

No. 17-2444

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**In The United States Court of Appeals  
For The Fourth Circuit**

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ASHLEY AMARIS OVERBEY; BALTIMORE BREW,

*Plaintiffs-Appellants,*

v.

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

*Defendants-Appellees.*

On Appeal from the United States District Court  
For The District of Maryland, No. 1:17-CV-01793-MJG,  
The Honorable Marvin J. Garbis, Presiding

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**Motion for Leave to File Brief of *Amici Curiae***

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1. Pursuant to Federal Rule of Appellate Procedure 29(a)(3), Reporters Committee for Freedom of the Press and 19 Media Organizations respectfully move this Court for leave to file an *amici curiae* brief supporting Plaintiffs-Appellants. The proposed brief of *amici curiae* is attached to this motion.

2. *Amici curiae* file this brief in support of Plaintiffs-Appellants' appeal of the district court's decision dismissing their claims challenging the constitutionality of the policy and practice of the Mayor and City

Council of the City of Baltimore (the “City”) of imposing a mandatory “non-disparagement” clause on all individuals who settle police misconduct claims. The “non-disparagement” clause precludes such settling claimants—but not the City or its police force—from discussing their allegations of police misconduct with the public, including members of the press.

3. As representatives and members of the news media, *amici* have a strong interest in safeguarding the public’s access to information about settlement agreements made between the public and the government and in preserving the press’s ability to report accurately and fairly on allegations of police misconduct.

4. *Amici* submit this brief to emphasize the First Amendment interests at stake in this case and the impact that gag orders like those entered by the City have on all members of the media.

5. Counsel for Plaintiffs-Appellants have consented to the filing of this brief.

6. Counsel for Defendants-Appellees have neither consented to nor opposed filing of this brief.

7. Pursuant to Federal Rule of Appellate Procedure 26.1, Local Rule 26.1, and Local Rule 27(c), Movants are a variety of non-profit entities, privately held companies, and public companies. There are no publicly held corporations that have a direct financial interest in the outcome of the litigation by reason of a franchise, lease, profit-sharing agreement, insurance, or indemnity agreement with any Movant.

RESPECTFULLY SUBMITTED this 29th day of May, 2018.

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## CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies under Fed. R. App. P. 32(g) that the foregoing motion meets the formatting and type-volume requirements set by Fed. R. App. P. 27(d) and Fed. R. App. P. 32(a). This motion is printed in 14 point, proportionately-spaced typeface utilizing Microsoft Word 2016 and contains 299 words, including headings, footnotes, and quotations, and excluding all items identified under Fed. R. App. P. 32(f).

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on May 29, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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

*Defendants-Appellees.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND, No. 1:17-CV-01793-MJG,  
THE HONORABLE MARVIN J. GARBIS, PRESIDING

---

**BRIEF OF *AMICI CURIAE* REPORTERS COMMITTEE FOR FREEDOM  
OF THE PRESS AND 19 MEDIA ORGANIZATIONS  
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

---

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that no party to this brief is a publicly-held corporation, issues stock, or has a parent corporation, except that (1) The Baltimore Sun is a subsidiary of Tronc, Inc., which is publicly held; (2) ten percent or more of BuzzFeed's stock is owned by NBCUniversal Media LLC, a wholly-owned direct subsidiary of Comcast Corporation, which is publicly traded; (3) ten percent or more of Gannett Co., Inc.'s stock is held by BlackRock, Inc., a publicly held corporation; and (4) The Washington Post (WP Company LLC) is a wholly-owned subsidiary of Nash Holdings LLC, a holding company owned by Jeffrey P. Bezos, and WP Company LLC and Nash Holdings LLC are both privately held companies with no securities in the hands of the public.

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### **INTEREST OF AMICI CURIAE**

*Amici curiae* file this brief in support of Plaintiffs-Appellants’ appeal of the district court’s decision dismissing their claims challenging the constitutionality of the policy and practice of the Mayor and City Council of the City of Baltimore (the “City”) of imposing a mandatory “non-disparagement” clause on all individuals who settle police misconduct claims.<sup>1</sup> The “non-disparagement” clause precludes such settling claimants—but not the City or its police force—from discussing their allegations of police misconduct with the public, including members of the press. As representatives and members of the news media, *amici* have a strong interest in safeguarding the public’s access to information about settlement agreements made between the public and the government and in preserving the press’s ability to report accurately and fairly on allegations of police misconduct. *Amici* submit this brief to emphasize the First Amendment interests at stake in this case and the impact that gag orders like those entered by the City have on all members of the media.

This case touches on matters of significant nationwide interest and importance. Police misconduct is a prominent issue of public concern, especially in light of national stories like the 2015 death of Freddie Gray, who fell into a

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<sup>1</sup> A supplemental statement of identity and interest of *amici curiae* is included below as Appendix A.

coma during his post-arrest transport in a Baltimore City Police Department van, and other alleged victims of police brutality. The American public has a powerful interest in the government response to complaints of police misconduct, including the details of agreements to settle such claims with victims of police malfeasance.

The gag order imposed by the City's settlements with victims of police misconduct imposes unconstitutional restrictions on the ability of all reporters and news organizations—both inside and outside of Maryland—to keep the public informed about a jurisdiction that has been at the center of a nationwide story about police misconduct. Moreover, the importance of this Court's resolution of the appeal before it extends beyond this case. It is vital that municipal and state governments be required to maintain open access to their settlements with victims of police misconduct. Limiting the ability of victims to discuss the terms of their settlement and the details of their claims goes against strong public policy that favors public access to settlement agreements.

### **SOURCE OF AUTHORITY TO FILE**

*Amici* have obtained the consent of Appellants, and Appellees have neither consented to nor opposed filing of this brief. *See* Mot. for Leave; Fed. R. App. P. 29(a)(3).

### **FED. R. APP. P. 29(c)(5) STATEMENT**

*Amici* state that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or

submitting the brief; and no person—other than the *amici curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

### **SUMMARY OF ARGUMENT**

The City’s policy of imposing mandatory, so-called “non-disparagement” clauses to all settlements of police misconduct claims places unconstitutional restrictions the media’s ability to engage in vital newsgathering on allegations of police misconduct. These one-sided “gag orders” on settling police misconduct claimants prevent members of the news media from accurately and fairly reporting on an issue of significant public interest and importance. Because of the City’s policy and practice of silencing police misconduct victims, the *Baltimore Brew*, which covers the Baltimore City police force, has been unable to fully and fairly report to the public on the nature and cause of police misconduct settlements.

The district court erred in disregarding First Amendment newsgathering protections that confer standing to the *Baltimore Brew* to challenge the City’s policy. The *Baltimore Brew* has been injured by the policy, which cuts off access entirely to important sources of information about settlement agreements between the City and victims of police brutality: the victims themselves. Under longstanding First Amendment principles, the *Baltimore Brew* has standing to

challenge the City's practice of imposing "gag orders" on settling police misconduct victims who otherwise wish to publicly share their story.

In addition, the imposition of mandatory "non-disparagement" clauses on all settling police misconduct complainants contravenes the clear policy of the Maryland legislature to maintain open access to government settlement agreements. State courts across the country, including Maryland, have consistently held that governments may not use confidentiality provisions in settlement agreements to prevent the disclosure of otherwise public documents. The district court erroneously ignored the Appellants' claim that the "non-disparagement" clause interferes with the Maryland public policy of transparency by preventing full accountability of police misconduct.

For all of these reasons, and particularly given the important First Amendment interests at stake, *amici* join Appellants in urging this Court to vacate the decision of the district court.

## ARGUMENT

### **I. THE BALTIMORE BREW HAS STANDING TO CHALLENGE THE "NON-DISPARAGEMENT" CLAUSE**

#### **A. The news media's access to sources who settle claims of police brutality with the City is critical to their ability to report fairly and accurately on claims and settlements.**

Parties to police misconduct settlement agreements are vital sources of information for journalists who report on such settlements. Generally, when

reporting on settlement agreements, journalists have an ethical obligation to seek out and attempt to speak to both parties to the agreement. The Society of Professional Journalists' Code of Ethics states that reporters should "[d]iligently seek subjects of news coverage to allow them to respond to criticism or allegations of wrongdoing." See also Reuters, *Handbook of Journalism*, available at [http://handbook.reuters.com/index.php?title=Main\\_Page](http://handbook.reuters.com/index.php?title=Main_Page) (in section on Freedom from Bias, stating that news stories "need to reflect all sides, not just one" and that journalists "have a duty of fairness to give the subject of . . . stories the opportunity to put their side."). The City policy of imposing a mandatory "non-disparagement" clause on all settling police misconduct claimants restricts the news media's ability to thoroughly and fairly report on those agreements because it interferes with their ability to get both sides of the story.

Across the country, reporters routinely rely on individuals who are injured or arrested by police officers as sources of information for reporting on encounters between the public and law enforcement. See, e.g., Nina Golgowski, *Young Man Beaten by Cops on Video Speaks Out After Officers' Firing*, HUFFPOST (Apr. 16, 2017) (available at [https://www.huffingtonpost.com/entry/georgia-man-beaten-by-police\\_us\\_58f3b727e4b0b9e9848cb041](https://www.huffingtonpost.com/entry/georgia-man-beaten-by-police_us_58f3b727e4b0b9e9848cb041)); Rob Hayes, *Man whose leg was broken in videotaped Pasadena arrest speaks out: 'I can't sleep'*, ABC7 (Dec. 20, 2017) (available at [5](http://abc7.com/man-in-videotaped-pasadena-arrest-speaks-</a></p></div><div data-bbox=)

out/2804279/); Dylan Stableford, *Bikini-clad girl thrown to ground by McKinney officer speaks out*, Yahoo News (June 8, 2015) (available at <https://www.yahoo.com/news/mckinney-police-pool-party-girl-speaks-121117251.html>); *Black women speak out on experiencing police violence*, Fusion (July 1, 2015) (available at <https://www.youtube.com/watch?v=JWK9m2Tfr8w>). More specifically, reporters speak to individuals who settle claims arising out of their encounters with police officers in order to inform the public about these settlements and the impact on victims, law enforcement, and the public. *See, e.g.*, Kevin Dietz, *Floyd Dent settles suit with city of Inkster for \$1.4 million*, WDIV-TV (May 28, 2015) (available at <https://www.clickondetroit.com/news/defenders/floyd-dent-settles-suit-with-city-of-inkster-for-1-4-million>); Pamela Manson, *Utah nurse reaches \$500,000 settlement in dispute over her arrest for blocking cop from drawing blood from patient*, SALT LAKE TRIB. (Oct. 31, 2017) (available at <https://www.sltrib.com/news/2017/10/31/utah-nurse-arrested-for-blocking-cop-from-drawing-blood-from-patient-receives-500000-settlement/>). The City's policy and practice of imposing a de facto "gag order" on police misconduct claimants prevents the news media from engaging in necessary newsgathering by prohibiting police misconduct victims who settle with the City from speaking to reporters—or

to anyone else—about their settlement agreements or the events that underlie the agreements.

When the news media is prevented from speaking to police misconduct settlement claimants, it is the public that loses. News reporting on police misconduct allegations is more accurate and complete when reporters can speak to police misconduct complainants and learn the details of their settlement agreements. Contrary to the district court's assumption, it is not enough for news organizations to simply rely on civil complaints filed by victims in order to report these stories. As veteran reporter Toni Locy has explained, "Without human sources to interpret and fill the gaps often left in documents, reporters cannot provide the public with the information it needs to decide how it wants its government to act." Toni Locy, *COVERING AMERICA'S COURTS* 84 (2013). Rather, a reporter's success often depends on his or her "ability to develop human sources willing to provide information." *Id.* Reporters must be able to speak to police misconduct complainants directly in order to fill in the gaps that may be left from simply reading their pre-settlement court papers. In addition, only by interviewing complainants can reporters ask questions necessary to probe their sincerity and veracity.

In addition, and contrary to the district court's conclusion, the ability of news organizations to speak to police misconduct complainants before they enter

into settlement agreements is meaningless to news outlets who seek to report on settlements. Journalists simply cannot know in advance which plaintiffs will settle, and therefore which plaintiffs they should be sure to interview, until after a settlement agreement has been reached. For example, the *Baltimore Brew* is not aware of which police misconduct claims have settled until after the approval of the settlement sought before the Board of Estimates or announced by the City.

The “non-disparagement” clause also impedes accuracy in news reporting because it permits the City to discuss the events leading to a settlement and the settlement terms itself, while silencing victims of police misconduct from doing the same. This restriction is at odds with the tenets of ethical journalism, which demands both accuracy and fairness. *See supra* Society of Professional Journalists’ Code of Ethics. In accordance with these tenants, news organizations reporting on settlements often present statements of both parties to a settlement agreement to give the public both sides of the story. *See, e.g.*, Carolyn Blackburne, *Teen who alleges police brutality speaks out, tells her version of the story*, WDMV (Sept. 22, 2016) (available at <http://www.localdvm.com/news/maryland/teen-who-alleges-police-brutality-speaks-out-tells-her-version-of-the-story/558771690>) (reporting on press conference held by alleged victim and her family to tell “their version of the story” and linking to report of second press conference in which law enforcement provided their “point of view”). The City’s mandatory “gag order,”

however, creates an ethical dilemma for reporters, who may be unable to report the victim's perspective. Most importantly, it renders news reporting less accurate and complete, to the detriment of the public.

**B. The *Baltimore Brew* has standing to challenge the City's routine practice of requiring "non-disparagement" clauses in police misconduct settlement agreements, which directly inhibit the news media from gathering the news.**

The Supreme Court has repeatedly affirmed the principle that "[a] broadly defined freedom of the press assures the maintenance of our political system and an open society." *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967); *see also Minneapolis Star & Trib. Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983) ("An untrammelled press is a vital source of public information, and an informed public is the essence of working democracy.") (internal alterations and citation omitted). In furtherance of these values, the Court has underscored "the significance of ... [the] press ... to the country's welfare," and that the First Amendment provides protection for newsgathering because "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). The Fourth Circuit has embraced and affirmed First Amendment newsgathering protections. *See Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 520 (4th Cir. 1999) (stating that there are "First Amendment interests in newsgathering") (quoting *In re Shain*, 978 F.2d 850, 855 (4th Cir.1992) (Wilkinson J., concurring)).

The City's policy of imposing a "gag order" on police misconduct complainants who settle with the City, such as the mandatory "non-disparagement" clause included in Overbey's settlement agreement (and in over 95% of settlement agreements that the City enters into with victims of police brutality), infringes on the *Baltimore Brew's* constitutionally protected interest in newsgathering. The *Baltimore Brew* has suffered an injury in fact because the "non-disparagement" clause effectively cuts it off from any access to important sources of information about claims of police brutality and settlement agreements by forbidding claimants from speaking with the *Baltimore Brew*.

*CBS Inc. v. Young*, 522 F.2d 234, 237 (6th Cir. 1975) (per curiam), is relevant to the claims here. In that case, a district court order forbade all parties in numerous civil actions arising from the Kent State shooting from discussing the case with members of the news media. The U.S. Court of Appeals for the Sixth Circuit held that CBS had standing to challenge the gag order because the order "in denying [CBS] access to potential sources of information, at least arguably impairs rights guaranteed to the petitioner by the First Amendment." *Id.* at 237. There is nothing in *CBS Inc.* to suggest that CBS lacked access to the complaints in the numerous civil actions arising out of the Kent State shootings that were at issue, and CBS could have presumably interviewed the trial participants before the gag order was entered. Yet the Court still found that CBS had standing to challenge

the gag order because it was “effectively cut off from any access whatever to important sources of information about the trial.” *Id.* Accordingly, the Sixth Circuit found, although CBS was not named in the gag order, “as applied to CBS, this order affected its constitutionally guaranteed right as a member of the press to gather news.” *Id.* at 238.

The Sixth Circuit’s holding has been followed by several sister circuits, all concluding that news organizations have standing to challenge gag orders in an effort to obtain information or access to judicial proceedings, although they are neither parties to the litigation nor restrained directly by the orders. *See, e.g., Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 777 (3d Cir. 1994); *In re Application of Dow Jones & Co.*, 842 F.2d 603, 608 (2d Cir.), *cert. denied*, 488 U.S. 946 (1988); *Journal Publ’g Co. v. Mechem*, 801 F.2d 1233, 1235 (10th Cir. 1986); *Radio & Television News Ass’n v. United States Dist. Court*, 781 F.2d 1443, 1445 (9th Cir. 1986); *United States v. Gurney*, 558 F.2d 1202, 1206-7 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978). Here too, the *Baltimore Brew* has sufficient standing to challenge the City’s policy and practice of imposing a “gag order” on settling police misconduct claimants, like Overbey, even though the *Baltimore Brew* is not a party to the settlement agreements, because the policy “affected its constitutionally guaranteed right as a member of the press to gather news.” *CBS Inc.*, 522 F.2d at 238.

In addition, the *Baltimore Brew* has standing to bring its action because the First Amendment protects news organizations' right to receive protected speech. This Court has recognized a standing doctrine "unique to the First Amendment, which provides standing to persons who are 'willing listeners' to a willing speaker who, but for the restriction, would convey information." *ACLU v. Holder*, 673 F.3d 245, 255 (4th Cir. 2011). "It is now well established that the Constitution protects the right to receive information and ideas" from a willing speaker. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *see also Virginia State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 756 (1976) (explaining that, where a willing speaker exists, "the protection afforded [by the First Amendment] is to the communication, to its source and to its recipients both"). The "willing speakers" here are individuals who want to share details of their police misconduct claims but for the City's policy of imposing a gag order on any police misconduct complainant who settles their legal claims with the City. The "non-disparagement" clause prevents the *Baltimore Brew* from gathering the news by speaking to sources that are otherwise willing to speak to them. Indeed, the Amended Complaint alleges that the *Baltimore Brew* has been prevented from speaking to sources that refuse to speak to them based on their "non-disparagement" clauses. *See* ECF No. 5, Am. Compl. ¶¶ 24, 75. Other news organizations have been similarly prevented from speaking to otherwise willing sources as a result of the

“non-disparagement” clause in the source’s settlement agreement. *See* Mark Puente, *Undue Force*, BALTIMORE SUN (Sept. 28, 2014) (available at <http://data.baltimoresun.com/news/police-settlements/>) (reporting on settlements of claims of police brutality with the City of Baltimore and describing at least one victim who wished to speak to the newspaper but was prevented from doing so by the “non-disparagement” clause in her settlement agreement). Here, Overbey and the *Baltimore Brew* have pleaded the necessary “direct connection between an identifiable willing speaker and ... a willing listener,” including allegations and testimony that some claimants would have spoken with [the media, including the *Baltimore Brew*] in the past but for the speech restriction or would have spoken to [the media, including the *Baltimore Brew*] in the future but for the speech restriction.” *Am. Civil Liberties Union v. Holder*, 673 F.3d 245, 255 (4th Cir. 2011) (discussing *Stephens v. County of Albermarle*, 524 F.3d 485, 492-93 (4th Cir. 2008)).

Moreover, even absent a willing speaker, news organizations like the *Baltimore Brew* have standing to challenge gag orders like the City’s policy here by virtue of their independent First Amendment right to gather the news. Indeed, many circuits have found media standing to challenge confidentiality orders without expressly finding the existence of a willing speaker. As the Second Circuit observed, in such circumstances, “[i]t is hard, in fact, to imagine that there are no

willing speakers. Without them there would be no need for a restraining order; it would be superfluous.” *Dow Jones & Co.*, 842 F.2d at 607; *see also CBS Inc.*, 522 F.2d at 238 (finding media standing without discussing a willing speaker requirement). Of course, in the present case, the Court need not decide whether, in every case, the media must demonstrate the existence of a willing speaker to establish standing to challenge a court’s confidentiality order, because, in the present case, the *Baltimore Brew* has sufficiently alleged that a willing speaker does exist.

Thus, the *Baltimore Brew* has alleged an injury in fact that is fairly traceable to the City’s enforcement of the “non-disparagement” clause in claimants’ settlement agreements and likely to be redressed by the relief requested. The City’s policy of imposing a “gag order” on all police misconduct claimants who settle their claims with the City impedes news organizations’ abilities to gather the news and to receive protected speech, abilities which are arguably protected by the First Amendment. The relief requested—that the Court declare that the City’s gag order is illegal, unenforceable, and unconstitutional under the First Amendment and void as against public policy—would redress this injury by allowing news organizations like the *Baltimore Brew* to discover information about the City’s widespread police misconduct problem and the public funds allocated to settle claims. Because the *Baltimore Brew*’s injury in fact is directly caused by the “non-

disparagement” clause, and such injury will be redressed by a decision striking down its mandatory use in police misconduct settlements, the *Baltimore Brew* has established its standing to bring the instant action.

## **II. THE CITY’S POLICY OF IMPOSING GAG ORDERS ON PARTIES SETTling POLICE MISCONDUCT CLAIMS IS CONTRARY TO MARYLAND PUBLIC POLICY IN FAVOR OF TRANSPARENCY IN GOVERNMENT**

It is beyond question that the Overbey settlement, as is the case with all police misconduct settlements with the City, is a public record for purposes of the Maryland Public Information Act, regardless of its “non-disparagement” provision. *Baltimore Sun Co. v. Mayor & City Council of Baltimore*, 359 Md. 653, 666 n.1, 755 A.2d 1130, 1137 n.1 (2000) (citing cases from around the country). The settlement proceeds were paid out of City funds comprised of public tax money, and the agreement resolves a claim between Overbey and the Baltimore City Police Department, thus negating any notion that the agreement concerned purely personal or non-governmental matters.

Although the “non-disparagement” clause at issue in this case does not purport to make the settlement agreement confidential, it does restrict one of the parties from providing the public with information about the events leading to the settlement agreement and the content of the agreement itself. Such restrictions are contrary to public policy in Maryland (and states around the country), which favor transparency in settlement agreements entered into by government entities. The

“non-disparagement” clause thus inhibits public knowledge about the activities of law enforcement and City government, interfering with Maryland public policy in favor of transparency.

The Maryland Public Information Act provides, “All persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees.” MD Code, General Provisions, § 4-103. Although the Maryland Public Information Act carries out this purpose specifically by providing for inspection of public records, the Act itself evinces a public policy in favor of transparency in government, generally. Indeed, Maryland’s highest court has repeatedly affirmed that “[t]he Public Information Act provides that the public is entitled to information regarding the affairs of government” and that “the provisions of the Public Information Act reflect the legislative intent that citizens of the State of Maryland be accorded wide-ranging access to public information concerning the operation of their government.” *A.S. Abell Publ’g Co. v. Mezzanote*, 297 Md. 26, 32, 464 A.2d 1068, 1071 (1983); *see also Maryland Dep’t of State Police v. Maryland State Conf. of NAACP Branches*, 190 Md. App. 359, 367, 988 A.2d 1075, 1079 (Md. Ct. Spec. App. 2010) (stating that the Maryland Public Information Act makes clear that it is the public policy of the State to provide access to the “operation of [the peoples’] government”), *aff’d*, 430 Md. 179, 59 A.3d 1037 (2013).

With respect to settlements, the Maryland Court of Appeals has recognized that “[c]ourts generally take the position that the requirements of a public information statute cannot ordinarily be circumvented by agreements between the government officials and others.” *Baltimore Sun Co.*, 359 Md. at 666 n.1, 755 A.2d at 1137 n.1 (citing cases from around the country). Thus, the people of Maryland, through their elected representatives, have stated in the clearest of terms that it is more important that they have full access to settlement agreements and information relevant to the formation of such agreements, than that they remain confidential. Under Maryland law, a “gag order” such as the one imposed by the City on settling police misconduct complainants violates the public policy of transparency embodied in Maryland’s public records disclosure statute. *See, e.g., Lexington Fayette-Urban Cty. Gov’t v. Lexington Herald-Leader Co.*, 941 S.W.2d 469 (Ky. 1997) (settlement agreement between individual and police department, whereby police department agreed to pay compensation for injury, was a public record and not exempted from Open Records Act). Accordingly, this Court should hold that the City, an arm of state government, may not circumvent the preference for openness and transparency established by the Maryland’s public records statute by forcing police misconduct complainants to keep their reasons for reaching a settlement with the City confidential.

Indeed, courts around the country have recognized the settlement agreements entered into by public entities are public records that must be disclosed under public records laws, even if the agreements contain confidentiality provisions. *See, e.g., Champa v. Weston Pub. Schs.*, 473 Mass. 86, 98, 39 N.E.3d 435, 445 (2015) (“[T]he fact that [a] school district and [a] family contractually agreed to keep [a] settlement private cannot, by itself, trump the public records law and the school district’s obligation to comply with the law’s requirements.”); *Tribune-Review Publ’g Co. v. Westmoreland Cty. Hous. Auth.*, 574 Pa. 661, 666-67, 833 A.2d 112, 115 (2003) (settlement agreement between Housing Authority’s insurer and complainant ending federal civil rights lawsuit a public record subject to disclosure and confidentiality provision in the agreement void as against public policy); *Cent. Ky. News-Journal v. George*, 306 S.W.3d 41, 46, 48 (Ky. 2010) (settlement agreement between public school board and former employee must be disclosed despite confidentiality provision); *State ex rel. Findlay Publ’g Co. v. Hancock Cty. Bd. of Comm’rs*, 80 Ohio St. 3d 134, 684 N.E.2d 1222 (1997) (confidentiality provision of settlement agreement entered into by county in civil rights lawsuit does not preclude disclosure under Ohio Public Records Act because “[a] public entity cannot enter into enforceable promises of confidentiality regarding public records”); *Des Moines Indep. Sch. Dist. v. Des Moines Register*, 487 N.W.2d 666 (Iowa 1992) (settlement agreement between public school and

former principal must be disclosed under Iowa Open Records Law); *Anchorage Sch. Dist. v. Anchorage Daily News*, 779 P.2d 1191, 1193 (Alaska 1989) (confidentiality provision in settlement agreement between public school district and company unenforceable); *Guy Gannett Publ'g Co. v. Univ. of Maine*, 555 A.2d 470 (Me. 1989) (settlement agreement between public university and former basketball coach containing confidentiality provision must be disclosed); *Librach v. Cooper*, 778 S.W.2d 351, 356, 353 n.2 (Mo. Ct. App. 1989) (settlement agreement between public school district and former superintendent must be disclosed, despite confidentiality provision; “The Agreement does contain mutual promises not to disclose the terms of the Agreement. Private promises, however, cannot change statutory dictates.”); *Daily Gazette Co. v. Withrow*, 177 W. Va. 110, 118-19, 350 S.E.2d 738, 746 (1986) (settlement agreement between sheriff and former deputy sheriff must be disclosed, despite confidentiality provision; “Assurances of confidentiality do not justify withholding public information from the public; such assurances by their own force do not transform a public record into a private record for the purpose of the State’s Freedom of Information Act.”), *superseded by statute on other grounds*, 206 W. Va. 51, 521 S.E.2d 543 (1999); *Register Div. of Freedom Newspapers, Inc. v. Cty. of Orange*, 158 Cal. App. 3d 893, 909-10, 205 Cal. Rptr. 92, 102 (1984) (settlement agreement between county jail and inmate must be released despite “expectation” that the settlement

agreement would remain confidential at the time it was entered into); *Dutton v. Guste*, 395 So. 2d 683, 686 (La. 1981) (settlement agreement between state and architecture/engineering firm to settle claims over building of Louisiana Superdome must be disclosed).

Transparency is necessary to hold government officials, like the Baltimore City Police Department, accountable. The public interest in obtaining details of police misconduct complaints and the City's agreements to settle such complaints from the victims themselves is especially strong, given the prominent and public role of law enforcement. Freedom to speak about police misconduct allows settling complainants to say they have identified occurrences of police misconduct that the City was willing to settle. Maryland's clear public policy in favor of government transparency must be enforced to allow the public to monitor the City's police force, evaluate settled police misconduct claims and the terms of such settlements, and hear from both sides to an agreement.

### **CONCLUSION**

For the foregoing reasons, this Court should vacate the district court's order and remand.

RESPECTFULLY SUBMITTED this 29th day of May, 2018.

By           /s/ Lisa Zycherman          

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**CERTIFICATE OF COMPLIANCE**

The foregoing brief complies with the requirements of Federal Rules of Civil Procedure 32(a)(7)(B) and Circuit Rule 32(b). The brief is proportionately spaced in Times New Roman 14-point type. According to the word processing system used to prepare the brief, Microsoft Word, the word count of the brief is 4,461, not including the table of contents, table of authorities, certificate of service, and certificate of compliance.

DATED this 29th day of May, 2018.

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**APPENDIX A**  
**STATEMENTS OF INTEREST**

With some 500 members, **American Society of News Editors** (“ASNE”) is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

The **Associated Press Media Editors** is a nonprofit, tax-exempt organization of newsroom leaders and journalism educators that works closely with The Associated Press to promote journalism excellence. APME advances the principles and practices of responsible journalism; supports and mentors a diverse network of current and emerging newsroom leaders; and champions the First Amendment and promotes freedom of information.

**Association of Alternative Newsmedia** (“AAN”) is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN

members have a total weekly circulation of seven million and a reach of over 25 million readers.

**The Baltimore Sun** is a subsidiary of tronc, Inc., which is one of the country's leading media companies. The company's leading daily newspapers include the Los Angeles Times, Chicago Tribune, New York Daily News, San Diego Union-Tribune, The Baltimore Sun, Sun Sentinel (South Florida), Orlando Sentinel, Hartford Courant, The Morning Call and Daily Press. Popular news and information websites, including [www.chicagotribune.com](http://www.chicagotribune.com) and [www.latimes.com](http://www.latimes.com), complement tronc's publishing properties and extend the company's nationwide audience.

**BuzzFeed** is a social news and entertainment company that provides shareable breaking news, original reporting, entertainment, and video across the social web to its global audience of more than 200 million.

The **Center for Investigative Reporting (CIR)**, founded in 1977, is the nation's first nonprofit investigative journalism organization. CIR produces investigative journalism for its <https://www.revealnews.org> website, the Reveal national public radio show and podcast, and various documentary projects—often in collaboration with other newsrooms across the country.

**The E.W. Scripps Company** serves audiences and businesses through television, radio and digital media brands, with 33 television stations in 24

markets. Scripps also owns 33 radio stations in eight markets, as well as local and national digital journalism and information businesses, including mobile video news service Newsy and weather app developer WeatherSphere. Scripps owns and operates an award-winning investigative reporting newsroom in Washington, D.C., and serves as the long-time steward of the nation's largest, most successful and longest-running educational program, the Scripps National Spelling Bee.

**Gannett Co., Inc.** is a leading news and information company which publishes USA TODAY and more than 100 local media properties. Each month more than 110 unique visitors access content from USA TODAY and Gannett's local media organizations, putting the company squarely in the Top 10 U.S. news and information category.

The **International Documentary Association (IDA)** is dedicated to building and serving the needs of a thriving documentary culture. Through its programs, the IDA provides resources, creates community, and defends rights and freedoms for documentary artists, activists, and journalists.

The **Investigative Reporting Program (IRP)** at UC Berkeley's Graduate School of Journalism is dedicated to promoting and protecting the practice of investigative reporting. Evolving from a single seminar, the IRP now encompasses a nonprofit newsroom, a seminar for undergraduate reporters and a post-graduate fellowship program, among other initiatives. Through its various projects, students

have opportunities to gain mentorship and practical experience in breaking major stories for some of the nation's foremost print and broadcast outlets. The IRP also works closely with students to develop and publish their own investigative pieces. The IRP's work has appeared on PBS Frontline, Univision, Frontline/WORLD, NPR and PBS NewsHour and in publications such as Mother Jones, The New York Times, Los Angeles Times, Time magazine and the San Francisco Chronicle, among others.

The **Investigative Reporting Workshop**, a project of the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at [investigativereportingworkshop.org](http://investigativereportingworkshop.org) about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

The **Maryland D.C. Delaware Broadcasters Association** unites public and commercial radio and television across Maryland, D.C. and Delaware. The main purpose of the association is to represent and further the interests of broadcasters, communicate relevant information to broadcasters through meetings and publications and provide educational services through webinars, workshops or other appropriate means in order to better serve the public.

The **Maryland-Delaware-District of Columbia Press Association**, founded in 1908, is a nonprofit organization devoted to advocating for the interests of news media organizations in the region. The Association's members include nearly all of the newspapers in Maryland, Delaware and the District of Columbia as well as online-only publications and TV stations. The Association serves to bring together news media organizations for the preservation and defense of the principles of the First Amendment and to promote the growth and development of the industry.

**MPA – The Association of Magazine Media (“MPA”)** is the largest industry association for magazine publishers. The MPA, established in 1919, represents over 175 domestic magazine media companies with more than 900 magazine titles. The MPA represents the interests of weekly, monthly, and quarterly publications that produce titles on topics that cover politics, religion, sports, industry, and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

The **National Press Photographers Association (“NPPA”)** is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's approximately 7,000 members include television and still photographers, editors, students, and representatives of

businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

**Online News Association** (“ONA”) is the world’s largest association of online journalists. ONA’s mission is to inspire innovation and excellence among journalists to better serve the public. ONA’s more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence and freedom of expression and access.

The **Reporters Committee for Freedom of the Press** is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation’s news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation,

amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

**Society of Professional Journalists (“SPJ”)** is dedicated to improving and protecting journalism. It is the nation’s largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

The **Tully Center for Free Speech** began in Fall 2006 at Syracuse University’s S.I. Newhouse School of Public Communications, one of the nation’s premier schools of mass communications.

**The Washington Post** (formally, WP Company LLC d/b/a The Washington Post) is a news organization based in Washington, D.C. It publishes a daily print newspaper, a variety of digital and mobile products, and a website, washingtonpost.com, that reached an audience of more than 75 million unique visitors per month in 2017.

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/s/ Lisa B. Zycherman (signature)

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I certify that on 05/29/2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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