.

court placed the burden on the defendant to substantiate its alternative explanation at the motion to dismiss stage. *See* 640 F.3d 1,19 (1st Cir. 2011). The court found that "[t]he lack of any plausible alternative justification for the plaintiffs' terminations [made] the inference of political discrimination from the facts alleged more reasonable," and accordingly the defendant's motion to dismiss was denied. *Id.* at 18 n.6. The plaintiffs' "complaint unquestionably describe[d] a plausible discriminatory sequence," and "[u]nder the Federal Rules, no more is required to 'unlock the doors of discovery.'" *Id.* at 19 (quoting *Iqbal*, 556 U.S. at 679). The court acknowledged that "[a]lthough discovery may reveal facts that belie the plaintiff's claim, that possibility does not negate its plausibility." *Id.*

These competing articulations of the obvious alternative explanation standard have led to significant disparity in outcomes for litigants in First Circuit district courts. *Compare Camacho-Torres v. Betancourt-Vazquez*, 722 F. Supp. 2d 150, 154 (D.P.R. 2010) (applying a heightened requirement by stating that for a plaintiff to survive a motion to dismiss, their "inferences must be at least as plausible as any 'obvious alternative explanation'" (quoting *Iqbal*, 556 U.S. at 679)) *with Chao v. Ballista*, 630 F. Supp. 2d 170, 177 (D. Mass. 2009) (clarifying that "analysis depends on the full factual picture, the particular cause of action, and the available alternative explanations," and that "a complaint should only be dismissed at the pleading stage where the allegations are so broad, and the alternative explanations so overwhelming, that the claims no longer appear plausible").

b. The Eleventh Circuit Has Not Adopted a Clear Rule Regarding Proper Evaluation of Obvious Alternative Explanations.

In *Doe v. Emory University*, the court placed the burden on the plaintiff and dismissed a Title IX complaint that alleged sex discrimination because the complaint failed to rule out non-sex-based biases. *See* 110 F.4th 1254, 1261 (11th Cir. 2024). The complaint alleged that the university investigation at issue contained procedural and evidentiary irregularities, that the panel responsible for evaluating the case "made statements indicating anti-male bias," and that the university faced public pressure to credit females over males. *Id.* at 1260. The court evaluated each allegation in isolation, and even though each was admittedly "consistent with gender bias," they "[were not] necessarily indicative of it." *Id.* at 1261–63 (internal quotations omitted). Instead, the court credited the "obvious alternative explanation" that "the deficiencies Doe identifie[d] suggest[ed] 'pro-complainant bias,'" which "[was not] necessarily suggestive of unlawful sex discrimination." *Id.* at 1261. Despite the many allegations, "[n]one . . . exclude[d] the 'obvious alternative explanation,'" and the discrimination claim was dismissed. *Id.* at 1262 (quoting *Doe v. Samford Univ.*, 29 F.4th 675, 689 (11th Cir. 2022)).

In other cases, however, the Eleventh Circuit has placed the burden on the defendant. *See, e.g.*, *Adinolfe v. United Techs. Corp.*, 768 F.3d 1161, 1175–76 (11th Cir. 2014) (finding that even though alternative theories likely existed, "there [was] no 'obvious alternative explanation'

that a court, drawing on its 'judicial experience and common sense,' can rely on at the motion-to-dismiss stage to conclude that the plaintiffs' explanation is implausible" (quoting *Twombly*, 550 U.S. at 570)); *Almanza v. United Airlines, Inc.*, 851 F.3d 1060, 1071 n.8 (11th Cir. 2017) (explaining that defendants need not "affirmatively identify and justify what they actually did," because "on a Rule 12(b)(6) motion, [d]efendants must explain only why [p]laintiffs' allegations are not plausible").

Because of this lack of clarity at the appellate level, district courts throughout the Eleventh Circuit have differed in their analysis of alternative explanations in motions to dismiss. *Compare Karl Storz Endoscopy-Am. Inc. v. Integrated Med. Sys. Int'l, Inc.*, 400 F. Supp. 3d 1248, 1256 (N.D. Ala. 2019) (explaining that "[t]he court need not make every inference in a plaintiff's favor when 'obvious alternative explanations' exist" (citation omitted)) *with Myers v. Provident Life & Accident Ins. Co.*, 564 F. Supp. 3d 1157, 1182 (M.D. Fla. 2021) (finding a defendant's obvious alternative explanation "unavailing" because the defendant "fail[ed] to articulate why [the proffered explanation] renders the . . . claim implausible").

C. The Fourth Circuit Has Not Articulated a Standard with Respect to Which Party Bears the Burden When a Defendant Offers an Alternative Explanation for Alleged Conduct.

Within the Fourth Circuit, there are only four published, controlling opinions that discuss an obvious alternative explanation in the motion to dismiss context. *See McCleary-Evans v. Md. Dep't of Transp., State Highway Admin.*, 780 F.3d 582, 588 (4th Cir. 2015); *Woods v. City of Greensboro*, 855 F.3d 639, 649 (4th Cir.

2017); *Evans v. Chalmers*, 703 F.3d 636, 657 n.16 (4th Cir. 2012); *Desper v. Clarke*, 1 F.4th 236, 245 (4th Cir. 2021). Of those, there is conflicting direction on which party bears the burden of substantiating or negating an obvious alternative explanation.

In *McCleary-Evans*, the Fourth Circuit analyzed a purported obvious alternative explanation similarly to the Ninth Circuit. The case presented an employment discrimination claim, and the court held that the plaintiff's desired inference of invidious discrimination was implausible "in light of the 'obvious alternative explanation' that the decisionmakers simply judged those hired to be more qualified and better suited for the positions." 780 F.3d at 588 (quoting *Twombly*, 550 U.S. at 567). The court only provided three sentences of analysis, offering little guidance and announcing a broad rule that improperly burdens plaintiffs at the motion to dismiss stage. *See id.* Indeed, in employment discrimination cases, allegedly discriminatory hiring decisions can almost always be alternatively explained by the application of non-discriminatory hiring criteria. Plaintiffs in such contexts need not conclusively rule out all non-discriminatory explanations at the motion to dismiss stage; they only need to provide plausible allegations of discriminatory conduct.

Conversely, in *Woods*, the Fourth Circuit applied a plaintiff-friendly construction. *See* 855 F.3d at 649–50. There, the plaintiffs brought a racial discrimination claim. *Id.* at 641. The court instructed it "must consider the plausibility of inferring discrimination based on [plaintiff's] allegations in light of an 'obvious alternative explanation' for the conduct." *Id.* at 649 (quoting *Iqbal*, 556 U.S. at 682). The court elaborated it "must be satisfied that

[defendant's] explanation for [the alleged conduct] *does not render [plaintiff's] allegations implausible*." *Id.* (emphasis added). Ultimately, "[t]he question is not whether there are more likely explanations for [defendant's] action, [] but whether [defendant's] impliedly proffered reason . . . is so obviously an irrefutably sound and unambiguously nondiscriminatory and non-pretextual explanation that it renders [plaintiff's] claim of pretext implausible." *Id.* (citation omitted).[6] Because the defendant's alternative explanation failed to meet that bar, the complaint survived the motion to dismiss. *Id.* at 649–50. The remaining two opinions do not substantively address the question presented.[7]

1. The Fourth Circuit Erroneously Dismissed Petitioners' Claims Based on a Supposed Obvious Alterative Explanation, Warranting Reversal.

Because the Fourth Circuit has competing judicial statements of which standard controls when a court is faced with competing explanations for alleged conduct at the motion to dismiss stage, litigants are left to guess how to plausibly allege their claims. The present case

6. Petitioners cited *Woods* in their appellate briefing, but the court disregarded it. App. 11a–12a.

7. The controlling opinion in *Evans* only discusses obvious alternative explanations in a footnote, emphasizing that allegations should be viewed in conjunction with one another "to determine whether plaintiffs' well-pleaded, non-conclusory allegations collectively nudge the issue . . . 'across the line from conceivable to plausible.'" 703 F.3d at 657 n.16 (quoting *Iqbal*, 556 U.S. at 682). Similarly, *Desper* states in a single sentence that the complaint at issue was implausible in light of the defendant's obvious alternative explanation. 1 F.4th at 245.

illustrates the lack of effective guidance. Petitioners made numerous factual allegations which were improperly cast aside in favor of Respondents' alternative explanation, which failed to render Petitioners' factual allegations and reasonable inferences therefrom implausible. *See Infra* Statement of the Case. Instead, the court placed the burden on Petitioners to refute those explanations, similar to the Ninth Circuit's defendant-friendly rule. *See* App. 11a–12a.

Had the court correctly interpreted this Court's precedent and applied the plaintiff-friendly rule from the Second, Eighth, and D.C. Circuits, or from the Fourth Circuit's own precedent in *Woods*, Respondents' motion to dismiss would have failed. The explanation credited by the Fourth Circuit was that "[Petitioners'] requests were so numerous and broad that they exceeded [Respondents'] capacity to respond as quickly and inexpensively as [Petitioners] demanded." *Id.* at 11a. On appeal, the court summarily explained away Petitioners' eighteen requests—each of which received a deficient response, if any response at all—by reasoning that the "delays in producing the records being sought resulted from the [Respondents] simply discharging their responsibility under the MPIA to evaluate each request individually." *Id.* at 11a–12a (internal quotations omitted). The appellate court decided that "[Respondents'] alleged conduct could only—at best for the [Petitioners]—suggest . . . bureaucratic dysfunction." *Id.* at 12a (internal quotations omitted).

While bureaucratic dysfunction is a possible explanation for Petitioners' allegations, dismissal was unwarranted. This possible explanation fails to account for the myriad factual allegations contained in Petitioners'

pleadings, including allegations concerning disparity in response times based on the identity of requesters, statistical data showing broader trends, and particularly adverse actions taken in response to speech made by the Petitioners against Respondents. Am. Compl. ¶ 54. In other words, Respondents' explanation failed to render Petitioners' allegations implausible.

This proposed alternative explanation also fails to account for all three Petitioners. The circuit court noted that the requests were "numerous and broad," but Soderberg only filed two requests for officer disciplinary records, *id.* at ¶ 41, and Figueroa only twice submitted requests regarding two incidents of police misconduct. *See id.* at ¶¶ 43–44. Moreover, Petitioners' proffered comparator evidence showed that the records Soderberg requested had already been prepared and delivered around a month before to other, less critical requesters. *See id.* at ¶¶ 41–47. Even if there were bureaucratic dysfunction, it would not explain why the three Petitioners experienced delays that comparable, yet less critical parties did not experience. It likewise would not explain why all three petitioners experienced similar deficiencies when they each made different requests in terms of content and scope.

Discussing Petitioners' *Monell* claims, the circuit court concluded that Petitioners did not plausibly allege a custom or policy of discriminating against Petitioners' requests, finding that bureaucratic dysfunction and a recent amendment to the public records statute were sufficiently obvious alternative explanations. *See* App. 9a–10a. This conclusion was in error. Again, the numerosity of the requests is an inadequate explanation because

Petitioners made requests that Respondents fulfilled for other parties but not for Petitioners. Additionally, the MPAA became law on October 1, 2021, amending the statute to be more favorable for record requesters. *Supra* n.1. If anything, this change in law should have made records easier to obtain, not harder. Even if the law had made filling requests more difficult, Petitioners had been making requests since as early as 2019; therefore, the MPAA's passage cannot explain deficient responses to requests that were made prior to the change in law. This explanation fails to account for multiple requests, a fact left out of the lower court's analysis. App. 9a–10a.

II. This Case Presents an Ideal Vehicle for This Court to Resolve an Important and Recurring Procedural Issue with Broad Applicability.

In the wake of *Twombly* and *Iqbal*, motions to dismiss have become commonplace. *See* Lonny Hoffman, Twombly *and* Iqbal's *Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*, 6 Fed. Cts. L. Rev. 1, 1, 10–11 (2012) (discussing a statistically significant increase in motions to dismiss filed in federal courts after *Iqbal*). Without a clear rule dictating which party bears the burden of substantiating or refuting a defendant's alternative explanations for alleged conduct, disparities across circuits will continue to widen, reducing predictability for litigants and encouraging forum shopping. Confusion amongst the circuits is rampant because this Court has not yet had the proper opportunity to clarify the obvious alternative explanation standard. *Supra* Section I.B. This case provides such an opportunity, making it a serious candidate for review.

Moreover, the Fourth Circuit's use of the obvious alternative explanation standard to explain away all of Petitioners' claims makes this Court's review of the question presented outcome-determinative for all claims.

A. The Variable Pleading Standard Is a Serious and Recurring Issue Necessitating This Court's Review.

Motions to dismiss are common in federal civil litigation. *See* Hoffman, *supra*, at 1, 10–11. Because courts evaluate alternative explanations at the motion to dismiss stage, it is critically important to have a clear and unified rule regarding which party bears the burden of substantiating or negating an obvious alternative explanation. Clarifying the responsibilities of parties at the pleading stage will positively affect litigants in a broad array of claims.

At the pleading stage, plaintiffs face a host of problems hindering access to relief. Such obstacles are particularly pronounced when parties face information asymmetries. The circuits at large have recognized this problem, noting that information asymmetries occur "when discoverable information is in the control and possession of the defendant." *Innova Hosp. San Antonio, Ltd. P'ship v. Blue Cross & Blue Shield of Ga., Inc.*, 892 F.3d 719, 730 (5th Cir. 2018); *see, e.g.*, *Saldivar v. Racine*, 818 F.3d 14, 23 (1st Cir. 2016); *Taylor v. Salvation Army Nat'l Corp*, 110 F.4th 1017, 1029 (7th Cir. 2024).

The Tenth Circuit has recently recognized how information asymmetries are uniquely problematic

for retaliation claims. *See Brown v. City of Tulsa*, 124 F.4th 1251, 1268 (10th Cir. 2025). In *City of Tulsa*, the court considered a former police officer's employment discrimination claim and noted "when a plaintiff pleads a First Amendment retaliation claim, they likely have no way of knowing the government's specific interest in taking adverse action against them or what internal governmental disruption—whether actual or anticipated—the speech caused." 124 F.4th at 1268–69 (internal citations omitted); *cf. Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 448 (2024) (Gorsuch, J., concurring) (cautioning against "systemic bias in the government's favor"). If the burden of excluding alternative explanations at the pleading stage is placed on a plaintiff operating at an informational disadvantage, that plaintiff will experience a serious barrier to remedies. This problem is illustrated by the facts of this case. Petitioners, like the police officer in *City of Tulsa*, faced information asymmetry because evidence of internal procedures and retaliatory animus was uniquely in Respondents' possession.

Beyond just information asymmetry, the question presented is important, recurring, and of a procedural nature that has broad applicability. This Court has exercised its certiorari jurisdiction in the past to remedy decisions that highlight circuit-wide disputes and confusion about key procedural issues. *See* Shapiro, Geller, Bishop, Harnett & Himmelfarb, *Supreme Court Practice* § 4.15 (noting this Court's "particular interest in significant procedural issues," including the pleading standard as seen in *Twombly* and *Iqbal*). Because this petition presents a type of question this Court routinely reviews, certiorari is warranted.

B. The Procedural Question Is Cleanly Presented and Outcome-Determinative, Creating an Ideal Vehicle for This Court to Resolve the Circuit Split.

Should this Court grant certiorari and resolve the split this petition identifies, its ruling would be outcome-determinative for all of Petitioners' claims. Because the court below relied on alternative explanations to gloss over Petitioners' key factual allegations as to content-based and viewpoint discrimination, retaliation, and *Monell* liability, there are not sufficient alternative grounds on which this case can be resolved.

The First Amendment claims were each dismissed by the appellate court based on the alternative explanation of "bureaucratic dysfunction." App. 12a. The Fourth Circuit's conclusion adopted over one hundred pages of reasoning from the trial court and overlooked, *inter alia*, the following well-pleaded, specific factual allegations: 1) Petitioners' extensive comparator evidence, including approximately 580 data points, which showed media requesters receiving responses eight times slower than prosecutors and law enforcement; 2) Petitioners' allegation that by delaying or denying production of requested files that had recently been produced to less critical requesters, Respondents discriminated against Petitioners by taking five months to fulfill one request and never fulfilling another; and 3) Respondents told Petitioners that a file would be ready on a certain day for no payment, but after Petitioners filed suit, Respondents retaliated by charging thousands of dollars for the same production. Am. Compl. ¶¶ 54, 41–47, 94, 96. By relying on the alternative explanation of bureaucratic dysfunction to

explain away Petitioners' robust allegations, the Fourth Circuit improperly placed the burden on Petitioners. Thus, a decision from this Court clarifying the standard on obvious alternative explanations in a motion to dismiss is outcome-determinative on these claims.

As for *Monell* liability, the circuit court concluded that Petitioners' allegations were insufficiently "scattershot" to plausibly allege a custom or practice. App. 9a. The court below determined that Respondents' alleged conduct was better explained by the alternative explanation that Respondents were overwhelmed by numerous requests from Petitioners "at a time the law was evolving and the BPD had to consider the statutory change." *Id.* at 9a–10a.

By deciding that request inundation served as an alternative explanation sufficient to dismiss Petitioners' claims, the court overlooked the allegations that two Petitioners did not make numerous and broad requests. Petitioners Figueroa and Soderberg each only made requests on two occasions, and those requests were for limited subject matter, which in some cases had already been prepared for less adversarial requesters. Am. Compl. ¶¶ 41, 43–44. Furthermore, the courts overlooked the robust statistical allegations evincing a clear trend of media requesters receiving responses up to eight times slower than states' attorneys and law enforcement counterparts, *id.* at ¶ 54, directly contradicting the court's conclusion that Petitioners' allegations were insufficiently scattershot. By deciding that a change in the state law governing records requests was a prevailing alternative explanation, the court overlooked all the allegations of deficient request responses that were made prior to the statutory change, and thus would have been completely

unaffected by any legal shifts. *See, e.g.*, Am. Comp. ¶¶ 26–27, 30–31, 33, 36, 43. Moreover, the circuit court overlooked the allegations that the change in the state law should have resulted in improved responses to requests rather than delayed and deficient responses. *Supra* n.1. Taken together, Petitioners' allegations were sufficient to establish a custom or practice under *Monell*, and the appellate court's conclusion to the contrary is another example of a misapplication of the obvious alternative explanation standard.

This error is outcome-determinative on the issue of *Monell* liability. Because the burden was improperly placed on Petitioners, the appellate court failed to credit well-pleaded factual allegations as true and draw all reasonable inferences therefrom in favor of Petitioners. *See Twombly*, 550 U.S. at 570; *Iqbal*, 556 U.S. at 678; *see also Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 164 (1993) (holding that courts may not apply a heightened pleading standard in civil rights cases alleging municipal liability). If the burden is properly placed on Respondents, then alternative explanations would have to render Petitioners' allegations implausible. The credited alternative explanations for *Monell* liability plainly fail to render Petitioner's robust allegations implausible, and the Fourth Circuit's conclusion is an example of an impermissible and premature factual determination at the pleading stage. This petition therefore presents an ideal vehicle for the Court to clarify the standard.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, DECIDED DECEMBER 20, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-2293

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.

Appendix A

Argued: October 29, 2024
Decided: December 20, 2024

OPINION

UNPUBLISHED

Appeal from the United States District Court for the District of Maryland, at Baltimore. Ellen Lipton Hollander, Senior District Judge. (1:22-cv-01901-ELH).

Before KING and QUATTLEBAUM, Circuit Judges, and FLOYD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

The Plaintiffs—Open Justice Baltimore ("Open Justice"), Alissa Figueroa, and Brandon Soderberg—pursue this appeal from the District of Maryland's August 2023 dismissal of their operative Complaint in this matter. They jointly allege three claims under the First Amendment and its state counterpart—Article 40 of the Maryland Declaration of Rights—plus violations of the Maryland Public Information Act (the "MPIA") and the Maryland Police Accountability Act (the "MPAA"). The Complaint seeks relief from seven defendants, i.e., the Baltimore City Law Department (the "Law Department"); the Mayor and City Council of Baltimore ("Baltimore

City"); the Baltimore Police Department (the "BPD"); plus the Police Commissioner and three lawyers in the Law Department. As explained herein, we affirm the dismissal rulings of the district court. *See Open Just. Balt. v. Balt. City Law Dep't,* 2023 WL 5153654 (D. Md. Aug. 10, 2023) (the "Opinion").

I.

A.

The Plaintiffs have a goal of securing records of Baltimore City and the BPD in order to better inform the public about law enforcement misconduct. Open Justice seeks to make reports involving police misconduct publicly available in a searchable database on its website, called bpdwatch.org. Soderberg and Figueroa—an author and journalist, respectively—report on police misconduct in Maryland and elsewhere, and seek to continue their efforts. Between December 2019 and May 2022, the Plaintiffs submitted 18 voluminous requests for records to the BPD and Baltimore City pursuant to the MPIA, and asked that all costs and fees relating to production of the requested records be waived. Those requests—which were included in the more than 200 pages of exhibits made part of the Complaint—related to, inter alia, records of civilian complaints against Baltimore City's police officers, plus records of internal BPD investigations, officer personnel files, arrest reports, and related materials.

The MPIA—Maryland's freedom of information law—provides for a public right to inspect records of the State and the political subdivisions of Maryland. *See* Md.

Code §§ 4-101, *et seq.,* of the General Provisions Article ("G.P."), amended by the MPAA in 2021, G.P. § 4-351(a)(4), (c)-(e). The MPIA and the MPAA together provide, inter alia, that internal records concerning police discipline and complaints against law enforcement personnel may be released to the public, subject to certain exceptions. *See, e.g., id.* § 4-351(a)(4).

The MPIA mandates a records custodian to review requested records individually, and determine whether they can be released, inspected, or copied. It also authorizes a record custodian to deny or limit access to documents in specific circumstances. *See* G.P. § 4-201(a)(1)-(2). The MPIA allows the State agencies to charge a reasonable fee for expenses incurred in "the search for, preparation of, and reproduction of a public record," and, in circumstances where "the waiver would be in the public interest," authorizes such agencies to grant full or partial fee waivers. *See* G.P. § 4-206(b)(i)-(iii), (e).

B.

On June 30, 2022—after receiving what the Plaintiffs allege to be obstructive and inadequate responses to their MPIA record requests, and facing the imposition of expensive preparation and reproduction fees—the Plaintiffs filed this lawsuit in the Circuit Court for Baltimore City.

On August 2, 2022, the defendants, alleging federal question jurisdiction, removed the lawsuit to the District of Maryland. After removal, the Plaintiffs filed their

operative Complaint. As relevant here, the Complaint alleged three federal constitutional claims of viewpoint- and content-based discrimination and retaliation, in violation of the First Amendment, and sought to pursue those claims under 42 U.S.C. § 1983. The Complaint also alleged free speech claims under the Maryland Declaration of Rights, plus state law claims under the MPIA and the MPAA.

On November 7, 2022, the defendants moved to dismiss the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for failure to state a claim upon which relief can be granted. After briefing, the district court, by its 59-page August 10, 2023 Opinion, dismissed the 42 U.S.C. § 1983 claims and remanded the state law claims to the Circuit Court for Baltimore City. After the Opinion was filed, the Plaintiffs moved to alter or amend the judgment, pursuant to Federal Rule of Civil Procedure 59. That motion was denied on November 17, 2023, by the court's 31-page memorandum opinion. *See Open Just. Balt. v. Balt. City Law Dep't,* 2023 WL 8004885, at *1 (D. Md. Nov. 17, 2023) (the "Rule 59 Denial").

On December 13, 2023, the Plaintiffs timely filed this appeal, contending therein that the district court erred in dismissing their § 1983 federal constitutional claims, i.e., those alleged in Counts I, II, and III, against the BPD and Baltimore City. Those claims alleged viewpoint discrimination, content-based discrimination, and retaliation, each in violation of the First Amendment. We possess jurisdiction of the appeal pursuant to § 1291 of Title 28. As explained below, we are satisfied to adopt

both the comprehensive Opinion and the Rule 59 Denial, and we therefore affirm the judgment.

II.

We have carefully examined the record on appeal, including the various requests for official records that are appended to and made part of the Complaint. *See Weidman v. Exxon Mobil Corp.,* 776 F.3d 214, 219 (4th Cir. 2015) ("[W]e review a grant of a motion to dismiss for failure to state a claim de novo.").[1] When assessing a Rule 12(b)(6) motion, we are entitled to "also consider documents that are explicitly incorporated into the complaint by reference, and those attached to the complaint as exhibits." *See Goines v. Valley Cmty. Servs. Bd.,* 822 F.3d 159, 166 (4th Cir. 2016) (internal citations omitted).

Like the district court, and having assessed the relevant issues de novo, we are constrained to conclude

1. Because this is an appeal from a Rule 12(b)(6) dismissal, we are obliged to "accept as true all of the factual allegations contained in the complaint." *See Erickson v. Pardus,* 551 U.S. 89, 94 (2007). But "such deference is not accorded to legal conclusions stated therein." *See Walters v. McMahen,* 684 F.3d 435, 439 (4th Cir. 2012); *see also* Opinion, 2023 WL 5153654, at *13 ("However, a court is not required to accept legal conclusions drawn from the facts."). "[L]ike the district court, we draw all reasonable inferences in favor of the plaintiff." *See E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.,* 637 F.3d 435, 440 (4th Cir. 2011); *see also* Opinion, 2023 WL 5153654, at *13 ("In reviewing a Rule 12(b)(6) motion, a court must accept as true all of the factual allegations contained in the complaint, and must draw all reasonable inferences from those facts in favor of the plaintiff.").

that the Plaintiffs failed to allege facts sufficient to plausibly show that the defendants engaged in viewpoint discrimination, content-based discrimination, and retaliation, in violation of the First Amendment. *See Bell Atl. Corp. v. Twombly,* 550 U.S. 554, 570 (2007).

III.

Adhering to the sequence of claims assessed in the Opinion's analysis, we will first briefly evaluate the Plaintiffs' contentions concerning viewpoint- and content-based discrimination, including those regarding municipal liability against the BPD and Baltimore City. We will then summarize our views on the Plaintiffs' claim of retaliation.

A.

Section 1983 of Title 42 authorizes a cause of action in federal court against any person who, acting under color of state law, "subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." *See* 42 U.S.C. § 1983. In other words, to allege a plausible cause of action under § 1983, "a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *See West v. Atkins,* 487 U.S. 42, 48 (1988). That is, "[§] 1983 itself creates no rights; rather it provides a method for vindicating federal rights elsewhere conferred." *See Kendall v. City of Chesapeake,* 174 F.3d 437, 440 (4th Cir. 1999) (internal quotation marks omitted).

As an initial matter, it is important to observe that the First Amendment does not "mandate[] a right of access to government information or sources of information within the government's control." *See Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) (plurality opinion); *see also Fusaro v. Cogan*, 930 F.3d 241, 249-50 (4th Cir. 2019). And we have recognized that "there is generally no First Amendment claim based on the government's denial of access" to information "compiled, controlled, and maintained by the government." *See Fusaro*, 930 F.3d at 250. Put otherwise, the Constitution—and its First Amendment—does not mandate that the BPD or Baltimore City disclose official records requested by the Plaintiffs. *See Houchins*, 438 U.S. at 14-15.

B.

With that background, we turn briefly to the allegations of Counts I, II, and III of the Complaint, which embody the claims on appeal. With respect to the claims of viewpoint and content-based discrimination, i.e. Counts I and II, the Plaintiffs have—as the Opinion ruled—failed to allege facts demonstrating that the defendants prevented them from speaking, or restricted their speech "based on its substantive content or the message it conveys." *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995).

The Plaintiffs asserted their viewpoint- and content-based discrimination claims against the BPD and Baltimore City pursuant to the Supreme Court's 1978 decision in *Monell v. Department of Social Services*,

alleging that they engaged in persistent and widespread practices that amounted to an "official municipal policy." *See* 436 U.S. 658 (1978); *see also Lozman v. Riviera Beach,* 585 U.S. 87, 95 (2018) (explaining in *Monell* that "a city or other local governmental entity cannot be subject to liability [under § 1983] at all unless the harm was caused in the implementation of official municipal policy").

As the Opinion explained, the Complaint alleged "scattershot accusations of unrelated constitutional violations" that are insufficient to establish that the alleged discriminatory acts resulted from an official municipal policy of the BPD or Baltimore City, as required by *Monell. See* Opinion, 2023 WL 5153654, at *24 (quoting *Carter v. Morris,* 164 F.3d 215, 218 (4th Cir. 1999)); *see also Owens v. Balt. City State's Att'ys Off.,* 767 F.3d 379, 403-04 (4th Cir. 2014) ("Sporadic or isolated violations of rights will not give rise to *Monell* liability."). And the Opinion carefully discussed how Maryland's 2021 enactment in the MPAA—also known as "Anton's Law"—impacted the defendants' conduct. In so doing, the Opinion recited that:

> [T]he allegations and exhibits here reveal that BPD was aware of its obligations under the MPIA. However, over a relatively short period of time, three requestors made extensive record requests to the BPD, and at a time when the law was evolving and the BPD had to consider the statutory change. Specifically, the MPIA was amended by Anton's Law, effective October 1, 2021.

> . . . Given the recent passage of Anton's Law in relation to some of the requests, BPD hardly had time to formulate a "widespread and permanent practice necessary to establish [a] custom." And, the allegations, even if proven, do not establish a custom or policy "with the force of law."

See Opinion, 2023 WL 5153654, at *25 (internal citations omitted).

The Plaintiffs' claim that the BPD and Baltimore City retaliated against them by restricting access to official records, i.e., Count III, similarly fails, in that the Plaintiffs—as the Opinion recites—failed to allege facts demonstrating a plausible "causal relationship" between their protected speech and alleged retaliation. *See Constantine v. Rectors & Visitors of George Mason Univ.,* 411 F.3d 474, 499 (4th Cir. 2005); *see also Raub v. Campbell,* 785 F.3d 876, 885 (4th Cir. 2015) (explaining that protected expression must be "but for" cause of retaliation). As the Opinion further explained,

> [T]he alleged retaliation is "based on Plaintiffs' filing of this lawsuit." However, in Count III . . . [P]laintiffs fail to allege which specific actions, if any, were taken by defendants after the filing of this suit on June 30, 2022. For instance, [P]laintiffs assert only that "Defendants impermissibly retaliated against Plaintiffs' protected speech by placing numerous restraints on Plaintiffs' access to

> public records." But, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to state a constitutional violation. *Iqbal,* 556 U.S. at 681, 685.

See Opinion, 2023 WL 5153654, at *27.

We readily agree with the district court, in that the Complaint "contains no allegations that, if proven, would establish that defendants considered Plaintiffs' viewpoints or content when responding to the requests," nor does the Complaint allege any "specific actions . . . taken by defendants after the filing of this suit" that constituted retaliation. *See* Opinion, 2023 WL 5153654, at *27.

C.

Finally, the district court reasoned that there was an "obvious alternative explanation" for the defendants' alleged unconstitutional acts. *See Ashcroft v. Iqbal,* 556 U.S. 662, 682 (2009) (quoting *Twombly,* 550 U.S. at 567). That is, the Plaintiffs' requests were so numerous and broad that they exceeded the defendants' capacity to respond as quickly and inexpensively as the Plaintiffs demanded.[2] Therefore, delays in producing the records

2. The Opinion, recognizing that "it is somewhat difficult to summarize the content" of the 44 voluminous exhibits appended to the Complaint, included within it a representative records request submitted by Open Justice to the BPD "to illustrate the scope and the complexity of many of the requests." *See* Opinion, 2023 WL 5153654, at *5.

being sought resulted from the defendants "simply discharging their responsibility," under the MPIA, "to evaluate each request individually." *See* Rule 59 Denial, 2023 WL 8004885, at *12. Put simply, the defendants' alleged conduct could only—at best for the Plaintiffs—"suggest [a] bureaucratic dysfunction." *Id.* at *14.

With regard to the Plaintiffs' contentions that their access to the requested records was restricted by the alleged expensive fees being imposed, the Rule 59 Denial explained that the BPD and Baltimore City found it necessary to hire third-party vendors and outside counsel to conduct the essential "intensive document review" required in responding to the Plaintiffs' voluminous records requests. *See* Rule 59 Denial, 2023 WL 8004885, at *13. In such circumstances, the BPD and Baltimore City simply requested reimbursement for the third-party fees incurred—"costs that the defendants had not previously agreed to waive." *Id.*

Having carefully assessed the record and the various submissions of the parties, and with the benefit of oral argument, we are satisfied that the district court did not err in its dismissals of the three § 1983 First Amendment claims. In further support thereof, we are also satisfied to adopt the court's carefully crafted, thoughtful, and well-reasoned Opinion, as well as its comprehensive Rule 59 Denial.

IV.

Pursuant to the foregoing, the Appellants' contentions are rejected, and the judgment of the district court is affirmed.

AFFIRMED.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED DECEMBER 20, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-2293
(1:22-cv-01901-ELH)

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.

Appendix B

Filed December 20, 2024

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ NWAMAKA ANOWI, CLERK

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, FILED NOVEMBER 17, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. ELH-22-1901

OPEN JUSTICE BALTIMORE, *et al.*

Plaintiffs,

v.

BALTIMORE CITY LAW DEPARTMENT, *et al.*

Defendants.

Filed November 17, 2023

MEMORANDUM OPINION

This case arises from efforts by the plaintiffs to obtain records from the Baltimore City Police Department ("BPD") that generally concern police misconduct.

Plaintiffs Open Justice Baltimore ("OJB"), a community organization; Brandon Soderberg, a journalist and author; and Alissa Figueroa, a journalist, filed suit in the Circuit Court for Baltimore City against the BPD; the Baltimore City Law Department ("Law Department");

the Mayor and City Council of Baltimore (the "City"); as well as several individuals in their official capacities: City Solicitor James Shea; Stephen Salsbury, Chief of Staff to the City Solicitor; Chief Legal Counsel Lisa Walden; and Police Commissioner Michael Harrison. ECF 3.[1] Plaintiffs alleged, *inter alia*, that defendants' incomplete and untimely responses to plaintiffs' requests for public records concerning police misconduct violated the First Amendment. *Id.*

Defendants removed the case to federal court on the basis of federal question jurisdiction. ECF 1. Thereafter, plaintiffs filed an Amended Complaint (ECF 14), supported by 238 pages of exhibits. Plaintiffs again alleged, *inter alia*, violations of the First Amendment in connection with their requests for public records pertaining to police misconduct. ECF 14 ("Amended Complaint"), ¶¶ 1-4, 127-134.

By Memorandum Opinion and Order entered August 10, 2023, I dismissed plaintiffs' First Amendment claims. ECF 32; ECF 33. I also declined to exercise supplemental jurisdiction with respect to plaintiffs' remaining State law claims. Instead, I remanded the case to the Circuit Court for Baltimore City. ECF 32 at 58; ECF 33.

On September 4, 2023, pursuant to Fed. R. Civ. P. 59, plaintiffs moved to alter or amend the Court's judgment. ECF 35 ("Motion"). They primarily argue that the Court

1. Harrison is no longer the Police Commissioner; Shea no longer serves as City Solicitor; and Salsbury is now Deputy City Solicitor.

failed to consider factual allegations that support their claim that defendants committed viewpoint discrimination in violation of the First Amendment. The BPD and Commissioner Harrison responded to the Motion on October 16, 2023. *See* ECF 42, 42-1. In a separate filing on the same date, the Law Department, Shea, Salsbury, Walden, and the Mayor and City Council of Baltimore also responded. ECF 43, 43-1-3.

No hearing is necessary to resolve the Motion. *See* Local Rule 105.6. For the reasons that follow, I shall deny the Motion.

I. Background

In my Memorandum Opinion of August 10, 2023, I described in detail the procedural history of the case and plaintiffs' factual allegations. ECF 32 at 3-24. Therefore, I shall assume familiarity with this material and incorporate it here by reference. Nevertheless, a brief review of certain relevant details is helpful.

The Amended Complaint contains six counts, all related to defendants' alleged failure to respond adequately to public records requests made by plaintiffs pursuant to the Maryland Public Information Act ("MPIA"), Md. Code (2019 Repl. Vol., 2022 Supp.), §§ 4-101 *et seq.* of the General Provisions Article ("G.P."), as amended by the Maryland Police Accountability Act ("MPAA" or "Anton's Law"), G.P. § 4-351(a)(4), (c), (d), (e). Counts I, II, and III allege viewpoint discrimination, content-based discrimination, and retaliation, respectively, in violation of the First

Amendment and its Maryland counterpart, Article 40 of the Maryland Declaration of Rights. *Id.* ¶¶ 127-47.[2] Counts IV, V, and VI allege that defendants violated the MPIA, as amended by Anton's Law, by "failing to provide the requested records," *id.* ¶¶ 148-53 (Count IV), by "fail[ing] to abide by the time provisions of the" MPIA, *id.* ¶¶ 154-58 (Count V), and by "failing to waive fees." *Id.* ¶¶ 160-65 (Count VI).

The MPIA, enacted in 1970, is Maryland's analog to the Freedom of Information Act, 5 U.S.C § 552. It declares generally: "All persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees." G.P. § 4-103(a). To that end, the MPIA provides that, "[e]xcept as otherwise provided by law, a custodian shall

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2. The First Amendment to the Constitution provides, in part: "Congress shall make no law . . . abridging the freedom of speech." It is made applicable to the states through the Fourteenth Amendment. *Cantwell v. State of Conn.*, 310 U.S. 296, 303 (1940); *see also Manhattan Cnty. Access Corp. v. Halleck*, 587 U.S. ___, 139 S. Ct. 1921, 1928 (2019).

Article 40 of the Maryland Declaration of Rights provides that "every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects." Article 40 is the State of Maryland's constitutional counterpart to the First Amendment. It is ordinarily interpreted *in pari materia* with its federal analog. *See Kensington Volunteer Fire Dep't, Inc. v. Montgomery Cnty.*, 684 F.3d 462, 468 n.3 (4th Cir. 2012) ("Article 40 is 'co-extensive' with the First Amendment, and is construed *in pari materia* with it.") (quoting *Newell v. Runnels*, 407 Md. 578, 967 A.2d 729, 743 n.11 (2009)); *Borzilleri v. Mosby*, 189 F. Supp. 3d 551, 556-57 (D. Md. 2016), *aff'd*, 874 F.3d 187 (4th Cir. 2017); *Nefedro v. Montgomery Cnty.*, 414 Md. 585, 593 n.5, 996 A.2d 850, 855 n.5 (2010).

allow a person or governmental unit to inspect any public record at any reasonable time," *id.* § 4-201(a)(1), and that "[i]nspection or copying of a public record may be denied only to the extent provided" by the MPIA. *Id.* § 4-201(a)(2). Under the provisions relevant here, "a custodian may deny inspection of . . . records, other than a record of a technical infraction, relating to an administrative or criminal investigation of misconduct by a police officer," *id.* § 4-351(a)(4), "only to the extent that the inspection would . . . (1) interfere with a valid and proper law enforcement proceeding; (2) deprive another person of a right to a fair trial or an impartial adjudication; (3) constitute an unwarranted invasion of personal privacy; (4) disclose the identity of a confidential source; (5) disclose an investigative technique or procedure; (6) prejudice an investigation; or (7) endanger the life or physical safety of an individual." *Id.* § 4-351(b)(1)-(7).

In general, an agency may charge for costs and fees incurred in "the search for, preparation of, and reproduction of a public record prepared, on request of the applicant, in a customized format; and the actual costs of the search for, preparation for, and reproduction of a public record in standard format, including media and mechanical processing costs." G.P. § 4-206(b)(i)-(ii). However, an agency may waive the fee if "the applicant asks for a waiver, G.P. § 4-206(e)(1), and if, "after consideration of the ability of the applicant to pay the fee and other relevant factors, the official custodian determines that the waiver would be in the public interest." *Id.*

Appendix C

In their Amended Complaint, plaintiffs allege that, in the three years preceding the filing of their lawsuit, they "made eighteen requests [to defendants] for public records . . . regarding the police and police misconduct." ECF 14, ¶ 2. According to plaintiffs, none of these requests has been fulfilled. *Id.* ¶ 26.

As plaintiffs' exhibits reflect, many of these requests were extremely broad in scope. *See, e.g.*, ECF 32 at 10-13. For example, by letter dated December 20, 2019, OJB requested "[r]ecords relating to all citizen [or administrative] complaints filed in any manner or form to any member or affiliate of the [BPD], about the [BPD], with any subsequent investigations and conclusions, that the [BPD] closed during the period of January 1, 2019 through and including December 19, 2019." ECF 14-1 at 1-5. The letter provided a 19-line definition of "Documents." *Id.* at 3. Additional letter requests submitted by OJB on January 10, 2020, and March 14, 2022, were similarly broad. *See id.* at 7 (requesting records relating to all citizen or administrative complaints that the BPD "has not closed and has had open for over twelve months"); *id.* at 12 (requesting records relating to all citizen or administrative complaints "that the [BPD] closed during the period of July 1, 2021 through and including December 31, 2021").

Plaintiffs also submitted several other more limited requests for records relating to individual officers. *See id.* ¶¶ 31-32, 53. For example, on February 3, 2020, OJB requested the "misconduct records of Robert Dohony, a single officer." *Id.* ¶ 31. According to plaintiffs, the "BPD

and the Law Department repeatedly attempted to thwart OJB's access to the [Dohony] records through a variety of methods," such as by "repeatedly and egregiously ignoring OJB's fee waiver requests." *Id.*

In addition, on February 8, 2022, OJB requested "the full extent of information available from James Deasel's personnel file under Anton's Law" and "thirty-five specified criminal incident reports written by . . . Deasel that aroused public suspicion." *Id.* ¶ 32. According to plaintiffs, "the Law Department provided 25 of the requested criminal incident reports" but otherwise failed to fulfill plaintiffs' requests. *Id.*

Further, plaintiffs allege that Soderberg "requested the personnel file for Officer Melvin Hill on May 5, 2022" and "records for Officer Luke Shelley . . . on June 6, 2022." *Id.* ¶ 53. Soderberg's request for Officer Hill's records was fulfilled on September 29, 2022, but his request for Officer Shelley's records was "left unanswered." *Id.* A discussion of plaintiffs' other requests can be found in the Court's Memorandum Opinion of August 10, 2023. *See* ECF 32 at 8-24.

Of relevance here, plaintiffs allege that BPD and the Law Department have shown "preferential treatment towards different requesters." ECF 14, ¶ 48. They also assert that defendants "clearly release to requesters of favorable files over requesters of unfavorable files." *Id.* ¶ 52. In plaintiffs' view, defendants' failure to respond adequately to their MPIA requests is evidence of disparate

treatment in favor of requesters less likely to publicize information showing police misconduct. *Id.* ¶¶ 48-53.[3]

In particular, plaintiffs suggest that defendants readily granted "MPIA [request] 21-2452" because it concerned officers with "very minimal complaint histories," *id.* ¶ 50, and was made by "an associate at the Ponds Law Firm," which, according to plaintiffs, had "limited ability for dissemination or sharing of disclosed records." *Id.* ¶ 51. In contrast, plaintiffs assert that their requests were left mostly unfulfilled because they concerned "notorious officers on the [police] force, with known histories of violence and complaints," *id.* ¶ 50, and because plaintiffs, unlike the law firm responsible for request 21-2452, planned to publicize the information they received. *Id.* ¶ 51.

In addition, plaintiffs allege that "Defendants . . . show[ed] preferential treatment when disclosing summaries of full files," by delaying the disclosure to Soderberg of a summary of Officer Hill's personnel file for five months, even though a similar or identical summary had been provided to other requesters several months earlier. *Id.* ¶ 53. Moreover, plaintiffs allege that disparate treatment is evident in records maintained by defendants recording "the dates in which requesters make requests, the category of the requester, what is requested, and the date information was released." *Id.* ¶ 54. According to plaintiffs, these records show, *inter alia*, that "it takes about eight times as long for media requesters to receive

3. Plaintiffs have not lodged an Equal Protection claim.

a response [than] it does for states' attorneys and law enforcement." *Id.*

In my Memorandum Opinion of August 10, 2023, I concluded that plaintiffs had not sufficiently alleged First Amendment claims based on viewpoint discrimination, content-based discrimination, or retaliation. ECF 32 at 44-54. With respect to plaintiffs' claim of viewpoint or content-based discrimination, I acknowledged that, according to plaintiffs, defendants were "aware of plaintiffs' viewpoints and the content they publish due to lawsuits filed by them." *Id.* at 46. In addition, I noted that "it appear[ed] [from the allegations] that plaintiffs' requests for records related to police misconduct would be used to criticize the BPD." *Id.* at 47. Nonetheless, I determined that the "Amended Complaint contains no allegations that, if proven, would establish that defendants considered plaintiffs' viewpoints or content when responding to requests." *Id.* "In essence," I explained, "plaintiffs baldly assert that, by the very nature of who they are, any violation of the MPIA must necessarily be the result of discriminatory animus." *Id.* I concluded that such an assertion did not suffice to plead viewpoint discrimination. *Id.* at 52.

I also concluded that, even if plaintiffs had successfully pleaded viewpoint or content-based discrimination, they had not adequately alleged that this discrimination was the result of a municipal policy or practice, as is required to establish municipal liability under *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978), and its progeny. In particular, I determined that plaintiffs failed to allege that any City policymaker knew of, but exercised

deliberate indifference to, a persistent and widespread unconstitutional practice. ECF 32 at 50-51.

I also dismissed plaintiffs' claim of retaliation in violation of the First Amendment. *Id.* at 54. In my view, "plaintiffs fail[ed] to allege which specific actions, if any, were taken by defendants [in alleged retaliation for] the filing of this suit" on June 30, 2022. *Id.* at 53 (citing ECF 3; ECF 14, ¶ 146).

II. Standard of Review

Plaintiffs' Motion is filed "pursuant to Rule 59" of the Federal Rules of Civil Procedure. ECF 35 at 1.[4] Fed. R. Civ. Proc. 59(e) is captioned "Motion to Alter or Amend a Judgment." It provides: "A motion to alter or amend a judgment must be filed no later than 28 days after the entry of judgment." Plaintiffs filed the Motion on September 4, 2023 (ECF 35), twenty-five days after the Court entered judgment on August 10, 2023. ECF 33. Therefore, the Motion was timely filed.

The purpose of Rule 59(e) is to "give[] a district court the chance to rectify its own mistakes in the period immediately following its decision." *Banister v. Davis*, 590 U.S. ___, 140 S. Ct. 1698, 1703 (2020) (citation and internal quotation marks omitted); *see Zinkand v.*

4. Plaintiffs do not specify the portion of "Rule 59" on which they rely. Nor do they cite any authority interpreting this Rule. Because the Motion is styled as a "Motion to Alter or Amend Judgment," the Court believes that plaintiffs mean to invoke Fed. R. Civ. Proc. 59(e).

Brown, 478 F.3d 634, 637 (4th Cir. 2007); *Pac. Ins. Co. v. American Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998). Allowing the district court this opportunity helps to "spar[e] the parties and the appellate courts the burden of unnecessary appellate proceedings." *Pac. Ins. Co.*, 148 F.3d at 403. Nonetheless, "'reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." *Id.* (quoting 11 Wright et al., Federal Practice and Procedure § 2810.1 at 124 (2d ed. 1995) ("Wright and Miller 1995"). Indeed, "because of the narrow purposes for which they are intended, Rule 59(e) motions typically are denied." 11 Wright et al., Federal Practice and Procedure § 2810.1 at 171 (3d ed. 2012).

Rule 59(e) does not provide a standard by which to evaluate a motion to alter or amend a judgment. However, Fourth Circuit "case law makes clear [] that Rule 59(e) motions can be successful in only three situations: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Zinkand*, 478 F.3d at 637 (citation and internal quotation marks omitted); *see Ingle ex rel. Estate of Ingle v. Yelton*, 439 F.3d 191, 197 (4th Cir. 2006); *U.S. ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 290 (4th Cir. 2002), *cert. denied*, 538 U.S. 1012 (2003); *EEOC v. Lockheed Martin Corp.*, 116 F.3d 110, 112 (4th Cir. 1997).

The Fourth Circuit has cautioned that other uses of Rule 59(e) are inappropriate. For example, a party may not use a Rule 59(e) motion to "raise arguments [that] could have been raised prior to the issuance of the judgment"

or to "argue a case under a novel legal theory that the party had the ability to address in the first instance." *Pac. Ins. Co.*, 148 F.3d at 403; *see also Matter of Reese*, 91 F.3d 37, 39 (7th Cir. 1996) ("A motion under Rule 59(e) is not authorized to enable a party to complete presenting his case after the court has ruled against him.") (citation and internal quotation marks omitted). Nor may a party use a Rule 59(e) motion to "'relitigate old matters.'" *Pac. Ins. Co.*, 148 F.3d at 403 (quoting Wright and Miller 1995 § 2810.1 at 127-28).

The decision whether to alter or amend a judgment is firmly within a court's discretion. *See*, *e.g.*, *Bogart v. Chapell*, 396 F.3d 548, 555 (4th Cir. 2005). However, "[t]o justify reconsideration on th[e] basis" that a court committed a clear error of law, it is not enough for a plaintiff to show that the court's judgment was "'just maybe or probably wrong.'" *Fontell v. Hassett*, 891 F. Supp. 2d 739, 741 (D. Md. 2012) (quoting *TFWS, Inc. v. Franchot*, 572 F.3d 186, 194 (4th Cir. 2009)). Instead, the error identified by the plaintiff "must strike [the court] as wrong with the force of a five-week-old, unrefrigerated dead fish. It must be dead wrong." *U.S. Tobacco Coop. Inc. v. Big South Wholesale of Va., LLC*, 899 F.3d 236, 258 (4th Cir. 2018).

In other words, "[m]ere disagreement" with a court's ruling is not a proper basis for a Rule 59(e) motion. *Hutchinson v. Staton*, 994 F.2d 1076, 1082 (4th Cir. 1993). Without these "restraint[s]," "there would be no conclusion to motions practice, each motion becoming nothing more than the latest installment in a potentially endless serial

that would exhaust the resources of the parties and the court—not to mention its patience." *Pinney v. Nokia*, 402 F.3d 430, 452-53 (4th Cir. 2005); *see also Jackson v. Sprint/United Mgmt. Co.*, 633 F. Supp. 3d 741, 746 (D. Md. 2022).

III. Discussion

A.

In their Motion, plaintiffs acknowledge that "[t]he Court's Memorandum Opinion provides an in-depth analysis of the matters before the Court." ECF 35, ¶ 3. However, they complain that the Court "does not mention critical facts that Plaintiffs brought that contest the Court's findings" with respect to viewpoint discrimination and First Amendment retaliation. *Id.* As far as the Court can discern, plaintiffs identify three "critical facts" pertinent to their claim of viewpoint discrimination. *See id.* ¶¶ 4-13.

First, plaintiffs claim that they "have faced a pattern of unwavering obstruction and [have] been unable to get even the simplest document disclosed without a struggle"; yet, "a requester with less critical views was provided agency records with much less condemning content with much more ease." *Id.* ¶ 6. Plaintiffs identify the "requester with less critical views" as "Michael Fortini, an associate at the Ponds Law Firm," who made MPIA request number "21-2452," which concerned officers with "minimal complaint histories." *Id.* ¶¶ 6, 7. Second, plaintiffs allege that defendants delayed providing or withheld from Soderberg records pertaining to officers Melvin Hill and

Luke Shelley, even though similar or identical records had already been produced to different requesters. *Id.* ¶ 9. Third, plaintiffs assert that "internal record-keeping used [by defendants] to track MPIA requests . . . indicate[s] that for requests of single officers, it takes about eight times longer for media requesters to receive a response [than] it does for states' attorneys and law enforcement to receive a response." *Id.* ¶ 10 (citing ECF 27-1 at 239-41).

Plaintiffs also argue that the Court failed to consider allegations suggesting that defendants retaliated against plaintiffs for the filing of this lawsuit and other activity protected by the First Amendment. ECF 35, ¶¶ 14-21. In particular, plaintiffs assert that the Court failed to consider defendants' alleged revocation of a fee waiver after the suit was filed, *id.* ¶ 15; defendants' failure to cooperate with Soderberg after he published a book examining the BPD's notorious Gun Trace Task Force, *id.* ¶ 16; and defendants' attempts to charge Figueroa for certain records "[a]fter [they] learned of Figueroa's position as media and the nature of the contents of her MPIA requests which related to police misconduct." *Id.* ¶¶ 17-18.

Citing *Martin v. Duffy*, 858 F.3d 239, 249 (4th Cir. 2017), plaintiffs state that a "plaintiff suffers a retaliatory action if the alleged retaliatory conduct would likely deter a person of ordinary firmness from the exercise of First Amendment rights." *Id.* ¶ 19. According to plaintiffs, defendants' unjustified imposition of significant fees, "pressure to accept incomplete information, and delays in . . . releas[ing] . . . information would likely deter

an independent journalist of ordinary firmness from requesting more records," and therefore constitutes First Amendment retaliation. *Id.* ¶ 20. In addition, plaintiffs claim that their allegations of "eighteen instances of abuse" are sufficient to plead municipal liability. *Id.*

In response, the BPD argues: "At bottom, Plaintiffs urge this Court to reconsider its ruling because they disagree with it." ECF 42-1 at 5. According to the BPD, "Plaintiffs' Motion is virtually an unmodified regurgitation of their Opposition to Defendants' Motion to Dismiss . . . and [the] Amended Complaint, all of which this Court considered when rendering its Opinion." *Id.* In support, the BPD provides a table purporting to show that "nearly every substantive paragraph in Plaintiffs' Motion can be found, oftentimes verbatim, in their Opposition, their Amended Complaint, or both." *Id.* at 5-6. In urging the Court to deny the Motion, the BPD claims: "Plaintiffs [have] advance[d] no intervening change in controlling law, no new evidence, and no clear error of law or manifest injustice." *Id.* at 7.

The other defendants make similar assertions in their opposition. ECF 43-1. They contend that plaintiffs have "'merely reiterate[d] arguments' . . . already . . . rejected by the Court" and have failed to "'point to any controlling case law or evidence that was unavailable' at the time" the Court dismissed plaintiffs' First Amendment claims. *Id.* at 3 (quoting *Amy v. Sebelius*, 749 F. Supp. 2d 315, 340 (D. Md. 2010)).

Appendix C

B.

"Motions under Rule 59 are not to be made lightly," *Aiken Cnty. v. Bodman*, RBH-05-2737, 2009 WL 10710596, at *2 (D. S.C. June 19, 2009), and they are subject to a "stringent standard" of review. *J & J Sports Prods., Inc. v. Intipuqueno, LLC*, DKC-15-1325, 2016 WL 4141010, at *2 (D. Md. Aug. 4, 2016). This stringent standard is important because it requires a party requesting the "extraordinary" remedy of an amended judgment to justify its demand on limited judicial resources. *Pac. Ins. Co.*, 148 F.3d at 403. Yet, plaintiffs' Motion fails to describe the standard of review applicable to motions brought under Rule 59(e), let alone explain how this "stringent standard" is met in this case. This is a noteworthy omission.

Another important precept pertaining to Rule 59(e) is that a motion under the Rule is not to be used to "relitigate old matters." *Pac. Ins. Co.*, 148 F.3d at 403 (citation and internal quotation marks omitted). Yet, plaintiffs' Motion does little more than restate in slightly different terms certain allegations made in the Amended Complaint. In this respect, the Motion is inconsistent with the purpose for which the Rule 59(e) procedural device is intended.

In particular, paragraphs 5-8 of the Motion simply repeat, with some changes in wording, the allegations made in paragraphs 48-52 of the Amended Complaint. *Compare* ECF 35, ¶¶ 5-8 *with* ECF 14, ¶¶ 48-52. And, both series of allegations conclude with nearly identical statements.

Appendix C

To illustrate, paragraph 8 of the Motion states: "Defendants' only known release of a full personnel file, at no cost, demonstrates Defendants' preference for releasing favorable files over unfavorable files[,] and disclosure to private entities rather than to entities with criticism of BPD and a public reach like [OJB]." ECF 35, ¶ 8. And, the Amended Complaint states, ECF 14, ¶ 52: "From Defendants [sic] only known release of a full personnel file, at no cost, we can see Defendants clearly release favorable files over unfavorable files; Defendants clearly release to requesters of favorable files over requesters of unfavorable files."

The Motion's other assertions regarding viewpoint discrimination are also repetitive of allegations in the Amended Complaint. *Compare* ECF 35, ¶¶ 9-12 *with* ECF 14, ¶¶ 53-56. For example, in paragraph nine of the Motion, plaintiffs state: "Even when Plaintiffs have acquiesced to accepting *summaries* of misconduct records in place of full files, Defendants do not just break the law, but also ensure a difficult process for obtaining these records" (emphasis in Motion). That statement is nearly identical to the following allegation in the Amended Complaint, ECF 14, ¶ 53: "Even where Plaintiffs have acquiesced to accepting summaries of misconduct records, Defendants do not just break the law, but also ensure a difficult process for obtaining the records."

In addition, plaintiffs' statement in paragraph ten of the Motion that "Defendants' own records demonstrate an even more concrete preferential treatment of requesters," ECF 35, ¶ 10, is repetitive of their assertion in the Amended

Complaint that defendants' "[p]referential treatment to different requesters can be made even more concrete" by examining "[d]efendants' own records." ECF 14, ¶ 54. And, plaintiffs' statement in the Motion that "state's attorneys receive records within the statutory timeframe, proving timely disclosure is not an impossibility," ECF 35, ¶ 11, is substantially identical to their allegation in the Amended Complaint that "states [sic] attorneys are shown to receive records within the statutory timeframe, proving it is not an impossibility." ECF 14, ¶ 55.

Furthermore, plaintiffs' assertions in the Motion concerning defendants' alleged retaliation in violation of the First Amendment, and *Monell* liability, are duplicative of allegations in the Amended Complaint. Indeed, to substantiate their statements in the Motion concerning retaliation and *Monell* liability, plaintiffs simply refer the Court to allegations already advanced in the Amended Complaint. *See* ECF 35, ¶¶ 14-18.

Thus, much of the Motion reiterates allegations presented in the Amended Complaint. However, plaintiffs observe that the Court did "not mention" in its Memorandum Opinion of August 10, 2023, certain "critical" factual allegations in the Amended Complaint relating to plaintiffs' First Amendment claims—in particular, paragraphs 48 to 57 of the Amended Complaint. *Id.* ¶¶ 3-4.[5] Because the Memorandum Opinion did not mention paragraphs 48 to 57 of the Amended Complaint,

5. Plaintiffs' citations to the Amended Complaint provide page numbers rather than paragraph numbers.

plaintiffs posit that their renewed allegations of viewpoint discrimination and retaliation do not, in fact, concern "old matters" in the typical sense. *Id.* ¶ 3; *see Pac. Ins. Co.*, 148 F.3d at 403.

It is true that, in my Memorandum Opinion, I did not mention every factual allegation contained in the Amended Complaint. But, I certainly considered and rejected plaintiffs' claims of viewpoint discrimination and retaliation under the First Amendment, ECF 32 at 44-54, as well as plaintiffs' contention as to liability under *Monell*, 436 U.S. 658.

For example, citing portions of the Amended Complaint captioned, *inter alia*, "*Defendants' viewpoint discrimination against OJB,*" "*Defendants' viewpoint discrimination against Plaintiff Soderberg,*" and "*Defendants' viewpoint discrimination against Plaintiff Figueroa,*" I stated: "In essence, plaintiffs assert that defendants violated the MPIA with respect to plaintiffs' requests because defendants disapprove of how plaintiffs will use the information." ECF 32 at 44 (citing ECF 14, ¶¶ 62-93) (italics in Amended Complaint). Citing paragraphs of the Amended Complaint setting forth plaintiffs' claim of viewpoint discrimination, I observed: "Plaintiffs posit that defendants are aware of plaintiffs' viewpoints and the content they publish due to previous lawsuits filed by them, and because of plaintiffs' professional interests and accomplishments." ECF 32 at 46-47 (citing ECF 14, ¶¶ 62, 63, 66, 67, 70, 71, 74, 78-80, 84, 87, 88, 91). And, again citing paragraphs setting forth plaintiffs' claim of viewpoint discrimination, I concluded

that plaintiffs' allegations would not, if proven, "establish that defendants considered plaintiffs' viewpoints or content when responding to the requests." ECF 32 at 47 (citing ECF 14, ¶¶ 63, 67, 70, 71, 74).

To be sure, a court must consider all nonconclusory factual allegations when determining whether a complaint "states a plausible claim for relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). But, the law does not require a court to "mention" every nonconclusory factual allegation when it summarizes the facts or sets forth the reasons for its decision. This is especially so when, as here, a plaintiff has submitted an Amended Complaint that, with its 44 exhibits, totals 277 pages. The fact that a court granting a motion to dismiss has not mentioned every factual allegation included in a lawsuit is, by itself, not grounds for relief under Rule 59(e)'s demanding standard. *See U.S. Tobacco Coop. Inc.*, 899 F.3d at 258 (requiring that the error identified by the plaintiff must "strike [the court] as wrong with the force of a five-week-old, unrefrigerated dead fish.").

Indeed, the Fourth Circuit recently observed that, "when there isn't a federal rule requiring the district court to make its reasoning known," in general, "a district court's lack of explanation doesn't amount to error." *Frazier v. Prince George's Cnty.*, ___ F.4th ___, 2023 WL 7563846, at *4 (4th Cir. Nov. 15, 2023). Moreover, even when there *is* a rule requiring the district court to explain its reasoning, such as Federal Rule of Civil Procedure 52(a)(2), the "burden" of explanation borne by the district court "is not Herculean." *Id.* For example, Rule 52(a)(2),

which provides that a court must "state the findings and conclusions that support" its decision to grant or deny an interlocutory injunction, "does not require a tome that memorializes all factual minutiae or responds to every legal assertion." *Id.*

Here, the Memorandum Opinion of August 10, 2023, did "respond[] to every legal assertion," because it addressed each of plaintiffs' constitutional claims. *Id.* And, the Memorandum Opinion did "make [the Court's] reasoning known." *Id.*

"District courts are busy places." *United States v. Amin*, ___ F.4th ___, 2023 WL 7118917, at *4 (4th Cir. Oct. 30, 2023). Some judges write lengthy opinions; others do not. The measure of a sound judicial opinion is certainly not the number of allegations the Court chooses to mention.

C.

In any event, even if I were to reevaluate plaintiffs' First Amendment claims *de novo*, I would still conclude that they must be dismissed for failure to state a claim.

As discussed in the Memorandum Opinion of August 10, 2023, ECF 32 at 45, the prohibition against viewpoint discrimination is "a core postulate of free speech law: The government may not discriminate against speech based on the ideas or opinions it conveys." *Iancu v. Brunetti*, 588 U.S. ___, 139 S.Ct. 2294, 2299 (2019). In other words, "[t]he government must abstain from regulating speech

when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (citing *Perry Ed. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 46 (1983)).

Viewpoint discrimination is prohibited in any forum. *See Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1067 (4th Cir. 2006) ("The ban on viewpoint discrimination is a constant. Beyond this, speakers' rights depend upon how widely the government has opened its property and its purposes in doing so.")

"[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)). However, direct proof of viewpoint discrimination is hard to come by, because "the government rarely flatly admits it is engaging in viewpoint discrimination." *Ridley v. Mass. Bay Trans. Auth.*, 390 F.3d 65, 86 (1st Cir. 2004), *partially abrogated on other grounds by Matal v. Tam*, 582 U.S. 218 (2017). Therefore, courts have recognized that several types of indirect evidence can be probative of viewpoint discrimination. *See Ridley*, 390 F.3d at 86; *Am. Freedom Defense Initiative v. Wash. Metro. Area Transit Auth.*, 901 F.3d 356, 365-66 (D.C. Cir. 2018); *see also Wang v. City of Rockville*, GJH-17-2131, 2019 WL 1331400, at *2.

For example, in *Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cnty.*, 653 F.3d 290, 297-98 (3d Cir. 2011), the Third Circuit recognized that a plaintiff can establish viewpoint discrimination with a "comparator analysis," that is, a showing that the government's treatment of the plaintiff was less favorable than its treatment of other, similarly-situated speakers with different viewpoints. Likewise, in *Ridley*, 390 F.3d at 86, the First Circuit acknowledged that, "where the government states that it rejects something because of a certain characteristic, but other things possessing the same characteristic are accepted," a "suspicion [arises] that the stated neutral ground for action is meant to shield an impermissible motive." The *Ridley* court also observed that "suspicion [of viewpoint discrimination] arises where the viewpoint-neutral ground" advanced by the government "is not actually served very well by the specific governmental action at issue; where, in other words, the fit between the means and ends is loose or nonexistent." *Id.*

The D.C. Circuit has likened a court's inquiry into viewpoint discrimination to "the test the Supreme Court has used to unearth tacit discrimination on the basis of race." *See Am. Freedom Defense Initiative*, 901 F.3d at 366. According to the D.C. Circuit, "'[t]he historical background of the decision' is relevant; if the Government has repeatedly been found to have engaged in viewpoint discrimination, especially against the plaintiff, then courts should look skeptically at its seemingly viewpoint-neutral rationale." *Id.* (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977)). Moreover,

"'[t]he specific sequence of events leading up to the challenged decision,' such as '[d]epartures from the normal procedural sequence' and '[s]ubstantive departures' from 'the factors usually considered important' may also be relevant." *Am. Freedom Defense Initiative*, 901 F.3d at 366 (quoting *Arlington Heights*, 429 U.S. at 267)).

Of course, the Court's task here is to evaluate the sufficiency of plaintiffs' allegations, not to determine whether plaintiffs have proved their case. Nonetheless, the Court's understanding of what evidence would be probative of viewpoint discrimination necessarily informs its assessment of whether plaintiffs have included allegations that, if proved, would allow a factfinder to conclude that defendants committed viewpoint discrimination.

Plaintiffs' claim of viewpoint discrimination rests on a "comparator analysis," *see Pittsburgh League*, 653 F.3d at 297-98: that is, allegations that defendants were less accommodating of plaintiffs' requests than they were of requests made by other similarly-situated requesters with viewpoints that were supposedly less critical of the BPD. ECF 14, ¶¶ 48-57. In my view, these allegations fail to move plaintiffs' claim of viewpoint discrimination "'across the line from conceivable to plausible.'" *Iqbal*, 556 U.S. at 680 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 680 (2007)).

The first of plaintiffs' allegations of disparate treatment concerns defendants' response to "MPIA [request] 21-2452," which was "made by Michael Fortini, an associate at the Ponds Law Firm." ECF 14, ¶ 51. According to

plaintiffs, the defendants' response was "more favorabl[e]" than defendants' responses to the requests made by plaintiffs, because request 21-2452 concerned "officers [with] very minimal complaint histories" that could be "provided on one page." *Id.* ¶ 50. In contrast, plaintiffs' requests concerned "notorious officers on the force, with known histories of violence and complaints," including James Deasel, whose "summary was provided in over 80 pages." *Id.* In addition, plaintiffs assert that defendants responded more favorably to request 21-2452 because the requester, the "Ponds Law Firm," had "a limited ability for dissemination or sharing of disclosed records" and had offered to "dismiss an existing complaint in federal court if the files were disclosed in full." *Id.* ¶ 51. Plaintiffs conclude that defendants' treatment of request 21-2452 shows that they "clearly release favorable files over unfavorable files." *Id.* ¶ 52.

The second of plaintiffs' allegations of establish viewpoint discrimination is that defendants delayed providing or entirely withheld from Soderberg certain files that defendants had already provided in some form to other requesters. *Id.* ¶ 53. For example, plaintiffs assert that even though defendants provided the file for Officer Hill to other requesters in April 2022, they did not fulfill a request by Soderberg relating to Officer Hill until September 29, 2022. *Id.*

Plaintiffs' third allegation in support of their claim of viewpoint discrimination is that defendants' own records, documenting, *inter alia*, the date a request was made, by whom, and when the request was fulfilled, show that

defendants responded more slowly to requests by the media than to requests by attorneys, law enforcement, and inmates. *Id.* ¶¶ 54-55.

Again, my assessment of these allegations is governed by the pleading standard articulated by the Supreme Court in *Twombly*, 550 U.S. 544, and *Iqbal*, 556 U.S. 662. As the Court explained in *Iqbal*, 556 U.S. at 678, "[t]o 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.'" (quoting *Twombly*, 550 at 570). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 at 556). In particular, "[w]here 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.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 at 557) (some internal quotation marks omitted).

In *Twombly*, the plaintiffs claimed that the defendants violated the Sherman Act, 15 U.S.C. § 1, which prohibits restraints of trade that are "effected by a contract, combination, or conspiracy." 550 U.S. at 551, 553 (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 775 (1984)). In support of their claim, the plaintiffs "flatly pleaded" the existence of an illegal contract or conspiracy, and "also alleged that the defendants' 'parallel course of conduct . . . to prevent competition' and inflate prices was indicative of the unlawful agreement alleged." *Iqbal*, 556 U.S. at 679-80 (quoting *Twombly*, 550 U.S. at 551).

The Supreme Court concluded that these allegations failed to state a plausible claim for relief. *Twombly*, 550 U.S. at 570. "In doing so it first noted that the plaintiffs' assertion of an unlawful agreement was a 'legal conclusion' and, as such, was not entitled to the assumption of truth." *Iqbal*, 556 U.S. 680 (quoting *Twombly*, 550 U.S. at 555). The Court then considered whether plaintiffs' "well-pleaded, nonconclusory factual allegation of parallel behavior . . . gave rise to a 'plausible suggestion of conspiracy.'" *Iqbal*, 556 U.S. at 680 (quoting *Twombly*, 550 U.S. at 566). The Court "acknowledg[ed] that parallel conduct was *consistent with* an unlawful agreement," but "nevertheless concluded that it did not plausibly suggest an illicit accord because it was not only compatible with, but indeed *was more likely explained by*, lawful, unchoreographed free-market behavior." *Iqbal*, 556 U.S. at 680 (citing *Twombly*, 550 U.S. at 567) (emphasis added). "Because the well-pleaded fact of parallel conduct, accepted as true, did not plausibly suggest an unlawful agreement, the Court held the plaintiffs' complaint must be dismissed." *Iqbal*, 556 U.S. at 680 (citing *Twombly*, 550 U.S. at 570).

In *Iqbal*, 556 U.S. at 666, the plaintiff, a Muslim citizen of Pakistan, claimed that John Ashcroft, the former Attorney General of the United States, and Robert Mueller, the former Director of the Federal Bureau of Investigation ("FBI"), "adopted an unconstitutional policy that subjected [the plaintiff] to harsh conditions of confinement on account of his race, religion, or national origin." In support of this claim, the plaintiff alleged that Ashcroft and Mueller "'maliciously agreed to subject' him to harsh conditions of confinement 'as a matter of policy,

solely on account of'" his protected characteristics. *Id.* at 680 (quoting complaint). Further, the plaintiff alleged that "Ashcroft was the 'principal architect' of this invidious policy, and that Mueller was 'instrumental' in adopting and executing it." *Id.* at 680-81 (quoting complaint). The Court determined that "[t]hese bare assertions, much like the pleading of conspiracy in *Twombly*, amount[ed] to nothing more than a 'formulaic recitation of the elements of' a constitutional discrimination claim," and concluded on that basis that they were insufficient to state a plausible claim for relief. *Id.* at 681 (quoting *Twombly*, 550 U.S. at 555).

The plaintiff in *Iqbal* also alleged in support of his claim of unconstitutional discrimination that "the [FBI], under the direction of [Mueller], arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11 [, 2001]." *Iqbal*, 556 U.S. at 681 (quoting complaint) (first alteration in *Iqbal*). In addition, the plaintiff alleged that Mueller and Ashcroft had approved the practice of holding detainees in highly restrictive conditions while the detainees were investigated by the FBI. *Id.* The Court acknowledged that, "[t]aken as true, these allegations are consistent with [Mueller and Ashcroft's] purposefully designating detainees 'of high interest' because of their race, religion, or national origin." *Id.* Of import here, the Court also said that, "given more likely explanations," the allegations "do not plausibly establish this purpose." *Id.* The Court reasoned, *id.* at 682:

> It should come as no surprise that a legitimate policy directing law enforcement to arrest and

> detain individuals because of their suspected link to the attacks [of September 11, 2001] would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. As between that "obvious alternative explanation" for the arrests, and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion. (quoting *Twombly*, 550 U.S. at 567).

In this case, "[t]aken as true, [plaintiffs'] allegations" that, *inter alia*, defendants granted MPIA request 21-2452 more promptly that plaintiffs' own requests, ECF ¶¶ 50-52, and delayed providing or entirely withheld from Soderberg files that in some form had already been provided to other requesters, *id.* ¶ 53, could be "consistent with" viewpoint discrimination by defendants. *Iqbal*, 556 U.S. at 681. However, as the Supreme Court made clear in *Twombly* and *Iqbal*, "a complaint [that] pleads facts that are 'merely consistent with' a defendant's liability . . . 'stops short'" of stating a plausible claim for relief. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). This is especially so when there exists an "'obvious alternative explanation'" for the conduct that the plaintiff alleges was taken with discriminatory intent. *Iqbal*, 556 U.S. at 682 (quoting *Twombly*, 550 U.S. at 567).

Here, the exhibits appended by plaintiffs to their Amended Complaint make clear that there is an "obvious alternative explanation" for defendants' alleged shortcomings in responding to plaintiffs' requests: plaintiffs' numerous and broad requests exceeded defendants' capacity to respond as quickly and inexpensively as plaintiffs demanded.[6]

For example, the BPD's "Document Compliance Unit" sent a letter responding to plaintiffs' request for all citizen or administrative complaints closed during the period of July 1, 2020 to June 30, 2021, and all citizen or administrative complaints open for more than twelve months. ECF 14-1 at 17-22. The letter stated that fulfilling that request would require "13,203 hours" of document review of "3,247 files" by fifteen contract attorneys. *Id.* at 19; *id.* at 37-44 (emails relating to this request). Moreover, the cost of this review was estimated at $723,210. *Id.* at 34.

In a subsequent email, plaintiffs' counsel demanded that defendants fulfill the request, "at no cost" to plaintiffs, "within thirty days." *Id.* at 40. Plaintiffs' counsel asserted that, by previously agreeing to waive internal costs related to the fulfillment of plaintiffs' requests, defendants had also agreed to waive outside counsel fees related to the request. *Id.* at 41. In reply, a representative of defendants explained that "the fees [that defendants] agreed to waive

6. As discussed in ECF 32 at 28-30, in evaluating the sufficiency of a complaint, I may "consider documents that are explicitly incorporated into the complaint by reference, and those attached to the complaint as exhibits." *Goines v. Valley Cmty. Servs. Bd.*, 822 F.2d 159, 167 (4th Cir. 2016) (citations omitted).

in our previous estimate were the City's internal costs, not those of our outside vendor." *Id.* at 40. Defendants' representative continued: "Should you be interested in narrowing the scope of the request, or identifying certain documents (or even categories of documents), we would be more than willing to work with you on that process. But we cannot simply embark on this project that will still involve hundreds of thousands of dollars in cost and thousands of review hours for free." *Id.* at 43.

These exchanges suggest that defendants worked in good faith to respond to plaintiffs' numerous and voluminous requests, which would have required thousands of work hours and several hundred thousand dollars in costs to fulfill. They do not support a reasonable inference of viewpoint discrimination.

I am also unpersuaded that viewpoint discrimination can be reasonably inferred from defendants' alleged delay in providing Soderberg with files concerning officers who were the subjects of already-fulfilled requests made by different requesters. ECF 14, ¶ 53. The fact that one request concerning a particular officer has been previously satisfied does not mean that a distinct request, made later in time, concerning the same officer, must also be granted, or granted immediately. Indeed, to hold otherwise would be inconsistent with the MPIA itself, which permits a custodian to deny disclosure if, *inter alia*, disclosure would "interfere with a valid and proper law enforcement proceeding." MPIA § 4-351(b)(1); *see also id.* § 4-351(b)(2)-(7). The fact that no "law enforcement proceeding," or other ground for denial, existed at one time does not mean that

such a proceeding or other ground for denial has not since arisen. The "obvious alternative explanation," *see Iqbal*, 556 U.S. at 682, for the delay alleged by plaintiffs is that defendants were simply discharging their responsibility to evaluate each request individually.

Finally, the records maintained by defendants, appended in barely legible form to the Amended Complaint, *see* ECF 14-1 at 227-229, also fail to provide any plausible basis for plaintiffs' claim of viewpoint discrimination. These records show that defendants 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*. *Id.* at 227. The allegations, if proven, would provide no basis for concluding that other media requesters were provided with their requests because they lacked the "critical" viewpoint plaintiffs appear to claim as uniquely their own.

Moreover, the records show that, to the extent that plaintiffs' requests were not immediately fulfilled, they were among many other "pending" requests. So, for example, although Soderberg's four requests of June 30, 2022, are listed as "pending," so too is nearly every other contemporaneous request, including those made by, among others, the "FOP," or Fraternal Order of Police; the "OPD," or Office of the Public Defender; and several "inmate[s]." *Id.* at 227. The Court can discern no pattern in defendants' records except that more recent requests are less likely to have been fulfilled than older ones. *See id.* at 227-229.

Twombly and *Iqbal* empower a court reviewing the sufficiency of a complaint to make a judgment about whether the allegations plausibly—not merely possibly—establish wrongdoing. Moreover, they provide that a court's assessment of plausibility may be informed by the existence of an "obvious alternative explanation" for conduct that a plaintiff alleges was taken with wrongful intent. *See Iqbal*, 556 U.S. at 682. Having applied these principles to the allegations in this case, I am satisfied that my decision to dismiss plaintiffs' claim of viewpoint discrimination for failure to state a claim was the correct one.

D.

I am also satisfied that it was appropriate to dismiss plaintiffs' claim of First Amendment retaliation for failure to state a claim.

To state a claim for retaliation in violation of the First Amendment, a plaintiff must allege that "(1) his speech was protected, (2) the 'alleged retaliatory action adversely affected' his protected speech, and (3) [there exists] a causal relationship between the protected speech and the retaliation." *Raub v. Campbell*, 785 F.3d 876, 885 (4th Cir. 2015) (quoting *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 685-86 (4th Cir. 2000)). The "causal requirement is 'rigorous.'" *Raub*, 785 F.3d at 885 (quoting *Huang v. Bd. of Governors of the Univ. of N.C.*, 902 F.2d 1134, 1140 (4th Cir. 1990)).

In particular, "'it is not enough that the protected expression played a role or was a motivating factor in the

retaliation; claimant must show [or plausibly allege] that 'but for' the protected expression the [state actor] would not have taken the alleged retaliatory action.'" *Raub*, 785 F.3d at 885 (quoting *Huang*, 902 F.2d at 1140) (second alteration in *Raub*); *see also Nieves v. Bartlett*, 587 U.S. ___, 139 S. Ct. 1715, 1722 (2019) ("It is not enough to show that an official acted with a retaliatory motive and that the plaintiff was injured—the motive must *cause* the injury. Specifically, it must be a 'but-for' cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive.").

Plaintiffs do not plausibly allege that a retaliatory motive was the "but for" cause of—or even a "motivating factor in"—defendants' alleged failure to fulfill plaintiffs' requests as promptly, completely, or inexpensively as plaintiffs demanded. *See Raub*, 785 F.3d at 885.

For example, plaintiffs' principal allegation of retaliation is that, "[a]fter the filing of th[e] lawsuit, Defendants . . . refused to honor a $750,000.00 fee waiver and granted the lowest fee waiver it has ever granted to OJB." ECF 35, ¶ 15 (citing ECF 14, ¶ 97). However, plaintiffs' exhibits suggest that defendants' purported "refus[al] to honor" a fee waiver was, in fact, defendants' attempt to charge plaintiffs for the cost of intensive document review by outside counsel, costs that defendants had not previously agreed to waive. *See* ECF 14-1 at 40. The exhibits do not support any plausible inference that retaliatory motive was the but for cause of defendants' request that plaintiffs defray the considerable costs of engaging outside counsel.

Plaintiffs also contend that retaliation is evident in the alleged fact that, "[a]fter the filing of this lawsuit, the Law Department demanded payment of $7,000.00 for James Deasel's record, which it was ready to turn over at no cost . . . prior to the filing of the lawsuit." ECF 35, ¶ 14 (citing ECF 14, ¶ 96). However, this contention is also belied by plaintiffs' exhibits, which suggest that the files defendants were "ready to turn over at no cost"—and in fact did provide to plaintiffs—were *summaries* of the requested files, which the BPD offers "at little or no cost to the requestor." ECF 14-1 at 156. In particular, on April 21, 2022, plaintiffs' counsel acknowledged receiving "summaries of James Deasel's file," but stated that he had expected to receive "the full file." *Id.* at 94. On May 24, 2022, Salsbury informed plaintiffs' counsel that that the Law Department "received the entire file and our review is ongoing." *Id.* at 81. In another email, sent to plaintiffs' counsel on May 25, 2022, Salsbury stated: "The Law Department and BPD are faced with a number of MPIA requests in addition to yours." *Id.* at 86. Salsbury expected that Deasel's record would be produced "within the next week," but also noted: "We've had some staffing turnover that has slowed down our ability to turn all of these requests around." *Id.* On October 4, 2022, two months after this lawsuit was filed, the BPD sent plaintiffs' counsel a letter estimating that the cost of producing Deasel's full record—as distinguished from a summary of his record—would be $7,260.15. *Id.* at 103-106. This sequence of events may suggest bureaucratic dysfunction. It does not suggest that defendants acted with retaliatory motive.

Plaintiffs' other allegations of retaliation, *see* ECF 35, ¶¶ 14-21, if proven, also would not support a reasonable inference that defendants acted with retaliatory motive. For example, plaintiffs assert that "Defendants are treating Soderberg different than other requesters due to his past releases against BPD," ECF 14, ¶ 99, and "Defendants pressured Figueroa to reduce her request and accept mere summaries in lieu of her initial requested documents." *Id.* ¶ 105. These conclusory allegations fall far short of stating a claim for retaliation in violation of the First Amendment. Plaintiffs' assertion that defendants attempted to charge Soderberg and Figueroa for their requests after learning of their "position[s] as media" is also insufficient to state a claim for retaliation. ECF 35, ¶¶ 17-18. As noted, the MPIA authorizes an agency to charge for costs and fees incurred in "the search for, preparation of, and reproduction of a public record prepared, on request of the applicant, in a customized format; and the actual costs of the search for, preparation for, and reproduction of a public record in standard format, including media and mechanical processing costs." G.P. § 4-206(b)(i)-(ii). Plaintiffs' allegations, if proven, would provide no basis for concluding that defendants' assessment of charges to Soderberg and Figueroa was anything other than a lawful exercise of their statutory authority.

In sum, I see no basis for amending the judgment dismissing Count III of the Amended Complaint, which alleged retaliation in violation of the First Amendment. *See* ECF 33, ¶ 3.

E.

Finally, I do not see any reason to depart from my earlier conclusion that plaintiffs' allegations of wrongdoing by defendants do not suffice to plead municipal liability under *Monell*, 436 U.S. 658. *See* ECF 32 at 51-52.

Under *Monell*, "[m]uncipalities are not liable under respondeat superior principles for all constitutional violations of their employees simply because of the employment relationship." *Spell v. McDaniel*, 824 F.2d 1380, 1385 (4th Cir. 1987) (citing *Monell*, 436 U.S. at 692-94). "Instead, municipal liability results only 'when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury.'" *Spell*, 824 F.2d at 1385 (citing *Monell*, 436 U.S. at 694).

"[M]unicipal 'policy' is found most obviously in municipal ordinances, regulations and the like which directly command or authorize constitutional violations." *Spell*, 824 F.2d at 1385 (citation omitted). However, "it may also be found in formal or informal *ad hoc* 'policy' choices or decisions of municipal officials authorized to make and implement municipal policy." *Id.* (citation omitted). A "policy" is attributable to a municipality only if "(1) it is directly made by its lawmakers, *i.e.*, its governing body, or (2) it is made by a municipal agency or official, having final authority to establish and implement the relevant policy." *Id.* at 1387 (citations and internal quotation marks omitted).

"Custom" or "usage," by contrast, "may be found in 'persistent and widespread . . . practices of [municipal] officials [which] [a]lthough not authorized by written law, [are] so permanent and well-settled as to [have] the force of law.'" *Id.* at 1386 (quoting *Monell*, 436 U.S. at 691) (alterations in *Spell*). "Municipal fault for allowing such a developed 'custom or usage' to continue requires (1) actual or constructive knowledge of its existence by responsible policymakers, and (2) their failure, as a matter of specific intent or deliberate indifference, thereafter to correct or stop the practices." *Spell*, 824 F.2d at 1391. "Actual knowledge may be evidenced by recorded reports to or discussions by a municipal governing body." *Id.* at 1387. "Constructive knowledge may be evidenced by the fact that the practices have been so widespread or flagrant that in the proper exercise of its official responsibilities the governing body should have known of them." *Id.*

Plaintiffs do not contend that defendants adopted a formal policy of viewpoint discrimination. Rather, plaintiffs appear to argue that defendants condoned or ratified an unconstitutional custom of viewpoint discrimination. In particular, plaintiffs allege "eighteen instances of abuse" by defendants. ECF 35, ¶ 22 (citing ECF 14, ¶¶ 26-47). This "presentation," plaintiffs claim, "was extensive and beyond mere scattershot accusations." *Id.*

In at least two respects, plaintiffs' allegations are insufficient to plead municipal liability for defendants' alleged viewpoint discrimination. First, plaintiffs have failed to allege that there existed a "persistent and widespread" practice of disfavoring requesters on the

basis of their viewpoint. To be sure, plaintiffs' allegations suggest that their own requests to defendants—by plaintiffs' count, eighteen requests—were "persistent" and numerous. But, plaintiffs' own persistence is irrelevant to assessing whether defendants had a well-established practice sanctionable under *Monell*. And, as noted, the only pattern discernible in defendants' treatment of record requests is that more recent requests are less likely to have been fulfilled than older ones. ECF 14-1 at 227-229. Second, plaintiffs have failed to allege that any policymaker had actual or constructive knowledge of—let alone exercised deliberate indifference to—the alleged wrongdoing.

IV. Conclusion

A final order, such as an order granting a motion to dismiss for failure to state a claim, "trigger[s] heightened standards for reconsideration." *American Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 514 (4th Cir. 2003) (citing Fed. R. Civ. P. 59(e)). "This is understandable," because "significant time and resources are often invested in arriving at a final judgment." *Murphy Farms*, 326 F.3d at 514. For the reasons set forth above, I shall deny the Motion.

An Order follows, consistent with this Memorandum Opinion.

Date: November 17, 2023

/s/
Ellen Lipton Hollander
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, FILED NOVEMBER 17, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. ELH-22-1901

OPEN JUSTICE BALTIMORE, *et al.*,

Plaintiffs,

v.

BALTIMORE CITY LAW DEPARTMENT, *et al.*,

Defendants.

Filed November 17, 2023

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is this 17th day of November, 2023, by the United States District Court for the District of Maryland, **ORDERED** that plaintiffs' "Motion to Alter or Amend Judgment" (ECF 35) is **DENIED**.

/s/ Ellen Lipton Hollander
Ellen Lipton Hollander
United States District Judge

APPENDIX E — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, FILED AUGUST 10, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. ELH-22-1901

OPEN JUSTICE BALTIMORE, *et al.*,

Plaintiffs,

v.

BALTIMORE CITY LAW DEPARTMENT, *et al.*,

Defendants.

Filed August 10, 2023

MEMORANDUM OPINION

This case concerns numerous attempts by a community organization, a journalist, and a journalist/author to obtain records from the Baltimore Police Department ("BPD") pertaining largely to police misconduct. Plaintiffs allege that defendants have violated, *inter alia*, the First Amendment to the Constitution and the Maryland Public Information Act by their "deficient response[s]." ECF 14, ¶ 23.

Unhappy with the defendants' failure to provide the requested records, plaintiffs Open Justice Baltimore

("OJB"), Alissa Figueroa, and Brandon Soderberg filed suit in the Circuit Court for Baltimore City against defendants BPD and BPD Police Commissioner Michael Harrison (collectively, the "BPD Defendants"), as well as the Baltimore City Law Department; City Solicitor James Shea; Stephen Salsbury, Chief of Staff to the City Solicitor; Lisa Walden, Chief Legal Counsel; and the Mayor and City Council of Baltimore (the "City") (collectively, the "City Defendants"). ECF 3.[1] Defendants removed the case to federal court.[2] Thereafter, on October 24, 2022, plaintiffs filed an Amended Complaint. ECF 14.[3]

Pursuant to 42 U.S.C. § 1983, the Amended Complaint alleges violations of the First Amendment to the Constitution. It also asserts a parallel claim under Article 40 of the Maryland Declaration of Rights, which is Maryland's counterpart to the First Amendment. In addition, plaintiffs assert violations of the Maryland Public Information Act ("MPIA"), Md. Code (2019 Repl. Vol., 2022 Supp.), §§ 4-101 *et seq.* of the General Provisions

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1. To my knowledge, Harrison, Shea, Salsbury, and Walden have left their respective positions.

2. The case was timely removed to federal court on August 2, 2022, pursuant to 28 U.S.C. § 1441(a). ECF 1 ("Notice of Removal"), ¶ 5. Removal apparently was based on federal question jurisdiction, because defendants asserted that the case "contain[s] claims under 42 U.S.C. § 1983, *et seq.*, over which this Court has original jurisdiction." ECF 1, ¶ 6. However, defendants do not cite 28 U.S.C. § 1331 in their Notice of Removal.

3. Curiously, the Amended Complaint is titled "Complaint." *See* ECF 14.

Article ("G.P."), as amended by the Maryland Police Accountability Act ("MPAA" or "Anton's Law"), G.P § 4-351(a)(4), (c), (d), (e). *See* ECF 14 at 31-36. Notably, each individual defendant is sued only in his or her official capacity. *Id.* ¶ 1.[4] The Amended Complaint is supported by one submission that actually consists of 44 separate exhibits. *See* ECF 14-1.[5]

Plaintiffs seek injunctive relief, attorney's fees, and "other proper relief." ECF 14, ¶ 4. In their "Prayer For Relief," plaintiffs also seek a declaratory judgment and unspecified monetary damages. *Id.* at 35-37.

The BPD Defendants and the City Defendants have each moved to dismiss the Amended Complaint, pursuant to Fed. R. Civ. P. 12(b). ECF 15 (the "BPD Motion"); ECF 16 (the "City Motion"). Plaintiffs responded collectively to these motions (ECF 27, the "Opposition"), and resubmitted the 44 exhibits collectively. ECF 27-1. The

4. In a later filing, plaintiffs also refer to "Eric Meloncon" as a defendant, in his "official capacity." *See* ECF 27 at 23. However, Meloncon is not named as a party in the Amended Complaint. *See* ECF 14. Nor is there any indication that he was served with the suit. *See* Docket.

5. The original Complaint (ECF 3) was supported by 55 exhibits, each with its own ECF number. So, if an exhibit was mentioned, it could be easily located. In contrast, ECF 14-1 consists of 44 separate exhibits, docketed collectively and in random order, totaling 238 pages. Although plaintiffs provided a courtesy copy of ECF 14-1, it does not contain tabs to separate the exhibits. Simply put, it was a challenge to wade through the 238 pages in search of particular exhibits.

BPD Defendants and the City Defendants replied. ECF 30; ECF 31.

No hearing is necessary to resolve the motions. *See* Local Rule 105.6. For the reasons that follow, I shall grant defendants' motions to dismiss as to the individual defendants, who were sued only in their official capacities, and as to the Baltimore City Law Department. I shall also dismiss plaintiffs' federal law claims. As to the State law claims, I decline to exercise supplemental jurisdiction. *See* 28 U.S.C. § 1367(c)(3). Therefore, I shall remand the State law claims to the Circuit Court for Baltimore City.

I. Background

A. Procedural Summary

Plaintiffs commenced this action on June 30, 2022, by filing suit in the Circuit Court for Baltimore City. ECF 3. The Complaint alleged violations of the First and Fourteenth Amendments to the Constitution as well as Articles 24 and 40 of the Maryland Declaration of Rights.[6]

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6. Although the Complaint referenced the MPIA and Anton's Law, the Complaint did not contain a count based on those statutes.

"Article 24 of the Maryland Declaration of Rights is the state law equivalent of the Fourteenth Amendment of the United States." *Hawkins v. Leggett*, 955 F. Supp. 2d 474 (D. Md. 2013) (quotation marks omitted). Article 24 "has been interpreted to apply 'in like manner and to the same extent as the Fourteenth Amendment of the Federal Constitution,' so that 'decisions of the Supreme Court on the Fourteenth Amendment are practically direct authorities.'" *Frey v. Comptroller of Treasury*, 422 Md. 111,

Defendants removed the case to this Court on August 2, 2022, asserting federal question jurisdiction. *See* ECF 1. Thereafter, defendants moved to dismiss the Complaint for failure to state a claim. ECF 12 (BPD Defendants); ECF 13 (City Defendants).

Plaintiffs subsequently filed the Amended Complaint. ECF 14. It did not include due process claims under the Fourteenth Amendment and Article 24 of the Maryland Declaration of Rights. But, plaintiffs added claims under the MPIA and MPAA. *Id.* ¶¶ 127-65.[7]

Counts I, II, and III assert federal and State free speech claims against all defendants under the First Amendment and its State counterpart, Article 40 of the Maryland Declaration of Rights. In particular, Count I alleges viewpoint discrimination; Count II alleges content-based discrimination; and Count III alleges retaliation in restricting access to public records. *See id.* ¶¶ 127-47.

176, 29 A.3d 475, 513 (2011) (quoting *Attorney Gen. of Maryland v. Waldron*, 289 Md. 683, 704, 426 A.2d 929, 941 (1981)).

Article 40 of the Maryland Declaration of Rights is Maryland's counterpart to the provisions for freedom of speech and freedom of the press contained in the First Amendment. Courts ordinarily "need not consider Article 40 and the First Amendment separately as Article 40 is read generally *in pari materia* with the First Amendment." *Nefedro v. Montgomery County*, 414 Md. 585, 593 n. 5, 996 A.2d 850, 855 n. 5 (2010).

7. The Amended Complaint (ECF 14) supersedes the original Complaint. *See Goodman v. Diggs*, 986 F.3d 493, 498 (4th Cir. 2021); *Young v. City of Mt. Ranier*, 238 F.3d 567, 573 (4th Cir. 2001). Because ECF 12 and ECF 13 are directed to the original Complaint, I shall deny ECF 12 and ECF 13 as moot.

Counts IV, V, and VI contain State law claims against all defendants brought under the MPIA and the MPAA. *Id.* ¶¶ 148-65. Count IV alleges that defendants violated the MPIA and the MPAA by failing to provide requested police misconduct records to plaintiffs. *Id.* ¶¶ 148-53. Count V alleges that defendants failed to abide by the time provisions of the MPIA. *Id.* ¶¶ 154-58. And, Count VI alleges that defendants violated the MPIA and the MPAA by failing to waive fees and costs for plaintiffs. ECF 14, ¶¶ 160-65.

B. The MPIA and The MPAA

The MPIA, enacted in 1970, is Maryland's analog to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The Maryland General Assembly enacted the MPIA in order to "foster transparency in the operation of our State government" and to "'provide the public the right to inspect the records of the State government or of a political subdivision within the State.'" *Glenn v. Maryland Dep't of Health and Mental Hygiene*, 446 Md. 378, 380, 384, 132 A.3d 245, 247, 249 (2016) (quoting *Haigley v. Dep't of Health and Mental Hygiene*, 128 Md. App. 194, 207, 736 A.2d 1185, 1191 (1999) (Hollander, J.) (cleaned up).[8] The provisions of the statute are "'liberally construed . . . in order to effectuate [the statute's] broad remedial purpose.'" *Kirwan v. The Diamondback*, 352 Md. 74, 81, 721 A.2d 196, 199 (1998) (citation omitted).

8. The MPIA was previously codified in §§ 10-611 to 10-628 of the State Government ("S.G") Article of the Maryland Code.

Appendix E

The MPIA codifies the ideal of open government that "[a]ll persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees." G.P. § 4-103. To that end, the MPIA states that, "[e]xcept as otherwise provided by law, a custodian shall allow a person or governmental unit to inspect any public record at any reasonable time," *id.* § 4-201(a)(1), and that "[i]nspection or copying of a public record may be denied only to the extent provided" by the MPIA. *Id.* § 4-201(a)(2); *see also Certain Underwriters at Lloyd's, London v. Cohen*, 785 F.3d 886, 893 (4th Cir. 2015); *Waterkeeper Alliance, Inc. v. Md. Dep't of Agric.*, 439 Md. 262, 268, 96 A.3d 105, 108 (2014).

There are many exceptions and limitations to the general entitlement to public access. *See* G.P. §§ 4-301, 4-304 to 4-341, 4-343 to 4-356. Of relevance here, the investigatory records provision of the MPIA, set forth in G.P. § 4-351, is titled "Investigation; intelligence information; security procedures." It was amended, effective October 1, 2021, by Anton's Law. It added, *inter alia*, G.P. § 4-351(a)(4). GP § 4-351 provides (italics in original):

> (a) Subject to subsections (b), (c), and (d) of this section, a custodian may deny inspection of:
>
> > (1) records of investigations conducted by the Attorney General, a State's Attorney, a municipal or county attorney, a police department, or a sheriff;

(2) an investigatory file compiled for any other law enforcement, judicial, correctional, or prosecution purpose; or

(3) records that contain intelligence information or security procedures of the Attorney General, a State's Attorney, a municipal or county attorney, a police department, a State or local correctional facility, or a sheriff.

(4) records, other than a record of a technical infraction, relating to an administrative or criminal investigation of misconduct by a police officer, including an internal affairs investigatory record, a hearing record, and records relating to a disciplinary decision.

(b) A custodian may deny inspection by a person in interest only to the extent that the inspection would:

(1) interfere with a valid and proper law enforcement proceeding;

(2) deprive another person of a right to a fair trial or an impartial adjudication;

(3) constitute an unwarranted invasion of personal privacy;

(4) disclose the identity of a confidential source;

(5) disclose an investigative technique or procedure;

(6) prejudice an investigation; or

(7) endanger the life or physical safety of an individual.

***

(d) Except as provided in subsection (c) of this section [which concerns disclosures to law enforcement], a custodian:

(1) shall redact the portions of a record described in subsection (a)(4) of this section to the extent that the record reflects:

(i) medical information of the person in interest;

(ii) personal contact information of the person in interest or a witness; or

> (iii) information relating to the family of the person in interest; and
>
> (2) may redact the portion of a record described in subsection (a)(4) of this section to the extent that the record reflects witness information other than personal contact information.

"Applicant" is defined as a person or governmental unit that asks to inspect a public record. G.P. § 4-101(b). And, "person in interest" means, *id.* § 4-101(g):

> (1) a person or governmental unit that is the subject of a public record or a designee of the person or governmental unit;
>
> (2) if the person has a legal disability, the parent or legal representative of the person; or
>
> (3) as to requests for correction of certificates of death under § 5-310(d)(2) of the Health — General Article, the spouse, adult child, parent, adult sibling, grandparent, or guardian of the person of the deceased at the time of the deceased's death.

An agency is generally permitted to charge an applicant for costs and fees for "the search for, preparation of, and reproduction of a public record prepared, on request of the applicant, in a customized format; and the actual

costs of the search for, preparation of, and reproduction of a public record in standard format, including media and mechanical processing costs." G.P. § 4-206(b)(i)-(ii). "The fee assessed to the requestor must bear a reasonable relationship 'to the recovery of actual costs incurred by a governmental unit' for the search, preparation, and reproduction of requested public records." *Glass v. Anne Arundel Cty.*, 453 Md. 201, 212, 160 A.3d 658, 664 (2017) (quoting former G.P. § 4-206); *see also Action Comm. for Transit, Inc. v. Town of Chevy Chase*, 229 Md. App. 540, 542-44, 145 A.3d 640, 642 (2017) ("The [MPIA] . . . permits government agencies to charge a reasonable fee for expenses incurred in the course of responding to a request to inspect public records.").

However, the agency may waive this fee if "the applicant asks for a waiver," G.P. § 4-206(e)(1), and if, "after consideration of the ability of the applicant to pay the fee and other relevant factors, the official custodian determines that the waiver would be in the public interest." *Id.* § 4-206(e)(2)(ii). But, a custodian need not convey to an applicant the reasons underlying that denial. *Action Comm. for Transit, Inc.*, 229 Md. App. at 561, 145 A.3d at 652.

In order for a reviewing court properly to affirm an agency's denial of a fee waiver request the record must, however, contain "sufficient information . . . to satisfy [the court] that the custodian's decision was not arbitrary or capricious." *Id.* When conducting such a review, the court's consideration is not limited to the record before the agency. Rather, it extends to "facts

generated 'by pleadings, affidavit, deposition, answers to interrogatories, admission of facts, stipulations and concessions.'" *Id.* at 559 (quoting *Prince George's Cnty. v. Wash. Post Co.*, 149 Md. App. 289, 304, 815 A.2d 859, 868 (2003)).

Although the MPIA governs all aspects of record production, disputes may arise. Contemplating such disputes, the MPIA provides a comprehensive framework for resolving them. *See* G.P. § 4-1A-01 *et seq.* (State Public Information Act Compliance Board); § 4-1B-01 *et seq.* (Public Access Ombudsman); § 4-362 (Judicial Review). If a requestor believes that the agency failed to produce or allow inspection of a document, the requestor may file a complaint with the Office of the Public Access Ombudsman, the State Public Information Act Compliance Board, and/or seek judicial review in the Maryland circuit courts. *Id.*

C. The Requests

The Amended Complaint concerns eighteen MPIA requests, most of which are quite extensive in scope. ECF 14, ¶¶ 26-35, 41-47. OJB, a § 501(c)(3) community organization in Baltimore (ECF 14, ¶ 8), made fourteen of the eighteen MPIA requests. *Id.* ¶¶ 26-35.[9] Soderberg and Figueroa each made two requests. *Id.* ¶¶ 41-47.

9. The BPD Defendants assert that sixteen of the requests pertain to them. ECF 15-1 at 4. And, they assert that OJB made twelve of the requests. *Id.* But, they state: "The February 8, 2020 [sic] requests appear to have been made on behalf of Baltimore Action Legal Team, which is the lawyer for OJB, but not a party to this lawsuit." *Id.* at 4 n. 2. OJB's counsel, Matthew Zernhelt, Legal Director for the Baltimore Action Legal Team ("BALT"), made all of the requests, on behalf of OJB, not BALT.

Appendix E

The various requests made by each plaintiff are discussed chronologically.[10] However, it is somewhat difficult to summarize the content of the various requests. The adage that a picture is worth a thousand words is apt. Therefore, I begin by including a copy of an OJB request (ECF 14-1 at 2-5), because it serves to illustrate the scope and the complexity of many of the requests.

BALTIMORE
ACTION LEGAL TEAM

December 20, 2019

Via: Electronic Mail
Baltimore Police Department
c/o Office of Legal Affairs, Dana Abdul Saboor or MPIA Representative
242 W. 29th Street
Baltimore, MD 21211

Re: Maryland Public Information Act Request

Dear Public Information Act Representative,

Pursuant to the Maryland Public Information Act, MD CODE, Gen. Prov., T. 4, we hereby request on the behalf of Open Justice Baltimore the following records pertaining to

10. The chronological order does not always correspond to the presentation in the Amended Complaint.

investigations of *citizen and administrative complaints* against officers of the Baltimore Police Department. Open Justice Baltimore is a Baltimore-based organization interested in policy and handling of police misconduct.

Open Justice Baltimore specifically requests:

1. Records relating to all citizen complaints filed in any manner or form to any member or affiliate of the Baltimore Police Department, about the Baltimore Police Department, with any subsequent investigations and conclusions, that the Baltimore Police Department closed during the period of January 1, 2019 through and including December 19, 2019. Please include the entire file and all related documents as further described below. Please redact the name of the officer of the instant file and interchange with traceable, but not identifiable to the officer, number.

2. Records relating to all administrative complaints filed in any manner or form to any member or affiliate of the Baltimore Police Department, about the Baltimore Police Department, with any subsequent investigations and conclusions, that the Baltimore Police Department closed during the period of January 1, 2019 through and including December 19, 2019. Please include

the entire file and all related documents as further described below. Please redact the name of the officer of the instant file and interchange with traceable, but not identifiable to the officer, number.

Please redact the officer's name and badge number in which a complaint is directed. Please replace the officer's name with a number that does not identify the officer's identity. However, maintain consistency so that an officer's assigned number appears repeatedly if they have multiple citizen and/or administrative complaints.

The nature of this request seeks all complaints filed, all records collected or created during the investigation of each complaint, and all records reflecting the conclusion, recommendation, and outcome of each investigation.

"Citizen and administrative complaints" means all complaints made in any form to any member or affiliate of the Baltimore Police Department. This includes complaints made against any of the Department's officers, or any of its units or configurations.

Documents may include, but are not limited to: Complaint forms, Written Notifications, Documentation from any Accelerated Disposition Programs, Disciplinary Review Committee

Appendix E

Documents, Final Dispositions, Casebooks, Disciplinary/Failure to Appear and Traffic Matrixes, Disciplinary Recommendations, Acceptance of Disciplinary Action, Charging Documents, Written Summaries, Verdict Sheets, Exhibits, Form 155s, Certification of Completion of Disciplinary Action, Statements, Interviews, Administrative Reports, Form 95s, Use of Force Review documents, Use of Force Preliminary Review Checklist for Supervisors, Use of Force and Reportable Force Documents, Force Reports, Form 96s, Public Safety Statements, Form 97s, Notification of Internal Investigations, Form 98s, 24-Hour Reports, Critical incident debriefing materials, Blue Team Entries, Crime scene logs, Firearm/weapon ballistic reports and diagnostics and photographs, Other photographs and any other evidence collected, Re-classification documents, Analysis supporting changes in classification, Chain of Custody documents, Written requests for extensions, Force Extension Request Forms, Approval and disapproval forms, Documentation of incomplete review, Documentation or errors, Documentation of all communication, Completed assessments, Corrective Recommendations, Unapproved delay Notifications, Use of Force Assessment Form, Use of Force Review Submission Tables, Use of Force Coordinator Files, Additional reviews, Additional assessments, and any Final Reports. Please include documentation of

any aid rendered to an injured person. Please provide documents of resulting administrative leave.

Please include all documentation regarding recommendations disciplinary action, counseling, training referrals, and or other steps taken. Please also include any criminal referrals made, and documents further created, sent, and received in relation to that referral.

Please include all audio and visual records. This may include but is not limited to: CCTV footage, Private or public surveillance, Cell phone video footage, KGA and 911 recordings, Body worn camera recordings, "dash cam" footage, any other video, and any other evidence collected.

Please include all related documents in IAPro or other record keeping systems. Please also include any documents received from the Civilian Review Board that are maintained with files related to this investigation.

Please also include records of phone, email, and other communications regarding this incident. This may include but is not limited to records of communication with the victim or the victim's family, and critical incident debriefing materials. Please provide any records related to media about an incident. This includes policy statements regarding statements allowed and

disallowed, and coordination of public comment or interviews.

Please also provide any relevant training and equipment provided to any involved officers. This includes trainings made available to all those involved in the incident and trainings taken by those involved in the incident. Training records shall include at a minimum the name of the trainer, type of training conducted, and date the training was completed.

Please include subject matter experts that were consulted, if such occurred, and the exact content in which they assisted, whether it be statements, writings, depictions, audio, video, or other, as well as any recordings of cost for their services and records of transaction for payment of their services.

This record request extends to all parts of the agency, including but not limited to the Department's Special Investigations Response Team ("SIRT") investigations. This includes SIRT investigations done by, in collaboration with, in conjunction with, or parallel to an investigation of Homicide, Crash Team, W.A.T.F., Arson Unit, etc.

Provide these records from all department personnel, including but not limited to: First-Line Permanent-Rank Supervisors,

Appendix E

Lieutenants, Executive Officer/Captains, Commanding Officers, Police Commissioner, Trainers, Investigators, etc.

We would prefer the request be filled electronically in a searchable and analyzable electronic format, by e-mail attachment if available, or CD-ROM if not. They can be sent to mzernhelt@baltimoreactionlegal.org. If there is a concern with sending them via email, please contact me at that email address as soon as possible. Please acknowledge which, if any, of the above records the Baltimore Police Department does not keep in a searchable and analyzable electronic format, and provide those records in the fullest and most accessible format you maintain.

As you know, the Act requires that you make available for inspection and copying all public records, except certain exempt records, within thirty days of receipt of a request.

It is our position that all of the requested information is clearly public and non-exempt under the Act.

In the event that some of the information requested is deemed to fall under an exception to the Act, we expect, as the Act requires, that you will notify me within ten days and redact the material which you believe is exempt and

send the remaining non-exempt material within thirty days. Please identify with specificity the information that is deemed not to fall within the Act and please list the specific exemption(s) under the Act on which you rely to withhold the records. We do not object if you redact any: social security numbers; the home address and phone of witnesses or complainants; medical records; or identifying information of the complainant or civilian third-party witness.

We are prepared to pay reasonable copying costs for reproducing the requested materials but request that you waive any such fees under the GP § 4-206(e), which authorizes you to waive copying fees when doing so would be "in the public interest." Being a program of a non-profit organization the requestor has been deemed a public interest organization, classified tax-exempt, not generating any beneficiary income. Additionally, the requestor seeks the information for a public purpose and concern, as it regards official actions and the agency's performance of its public duty. As it regards the public safety, welfare, and legal rights of the general public, and because it bears implications on the interests of Maryland taxpayers, the request further aligns with the public interest. Furthermore, this request is not for commercial benefit as it is not made by news media.

> In the event that there are fees, please inform BALT of the total charges in advance of fulfilling this request.
>
> Thank you for your time, prompt attention to, and cooperation in this matter.
>
> Sincerely,
>
> /s/ Matt Zernhelt
> Matt Zernhelt, Esq.

On December 19, 2019, OJB, through counsel, submitted a request to the BPD, over three pages in length. *Id.* at 1-5 ("Request 1" or "Exhibit 1").[11] OJB requested "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. *Id.* at 2; *see also* ECF 14, ¶ 26. OJB invited BPD to redact and replace names and badge numbers with traceable but non-identifiable numerical designations, "so that an officer's assigned number appears repeatedly if they have multiple citizen and/or administrative complaints." ECF 14-1 at 2.

Request 1 devotes more than a page to the definition of the term "documents." And, the request also seeks records of phone and email communications and training

11. Although plaintiffs allege in the suit that the request was made on December 19, 2019, the request is dated December 20, 2019. *See* ECF 14-1 at 2.

records, as well as information as to any experts consulted by the BPD. *Id.* at 3, 4. Moreover, the request "extends to all parts of the agency and all BPD personnel. *Id.* at 4.

Plaintiffs allege: "Defendants declared that disclosure of their internal accountability records was not in the public interest so no fees would be waived." ECF 14, ¶ 26. And, as of the filing of the Amended Complaint, they assert that "[n]o records have been disclosed" in response to this request. *Id.*

OJB submitted a request to the BPD on December 20, 2019, again over three pages in length. ECF 14-1 at 59-63 ("Request 2" or "Exhibit 10"); *see* ECF 14, ¶ 30. Request 2 sought all files related to investigations of the Special Investigation Response Team ("SIRT") that were closed between July 1, 2018, and December 19, 2019. ECF 14-1 at 60.

On January 10, 2020, OJB sought records pertaining to citizen and administrative complaints against BPD officers that have been "*open for over twelve months*." ECF 14-1 at 6-10 ("Request 3" or "Exhibit 2") (underlining in original). And, by separate letter on January 10, 2020, OJB asked BPD for all files related to SIRT investigations open for more than twelve months. ECF 14-1 at 64-68 ("Request 4" or "Exhibit 11");[12] *see* ECF 14, ¶ 30. Requests 3 and 4 are each almost four pages in length.

12. Plaintiffs seem to refer to Exhibit 12, rather than Exhibit 11. *See* ECF 14, ¶ 30, line 2. But, Exhibit 12 is a request of February 3, 2020, and it does not pertain to SIRT.

In all four requests, which are comparable in detail, OJB asked BPD to waive any costs and fees related to reproducing the requested records, writing ECF 14-1 at 4-5, 9-10, 63, 68:

> We are prepared to pay reasonable copying costs for reproducing the requested materials but request that you waive any such fees under the GP § 4-206(e), which authorizes you to waive copying fees when doing so would be "in the public interest." Being a program of a non-profit organization the requestor has been deemed a public interest organization, classified tax-exempt, not generating any beneficiary income. Additionally, the requestor seeks the information for a public purpose and concern, as it regards official actions and the agency's performance of its public duty. As it regards the public safety, welfare, and legal rights of the general public, and because it bears implications on the interests of Maryland taxpayers, the request further aligns with the public interest. Furthermore, this request is not for commercial benefit as it is not made by for-profit news media.

In response to these requests, plaintiffs allege that "BPD and the Law Department declared it was not in the public interest to publicly disclose records of how it handles violence and its misconduct." ECF 14, ¶ 30. Moreover, they assert that "BPD and the Law Department obstructed access to these public records by delaying responses to requests, employing a broad

use of exemptions to disclosure, urging OJB to narrow the requests, using deceitful fee waiver practices, and repeatedly transgressing MPIA deadlines." *Id.* According to plaintiffs, "OJB only received the first [SIRT] request after an improper demand for payment, and only after production was delayed by twenty-one months, undermining the information's relevance." *Id.*

The BPD Defendants note that OJB's requests dated December 19, 2019 (Request 1), December 20, 2019 (Request 2), and January 10, 2019 (Requests 3 and 4) are the subject of litigation in the Maryland judicial system. ECF 15-1 at 5. They refer to the case of *Open Justice Baltimore v. Baltimore Police Department, et al.*, filed in the Circuit Court for Baltimore City on March 2, 2020, Case 24-C-20-001269. It is now pending before the Supreme Court of Maryland, based upon a writ of certiorari granted on or about September 30, 2022. *See Baltimore Police Department v. OJB*, 484 Md. 7, 282 A.3d 2022).[13] Argument was held on January 6, 2023.[14]

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13. In Maryland's general election of November 2022, the voters of Maryland approved a constitutional amendment to change the name of the Maryland Court of Appeals to the Supreme Court of Maryland. And, the voters also approved changing the name of the Maryland Court of Special Appeals to the Appellate Court of Maryland. These changes went into effect on December 14, 2022. *See* Press Release, Maryland Courts, Voter-approved constitutional change renames high courts to Supreme and Appellate Court of Maryland (Dec. 14, 2022), https://www.courts.state.md.us/media/news/2022/pr20221214#:~:text=Effective%20immediately % 2C% 20the% 20Court% 20of,the% 20Appellate% 20Court% 20of%20Maryland.

14. Four MPIA applications are at issue in the case. In an unpublished opinion issued on February 7, 2022, the Maryland

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In a four-and-a-half-page submission on February 3, 2020, OJB requested records of investigations of potential or alleged criminal conduct of Officer Robert Dohony since at least March 28, 2017. ECF 14-1 at 69-74 ("Request 5" or "Exhibit 12"); *see* ECF 14, ¶ 31. Request 5 also sought a fee waiver. ECF 14-1 at 73.

Plaintiffs allege: "BPD and the Law Department repeatedly attempted to thwart OJB's access to the records through a variety of methods: transgressing the MPIA deadline for responding to Dohony's records request, repeatedly and egregiously ignoring OJB's fee waiver requests, suggesting OJB narrow their [sic] request for Dohony's records, and employing an overly broad use of exemptions to avoid granting OJB access to Dohony's records." ECF 14, ¶ 31. Additionally, they allege that, as of the filing of the Amended Complaint, "no records have been provided." *Id.* In response, BPD Defendants state that "OJB requested misconduct records of Robert Dohony prior to the passage of Anton's Law, when such records were not disclosable." ECF 15-1 at 6.

OJB requested a list of all active employees of the BPD on December 14, 2020. ECF 14-1 at 113-115 ("Request 6"

Court of Special Appeals upheld the decision of the Circuit Court, denying production of records for open internal investigations. But, the State's intermediate appellate court reversed as to the denial of the fee waiver requests. *See Open Justice Baltimore v. Baltimore City Police Department*, No. 122, Sept. Term, 2021, 2022 Md. App. LEXIS 106, 2022 WL 354486 (Feb. 7, 2022). A related appellate case, decided on December 17, 2021, is titled *Baltimore Action Legal Team v. Office of State's Attorney of Balt.*, 253 Md. App. 360, 265 A.3d 1187.

or "Exhibit 21"); *see* ECF 14, ¶ 33. As to these employees, OJB sought information as to ethnicity, gender, date of birth, service dates, job titles, as well as other work information. ECF 14-1 at 114-115. Ken Hurst, Contract Specialist and Document Compliance Coordinator in BPD's Office of Legal Affairs, acknowledged the request three days later. *Id.* at 116. And, on February 18, 2021, Hurst notified OJB that he had "received the information requested" but was "waiting on the review by the paralegal to approve for release after redactions have been done." *Id* at 121. On March 5, 2021, Hurst wrote: "Sorry for the delay. I'm waiting on the para legal [sic] to finish, we are a little behind." ECF 14-1 at 122. Then, on March 25, 2021, Hurst "sent an official response letter indicating that OJB's request had been denied based on [what OJB regards as] inapplicable exemptions." ECF 14, ¶ 33; *see* ECF 14-1 at 123.[15] According to the BPD, "OJB's December 14, 2020 request [(Request 6)] was the subject of *Open Justice Baltimore v. The City of Baltimore, et al.*, filed on August 30, 2021, in the Circuit Court for Baltimore City, Case 24-C-21-003745. ECF 15-1 at 5.

Plaintiffs allege that "OJB submitted another request on October 1, 2021, seeking all officer misconduct complaints closed between July 1, 2020, and June 30, 2021." ECF 14, ¶ 26 ("Request 7").[16] In a letter to OJB

15. The Court was not provided with a copy of the letter.

16. Plaintiffs cite to Exhibit 2 for this request. ECF 14, ¶ 26, line 4. But, Exhibit 2, discussed earlier, is a request made on January 10, 2020. *See* ECF 14-1 at 6-10. I was unable to locate the particular exhibit in ECF 14-1.

dated October 12, 2021 (ECF 14-1 at 17-22), Hurst addressed OBJ's requests for closed citizen complaints for the period July 1, 2020 through June 30, 2021; closed administrative complaints for the same period; as well as citizen and administrative complaints open for more than a year. He stated: "BPD will provide [OJB] with the responsive records regarding closed citizen and administrative complaints." *Id.* But, Hurst advised that the requests were denied for "open citizen complaints and open administrative complaints" because disclosure "would prejudice" ongoing investigations. *Id.*

Hurst's letter continued, *id.* at 20:

> BPD is certainly cognizant of the overwhelming public interest in the review of these files. BPD also understands that [OJB] intend[s] to make this information public. For these reasons, BPD is granting a complete waiver of all of BPD's fees. The only cost passed on to [OJB] will be that of the outside counsel, a cost that BPD is incurring only because of [OJB's] request.

BPD valued the fee waiver at more than $770,000. ECF 14-1 at 20. The letter details the anticipated time and expense for outside counsel as well as the Baltimore City Law Department. *Id.* at 19-20. BPD also noted that it cannot estimate the cost of video and/or video recordings, which "vary from file to file." *Id.* at 21. And, Hurst stated that OJB would have to submit a "prepayment" of $603,870.00 "before any work can commence." *Id.* According to plaintiffs, this "constituted a fee waiver denial." ECF 14, ¶ 27.

In a follow-up email to OJB regarding this request, dated August 11, 2022 (ECF 14-1 at 37), Salsbury stated that "it was determined that there were in fact fewer cases that fit the perimeters [sic] of [OJB's] original request." *Id.* When OJB asked later that day how the change would affect the fees for the request (*see id.* at 40), Salsbury stated: "[W]e do anticipate a change in the fee estimate based on the lower number of files." *Id.* He added: "We are currently working with our outside vendor to prepare the estimate." *Id.*

In their motion to dismiss, the BPD Defendants assert that "OJB's MPIA request made on October 1, 2021 [(Request 7)] is the subject of *Open Justice Baltimore v. Baltimore Police Department, et al.* (Circuit Court for Baltimore City, case no. 24-C-21-005650, filed December 15, 2021[])", ECF 15-1 at 5, pending before the Circuit Court for Baltimore City. *Id.* at 5-6. But, they also assert that the Circuit Court "rejected OJB's arguments and granted BPD's Motion to Dismiss with respect to violations of the First Amendment on August 15, 2022." *Id.* at 5 n. 4. Further, they claim that the case is proceeding under the MPIA's "dispute resolution framework." *Id.*

In an email to the BPD dated February 8, 2022, OJB requested the "entirety of disclosable material in Det. Jame [sic] Deasel's personnel file, everything available including all investigations and conclusions." ECF 14-1 at 24 ("Request 8" or "Exhibit 5"); *see* ECF 14, ¶ 32. OJB also requested "a fee waiver for this material." ECF 14-1 at 24.

That same day, OJB submitted "a new PIA request" for "[a]ll police reports" concerning "arrests involving

BPD Det. James Deasel." *Id.* at 76 ("Request 9" or "Exhibit 13"). Plaintiffs allege that the second email "was for thirty-five specified criminal incident reports written by James Deasel that aroused public suspicion." ECF 14, ¶ 32. OJB also asked defendants to "[f]ulfill this request at no cost." ECF 14-1 at 76. Plaintiffs assert that "OJB hoped smaller and simpler requests would be easier for BPD and the Law Department to navigate," but defendants still "refused to fulfill OJB's request for even a single officer's file." ECF 14, ¶ 32.

According to plaintiffs, on April 21, 2022, "the Law Department provided what they described as James Deasel's personnel file." *Id.*; *see* ECF 14-1 at 93-94. However, plaintiffs allege that "the attached document was only a summary of James Deasel's file, in direct contradiction and disregard of both OJB's original request and the parties' ongoing communications." ECF 14, ¶ 32.

Specifically, in an email to Hurst and Salsbury dated April 25, 2022 (ECF 14-1 at 96, Exhibit 16), OJB stated, in part, *id.* (brackets added):

> [OJB] asked for the full file on 2/8. You responded with an offer to provide a summary on 2/24 to which [OJB] clearly stated [OJB] wanted the entirety of his personnel file on 2/24. [OJB] then followed up to this directly on at least 2/25, 3/11, and 3/31. You then only sent the summary.

On October 4, 2022, Hurst wrote to OJB. ECF 14-1 at 102-06 (Exhibit 18). He said, in part, *id.* at 103 (underlining in original):

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> Upon reviewing your request, BPD will provide you with the responsive closed disciplinary files of Det. James Deasel. A response to your fee waiver request and a detailed cost estimate is provided below. However, your request "for Det. James Deasel's personnel file, everything available including all investigations and conclusions" is denied for all open disciplinary actions as such disclosure would prejudice pending administrative and/or criminal investigations.

According to plaintiffs, on October 21, 2022, Hurst sent OJB "25 of the requested criminal incident reports" related to Detective Deasel. ECF 14, ¶ 32; *see* ECF 14-1 at 111-12. However, plaintiffs allege that "[t]he Law Department has yet to disclose the personnel file requested in February." ECF 14, ¶ 32. In their Motion, the BPD Defendants claim that "BPD has not produced the misconduct records of James Deasel because the requestor has not paid the nonwaived portion of the productions." ECF 15-1 at 6.

On February 14, 2022, OJB requested the names of officers matching each case number on a list of BPD's 2019 misconduct investigations. ECF 14, ¶ 28 ("Request 10").[17] In an email to OJB dated May 29, 2022, Julie Hallam, Esquire, of the Baltimore City Law Department, provided the list in PDF format. ECF 14-1 at 46. And, upon requests from OJB on May 21, 2022, and June 2, 2022 (*see id.* at

17. The Court was not provided a copy of this request.

47), Hallam provided the spreadsheet in "Native format" on June 6, 2022. *Id.*

On February 21, 2022, in an email to Dana Moore, the Chief Equity Officer for Baltimore City, OJB requested all Civilian Review Board ("CRB") investigations "closed in calendar year 2021, regardless of finding." ECF 14-1 at 133 ("Request 11" or "Exhibit 22"); *see* ECF 14, ¶ 34. Additionally, OJB requested "all [Internal Affairs Division] files provided to the CRB from BPD in calendar year 2021." ECF 14-1 at 133. Based on the recent passage of Anton's Law, OJB also requested minimal redactions of officers' names. *Id.* And, OJB asked "for all communications to and from BPD in efforts relating to the investigations, as well." ECF 14-1 at 133. Further, OJB "request[ed] a fee waiver in the public interest." *Id.*

In the months that followed, OJB and Assistant City Solicitor D'ereka Bolden exchanged several emails. *See id.* at 135-44 (Exhibit 23). Notably, on May 27, 2022, Bolden wrote to OJB stating, in part: "In consideration of your fee waiver request, the CRB has decided to provide all responsive records to you on a rolling basis at no charge." *Id.* at 145. However, plaintiffs allege that, as of the filing of the Amended Complaint, "Defendants produced only one CRB file, which lacks any officer's name." ECF 14, ¶ 34.

On March 14, 2022, OJB requested all officer misconduct complaints closed between July 2021 and December 2021. ECF 14-1 at 11-15 ("Request 12" or "Exhibit 3"); *see* ECF 14, ¶ 26. OJB also included a fee-waiver request, "in the public interest." ECF 14-1 at 14.

According to plaintiffs, "[n]o requested records have been disclosed to date." ECF 14, ¶ 26.

Then, on March 31, 2022, OJB requested a list of names of officers associated with misconduct investigations from 2020 and 2021. ECF 14, ¶ 29 ("Request 13"); ECF 14-1 at 58.[18] According to plaintiffs, "[t]he Law Department took two months before responding to this request." ECF 14, ¶ 29. And, plaintiffs claim that the "list has still not been produced." *Id.*

The last MPIA request made by OJB, dated May 26, 2022, sought the full personnel files of 197 officers "that [sic] are on the State's Attorney for Baltimore City's list of police officers with issues of integrity[.]" ECF 14-1 at 147 ("Request 14" or "Exhibit 24"); *see* ECF 14, ¶ 35. That same day, Salsbury responded to the request, stating: "We'll review and get back to you in accordance with the provisions of the MPIA." ECF 14-1 at 148. Plaintiffs allege that, as of the date of filing the Amended Complaint, defendants "have failed to provide any further response, let alone records." ECF 14, ¶ 35.

In their motion to dismiss, BPD Defendants contend that "only OJB's requests dated March 14, 2022, March 31, 2022, and May 26, 2022 (Requests 12 to 14) remain either pending or not the subject of state court litigation." ECF 15-1 at 6.

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18. Plaintiffs cite "Ex. 9." *See* ECF 14, ¶ 29. Exhibit 9 appears at ECF 14-1 at 49-58. The exhibit consists of correspondence that begins on January 4, 2022. *Id.* at 50. ECF 14-1 at 58 contains a reference to a request made on March 31, 2022.

As noted, the two individual plaintiffs also submitted MPIA requests. They allege that on "April 30, 2021, Alissa Figueroa through her assistant Laura Juncadella requested BPD's investigatory files and related records regarding the in-custody death of Tyrone West, which occurred on or around July 18, 2013." *Id.* ¶ 43; *see* ECF 14-1 at 194-96 ("Request 15" or "Exhibit 33"). Juncadella stated that she is "a member of the news media and this request is for news gathering purposes." ECF 14-1 at 196. She also claimed that "disclosure of the requested information is in the public interest." *Id.* Therefore, she requested "a waiver of all fees . . . ." *Id.* According to plaintiffs, "Figueroa was charged about $400 and the records were not released to her until on or around November 4, 2021." ECF 14, ¶ 43.[19]

In an Affidavit of Figueroa dated June 29, 2022, (ECF 14-1 at 198-199), Figueroa details another MPIA request she made. *See* ECF 14, ¶ 44 ("Request 16"). The Affidavit states, ECF 14-1 at 198-199 (emphasis in original):

> • On October 1, 2021, my team and I requested all records relating to misconduct investigations for ten police officers.
>
> • Over thirty days later, the Baltimore City Law Department (Law Department) responded on November 3, 2021, granting the request but

19. Tyrone West died on July 18, 2013, in the aftermath of a traffic stop. His death spawned fierce litigation in this Court in which West's family alleged the use of excessive force. The case culminated in a settlement. *See Jones v. Chapman*, Case ELH-14-2627.

cited enormous fees. The Law Department estimated that it would cost BPD a total of $5,177.00, outside counsel a total of $61,332.50, and the Baltimore City Law Department a total of $52,743.00.

• Although the Law Department stated it was cognizant of the public interest and the intent to make this information public, the Law Department stated that it would be unable to waive all costs and would only waive BPD and the Law Department's fees.

• Since the Law Department had "to pay outside counsel," they said I would still be responsible for $44,981.50, with that full amount being due before production began. This amount would allegedly cover the contract attorney fee of $25,000.00, the managing attorney fee of $7,644.00, a three and a half month hosting charge of $3,150.00, and a three and a half month LSPM charge of $9,187.50. The Law Department also informed me that due to COVID, there would be a delay in the production of the files and that this fee was only an estimate.

• As an independent journalist, I did not have the funds to pay this amount of money. Without the full grant of the fee waiver, it was impossible for me to access the records I had requested.

• I responded to the Law Department's presentation of costs asking for an estimate of fees for just two officers' files out of the list of ten.

• The Law Department followed-up with an email, redirecting away from disclosure of actual files, stating "[i]n lieu of providing you with a new cost estimate, we would like to offer you the option to receive the disciplinary history summary for each BPD member identified in the request in lieu of a comprehensive response to the request. These summaries . . . can be prepared more quickly than a full disciplinary file, and can be produced ***at little or no costs to the requestor***." I received this email on January 11, 2022, 102 days after my initial October 1, 2021 request.

• After being presented with an insurmountable fee for actual files and abusive delay in response times, I was presented with taking summaries or obtaining no records at all. Laura Juncadella, my research assistant, responded to the Law Department's email confirming that I would accept the disciplinary history summary for each BPD member identified in the request in lieu of a comprehensive response to the request. Juncadella, asked for confirmation of receipt of the email; none was given.

• Juncadella followed up fourteen days later on January 27, 2022 but received no response. Four

days later, on January 31, 2022, she followed up again to confirm that the request had been received but again there was no response. Forty days after requesting the summaries, on February 22, 2022, she asked for a status request; there was no response. Sixty-one days after requesting the summaries, on March 15, 2022, she followed up again.

• Between this time and April 1, 2022, there was a phone call between the parties and Juncadella was informed that there would be a status update on April 1, 2022. On April 1, 2022, seventy-eight days after requesting the summaries, and 180 days after the initial requests, Juncadella followed up to ask for a status update.

• The Law Department finally responded with the summaries. It took the law department 180 days, or half of a year, and more than nine follow-up emails or phone calls to produce a reduced version of my initial request. As a freelance journalist paying my team by the day, I used a great amount of my minimal resources to receive what already belongs to the public under Anton's law. The Law Department took active and passive steps to obstruct my access to disciplinary records that I requested.

• I have known about at least one previous internal affairs investigation for all ten officers.

> These officers had previously been involved in the loss of life. Civil litigation has been brought due to death at the hands of these officers. Civil litigation publicly discussed internal affairs investigations conducted into some of the officers. Similarly, investigations about these officers have been discussed in public media. Upon review of the summaries the Law Department provided, I discovered that no information nor acknowledgement about these internal affairs investigations were included in these summaries.

Soderberg "filed two requests for officer disciplinary records in Spring 2022, and the Law Department responded to both with a form email stating he would be contacted with the 'possible costs associated with this request,' and suggesting he accept 'the disciplinary history summary for each BPD member identified in the request in lieu of a comprehensive response to the request.'" ECF 14, ¶ 41 (citing ECF 14-1 at 189-90 ("Request 17" or "Exhibit 31") & 191-92 ("Request 18" or "Exhibit 32")). According to the BPD Defendants, "Soderberg did not communicate any issues with BPD or utilize any of the MPIA dispute resolution mechanisms prior to this lawsuit." ECF 15-1 at 6 (citing ECF 14, ¶¶ 41, 53).

In sum, plaintiffs allege that the BPD and the Baltimore City Law Department "have violated the law in their responses to every single request." ECF 14, ¶ 2. They contend that "the repeated and protracted fight over each records request cumulatively display [sic] a true pattern

and practice of obstructing disclosure as required by the [MPIA]." *Id.* Further, they contend that all defendants "have taken actions to prevent the disclosure of police misconduct records . . . ." ECF 14, ¶ 3.

II. Standard of Review

The BPD Defendants and the City Defendants have each moved to dismiss under Fed. R. Civ. P. 12(b)(6). ECF 15; ECF 16. A defendant may test the legal sufficiency of a complaint by way of a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *Nanendla v. WakeMed*, 24 F.4th 299, 304-05 (4th Cir. 2022); *ACA Fin. Guar. Corp. v. City of Buena Vista*, 917 F.3d 206, 211 (4th Cir. 2019); *Paradise Wire & Cable Defined Benefit Pension Plan v. Weil*, 918 F.3d 312, 317 (4th Cir. 2019); *In re Birmingham*, 846 F.3d 88, 92 (4th Cir. 2017); *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 165-66 (4th Cir. 2016); *McBurney v. Cuccinelli*, 616 F.3d 393, 408 (4th Cir. 2010), *aff'd sub nom., McBurney v. Young*, 569 U.S. 221, 133 S. Ct. 1709, 185 L. Ed. 2d 758 (2013); *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999). A Rule 12(b)(6) motion constitutes an assertion by a defendant that, even if the facts alleged by a plaintiff are true, the complaint fails as a matter of law "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

Whether a complaint states a claim for relief is assessed by reference to the pleading requirements of Fed. R. Civ. P. 8(a)(2). That rule provides that a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." The purpose

of the rule is to provide the defendants with "fair notice" of the claims and the "grounds" for entitlement to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

To survive a motion under Rule 12(b)(6), a complaint must contain facts sufficient to "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570; *see Ashcroft v. Iqbal*, 556 U.S. 662, 684, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) ("Our decision in *Twombly* expounded the pleading standard for 'all civil actions' . . . ." (citation omitted)); *see also Nanendla*, 24 F.4th at 304-05; *Paradise Wire & Cable*, 918 F.3d at 317; *Willner v. Dimon*, 849 F.3d 93, 112 (4th Cir. 2017). To be sure, a plaintiff need not include "detailed factual allegations" in order to satisfy Rule 8(a)(2). *Twombly*, 550 U.S. at 555. Moreover, federal pleading rules "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." *Johnson v. City of Shelby, Miss.*, 574 U.S. 10, 10, 135 S. Ct. 346, 190 L. Ed. 2d 309 (2014) (per curiam). But, mere "'naked assertions' of wrongdoing" are generally insufficient to state a claim for relief. *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (citation omitted).

In other words, the rule demands more than bald accusations or mere speculation. *Twombly*, 550 U.S. at 555; *see Painter's Mill Grille, LLC v. Brown*, 716 F.3d 342, 350 (4th Cir. 2013). If a complaint provides no more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action," it is insufficient. *Twombly*, 550 U.S. at 555. "[A]n unadorned, the-

defendant-unlawfully-harmed-me accusation" does not state a plausible claim of relief. *Iqbal*, 556 U.S. at 678. Rather, to satisfy the minimal requirements of Rule 8(a)(2), the complaint must set forth "enough factual matter (taken as true) to suggest" a cognizable cause of action, "even if . . . [the] actual proof of those facts is improbable and . . . recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556 (internal quotation marks omitted).

In reviewing a Rule 12(b)(6) motion, "a court 'must accept as true all of the factual allegations contained in the complaint,' and must 'draw all reasonable inferences [from those facts] in favor of the plaintiff.'" *Retfalvi v. United States*, 930 F.3d 600, 605 (4th Cir. 2019) (alteration in *Retfalvi*) (quoting *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011)); *see Semenova v. Md. Transit Admin.*, 845 F.3d 564, 567 (4th Cir. 2017); *Houck v. Substitute Tr. Servs., Inc.*, 791 F.3d 473, 484 (4th Cir. 2015). However, "a court is not required to accept legal conclusions drawn from the facts." *Retfalvi*, 930 F.3d at 605 (citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)); *see Glassman v. Arlington Cty.*, 628 F.3d 140, 146 (4th Cir. 2010). "A court decides whether [the pleading] standard is met by separating the legal conclusions from the factual allegations, assuming the truth of only the factual allegations, and then determining whether those allegations allow the court to reasonably infer" that the plaintiff is entitled to the legal remedy sought. *A Society Without a Name v. Virginia*, 655 F.3d 342, 346 (4th. Cir. 2011), *cert. denied*, 566 U.S. 937, 132 S. Ct. 1960, 182 L. Ed. 2d 772 (2012). But, "[m]ere recitals of a cause of action,

supported only by conclusory statements, are insufficient to survive" a Rule 12(b)(6) motion. *Morrow v. Navy Fed. Credit Union*, 2022 U.S. App. LEXIS 18667, 2022 WL 2526676, at *2 (4th Cir. July 7, 2022).

In connection with a Rule 12(b)(6) motion, courts ordinarily do not "'resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.'" *King v. Rubenstein*, 825 F.3d 206, 214 (4th Cir. 2016) (quoting *Edwards*, 178 F.3d at 243). But, "in the relatively rare circumstances where facts sufficient to rule on an affirmative defense are alleged in the complaint, the defense may be reached by a motion to dismiss filed under Rule 12(b)(6)." *Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007) (en banc); *accord Pressley v. Tupperware Long Term Disability Plan*, 553 F.3d 334, 336 (4th Cir. 2009). Because Rule 12(b)(6) "is intended [only] to test the legal adequacy of the complaint," *Richmond, Fredericksburg & Potomac R.R. Co. v. Forst*, 4 F.3d 244, 250 (4th Cir. 1993), "[t]his principle only applies . . . if all facts necessary to the affirmative defense 'clearly appear[] *on the face of the complaint*.'" *Goodman*, 494 F.3d at 464 (emphasis in *Goodman*) (quoting *Forst*, 4 F.3d at 250).

Notably, a plaintiff may not cure a defect in a complaint or otherwise amend a complaint by way of opposition briefing. *See, e.g., So. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184 (4th Cir. 2013) ("It is well-established that parties cannot amend their complaints through briefing or oral advocacy."); *Glenn v. Wells Fargo Bank, N.A.*, DKC-3058, 2016 U.S. Dist. LEXIS 85824, 2016 WL 3570274, at *3

(D. Md. July 1, 2016) (declining to consider declaration attached to brief opposing motion to dismiss because, among other things, it included allegations not alleged in the suit); *Zachair Ltd. v. Driggs*, 965 F. Supp. 741, 748 n. 4 (D. Md. 1997) (stating that a plaintiff "is bound by the allegations contained in its complaint and cannot, through the use of motion briefs, amend the complaint"), *aff'd*, 141 F.3d 1162 (4th Cir. 1998); *Mylan Labs., Inc. v. Akzo, N.V.*, 770 F. Supp. 1053, 1068 (D. Md. 1991) ("'[I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss'") (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir.1984)), *aff'd*, 2 F.3d 56 (4th Cir. 1993).

"Generally, when a defendant moves to dismiss a complaint under Rule 12(b)(6), courts are limited to considering the sufficiency of allegations set forth in the complaint and the 'documents attached or incorporated into the complaint.'" *Zak v. Chelsea Therapeutics Int'l, Ltd.*, 780 F.3d 597, 606 (4th Cir. 2015) (quoting *E.I. du Pont de Nemours & Co.*, 637 F.3d at 448). *See Goines*, 822 F.3d at 166 (a court may properly consider documents that are "explicitly incorporated into the complaint by reference and those attached to the complaint as exhibits."); *see also Six v. Generations Fed. Credit Union*, 891 F.3d 508, 512 (4th Cir. 2018); *Anand v. Ocwen Loan Servicing, LLC*, 754 F.3d 195, 198 (4th Cir. 2014); *U.S. ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 745 F.3d 131, 136 (4th Cir. 2014); *Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 234 (4th Cir. 2004), *cert. denied*, 543 U.S. 979, 125 S. Ct. 479, 160 L. Ed. 2d 356 (2004); *Phillips v. LCI Int'l Inc.*, 190 F.3d 609, 618 (4th Cir. 1999). In

contrast, the court "may not consider any documents that are outside of the complaint, or not expressly incorporated therein[.]" *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 557 (4th Cir. 2013), *abrogated on other grounds by Reed. v. Town of Gilbert*, 576 U.S. 155, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015); *see Bosiger v. U.S. Airways*, 510 F.3d 442, 450 (4th Cir. 2007).

But, "before treating the contents of an attached or incorporated document as true, the district court should consider the nature of the document and why the plaintiff attached it." *Goines*, 822 F.3d at 167. Of import here, "[w]hen the plaintiff attaches or incorporates a document upon which his claim is based, or when the complaint otherwise shows that the plaintiff has adopted the contents of the document, crediting the document over conflicting allegations in the complaint is proper." *Id.* Conversely, "where the plaintiff attaches or incorporates a document for purposes other than the truthfulness of the document, it is inappropriate to treat the contents of that document as true." *Id.*

Under limited circumstances, when resolving a Rule 12(b)(6) motion, a court may consider documents beyond the complaint without converting the motion to dismiss to one for summary judgment. *Goldfarb v. Mayor & City Council of Balt.*, 791 F.3d 500, 508 (4th Cir. 2015). In particular, a court may "consider a document submitted by the movant that [is] not attached to or expressly incorporated in a complaint, so long as the document was integral to the complaint and there is no dispute about the document's authenticity." *Goines*, 822 F.3d at 166

(citations omitted); *see also Fusaro v. Cogan*, 930 F.3d 241, 248 (4th Cir. 2019); *Woods v. City of Greensboro*, 855 F.3d 639, 642 (4th Cir. 2017), *cert. denied*, __ U.S. __, 583 U.S. 1044, 138 S. Ct. 558, 199 L. Ed. 2d 447 (2017); *Kensington Volunteer Fire Dep't v. Montgomery Cty.*, 684 F.3d 462, 467 (4th Cir. 2012).

To be "integral," a document must be one "that by its 'very existence, *and not the mere information it contains*, gives rise to the legal rights asserted.'" *Chesapeake Bay Found., Inc. v. Severstal Sparrows Point, LLC*, 794 F. Supp. 2d 602, 611 (D. Md. 2011)) (emphasis in original) (citation omitted); *see also Brentzel v. Fairfax Transfer and Storage, Inc.*, 2021 U.S. App. LEXIS 38522, 2021 WL 6138286, at *2 (4th Cir. Dec. 29, 2021) (per curiam); Fed. R. Civ. P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.").

In addition, "a court may properly take judicial notice of 'matters of public record' and other information that, under Federal Rule of Evidence 201, constitute 'adjudicative facts.'" *Goldfarb*, 791 F.3d at 508; *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007); *Katyle v. Penn Nat'l Gaming, Inc.*, 637 F.3d 462, 466 (4th Cir. 2011), *cert. denied*, 565 U.S. 825, 132 S. Ct. 115, 181 L. Ed. 2d 39 (2011); *Philips v. Pitt Cty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009). However, under Fed. R. Evid. 201, a court may take judicial notice of adjudicative facts only if they are "not subject to reasonable dispute," in that they are "(1) generally known within the territorial jurisdiction

of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

Under the principles outlined above, I may consider ECF 14-1, consisting of 44 exhibits, because plaintiffs appended the exhibits to their Amended Complaint. The exhibits are also integral to the Amended Complaint. *See* ECF 14. Moreover, the authenticity of the exhibits is not disputed, nor do defendants take issue with them.[20]

And, as noted, defendants point out that OJB has lodged related MPIA lawsuits against the BPD and other defendants in State court. They cite *Open Justice Baltimore v. Baltimore Police Department, et al.*, Circuit Court for Baltimore City, Case 24-C-20-001269, filed March 2, 2020; *Open Justice Baltimore v. The City of Baltimore, et al.*, Circuit Court for Baltimore City, Case 24-C-21-003745, filed August 30, 2021; and *Open Justice Baltimore v. Baltimore Police Department, et al.*, Circuit Court for Baltimore City, Case 24-C-21-005650, filed December 15, 2021. In the context of a motion to dismiss, "[a] court may take judicial notice of docket entries, pleadings and papers in other cases without converting a motion to dismiss into a motion for summary judgment." *Brown v. Ocwen Loan Servicing, LLC*, PJM-14-3454, 2015 U.S. Dist. LEXIS 110133, 2015 WL 5008763, at *1 n.3 (D. Md. Aug. 20, 2015), *aff'd*, 639 F. App'x. 200 (4th Cir. 2016); *see also Anderson v. Fed. Deposit Ins. Corp.*, 918 F.2d

20. ECF 27-1 appears to be identical to ECF 14-1. I will cite only to ECF 14-1.

1139, 1141 n.1 (4th Cir. 1990) (holding that a district court may "properly take judicial notice of its own records"). Therefore, I may take judicial notice of the complaints filed in each of State court cases.

III. Discussion

A. Claims and Parties

1.

Plaintiffs filed suit against four individual defendants, only in their official capacities. ECF 14 at 2. They also sued the BPD, the Baltimore City Law Department, and the City for the exact same conduct and claims.

As an initial matter, when a plaintiff sues an individual in his or her official capacity, and also sues a municipality or agency for the same conduct, the claims against the individual are duplicative. *See 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."); *Cottman v. Baltimore Police Department*, SAG-21-00837, 2022 U.S. Dist. LEXIS 7637, 2022 WL 137735, at *5 (D. Md. Jan. 13, 2022) (dismissing a claim against the BPD Commissioner "as it is duplicative of [the plaintiff's] *Monell* claim against the BPD.") This 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, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985) (quoting *Huggins v. Prince George's County*, 683 F.3d 525, 532 (4th Cir. 2012)); *see also Griffin v. Salisbury Police Dep't*, RDB-20-2511, 2020 U.S. Dist. LEXIS 192746, 2020 WL 6135148 at *4 (D. Md. Oct. 19, 2020) ("[A] claim against a state official in his official capacity is analogous to asserting a claim against the entity of which the official is an agent.").

Again, all of the individual defendants were sued only in their official capacities. On this basis, the claims against Commissioner Harrison are duplicative of the claims against the BPD. And, the claims against City Solicitor James Shea; Stephen Salsbury, Chief of Staff to the City Solicitor; and Lisa Walden, Chief Legal Counsel are duplicative of the claims against the Mayor and City Council of Baltimore. Therefore, the claims against the individual defendants are subject to dismissal.

In addition, the Amended Complaint is woefully deficient in failing to allege any facts related to actionable conduct on the part of Harrison and Shea. As mentioned, the federal constitutional claims are lodged pursuant to 42 U.S.C. § 1983. I discuss § 1983 in detail, *infra*. But, I note here that there is no respondeat superior liability under § 1983. Rather, liability under 42 U.S.C. § 1983 attaches only upon personal participation by a defendant in the constitutional violation. *See Love-Lane*, 355 F.3d at 782 (no respondeat superior liability under § 1983).

To be sure, supervisor may be liable "for the failings of a subordinate under certain narrow circumstances."

Green v. Beck, 539 F. App'x 78, 80 (4th Cir. 2013). However, liability of supervisory officials "is not based on ordinary principles of respondeat superior, but rather is premised on 'a recognition that supervisory indifference or tacit authorization of subordinates' misconduct may be a causative factor in the constitutional injuries they inflict on those committed to their care.'" *Baynard v. Malone*, 268 F.3d 228, 235 (4th Cir. 2001) (quoting *Slakan v. Porter*, 737 F.2d 368, 372 (4th Cir. 1984)); *see Campbell v. Florian*, 972 F.3d 385, 398 (4th Cir. 2020). Thus, supervisory liability under § 1983 must be predicated on facts that, if proven, would establish that: (1) the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to citizens like the plaintiff; (2) the supervisor's response to the knowledge was so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices; and (3) there was an affirmative causal link between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff. *See Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994); *see also Wilkins v. Montgomery*, 751 F.3d 214, 226 (4th Cir. 2014).

To qualify as "pervasive," a plaintiff must demonstrate that the challenged conduct "is widespread, or at least has been used on several different occasions." *Shaw*, 13 F.3d at 799. Therefore, it is insufficient to point "to a single incident or isolated incidents, for a supervisor cannot be expected to promulgate rules and procedures covering every conceivable occurrence . . . nor can he reasonably be expected to guard against the deliberate [unlawful] acts of

his properly trained employees when he has no basis upon which to anticipate the misconduct." *Id.* (quoting *Slakan*, 737 F.2d at 373) (alteration inserted). On the other hand, a supervisor's "continued inaction in the face of documented widespread abuses . . . provides an independent basis" for § 1983 liability against that official for his deliberate indifference or acquiescence to "the constitutionally offensive conduct of his subordinates." *Slakan*, 737 F.2d at 373; *see Shaw*, 13 F.3d at 799.

The Amended Complaint is devoid of reference to any conduct on the part of Harrison and Shea that would amount to supervisory liability. Plaintiffs have not set forth any allegations that Harrison or Shea were personally involved in the events at issue, nor have they alleged facts indicating supervisory liability.

In sum, the Amended Complaint fails to state a claim as to any of the individual defendants. *See* ECF 14. Therefore, I shall dismiss the suit as to these defendants.

2.

The Baltimore City Charter provides that "[t]he inhabitants of the City of Baltimore are a corporation, by the name of the 'Mayor and City Council of Baltimore,' and by that name ... may sue and be sued." BALTIMORE CITY CHARTER art. 1, § 1. The Baltimore City Law Department is not an entity that has an independent legal identity separate from the Mayor and City Council of Baltimore. Nor does it have the capacity to sue or be sued. Rather, it is an executive agency of City government.

In my view, the Baltimore City Law Department is not a proper defendant. *Cf. Weathersbee v. Baltimore City Fire Dept.*, 970 F. Supp. 2d 418, 425 (D. Md. 2013) (concluding that no claims were viable against the Baltimore City Fire Department because it is not an entity that can sue or be sued); *Jenkins v. Balt. City Fire Dep't*, 862 F. Supp. 2d 427, 442 (D. Md. 2012) ("The Court finds no merit in plaintiffs' argument that [the Baltimore City Fire Department] is an agent of the City and agents can be sued . . . ."), *aff'd on other grounds*, 519 F. App'x 192 (4th Cir. 2013); *Upman v. Howard County Police Dep't*, RDB-09-1547, 2010 U.S. Dist. LEXIS 25007, 2010 WL 1007844, at *2 (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."). In other words, naming both the Baltimore City Law Department, along with the Mayor and City Council of Baltimore, is superfluous.

Accordingly, I shall dismiss the suit as to the Baltimore City Law Department.

3.

The BPD Defendants argue that "the Court should dismiss any claims related to the [previously filed] state court suits." ECF 15-1 at 22. Plaintiffs do not dispute this contention. *See* ECF 27.

Litigants are generally not permitted to pursue simultaneously or successively the same claim in two cases. "The rule against claim splitting 'prohibits a

plaintiff from prosecuting its case piecemeal and requires that all claims arising out of a single wrong be presented in one action.'" *Lee v. Norfolk S. Ry. Co.*, 802 F.3d 626, 635 (4th Cir. 2015) (quoting *Sensormatic Sec. Corp. v. Sensormatic Elecs. Corp.*, 273 F. Appx. 256, 265 (4th Cir. 2008)). "In a claim splitting case, as with the traditional res judicata analysis, the second suit will be barred if the claim involves the same parties or their privies and 'arises out of the same transaction or series of transactions' as the first claim." *Sensormatic*, 452 F. Supp. 2d 621, 626 (D. Md. 2006), *aff'd*, 273 Fed. Appx. 256 (4th Cir. 2008) (citing *Trustmark Insur. Co. v. ESLU, Inc.*, 299 F.3d 1265, 1269-70 (11th Cir. 2002)).

The prohibition on claim splitting fosters judicial economy and protects parties from "the vexation of concurrent litigation over the same subject matter." *Alston v. Experian Info. Sols., Inc.*, TDC-14-3957, 2016 U.S. Dist. LEXIS 27444, 2016 WL 901249, at *3 (D. Md. Mar. 3, 2016), *aff'd*, 680 F. App'x 243 (4th Cir. 2017). The doctrine is intended in part "to prohibit plaintiffs from 'circumventing' a court's earlier ruling." *Chihota v. Fulton, Friedman & Gullace, LLP*, WDQ-12-0975, 2012 U.S. Dist. LEXIS 172735, 2012 WL 6086860, at *3 (D. Md. Dec. 5, 2012). In determining the appropriate recourse for a claim splitting violation, courts must also be mindful to "protect[ ] litigants against gamesmanship." *Airframe Systems, Inc. v. Raytheon Co.*, 601 F.3d 9, 14 (1st Cir. 2010); *see also Chihota*, 2012 U.S. Dist. LEXIS 172735, 2012 WL 6086860, at *2 n.18.

As noted, OJB lodged three related MPIA lawsuits against the BPD and other defendants in State court.

These suits allegedly concern Requests 1 through 4, 6, and 7. In particular, *Open Justice Baltimore v. Baltimore Police Department, et al.*, Circuit Court for Baltimore City, Case 24-C-20-001269, filed March 2, 2020, pertains to Requests 1, 2, 3, and 4. *Open Justice Baltimore v. The City of Baltimore, et al.*, Circuit Court for Baltimore City, Case 24-C-21-003745, filed August 30, 2021, concerns Request 6. And, *Open Justice Baltimore v. Baltimore Police Department, et al.*, Circuit Court for Baltimore City, Case 24-C-21-005650, filed December 15, 2021, pertains to Request 7.

The Court was not provided with any documents or filings related to the State court cases. But, as discussed earlier, the Court may take judicial notice of the complaints filed in the state cases. And, those suits concern Requests 1 through 4, 6, and 7 of the instant case. Therefore, as to these six requests, plaintiffs are not entitled to relief, because these requests are or were the subject of litigation in State court.

4.

The BPD Defendants also argue that, "[t]o the extent that OJB attempts to sue Defendants under the MPIA for violations that occurred more than two years prior to the filing of the Amended Complaint, those claims are barred by the statute of limitations and must be dismissed with prejudice and without leave to amend." ECF 15-1 at 22 (citing *Rounds v. Maryland-Nat. Capital Park and Planning Com'n*, 441 Md. 621, 656, 109 A.3d 639 (2015)). Plaintiffs do not dispute this contention, either. *See* ECF 27.

Appendix E

Request 5, in which OJB requested misconduct records of Officer Robert Dohony, was made on February 3, 2020. *See* ECF 14, ¶ 31; *see also* ECF 14-1 at 70-74. As noted, plaintiffs commenced this action on June 30, 2022, by filing a Complaint in the Circuit Court for Baltimore City. ECF 3. In general, an action to enforce must be brought within two years from the date on which the claim arises. *See* Md. Code (2020 Repl. Vol.), § 5-110 of the Courts and Judicial Proceedings Article ("C.J."). However, the statute carves out an exception, not addressed by the parties. C.J. § 5-110 requires an enforcement action to be filed within two years, "except that if the defendant has materially and willfully misrepresented any information required under those sections to be disclosed to a person and the information so misrepresented is material to the establishment of liability . . . the action may be brought . . . within two years after discovery by the person of the misrepresentation."

In regard to Request 5, plaintiffs allege that defendants "repeatedly attempted to thwart OJB's access to the records through a variety of methods: transgressing the MPIA deadline for responding to Dohony's records request, repeatedly and egregiously ignoring OJB's fee waiver requests, suggesting OJB narrow their request for Dohony's records, and employing an overly broad use of exemptions to avoid granting OJB access to Dohony's records." ECF 14, ¶ 31. Moreover, the crux of the Amended Complaint alleges that defendants engaged in "deceitful" practices" in responding to plaintiffs' requests. *See* ECF 14, ¶¶ 30, 64, 81, 94, 130, 138.

Limitations is an affirmative defense. *See* Fed. R. Civ. P. 8(c)(1) (in responding to a pleading, "a party must affirmatively state any . . . affirmative defense, including . . . statute of limitations . . . ."). As noted, courts ordinarily do not determine the applicability of a defense in connection with Rule 12(b)(6). *See King*, 825 F.3d at 214. Therefore, I cannot conclude on the face of the Amended Complaint that Request 5 is barred by limitations.

B. Federal Law Claims

1. Section 1983

Counts I, II, and III are based on the First Amendment, and lodged pursuant to 42 U.S.C. § 1983.

Under § 1983, a plaintiff may file suit against any person who, acting under the color of state law, "subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. *See, e.g., Nieves v. Bartlett*, ___ U.S. ___, 139 S. Ct. 1715, 1721, 204 L. Ed. 2d 1 (2019); *Filarsky v. Delia*, 566 U.S. 377, 132 S. Ct. 1657, 182 L. Ed. 2d 662 (2012); *Owens v. Balt. City State's Attorney's Office*, 767 F.3d 379 (4th Cir. 2014), *cert. denied sub nom. Balt. City Police Dep't v. Owens*, 575 U.S. 983, 135 S. Ct. 1893, 191 L. Ed. 2d 762 (2015). However, § 1983 "'is not itself a source of substantive rights,' but provides 'a method for vindicating federal rights elsewhere conferred.'" *Albright v. Oliver*, 510 U.S. 266, 271, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994)

(quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979)); *see Safar v. Tingle*, 859 F.3d 241, 245 (4th Cir. 2017). In other words, § 1983 allows "a party who has been deprived of a federal right under the color of state law to seek relief." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 707, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999).

To state a claim under § 1983, a plaintiff must allege: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a "person acting under the color of state law." *West v. Atkins*, 487 U.S. 42, 48, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988); *see Davison v. Randall*, 912 F.3d 666, 679 (4th Cir. 2019); *Crosby v. City of Gastonia*, 635 F.3d 634, 639 (4th Cir. 2011), *cert. denied*, 565 U.S. 823, 132 S. Ct. 112, 181 L. Ed. 2d 37 (2011); *Wahi v. Charleston Area Med. Ctr., Inc.*, 562 F.3d 599, 615 (4th Cir. 2009); *Jenkins v. Medford*, 119 F.3d 1156, 1159-60 (4th Cir. 1997). "The first step in any such claim is to pinpoint the specific right that has been infringed." *Safar*, 859 F.3d at 245.

The phrase "under color of state law" is an element that "'is synonymous with the more familiar state-action requirement' for Fourteenth Amendment claims, 'and the analysis for each is identical.'" *Davison*, 912 F.3d at 679 (quoting *Philips*, 572 F.3d at 180); *see also Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982). A person acts under color of state law "only when exercising power 'possessed by virtue of state law and made possible only because the wrongdoer

is clothed with the authority of state law.'" *Polk Cnty. v. Dodson*, 454 U.S. 312, 317-18, 102 S. Ct. 445, 70 L. Ed. 2d 509 (1981) (quoting *United States v. Classic*, 313 U.S. 299, 326, 61 S. Ct. 1031, 85 L. Ed. 1368, (1941)); *see also Philips*, 572 F.3d at 181 (citations and internal quotation marks omitted) ("[P]rivate activity will generally not be deemed state action unless the state has so dominated such activity as to convert it to state action: Mere approval of or acquiescence in the initiatives of a private party is insufficient.").

In the seminal case of *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), the Supreme Court determined that a local governmental body may be liable under § 1983 based on the unconstitutional actions of individual defendants, but only where those defendants were executing an official policy or custom of the local government, resulting in a violation of the plaintiff's rights. *Id.* at 690-91. A viable *Monell* claim consists of two components: 1) an unconstitutional policy or custom of the municipality; 2) and the unconstitutional policy or custom caused a violation of the plaintiff's rights. *See, e.g., Bd. of Comm'rs of Bryan Cty., v. Brown*, 520 U.S. 397, 403, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997); *Washington v. Housing Authority of the City of Columbia*, 58 F.4th 170, 177 (4th Cir. 2023); *Kirby v. City of Elizabeth City*, 388 F.3d 440, 451 (4th Cir. 2004); *Lytle v. Doyle*, 326 F.3d 463, 471 (4th Cir. 2003).

As the *Monell* Court explained, 436 U.S. at 694, "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts

may fairly be said to represent official policy, inflicts the injury the government as an entity is responsible under § 1983." *See Love-Lane*, 355 F.3d at 782. But, liability attaches "only where the municipality itself causes the constitutional violation at issue." *City of Canton v. Harris*, 489 U.S. 378, 385, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989) (emphasis in original); *accord Holloman v. Markowski*, 661 F. App'x 797, 799 (4th Cir. 2016) (per curiam), *cert. denied*, 580 U.S. 1205, 137 S. Ct. 1342, 197 L. Ed. 2d 531 (2017).

Generally, § 1983 suits against a State for money damages are barred by the sovereign immunity embodied in the Eleventh Amendment. *See Quern v. Jordan*, 440 U.S. 332, 345, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979). And, since 1867, the BPD has been regarded as a State agency under Maryland law, at least for some purposes. *Mayor & City Council of Balt. v. Clark*, 404 Md. 13, 23, 944 A.2d 1122, 1128 (2008); *Beca v. City of Baltimore*, 279 Md. 177, 180-81, 367 A.2d 478, 480 (1977). To that end, Pub. Local Laws Of Md. ("PLL"), Art. 4, § 16-2(a) (2021) states: "The Police Department of Baltimore City is hereby constituted and established as an agency and instrumentality of the State of Maryland."

In *Clark*, for example, the Maryland high court said, 404 Md. at 28, 944 A.2d at 1131: "[N]otwithstanding the Mayor's role in appointing and removing the City's Police Commissioner, the Baltimore City Police Department is a state agency." *See also Ashton v. Brown*, 339 Md. 70, 104 n. 18, 660 A.2d 447, 464 n. 18 (1995) (stating that "the Baltimore City Police Department, for purposes

of Maryland law, is a state agency"); *Clea v. Mayor & City Council of Balt.*, 312 Md. 662, 668, 541 A.2d 1303, 1306 (1988) ("Unlike other municipal or county police departments which are agencies of the municipality or county . . . the Baltimore City Police Department is a state agency.") (citations omitted).[21]

Nevertheless, the weight of authority in this District generally holds that, for purposes of § 1983, the BPD is

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21. On November 8, 2022, "82% of Baltimore [City] voters approved a ballot measure to bring the police department back under local control." *Baltimore Police Being Placed Under City Control After Functioning as State Agency*, POLICE MAG. (Nov. 14, 2022), https://www.policemag.com/649878/baltimore-police-being-placed-under-city-control-after-functioning-as-state-agen.

In a report published in 2019 by the Abell Foundation, George A. Nilson, Esquire, a former City Solicitor, stated, *The Abell Report*, ABELL FOUND. (Mar. 2019), at 6:

> The most significant impact of a change from State Agency status to City Agency status relates to the legal immunities that currently offer some protection to the Police Department and Baltimore City when citizens claim to have been mistreated by police officers. Currently, the Police Department is protected by State sovereign immunity that provides a greater level of protection than local immunity. If the Police Department becomes a City Agency, it would lose the protection of State sovereign immunity and be exposed to significantly higher damages awards in civil lawsuits.

The parties have not supplemented their submissions to address the import, if any, of the recent change in BPD's status.

a municipal entity, not protected by sovereign immunity. *See, e.g., Earl v. Taylor*, CCB-20-1355, 2021 U.S. Dist. LEXIS 186896, 2021 WL 4458930, at *3 (D. Md. Sept. 29, 2021); *Washington v. Baltimore Police Dep't*, 457 F. Supp. 3d 520, 532 (D. Md. 2020); *Johnson v. Baltimore Police Dep't*, 452 F. Supp. 3d 283, 299 (D. Md. 2020); *Hill v. CBAC Gaming LLC*, DKC-19-0695, 2019 U.S. Dist. LEXIS 213988, 2019 WL 6729392, at *4-5 (D. Md. Dec. 11, 2019); *Lucero v. Early*, GLR-13-1036, 2019 U.S. Dist. LEXIS 165747, 2019 WL 4673448, at *4 (D. Md. Sept. 25, 2019); *Bumgardner v. Taylor*, RBD-18-1438, 2019 U.S. Dist. LEXIS 53759, 2019 WL 1411059, at *5 (D. Md. Mar. 28, 2019); *Fish v. Mayor and City of Balt.*, CCB-17-1438, 2018 U.S. Dist. LEXIS 4222, 2018 WL 348111, at *3 (D. Md. Jan. 10, 2018); *Chin v. City of Balt.*, 241 F. Supp. 2d 546, 548 (D. Md. 2003); *Alderman v. Balt. Police Dep't*, 952 F. Supp. 256, 258 (D. Md. 1997); *see also Est. of Bryant v. Baltimore Police Dep't*, ELH-19-384, 2020 U.S. Dist. LEXIS 22990, 2020 WL 673571, at *33 (D. Md. Feb. 10, 2020); *Grim v. Baltimore* Police Dep't, ELH-18-3864, 2019 U.S. Dist. LEXIS 194461, 2019 WL 5865561, at *14-15 (D. Md. Nov. 8, 2019); *Jones v. Chapman*, ELH-14-2627, 2015 U.S. Dist. LEXIS 96562, 2015 WL 4509871, at *10 (D. Md. July 24, 2015); *Humbert v. O'Malley*, WDQ-11-0440, 2011 U.S. Dist. LEXIS 137182, 2011 WL 6019689, at *5 n.6 (D. Md. Nov. 29, 2011).

Therefore, as a municipal entity, the BPD is subject to suit under § 1983. In *Connick v. Thompson*, 563 U.S. 51, 60, 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011), the Supreme Court explained (emphasis in *Connick*):

Appendix E

> A municipality or other local government may be liable under [§ 1983] if the governmental body itself "subjects" a person to a deprivation of rights or "causes" a person "to be subjected" to such deprivation. *See Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 692, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). But, under § 1983, local governments are responsible only for "their *own* illegal acts." *Pembaur v. Cincinnati*, 475 U.S. 469, 479, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986) (citing *Monell*, 436 U.S. at 665-683). They are not vicariously liable under § 1983 for their employees' actions. *See id.*, at 691; *Canton*, 489 U.S. at 392; *Board of Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 403, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997) (collecting cases).

However, neither an individual nor a municipality can be held liable in a § 1983 action under a theory of respondeat superior. *Monell*, 436 U.S. at 693-94; *Love-Lane*, 355 F.3d at 782. Moreover, "[i]t is well established that in a § 1983 case a city or other local governmental entity cannot be subject to liability at all unless the harm was caused in the implementation of 'official municipal policy.'" *Lozman v. City of Riviera Beach*, __ U.S.__, 138 S. Ct. 1945, 1951, 201 L. Ed. 2d 342 (2018) (citation omitted); *see Milligan v. City of Newport News*, 743 F.2d 227, 229 (4th Cir. 1984). In other words, a municipality is liable when a "policy or custom" is "fairly attributable to the municipality as its 'own,' and is . . . the 'moving force' behind the particular constitutional violation." *Spell v.*

McDaniel, 824 F.2d 1380, 1387 (4th Cir. 1987) (internal citations omitted).

A plaintiff may demonstrate the existence of an official policy in three ways: (1) a written ordinance or regulation; (2) certain affirmative decisions of policymaking officials; or (3) in certain omissions made by policymaking officials that "manifest deliberate indifference to the rights of citizens." *Carter v. Morris*, 164 F.3d 215, 218 (4th Cir. 1999). "Locating a 'policy' ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality." *Bd. of Comm'rs of Bryan Cty.*, 520 U.S. at 403-04.

"An official policy often refers to 'formal rules or understandings . . . that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time,' and must be contrasted with 'episodic exercises of discretion in the operational details of government.'" *Semple v. City of Moundsville*, 195 F.3d 708, 712 (4th Cir. 1999) (alteration in *Semple*; citations omitted). However, "the governmental unit may create an official policy by making a single decision regarding a course of action in response to particular circumstances." *Id.*

Of relevance, beyond "formal decisionmaking channels, a municipal custom may arise if a practice is so 'persistent and widespread' and 'so permanent and well settled as to constitute a "custom or usage" with the

force of law.'" *Carter*, 164 F.3d at 218 (quoting *Monell*, 436 U.S. at 691); *see Simms ex rel. Simms v. Hardesty*, 303 F. Supp. 2d 656, 670 (D. Md. 2003). A policy or custom "may be attributed to a municipality when the duration and frequency of the practices warrants a finding of either actual or constructive knowledge by the municipal governing body that the practices have become customary among its employees." *Spell*, 824 F.2d at 1387; *see Holloman*, 661 F. App'x at 799. In addition, "a policy or custom may possibly be inferred from continued inaction in the face of a known history of widespread constitutional deprivations on the part of city employees, or, under quite narrow circumstances, from the manifest propensity of a general, known course of employee conduct to cause constitutional deprivations to an identifiable group of persons having a special relationship to the state." *Milligan*, 743 F.2d at 229 (internal citations omitted).

In *Owens*, 767 F.3d at 402, the Fourth Circuit reiterated that to establish a *Monell* claim based on custom and practice, the plaintiff "must point to 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.'" (quoting *Spell*, 824 F.2d at 1386-91) (alteration in *Owens*). Therefore, "Section 1983 plaintiffs seeking to impose liability on a municipality must . . . adequately plead and prove the existence of an official policy or custom that is fairly attributable to the municipality and that proximately caused the deprivation of their rights." *Jordan by Jordan v. Jackson*, 15 F.3d 333, 338 (4th Cir. 1994).

A policy or custom that gives rise to § 1983 liability will not, however, "be inferred merely from municipal inaction in the face of isolated constitutional deprivations by municipal employees." *Milligan*, 743 F.2d at 230. Only when a municipality's conduct demonstrates a "deliberate indifference" to the rights of its inhabitants can the conduct be properly thought of as a "policy or custom" actionable under § 1983. *Jones v. Wellham*, 104 F.3d 620, 626 (4th Cir. 1997) (citing *Canton*, 489 U.S. at 389).

Of relevance, "not all undesirable behavior by state actors is unconstitutional." *Pink v. Lester*, 52 F.3d 73, 75 (1995) (citing *Paul v. Davis*, 424 U.S. 693, 701, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976)). A constitutional violation requires more than mere negligence. *See Johnson v. Quinones*, 145 F.3d 164, 166 (4th Cir. 1998). Indeed, "the 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), *cert. denied*, 529 U.S. 1067, 120 S. Ct. 1673, 146 L. Ed. 2d 482 (2000).

2. Viewpoint & Content-Based Discrimination (Counts I, II)

Count I asserts a First Amendment claim of viewpoint discrimination, in which plaintiffs allege that defendants unlawfully restricted their access to public records based on opinions or perspectives of the plaintiffs. ECF 14, ¶¶ 127-34. Count II alleges a First Amendment claim of content-based discrimination. ECF 14, ¶¶ 135-42.[22] And,

22. Plaintiffs do not distinguish "viewpoint" and "content-based" discrimination. In fact, plaintiffs seem to have "copied

plaintiffs assert their claims under *Monell*, 436 U.S. 658, alleging "'practices so persistent and widespread as to practically have the force of the law.'" ECF 27 at 22 (citing *Connick*, 563 U.S. at 61).

In essence, plaintiffs assert that defendants violated the MPIA with respect to plaintiffs' requests because defendants disapprove of how plaintiffs will use the information. ECF 14, ¶¶ 62-93. For instance, Count I of the Amended Complaint alleges, *id.* ¶ 131:

> Defendants have engaged in viewpoint discrimination towards Plaintiffs because of viewpoints expressed in their speech. Defendants have explicitly communicated disapproval for how Plaintiffs are using requested information: to shed light on Defendants' practice and history of concealing abuse, violence, corruption, misconduct, etc. Consequently, Defendants have taken actions to suppress Plaintiffs' protected speech in order to protect themselves from further liability.

The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government

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and pasted" the allegations from both counts, at times forgetting to replace the word "viewpoint" with the word "content-based." *Compare* ECF 14, ¶¶ 61-76 *with* ¶¶ 77-93.

for a redress of grievances." And, it "is applicable to the States through the Due Process Clause of the Fourteenth Amendment." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council Inc.*, 425 U.S. 748, 749 n.1, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976); *see Lovell v. Griffin*, 303 U.S. 444, 450, 58 S. Ct. 666, 82 L. Ed. 949 (1983).

Under the First Amendment, the "government generally has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Barr v. Am. Assoc. of Political Consultants, Inc.*, __ U.S. __, 140 S. Ct. 2335, 2346, 207 L. Ed. 2d 784 (2020) (quotation marks and citation omitted). A "core postulate of free speech law" is that the "government may not discriminate against speech based on the ideas or opinions it conveys." *Iancu v. Brunetti*, __ U.S. __, 139 S. Ct. 2294, 2299, 204 L. Ed. 2d 714 (2019). "'Premised on mistrust of governmental power" the First Amendment "stands against attempts to disfavor certain subjects or viewpoints.'" *Am. Civil Liberties Union of N. Carolina v. Tata*, 742 F.3d 563, 565-66 (4th Cir. 2014) (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010)).

"The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Connick v. Myers*, 461 U.S. 138, 145, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983) (quoting *Roth v. United States*, 354 U.S. 476, 484, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957)). The Supreme Court has said: "The hallmark of the protection of free speech is to allow 'free trade in ideas'—even ideas

that the overwhelming majority of people might find distasteful or discomforting." *Virginia v. Black*, 538 U.S. 343, 365, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003) (quoting *Abrams v. United States*, 250 U.S. 616, 630, 40 S. Ct. 17, 63 L. Ed. 1173 (1919) (Holmes, J., dissenting)). As a general matter, "imposing financial burdens based on the content of the speech or viewpoint of the speaker runs afoul of the First Amendment." *Wang v. City of Rockville*, GJH-17-2131, 2018 U.S. Dist. LEXIS 20649, 2018 WL 801526, at *3 (D. Md. Feb. 7, 2018) (citing *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 828, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995)).

"Viewpoint-based discrimination occurs when a government official 'targets not subject matter, but particular views taken by speakers on a subject.'" *Robertson v. Anderson Mill Elementary Sch.*, 989 F.3d 282, 290 (4th Cir. 2021) (quoting *Rosenberger*, 515 U.S. at 829). Viewpoint-based restrictions are a subset of content-based restrictions. *See Barr*, 140 S. Ct. at 2346; *see also Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 168, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015) ("Government discrimination among viewpoints . . . is a 'more blatant' and 'egregious form of content discrimination'[.]") (quoting *Rosenberger*, 15 U.S. at 829); *Rosenberger*, 515 U.S. at 829 ("Viewpoint discrimination is thus an egregious form of content discrimination"); *McCullen v. Coakley*, 573 U.S. 464, 484-85, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014) (noting than an exemption for a group on only one side of the abortion debate would constitute a clear form of viewpoint discrimination); *Davison*, 912 F.3d at 687 (stating that viewpoint discrimination "'targets'" a speaker's view on

a subject and concluding that public official's conduct in banning a constituent from the public official's Facebook page constituted viewpoint discrimination) (citation omitted); *Sons of Confederate Veterans, Inc. ex rel. Griffin v. Comm'r of Virginia Dep't of Motor Vehicles*, 288 F.3d 610, 623 (4th Cir. 2002) ("Viewpoint discrimination is a kind of content discrimination, but is not always easily distinguishable."). Further, "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject' the violation of the First Amendment is all the more blatant . . . . *Rosenberger*, 515 U.S. at 829.

Plaintiffs posit that defendants are aware of plaintiffs' viewpoints and the content they publish due to previous lawsuits filed by them, and because of plaintiffs' professional interests and accomplishments. ECF 14, ¶¶ 62, 63, 66, 67, 70, 71, 74, 78-80, 84, 87, 88, 91. Additionally, it appears that plaintiffs' requests for records related to police misconduct would be used to criticize the BPD. *See Robinson v. City of Mount Rainer*, GJH-20-2246, 2021 U.S. Dist. LEXIS 63366, 2021 WL 1222900, at *8 (D. Md. Mar. 31, 2021) ("It can be inferred from these facts, as well as the content of [plaintiff's] public information requests—seeking information such as arrest statistics, stop-and-frisk reports, and information related to the Ethics Commission's selection process—that Plaintiff was seeking information she would use to criticize the City [of Mount Rainier]." However, the Amended Complaint contains no allegations that, if proven, would establish that defendants considered plaintiffs' viewpoints or content when responding to the requests. In essence, plaintiffs

baldly assert that, by the very nature of who they are, any violation of the MPIA must necessarily be the result of a discriminatory animus. *See* ECF 14, ¶¶ 63, 67, 70, 71, 74.

Regardless, even assuming that defendants have delayed or denied plaintiffs access to public records on the basis of viewpoint or content-based discrimination, plaintiffs' alleged constitutional violations by defendants extend only to plaintiffs. As noted, the Fourth Circuit has instructed 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; *see Owens*, 767 F.3d at 403. Instead, a plaintiff must allege "'numerous particular instances' of unconstitutional conduct . . . ." *Lytle*, 326 F.3d at 473 (quoting *Kopf v. Wing*, 942 F.2d 265, 269 (4th Cir. 1991)). Plaintiffs cannot rely upon "scattershot accusations of unrelated constitutional violations" to establish liability under *Monell. Carter*, 164 F.3d at 218. And, even those kinds of allegations are absent.

The case of *Robinson*, 2021 U.S. Dist. LEXIS 63366, 2021 WL 1222900, is instructive. There, the plaintiff alleged that the City of Mount Rainier denied the nine MPIA requests she made for information and four requests for fee waivers, and that the City did so because of her viewpoint, in violation of the First Amendment. 2021 U.S. Dist. LEXIS 63366, [WL] at *17. The allegation was based upon a city attorney's explicit reference to the plaintiff's viewpoint when processing her MPIA requests, as well as an open letter published by the City Council of Mount Rainer that criticized the plaintiff. 2021 U.S. Dist. LEXIS 63366, [WL] at *5, 8.

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Of import here, the *Robinson* Court said, 2021 U.S. Dist. LEXIS 63366, [WL] at *17 (alteration added):

> [Plaintiff's conclusory statement] is insufficient where it is supported by factual allegations involving the Plaintiff alone—she does not point to any other instances of the City's discriminatory conduct or otherwise allege that its discrimination extends beyond herself. 'Sporadic or isolated violations of rights will not give rise to *Monell* liability; only widespread or flagrant violations will.' *See Owens v. Baltimore City State's Att'ys Off.*, 767 F.3d 379, 403 (4th Cir. 2014) (quoting *Spell v. McDaniel*, 824 F.2d 1380, 1390 (4th Cir. 1987)) (finding the plaintiff's *Monell* claim—based on a policy or custom of withholding exculpatory evidence from criminal defendants—survived where he alleged that "reported and unreported cases" from before and during the events at issue, as well as "numerous 'successful motions'" in other criminal cases, showed similar conduct by officers and that the department ignored this conduct); *see also Weeden v. Prince George's Cty.*, No. GJH-17-2013, 2018 U.S. Dist. LEXIS 95469, 2018 WL 2694441, at *4 (D. Md. June 4, 2018) (dismissing *Monell* claim where the plaintiff offered broad, general allegations of a widespread practice but identified only one specific instance of unconstitutional conduct). Because Plaintiff has not alleged the existence of a widespread unconstitutional practice that

> constitutes a custom with the force of law, and thus has not alleged the City maintained an official policy or custom that caused the violation of her constitutional rights, she has failed to state a *Monell* claim against the City.

Accordingly, the court granted the defendant's motion to dismiss with respect to the *Monell* claim. *Id.*

OJB has sued BPD in State court for similar claims of violations of the MPIA. But, plaintiffs cite no other instances involving others whose requests were denied. Nor do plaintiffs point to any other instances in which BPD allegedly stonewalled the production of records or was found to have violated the First Amendment in processing MPIA requests.

Nevertheless, it would seem that a municipality could be found to have a custom or practice, even if there is only one entity or person subject to it. *See Oyenik v. Corizon Health Incorporated*, 696 Fed. App'x 792, 794 (9th Cir. 2017) ("There is no case law indicating that a custom cannot be inferred from a pattern of behavior toward a single individual . . . ."). For example, if only one person submits multiple MPIA requests, over a period of time, and they are always rejected, it is possible that there is a custom or policy as to such requests, even though others are not affected.

But, the allegations and exhibits here reveal that BPD was aware of its obligations under the MPIA. However, over a relatively short period of time, three requestors

made extensive record requests to the BPD, and at a time when the law was evolving and the BPD had to consider the statutory change. Specifically, the MPIA was amended by Anton's Law, effective October 1, 2021.

To be sure, many of the requests preceded that date, and the last MPIA request is dated May 26, 2022. But, the MPIA permits redaction of records under certain circumstances. And, production is not a simple matter of locating and then handing over documents. After the records are located, the BPD has a right (and obligation) to review them to determine whether they fall within a statutory exception; whether redactions are warranted; and, if so, to make them. This can be a labor-intensive and time-consuming process, particularly when the requests are substantial.

In terms of BPD's alleged policy, it is noteworthy that at least some of the requests are impacted by Anton's Law. Given the recent passage of Anton's Law in relation to some of the requests, BPD hardly had time to formulate a "widespread and permanent practice necessary to establish [a] custom." *Carter*, 164 F.3d at 220. And, the allegations, even if proven, do not establish a custom or policy "with the force of law." *Robinson*, 2021 U.S. Dist. LEXIS 63366, 2021 WL 1222900, at *17.

Furthermore, BPD's decision-making process with regard to OJB's fee waiver requests is currently pending before Maryland's highest court. *See Baltimore Police Department*, 484 Md. at 7, 282 A.3d at 1106. These factors, along with the unique scope and complexity of the

requests, are at odds with the conclusory assertions of a custom or practice that is tantamount to a policy.

In addition, plaintiffs have failed to allege that a policymaker had actual or constructive knowledge of any constitutional violations, or that a policymaker failed to correct the improper conduct due to deliberate indifference. As discussed earlier, a municipal entity could be liable if it "fail[s] 'to put a stop to or correct a widespread pattern of unconstitutional conduct.'" *Owens*, 767 F.3d at 402 (quoting *Spell*, 824 F.2d at 1389). A *Monell* claim survives if the plaintiff alleges facts to support that the defendant "was aware of ongoing constitutional violations" and "did nothing to stop or correct those actions." *Smith v. Aita*, CCB-14-3487, 2016 U.S. Dist. LEXIS 90029, 2016 WL 3693713 at *4 (D. Md. July 12, 2016); *see Garcia v. Montgomery Cnty.*, JFM-12-3592, 2013 U.S. Dist. LEXIS 120659, 2013 WL 4539394 at *5 (D. Md. Aug. 23, 2013) (denying motion to dismiss on the basis that the plaintiff alleged that the defendant "was aware of the ongoing constitutional violations" by police officers and that "the county's failure to supervise and discipline its officers allowed a pattern and/or practice of unconstitutional actions to develop"); *McDowell v. Grimes*, GLR-17-3200, 2018 U.S. Dist. LEXIS 133289, 2018 WL 3756727, at *5 (D. Md. Aug. 7, 2018) (denying motion to dismiss because the plaintiff alleged sufficient facts that, if proven, would establish that the defendant "had knowledge of, and was deliberately indifferent to, officers' practice of unconstitutional conduct"); *Jones v. Jordan*, GLR-16-2662, 2017 U.S. Dist. LEXIS 150701, 2017 WL 4122795, at *11 (D. Md. Sept. 18, 2017) (denying

motion to dismiss on the basis that the facts were sufficient to plead that the defendant was aware of police officers' ongoing violations).

To assert a plausible *Monell* claim on this basis, a plaintiff must allege "a 'persistent and widespread practice[] of municipal officials,' the 'duration and frequency' of which indicate that policymakers (1) had actual or constructive knowledge of the conduct, and (2) failed to correct it due to their 'deliberate indifference.'" *Owens*, 767 F.3d at 402 (quoting *Spell*, 824 F.2d at 1386-1391). Both "knowledge and indifference can be inferred from the 'extent' of employees' misconduct." *Owens*, 767 F.3d at 402-03 (quoting *Spell*, 824 F.2d at 1391). However, only "'widespread or flagrant'" misconduct is sufficient. *Owens*, 767 F.3d at 403 (quoting Spell, 824 F.2d at 1387). In contrast, "[s]poradic or isolated" misconduct is not. *Owens*, 767 F.3d at 403.

In *Corbitt v. Baltimore City Police Department*, RDB-20-3431, 2021 U.S. Dist. LEXIS 149996, 2021 WL 3510579, at *7 (D. Md. Aug 10, 2021), Judge Bennett granted a defendant's motion to dismiss a *Monell* claim because the plaintiff asserted "absolutely no facts to support his contention that the BPD . . . condoned the activity of BPD Officers." In addition, the court reasoned that there were no allegations as to whether there had been similar incidents or whether the BPD was aware of the alleged improper conduct. *Id.*

Here, in a conclusory fashion, plaintiffs assert that "[t]he individual agents of the agencies did not only have

an actual or constructive knowledge of the misconduct perpetrated by the agencies, but they themselves ensured its continuance." ECF 14, ¶ 25. Yet, put simply, the Amended Complaint contains no facts—just bald assertions—that the BPD and the City employees considered viewpoint and content when processing the MPIA requests at issue.

Certainly, *Monell* does not impose heightened pleading requirements, beyond the basic "short and plain statement" requirement of Fed. R. Civ. P. 8(a). *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993). But, it still requires plaintiffs to plead adequately "the existence of an official policy or custom that is fairly attributable to the municipality and that proximately caused the deprivation of their rights," *Jordan by Jordan*, 15 F.3d at 338; *see also Grim*, 2020 U.S. Dist. LEXIS 38424, 2020 WL 1063091, at *5 ("[A] viable § 1983 *Monell* claim consists of two components: (1) the municipality had an unconstitutional policy or custom; and (2) the unconstitutional policy or custom caused a violation of the plaintiff's constitutional rights.").

Accordingly, plaintiffs fail to state First Amendment claims based on viewpoint and content-based discrimination. These claims are subject to dismissal.

3. Retaliation (Count III)

In Count III, plaintiffs allege: "All Defendants violated all Plaintiffs' right to free speech under the

First Amendment of the Constitution of the United States, through 42 U.S.C. § 1983, . . . through retaliation in restricting access to public records." ECF 14 at 34. In particular, plaintiffs assert: "Defendants' retaliation based on Plaintiffs' filing of this lawsuit has adversely affected Plaintiffs' ability to engage in constitutionally protected speech and fulfill its [sic] intended purpose of increasing public awareness of government corruption." *Id.* ¶ 146.

The right to free speech under the First Amendment includes not only the affirmative right to speak, but also the right to be free from retaliation by a public official for the exercise of that right. *See ACLU v. Wicomico County, Md.*, 999 F.2d 780, 785 (4th Cir. 1993). In order to prevail on a claim of retaliation, plaintiffs "must allege either that the retaliatory act was taken in response to the exercise of a constitutionally protected right or that the act itself violated such a right." *Adams v. Rice*, 40 F.3d 72, 75 (4th Cir.1994).

The Fourth Circuit has said, ACLU, 999 F.2d at 785: "Retaliation, though it is not expressly referred to in the Constitution, is nonetheless actionable because retaliatory actions may tend to chill individuals' exercise of constitutional rights." (citing *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972)); *see also Pickering v. Board of Educ.*, 391 U.S. 563, 574, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968) (noting that retaliatory acts can be "a potent means of inhibiting speech"). "[B]y engaging in retaliatory acts, public officials place informal restraints on speech allow[ing] the government to produce

a result which [it] could not command directly. Such interference with constitutional rights is impermissible." *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 685 (4th Cir. 2000) (quoting *Perry*, 408 U.S. at 597 (1972)) (internal citations and quotation marks omitted).

A plaintiff who brings a § 1983 First Amendment retaliation claim must allege facts that, if proven, would show: (1) that the plaintiff's speech was protected; (2) that "the defendant's alleged retaliatory action adversely affected the plaintiff's constitutionally protected speech"; and (3) "a causal relationship exists between the plaintiff's speech and the defendant's retaliatory action." *Suarez*, 202 F.3d at 685-86. "'A complaint which alleges retaliation in wholly conclusory terms may safely be dismissed on the pleading alone.'" *Gill v. Mooney*, 824 F.2d 192, 194 (2d Cir. 1987) (quoting *Flaherty v. Coughlin*, 713 F.2d 10, 13 (2d Cir. 1983)); *Pierce v. King*, 918 F. Supp. 932, 945 (E.D.N.C. 1996) (noting that conclusory allegations of retaliation are insufficient to state claim).

In *Raub v. Campbell*, 785 F.3d 876 (4th Cir. 2015), the Fourth Circuit reviewed the elements of a First Amendment claim and said, *id.* at 885:

> Of note, our causal requirement is "rigorous." *Huang v. Bd. of Governors of the Univ. of N.C.*, 902 F.2d 1134, 1140 (4th Cir.1990). "[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." *Id.*

As noted, the alleged retaliation is "based on Plaintiffs' filing of this lawsuit." *Id.* ¶ 146. However, in Count III of the Amended Complaint plaintiffs fail to allege which specific actions, if any, were taken by defendants after the filing of this suit on June 30, 2022. *See* ECF 3. For instance, plaintiffs assert only that "Defendants impermissibly retaliated against Plaintiffs' protected speech by placing numerous restraints on Plaintiffs' access to public records." ECF 14, ¶ 147. But, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to state a constitutional violation. *Iqbal*, 556 U.S. at 681, 685.

Thus, Count III fails to state a claim under the First Amendment based on a theory of retaliation.

B. State Law Claims

Based on my analysis, the federal claims are not viable. Therefore, the suit no longer presents a federal question. Plaintiffs' remaining claims are predicated on State law.

In their motions to dismiss, defendants claim that "state courts have exclusive jurisdiction over Plaintiffs' MPIA claims" (ECF 15-1 at 20), and that "MPIA matters are within the sole province of the State Circuit Court." ECF 16-1. Ironically, it was defendants who removed this case to federal court in the first place. *See* ECF 1. Nevertheless, defendants now contend that the Court should decline to exercise supplemental jurisdiction because the "First Amendment claims are not viable, the

MPIA claims predominate over the First Amendment claims, and the Amended Complaint involves issues of novel state law." ECF 30 at 14. Conversely, in their Opposition, plaintiffs claim that "[s]upplemental jurisdiction for the state law claims is proper under 28 U.S.C. § 1367(a), as the constitutional issues are predominate and this petition raises no novel or complex issue of state law." ECF 27 at 33-34.

Under 28 U.S.C. § 1367(a), a federal court may exercise "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."

"[T]he doctrine of supplemental jurisdiction . . . 'is a doctrine of flexibility, designed to allow courts to deal with cases involving pendent claims in a manner that most sensibly accommodates a range of concerns and values.'" *Jordahl v. Democratic Party of Va.*, 122 F.3d 192, 203 (4th Cir. 1997) (quoting *Shanaghan v. Cahill*, 58 F.3d 106, 106 (4th Cir. 1995)). In *ESAB Group, Inc. v. Zurich Insurance PLC*, 685 F.3d 376, 394 (4th Cir. 2012), the Fourth Circuit described the traditional approach to supplemental jurisdiction (previously known as "pendent" jurisdiction). It said, *id.* at 394 (internal citation omitted):

> [S]o long as one claim in an action presented a federal question on the face of the well-pleaded complaint, a court could exercise jurisdiction over the entire constitutional case

> or controversy. It does not follow, however, that the federal court had original jurisdiction over the entire case; rather, it had original jurisdiction over at least one claim, allowing the exercise of supplemental/pendent jurisdiction over the remaining claims. And the Supreme Court subsequently recognized that, when the exercise of pendent jurisdiction over these claims became "inappropriate," district courts had inherent authority to remand them to state courts.

However, pursuant to § 1367(c)(3), a district court "may decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction." In *Shanaghan v. Cahill*, 58 F.3d at 110, the Fourth Circuit recognized that under § 1367(c)(3), "trial courts enjoy wide latitude in determining whether or not to retain jurisdiction over state claims when federal claims have been extinguished." *See also ESAB*, 685 F.3d at 394 ("Section 1367(c) recognizes courts' authority to decline to exercise supplemental jurisdiction in limited circumstances, including . . . where the court dismisses the claims over which it has original jurisdiction."); *Hinson v. Northwest Fin. S. Carolina, Inc.*, 239 F.3d 611, 616 (4th Cir. 2001) (stating that, "under the authority of 28 U.S.C. § 1367(c), authorizing a federal court to decline to exercise supplemental jurisdiction, a district court has inherent power to dismiss the case . . . provided the conditions set forth in § 1367(c) for declining to exercise supplemental jurisdiction have been met"); *see, e.g., Ramsay v. Sawyer Property Management of Maryland*,

LLC, 948 F.Supp.2d 525, 537 (D. Md. 2013) (declining to exercise supplemental jurisdiction over plaintiff's state law claims after dismissing federal law claims); *Int'l Ass'n of Machinists & Aero. Workers v. Werner-Matsuda*, 390 F. Supp. 2d 479, 500 (D. Md. 2005) ("Because the court will dismiss the claims over which it has original jurisdiction, the court will decline to exercise supplemental jurisdiction over the remaining state law claims.").

The Court may exercise this discretion by dismissing a case or by remanding the case if it is a removed action. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 353-57, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988). "In *Carnegie-Mellon*, the [Supreme] Court found federal courts to have an *inherent* power to remand removed State claims when the federal claims drop out of the case." *Hinson*, 239 F.3d at 616 (emphasis in original). "Even though *Carnegie-Mellon* was decided before the doctrine of pendent jurisdiction was codified in 28 U.S.C. § 1367," the Fourth Circuit has said that it "continues to inform the proper interpretation of § 1367(c)." *Id.* And, the 30-day deadline specified in 28 U.S.C. § 1447(c) for motions to remand on the basis of defects other than subject matter jurisdiction does not apply to motions to remand arguing that the Court should decline to exercise supplemental jurisdiction. This is because such motions do not arise under § 1447(c). *See Hinson*, 239 F.3d at 616.

When exercising this discretion, the Supreme Court has instructed federal courts to "consider and weigh . . . the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction

over . . . pendent state-law claims." *Carnegie-Mellon*, 484 U.S. at 350. In particular, "a remand may best promote [these] values" by permitting a case to be resolved in State court without the needless expense of filing a new case. *Id.* at 353. The Supreme Court has also said: "Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966).

These factors plainly favor remand to the Circuit Court for Baltimore City.[23] First, each count in the Amended Complaint is rooted in State law: the MPIA and MPAA. And, as noted, BPD's decision-making process

23. The BPD Defendants also note that "Plaintiffs' attempt to bring MPIA claims in federal court become even more problematic" because "BPD is a state agency that has not consented to this lawsuit, nor has any federal statute abrogated BPD's sovereign immunity in federal court." ECF 30 at 13. To be sure, "State sovereign immunity is applicable to state agencies and instrumentalities." *Mealey v. Baltimore City Policy Department*, JRR-21-2332, 2023 U.S. Dist. LEXIS 26504, 2023 WL 2023262, at *18 (D. Md. Feb. 15, 2023) (citing *Corbitt*, 2021 U.S. Dist. LEXIS 149996, 2021 WL 3510579 at *7). And, as noted, until a recent election, the BPD has been regarded as a State agency under Maryland law.

However, the parties do not provide any briefing regarding the implications of this recent change, nor do they provide a discussion on any potential retroactivity that may apply to the BPD in this instance. Regardless, because I have decided to remand the suit back to the Circuit Court for Baltimore City, this Court need not reach the issue of State sovereign immunity.

with regard to OJB's fee waiver request is currently pending before Maryland's highest court.

In particular, *Open Justice Baltimore v. Baltimore Police Department, et al.*, Circuit Court for Baltimore City, Case 24-C-20-001269, filed March 2, 2020, involves BPD's interpretation of the MPIA's fee waiver provision. This is an issue that permeates the Amended Complaint. And, the Supreme Court of Maryland heard oral arguments in the State case on January 6, 2023.

Furthermore, the MPIA explicitly contemplates that if a requestor is denied inspection of a public record, a complaint "shall be filed with the circuit court for the county where: (i) the complainant resides or has a principle place of business; or (ii) the public record is located." G.P. § 4-362; *see also Sowe v. Md.*, WDQ-09-0621, 2009 U.S. Dist. LEXIS 74990, 2009 WL 2730284, at *2 "([The MPIA] requires suit to be filed in a state circuit court.") (citations omitted). As discussed, OJB has filed several suits in State court.

Regrettably, the motions have been ripe for some time. Nevertheless, the case has not progressed beyond preliminary motion practice. *Cf. Carnegie-Mellon*, 484 U.S. at 350 n.7 ("[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine . . . will point toward declining to exercise jurisdiction over the remaining state-law claims.").

As I see it, remand is appropriate. *See, e.g., Medina v. L & M Const., Inc.*, RWT-14-00329, 2014 U.S. Dist. LEXIS 56188, 2014 WL 1658874, at *2 (D. Md. Apr. 23, 2014) ("Finally, as a matter of comity, this Court will remand Medina's state law claims back to state court, as '[n]eedless decisions of state law [by federal courts] should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.'") (alteration in *Medina*) (quoting *Gibbs*, 383 U.S. at 726).

IV. Conclusion

For the reasons stated herein, I shall dismiss the suit as to the individual defendants, as they were sued only in their official capacities, and thus the claims as to them are duplicative. Moreover, as to Harrison and Shea, there are no allegations to support a claim for supervisory liability. I shall also dismiss the case as to the Baltimore City Law Department, because it is not a proper defendant. And, I shall grant defendants' motions to dismiss as to the First Amendment claims in Counts I through III.

As a result, there is no viable claim that establishes federal question jurisdiction. And, I decline to exercise supplemental jurisdiction over the remaining State law claims, contained in Counts I through VI. Accordingly, I shall remand the State law claims in Counts I through VI to the Circuit Court for Baltimore City.[24]

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24. This Court expresses no opinion on the merits of any State law claims.

Appendix E

An Order follows, consistent with this Memorandum Opinion.

Date: August 10, 2023 /s/ Ellen L. Hollander
Ellen L. Hollander
United States District Judge

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, FILED AUGUST 10, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. ELH-22-1901

OPEN JUSTICE BALTIMORE, *et al.*,

Plaintiffs,

v.

BALTIMORE CITY LAW DEPARTMENT, *et al.*,

Defendants.

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is this 10th day of August, 2023, by the United States District Court for the District of Maryland **ORDERED:**

1) ECF 12 and ECF 13 are denied, as moot;

2) The suit is dismissed as to the individual defendants and the Baltimore City Law Department;

3) As to the federal claims in Counts I through III, defendants' motions to dismiss (ECF 15; ECF 16) are GRANTED;

4) Judgment is entered in favor of defendants and against plaintiff with respect to the federal claims in Counts I through III;

5) The Court declines to exercise supplemental jurisdiction as to the State law claims in Counts I through VI;

6) As to the BPD and the City, the Court shall remand the State law claims to the Circuit Court for Baltimore City; and

7) The Clerk shall CLOSE this case.

/s/
Ellen Lipton Hollander
United States District Judge