



July 25, 2019

Council President Brandon Scott  
Members of the City Council  
100 N. Holliday St., #400  
Baltimore, MD 21202

Dear President Scott and Members of the City Council,

We write to address concerns that have been raised about Council Bill 19-0409, entitled Transparency and Oversight in Claims and Litigation, which was introduced on July 22, prohibiting the City from requiring victims of police misconduct or unlawful discrimination to agree to gag orders as part of any settlement with the City regarding those claims. Specifically, concerns have been raised as to 1) whether the legislation is needed in view of current City policy, and 2) even if it is needed, whether the legislation exceeds the authority of the City Council, in violation of the City Charter.

**First, with respect to the need for the legislation:** At a press conference on Wednesday, July 24, Mayor Jack Young and Deputy City Solicitor Dana Moore asserted that since Fall of 2017, the City has not used non-disparagement agreements (NDAs) and that plaintiffs in civil rights cases are now free to speak openly about their experiences. Specifically, Ms. Moore stated: "The new agreements say you are free to discuss your case. You can say whatever you want about your case. You are not inhibited in any way, in discussing the facts of the case." <https://www.wbaltv.com/article/leaders-clarify-policy-on-gag-orders-when-people-settle-lawsuits/28497438>.

*This is not true.* Indeed, if it was true that the City's NDAs allow plaintiffs to speak freely and without inhibition about their experiences, what would be the purpose of including these provisions in the agreement? What is true is that in late 2017 or early 2018, the City altered the language of the NDAs it still insists upon including in nearly all police misconduct settlements it enters into. The revised language is attached. To summarize, it values plaintiffs' free speech rights at \$500, and says that by receiving this \$500 the plaintiffs are bound not to "disparage" the City, and to "strictly limit"

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any comment about his or her experience to facts alleged in legal papers, which ordinarily are very limited, and need not and do not include full accounts of peoples' experiences and feelings. The new NDA language is still captioned as a "Non-Disparagement/Limitation on Public Statements", and it still restricts the speech of settling plaintiffs on threat of significant financial penalty, including payment of attorneys' fees to the City. The new NDA language is still unconstitutional and invalid under the Fourth Circuit ruling in *Overbey v. Mayor and City Council of Baltimore*, which recognizes that the government may not silence its critics. This is no less true when it does so by payment of hush money than when it does so through legislation or executive action. Indeed, it is important to note that the Supreme Court has said repeatedly that the First Amendment means there is no such thing as defamation of a government entity, let alone the even broader "disparagement." *New York Times Co. v. Sullivan*, 376 U.S. 254, 290-92 (1964); *Rosenblatt v. Baer*, 383 U.S. 75, 79-83 (1966). And when the City is trying to prevent "defamation" or "disparagement" of its employees, it is seeking to protect their private, non-governmental interests, which it has no business doing at all.

In any case, there is reason to doubt that the City is even following its stated policy, because we have a settlement agreement, from May of 2018, months after the City's alleged policy change, which does not contain the language the City claims to have been using since 2017. Instead, the NDA in that agreement precludes the plaintiffs from

discussing, supplying, posting, communicating or publishing any opinions, materials, comments, documents, facts or allegations in any way connected to the Litigation or the Occurrence, or the substance of any prior settlement offers or discussion, with/to anyone including the news media or through any other media (print, television, or online) except that the Releasing Parties' counsel may indicate that the litigation has been settled in the amount stated herein to avoid the cost, time, expense and uncertainties of protracted litigation and to bring the matter to a final resolution.

*See attached.* This language is nearly identical – but actually slightly more restrictive – than the language challenged by Ashley Overbey and the Baltimore Brew in their litigation. Like the penalty exacted by the City upon Ms. Overbey, this agreement also would impose a penalty of 50% of settlement proceeds *plus* payment of the City's attorneys' fees if the City alleges it is violated.

Given the undeniable fact that the City continues to employ what it calls NDAs to silence plaintiffs in nearly all of its settlements, and given its continued court fight to invalidate any restrictions on its right to do so, the need for the legislation is just as pressing now as it ever was.

**Second, with respect to whether the legislation exceeds the Council's authority:** We understand that several provisions of the City Charter and City Code have been cited as in conflict with the legislation, none of which we believe establish the impropriety of the proposed legislation. We discuss each in turn.

City Charter Art. VI, §§ 2, 15 have been cited, which relate the powers of the Board of Estimates. Section 2 says that the Board sets the fiscal policy for the City. But the legislation does not relate in any way to the fiscal policy of the City. It relates to the City's policy regarding the terms of settling police misconduct and unlawful discrimination cases, specifically a non-monetary term imposed on settling plaintiffs. Thus, this provision is totally irrelevant to the Council's ability to enact the legislation at issue. Section 15 details the Board's responsibility to set procedures regarding the approval for payments of claims against the City. While the Board's regulations do not appear to be online, this provision is also totally irrelevant, because it concerns the Board's required approval of *payments* made in connection with claims against the City. The Board does not have any role in approving non-fiscal aspects of claims against the city, pursuant to City Charter, Art. VI, § 2, only the fiscal aspects. And whether or not Baltimore will impose gag orders on victims of police misconduct or unlawful discrimination in settlement agreements cannot be plausibly said to have any fiscal impact on the City. There is no credible basis to assert that not requiring gag orders in settlement agreements will cost the City money (indeed, the City Solicitor previously has asserted in court documents that not doing so will *save* the City money. C. Campbell, *Baltimore City Council ordinance would prohibit gag order requirement in police brutality, misconduct cases*, The Baltimore Sun, July 18, 2019, <https://www.baltimoresun.com/politics/bs-md-pol-gag-order-ordinance-20190718-yrxsh43nofb4jfg6gaupq232p4-story.html>. Therefore, this provision is also irrelevant to the policy question about whether legislation prohibiting the City from using gag orders in settlements is appropriate for the City Council and Mayor to decide.

Also cited is Baltimore City Code, Art. 1, Subtitle 12, which creates the Central Bureau of Investigation within the Law Department. We are at a loss to see how this Subtitle could preclude the City Council from enacting police transparency legislation. First, this is a part of the City Code, not the City Charter. Even if the proposed legislation conflicted with some provision in this Subtitle (which we don't think it does), the City Council is free to pass new legislation that alters it (and the proposed legislation does not, because it doesn't need to). City Code, Art. 1, § 12-5, which repeals any inconsistent ordinances existing at the time this Subtitle was passed, has been pointed to specifically. But that provision does not and could not bind future City Council action to alter this Subtitle (and, indeed, the Subtitle was altered in 1966 and 1976, following initial passage in 1950). More substantively, there is simply nothing in Subtitle 12 that relates to the City Council's power to set the terms of City policy regarding the content of settlement agreements in particular kinds of cases against the City. The Subtitle says that the Bureau of Investigation has the duty to investigate claims made against the City, and report the results of those investigations to the City Solicitor. The obvious intent is to assist the City Solicitor in defending against such claims. This section of the City Code has no relevance to the legislation at issue, because the legislation has nothing to do with investigations of claims against the City.

Finally, City Charter, Art. VII, § 24, has been cited. This provision creates the Law Department within the executive branch, and creates the office of the City Solicitor, specifically describing the Solicitor's job function: "The City Solicitor shall have sole charge and direction of the preparation and trial of all suits, actions and proceedings of

every kind to which the City, or any municipal officer or agency, shall be a party.” Charter, Art. VII, § 24(b). Read in context, we think this clearly means that the City Solicitor is in charge of the City’s litigation, as opposed to any other lawyer, except those appointed pursuant to other provisions in the Charter. *See* City Charter, Art. VII, § 24(c). It does NOT mean that the City Council, as the legislative body in Baltimore, is prohibited from setting Baltimore City policy on this or any other question. To interpret this otherwise would confuse the role of the client (and who the client is), with the role of the lawyer.

In a democracy there can be no doubt that the legislative branch has the authority (and the responsibility) to decide what the government’s policies should be, and the rules governing government employees’ conduct (including employees like the City Solicitor). Certainly other jurisdictions have thought so, in this precise area, such as the California legislature, which passed a bill earlier this year that says “a settlement agreement that prevents the disclosure of factual information related to a claim filed in a civil action or a complaint filed in an administrative action, regarding any of the following, is prohibited . . . .” Cal. Code, Code of Civ. Proc. § 1001(a). Equally importantly, the ethics rules that apply to every lawyer, including City attorneys, make clear that a lawyer “shall abide by a client’s decisions concerning the objectives of the representation.” Md. R. 19-301.2. Here, the client is the City of Baltimore, which acts through its elected and appointed officials. The ethics rules recognize this as well, stating “[a]n attorney employed or retained by an organization represents the organization acting through its duly authorized constituents.” Md. R. 19-301.13. Comment 8 to this rule makes clear that this principle applies to governmental entities as well. And the Mayor and City Council of Baltimore are not simply the corporate name for the City. It defines “the authorized constituents” who can, and must, direct the City Solicitor in his actions. It is the Mayor and the City Council who run the City, not the City’s Solicitor.

In short, nothing in the City Charter or City Code prohibit the City Council from passing, and the Mayor from approving, legislation governing the City’s policies regarding gag orders on those victims of police misconduct or unlawful discrimination who settle lawsuits against the City. The legislation addresses a critical issue of City policy, directly affecting the First Amendment rights of victims of multiple forms of misconduct, and the rights of the public at large to hear directly from such victims. And it should be a part of the City’s ongoing efforts to ensure transparency in its actions.

Sincerely,

David Rocah  
Senior Staff Attorney

**From:** Smalkin, Frederic N.C. Frederic.Smalkin@baltimorecity.gov

**Subject:** RE: Overbey et al v. Baltimore

**Date:** April 6, 2018 at 12:23 PM

**To:** Wolff, Daniel W. DWolff@crowell.com

**Cc:** Kanu, Nkechi NKanu@crowell.com, O'Connor, Tyler TOConnor@Crowell.com, Debbie Jeon jeon@aclu-md.org, Nick Steiner steiner@aclu-md.org, Glynn, Lydie Lydie.Glynn@baltimorecity.gov, Foltin, Jason Jason.Foltin@baltimorecity.gov, Glynn, Colin Colin.Glynn@baltimorecity.gov

FS

Dan et al.,

Finally, here is the revised non-disparagement clause:

**9. Non-Disparagement/Limitation on Public Statements:** As stated in the Recitals and elsewhere in this Agreement, the overarching purpose of this Agreement is to bring final resolution to disputed claims, contentions and allegations. The Settling Parties understand that these disputes could have been decided in a court of law, but have of their own free will and desire determined that each would like to bring the dispute to an end. The Releasing Party acknowledges and agrees that, but for his or her promises in this Paragraph, the Released Parties would not have settled the Litigation. Accordingly, it is understood and agreed by the Settling Parties that in exchange for the payment of Five Hundred Dollars (\$500.00) of the Settlement Sum by the Released Parties, the Releasing Party, and that party's agents, representatives and attorneys, shall strictly refrain from and avoid any attempt to defame and/or disparage the Released Parties, including each of the Released Parties' employees or agents, regarding any matter related to, or arising from, the Litigation or the Occurrence; and strictly limit their public comments, including discussing, supplying, or posting, any verbal, written or electronic expression or communication, or any deed or act of communication, or any opinions, materials, comments, documents, to the facts alleged in the pleadings and motions filed with the court.

Notwithstanding the prohibitions stated herein, the Releasing Party may disclose facts regarding this Agreement to his or her counsel, accountants, tax preparers, and financial consultants to the extent reasonably necessary in the performance of such provider's or entity's professional services rendered to the Releasing Party. In addition, nothing herein should be construed as prohibiting the Releasing Party from cooperating with any court subpoena, official federal, Maryland, or local governmental investigation. Further, nothing in this Agreement should be construed as limiting the City's response to any public information requests. The Settling Parties understand that a summary of the settlement and the Litigation will be disclosed to the public by the City, and that upon request the City will provide any disclosable documents generated in the course of

litigation.

The Settling Parties agree and understand that any violation of the obligations set forth in this Paragraph 9 is deemed by the Settling Parties to be a material breach of this Agreement which would cause damages to the City which are impossible to calculate (both now and in the future) including damage from reputational loss, increased litigation, and other such intangible or immeasurable potential harms. Accordingly, the Settling Parties hereby make their best estimate of a reasonable monetary value for these damages and agree that any such breach shall entitle the City to liquidated damages in the amount of XXXX Thousand Dollars (\$XX,000.00) from the Releasing Party. The other obligations of this Agreement shall remain in force. If it is necessary for the City to enforce this provision, the City shall be further entitled to recover all reasonable attorneys' fees, costs and expenses of such litigation from the Releasing Party.

Please contact me if you wish to discuss anything further. Regards,

FS Jr.



Department of Law  
[in View my profile](#)

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**Frederic Smalkin, Jr.**  
***Assistant Solicitor, Litigation Division***

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**SETTLEMENT AGREEMENT AND RELEASE**

THIS SETTLEMENT AGREEMENT AND RELEASE (the "Agreement") is made and entered into this \_\_\_\_ day of May, 2018, by and among [REDACTED] [REDACTED] (the "Releasing Parties") and The Mayor and City Council of Baltimore (the "City"), Detective [REDACTED] and Officer [REDACTED] (collectively, the "Released Parties"). The Released Parties together with the Releasing Parties are referred to herein as the "Settling Parties."

**RECITALS**

WHEREAS, the Releasing Parties filed a Complaint in the Circuit Court for Baltimore City against the Released Parties, substantially or similarly styled as [REDACTED] [REDACTED] (the "Litigation");

WHEREAS, the Litigation arises out of an alleged [REDACTED] [REDACTED] Baltimore, Maryland, involving [REDACTED] [REDACTED] in their capacity as Baltimore City Police Officers (the "Occurrence"); and

WHEREAS, the Settling Parties are desirous of settling and terminating all existing or future claims, disputes, and actions between and among them of whatever nature, arising from or in anyway connected with the Litigation or the Occurrence and bring complete resolution to this matter.

**AGREEMENT**

NOW THEREFORE, in consideration of the mutual promises and agreements set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Settling Parties hereby covenant and agree as follows:

1. **Recitals:** The foregoing recitals are incorporated into and made part of this Agreement.

2. **Payment:** In consideration of the Settling Parties' desire to enter into this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which is acknowledged by the Settling Parties, the City shall make the sum total payment to the Releasing Parties of [REDACTED] on behalf of the Released Parties, as full and final payment for making the Release and abiding by the terms set forth in this Agreement (the "Settlement Sum").

3. **Dismissal:** Within one (1) business day after receipt of the Settlement Sum, Plaintiffs shall file with the Court a Joint Stipulation of Dismissal with Prejudice as to the Released Parties.

4. **Warranty of Capacity to Enter Into Release:** The Releasing Parties represent and warrant that no other person or entity has any interest in the claims, demands, allegations or causes of action referred to in this Settlement Agreement except as otherwise set forth herein and that they have the sole right and exclusive authority to execute this Settlement Agreement, to receive the sum specified in it and to release all claims on their behalf, and that they have not sold, assigned, transferred, conveyed or otherwise disposed of any claim, demand, obligation or causes of action referred to in this Settlement Agreement. If any person should assert a claim on behalf of the Releasing Parties for damages against any of the Released Parties claiming that the Releasing Parties did not have the right or authority to enter into this Settlement Agreement or receive the monies hereunder, the Releasing Parties agree to indemnify, defend and hold harmless the Released Parties from any and all claims or contentions, damages, costs, liability and attorneys' fees as a consequence or result of such claim or lawsuit.

5. **General Release and Covenant not to Sue:** In consideration of the payment of the Settlement Sum and other good and valuable consideration, the Releasing Parties, their heirs,



assigns, agents, representatives, attorneys and successors in interest hereby unconditionally release and forever discharge and covenant not to sue the Released Parties, their officials, agents, employees, employers, agencies, departments, directors, officers, members, representatives, assigns, attorneys, successors in interest, and all other persons, firms, governmental entities and corporations from any and all claims which the Releasing Parties may now or hereafter have or claim to have, arising out of, or in any way related to, the Occurrence and the allegations or claims asserted, or that could have been asserted, in the Litigation, provided, however, the obligations of the Settling Parties under this Agreement shall continue in full force and effect. "Claims" includes, but is not limited to, any and all losses, costs, expenses, debts, actions (statutory, in law or in equity), causes of action, suits, damages, claims, demands and all other claims, liabilities and obligations of any nature whatsoever.

6. **Costs and Expenses.** Each party will be responsible for their own costs and expenses incurred in connection with the prosecution, defense and settlement of the claims asserted by the Releasing Parties against the Released Parties.

7. **No Admission of Liability:** It is understood and agreed by the Settling Parties that this Agreement and the releases contained herein shall not be construed as an admission of liability on the part of the Released Parties, any such liability being expressly denied, and that rather, the purpose of this Agreement is to fully and finally resolve all differences amongst the Settling Parties and to allow the Settling Parties to avoid the time, expense and uncertainties of protracted litigation.

8. **Non-Disparagement/Limitation on Public Statements:** As stated in the Recitals and elsewhere in this Agreement, the overarching purpose of this Agreement is to bring final resolution to hotly disputed claims, contentions and allegations. The Settling Parties understand that these disputes could have been decided in a court of law, but have of their own free will and desire

determined that each would like to bring the dispute to an end. Accordingly, it is understood and agreed by the Settling Parties that in exchange for the payment of Five Hundred Dollars (\$500.00) of the Settlement Sum by the Released Parties, the Releasing Parties, and that parties' agents, representatives and attorneys, shall, to the extent permitted by law, strictly refrain from and avoid any attempt to defame and/or disparage the Released Parties, including each of the Released Parties' employees or agents regarding any matter related to, or arising from, the Litigation or the Occurrence. Further, in exchange for the payment of this same Five Hundred Dollar (\$500.00) portion of the Settlement Sum by the Released Parties and because the allegations of the Occurrence and Litigation are disputed, the Settling Parties agree that the Releasing Parties and their agents, representatives, and attorneys, shall, to the extent permitted by law, limit their public comments regarding the Litigation and the Occurrence to the fact that a satisfactory settlement occurred involving the Parties. It is understood and agreed by the Settling Parties that this limitation on public comments or statements shall include a prohibition against discussing, supplying, posting, communicating or publishing any opinions, materials, comments, documents, facts or allegations in any way connected to the Litigation or the Occurrence, or the substance of any prior settlement offers or discussions, with/to anyone including the news media or through any other media (print, television, or online), except that the Releasing Parties' counsel may indicate that the Litigation has been settled in the amount stated herein to avoid the cost, time, expense and uncertainties of protracted litigation and to bring the matter to a final resolution.

Notwithstanding the prohibitions stated herein, the Releasing Parties may disclose facts regarding this Agreement to their counsel, accountants, tax preparers, and financial consultants to the extent reasonably necessary to prepare tax returns or other financial reports in the performance of such person's or entity's professional services rendered to the Releasing Parties. In addition,

nothing herein should be construed as prohibiting the Releasing Parties from cooperating with any court subpoena, official federal, Maryland, or local governmental investigation. Further, nothing in this Agreement should be construed as limiting the City's response to any public information requests. The Settling Parties understand that a summary of the settlement and the Litigation will be disclosed to the public by the City, and that upon request the City will provide any non-privileged documents including sworn statements generated in the course of litigation.

The Settling Parties agree and understand that any violation of the obligations set forth in this Paragraph 8 is deemed by the Settling Parties to be a material breach of this Agreement which would cause damages to the City which are impossible to calculate (both now and in the future) including damage from reputational loss, increased litigation, and other such intangible or immeasurable potential harms. Accordingly, the Settling Parties hereby make their best estimate of a monetary value for these damages and agree that any such breach shall entitle the City to liquidated damages in the amount of Five Hundred Dollars (\$500.00) from the Releasing Parties. The other obligations of this Agreement shall remain in force. If it is necessary for the City to pursue in litigation recovery of the liquidated damages described in this paragraph, the City shall be further entitled to recover all reasonable attorneys' fees, costs and expenses of such litigation from the Releasing Party.

9. **Medicare/Medicaid Liens**: The Releasing Parties understand that Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007 ("MMSEA") imposes a lien (the "Medicare Lien") for reimbursement of certain payments made by Medicare. The Settling Parties understand and believe that there are no outstanding Medicare Liens. Notwithstanding this, in the event that payment of the claims results in an obligation to reimburse Medicare, the Releasing Parties agree to make such reimbursement and agree that their attorneys may retain

sufficient funds in the attorneys' escrow account to satisfy the Medicare Lien. If the Releasing Parties or their attorneys fail to satisfy a Medicare Lien, and that failure causes the Released Parties to pay or reimburse any person or entity any amount MMSEA specifies, the Releasing Parties agree to reimburse the Released Parties' payment or reimbursement to such person or entity. Upon receipt of documentation from Medicare that any Medicare Lien is satisfied, the Releasing Parties will send a copy of such documentation to the Released Parties.

10. **No Evidence of Need to Indemnify:** It is understood and agreed by the Settling Parties that this Agreement and/or corresponding settlement or payment of the Settling Sum is not to be construed as evidence of an obligation on behalf of the City to indemnify any person who may be covered under this Agreement for claims of intentional conduct, as such contention is expressly denied.

11. **Entire Agreement of the Parties:** It is understood and agreed by the Settling Parties that this Agreement constitutes the entire Agreement among the Settling Parties with respect to the subject matter hereof and supersedes all other prior and contemporaneous written or oral agreements and discussions. This Agreement may only be amended by a writing signed by all parties hereto.

12. **Drafting of the Agreement.** The Settling Parties acknowledge and agree that this Agreement represents the product of negotiations and shall not be deemed to have been drafted exclusively by any one party. In the event of a dispute regarding the meaning of any language contained in this Agreement, the Settling Parties agree that the same shall be accorded a reasonable construction and shall not be construed more strongly against one party than the other.

13. **Severability:** In the event that any covenant, condition, or other provision contained in this Agreement is held to be invalid, void, or illegal by any court of competent jurisdiction, the same

shall be deemed severable from the remainder of this Agreement and shall in no way affect, impair or invalidate any other covenant, condition or other provision contained herein. If such condition, covenant or other provision shall be deemed invalid due to its scope of breadth, such covenant, condition or other provision shall be deemed valid to the extent of the scope of breadth permitted by law.

14. **WAIVER OF JURY TRIAL:** TO THE EXTENT AN ACTION IS FILED IN ANY COURT FOR A BREACH OF ANY COVENANT, TERM OR CONDITION OF THIS AGREEMENT, THE SETTLING PARTIES HEREBY VOLUNTARILY WAIVE ANY AND ALL RIGHTS TO A TRIAL BY JURY.

15. **Knowing and Voluntary Act:** The Settling Parties represent that they have read this Agreement and acknowledge that they have been represented or had the opportunity to be represented by legal counsel of their own choice throughout all of the negotiations which preceded the execution of this Agreement and that they have voluntarily executed this Agreement with the consent and/or on the advice of such legal counsel. The Settling Parties further acknowledge that their counsel has had adequate opportunity to make whatever investigation or inquiry they may deem necessary or desirable in connection with the subject matter of this Agreement prior to the execution hereof and the delivery and acceptance of the considerations specified herein. The Settling Parties shall bear their own costs, including, but not limited to, attorney's fees associated with the Litigation or the Occurrence.

16. **Survival of Terms:** The Settling Parties agree that this Agreement shall upon approval inure to the benefit of the Settling Parties, their respective agents, assigns, partners, heirs, executors, administrators, and personal or legal representatives. The Settling Parties


understand and agree that the terms, covenants, and conditions set forth in this Agreement shall survive the closing of the Agreement.

17. **Governing Law:** This Agreement shall be governed by and construed and enforced in accordance with the laws of the State of Maryland, without giving effect to its conflicts of law provisions, and any disputes arising out of or under this Agreement shall be subject to the exclusive jurisdiction of the state or federal courts located in Baltimore City, Maryland.

18. **Counterparts:** This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall be deemed to be one and the same instrument. An emailed, facsimile or copy signature will be binding and legal in all respects as if it were an original signature to this Agreement.

IN WITNESS WHEREOF, the Settling Parties have executed this Agreement by the duly authorized representatives as of the date first written above:

\_\_\_\_\_  
WITNESS

\_\_\_\_\_  


\_\_\_\_\_  
WITNESS

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WITNESS

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WITNESS

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MAYOR AND CITY COUNCIL OF BALTIMORE

\_\_\_\_\_  
WITNESS

By: \_\_\_\_\_ (SEAL)  
Andre M. Davis, City Solicitor