Case No. 17-2444

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ASHLEY AMARIS OVERBEY,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

Appeal from an Order of the United States District Court for the District of Maryland at Baltimore, Case No. 1:17-cv-01793-MJG

BRIEF OF HOWARD UNIVERSITY SCHOOL OF LAW CIVIL RIGHTS CLINIC AND PUBLIC JUSTICE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

Jennifer D. Bennett
Counsel of Record
PUBLIC JUSTICE, P.C.
475 14th Street, Suite 610
Oakland, CA 94612
Phone: (510) 622-8150
jbennett@publicjustice.net

Ajmel Quereshi
CIVIL RIGHTS CLINIC
HOWARD UNIV. SCHOOL OF LAW
2900 Van Ness Street, NW
Washington, DC 20008
Phone: (202) 216-5574
Ajmel.quereshi@law.howard.edu

Counsel for Amici

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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Howard University School of Law Civil Rights Clinic and Public Justice
(name of party/amicus)

who is amicus, makes the following disclosure:
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1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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

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If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
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6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Jennifer D. Bennett Date: May 29, 2018

Counsel for: Amici

CERTIFICATE OF SERVICE

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I certify that on May 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:

Jennifer D. Bennett (signature) May 29, 2018 (date)

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The Howard University School of Law Civil Rights Clinic and Public Justice respectfully submit this brief, as *amici curiae*, to address the validity of mandatory confidentiality clauses in the settlement agreements employed by the Baltimore Police Department (BPD). These clauses are void as a matter of public policy because they conflict with the Maryland Attorneys' Rules of Professional Conduct and the American Bar Association's Model Rules of Professional Conduct.[1]

INTEREST OF *AMICI*

The Civil Rights Clinic at Howard University School of Law engages in trial and appellate litigation in the service of human rights, social justice and economic fairness. The Clinic provides pro bono services to indigent, prisoner and pro se clients in federal and state courts on a range of civil rights matters, including but not limited to, government transparency, racial discrimination, and police brutality. Central to the Clinic's work has been its involvement in cases which concern police officials' excessive use of force and transparency regarding government misconduct. Among other things, the Clinic regularly submits public information requests to police agencies in Maryland, Virginia and the District of Columbia regarding allegations of police misconduct. Because of the important

[1] Counsel for *amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

issues in this case regarding governmental accountability and police misconduct, the matters raised therein are of substantial concern to the Clinic.

Public Justice is a national public interest legal organization that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting corporate and governmental misconduct. As part of this work, Public Justice has long represented those whose rights have been violated by law enforcement officers. Public Justice also has a longstanding project devoted to fighting court secrecy. It has been involved in several cases challenging unlawful sealing orders, overbroad protective orders, or confidentiality provisions in settlement agreements that were used to hide corporate or governmental misconduct—often misconduct that was continuing to cause harm precisely because the evidence was hidden by the unlawful use of secrecy provisions.

This case sits at the intersection of these two bodies of work. The City of Baltimore's one-sided confidentiality provisions unlawfully silence those whose rights have been violated by law enforcement, impeding the accountability and transparency necessary to prevent these kinds of violations in the future.

SUMMARY OF ARGUMENT

Over the last three years, the American public has become painfully aware of what African-Americans in Baltimore have long known: the Baltimore Police Department regularly engages in unconstitutional conduct, frequently directed at

African-Americans. According to the U.S. Department of Justice, disparities between the treatment of African Americans and non-African Americans exist at every stage of the criminal process in Baltimore. Furthermore, officers frequently use excessive force when interacting with African Americans. Despite the widespread nature of police misconduct in the City, Baltimore has attempted to squelch public discussion of the matter through unilateral non-disparagement and nondisclosure clauses. These clauses require that before any victim of police misconduct may settle a claim against the City, the victim, as well as her attorney, agree to never "discuss any facts or allegations in any way connected to the litigation" against the City.

Not only do these provisions inhibit public discussion regarding an important topic, they violate the Maryland Attorneys' Rules of Professional Conduct and the Model Rules of Professional Responsibility for Attorneys, and thus, are void as a matter of public policy. The Maryland Rules, which mirror the Model Rules, provide that an attorney may not offer or agree to a contractual limitation which inhibits their future practice as a lawyer. As the Maryland State Bar Association, the American Bar Association, and ethics committees from several states have explained, broadly termed agreements which prohibit an attorney from discussing any information related to his or her client's complaint, including their allegations against the Defendant, violate this provision. By prohibiting an attorney from

disclosing any information regarding his previous client's claims against the Defendant, the attorney is effectively prohibited from using the information acquired during a future representation; thus, adversely affecting the quality of representation the attorney can provide the future client and the number of attorneys available to competently represent victims of police misconduct.

These concerns are particularly serious in Baltimore where police misconduct is frequent and officers regularly retaliate against individuals who attempt to lodge complaints with the Department. Accordingly, there is a significant demand for attorneys to undertake multiple representations against the Department involving allegations of misconduct.

ARGUMENT

As a condition of settling a claim against it, the City of Baltimore requires victims of police brutality, as well as their attorneys, to agree not to "discuss[] any opinions, facts or allegations in any way connected to the Litigation or the Occurrence[.]" Agreement § 9, ECF No. 11-4. The provision is void as a matter of public policy. As the Maryland Bar Association and the American Bar Association have held, broadly-termed confidentiality clauses which prohibit an attorney from discussing a plaintiff's allegations, including publicly available facts, constitute an unlawful prohibition on an attorney's right to practice. These clauses are of serious

concern because, by limiting what information an attorney may disclose in the future, they adversely affect the quality of representation subsequent victims receive.

I. CONTRACTUAL PROVISIONS WHICH VIOLATE PUBLIC POLICY, INCLUDING THE RULES OF PROFESSIONAL RESPONSIBILITY, ARE VOID.

A contract is void or unenforceable if it is repugnant to the public policy of a jurisdiction. *See e.g. Shrimp v. Huff*, 556 A.2d 252, 263 (Md. 1989) ("[W]e have recognized the well settled principle that contracts which discourage or restrain the right to marry are void as against public policy."); *Cerniglia v. C & D Farms, Inc.*, 203 So.2d 1, 2 (Fla. 1967) ("If performance, in Florida, of a foreign made contract is repugnant to our public policy it is unenforceable here[.]"). For example, a contract which violates a provision of the constitution or a statute is void and illegal, and, will not be enforced. *Queen v. Agger*, 412 A.2d 733, 735 (Md. 1980).

However, public policy is not limited to these contexts. "The term "public policy" is not easily defined." *Harris v. Gonzalez*, 789 So.2d 405, 409 (Fla. Dist. Ct. App. 2001). "In substance, it may be said to be the community common sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like." *City of Leesburg v. Ware*, 153 So. 87, 89 (Fla. 1934). Contracts that include "agreements having a tendency to obstruct or interfere with the administration of justice, or to

injure public service" have been held to be void as against public policy. *First Nat. Bank of St. Mary's v. Fidelity & Deposit Co.*, 389 A.2d 359, 365 (Md. 1978).

This includes contracts that violate the Rules of Professional Responsibility for Attorneys. "The Rules of Professional Conduct are not only ethical standards to guide the conduct of members of the bar; but they also serve as an expression of public policy to protect the public." *Fields v. Ratfield*, No. A132766, 2012 WL 5359775 at *9 (Cal. App. 2012)) (internal quotation marks omitted); *Rich v. Simoni*, 772 S.E.2d 327, 334 (W.Va. 2015) ("[W]e have no difficulty recognizing that the Rules of Professional Conduct may constitute statements of public policy which in turn may carry the equivalent force and effect as statutes enacted by this state's legislature."); *Trotter v. Nelson*, 684 N.E.2d 1150, 1153 (Ind. 1997) ("The Rules of Professional Conduct, as enacted by this Court, contain both implicit and explicit declarations of public policy."); *Cruse v. O'Quinn*, 273 S.W.3d 766, 776 (Tex. App. 2008) (finding that disciplinary rules constitute an expression of Texas public policy regarding fee-sharing agreements); *Brandon v. Newman*, 532 S.E.2d 743, 747 (Ct. App. Ga. 2007) ("[T]he trial court correctly concluded that the State Bar disciplinary provisions establish the public policy disapproving rewards for referrals through fee-sharing agreements with non[-]lawyers. That public policy voids Beazley's unethical fee-splitting contract with Brandon."); *Evans & Luptak, PLC v. Lizza*, 650 N.W.2d 364, 370 (Mich. Ct. App. 2002) (recognizing "fundamental principle that

contracts that violate our ethical rules violate our public policy and therefore are unenforceable"); *Albert Cohen v. Radio-Electronics Officers Union, Dist. 3, NMEBA, AFL-CIO*, 645 A.2d 1248 (N.J. App. 1994) (holding that a non-refundable retainer agreement between an attorney and a client violated the state rules of professional conduct for attorneys and was therefore void).

II. THE MARYLAND ATTORNEYS' RULES OF PROFESSIONAL CONDUCT PROHIBIT UNILATERAL CONFIDENTIALITY CLAUSES.

A. Rule 19-305.6(b) of the Maryland Attorney's Rules of Professional Conduct.

The City of Baltimore's use of a unilateral confidentiality clause, which prohibits the discussion of any "opinions, facts or allegations in any way connected" to the victim's claim, violates Rule 19-305.6(b) of the Maryland Attorney's Rules of Professional Conduct. The Rule, adopted verbatim from Rule 5.6 of the ABA Model Rules of Professional Conduct, states that "an attorney shall not participate in offering or making an agreement in which a restriction on the attorney's right to practice is part of the settlement of a client controversy." MARYLAND ATTORNEYS' RULES OF PROF'L CONDUCT R. 19-305.6(b); *see* MODEL RULES OF PROF'L CONDUCT R. 5.6.

As the Maryland State Bar Association has explained, the Rule prohibits broadly termed agreements, such as those employed by the City of Baltimore, which prohibit the disclosure of any information regarding a victim's complaint.

"Maryland Rule 5.6 prohibits a lawyer from agreeing (or asking another lawyer to agree) never to use or disclose public information regarding a matter." Maryland State Bar Association, Inc., Committee on Ethics, Ethics Docket No. 2016-07 (2016), https://www.msba.org/ethics-opinions/as-part-of-settling-a-lawsuit-does-it-violate-the-maryland-rules-of-professional-conduct-for-a-defendant-to-propose-to-or-for-a-plaintiffs-attorney-to-agree-to-never-discuss-or-disclose-the/. Although the rule is termed a limitation on an attorney's conduct, the Rule is ultimately concerned with the effect of these clauses on future clients: "[S]uch a provision would necessarily limit an attorney's ability to develop or to discuss legal strategy and prior litigation with future clients, and therefore would require the attorney to either refuse to undertake particular representations, or to undertake such cases with only a limited ability to communicate with the client[.]"[2] *Id*.

The MSBA's decision accords with "the majority of opinions." *Id*. The American Bar Association has stated that a "lawyer may not participate or comply with a settlement agreement that would prevent him from using information gained during the representation in later representations against the opposing party, or a related party, except in limited circumstances." American Bar Association, Standing

[2] By restricting what an attorney would be able to say to their client, the restriction may also potentially violate Model Rule of Professional Conduct 1.4 governing attorney client communications. Maryland State Bar Association, Inc., Committee on Ethics, Ethics Docket No. 2016-07 (2016).

Committee on Ethics and Professional Responsibility, Formal Opinion 00-417 (April 7, 2000), at 1. Such "an agreement not to use information learned during the representation effectively would restrict the lawyer's right to practice and hence would violate Rule 5.6(b)." *Id.* The Rule not only prohibits attorneys from agreeing to such terms, but also bars opposing counsel from proposing them. *Id*. The prohibition applies equally to cases where one of the parties is a governmental entity. *Id*. at 2.

The ABA has made clear that although such clauses are not explicit bars on future representation, they are prohibited because their effect on future clients is the same. "As a practical matter, however, this proposed limitation effectively would bar the lawyer from future representations because the lawyer's inability to use certain information may materially limit his representation of the future client and, further, may adversely affect that representation." *Id*. at 3. The ABA has compared such provisions to a "settlement provision that bars a lawyer in future representations from subpoenaing certain records or fact witnesses, or using certain expert witnesses." *Id*. at 4.

The ABA's concerns are not merely speculative. Clauses, such as those City of Baltimore employs, limit the client's ability to select counsel and continue to hinder the client throughout the course of her case. There is evidence that information regarding an attorney's previous work against a Defendant is

particularly relevant to clients' decisions on selecting counsel. *See, e.g,* Vivien Tseng, *Client Retention from a General Counsel Counsel's Perspective*, 46 BOSTON B.J. 31, 31 (2002) (noting that clients look for "specific, in-depth experience" and that a law firm can differentiate itself from competitors if it has "solved [the same] problem for other clients before."). Likewise, by limiting what their counsel may say regarding other claims against the City, such agreements deprive clients of the ability to present "highly persuasive" evidence that a department or officer's actions are evidence of habit or routine practice. FED. R. EVID. 406 advisory committee's note ("Agreement is general that habit evidence is highly persuasive as proof of conduct on a particular occasion.").

The ABA has distinguished provisions such as those the City of Baltimore employs, which prohibit disclosure of any information and are therefore impermissible under the Rules of Professional Responsibility, from more limited terms which do not always violate these Rules:

> For example, Rule 5.6(b) does not proscribe a lawyer from agreeing not to reveal information about the facts of the particular matter or the terms of its settlement. This information, after all, is information relating to the representation of the attorney's present client . . . . With respect to former clients, a lawyer may reveal information relating to the representation only with client consent or in certain limited circumstances not relevant here. A proposed settlement provision, agreed to by the client, that prohibits the lawyer from disclosing information relating to the representation is no more than what is required by the Model Rules absent client consent, and does not

> necessarily limit the lawyer's future practice in the manner accomplished by a restriction on the use of information relating to the opposing party in the matter.

Id.

Several other states have concurred with the ABA. For example, the District of Columbia Bar Association has stated that a "settlement agreement may not compel counsel to keep confidential and not further disclose in promotional materials or on law firm websites public information about the case, such as the name of the opponent, the allegations set forth in the complaint on file, or the fact that the case has settled." District of Columbia Bar Ass'n, Legal Ethics Comm., Op. 335 (2006), https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion335.cfm. These agreements have the "purpose and effect of preventing counsel from informing potential clients of their experience and expertise, thereby making it difficult for future clients to identify well-qualified counsel and employ them to bring similar cases." *Id*. Simply stated, these agreements conflict with the basic principle underlying Rule 5.6: "that clients should have the opportunity to retain the best lawyers they can employ to represent them. Were clauses such as these to be regularly incorporated in settlement agreements, lawyers would be prevented from disclosing their relevant experience, and clients would be hampered in identifying experienced lawyers." *Id*. Finally, prohibiting these agreements has no demonstrable harm on clients: "If all parties are prohibited

from agreeing to such provisions, they have no value. It seems improbable that if such confidentiality clauses are prohibited to all litigants, there would be any measurable effect on the number of settlements or on the value of those settlements." *Id.*

Ethics committees in other states, including several in the Fourth Circuit, have agreed. South Carolina Bar Ass'n, Ethics Advisory Committee, Ethics Advisory Op. 16-02 (2016), https://www.scbar.org/lawyers/legal-resources-info/ethics-advisory-opinions/eao/ethics-advisory-opinion-16-02/ (holding that a lawyer may not agree to a settlement term restricting use of information gained in the course of representation); South Carolina Bar Ass'n, Ethics Advisory Committee, Ethics Advisory Op. 10-04 (2010), https://www.scbar.org/lawyers/legal-resources-info/ethics-advisory-opinions/eao/ethics-advisory-opinion-10-04/ ("improper for a lawyer to become personally obligated in a client's settlement agreement to refrain from identifying the defendant as a part of the lawyer's business"); North Carolina State Bar Ass'n, RPC 179: Settlement Agreements Restricting A Lawyer's Practice (July 21, 1994), https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-179/ (holding that a lawyer may not offer or enter into a settlement agreement that contains a provision which prevents the settling party from representing other claimants against the opposing party); N.Y. State Bar Ass'n, Comm. on Prof'l Ethics, Formal Op. 730 (2000),

https://www.nysba.org/CustomTemplates/Content.aspx?id=5514 (holding that a "settlement agreement may not impose on a lawyer a higher degree of confidentiality than the lawyer owes his own client"); Tenn. Bd. of Prof'l Resp., Formal Op. 98-F-141: Settlement Clause Restricting Right to Practice (1998), http://www.tbpr.org/ethic_opinions/98-f-141 (holding that clauses restricting plaintiff or plaintiff's counsel from using case information to assist other litigants or claimants are ethically inappropriate); State Bar Ass'n of N.D., Ethics Committee, Ethics Op. No. 1997-05 (June 30, 1997), http://c.ymcdn.com/sites/www.sband.org/resource/resmgr/docs/for_lawyers/97-05.pdf (concluding that lawyers may not agree to keep confidential information that does not constitute confidential client information, including information that is public record); *see also* Ind. State Bar Ass'n, Legal Ethics Comm., Op. 1 (2014), http://c.ymcdn.com/sites/www.inbar.org/resource/resmgr/Ethics_Opinions/Legal-Ethics-Op-1-2014.pdf (stating that broadly framed confidentiality clauses may violate Rule 5.6(b) of Indiana's Rules of Professional Conduct); Bar Ass'n of San Francisco, San Francisco Ethics Op. 2012-1 (2012), https://www.sfbar.org/ethics/opinion_2012-1.aspx (concluding that attorneys, under the California Rules of Professional Conduct for Attorneys, cannot be barred from mentioning in their *curriculum vitae* or other promotional material that they had

worked on an LGBT employment discrimination case against a particular defendant).

Accordingly, confidentiality clauses, such as those employed by the City of Baltimore, which prohibit the discussion of any information related to the victim's claim, violate Rule 19-305.6 of the Maryland Attorney's Rules of Professional Conduct and Rule 5.6 of the Model Rules of Professional Conduct.

B. Rule 19-303.4 of the Maryland Rules of Professional Conduct

Broad confidentiality clauses, such as those employed by the City of Baltimore, also violate Rule 3.4(f) of the Model Rules of Professional Conduct, which Maryland has adopted verbatim as Rule 19-303.4(f): an attorney shall not "request a person other than a client to refrain from voluntarily giving relevant information to another party unless (1) the person is a relative or an employee or other agent of a client; and (2) the attorney reasonably believes that the person's interests will not be adversely affected by refraining from giving such information." MARYLAND ATTORNEYS' RULES OF PROF'L CONDUCT R. 19-303.4(f); *see* MODEL RULES OF PROF'L CONDUCT R. 3.4(f).

The purpose of Rule 3.4 is to protect the integrity of the adversarial system by prohibiting the concealment of evidence. MODEL RULES OF PROF'L CONDUCT 3.4 cmt 1. The Chicago Bar Association Committee on Professional Responsibility has stated that Rule 3.4(f) prohibits a lawyer from proposing or accepting a settlement

that bars an opposing party from disclosing to another party information such as "the existence, substance, and content of the claims." Chicago Bar Ass'n, Professional Responsibility Committee, Ethics. Op. 2012-10 (2012). "[O]ther party" includes "any person or entity with a current or potential claim against one of the parties to the settlement agreement." *Id.* In other words, "other party" would encompass the general public. *Id.* "[A] more narrow interpretation would undermine . . . the proper functioning of the justice system by allowing a party to a settlement agreement to conceal important information and thus obstruct meritorious lawsuits." *Id*. Thus, the settlement provision required by the City of Baltimore, which prohibits the disclosure of any information regarding a previous client's claims against the Defendant, violates Rule 3.4(f).

III. THE CONCERNS UNDERLYING RULE 5.6 AND RULE 3.4 ARE PARTICULARLY RELEVANT IN BALTIMORE.

The concerns underlying Rules 5.6 and 3.4 are directly applicable to the provision the City of Baltimore regularly employs and is at issue in this case. The broad scope of the provision guarantees that once an attorney and his client settle a case involving allegations of police misconduct, the attorney will have difficulty adequately representing another victim of police misconduct as a result of what he may not disclose. The effect on victims of police misconduct in Baltimore is particularly serious given: 1) the frequency of police misconduct; and 2) the frequent need for victims to seek judicial relief given the propensity of the Baltimore Police

Department to retaliate against victims who complain about police misconduct. As a result, attorneys in Baltimore are frequently asked to represent successive individuals with police misconduct claims against the City.

A. Police Misconduct in Baltimore is Endemic.

Since 2011, the City of Baltimore has faced 317 lawsuits related to police conduct. Mark Puente, *Sun Investigates: Undue Force*, BALT. SUN (Sep. 28, 2014), http://data.baltimoresun.com/news/police-settlements/. As a result, the City of Baltimore has paid approximately $5.7 million in response to allegations of police misconduct. *Id*. These cases have involved allegations that officers battered residents causing them to suffer broken bones, head trauma, organ failure and, in some cases, even death. *Id*.

According to a recent investigation of the Baltimore Police Department by the U.S. Department of Justice, BPD regularly asserts authority through the use excessive force, particularly when interacting with African Americans. U.S. Dep't of Just. C. R. Div., Investigation of the Baltimore City Police Department (2016) [hereinafter DOJ Baltimore Report], at 8, https://www.justice.gov/opa/file/883366/download. Officers frequently use aggressive and forceful tactics that increase tension between civilians, and escalate encounters. *Id*. These practices become more prevalent when the officer's verbal

commands are not met, regardless of whether the individual poses an imminent threat. *Id*.

Additionally, the Department continues to employ a variety of other illegal and racially discriminatory practices. "BPD . . . stops African American drivers at disproportionate rates. African Americans accounted for 82 percent of all BPD vehicle stops, compared to only 60 percent of the driving age population in the City and 27 percent of the driving age population in the greater metropolitan area." *Id*.at 7.

These disparities are not limited to the traffic context, but are prevalent at every stage of the policing process. *Id*. at 3. For example, police officials in Baltimore were three times more likely to stop African-American residents than their white counterparts. *Id*. at 7 ("BPD disproportionately stops African-American pedestrians. Citywide, BPD stopped African-American residents three times as often as white residents after controlling for the population of the area in which the stops occurred.").

As in the traffic context, the Department of Justice concluded that these disparities were not justified by differences in criminal activity between white and African-American individuals. BPD officers recorded over 300,000 pedestrian stops between January 2010 and May 2015. *Id*. at 5. "These stops were concentrated in predominantly African-American neighborhoods and often lack[ed] reasonable

suspicion." *Id*. Only 3.7 percent of pedestrian stops resulted in officers issuing a citation or making an arrest. *Id*. at 6. Many of those arrested based upon pedestrian stops had their charges dismissed upon initial review by either supervisors at BPD's Central Booking or local prosecutors. *Id*. The report continued:

> BPD's pedestrian stops are concentrated on a small portion of Baltimore residents. BPD made roughly 44 percent of its stops in two small, predominantly African-American districts that contain only 11 percent of the City's population. Consequently, hundreds of individuals – nearly all of them African-American –were stopped on at least 10 separate occasions from 2010-2015. Indeed, 7 African-American men were stopped more than 30 times during this period.

Id. Rather than being the result of any difference in criminal activity between African Americans and whites, the report found the difference was the product of "a policing strategy that, by its design, led to differential enforcement in African-American communities." *Id*. at 8.

B. Baltimore Police Frequently Retaliate Against Victims of Police Misconduct.

Compounding matters, the report found that, as a matter of practice, BPD officers retaliate against individuals who attempted to complain about their treatment. *Id*. at 117. Accordingly, most victims have no option but to seek judicial relief.

For example, the report recounted the experience of a man who the BPD arrested simply because he approached an officer asking why his friend had been

stopped. *Id.* Although there was no evidence that the man interfered with the officer's work or otherwise committed a crime, the officer arrested the man because he continued to stand "near" him. *Id.* In a similar incident, BPD officers arrested a man after he approached the officers complaining that they "had assaulted his nephew and stolen from him." *Id.* "When he approached the officers, demanding to know which of them had punched his nephew . . . he was placed under arrest" on suspicion of gambling. *Id.* As the report found, "[i]n making these arrests, BPD officers violated these individuals' right to question and criticize police actions." *Id.*

Additionally, the report also expressed serious concerns that BPD officers interfere with individuals who attempt to lawfully record police activity." *Id.* at 119. For example:

> [A] young man was charged with three offenses after filming BPD officers arresting his friend for trespassing outside a nightclub in Baltimore City. The friend was engaged in an argument with security officers at a bar complex. . . . When BPD Officers informed him that he was trespassing and began handcuffing him, his companion, allegedly standing approximately 20 feet away, began to film the incident using his phone. Two other officers on the scene turned and confronted him, grabbing his phone and placing him in handcuffs. While the alleged trespasser was released with only a ticket, the man filming was arrested and charged with three offenses: failure to obey, trespassing, and assault[.]

Id. at 120.

Finally, in retaliating against individuals exercising their First Amendment rights, officers frequently use excessive force. For example, the report recounted the experience of a young man who was tased for supposedly approaching the officer in an aggressive manner, according to the arresting officer. *Id*. at 119. "Although the report is not clear on what the officer meant by aggressive, the report states that the man's 'mouth'—his words—constituted the weapon or means of attack." *Id*. The net result is that BPD has created an environment which discourages complaints from being filed, deemphasizes the severity of complaints, and does minimal, or no, investigation into such misconduct.

By limiting what information attorneys may disclose regarding their prior work, confidentiality clauses adversely affect, what is for many victims of police misconduct, the only viable path to a remedy.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the U.S. Court of Appeals for the Fourth Circuit reverse the decision of the U.S. District Court for the District of Maryland dismissing Plaintiff Ashley Overbey's claim.[3]

[3] Several students in the Howard University School of Law Civil Rights Clinic assisted with this brief, namely Sean McMillon.

Dated: May 29, 2018

Respectfully submitted,

/s/Jennifer D. Bennett
Jennifer D. Bennett
Counsel of Record
PUBLIC JUSTICE, P.C.
475 14th Street, Suite 610
Oakland, CA 94612
Phone: (510) 622-8150
Email: jbennett@publicjustice.net

Ajmel A. Quereshi
CIVIL RIGHTS CLINIC
HOWARD UNIVERSITY SCHOOL OF LAW
2900 Van Ness Street, NW
Washington, DC 20008
Phone: (202) 216-5574
Email: Ajmel.quereshi@law.howard.edu

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 4,400 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f).
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Dated: May 29, 2018 By: /s/ Jennifer D. Bennett

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s/ Jennifer Bennett
Signature

May 29, 2018
Date