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**IN THE COURT OF APPEALS OF MARYLAND**

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**No. 84**  
**September Term, 2014**

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**MARYLAND DEPARTMENT OF STATE POLICE,**

*Petitioner,*

v.

**TELETA S. DASHIELL,**

*Respondent.*

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On Writ of Certiorari to the Court of Special Appeals

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**BRIEF OF *AMICI CURIAE* CASA DE MARYLAND, CAUCUS OF AFRICAN-AMERICAN LEADERS, HOWARD UNIVERSITY SCHOOL OF LAW CIVIL RIGHTS CLINIC, MARYLAND STATE CONFERENCE OF NAACP BRANCHES, PUBLIC JUSTICE CENTER, AND SOMERSET COUNTY ORGANIZATIONAL PARTNERSHIP**

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## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
INTERESTS OF <i>AMICI</i> .....	2
ARGUMENT .....	5
I. THE NEED TO ADDRESS POLICE MISCONDUCT IS A SOCIETAL INTEREST OF THE UTMOST IMPORTANCE AND URGENCY .....	5
A. The deaths of several unarmed Black men have prompted renewed focus on the persistent problem of police misconduct and its disproportionate effect on communities of color .....	5
B. Hundreds of police misconduct allegations are substantiated through internal investigations and lawsuits each year in Maryland, the victims overwhelmingly persons of color .....	8
II. CURRENT STRATEGIES FOR DETERRING POLICE MISCONDUCT ARE CONSTRAINED BY SIGNIFICANT LIMITATIONS .....	11
A. Civil litigation .....	11
B. Criminal prosecution .....	13
C. Internal affairs investigations .....	16
III. PERMITTING DISCLOSURE OF POLICE MISCONDUCT INVESTIGATIONS WOULD PROVIDE THE PUBLIC WITH A POWERFUL MEANS OF ADDRESSING POLICE MISCONDUCT AND RESTORING TRUST IN POLICE .....	18
A. Disclosure of records of police misconduct investigations allows the public to uncover police abuses and inadequacies in investigations .....	18
B. Increased transparency builds trust between police and the communities that they serve .....	21
CONCLUSION .....	25
CERTIFICATE OF SERVICE .....	26

## TABLE OF AUTHORITIES

### CASES

<i>City of Balt. Dev. Corp. v. Carmel Realty Assocs.</i> , 395 Md. 299 (2006) .....	4
<i>Doe v. Marsalis</i> , 202 F.R.D. 233 (N.D. Ill. 2001) .....	13, 18
<i>Fields v. State</i> , 432 Md. 650 (2013).....	20
<i>Great Falls Tribune Co. v. Cascade Cnty. Sheriff</i> , 775 P.2d 1267 (Mont. 1989) .....	24
<i>Hawk Eye v. Jackson</i> , 521 N.W.2d 750 (Iowa 1994) .....	19
<i>Ireland v. Shearin</i> , 417 Md. 401 (2010) .....	4
<i>Jones v. Jennings</i> , 788 P.2d 732 (Alaska 1990).....	24
<i>Kelly v. City of San Jose</i> , 114 F.R.D. 653 (N.D. Cal. 1987).....	20, 21
<i>King v. Conde</i> , 121 F.R.D. 180 (E.D.N.Y. 1988) .....	20
<i>Massey v. Galley</i> , 392 Md. 634 (2006).....	4
<i>Martin v. Connor</i> , 287 F.R.D. 348 (D. Md. 2012).....	20
<i>Md. Dep't of State Police v. Md. State Conference of NAACP Branches</i> , 430 Md. 179 (2013) .....	4
<i>Mercy v. Cnty. of Suffolk</i> , 93 F.R.D. 520 (E.D.N.Y. 1982) .....	21
<i>Montgomery Cnty. Md. v. Shropshire</i> , 420 Md. 362 (2011).....	24
<i>S.F. Police Officers' Ass'n v. Super. Ct.</i> , 202 Cal. App. 3d 183 (1988).....	24
<i>Stern v. FBI</i> , 737 F.2d 84 (D.C. Cir. 1984).....	19
<i>Welsh v. City &amp; Cnty. of San Francisco</i> , 887 F. Supp. 1293 (N.D. Cal. 1995).....	19
<i>Wiggins v. Burge</i> , 173 F.R.D. 226 (N.D. Ill. 1997) .....	19
<i>Worcester Telegram &amp; Gazette Corp. v. Chief of Police of Worcester</i> , 787 N.E.2d 602 (Mass. App. Ct. 2003).....	22

## STATUTES

42 U.S.C. § 1983 .....	11
Md. Code Ann., Pub. Safety § 3-107 .....	17

## OTHER AUTHORITIES

ACLU of Maryland, <i>Briefing Paper on Deaths in Police Encounters in Maryland, 2010–2014</i> (2015) .....	10, 11, 14
Adam Dunn & Patrick J. Caceres, <i>Constructing a Better Estimate of Police Misconduct</i> , 7 <i>PolicyMatters J.</i> 10 (2010) .....	18
Alison L. Patton, <i>The Endless Cycle of Abuse: Why § 1983 Is Ineffective in Deterring Police Brutality</i> , 44 <i>Hastings L.J.</i> 753 (1993).....	passim
Ben Casselman, <i>It's Incredibly Rare for a Grand Jury to Do What Ferguson's Just Did</i> , Nov. 24, 2104 .....	15
Cato Institute, <i>National Police Misconduct Reporting Project 2010 Annual Report</i> ..	10, 14
Christopher Cooper, <i>Yes, Virginia, There is a Police Code of Silence: Prosecuting Police Officers and the Police Subculture</i> , 45 <i>Crim. L. Bull.</i> 277 (2009).....	15, 16
Editorial, <i>State Police Silent on Punishment for Racial Slur</i> , <i>Balt. Sun</i> , Mar. 2, 2010 .....	19, 23
Frank Newport, <i>Gallup Review: Black and White Attitudes Toward Police Criminal Justice System Viewed Sceptically by Blacks</i> , Aug. 20, 2014.....	7
James B. Comey, Dir., FBI, <i>Speech at Georgetown University</i> (Feb. 12, 2015) .....	8
Joanna C. Schwartz, <i>Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking</i> , 57 <i>UCLA L. Rev.</i> 1023 (2010).....	13
Joanna C. Schwartz, <i>What Police Learn from Lawsuits</i> , 33 <i>Cardozo L. Rev.</i> 841 (2012) .....	9, 16, 17
John Lewis, <i>Michael Brown, Eric Garner, and the 'Other America'</i> , <i>Atlantic</i> , Dec. 15, 2014.....	1
Judith A.M. Scully, <i>Rotten Apple or Rotten Barrel?: The Role of Civil Rights Lawyers in Ending the Culture of Police Violence</i> , 21 <i>Nat'l Black L.J.</i> 137 (2009) .....	passim

Justin Fenton, <i>Independent Review Faults City Police in Tyrone West Case</i> , Balt. Sun, Aug. 8, 2014.....	6
Justin Fenton, <i>Police Commissioner Batts Says Police Need to Tackle Racism to Build Trust</i> , Balt. Sun, Feb. 13, 2015 .....	24
Justin Fenton, <i>Tyrone West Files Show Passenger’s Account of Death in Police Custody</i> , Balt. Sun, Jan. 23, 2014 .....	5, 6
Kari Hong, <i>It’s Time to Get Rid of Grand Juries</i> , Bos. Globe, Dec. 5, 2014 .....	15
Kevin M. Keenan & Samuel Walker, <i>An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills of Rights</i> , 14 B.U. Pub. Int. L.J. 185 (2005) .....	22
Mark Puente, <i>Undue Force</i> , Balt. Sun, Sept. 28, 2014.....	9, 14
Pew Research Center, <i>Few Say Police Forces Nationally Do Well in Treating Races Equally</i> , Aug. 25, 2014 .....	7
Rani Molla, <i>Why the Data on Justifiable Homicide Just Won’t Do</i> , Wall St. J., Sept. 2, 2014.....	10
Rich Schapiro, <i>‘If You Snitch, Your Career Is Done’: Former Baltimore Cop Says He Was Harassed, Labeled a ‘Rat’ After Attempt to Root Out Police Brutality</i> , N.Y. Daily News, Jan. 14, 2015 .....	16
Ryan Gabrielson et al., <i>Deadly Force, In Black and White</i> , ProPublica, Oct. 10, 2014 .....	8
Steven D. Zansberg & Pamela Campos, <i>Sunshine on the Thin Blue Line: Public Access to Police Internal Affairs Files</i> , 22 Comm. Law. 34 (2004).....	19, 22
U.S. Dep’t of Justice Office of Community Oriented Policing Services, <i>Building Trust Between the Police and the Citizens They Serve: An Internal Affairs Promising Practices Guide for Local Law Enforcement</i> (2014).....	21, 22
Wesley Lowery, <i>How Many Police Shootings a Year? No One Knows</i> , Wash. Post, Sept. 8, 2014.....	8

## INTRODUCTION

The deaths of several unarmed Black men have recently shined a spotlight on the ever-present problem of police misconduct and sparked a national dialogue about how police departments interact with and relate to communities of color. Here in Maryland, the 2013 death of Tyrone West while in the custody of the Baltimore Police Department has brought this debate into sharp focus in our own communities. John Lewis, borrowing the words of Dr. Martin Luther King, Jr., describes the reality of “the other America” illustrated by these tragic deaths:

One group of people in this country can expect the institutions of government to bend in their favor, no matter that they are supposedly regulated by impartial law. In the other, children, fathers, mothers, uncles, grandfathers, whole families, and many generations are swept up like rubbish by the hard, unforgiving hand of the law.

John Lewis, *Michael Brown, Eric Garner, and the ‘Other America’*, Atlantic, Dec. 15, 2014.

The relationship between the police and the communities they serve is central to the case before the Court. The Court is asked to determine whether the Maryland Department of State Police’s (MSP) blanket refusal to disclose records of an internal investigation into a sustained complaint of misconduct by a police officer can pass muster under the Maryland Public Information Act (PIA). Teleta Dashiell’s complaint that Sergeant John Maiello used a racial slur in a recorded voicemail on her cell phone was sustained and Sergeant Maiello was disciplined. That much is known. Nothing is known by anyone outside the MSP about how the investigation was conducted, what evidence was considered, what discipline the MSP deemed appropriate to address Sergeant Maiello’s offensive conduct, or whether any action was taken more generally to address an agency culture in which officers feel comfortable using racial slurs to describe

members of the public when they think no one is listening. Ms. Dashiell and the public do not know whether his actions were an aberration for the MSP, or part of a larger pattern. In short, the public knows nothing about the process and little about the result despite the serious implications of Sergeant Maiello's conduct for the MSP's relationship with the communities they serve, particularly communities of color.

Police misconduct is a problem of striking proportions nationally and here in Maryland, with dire consequences for those who suffer mistreatment at the hands of police and for the community as a whole. The limitations of current approaches for deterring police misconduct highlight the value of transparency in internal investigations as a powerful aid to advocacy efforts. Disclosure of records of misconduct investigations provides information about the scope of the problem and allows the public to assess the department's commitment to eradicating misconduct by officers. Greater transparency in misconduct investigations permits the public to identify deficiencies in the process where they exist and allays concerns when complaints are taken seriously and investigated thoroughly. By increasing accountability, disclosure of records of misconduct investigations builds trust between the police and the communities they serve.

*Amici* thus urge the Court to consider the compelling public interests at stake in this case. As has been said, "the obligation to endure gives us the right to know."<sup>1</sup>

### **INTERESTS OF *AMICI***

**CASA de Maryland, Inc.** is the state's largest Latino and immigrant rights and services organization with more than 65,000 individual members, 100 full-time staff, and seven offices across the state. CASA frequently advocates on behalf of individual

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<sup>1</sup> Jean Rostand, Acceptance Speech of the 1959 Kalinga Prize for the Popularization of Science (Apr. 21, 1960).

immigrants who have been adversely impacted by official misconduct as well as on community-wide issues of importance to immigrants. CASA is interested in the outcome of this appeal because of its frequent work on behalf of victims of police brutality and racial profiling. In more than a dozen police misconduct cases that CASA has confronted, the lack of access to records regarding the official investigation has hampered community trust and left CASA members directly impacted by the misconduct in an informational vacuum. Greater disclosure of records like those at issue here would aid CASA's efforts to reform law enforcement agencies and rebuild community-police trust.

The **Caucus of African-American Leaders** (CAAL) is a consortium of African-American leaders whose membership includes organizations ranging from the NAACP to the Black Chamber of Commerce. The CAAL is a community-based organization that addresses issues which adversely impact the African-American community in the State of Maryland. It collaborates with civil rights and civil liberties organizations on issues of social justice and has worked on cases involving alleged police misconduct and racial injustice. The CAAL has an interest in the outcome of this appeal because the Court's decision will determine the extent of public access to records of police misconduct investigations. Greater disclosure of records like those at issue here would aid the efforts of the CAAL and other organizations to address police misconduct in Maryland.

Founded in 1869, Howard University School of Law is the oldest historically Black law school and among the oldest law schools in the United States. The School has long placed the defense of human rights, equality and dignity at the heart of its educational practice. As part of that educational mission, the **Civil Rights Clinic at Howard University School of Law** engages in trial and appellate impact litigation in the service of human rights, social justice, economic fairness and political equality. The

Clinic seeks to participate in this case because police transparency is a fundamental measure by which any good society evaluates the constitutionality of law enforcement.

The **Maryland State Conference of NAACP Branches** represents the twenty-four county branches of the NAACP in Maryland. The NAACP is the nation's oldest and largest civil rights organization. Its mission is to ensure the political, educational, social, and economic equality of rights of all persons and to eliminate race-based discrimination. The Maryland State Conference NAACP has been actively engaged in addressing police misconduct in Maryland, and has litigated the extent of access to the MSP's records of investigations into complaints of racial profiling. *See Md. Dep't of State Police v. Md. State Conference of NAACP Branches*, 430 Md. 179 (2013). The Maryland State Conference NAACP is thus vitally interested in the outcome of this case as it will further define the ability to access misconduct investigation records under the PIA.

The **Public Justice Center** (PJC), a non-profit civil rights and anti-poverty legal services organization founded in 1985, has a longstanding commitment to protecting the broad right of access to public records provided by the PIA. The PJC has fought to ensure government transparency through its Appellate Advocacy Project, which seeks to improve the representation of indigent and disadvantaged persons and their interests before state and federal appellate courts. The Appellate Advocacy Project has represented individuals or submitted *amicus curiae* briefs in several cases involving the right of access under the PIA. *See, e.g., Ireland v. Shearin*, 417 Md. 401 (2010); *City of Balt. Dev. Corp. v. Carmel Realty Assocs.*, 395 Md. 299 (2006); *Massey v. Galley*, 392 Md. 634 (2006). The PJC seeks to participate as an *amicus* here because the outcome of this case will significantly impact efforts to address police misconduct in Maryland and further define the public right of access provided by the PIA.

The **Somerset County Organizational Partnership** is a coalition of African-American leaders in Somerset County, Maryland, who have united to work on issues affecting the African-American community, including police misconduct. The Partnership's membership includes leaders of a variety of prominent community organizations. Teleta Dashiell is a resident of Somerset County and reported Sergeant Maeillo's misconduct to the MSP branch located there. The Partnership has a significant interest in this case because disclosure of the records at issue would provide it with information about how misconduct is addressed by the MSP and may well impact the Partnership's efforts to address police misconduct in the region.

## **ARGUMENT**

### **I. THE NEED TO ADDRESS POLICE MISCONDUCT IS A SOCIETAL INTEREST OF THE UTMOST IMPORTANCE AND URGENCY.**

#### **A. The deaths of several unarmed Black men have prompted renewed focus on the persistent problem of police misconduct and its disproportionate effect on communities of color.**

The deaths of Michael Brown and Eric Garner have focused national attention on the prevalence of police misconduct against persons of color, particularly Black men. The 2013 death of Tyrone West while in the custody of the Baltimore Police Department has brought this debate closer to home. West died during a traffic stop which escalated into a struggle between West and officers who stopped him. Justin Fenton, *Tyrone West Files Show Passenger's Account of Death in Police Custody*, Balt. Sun, Jan. 23, 2014. The officers involved and witnesses on the scene have offered differing accounts of the events that led to his death. *Id.* West's passenger told investigators that West initially fought with the officers but that they continued to hit him after he had stopped resisting, while the officers involved stated that West resumed fighting them after appearing to give

up. *Id.* An autopsy determined that West died due to a heart condition exacerbated by the struggle with police and the high summer temperatures. *Id.*

An independent panel, convened to review the circumstances surrounding West's death, concluded that while officers did not use excessive force, numerous errors and departures from policy by the officers conducting the stop "potentially aggravated the situation." Justin Fenton, *Independent Review Faults City Police in Tyrone West Case*, Balt. Sun, Aug. 8, 2014. Reviewing the Baltimore Police Department as a whole, the panel determined that there are a "continuing number of critical incidents that seem to reveal lapses in tactical decision-making . . . departures from [Department] policies and lack of respect for both youth and adults who are stopped by the police." *Id.* Looking at West's death in particular, the panel identified multiple errors in the investigation, including the failure to record where a bag of cocaine was recovered, to test the bag for West's fingerprints, and to properly catalogue crime scene photos. *Id.* The panel found that the investigation report was "dominated" by discussion of West's criminal history but included no information on the history of the officers involved. *Id.* The panel also criticized the department's failure to communicate adequately with West's family and the community about West's death and their investigation and wrote in its report that "[t]he public's right to know and the need to build community trust are overriding factors." *Id.* Thus, the West case, and the resulting investigation and the transparency it provided, show that such transparency can both assuage concerns about a particular incident and at the same time reveal systemic issues worthy of public concern and police reform.

Prevailing public opinion is that police departments do not hold officers accountable for misconduct or treat racial and ethnic groups equally. A poll conducted by the Pew Research Center in August 2014 reveals that 91% of Blacks and 58% of

whites surveyed say that police departments nationally do a poor or only fair job of holding officers accountable for misconduct. See Pew Research Center, *Few Say Police Forces Nationally Do Well in Treating Races Equally*, Aug. 25, 2014.<sup>2</sup> The same percentages of individuals surveyed—91% of Blacks and 58% of whites—think that police departments do a poor or only fair job of treating racial and ethnic groups equally. See *id.* An analysis of Gallup poll data from 2011–2014 shows that Black people in particular have a low level of confidence in the police, with only 37% of Blacks surveyed reporting a great deal of confidence in police and 25% stating that they have little or no confidence in the police. Frank Newport, *Gallup Review: Black and White Attitudes Toward Police Criminal Justice System Viewed Sceptically by Blacks*, Aug. 20, 2014.<sup>3</sup>

The deep mistrust of the police by Black men and women is grounded in the reality of policing in America. FBI Director James Comey acknowledged this reality in a recent speech. After discussing research establishing the existence of unconscious racial bias among the majority of American society, he addressed what he termed “lazy mental shortcuts” that further influence police officers’ reactions to those around them:

[P]olice officers on patrol in our nation’s cities often work in environments where a hugely disproportionate percentage of street crime is committed by young men of color. Something happens to people of good will working in that environment. After years of police work, officers often can’t help but be influenced by the cynicism they feel.

A mental shortcut becomes almost irresistible and maybe even rational by some lights. The two young black men on one side of the street look like so many others the officer has locked up. Two white men on the other side

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<sup>2</sup> Available at <http://www.people-press.org/2014/08/25/few-say-police-forces-nationally-do-well-in-treating-races-equally/>.

<sup>3</sup> Available at <http://www.gallup.com/poll/175088/gallup-review-black-white-attitudes-toward-police.aspx?version=print>.

of the street—even in the same clothes—do not. The officer does not make the same association about the two white guys, whether that officer is white or black. And that drives different behavior. The officer turns toward one side of the street and not the other. We need to come to grips with the fact that this behavior complicates the relationship between police and the communities they serve.

James B. Comey, Dir., FBI, Speech at Georgetown University (Feb. 12, 2015).<sup>4</sup> And in fact, police encounters have starkly different outcomes for Black and white men. A 2014 analysis of data on police shootings from 2010–2012 reveals that a young Black man is at a twenty-one times greater risk of being fatally shot by police than his white counterpart.<sup>5</sup> Ryan Gabrielson et al., *Deadly Force, In Black and White*, ProPublica, Oct. 10, 2014.<sup>6</sup>

**B. Hundreds of police misconduct allegations are substantiated through internal investigations and lawsuits each year in Maryland, the victims overwhelmingly persons of color.**

Police misconduct is not just a problem in the far-off cities of Ferguson or New York or limited to an isolated occurrence here. Police misconduct plagues Maryland's communities. As noted previously with respect to data on police shootings, figures on police misconduct in Maryland are limited due to the lack of comprehensive and

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<sup>4</sup> Transcript available at <http://www.fbi.gov/news/speeches/hard-truths-law-enforcement-and-race>.

<sup>5</sup> This statistic is derived from data obtained from the FBI's Supplementary Homicide Report, which contains figures self-reported by a small percentage of police departments, a data limitation acknowledged by ProPublica. At this time, there is no reliable and complete accounting of the number of people killed by police officers every year. See Wesley Lowery, *How Many Police Shootings a Year? No One Knows*, Wash. Post, Sept. 8, 2014 (discussing the lack of reliable national data on how many people are shot by police officers each year). The severe limitations of publicly available data on police shootings and the consequent limitations of conclusions drawn from that data themselves point to the pressing need for increased transparency in this area.

<sup>6</sup> Available at <http://www.propublica.org/article/deadly-force-in-black-and-white>.

accessible data on the subject. Moreover, the number of complaints filed generally reflects only a small percentage of misconduct that occurs because many victims of police misconduct never file a complaint. *See* Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 *Cardozo L. Rev.* 841, 863 (2012) (discussing national survey revealing that less than 13% of people who believed they were mistreated by police filed a complaint). Victims who wish to file a complaint are often discouraged from doing so by fear of retaliation, an onerous process, or the officers themselves. *See id.* at 865–67 (recounting that complaint forms are often unclear, available only in English, or not disseminated and that officers often harass civilians trying to file a complaint); Alison L. Patton, *The Endless Cycle of Abuse: Why § 1983 Is Ineffective in Deterring Police Brutality*, 44 *Hastings L.J.* 753, 792–93 (1993) (reporting that it is “common practice” in many departments for the investigating officer to immediately determine whether an individual trying to file a complaint has any outstanding warrants). Many people do not even attempt to file a complaint, believing it to be pointless. *See* Patton, *supra*, at 793 & nn.222–23. The data that is available, however, is disturbing.

From 2012 through 2014 in Baltimore City alone, individuals filed 3,048 misconduct complaints against police officers. Mark Puente, *Undue Force*, *Balt. Sun*, Sept. 28, 2014. Of that number, 1,203 complaints were sustained following internal investigations, leading to sixty-one resignations and discipline of some form for more than 850 officers. *Id.* Since 2011, 317 lawsuits have been filed against the Baltimore Police Department, with plaintiffs in 102 of those cases winning a court judgment in their favor or obtaining a settlement from the department. *Id.* The Sun’s analysis of those claims shows that victims ranged from fifteen to eighty-seven years old and were most often Black. *Id.*

2010 statistics compiled by the Cato Institute’s National Police Misconduct Reporting Project show that police misconduct is a serious problem across the state. Two Maryland police departments—Prince George’s County and Baltimore—ranked in the listing of the 20 departments with the highest misconduct rates among all police forces with 1,000 or more officers. Cato Institute, *National Police Misconduct Reporting Project 2010 Annual Report*.<sup>7</sup> Prince George’s County had the fourth highest rate of misconduct in the country among police departments of comparable size. *Id.* The Anne Arundel County Police appeared in the listing of the 20 departments of 500 to 999 officers with the highest misconduct rates. *Id.*

Looking at civilian deaths during encounters with the police in Maryland, sadly, tells the same story. 2012 data on “justifiable homicides” by law enforcement reported to the FBI reveals that Maryland has the sixth highest number of homicides by police out of the thirty-nine states reporting. See Rani Molla, *Why the Data on Justifiable Homicide Just Won’t Do*, Wall St. J., Sept. 2, 2014.<sup>8</sup> Analyzing media reports and the limited data available,<sup>9</sup> the American Civil Liberties Union of Maryland found that at least 109 people died during police encounters from 2010 through 2014. ACLU of Maryland, *Briefing*

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<sup>7</sup> Available at <http://www.policemisconduct.net/statistics/2010-annual-report/> (last visited Feb. 27, 2015).

<sup>8</sup> Available at <http://blogs.wsj.com/numbers/why-the-data-on-justifiable-homicide-just-wont-do-1725/>.

<sup>9</sup> As noted with respect to other figures discussed in this brief, the conclusions drawn from the existing data are limited by the lack of complete and accessible data on deaths during police encounters in Maryland. See ACLU of Maryland, *Briefing Paper on Deaths in Police Encounters in Maryland, 2010–2014* at 2, 4–5 (2015) (noting that there is no state or federal requirement to collect or report data on the number of people who die during police encounters each year and discussing the methodology of the report).

*Paper on Deaths in Police Encounters in Maryland, 2010–2014* at 6 (2015) (hereinafter “*Deaths in Police Encounters*”).<sup>10</sup> The deaths were distributed amongst seventeen counties and Baltimore City, with Prince George’s County and Baltimore City reporting the highest number of deaths. *Id.* Despite the fact that Blacks make up only 29% of the state’s population, they represented 69% of those who died during a police encounter. *Id.* Even excluding data from Baltimore City and Prince George’s County, Blacks were five times as likely as whites to die as the result of a police encounter. *Id.* at 7.

Indisputably, police misconduct affects Maryland residents and communities. These alarming figures reveal the necessity and urgency of taking action to address police misconduct in this state.

## **II. CURRENT STRATEGIES FOR DETERRING POLICE MISCONDUCT ARE CONSTRAINED BY SIGNIFICANT LIMITATIONS.<sup>11</sup>**

### **A. Civil litigation**

Historically, advocates have used civil rights litigation under 42 U.S.C. § 1983 as a strategy for eradicating police brutality, achieving many notable victories. Section 1983 suits provide a means for an individual who has suffered brutality to obtain redress by bringing a claim for violation of his or her civil rights and can sometimes be the catalyst for a police department to adopt reforms to curb misconduct, particularly if the litigation results in a large judgment. *See Patton, supra*, at 800–01. But a plaintiff

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<sup>10</sup> Available at [http://www.aclu-md.org/uploaded\\_files/0000/0620/md\\_deaths\\_police\\_encounters.pdf](http://www.aclu-md.org/uploaded_files/0000/0620/md_deaths_police_encounters.pdf).

<sup>11</sup> The arguments in Section II of this brief are based on those made by the Howard University School of Law Civil Rights Clinic in its *amicus curiae* brief in this case before the Court of Special Appeals and are included here with the Clinic’s permission. *Amici* gratefully acknowledge the Clinic’s contribution to this brief.

bringing a federal civil rights claim faces an almost insurmountable series of obstacles in obtaining a favorable verdict, beginning with finding an attorney. *See id.* at 756–57. Despite the fact that the court may award a prevailing plaintiff an award of attorney’s fees, many victims of police misconduct still cannot afford to retain a lawyer, because of the many hurdles to prevailing described below. As a result, many such cases will only be litigated on contingency and will only be accepted if there is a possibility of a substantial recovery. *See id.* For this reason, § 1983 litigation has had little deterrent effect on practices that may be widespread, such as illegal stops, but generally do not result in significant damages. Once in court, victims of police misconduct must clear legal hurdles like the qualified immunity doctrine, fight aggressive defense tactics such as refusal to turn over relevant discovery, and overcome the biases of judge and jury in favor of police officers. *See id.* at 759–65.

Even if a plaintiff prevails, suits against individual officers concern only the actions of those officers and will not reach police practices that may be the root cause of misconduct. The fundamental limitation of using § 1983 litigation to combat police misconduct on a large scale is that “while it is possible to address ‘isolated brutality by weeding out the bad apples . . . sick organizations need organization-wide (systemic) solutions,’” and “[s]ection 1983 litigation does not allow the fact finder to question how police organizational culture cultivates and sustains violence.” Judith A.M. Scully, *Rotten Apple or Rotten Barrel?: The Role of Civil Rights Lawyers in Ending the Culture of Police Violence*, 21 Nat’l Black L.J. 137, 149 (2009) (citation omitted).

Section 1983 litigation is also unlikely to result in systemic change in police practices due to several practical realities. Many police departments do not monitor civil litigation against officers and never become aware of the outcome of any particular case.

Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. Rev. 1023, 1028 (2010) (reporting that over two-thirds of police departments and over eighty percent of sheriffs' departments with more than one thousand officers have no computerized system to track lawsuits). Indeed, the Baltimore Police Department only recently began monitoring lawsuits filed against officers and was previously unaware that some officers had as many as five pending lawsuits against them. Puente, *supra*. Even when a department knows about civil suits against an officer, they are not typically considered in promotion or disciplinary decisions. Patton, *supra*, at 782–86. The result, as one court has lamented, is that such litigation “follows a familiar formula: police misconduct = seriously aggrieved or sometimes dead victim = lawsuit = settlement paid by taxpayer = no real changes or evaluations to prevent further misconduct.” *Doe v. Marsalis*, 202 F.R.D. 233, 238 (N.D. Ill. 2001) (footnote omitted).

Litigants can also bring a claim for violation of civil rights under § 1983 for a police department's pattern and practice of violence. While pattern and practice suits can achieve systemic change, they are “very long, difficult and costly.” Patton, *supra*, at 799. A plaintiff must overcome high legal hurdles to pursue the claim and persevere through expensive, drawn-out discovery battles. *Id.* at 798. Because of the many impediments to winning a pattern and practice case, few attorneys undertake them. *Id.* at 799.

### **B. Criminal prosecution**

Criminal prosecution of police officers has not achieved even the limited success of § 1983 litigation in deterring police misconduct. Successful criminal prosecution of police officers is rare. Between April 2009 and December 2010, the National Police Misconduct Statistics and Reporting Project reported over 8,300 credible reports of police

misconduct, with only 3,238 of those reports resulting in criminal charges against the officer. *NPMRP 2010 Annual Report, supra*. And of those, a mere 1,063 officers were convicted of those charges or reduced charges associated with the allegations. *Id.* Only 36% of those convicted were sentenced to incarceration for any period of time. *Id.* Thus, less than 5% of the total credible reports resulted in incarceration of the perpetrator.

Analyses of particular localities reveal even starker figures. Statewide, officers were criminally charged in only two cases in connection with the death of a civilian between 2010 and 2014, even though there were at least 109 deaths during police encounters during that period.<sup>12</sup> *Deaths in Police Encounters* at 8. In Baltimore, the State's Attorney has prosecuted only ten officers for assault and ten officers for less serious offenses since 2011. Puente, *supra*. Over this same period, plaintiffs in 102 civil suits alleging police misconduct won judgments or obtained settlements. *Id.*

Even if a prosecutor pursues criminal charges against a police officer, conviction is an unlikely outcome. The shortcomings of the grand jury system were laid bare recently when grand juries in Ferguson and New York failed to return indictments against the officers responsible for the deaths of Michael Brown and Eric Garner. Yet 2010 Bureau of Justice statistics on federal indictments reveal that prosecutors almost always obtain an indictment, failing in just 11 cases out of the 162,000 presented to the grand jury that year. Ben Casselman, *It's Incredibly Rare for a Grand Jury to Do What*

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<sup>12</sup> This figure is based on media reports of criminal prosecutions. *See Deaths in Police Encounters* at 8. The lack of transparency in internal investigations, however, makes it impossible to be certain that this figure is accurate. *Id.*

*Ferguson's Just Did*, Nov. 24, 2104.<sup>13</sup> Data on the indictment of police officers specifically is non-existent, but analysis of media reports suggests that the odds of obtaining an indictment reverse from nearly always to virtually never when the accused is an officer. For example, the Houston Chronicle reported that grand juries in Dallas reviewed 81 shootings by officers between 2008 and 2012 and returned only one indictment. *Id.* To many, the disparity in grand jury outcomes exemplified by the results in Ferguson and New York shows that “grand juries can be manipulated for political means” so that “[i]nstead of having a public discussion as to why a case is not being brought, the grand juries are immunizing the prosecutor from scrutiny and accountability,” leading some to argue that the system should be abolished. Kari Hong, *It's Time to Get Rid of Grand Juries*, Bos. Globe, Dec. 5, 2014.

If an indictment is obtained, many officers refuse to assist in the prosecution of a fellow officer. The so-called “code of silence” is “a code of loyalty that requires police officers to either corroborate the lies of their fellow officers or remain silent about them.” Scully, *supra*, at 143; *see also* Patton, *supra*, at 778–79. This mentality is a result of the strong camaraderie that police officers develop to cope with their feelings of isolation from other citizens and is widespread throughout police culture. *See* Patton, *supra*, at 778–79; Christopher Cooper, *Yes, Virginia, There is a Police Code of Silence: Prosecuting Police Officers and the Police Subculture*, 45 *Crim. L. Bull.* 277, 280 (2009). In a survey of officers from 121 different police departments, only 39% believed that officers would report serious criminal violations committed by other officers. Scully,

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<sup>13</sup> Available at <http://fivethirtyeight.com/datalab/ferguson-michael-brown-indictment-darren-wilson/>. Fivethirtyeight.com is a website specializing in statistical analysis created by well-known statistician Nate Silver.

*supra*, at 143. The “code of silence” is enforced through the very real fear of retaliation for breaking the code. *See Cooper, supra*, at 282–84 (describing incidents where officers who reported misconduct by fellow officers were accused of perjury and received death threats). Recent news accounts have exposed retaliation against former Baltimore Police Department officer Joseph Crystal for reporting another officer’s assault on a handcuffed suspect. Crystal alleges that he was harassed, including finding a dead rat on the windshield of his car at his home, refused backup when out on patrol, and moved to an undesirable beat. Rich Schapiro, *‘If You Snitch, Your Career Is Done’: Former Baltimore Cop Says He Was Harassed, Labeled a ‘Rat’ After Attempt to Root Out Police Brutality*, N.Y. Daily News, Jan. 14, 2015.

### **C. Internal affairs investigations**

Internal affairs investigations demonstrate the greatest deficiencies as a check against police misconduct. These shortfalls are due in no small part to the lack of oversight created by the denial of public access to information about investigations. The available information indicates that many departments’ internal investigatory processes fail to satisfy the most basic standards of investigation. A Department of Justice inquiry found failures in every department it studied, a total of more than two dozen. *What Police Learn from Lawsuits, supra*, at 870. Many departments “did not follow the types of standard investigative procedures they would use to solve crimes: investigators did not look for witnesses, collect evidence, interview police personnel, or reconcile inconsistent statements.” *Id.* at 871. A study of the Chicago Police Department’s internal affairs division revealed that the officer accused of misconduct was interviewed in less than 15% of the cases, it was “not uncommon” to find a complaint unsubstantiated even though more than one officer submitted identical written responses to questions about the

incident, and that investigators performed background checks on the complainants and witnesses but did not review the complaint history of the officer. *Id.* at 871–72. In fact, no outside reviewer has ever found the operations of the internal affairs division of any major U.S. city to be satisfactory. *Id.* at 870.

Internal affairs investigations are further compromised by the investigators’ biases. The investigating officer may be more sympathetic to the accused officer due to subconscious bias and approach the investigation with preconceived notions. Patton, *supra*, at 791 & n.213. For example, one internal affairs investigator in California explained that repeated complaints against the same officer are “taken with a grain of salt” because the department assumes that working in certain positions will lead to more complaints or that the public may target a particular officer, rather than first considering whether they demonstrate a pattern of abuse. *See id.* at 791 n.213. The investigator may also have a conscious bias in favor of the officer, viewing low levels of excessive force as “bad style” not worthy of discipline. *Id.* at 791–92 & 792 n.214. An investigator’s biases “often result in a very different conclusion than the public would reach.” *Id.* at 791.

Finally, even if a complaint is substantiated, appropriate disciplinary action is often determined solely by the chief of the police department. *Id.* at 792. If anyone else weighs in, it is a hearing board comprised of other police officers. *See* Md. Code Ann., Pub. Safety § 3-107 (providing that an officer is entitled to a hearing before a board comprised of law enforcement officers before the department can take punitive action against the officer as the result of an investigation). If department leadership tolerates misconduct or fails to impose meaningful disciplinary action on an officer for sustained charges, other officers learn that such conduct is acceptable. Patton, *supra*, at 792; *see also* Scully, *supra*, at 141. Because of this dynamic, “the chief plays an enormous role in

setting the tone for the department, and greatly influences the standards the internal affairs department adopts in its internal investigations.” Patton, *supra*, at 792.

All of these tools are, of course, crucial to a multi-faceted strategy to curb police misconduct, but their considerable restrictions highlight the need for other approaches to address a problem that greatly impacts Maryland’s communities every day. For, as one court put it, the only way to end police misconduct “is to evaluate and reevaluate past practices,” but the local government “cannot accomplish this on its own.” *Marsalis*, 202 F.R.D. at 238. Rather, “[s]ome of these issues require public debate and appropriate media scrutiny.” *Id.*

### **III. PERMITTING DISCLOSURE OF POLICE MISCONDUCT INVESTIGATIONS WOULD PROVIDE THE PUBLIC WITH A POWERFUL MEANS OF ADDRESSING POLICE MISCONDUCT AND RESTORING TRUST IN POLICE.**

#### **A. Disclosure of records of police misconduct investigations allows the public to uncover police abuses and inadequacies in investigations.**

While not a panacea, the disclosure of records of police misconduct investigations would greatly aid efforts to address police misconduct. As noted several times, any discussion of police misconduct is inherently limited by the lack of available data on many aspects of the problem. *See Adam Dunn & Patrick J. Caceres, Constructing a Better Estimate of Police Misconduct*, 7 *PolicyMatters J.* 10, 10 (2010). At the most basic level, greater public access to records of police misconduct investigations would provide the public with a clearer idea of the scope of the problem and better inform efforts to address misconduct. Disclosure of investigation records would make it possible to discern patterns that may otherwise be obscured from public view and ignored or overlooked by the department itself. The Baltimore Police Department’s ignorance of the fact that some of its officers had as many as five pending lawsuits against them

demonstrates the kind of patterns that may lay hidden in misconduct investigation records at this very moment. Discovery of patterns in officer behavior, training, discipline, or victims of misconduct would permit more meaningful intervention.

Disclosure of records of misconduct investigations would allow the public to assess the police response to misconduct allegations. As other courts have recognized, “[t]he manner in which [misconduct] allegations are investigated is a matter of significant public interest.” *Wiggins v. Burge*, 173 F.R.D. 226, 229 (N.D. Ill. 1997); *see also Hawk Eye v. Jackson*, 521 N.W.2d 750, 753–54 (Iowa 1994). *Cf. Welsh v. City & Cnty. of San Francisco*, 887 F. Supp. 1293, 1302 (N.D. Cal. 1995) (sexual harassment and retaliation allegations); *Stern v. FBI*, 737 F.2d 84, 92 (D.C. Cir. 1984) (allegations of cover-up of illegal surveillance by the FBI). Disclosure of investigation records would permit the public to test the effectiveness of the process by measuring the investigator’s conclusion against their own and examining the process for bias, collusion, or ineptitude. *See* Steven D. Zansberg & Pamela Campos, *Sunshine on the Thin Blue Line: Public Access to Police Internal Affairs Files*, 22 *Comm. Law.* 34, 34, 37 (2004). Disclosure of misconduct investigation records also allows the public to assess whether the discipline meted out and any reforms undertaken as a result of sustained allegations are appropriate and effective. In an editorial concerning this case, The Baltimore Sun opined:

The public has a right to know if MSP condones such behavior. State police officials say they do not, but in such a matter, actions speak louder than words. Is using the n-word regarded as a minor transgression or perhaps not one at all? Under the agency’s current interpretation of the rules, it’s impossible to tell.

Editorial, *State Police Silent on Punishment for Racial Slur*, Balt. Sun, Mar. 2, 2010. If the MSP had not refused to provide Ms. Dashiell with records of the investigation of her complaint against Sergeant Maeillo, the public would be able to determine whether the

disciplinary action taken against Sergeant Maeillo for his use of a racial slur was appropriate. While police departments claim that members of the public are not in a position to make such judgments, the time is past when such judgments can be left to police officials cloaked in secrecy.

The effect of disclosing records of internal investigations is likely to have only positive ramifications for the police and the public. While police departments often cite fear of chilling witness cooperation as a justification for withholding records of misconduct investigations, as several courts have noted, there is no empirical evidence to suggest that this is the likely impact of disclosing records. *See, e.g., King v. Conde*, 121 F.R.D. 180, 192–93 (E.D.N.Y. 1988); *Kelly v. City of San Jose*, 114 F.R.D. 653, 664 (N.D. Cal. 1987). Moreover, investigation records are disclosed in other contexts, such as in criminal cases for impeachment purposes. *See Fields v. State*, 432 Md. 650, 666–67, 671–72 (2013). Yet, police departments can point to no greater evidence that the chilling effect feared by officials has materialized. *See Martin v. Connor*, 287 F.R.D. 348, 355–56 (D. Md. 2012) (noting that no empirical evidence has been cited for the assertion that disclosure of investigation records would chill participation in internal investigations).

Instead, public access to misconduct investigation records may actually remedy some of the deficiencies in the internal affairs process. As one judge wrote in considering disclosure of investigation records in connection with civil litigation:

No legitimate purpose is served by conducting the investigations under a veil of near-total secrecy. Rather, knowledge that a limited number of persons, as well as a state or federal court, may examine the file in the event of civil litigation may serve to insure that these investigations are carried out in an even-handed fashion, that the statements are carefully and accurately taken, and that the true facts come to light, whether they reflect

favorably on the individual police officers involved or on the department as a whole.

*Mercy v. Cnty. of Suffolk*, 93 F.R.D. 520, 522 (E.D.N.Y. 1982). Rather than chilling witness cooperation, increased scrutiny may well have the opposite effect of encouraging truthfulness and forthrightness. *See Kelly*, 114 F.R.D. at 665 (“[T]here is a real possibility that officers working in closed systems will feel less pressure to be honest than officers who know that they may be forced to defend what they say and report.”).

**B. Increased transparency builds trust between police and the communities that they serve.**

In addition to ensuring accountability and credibility, greater public access to records of police misconduct investigations is vital to building trust between police departments and the community. The importance of transparency in misconduct investigations has been widely recognized as a primary component of establishing and maintaining trust between the public and the police. A Department of Justice manual on best practices for effective internal affairs operations makes this relationship clear, identifying community trust as “the key to effective policing,” trust that is built through the integrity of the department and transparency with the community. U.S. Dep’t of Justice Office of Community Oriented Policing Services, *Building Trust Between the Police and the Citizens They Serve: An Internal Affairs Promising Practices Guide for Local Law Enforcement* at 7 (2014).<sup>14</sup> Recognizing the “awesome authority” that police officers are accorded and the immense harm that can result from any misuse of that authority, the manual advises that

[p]olice chiefs who are transparent (i.e., clear, concise, and open about their department’s Internal Affairs process) with their constituencies,

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<sup>14</sup> Available at <http://www.theiacp.org/portals/0/pdfs/BuildingTrust.pdf>.

acknowledge misconduct, appropriately deal with misconduct when it occurs, and include the public in the response to misconduct will not only obtain, but also sustain, the respect and confidence of the citizens in their jurisdictions.

*Id.* As one court acknowledged when considering the disclosure of internal investigation documents, the purpose of the internal affairs process is to investigate and resolve complaints of police actions that undermine the public's trust in the police and thus "[a] citizenry's full and fair assessment of a police department's internal investigation of its officer's actions promotes the core value of trust between citizens and police essential to law enforcement and the protection of constitutional rights." *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 787 N.E.2d 602, 607 (Mass. App. Ct. 2003).

Denying access to records in which the public has an indisputable interest, on the other hand, erodes whatever trust exists between the police and the community. The refusal to release information regarding internal investigations of misconduct and resistance to involvement from the community has fueled the perception that police are doing nothing to address misconduct in their ranks, critically damaging their relationship with the community, particularly communities of color. See Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills of Rights*, 14 B.U. Pub. Int. L.J. 185, 201-02 (2005) (discussing the persistent refusal of police departments to permit any civilian oversight of internal affairs investigations despite repeated calls for such oversight); Zansberg & Campos, *supra*, at 34 (characterizing the relationship between the public and the police as one of deep mistrust based on allegations of brutality and racial profiling that is further damaged by the refusal to disclose records of investigations). In its editorial about the

MSP's refusal to turn over the records of Sergeant Maiello's investigation, The Baltimore Sun identified this same dynamic, writing that "[w]ithout greater disclosure, the state police will continue to struggle with credibility on matters of race relations." Editorial, *supra*.

The refusal to disclose records of misconduct investigations perpetuates the public's distrust of the police and its belief that the police are not adequately addressing misconduct regardless of the reality of the police response to misconduct, which is unknown. It may be, as The Sun speculated in its editorial, that disclosure of these records would reveal that the MSP's internal investigations are thorough and professional and that Sergeant Maiello was appropriately disciplined. *See id.* (observing that Sergeant Maiello's reassignment may indicate that the MSP considered his conduct serious and that he was meaningfully disciplined). So long as records are withheld from disclosure and the public receives no information to suggest that the police are appropriately addressing misconduct, this distrust will remain.

While disclosure of misconduct investigation records would likely bring to light deficiencies in the process, it would also help to allay the public's concerns when it revealed that complaints are addressed appropriately. If investigations are thorough, discipline is imposed, and incidents of misconduct prompt training to prevent such occurrences in the future, disclosing records showing this would go far in restoring trust in the police, both for the public and for a specific victim of misconduct. Release of such records would also help explain police response to particular incidents and may alleviate community concerns if investigation records demonstrate it to be well-founded and reasonable. As one court put it, "it is the attitude of the public toward the police discipline system that will determine the effectiveness of the system as an element of

police-community relations.” *S.F. Police Officers’ Ass’n v. Super. Ct.*, 202 Cal. App. 3d 183, 191 (1988) (citation and internal quotation marks omitted). Thus, “[a] system can be theoretically sound and objective in practice but if it is not respected by the public, cooperation between the police and the public can suffer.” *Id.*

As many courts have recognized, the public has a right to know about police misconduct and departmental efforts to address it. As the Supreme Court of Alaska wrote, “[t]here is perhaps no more compelling justification for public access to documents regarding citizen complaints against police officers than preserving democratic values and fostering the public’s trust in those charged with enforcing the law.” *Jones v. Jennings*, 788 P.2d 732, 738 (Alaska 1990). The Montana Supreme Court recognized that the right to know is even more pressing when the allegations are substantiated, concluding that “[t]he conduct of our law enforcement officers is a sensitive matter so that if they engage in conduct resulting in discipline for misconduct in the line of duty, the public should know.” *Great Falls Tribune Co. v. Cascade Cnty. Sheriff*, 775 P.2d 1267, 1269 (Mont. 1989). Indeed, as members of this Court have opined, “[u]ndeniably, the public has an interest in protecting against abuse, bias, and conspiracy by the very people it has hired for protection.” *Montgomery Cnty. Md. v. Shropshire*, 420 Md. 362, 387 (2011) (Adkins, J., dissenting).

Public trust in the police is low, nationally and in Maryland in particular, where numerous police departments have been plagued by allegations of brutality and racial profiling. Baltimore Police Commissioner Anthony Batts recently acknowledged the poor relationship between his police force and the community. Justin Fenton, *Police Commissioner Batts Says Police Need to Tackle Racism to Build Trust*, Balt. Sun, Feb. 13, 2015. Public disclosure of records of misconduct investigations is critical to

addressing police misconduct in this state and to restoring the damaged trust between Maryland's police departments and its communities.

### CONCLUSION

For the reasons set forth above, *amici curiae* respectfully urge this Court to find that Ms. Dashiell has the right to review the documents that she seeks under the PIA.

Respectfully submitted,



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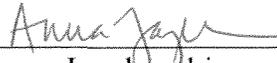
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**CERTIFICATE OF SERVICE**

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