IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

JENNELL BLACK, et al.	*	
	*	
Plaintiffs,	*	
	*	
v.	*	Civil Action No. 1:20-cv-03644-CCB
	*	
THOMAS WEBSTER IV, et al.	*	
	*	
Defendants.	*	

* * * * * * * * * * * * * *

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS RUSSELL ALEXANDER, VICTOR WEEDN, DAVID FOWLER, AND THE STATE OF MARYLAND'S MOTION TO DISMISS

TABLE OF CONTENTS

Page

INTRODUCTION 1

FACTUAL ALLEGATIONS IN THE AMENDED COMPLAINT 5

LEGAL STANDARD 9

I. PLAINTIFFS HAVE ADEQUATELY PLED THAT THE MOVING DEFENDANTS VIOLATED THEIR RIGHTS TO ACCESS THE COURTS AND TO SEEK LEGAL REDRESS UNDER BOTH THE U.S. CONSTITUTION AND THE MARYLAND DECLARATION OF RIGHTS (COUNT IV). 10

A. Defendants Alexander, Fowler, and Weedn Denied the Plaintiffs Meaningful Access to the Courts in Violation of the U.S. Constitution and Articles 24 and 40 of the Maryland Declaration of Rights. 10

B. Article 19 of the Maryland Constitution Further Guarantees Plaintiffs' Right of Access to the Courts and Protects Against Government Abuses of the Sort at Issue Here. 17

C. Qualified Immunity Does Not Shield Defendants Alexander and Fowler from Liability in this Case. 20

D. The Eleventh Amendment Does Not Shield Alexander or Fowler From Liability for Plaintiffs' State Constitutional Claims. 24

1. The State of Maryland's Eleventh Amendment immunity does not excuse state law violations committed by individual officials with malice or gross negligence. 24

2. Pennhurst also does not strip this Court of jurisdiction over Plaintiffs' state constitutional claims. 27

II. PLAINTIFFS HAVE ADEQUATELY PLED THAT THE STATE OF MARYLAND VIOLATED THE ADA AND SECTION 504 OF THE REHABILITATION ACT (COUNTS X, XI). 27

III. PLAINTIFFS HAVE STATED A CIVIL CONSPIRACY CLAIM UPON WHICH RELIEF CAN BE GRANTED (COUNT XIII). 32

IV. ANY DISMISSED CLAIMS SHOULD BE DISMISSED WITHOUT PREJUDICE. 34

CONCLUSION 35

TABLE OF AUTHORITIES

Page(s)

Cases

A Helping Hand, LLC v. Balt. Cty., MD,
515 F.3d 356 (4th Cir. 2008) 28, 29, 31

Ashton v. Brown,
339 Md. 70, 660 A.2d 447 (1995) 18, 26

Barbre v. Pope,
402 Md. 157 (2007) 25

Bell v. City of Milwaukee,
746 F.2d 1205 (7th Cir. 1984), *overruled on other grounds by Russ v. Watts*,
414 F.3d 783, 791 (7th Cir. 2005) 11, 15

Bounds v. Smith,
430 U.S. 817 (1977).....11

Burke v. Town of Walpole,
405 F.3d 66 (1st Cir. 2005).....23

Califano v. Sanders,
430 U.S. 99 (1977).....17

Canter v. Mamboob,
No. GJH-17-908, 2020 WL 1331894 (D. Md. Mar. 23, 2020).....26

Carter v. Maryland,
Civil No. JKB–12–1789, 2012 WL 6021370 (D. Md. Dec. 3, 2012).....19

Christopher v. Harbury,
536 U.S. 403 (2002).....10, 11

Constantine v. Rectors & Visitors of George Mason Univ.,
411 F.3d 474 (4th Cir. 2005) 28

Cooper v. Rodriguez,
443 Md. 680 (2015) 25

Dean v. McKinney,
976 F.3d 407 (4th Cir. 2020) 22

Doe v. Dep't of Pub. Safety & Corr. Servs.,
185 Md. App. 625, 971 A.2d 975 (2009).....10

Doe v. Doe,
358 Md. 113, 747 A.2d 617 (2000) 18

Equal Rts. Ctr. v. Abercrombie & Fitch Co.,
767 F. Supp. 2d 510 (D. Md. 2010), *on reconsideration in part* (Jan. 31, 2011).....30

Freilich v. Upper Chesapeake Health, Inc.,
313 F.3d 205 (4th Cir. 2002) 29

Ganzzermiller v. Univ. of Md. Upper Chesapeake Med. Ctr.,
No. CCB-16-3696, 2019 WL 4751457 (D. Md. Sept. 30, 2019).....28, 29

Gilliam v. Sealey,
932 F.3d 216 (4th Cir. 2019) 22

Goodman v. City of L.A. Police Dep't,
708 F. App'x. 888 (9th Cir. 2017) 14, 23

Halpern v. Wake Forest Univ. Health Scis.,
669 F.3d 454 (4th Cir. 2012) 32

Harlow v. Fitzgerald,
457 U.S. 800 (1982).....21

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982).....30

Hope v. Pelzer,
536 U.S. 730 22

Humbert v. Mayor & City Council of Balt. City,
866 F.3d 546 (4th Cir. 2017) 23

Hurt v. Fann,
No. DKC-14-873, 2015 WL 1210541 (D. Md. Mar. 16, 2015).....12

Jackson v. Lightsey,
775 F.3d 170 (4th Cir. 2014) 9

James v. Acre Mortg. & Fin., Inc.,
306 F. Supp. 3d 791 (D. Md. 2018), *reversed and remanded on other grounds sub nom. Edmonson v. Eagle National Bank*, 922 F.3d 535 (4th Cir. 2019).....35

Johnson v. Md. State Police,
331 Md. 285, 628 A.2d 162 (1993) 18

Lee v. Cline,
384 Md. 245 (2004) 25

Lexmark Int'l, Inc. v. Static Control Components, Inc.,
572 U.S. 118 (2014).....31

Lloyd v. Gen. Motors Corp.,
397 Md. 108 (2007).....33

Loeffler v. Staten Island Univ. Hosp.,
582 F.3d 268 (2d Cir. 2009).....29

McCullum v. Orlando Reg'l Healthcare Sys.,
768 F.3d 1135 (11th Cir. 2014).....29, 30

Md. Comm. Against the Gun Ban v. Simms,
835 F.Supp. 854 (D. Md. 1993), *rev'd on other grounds*, 30 F.3d 130 (4th Cir. 1994).....26

Miller v. Prince George's Cty., Md.,
475 F.3d 621 (4th Cir. 2007).....21, 23

Murphy v. Edmonds,
325 Md. 342, 601 A.2d 102 (1992).....18

MX Grp., Inc. v. City of Covington,
293 F.3d 326 (6th Cir. 2002).....31

Nielsen v. Clayton,
Nos. 94-1620, 94-1766, and 94-1766, 62 F.3d 1419, 1995 WL 417569 (7th Cir. July 11, 1995).....11, 12, 15

Osborne v. Georgiadis,
679 F. App'x 234 (4th Cir. 2017).....23

Owens v. Balt. City State's Attorneys' Office,
767 F.3d 379 (4th Cir. 2014).....21

Patterson v. Kennedy,
No. DKC-11-247, 2013 WL 1830132 (D. Md. Apr. 30, 2013).....12

Pennhurst State Sch. & Hosp. v. Haldeman,
465 U.S. 89 (1984).....24, 27, 33

Piselli v. 75th Street Med.,
371 Md. 188, 808 A.2d 508 (Md. 2001).....18

Pollard v. Pollard,
325 F. App'x 270 (4th Cir. 2009).....16

Renko v. McLean,
346 Md. 464, 697 A.2d 468 (1997) 18

Ritchie v. Donnelly,
324 Md. 344 (Md. 1991).....26

Robinson v. Am. Honda Motor Co., Inc.,
551 F.3d 218 (4th Cir. 2009) 10

Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.,
547 U.S. 47 (2006).....30

Ryland v. Shapiro,
708 F.2d 967 (5th Cir. 1983) 11, 12, 23

Scott v. Eversole Mortuary,
522 F.2d 1110 (9th Cir. 1975) 32

Shaw v. Stroud,
13 F.3d 791 (4th Cir. 1994) 35

State v. Bd. of Educ.,
346 Md. 633, 697 A.2d 1334 (1997) 18

The Pack Shack, Inc. v. Howard Cty.,
377 Md. 55, 832 A.2d 170 (2003) 10

Thomas v. City of Troy,
293 F. Supp. 3d 282 (N.D.N.Y. 2018).....23

Van Royen v. Lacey,
262 Md. 94 (1971) 33

Washington v. Wilmore,
407 F.3d 274 (4th Cir. 2005) 23

Weller v. Dep't of Soc. Servs. for the City of Balt.,
901 F.2d 387 (4th Cir. 1990) 24

Weyler v. Gibson,
110 Md. 636, 73 A. 261 (1909) 18

Whiting–Turner Contracting Co. v. Coupard,
304 Md. 340, 499 A.2d 178 (1985) 18

Williamson v. Stirling,
912 F.3d 154 (4th Cir. 2018) 22

Willingham v. Crooke,
412 F.3d 553 (4th Cir. 2005) 21

Wilson v. UT Health Ctr.,
973 F.2d 1263 (5th Cir.1992) 26

Wuenschel v. Kristoff,
No. JKB-17-1446, 2017 WL 3414040 (D. Md. Aug. 9, 2017).....9

Ying Jing Gan v. City of New York,
996 F.2d 522 (2d Cir.1993).....26

Young-Bey v. Whitacre,
No. JFC-10-3161, 2013 WL 2044891 (D. Md. May 13, 2013).....12

Statutes

28 U.S.C.

§1367.....27

42 U.S.C.

§ 12101.....32

§ 12181.....32

Americans with Disabilities Act ..... *passim*

Maryland Tort Claims Act.....24, 25

Rehabilitation Act ..... *passim*

Other Authorities

77 Md. Op. Att'y Gen. 100 (1992) 32

David Schuman, *The Right to a Remedy*, 65 Temp. L.Rev., 1197, 1201 n.25
(1992).....18

E. Davies & O. Wiggins, *Maryland Officials to Launch Review of Cases Handled by Ex-Chief Medical Examiner Who Testified in Chauvin's Defense*,
Washington Post (Apr. 23, 2021) 2

E. Levenson & A. Cooper, *Former Medical Examiner Says George Floyd Died Due to His Heart Disease -- not Derek Chauvin*, CNN (Apr. 15, 2021),
https://cnn.it/33j7QvI.....3

Maryland Constitution 27

Maryland Declaration of Rights Article 19 ..... *passim*

Maryland Declaration of Rights Article 24 .....9, 10, 17, 33

Maryland Declaration of Rights Article 40 .....9, 10, 17

P. Jackson & C. Tkacik, *3 Maryland Families For Years Criticized David Fowler's Rulings as Medical Examiner. Then Came Derek Chauvin's Trial*, The Baltimore Sun (Apr. 27, 2021) 3

P. Jackson & J. Fenton, *In-custody Death Reports Under Former Maryland Medical Examiner to Be Reviewed after he testified Chauvin did not kill George Floyd*, The Baltimore Sun (Apr. 23, 2021).....2, 13

U.S. Constitution..... *passim*

U.S. Constitution, First Amendment.....9, 10

U.S. Constitution, Eleventh Amendment..... *passim*

U.S. Constitution, Fourteenth Amendment 9, 10

INTRODUCTION

On September 15, 2018, officers from three police departments killed 19-year-old Anton Black. Public officials immediately conspired to protect the officers from the consequences of their use of excessive force. Certain of the Moving Defendants—including assistant medical examiner Russell Alexander and then-Chief Medical Examiner David Fowler—joined this conspiracy, obstructed the truth, and prevented the officers from being criminally prosecuted.

In this suit, Plaintiffs seek to hold Alexander, Fowler, current Chief Medical Examiner Victor Weedn, and the State of Maryland's Office of Medical Examiner (the "State" and, together, the "Moving Defendants") accountable for their role and complicity in the cover-up, which insulated the police officers from being held fully accountable for Anton's death. Plaintiffs' allegations against Moving Defendants are not about mere differences of opinions: the Plaintiffs allege that Moving Defendants engaged in intentional, egregious efforts to conceal facts and engaged in repeated, unethical departures from professional standards. This misconduct, as detailed in the First Amended Complaint ("Amended Complaint" or "AC"), includes: falsely describing the incident that led to Anton's death in a manner that is contradicted by the contemporaneous video, falsely claiming Anton's death was caused by heart conditions and his bipolar disease when no reasonable physician would so conclude, falsely suggesting that there should be physical evidence of asphyxia, and falsely stating that police restraining Anton in a prone position for over six minutes played no role in Anton's death. The relief sought against the Moving Defendants is primarily equitable: to ensure that no individual killed in police custody in the State of Maryland is ever again denied justice through the Medical Examiner's complicity.

Such relief is warranted: The Moving Defendants have a long (and now well-publicized) track record of taking extreme positions, well outside the medically defensible mainstream, in cases involving the deaths of Black people in police custody. The longstanding and persistent

pattern of misconduct by the Medical Examiner's office has obscured civil rights violations, preventing law enforcement officers from being prosecuted, and allowing officers who have committed violent acts against community members to remain in their jobs, where they continue to place the public at risk. In case after case involving the deaths of Black individuals at the hands of police, these Moving Defendants have gone to extreme lengths to shield the involved police officers from accountability. Indeed, following his recent testimony as the sole medical expert witness for Officer Derek Chauvin in his trial for the murder of George Floyd, Defendant David Fowler earned a national reputation for rendering absurd and unsupported opinions to absolve police officers of wrongdoing. Dr. Fowler's testimony seeking to vindicate Derek Chauvin for Mr. Floyd's murder led over 400 physicians across the country to issue a public rebuke,[1] and he is now widely held in such disrepute that the State of Maryland recently announced it will be launching a re-review of every police-custody killing (including Anton's) that the Office of Medical Examiner handled during Fowler's 17-year tenure.[2]

Even without the benefit of this upcoming review by the Office of the Maryland Attorney General or any discovery, the Amended Complaint specifically identifies several cases where Moving Defendants rendered medically unjustifiable opinions, shielding the officers involved from accountability. AC ¶¶191-92. There is good reason to believe that discovery will lead to identification of other instances of obfuscation and complicity by the Moving Defendants. Given

[1] Organized by the former Medical Examiner for the District of Columbia, Dr. Roger Mitchell, the letter called Fowler's testimony "disingenuous," stated his opinions were "baseless, revealed obvious bias, and raised malpractice concerns," and noted that the "disagreement" was "not a matter of opinion," but a "matter of ethics." P. Jackson & J. Fenton, *In-custody Death Reports Under Former Maryland Medical Examiner to Be Reviewed after he testified Chauvin did not kill George Floyd*, The Baltimore Sun (Apr. 23, 2021), https://bit.ly/3tsXPqm.

[2] E. Davies & O. Wiggins, *Maryland Officials to Launch Review of Cases Handled by Ex-Chief Medical Examiner Who Testified in Chauvin's Defense*, Washington Post (Apr. 23, 2021), https://wapo.st/3hxE6Dz.

the similarities between the killing of George Floyd (who died after Officer Chauvin kept him in a prone position with his body weight on his upper body for over nine minutes) and Anton's death (who died after officers kept him in a prone position with their body weight on his upper body for over six minutes) and the similarity in Dr. Fowler's testimony about the cause of George Floyd's and Anton's deaths,[3] Dr. Fowler's role in the Chauvin case alone is a sufficient basis to deny Moving Defendants' motion. While discovery has not yet begun, there is certainly reason to believe discovery will result in the identification of additional examples where Dr. Fowler and the other Moving Defendants acted to shield police officers from accountability. Indeed, Dr. Fowler's disgraceful "expert" testimony has already resulted in the identification of additional accounts of injustices perpetuated by Dr. Fowler and the Office of the Medical Examiner.[4]

Like their co-defendants' motion to dismiss, *see* ECF No. 53 at 2-3, Moving Defendants' motion rests on inapplicable law and misstated facts. Moving Defendants seek to dismiss the Amended Complaint on the merits and on the basis of qualified and Eleventh Amendment immunity. The substance of Moving Defendants' argument is that because Plaintiffs have managed to initiate a lawsuit notwithstanding Moving Defendants' intentional efforts to prevent them from doing so, their claim necessarily fails. But courts have not adopted such a narrow view of interference with access to the courts, and Plaintiffs have described the many ways in which their efforts to exercise their rights have been burdened, including additional delay, expense,

[3] *See, e.g.*, E. Levenson & A. Cooper, *Former Medical Examiner Says George Floyd Died Due to His Heart Disease -- not Derek Chauvin*, CNN (Apr. 15, 2021), https://cnn.it/33j7QvI (summarizing Fowler's testimony that Floyd died as a result of cardiac arrhythmia brought on by atherosclerosis, hypertensive heart disease, fentanyl and methamphetamine use, a tumor, and carbon monoxide, and not from positional asphyxia at the hands of Derek Chauvin).

[4] *See, e.g.*, P. Jackson & C. Tkacik, *3 Maryland Families For Years Criticized David Fowler's Rulings as Medical Examiner. Then Came Derek Chauvin's Trial*, The Baltimore Sun (Apr. 27, 2021), https://bit.ly/3upxESM; *The Death of Demetris Hall: Drowning or Murder?*, Change.org (last visited May 6, 2021), https://bit.ly/3f2PqF5.

emotional distress, and extraordinary efforts to fight for an accurate official record of Anton's death. Indeed, *to this day*, the Moving Defendants' co-defendants rely on the false autopsy report to argue that Plaintiffs have no legal claims; illustrating how the false report continues to jeopardize Plaintiffs' access to the courts. Plaintiffs have made well-pled, non-conclusory allegations about how Defendants Fowler and Alexander falsified the autopsy report, and the law is clear that the law does not immunize individual government officials who engage in such intentional and reckless abuses of authority.

Likewise, Moving Defendants' terse analysis of the ADA and Rehabilitation Act claims provides no basis to dismiss Plaintiffs' claims under those statutes. Moving Defendants do not dispute that, in covering up the true cause behind Anton's death—excessive force by police—Defendants discriminated based on Anton's disability status by wrongfully claiming that his bipolar disorder was a substantial cause of his death. Moving Defendants' arguments that Maryland's survival statute does not apply and that CJAB purportedly lacks standing to bring a claim ignore that the Family Plaintiffs and CJAB[5] have standing to bring ADA and Rehabilitation Act claims on their own behalf for the harm Defendants' actions directly caused them.

Moving Defendants' argument to dismiss Plaintiffs' state law claim for civil conspiracy fares no better. Moving Defendants acknowledge that if Plaintiffs' constitutional claims go forward (and they should), so, too, should their civil conspiracy claim. And Moving Defendants also wholly ignore the due process violation—which is well-supported by the allegations in the Amended Complaint—that serves as an independent basis for Plaintiffs' civil conspiracy claim to move forward. The Eleventh Amendment is no safe harbor for Defendants Alexander or Fowler

[5] The Family Plaintiffs include Plaintiffs Antone Black, Jennell Black, and Katyra Boyce as mother and next friend of W.B. CJAB is the Coalition for Justice for Anton Black.

from this civil conspiracy claim; they are both sued personally for their malice and gross negligence in furtherance of the conspiracy and are thus not immune from suit.

For these reasons, as discussed below, this Court should deny Moving Defendants' motion to dismiss. Plaintiffs have stated viable claims against Alexander, Fowler, Weedn, and the State, and these claims should proceed to discovery. Maryland's citizens are entitled to assurance that the Moving Defendants will no longer be able to continue their pattern and practice of disregarding well-established principles of forensic pathology in police deaths-in-custody cases to shield officers from being held accountable for civil rights violations and violence committed against residents. Any other outcome would undercut the Attorney General's promise to Maryland citizens following Derek Chauvin's conviction that his office is "committed to continuing the work" that needs to be done to resolve the "[s]ystemic problems with policing & with equal justice," Brian Frosh (@Brian Frosh), Twitter, (Apr. 20, 2021, 6:07 PM), https://bit.ly/3xSiVlG.

FACTUAL ALLEGATIONS IN THE AMENDED COMPLAINT

In their Memorandum of Points and Authorities in Opposition to the Towns of Ridgely, Centreville, and Greensboro and Dennis Lannon, Michael Petyo, and Jeannette Cleveland's Motion to Dismiss, Plaintiffs detailed the events leading up to Anton Black's untimely and tragic death. (ECF No. 53 at 3–8.) In this Memorandum, Plaintiffs repeat and incorporate by reference that statement of facts and provide a few additional ones detailing the actions taken by the Moving Defendants following Anton's death.

Almost immediately following Anton's death on September 15, 2018, government officials began to develop a narrative to absolve the police officers involved of their wrongdoing. Without evidence, they began claiming Anton had smoked "spice" and exhibited superhuman strength. AC ¶158. And they began concocting absurd claims that they thought Anton was dangerous. AC ¶159. The officials fed this narrative to the medical examiner's office, which continued to

perpetuate it. Defendant Alexander performed the autopsy on Anton, and Dr. Fowler was the Chief Medical Examiner at the time of that autopsy "responsible for ensuring [its] accuracy and integrity." (Defs.' Mot. to Dismiss, ECF No. 59-1 at 2.) Despite knowing that there were no drugs in Anton's system at the time of his death, the medical examiner refused Plaintiffs' requests to release toxicology reports or the autopsy report, choosing instead to aid police in further developing the false narrative that Anton has smoked spice, over a period of *months*. AC ¶164.

As time passed and a growing chorus called for transparency and accountability, Moving Defendants continued to refuse to release the toxicology report or the autopsy. AC ¶165. It was not until January 23, 2019, after Maryland Governor Larry Hogan called on state and local officials to release the autopsy report in response to pressure from Plaintiffs and the media, that the medical examiner's autopsy report was finally released. AC ¶169. At the time of their release, the autopsy and primary report had been completed over four months prior, and the neuropathology and cardiology report completed nearly three months prior. AC ¶171. The initial toxicology findings showed an absence of drugs in Anton's system, and it is certainly a plausible inference that the medical examiner refused to release that report because those findings contradicted the officers' narrative of Anton's death and imperiled their cover-up. *Id*. Indeed, once it was clear that the autopsy report would have to be released, Moving Defendants scrambled to conduct supplemental toxicological testing to salvage the "spice" theory; the supplemental toxicology report was dated the same day the medical examiner was forced to release its autopsy report—however it again found no signs of drugs in Anton's system. *Id.*

Similarly, the Moving Defendants prepared an autopsy report to shield the officers from prosecution, ignoring general, well-established medical knowledge in the process. *See id.* For example, despite documentation of *43* blunt-force-trauma wounds, the Moving Defendants'

autopsy report does not so much as mention the force used by police as a cause of death. AC ¶175. Nor does the Moving Defendants' autopsy report mention that Anton was continuously restrained in a prone position that interfered with his ability to breathe for more than six minutes, notwithstanding video evidence of the police actions that was readily available to the Moving Defendants for review as they prepared their reports. AC ¶¶175-76.

Instead, the Moving Defendants' narrative of Anton's death in the autopsy report specifically repeated the false claim that Anton had smoked "spice" despite toxicology reports that directly contradicted those claims, AC ¶176, and concluded that Anton's bipolar disorder, a psychiatric illness, was a "significant contributing condition" to his death, AC ¶173. The Moving Defendants further claimed that Anton's heart had failed suddenly, primarily due to "anomalous right coronary artery and myocardial tunneling of the left anterior descending coronary artery," AC ¶174, even though it was false to say these conditions caused death and they knew as much. AC ¶179-82. The autopsy reports that a single officer laid on Anton's back *at one point*, falsely minimizing what is clear from the video: that Chief Manos kept his weight on Anton for over six full minutes. AC ¶134-35. The medical examiner's report unreasonably states that "no evidence was found that restraint by law enforcement directly caused or significantly contributed to the decedent's death; in particular, no evidence was found that restraint led to the decedent being asphyxiated." AC ¶176. In other words, the autopsy report parroted the falsehood that officers did not cause, and played no significant role in Anton's death. And Defendant Alexander confirmed his intent to help cover for police when he told Maryland State Police Corporal Nathan Wilson that "Black's neck looked good." AC ¶171.

Anton's death was not the first time Moving Defendants went to such lengths to cover up misconduct by police officers. For example, in 2013, the Office of Medical Examiner, under Dr.

Fowler's direction, completed an autopsy report for **Tyrone West**, a 44-year-old Black man who died during a traffic stop after officers maced him, hit him with batons, and restrained him in a prone position for an extended period of time. AC ¶191. The Office of Medical Examiner falsely claimed that, due to possible dehydration, warm temperatures and minor cardiac abnormalities, the cause of Mr. West's death could not be determined. *Id.* An independent forensic pathologist, on the other hand, concluded that Mr. West's main cause of death was positional asphyxia. *Id.* On another occasion, Defendant Alexander (supervised by Dr. Fowler) performed an autopsy on **Tawon Boyd**, a 21-year-old Black man who died during a police encounter in which officers punched him in the face and restrained him in a prone position for five minutes. AC ¶192. Alexander concluded that Mr. Boyd's death was an accident, relying on the presence of drugs in his system, but an independent forensic pathologist opined that Mr. Boyd's death was a homicide resulting from positional asphyxia. *Id.* And just since the Amended Complaint was filed—again, without benefit of any discovery—additional instances of the Office of Medical Examiner's complicity have come to light. *See supra* note 2 (detailing other cases in which the Medical Examiner allegedly covered up misconduct).

The conduct of the Moving Defendants in this case, including their demonstrably absurd and unprofessional opinions about Anton's cause of death, their refusal to release the toxicology and autopsy reports, and their pattern of complicity in covering up other police custody deaths, all support an inference that the Office of the Medical Examiner was conspiring with police officials to bolster their false narrative and exculpate them from liability for Anton's death. The autopsy report defies common sense and basic standards of forensic pathology, and it deliberately ignores general, well-established medical knowledge. AC ¶177-93.

As a direct result of the medical examiner's conclusions, the Caroline County State's Attorney determined there would be no criminal prosecution of the officers responsible for Anton's death, refusing even to convene a grand jury to consider the matter. AC ¶194. Furthermore, the local and State governments used these false conclusions to ignore the CJAB's persistent demands for the involved officers to be investigated and disciplined for their role in Anton's death. The Moving Defendants' actions in conspiring with law enforcement and issuing a report that falsely characterized Anton's cause of death burdened and continues to burden Plaintiffs' ability to mount a civil action without onerous costs to rebut the medical examiner's conclusions. AC ¶195. Moving Defendants' actions also directly thwarted Plaintiffs' ability to hold police accountable through governmental disciplinary and criminal processes: all governmental agencies involved in investigating Anton's death relied on the autopsy's findings in rejecting discipline or prosecution of the individual officers for their roles in Anton's killing. AC ¶245.

Plaintiffs now sue Moving Defendants, as well as Defendants Thomas Webster IV, Michael Petyo, Gary Manos, Dennis Lannon, Jeannette Cleveland, and the Towns of Greensboro, Ridgely, and Centreville. The Amended Complaint seeks to hold one or more of the Moving Defendants liable for: (1) violations of Plaintiffs' right to access to the courts and legal redress under the First and Fourteenth Amendments to the U.S. Constitution and Articles 19, 24, and 40 of the Maryland Declaration of Rights (Count 4, Alexander, Weedn, and Fowler); (2) violations of ADA Title II (Count 10, State of Maryland) and Section 504 of the Rehabilitation Act (Count 11, State of Maryland); and (3) civil conspiracy (Count 13, all Moving Defendants). Defendants Alexander, Weedn, Fowler, and the State now move to dismiss those claims. (ECF No. 59.)

LEGAL STANDARD

To survive a motion to dismiss, "a complaint must present factual allegations that 'state a claim to relief that is plausible on its face.'" *Jackson v. Lightsey*, 775 F.3d 170, 178 (4th Cir.

2014). "Facial plausibility exists 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Wuenschel v. Kristoff*, No. JKB-17-1446, 2017 WL 3414040, at *1 (D. Md. Aug. 9, 2017). In evaluating a motion to dismiss, courts must construe the complaint's factual allegations in the non-moving party's favor and accept them as true. *See Robinson v. Am. Honda Motor Co., Inc.*, 551 F.3d 218, 222 (4th Cir. 2009).

ARGUMENT

I. Plaintiffs Have Adequately Pled that the Moving Defendants Violated Their Rights to Access the Courts and to Seek Legal Redress Under Both the U.S. Constitution and the Maryland Declaration of Rights (Count IV).

A. Defendants Alexander, Fowler, and Weedn[6] Denied the Plaintiffs Meaningful Access to the Courts in Violation of the U.S. Constitution and Articles 24 and 40 of the Maryland Declaration of Rights.

Even as they move to dismiss Plaintiffs' claims, thus seeking to deny Plaintiffs their day in Court, Moving Defendants assert that merely because Plaintiffs have managed to get in the courthouse door and file a complaint, any valid access-to-courts claim has been destroyed. ECF 59-1 at 9-10. Although the Moving Defendants acknowledge that all citizens have a right of access to the courts—a right grounded in the First and Fourteenth Amendments to the U.S. Constitution and Articles 19, 24, and 40 of the Maryland Declaration of Rights[7]—their argument demonstrates a fundamental misunderstanding of the constitutional right of access to the courts. *See Christopher*

[6] Defendant Weedn is sued only in his official capacity for prospective equitable relief, and only on Plaintiffs' federal constitutional claims in this Count.

[7] Because Article 24 is at least minimally construed as in *pari materia* with the Fourteenth Amendment and Article 40 is generally interpreted in *pari materia* with the First Amendment, Plaintiffs' arguments in support of their claims under these provisions likewise state a valid claim under those provisions for the same reasons. *See Doe v. Dep't of Pub. Safety & Corr. Servs.*, 185 Md. App. 625, 636, 971 A.2d 975, 982 (2009); *The Pack Shack, Inc. v. Howard Cty.*, 377 Md. 55, 64 n.3, 832 A.2d 170, 176 (2003). Because Article 19 is a specific "access to the courts" or "remedy" clause with no parallel in the federal constitution, it is addressed separately below.

v. Harbury, 536 U.S. 403, 415 n.12 (2002). Access to the courts must be "adequate, effective, and *meaningful*." *Bounds v. Smith*, 430 U.S. 817, 822 (1977) (emphasis added). Summary dismissal of the claims, as Moving Defendants urge in their motion, does not constitute adequate, effective, or meaningful access; unlike what the Moving Defendants seem to suggest, it is not necessary that they "literally bar the courthouse door" and prevent the filing of a civil action in order to violate Plaintiffs' right of access to the courts. *Bell v. City of Milwaukee*, 746 F.2d 1205, 1261 (7th Cir. 1984), *overruled on other grounds by Russ v. Watts*, 414 F.3d 783, 791 (7th Cir. 2005); *see also Nielsen v. Clayton*, Nos. 94-1620, 94-1764, and 94-1766, 62 F.3d 1419, 1995 WL 417569 (7th Cir. July 11, 1995).

Rather, as numerous courts have recognized, actions that frustrate or hinder the Plaintiffs' ability to seek legal redress in a meaningful way, including engaging in a cover-up that delays filing of an action, increases the cost of litigation or prevents any accountability through the criminal justice system, can certainly amount to a violation of the Plaintiffs' right of access to courts, regardless of whether Plaintiffs are eventually able to initiate a civil action. *See, e.g., Nielsen*, 62 F.3d 1419 (finding plaintiffs, family members of Nielsen who brought suit alleging denial of adequate, effective, and meaningful access to the courts, were entitled to recovery for emotional distress suffered for time all the way up to until jury's return of a verdict in their favor); *Bell*, 746 F.2d at 1261 (finding a violation of right of access to courts where police officials engaged in cover-up to shield from the public and the victim's family key facts which would form the basis of the family's claims for redress, even though plaintiff had previously initiated a wrongful death claim in state court soon after his son was killed by police); *Ryland v. Shapiro*, 708 F.2d 967, 974-75 (5th Cir. 1983) (finding plaintiffs, who brought suit alleging a violation of their right of access to courts based on a cover-up of their daughter's murder by prosecutors, stated a

valid theory of recovery where defendants' actions could have prejudiced plaintiffs by making it more expensive to litigate and more difficult to prevail because of stale evidence and fading memories of witnesses). Moreover, courts have recognized the interference with one's right of access to the courts, notwithstanding delays or increased litigation costs, can be enough in and of itself to support a claim upon which relief should be granted. *Ryland*, 708 F.2d at 974; *see also Nielsen*, 62 F.3d 1419. As numerous courts in this District have held, all a plaintiff must show is that "the defendant's acts hindered [plaintiff's] ability to pursue a non-frivolous claim." *Hurt v. Fann*, No. DKC-14-873, 2015 WL 1210541, *5 (D. Md. Mar. 16, 2015); *Young-Bey v. Whitacre*, No. JFC-10-3161, 2013 WL 2044891, *5 (D. Md. May 13, 2013); *Patterson v. Kennedy*, No. DKC-11-247, 2013 WL 1830132, *5 (D. Md. Apr. 30, 2013).

Plaintiffs easily meet this threshold when their well-pled allegations are taken as true, as they must be at this initial stage of the case. Here, Defendants Fowler and Alexander denied Plaintiffs meaningful access to the courts by working, in concert with police and other government officials, to conceal facts related to the true cause of Anton's death—asphyxiation at the hands of police. Defendants Fowler and Alexander conspired and acted intentionally to falsely characterize Anton's death as being alternately due to "natural causes" or an "accident" and to obfuscate police responsibility for Anton's death. AC ¶193 ("[T]he ME's responsibility was to opine based on reasonable medical and professional standards as to what caused the person's death, not to cover up for the officers' actions. . . . [C]onsistent with its practice in other cases the ME knowingly and intentionally misrepresented his death as, alternately, one of 'natural' causes or 'accident.'") Plaintiffs have specifically pled the ways in which Moving Defendants' actions did not merely reflect differences of opinion, but rather egregious misrepresentations of factual information and

departure from professional standards far beyond mere negligence to intentionally mask the true cause and police culpability for Anton's death:

1) By ignoring overwhelming and irrefutable evidence of Anton's prolonged restraint by police as captured on body camera footage;
2) Failing to acknowledge the basic principle that compressing a person's body interferes with their ability to breathe;
3) Failing to acknowledge that positioning a person face down with their legs bent back further interferes with their ability to breathe;
4) Making misleading statements suggesting that asphyxia due to restraint must be ruled out due to the absence of physical signs of asphyxia on Anton's body;
5) Making false representations about the significance of Anton's myocardial tunneling;
6) Misrepresenting and exaggerating the role of anomalous right coronary artery;
7) Claiming that bipolar disorder contributed to Anton's death; and
8) Departing from well-established customs in the field that deaths at the hands of another should be characterized as homicide.

AC ¶193. Further, Plaintiffs have provided specific examples of other instances in which Defendants Fowler and Alexander acted similarly in falsifying their autopsy reports, reaching patently unreasonable conclusions of cause of death, and shielding police officers from accountability. AC ¶¶190-92. Indeed, since the filing of this litigation, Dr. Fowler was the only medical expert to testify on behalf of Derek Chauvin to conclude he did not murder George Floyd, prompting a public letter by hundreds of doctors and medical examiners nationwide characterizing Dr. Fowler's conclusions as being so far outside the standards of professional norms and standards that they suggest bias and malpractice.[8] This rebuke was followed shortly thereafter by an announcement from Maryland's Attorney General and Governor that all prior deaths in custody determinations during Dr. Fowler's tenure will be the subject of an independent review.[9]

In similar circumstances, courts have routinely concluded that medical examiners can be

[8] *See* Exhibit A.

[9] Jackson & Fenton, *supra* note 1.

held liable when they recklessly or intentionally falsify their autopsy reports. For example, in *Goodman v. City of Los Angeles Police Department*, 708 Fed. Appx. 888 (9th Cir. 2017), the Ninth Circuit reversed a grant of summary judgment to a coroner seeking to escape liability for conduct mirroring Plaintiffs' allegations here:

> *It is clearly established law* that a coroner may not recklessly or intentionally falsify an autopsy report in a manner that plays a material role in a false arrest and prosecution . . . In the light most favorable to Goodman, a reasonable jury could find that Dr. Wang recklessly or intentionally falsified an autopsy report when he changed Alan's cause of death from "pending investigation" to "homicide" for several reasons. First, Dr. Wang failed to follow standards H31.7 and H31.9, created by the National Association of Medical Examiners, requiring a coroner to provide a reason for the change in cause of death. Second, his report omitted evidence that Alan's injury was consistent with an accidental fall. Third, both experts the DA retained concluded Alan's death was not a homicide, with one expert concluding that Dr. Wang's report was "defective and far outside recommended national guidelines for quality of work." The experts hired by both sides for this litigation disagree as to whether Dr. Wang's report was defensible, creating a genuine issue of material fact.

Id. at 890-91 (emphasis added) (citation omitted).[10]

The impact of the Moving Defendants' misconduct on Plaintiffs' access to the courts is real. Defendants Fowler and Alexander's efforts to delay and obfuscate the truth have frustrated and continue to frustrate Plaintiffs' ability to seek legal redress by imposing on Plaintiffs a significant financial burden to retain multiple experts, and greater difficulty in prevailing on their claims because of the need to overcome the false narrative that Defendants manufactured and continue to propagate and rely upon as their primary defense to this litigation.[11] Further, the

[10] To be clear, Plaintiffs do not assert that they have a right to any particular prosecutorial decision. Rather, they assert that they are protected from the unreasonable and arbitrary denial of access that occurs when other government officials feed a prosecutor false information for the express purpose of thwarting accountability, including criminal prosecution.

[11] Plaintiffs do not argue, as the Moving Defendants suggest, ECF No. 59-1 at 10, that they would have been able to mount a civil suit without paying *any* expert fees if the Medical Examiner had issued correct findings. Rather, Plaintiffs assert that the cost of litigation for the Plaintiffs is far more substantial given that Plaintiffs had to retain multiple additional experts to combat the Medical Examiner's intentionally misleading findings. And the expenses will become even more substantial as the case progresses through discovery and trial.

Moving Defendants' role in helping to cover up police responsibility for Anton's death is part of a broader institutional practice that has caused the Black Family significant emotional distress and suffering and that directly frustrates the police accountability aims of the Coalition, as they have pushed for involved officers to be placed on leave, administratively disciplined, and criminally prosecuted. For example, despite being in possession of direct evidence *contradicting* the police narrative that Anton was high on drugs at the time of death, the Moving Defendants withheld their toxicology report even while the police repeated these falsehoods to the media. And Plaintiffs were helpless as they watched the police escape criminal prosecution for their role in Anton's death because of the Moving Defendants' unsupported conclusions; as Caroline County State's Attorney Joseph Riley concluded that there was no homicide and closed the investigation based primarily on the Moving Defendants' false autopsy report. AC ¶194. This caused the Family Plaintiffs even more emotional distress and suffering, and thwarted the Coalition's efforts to hold the officers accountable. Although Plaintiffs eventually filed suit, they have already suffered and continue to suffer significant prejudice as a result of this cover-up. Moreover, Plaintiffs thus far have been entirely unable to persuade the towns of Greensboro, Ridgely and Centreville or Caroline County to impose discipline, commence criminal proceeding, or even convene a grand jury to investigate the officers who killed Anton.

In *Nielsen v. Clayton*, the court was confronted with a scenario similar to this case, with plaintiff family members of Mr. Nielsen alleging that the defendant medical professionals had violated their right of access to the courts by covering up the facts surrounding Nielsen's death. 1995 WL 417569. After a jury verdict finding that the defendants had in fact conspired to conceal the true facts of Nielsen's death, in part, based on their attempt to obscure facts during an internal investigation into Nielsen's death, the court determined that "plaintiffs were entitled to recover for emotional distress suffered until they obtained relief for Nielsen's death, which was when the jury returned a verdict in their favor," reasoning that the "cover-up of a constitutional deprivation" denied plaintiffs "adequate, effective and meaningful access to the courts." *Id*. at *7 (citing *Bell*, 746 F.2d at 1265). Similar to the situation in *Nielsen*, by participating in a cover-up to conceal

police responsibility for Anton's death, which efforts continue to this day, the Moving Defendants have denied, and are denying, Plaintiffs adequate, effective, and meaningful access to the courts.

Under well-recognized precedent for access-to-court claims, Plaintiffs have clearly pled sufficient facts to proceed. Adopting the Moving Defendants' interpretation of the case law to dismiss out-of-hand such claims by plaintiffs who are ultimately able to *initiate* a civil action, irrespective of the defendants' role in delaying or burdening that process, is illogical. Moreover, it would encourage and reward the very type of obstructive misconduct Defendants Fowler and Alexander engaged in here—actively delaying release of public reports and covering up misconduct— all of which makes it substantially more difficult for litigants to initiate and prevail in suits alleging constitutional violations. Notably, Moving Defendants' skewed view of the law is primarily based on their citation to *Pollard v. Pollard*, 325 Fed. Appx. 270 (4th Cir. 2009), ECF 59-1 at 9—an unpublished, per curiam decision of no precedential effect—to argue the access-to courts-claim should be dismissed because Plaintiffs have successfully commenced a lawsuit. Even if *Pollard* was precedential—and it is not—the Moving Defendants badly misread it. In *Pollard*, the court noted that in order for the plaintiff to prevail in her claims, she had to demonstrate that the defendant's actions either "foreclosed her from filing suit in state court" *or* "rendered ineffective any state court remedy she previously may have had." *Id*. at 272 (emphasis added). The court denied Pollard's access-to-court claim not only because she had filed suit, but also because she had not provided any evidence that the court remedy would be ineffective, factors that no doubt affected the Court's decision to treat the matter in a summary way. *Id*.

In contrast, here Plaintiffs have explained how Fowler and Alexander's acts hindered their ability to pursue a non-frivolous claim, and asserted specific reasons directly linked to the Moving Defendants' misconduct that the ability to obtain a full and complete remedy has been impaired, including the ability to see the officers held fully responsible for their misconduct, the substantial financial burden, the increased difficulty to prevail in the pending lawsuit, the persistent emotional distress caused by the cover-up, and the inability to hold police accountable through the criminal court process; because of the Moving Defendants' actions, Plaintiffs have been deprived the full

panoply of remedies and justice they are entitled to arising from Anton's death.

The Moving Defendants further contend, erroneously and without citing any authority, that the access-to-courts claim must be dismissed because Plaintiffs did not first avail themselves of an administrative process, outlined by Md. Code Ann., Health-Gen. § 5-310(d)(2)(i), to obtain relief. This argument is wrong, among other reasons, because constitutional claims carry no administrative exhaustion requirement. *See Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions."). Moving Defendants also ignore that availing themselves of the administrative process itself required Plaintiffs to retain experts and that any administrative process here would have been futile given that it could not address the Moving Defendants role in obscuring, falsifying, and delaying the release of the case of death—the damage of these actions has already been done: Given the Medical Examiner's actions in concealing police involvement in the four months leading up to the release of the autopsy report and its broader pattern of conduct in such cases, Plaintiffs had no reason to believe that availing themselves of this administrative process would have provided them with relief moving forward or remedied the harm already suffered.

For all of the above reasons, Plaintiffs have sufficiently pled facts to state a claim for violation of their right of access to courts as guaranteed by the First and Fourteenth Amendments and Articles 24 and 40 of the Maryland Declaration of Rights.

B. Article 19 of the Maryland Constitution Further Guarantees Plaintiffs' Right of Access to the Courts and Protects Against Government Abuses of the Sort at Issue Here.

Separate and apart from their well-established access-to-court claims under the federal constitution and analogous provisions of the Maryland Declaration of Rights, Plaintiffs have a strong separate court-access claim under Article 19 of the Maryland Declaration of Rights. Article 19 states:

Relief for injury to person or property. That every man, for any injury done to him in

> his person or property, ought to have a remedy by the course of the Law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land.

Although Article 19 has no counterpart in the federal constitution, the constitutions of 38 other states have clauses similar to Maryland's.[12] These provisions—often referred to as "remedy clauses" or "open courts clauses" or "access to the courts clauses"—derive from Chapter 40 of the Magna Carta, as interpreted by Lord Coke. *See Piselli v. 75th Street Med.,* 371 Md. 188, 204-05, 808 A.2d 508, 517-18 (2002) (collecting cases and other authorities).

The Maryland Court of Appeals has explained that "Article 19 of the Maryland Declaration of Rights insures that rights belonging to Marylanders are 'not illegally or arbitrarily denied by the government.'" *Doe v. Doe*, 358 Md. 113, 127, 747 A.2d 617, 624 (2000) (quoting *State v. Bd. of Educ.*, 346 Md. 633, 647, 697 A.2d 1334, 1341 (1997)). Courts have repeatedly held that the rights Marylanders enjoy under this provision are sweeping and expansive:

> [U]nder Article 19, "a plaintiff injured by unconstitutional state action should have a remedy to redress the wrong." *Ashton v. Brown,* 339 Md. 70, 105, 660 A.2d 447, 464–465 (1995). *See Weyler v. Gibson,* 110 Md. 636, 653–654, 73 A. 261, 263 (1909). Moreover, even with regard to causes of action not based upon constitutional violations, "Article 19 does guarantee access to the courts." *Johnson v. Maryland State Police,* 331 Md. 285, 297, 628 A.2d 162, 168 (1993). *See also, e.g., Renko v. McLean,* 346 Md. 464, 484, 697 A.2d 468, 478 (1997); *Murphy v. Edmonds,* 325 Md. 342, 365, 601 A.2d 102, 113 (1992); *Whiting–Turner Contracting Co. v. Coupard,* 304 Md. 340, 360, 499 A.2d 178, 189 (1985).

Id. at 128, 747 A.2d at 624-25.

Moving Defendants' interpretation that the application of Article 19 is limited to instances where a common law remedy has been abrogated by a statute, ECF 59-1 at 13, is far too cramped. The scope of Article 19 is not so narrow that it fails to protect Marylanders when powerful

[12] A list of the states whose constitutions contain remedy clauses can be found in David Schuman, *The Right to a Remedy*, 65 Temp. L.Rev., 1197, 1201 n.25 (1992).

government officials intentionally conspire, obfuscate, misrepresent facts and conspire with police and other government officials to cover up criminal misconduct, hindering and burdening the Plaintiffs' access to the civil courts, and precluding entirely the possibility of justice in the criminal courts. The rationale for applying the protections of Article 19 is even more forceful where, as here, Plaintiffs allege this frustration of their access to the courts is part of a larger pattern of systemic and racially discriminatory conduct.[13]

Moving Defendants wrongly suggest that Article 19 only protects against legislative infringements upon access to the courts. ECF 59-1 at 13. That courts have primarily addressed deprivations of rights under Article 19 in the context of statutory changes prescribing certain practices for would-be litigants does not mean the Article does not protect against intentional, plainly abusive acts of wrongdoing that have the effect of limiting or denying families their rights or their ability to access the courts in other, less common contexts. *See, e.g., Carter v. Maryland*, Civil No. JKB–12–1789, 2012 WL 6021370 (D. Md. Dec. 3, 2012) (concluding plaintiff stated claim for Article 19 denial of access-to-the-courts claim when injured by security procedures and without requiring any showing that plaintiff was ultimately unable to complete court proceedings).[14] Rather, as Moving Defendants acknowledge, Article 19 "prohibits unreasonable restrictions on access to remedies or the courts." ECF 59-1 at 13.

There is nothing "reasonable" about the ways Moving Defendants prevented Plaintiffs from access to remedies and access to the courts. Here, Plaintiffs' ability to seek legal redress was impeded and burdened by an utterly unreasonable, improper, and reckless or intentional effort by

[13] Plaintiffs reiterate that Defendants Fowler and Alexander are sued as individuals for Plaintiffs' State constitutional claims, as discussed below in Section D.

[14] To the extent Plaintiffs' Article 19 claim overlaps with their access-to-courts claims deriving from other constitutional provisions, they incorporate by reference their argument in support of those claims, *supra* pages 10-17.

Defendants Fowler and Alexander to conceal the truth and affirmatively misrepresent the cause of Anton's death. In issuing their patently absurd medical findings, Defendants Alexander and Fowler knew that their report carried the imprimatur of the State, was supposed to be definitive for all manner of official proceedings, and would effectively preclude a governmental investigation of Anton's death. Plaintiffs have been compelled to expend resources to discover the truth and dispute false assertions and findings about the cause of death—prerequisites for bringing any claim against any of the Defendants, because without the causal relationship between the actions of police and Anton's death, there is no wrongful death case for them to bring. And, Plaintiffs have alleged that this was Fowler and Alexander's intent: through their delay, obfuscation, and misrepresentations, they sought to obscure the actual cause of Anton's death and protect the white police officers involved, just as the Moving Defendants have in other cases involving Black men in police custody. AC ¶¶171-90. In addition to preventing the white officers from being held accountable, as alleged in the Amended Complaint, Fowler and Alexander's actions created very real barriers to seeking civil redress or criminal accountability. Moreover, Moving Defendants should not escape liability for their intentional misconduct solely because of Plaintiffs' exceptional determination and investment of considerable resources to overcome the barrier they constructed.[15]

C. Qualified Immunity Does Not Shield Defendants Alexander and Fowler from Liability in this Case.

Moving Defendants are incorrect in their assertion that Defendants Fowler and Alexander are entitled to qualified immunity for the conduct pled by Plaintiffs in Count IV. Qualified immunity is an affirmative defense for which Moving Defendants bear the burden of proof, and

[15] Besides missing the larger point, Moving Defendants' claim that Plaintiffs would be required to "pay either way," ECF 59-1 at 10, does not make sense. But for Moving Defendants' actions, the cause of death would not be a matter of factual dispute and there would be no need to engage expert witnesses to counteract the ME's false findings.

should rarely be granted prior to discovery. *See, e.g.*, *Owens v. Balt. City State's Attorneys' Office*, 767 F.3d 379, 396 (4th Cir. 2014) (citations omitted); *Willingham v. Crooke*, 412 F.3d 553, 559 (4th Cir. 2005). Moreover, the defense is applicable only to civil damages liability, only as to the federal law portions of Count IV, and only for the individual capacity claims asserted by Plaintiffs against Defendants Fowler and Alexander. Qualified immunity is entirely inapplicable to Plaintiffs' claims for declaratory and injunctive relief—the primary claims on this Count—and likewise inapplicable to the state constitutional portions of Count IV. *See, e.g., Miller v. Prince George's Cty., Md.,* 475 F.3d 621, 631 n.5 (4th Cir. 2007) ("Maryland recognizes no immunity for officials committing state constitutional violations.").

The doctrine of qualified immunity shields individual government officials sued under the federal constitution "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (cleaned up). But importantly for purposes of this motion, qualified immunity "does not shield officials when they have acted incompetently or knowingly violated the law." *Owens*, 767 F.3d at 396 (cleaned up). This is precisely what Plaintiffs allege Defendants Fowler and Alexander did.

The Amended Complaint details misconduct by Fowler and Alexander, including abetting a cover-up of Anton's actual cause of death in police custody, consistent with a pattern of such misconduct by Fowler and Alexander with respect to other police killings of Black civilians. In furtherance of this scheme, Moving Defendants withheld and delayed release of medical information to Anton's family, intentionally fabricated a cause of death for Anton, completely ignored contradictory evidence of homicide, contrived a preposterous contributing cause of death of bipolar disorder, and falsified findings in the reports they ultimately released so as to obscure

or deny police responsibility for his killing. This misconduct heightened the pain and hardship to Anton's family in connection with his death, made it impossible for Plaintiffs to seek criminal law accountability for the murder, and erected significant financial obstacles to their ability to pursue a civil rights action—all obstacles to justice and accountability that Plaintiffs assert were the intended aims of the Moving Defendants. Viewing the facts alleged in the light most favorable to Plaintiffs, no reasonable licensed medical examiner could conclude that this conduct was constitutionally permissible.

The Supreme Court long ago made clear that qualified immunity does not shield from liability officials who engage in conduct that is obviously unlawful. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). The Fourth Circuit recently reiterated this in rejecting a qualified immunity defense:

> [S]ome things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing. Indeed, it would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt. . . . Accordingly, public officials "'can still be on notice that their conduct violates established law even in novel factual circumstances,' so long as the law provided 'fair warning' that their conduct was wrongful."

Dean v. McKinney, 976 F.3d 407, 417 (4th Cir. 2020) (quoting *Williamson v. Sterling*, 912 F.3d 154, 187 (4th Cir. 2018)).

It was certainly well established and obvious at the time Fowler and Alexander engaged in their lies and fraud that such misconduct violates due process principles embodied in the federal constitution. All reasonable government officials should be on notice that knowingly falsifying official records in material ways violates the U.S. Constitution. *See, e.g., Gilliam v. Sealey,* 932 F.3d 216, 241 (4th Cir. 2019) (upholding district court's denial of qualified immunity where fact issues remained in dispute as to whether officers intentionally fabricated, obscured and failed to

disclose information).[16] Indeed, numerous courts have applied these rulings to falsification of records by medical examiners and coroners, holding specifically that "it is clearly established law that a coroner may not recklessly or intentionally falsify an autopsy report in a manner" that deprives a plaintiff of their constitutional rights. *Goodman*, 708 F. App'x at 890.[17] Just as it is plainly unlawful for a coroner to intentionally falsify an autopsy report in furtherance of an unjustified prosecution of an innocent citizen, it is also improper and unlawful for Defendants Fowler and Alexander to knowingly falsify evidence in furtherance of a scheme to cover up for police involvement in Anton's killing, as Plaintiffs allege they did here.

Moving Defendants have not asserted, nor could they reasonably claim, they were not on notice that it was unlawful to falsely claim in official autopsy reports that Black men were not killed by police when they actually were. There is no basis to dismiss for qualified immunity at this stage, certainly not before Plaintiffs have had an opportunity to obtain discovery.

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[16] *See also Osborne v. Georgiadis,* 679 F. App'x 234 (4th Cir. 2017) (denying qualified immunity to police for reckless, material omissions in warrant application); *Humbert v. Mayor & City Council of Balt. City*, 866 F.3d 546, 556-59 (4th Cir. 2017) ("[A]n officer who intentionally or recklessly puts lies before a magistrate, or hides facts from him, violates the Constitution.") (quoting *Miller*, 475 F.3d at 630-31); *Washington v. Wilmore*, 407 F.3d 274 (4th Cir. 2005) (prohibition on fabrication of evidence by police was sufficiently clear in 1983 to overcome qualified immunity defense).

[17] *See also Burke v. Town of Walpole*, 405 F.3d 66, 89 (1st Cir. 2005) ("The intentional or reckless fabrication of inculpatory evidence or omission of material exculpatory evidence by a forensic examiner . . . may amount to a constitutional violation."); *Ryland*, 708 F.2d 967 (5th Cir. 1983) (government officials can be held liable for falsifying cause of death on a death certificate); *Thomas v. City of Troy*, 293 F. Supp. 3d 282, 300 (N.D.N.Y. 2018) (denying qualified immunity for coroner and citing cases that "the right to be free from fabricated evidence in the form of falsified autopsy report is clearly established.").

D. The Eleventh Amendment Does Not Shield Alexander or Fowler From Liability for Plaintiffs' State Constitutional Claims.

The Moving Defendants assert Eleventh Amendment immunity as to those portions of Count IV that fall under the *state* constitution.[18] ECF 59-1 at 19. Moving Defendants argue, incorrectly, that even if they did violate Plaintiffs' rights to equal access to the courts under the Maryland Declaration of Rights, they are absolutely immune from liability on the state law claim under the Eleventh Amendment. *Id.* at 19-20. The basis of their claim is that: 1) the Maryland Tort Claims Act (MTCA) waives sovereign immunity only for actions filed in state court; and 2) absent valid waiver, the Eleventh Amendment, as interpreted by the Supreme Court in *Pennhurst State School & Hosp. v. Haldeman*, 465 U.S. 89, 101 (1984), strips federal courts of jurisdiction over state law claims, leaving this Court powerless to address these violations. Moving Defendants' analysis is flawed because Defendants David Fowler and Russell Alexander are being sued here individually, for their personal wrongdoing, which renders the Eleventh Amendment inapplicable.

1. *The State of Maryland's Eleventh Amendment immunity does not excuse state law violations committed by individual officials with malice or gross negligence.*

As discussed above, Plaintiffs' access-to-the-courts claim (Count IV) is asserted against Defendants Fowler, Alexander, and Weedn,[19] not against the State as an entity. Thus, while Moving Defendants are correct that the MTCA limits the state's waiver of sovereign immunity to claims filed against *the state* in state court, *see, e.g.*, *Weller v. Dep't of Soc. Servs. for the City of*

[18] Defendants raise no Eleventh Amendment argument with respect their liability for their federal constitutional violations embodied in Count IV or under the Americans with Disabilities Act or the Rehabilitation Act. Nor could they.

[19] Dr. Weedn joined the Medical Examiners' office after Anton's killing and had no personal role in the matter. He therefore is named only as a Defendant in his official capacity, pursuant to *Ex Parte Young*, on the federal portions of Count IV seeking equitable relief.

Balt., 901 F.2d 387, 397 (4th Cir. 1990), this argument is not applicable to Count IV, because it is not brought against the State, but rather against Defendants Fowler and Alexander. Maryland law and the Eleventh Amendment permit Plaintiffs' state constitutional claims to proceed in this Court.

The MTCA does not insulate individual officials from being sued in federal court for state law claims involving allegations of gross negligence or malice, rendering meaningless the MTCA's limitation of claims arising from that conduct to state court. *Barbre v. Pope*, 402 Md. 157, 190 (2007). Under Maryland law "malice" includes "wrongful motive, intent to injure, knowing and deliberate wrongdoing, ill-will or fraud." *Lee v. Cline*, 384 Md. 245, 268 (2004) (quotation marks and ellipsis omitted). Gross negligence includes "an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another." *Cooper v. Rodriguez*, 443 Md. 680, 708 (2015).

In the wake of Anton's death, certain Defendants immediately began to spread false narratives about his cause of death. *See* AC ¶¶158-159. Even as credible information called these narratives into question, the Moving Defendants contributed to this false narrative by obscuring the police's involvement in Anton's death. *See* AC ¶¶175. The Moving Defendants intentionally refused to release toxicology results which made clear that Anton had not ingested any drugs. AC ¶¶165. The Moving Defendants also refused to release their autopsy report which was authored by Fowler and Alexander, and continued to promulgate false narratives, blaming Anton's death on mental illness or on drugs—allegations they knew to be false based on toxicology reports in their possession. AC ¶¶164, 171. In addition, the autopsy report (signed by Fowler and Alexander) failed to address the 43 blunt force trauma wounds contribution to Anton's death and failed to address the fact that Anton was restrained in a prone position for more than six minutes. AC ¶175.

These facts show malice and gross negligence. As a direct result of Moving Defendants' ill-will and obfuscation, Plaintiffs' ability to seek legal redress was significantly impaired.

Unlike federal law, which distinguishes between a government employee's official and individual capacities, Maryland law maintains no such fiction. *Ritchie v. Donnelly*, 324 Md. 344, 373 (Md. 1991) (no distinction as to whether a state official was acting in his official or individual capacity exists with regard to actions against individual public officials grounded upon alleged violations of Maryland constitutional rights). Rather, Maryland case law teaches that "[p]ublic officials who violate Maryland's Constitution do so at their peril; they are entitled to no common-law immunity whatsoever." *Md. Comm. Against the Gun Ban v. Simms*, 835 F. Supp. 854, 868 (D. Md. 1993), *rev'd on other grounds*, 30 F.3d 130 (4th Cir. 1994).

The ability of Marylanders to secure redress directly against officials who violated their constitutional rights, notwithstanding sovereign immunity, is itself a principle of Maryland constitutional law. As the Court of Appeals held in *Ashton v. Brown,* 339 Md. at 105:

> [T]he principle that individual state officials should not be immune from suit for state constitutional violations is bound up with the basic tenet, expressed in Article 19 of the Maryland Declaration of Rights, that a plaintiff injured by unconstitutional state action should have a remedy to redress the wrong.

Thus, it is not surprising that many federal courts have concluded that individual state employees who commit state constitutional violations can be sued in their individual capacity without implicating the State entity's Eleventh Amendment immunity. *See, e.g., Canter v. Mamboob*, No. GJH-17-908, 2020 WL 1331894, at *17 (D. Md. Mar. 23, 2020).[20] Accordingly, Plaintiffs have stated viable claims arising under the Maryland Constitution against Defendants

[20] *Ying Jing Gan v. City of New York,* 996 F.2d 522, 529 (2d Cir.1993); *Wilson v. UT Health Ctr.,* 973 F.2d 1263, 1271 (5th Cir.1992) (Eleventh Amendment does not deprive federal courts of jurisdiction over state law claims against state officials strictly in their individual capacities).

Alexander and Fowler. Plaintiffs have sufficiently pled viable claims against Defendants Fowler and Alexander for depriving Plaintiffs' access to the courts and ability to seek legal redress, and Plaintiffs have also adequately alleged that Fowler and Alexander acted with malice and gross negligence in doing so. There is no basis to dismiss these claims.

2. Pennhurst *also does not strip this Court of jurisdiction over Plaintiffs' state constitutional claims.*

Similarly unavailing is Moving Defendants' related argument that the Supreme Court's 1984 *Pennhurst* ruling interprets the Eleventh Amendment as depriving federal courts of jurisdiction over all state law claims asserted against the state and its officials, absent a clear waiver of that immunity. Again, the flaw in this argument is the Moving Defendants' failure to recognize the significance of Plaintiffs' claims alleging state constitutional violations committed with gross negligence or actual malice by Fowler and Alexander individually. *Pennhurst* simply does not reach such a claim.

Congress granted federal courts general jurisdiction over supplemental state law claims under 28 U.S.C. § 1367, which allows this Court to hear state law claims against properly named defendants. This means when plaintiffs sue the State and its officials in federal court for civil rights violations they are permitted to sue both the State itself—as Plaintiffs do here under the ADA and Rehabilitation Act—and also to name as defendants individual government wrongdoers, as Plaintiffs have done here with respect to Defendants Fowler and Alexander. For these reasons, Moving Defendants' Eleventh Amendment immunity defense should be rejected, and Plaintiffs' claims under the Maryland Constitution (Count IV) should be allowed to proceed.

II. Plaintiffs Have Adequately Pled That the State of Maryland Violated the ADA and Section 504 of the Rehabilitation Act (Counts X, XI).

Moving Defendants are liable under the ADA and Rehabilitation Act for designating Anton Black's bipolar disorder as a cause of death, discriminating against him on the basis of his

disability, to cover up the true cause of his death: excessive police force. Moving Defendants misattribute these claims to "Anton Black's estate," and incorrectly contend that (i) the claims cannot be brought posthumously, ECF 59-1 at 16-17, and (ii) that no other Plaintiff can bring these claims because they are not "qualified individuals with a disability." ECF 59-1 at 18-19. These arguments misconstrue the Amended Complaint and badly misstate basic principles of anti-discrimination law, which recognize that the Family Plaintiffs and CJAB have standing to sue in their own right for their harm caused by Moving Defendants' discrimination.

In order to state a claim under Title II of the ADA and Section 504 of the Rehabilitation Act, the plaintiff must demonstrate that a defendant discriminated against someone who: 1) has a disability; 2) is otherwise qualified to receive the benefits of a public service, program, or activity; and 3) was excluded from participation in or denied the benefits of such service, program, or activity, or otherwise discriminated against, on the basis of her disability. *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 498 (4th Cir. 2005). In their brief, Moving Defendants do not dispute *any* of these elements with respect to their actions towards Anton Black, who had a disability, was otherwise qualified, and was discriminated against on the basis of his disability when the Moving Defendants wrongfully attributed his bipolar disorder as being a "significant contributing cause of his death." AC ¶284.

The Family Plaintiffs and CJAB have standing to sue on their own behalf for the State's discrimination against Anton because the State's discrimination caused them direct harm. Title II of the ADA and Section 504 of the Rehabilitation Act provide for a cause of action based on associational discrimination, which "permits a plaintiff to bring suit on its own behalf for injury it itself suffers because of its association with an ADA-protected third party." *A Helping Hand, LLC v. Balt. Cty., Md.*, 515 F.3d 356, 363 n.3 (4th Cir. 2008); *see Ganzzermiller v. Univ. of Md. Upper*

Chesapeake Med. Ctr., No. CCB-16-3696, 2019 WL 4751457, at *9 (D. Md. Sept. 30, 2019) (stating that the Fourth Circuit has "held that Title II of the ADA permits associational discrimination claims, and listing Circuits that have recognized such claims under the Rehabilitation Act).[21] While the Fourth Circuit has yet to address what standard courts should apply in evaluating whether individuals have standing to pursue such a claim under the relevant statutes, district courts within the Fourth Circuit (including this court in *Gazzermiller*), have considered the standards set out in *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 275 (2d Cir. 2009), and *McCullum v. Orlando Reg'l Healthcare Sys.*, 768 F.3d 1135, 1142 (11th Cir. 2014), and concluded that a claimant can recover if "they were personally excluded, personally denied benefits, or personally discriminated against because of their association with a disabled person"—essentially the same standard that the disabled party would need to meet in order to bring a claim on his or her own behalf.[22] *Ganzzermiller*, 2019 WL 4751457, at *9 (citing *McCullum*, 768 F.3d at 1143).

The Family Plaintiffs can bring such a claim because of the injuries they suffered resulting from Moving Defendants' discrimination. By falsely and implausibly claiming that Anton died from his bipolar disorder, Moving Defendants harmed the Family Plaintiffs by denying them the dignity of official recognition of the true cause of their immediate relative's death—excessive force—and discriminated against him by denigrating his disability. Indeed, not only was the

[21] The Fourth Circuit has stated that for associational discrimination claims, the plaintiff cannot be "loose[ly] associate[ed]" with the disabled party, such as a doctor who has only a loose association with disabled patients. *A Helping Hand, LLC*, 515 F.3d at 364 n.4 (quoting *Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205, 216 (4th Cir. 2002)). This concern is plainly inapplicable to family members discriminated against because of their association with a disabled child.

[22] The *McCullum* court rejected the *Loeffler* standard because the court viewed it as providing non-disabled persons with more rights under the ADA and Rehabilitation Act than disabled persons. *McCullum*, 768 F.3d at 1143; *accord Ganzzermiller*, 2019 WL 4751457, at *9.

State's autopsy report shocking because of its blatant falsity, but it further harmed the Black Family by effectively derailing the Family Plaintiffs' efforts to hold the appropriate parties accountable. AC ¶¶172–195, 208. Specifically, as a result of the Medical Examiner's improper and false characterization of the cause of Anton's death, the State's Attorney determined there was no cause for a criminal prosecution, and the Black Family was forced to hire multiple experts to counter the blatantly false report. *Id.* at ¶¶194–195. The Amended Complaint sufficiently establishes for purposes of Rule 12 that the Family Plaintiffs were "personally denied [the] benefits" of receiving a truthful and accurate autopsy report from the State of Maryland. *McCullum*, 768 F.3d at 1143.

For similar reasons, Plaintiff CJAB may assert a claim arising out of the Moving Defendants' discrimination against Anton because that discrimination caused CJAB to suffer an injury-in-fact. *See generally Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 (1982). An organization, such as CJAB, may sue for discriminatory actions that harm the organization itself, as long as the discrimination in question frustrates the mission of the organization and causes the organization to divert resources. "Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests . . . ." *Id.* at 379. Such allegations are sufficient to establish standing from the alleged discrimination. *Id.*; *accord Equal Rts. Ctr. v. Abercrombie & Fitch Co.*, 767 F. Supp. 2d 510, 519 (D. Md. 2010), *on reconsideration in part* (Jan. 31, 2011).[23]

Here, Plaintiffs have alleged that CJAB is a grassroots membership organization formed in the wake of Anton's killing in 2018 to promote accountability for law enforcement misconduct

[23] Because CJAB is asserting injury to itself, the argument that CJAB has not established associational standing is irrelevant. ECF 59-1 at 19. The presence of a single plaintiff with standing is sufficient. *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 53 n.2 (2006).

and prevent police violence on the Eastern Shore of Maryland. AC ¶10. CJAB works towards these goals by organizing its members to engage in advocacy for police reform, and specifically advocates for reform to address discrimination and violence against Black people, including those experiencing disabilities, who are often most vulnerable to police violence. *Id.* The Moving Defendants' complicity in covering up the true causes of Anton's death has burdened the advocacy efforts of CJAB, which, along with the Black Family, has had to assume government responsibilities to ensure the wrongdoing that occurred is properly investigated. *Id.* ¶208. The Moving Defendants' false findings as to the cause of Anton's death thwarted CJAB's ability to hold police accountable for discrimination against Black people, including those with disabilities. *Id.* ¶245. As a result, CJAB, along with members of the Black Family, had to spend significant time and resources to disprove the Medical Examiner's misrepresentations. *Id.* ¶¶245, 313. These allegations are sufficient for purposes of Rule 12 to show that CJAB has standing to sue Moving Defendants for violating Anton's rights under the ADA and Rehabilitation Act.[24]

The Moving Defendants' argument that a survival action on behalf of Anton's estate cannot be brought for posthumous discrimination, 59-1 at 16-17, is irrelevant to the above claims because Plaintiffs have not asserted their federal anti-discrimination claims on behalf of the estate: the claims of the Family Plaintiffs and CJAB are brought directly under the federal anti-discrimination

[24] Prudential limitations on standing, which "normally bar[ ] litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves," may be waived by Congress, and are inapplicable to the Family Plaintiffs' and CJAB's claims under Title II of the ADA and Section 504 of the Rehabilitation Act because of the broad language of those statutes' enforcement provisions. *See, e.g.*, *A Helping Hand, LLC*, 515 F.3d at 362 (no prudential limitations for Title II associational discrimination claim); *MX Grp., Inc. v. City of Covington*, 293 F.3d 326, 336 (6th Cir. 2002) (prudential limitations did not apply to Title II ADA and Rehabilitation Act organizational standing claim). Similarly, given the extremely broad enforcement language of both statutes, there is no doubt that the Family Plaintiffs' and CJAB's claims fall within the "zone of interests" protected by the ADA and Rehabilitation Act. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125 (2014).

laws and do not depend on the Maryland survival statute. There is no basis to conclude that CJAB and the Black Family cannot bring their ADA and Rehabilitation Act claims on their own behalf because Anton is deceased. The purpose of the ADA "is [to] provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101. Individuals do not cease to be members of a protected class when they die. *See Scott v. Eversole Mortuary*, 522 F.2d 1110, 1113 (9th Cir. 1975). Indeed, the ADA expressly includes funeral parlors within the definition of public accommodation, 42 U.S.C.A. § 12181, and the ADA Compliance Guide is clear that the ADA extends beyond death, stating that discrimination extends to "[a] funeral home that refused to provide funeral services for a person who died from AIDS-related complications." ADA Compliance Guide, ¶138 HIV/AIDS, 2017 WL 10992552 (June 2020).[25] In sum, there is no basis to conclude, in the statutory text or otherwise, that the ADA and Rehabilitation Act[26] become inapplicable at death.

III. Plaintiffs Have Stated a Civil Conspiracy Claim.

Plaintiffs have adequately pled a civil conspiracy claim against the Moving Defendants in Count 13, just as they adequately pled such claim against the other Defendants, *see* ECF No. 53 at 46-49. To state a claim for civil conspiracy, a plaintiff must allege: "1) [a] confederation of two

[25]For similar reasons, the Maryland Attorney General has opined that "the refusal to treat . . . an HIV-positive . . . body constitutes discrimination"; and that although a person may be deceased, "*the deceased is the disabled individual*"; that the family or friends of the deceased have standing to bring discrimination claims under the ADA; and that funeral homes must make reasonable accommodations, and may not impose higher charges, when working with an HIV-positive person's body. 77 Md. Op. Att'y Gen. 100 (1992) (emphasis added).

[26] The Court should not reach a different conclusion for the Rehabilitation Act because, "[t]o the extent possible, [courts] construe the ADA and Rehabilitation Act to impose similar requirements." *Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 461 (4th Cir. 2012).

or more persons by agreement or understanding; 2) some unlawful or tortious act done in furtherance of the conspiracy or use of lawful or tortious means to accomplish an act not in itself illegal; and 3) [a]ctual legal damage resulting to the plaintiff." *Lloyd v. Gen. Motors Corp.*, 397 Md. 108, 154 (2007) (quoting *Van Royen v. Lacey*, 262 Md. 94, 97-98 (1971)).

The only element that Moving Defendants contest is the third, arguing that Plaintiffs have not shown a violation that resulted in legal damage. ECF No. 59-1 at 22. This argument falls short for the same reasons that Moving Defendants' argument for dismissal of Count IV falls short. *See supra* Sec. I.A.–B. It also fails for the additional reason that Plaintiffs rest their claim on constitutional violations beyond those asserted in Count IV: the violation of Plaintiffs' right to due process under Article 24 of the Maryland Declaration of Rights. AC ¶309. That violation is well-supported by the allegations in the Amended Complaint, and Moving Defendants have not addressed it in their brief. The Amended Complaint contains numerous allegations and details about the Defendants' roles and acts in furtherance of the cover-up, *see* AC ¶¶158–61, 164–166, 171–77, 182–83, 185, 190, 194–95, 310–14, and about the harm that resulted, AC ¶¶310–14.

As they did with Plaintiffs' state constitutional claims in Count IV, Moving Defendants also contend that the Eleventh Amendment, as interpreted in *Pennhurst*, immunizes them from liability for conspiring with the other Defendants to cover up and misrepresent police responsibility for Anton's killing. But as noted above, the Eleventh Amendment does not shield from liability a defendant who acted with malice or gross negligence, nor does *Pennhurst* reach such claims. *See supra* Sec. I.D. Plaintiffs have adequately alleged that Defendants Alexander and Fowler acted with malice and gross negligence as members of the civil conspiracy.[27]

[27] Plaintiffs concede that the Eleventh Amendment and *Pennhurst* shields the State of Maryland and Weedn, who is sued only in his official capacity, from suit in federal court as to Plaintiffs'

Defendants Alexander and Fowler's complicity in the cover-up demonstrates their deliberate and malicious wrongdoing. Alexander and Fowler declined to release the medical examiner's toxicology report because that report concluded that Anton had no drugs in his system, AC ¶171, and conspired with other government officials to hide the true cause of Anton's death instead of reviewing actual evidence, *id*. ¶176. At minimum, Defendants Alexander and Fowler acted with gross negligence. Among other things, Alexander and Fowler released an autopsy report stating that bipolar disorder contributed to Anton's death, even though no reasonable medical professional would make that assertion. AC ¶172. And the rest of the report further belied both evidence and medical knowledge. *See id*. ¶¶177-83. For example, Moving Defendants failed to address 43 blunt-force-trauma wounds' contribution to Anton's death and failed to address that Anton was restrained in a prone position for more than six minutes. AC ¶175. Instead of focusing on relevant, Moving Defendants doubled down on a false narrative that Anton had smoked "spice," ignoring toxicology reports that directly contradicted those claims. AC ¶176. The lack of regard for evidence or scientific support demonstrates that Alexander and Fowler were grossly negligent in performing their duties, and that gross negligence aided the Defendants' civil conspiracy.

Thus, the Eleventh Amendment does not prevent Plaintiffs from bringing their civil conspiracy claim against Defendants Alexander and Fowler in federal court.

IV. Any Dismissed Claims Should Be Dismissed Without Prejudice.

For the reasons discussed above, Plaintiffs respectfully ask this Court to deny the Moving Defendants' motion to dismiss. If this Court concludes that Plaintiffs have not adequately pled claims against Moving Defendants, such a dismissal should be without prejudice. Since the

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Count 13 civil conspiracy claim. *Supra* Sec. I.D. The claim against the State and Weedn only should be dismissed without prejudice so that Plaintiffs may re-file it in state court.

Amended Complaint was filed and in the wake of Dr. Fowler's testimony in the Chauvin trial, extensive additional information has come to light about the Moving Defendants' complicity in police-custody deaths, and it is reasonable to expect further incidents will be identified.

Of course, the Amended Complaint contains specific allegations regarding incidents of misconduct by the Moving Defendants beyond those in Anton's case that show a pattern of unlawful conduct by the Moving Defendants with respect to police death-in-custody cases. *See, e.g., Shaw v. Stroud*, 13 F.3d 791, 800-01 (4th Cir. 1994) (holding that three incidents of excessive force were enough to establish a pattern of deliberate indifference). This Court may take judicial notice of the additional incidents identified in the wake of Dr. Fowler's recent testimony. *See James v. Acre Mortg. & Fin., Inc.*, 306 F. Supp. 3d 791, 799 (D. Md. 2018) ("This Court may take judicial notice of 'docket entries, pleadings and papers in other cases, … as well as 'newspaper articles, analysts' reports, and press releases.'") (citations omitted), *reversed and remanded on other grounds sub nom. Edmonson v. Eagle Nat'l Bank*, 922 F.3d 535 (4th Cir. 2019). These facts warrant denial of the motion.

CONCLUSION

For the reasons discussed above, Moving Defendants' Motion to Dismiss should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of May, 2021, a copy of the foregoing memorandum of law was electronically filed in this case through the ECF system and served electronically upon counsel of record.

/s/ John A. Freedman
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