IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

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| OFFICER JOHN DOE, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>MONTGOMERY COUNTY, MARYLAND,<br><br>Defendant. | Case No. C-15-CV-22-002523<br><br>HEARING REQUESTED |

**MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY MOTION TO INTERVENE TO MODIFY PROTECTIVE ORDER AND OBTAIN PUBLIC ACCESS TO COURT RECORDS AND PROCEEDINGS**

Proposed intervenors the Reporters Committee for Freedom of the Press (the "Reporters Committee") and The Washington Post (together "Media Intervenors") respectfully submit this Memorandum of Law in support of their motion to intervene in the above-captioned case for the limited purposes of vindicating the constitutional and common law rights of the press and public to judicial proceedings and records in this matter. Media Intervenors respectfully ask that they be heard on this Motion as soon as possible.

Courts have long recognized a public right of access to judicial proceedings and records. *See Nixon v. Warner Commc'ns*, 435 U.S. 589, 597 (1978); *Baltimore Sun Co. v. Mayor & City Council of Baltimore*, 755 A.2d 1130, 1134 (Md. 2000); *State v. Cottman Transmission Sys., Inc.*, 542 A.2d 859, 864 (Md. Ct. Spec. App. 1988). The filings and proceedings in the above-captioned case—which concerns the public's right to access police disciplinary records under the recently enacted Anton's Law and the Maryland Public Information Act ("MPIA")—are of keen interest to the press and public. Accordingly, for the reasons herein, Media Intervenors

respectfully request that they be granted leave to intervene and that the Court enter an order (1) unsealing all previously filed, sealed judicial records in the above-captioned matter, including the September 14, 2022 memorandum and supporting exhibits filed by Plaintiffs; and (2) modifying the protective order entered by the Court on August 16, 2022 (the "Protective Order") to require the parties to file on the public docket complete, unredacted copies of all future filings, including future memoranda, supporting papers and affidavits, and direct that future proceedings in this matter are to be held in open court. To the extent any party meets its high burden to demonstrate that sealing of some portion of a filing or filings in this case is necessitated by a compelling, countervailing interest, said filing or filings should be unsealed and made available to Media Intervenors and the public with tailored redactions supported by specific factual findings.

## RELEVANT PROCEDURAL HISTORY AND STATEMENT OF FACTS

Media Intervenors are the Reporters Committee and The Washington Post. The Reporters Committee is an unincorporated nonprofit association founded by journalists and media lawyers in 1970, when the nation's press faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

The Washington Post (formally, WP Company LLC d/b/a The Washington Post) is a news organization based in Washington, D.C. It publishes The Washington Post newspaper and the website www.washingtonpost.com, and produces a variety of digital and mobile news applications. The Post has won Pulitzer Prizes for its journalism, including the award in 2020 for explanatory reporting. The Post has published extensive coverage regarding Anton's Law, including articles about this case. *See, e.g.*, Steve Thompson, *When She Sought Answers About*

*an Officer, This Maryland Police Union Sued*, Wash. Post (Sept. 5, 2022), https://perma.cc/3JFN-PUNV; Steve Thompson, *Md. Opened Police IA Files to the Public. But Here the Union Looks First.*, Wash. Post (Aug. 26, 2022), https://perma.cc/GC3P-FN53; Steve Thompson, *Maryland Police Navigate New Law Opening Public Access to Disciplinary Records*, Wash. Post (Nov. 24, 2021), https://perma.cc/C96H-QY4F; Ovetta Wiggins & Erin Cox, *Maryland Enacts Landmark Police Overhaul, First State to Repeal Police Bill of Rights*, Wash. Post (Apr. 10, 2021), https://perma.cc/3XME-2NEP; Steve Thompson, *After Decades of Secrecy, Maryland Might Make Police Disciplinary Records Public*, Wash. Post (Mar. 5, 2021), https://perma.cc/A3JR-KX69.

Plaintiffs Officer John Doe and the Fraternal Order of Police of Montgomery County ("FOP") filed the above-captioned matter on July 5, 2022 to enjoin Defendant Montgomery County (the "County") from disclosing Doe's police disciplinary records in response to an MPIA request. The case requires the Court to interpret the Maryland Police Accountability Act of 2021, known as Anton's Law, which generally provides that police disciplinary records are subject to disclosure under the MPIA. Doe contends that Anton's Law does not require, or permit, the County to disclose his own disciplinary records because they contain unsubstantiated allegations, allegations on which he was cleared of wrongdoing, and technical infractions, the release of which he alleges would be contrary to the public interest. *See* Compl. ¶¶ 15–17.

Plaintiffs filed a consent motion for a protective order and briefing schedule on August 11, stipulating to permit "the parties"—Plaintiffs and the County[1]—"to fully brief and argue the issues related to the disclosure of Officer John Doe's records" under seal and without identifying

[1] The individual who submitted the MPIA request seeking access to Doe's police disciplinary records is not currently a party to this case.

Doe. Consent Motion at 1. The parties also stipulated that any future hearings would conceal Doe's identity and the contents of the disputed disciplinary records. *Id.* As grounds for the protective order they jointly sought, the parties stated that pseudonymity and sealing were necessary to protect Doe's privacy. Consent Motion at 2.

The Court granted the parties' consent motion in a two-page order on August 16, signing the parties' proposed order and adding only that, to obtain in camera review of sealed records, the parties must submit a formal request. The Protective Order did not contain any discussion of the interests supporting sealing or consider any less-restrictive alternatives. The Protective Order directed Plaintiffs to file their sealed memorandum within 30 days and the County to file a sealed reply memorandum 30 days after that. On September 14, 2022, Plaintiffs filed their memorandum and two supporting exhibits under seal.

## ARGUMENT

### I. The Court should grant Media Intervenors' motion to intervene.

Intervention is the appropriate procedural mechanism in a civil case for third parties, including members of the press and public, to challenge protective orders and assert their rights of access to judicial records and proceedings. *See* Md. Rule 16-910(a)(1) (permitting any party "including a person who has been permitted to intervene as a party" to move to inspect case records); *News Am. Div., Hearst Corp. v. State*, 447 A.2d 1264, 1272 (Md. 1982) (holding press may "intervene for the limited purpose of opposing the . . . motion for restrictive orders"); *Doe v. Shady Grove Adventist Hosp.*, 598 A.2d 507, 511 (Md. Ct. Spec. App. 1991) ("[N]ewspapers may intervene . . . for the limited purpose of asserting the First Amendment right of access to court proceedings and court records . . . in the civil context."). Indeed, it is well-settled that non-parties have standing to intervene to seek public access to sealed court records and proceedings,

and "must be given an opportunity to be heard." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) (citation omitted). If non-parties could not intervene to challenge access restrictions, the common law's and First Amendment's guarantees of presumptive access would be meaningless. *See Cottman Transmission Sys., Inc*., 542 A.2d at 864 (asking, in case where newspapers successfully intervened to challenge closure, "How else will the citizenry learn of the happenings in the courts—their government's third branch—except through access to the courts by the people themselves or through reports supplied them by the media?").

Here, Media Intervenors have standing to intervene because they seek to vindicate their—and the public's—rights to access judicial records and proceedings in this case. The Post has standing because the Protective Order entered impedes its reporters' newsgathering efforts, and unsealing all sealed filings to date, including Plaintiffs' September 14 memorandum, and modifying the Protective Order to require the parties to file future briefs publicly, would remove that impediment. The Post intends to continue reporting on this case and others like it—reporting that requires access to court records and proceedings. The Reporters Committee, like all members of the press and public, has standing to advocate for the news media's and public's rights to inspect court records and attend proceedings in this matter. Moreover, the Reporters Committee intends to file an amicus brief in this matter arguing that the County must disclose Doe's disciplinary records under Maryland law and, without access to the parties' legal arguments and supporting facts, it will be unable to adequately address and respond to arguments offered by the parties against public disclosure.

Additionally, the public's interest in open court proceedings is not adequately represented by the parties to this suit because they have consented to the Protective Order which provides for the filing of their memoranda entirely under seal. *Cf. News Am. Div., Hearst Corp.*, 447 A.2d at

1272 ("Allowing the press to appear by motion . . . furnishes the trial court with the benefit of argument by an advocate of First Amendment interests," especially where "there is little incentive on the part of the State to oppose" closure). And, as noted above, the requester seeking access to Doe's police disciplinary records under the MPIA is not a party to this case.

For these reasons, Media Intervenors must be permitted to intervene to seek access to the sealed judicial records filed to date, including Plaintiff's September 14 memorandum, as well as modification of the Protective Order, and to otherwise assert the public's rights of access to court records and proceedings in this case.

## II. The Court should unseal the sealed judicial records filed to date and modify the Protective Order to require the parties to file future memoranda and other documents publicly, and should ensure that all proceedings in this case are conducted in open court.

### A. The Protective Order requires the sealing of judicial records and closure of proceedings that are presumptively open to the public.

Media Intervenors have a presumptive right of access to judicial records and proceedings in this case under the First Amendment, Article 40 of the Maryland Declaration of Rights, and the common law. *See Nixon*, 435 U.S. at 597 (recognizing the public's common law "right to inspect and copy public records and documents, including judicial records and documents"); *Mayor & City Council of Baltimore*, 755 A.2d at 1134 ("The common law principle of openness is not limited to the trial itself but applies generally to court proceedings and documents," including civil proceedings); *Shady Grove Adventist Hosp.*, 598 A.2d at 511 ("The right of access guaranteed by the First Amendment and Article 40 of the Maryland Declaration of Rights applies to pretrial proceedings, trial proceedings, and court records," including in civil cases (citations omitted)); *Cottman Transmission Sys., Inc.*, 542 A.2d at 863 (same). The Maryland Rules codify the common law right of access, providing that "[j]udicial records are presumed to be open to the public for inspection." Md. Rule 16-903(b); *see also State v. WBAL-TV*, 975 A.2d

909, 921 (Md. Ct. Spec. App. 2009) (Maryland Rules "clearly reflect the common law presumption of the openness of court records").

The presumptive right of access extends, specifically, to legal briefs and supporting documents filed in civil cases. *See, e.g.*, *In re Providence J. Co., Inc*., 293 F.3d 1, 13 n.5 (1st Cir. 2002) (legal memoranda); *Republic of Philippines v. Westinghouse Elec. Corp*., 949 F.2d 653, 660 (3d Cir. 1991) (summary judgment motion and supporting papers, which "shape[]the scope and substance of the litigation"); *Rushford v. New Yorker Mag., Inc*., 846 F.2d 249, 252–54 (4th Cir. 1988) (same); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1072 (3d Cir. 1984) (preliminary injunction hearing and transcripts); *see also* Md. Rule 16-901(c)(1)(A) (presumption of openness attaches to court records, which include "a document . . . received, or maintained by a court in connection with one or more specific judicial actions or proceedings").

Here, the Protective Order requires the parties to "submit [their] memoranda" supporting and opposing Plaintiffs' request for "an order enjoining the production of the records subject to the pending MPIA request" "under seal." Protective Order at 1. It also provides that the parties will not disclose Doe's name or disciplinary records. *Id.* And, it requires future hearings to "proceed[] in a manner that protects the identity of the officer and the contents of the disputed materials"—likely requiring courtroom closure. *Id.* at 2. In accordance with the Protective Order, Plaintiffs filed their September 14, 2022 memorandum and supporting exhibits under seal. The Protective Order thus substantially restricts access to civil judicial records and proceedings which are presumptively open under constitutional and common law.

### B. The strong presumption of access to judicial records and proceedings in this case is not overcome.

Where, as here, the presumption of access to judicial proceedings and records attaches, it can be overcome only if "'the denial is necessitated by a compelling governmental interest, and

is narrowly tailored to serve that interest.'" *Cottman Transmission Sys., Inc*., 542 A.2d at 863 (quoting *Globe Newspaper Co.*, 457 U.S. at 607). The burden of making this showing rests with the proponent of closure. *Id.* Where, as here, a matter is entirely sealed, the burden on the proponent of sealing to justify such secrecy is a heavy one. As the Second Circuit has explained, "the more extensive [] the closure requested, the greater must be the gravity of the required interest and the likelihood of risk to that interest" to justify it. *Ayala v. Speckard*, 131 F.3d 62, 70 (2d Cir. 1997) (en banc). Likewise, under the Maryland Rules, closure is proper only for a "special and compelling reason," and any court order restricting access "shall be as narrow as practicable in scope and duration to effectuate the interest sought to be protected by the order." Md. Rule 16-912(d)(3), (5)(A).

Procedurally, courts must publicly docket notice of a hearing on closure, permit individuals opposing closure to be heard, make specific on-the-record findings justifying closure, and explain its consideration and rejection of less-restrictive alternatives to closure. *See Sumpter v. Sumpter*, 50 A.3d 1098, 1106 (Md. 2012); *Mayor & City Council of Baltimore*, 755 A.2d at 1136–37; *Baltimore Sun Co. v. Colbert*, 593 A.2d 224, 229 (Md. 1991); *accord.* Md. Rule 16-912(d)(1)–(2) (requiring courts to provide "an opportunity for a full adversary hearing" and "include findings regarding the interest sought to be protected").

Here, the Protective Order withholds essentially all information from the press and public about the facts and legal arguments driving pending litigation over the public's right to access police disciplinary records. The parties' filings, and the Court's ruling on them, will determine the level of transparency required under a new disclosure statute—Anton's Law—that was passed amid a nationwide call for increased accountability and transparency in policing following the murder of George Floyd and, in Maryland, the death of Anton Black at the hands

of police. *See* Thompson, *When She Sought Answers About an Officer*, *supra*. "Our society vests its law-enforcement officers with formidable power, the abuse of which is often extremely detrimental to the public interest." *Offen v. Brenner*, 935 A.2d 719, 725 (Md. 2007) (citation omitted). The reporting and investigation of "such abuses . . . serve[s] a public function of vital importance" and ensures that "the abusers [are] held accountable," *id.*, as does public access to the records of those investigations. Moreover, the public has a strong interest in learning about the parties' arguments regarding the MPIA, as "the provisions of the [MPIA] reflect the legislative intent that citizens of the State of Maryland be accorded wide-ranging access to public information concerning the operation of their government." *Prince George's Cnty. v. The Washington Post Co*., 815 A.2d 859, 869 (Md. Ct. Spec. App. 2003) (citation omitted). Filings urging this Court to weaken that access—including Plaintiffs' sealed September 14 memorandum—are of strong interest to the public.

On the other side of the balance, neither Doe nor the other parties have met their burden to demonstrate a compelling interest in the extensive, far-reaching closure imposed by the Protective Order. They claim that the order is needed to "protect the identity of the Plaintiff and the contents of the records" given Doe's privacy interests, and that "without such an order, the matter would likely be mooted by the publication of the contents of the disputed records and the identity of the officer." Consent Motion at 2. In making this argument, the parties rely heavily on *Doe v. Shady Grove Adventist Hospital*, 598 A.2d at 514, which permitted a plaintiff who had AIDS to use a pseudonym to avoid disclosing his medical records and facing the pervasive discrimination he feared would result from disclosure. Consent Motion at 2–4. Not only is that case distinguishable on its facts, but also it concerned *only* pseudonymity—not a Protective Order requiring the wholesale sealing of all legal memoranda and, likely, the closure of court

proceedings. The court, in fact, called the plaintiff's request for sealing in that case "unfortunately chosen language," and was careful to note that the trial judge "need not seal the records of the case at all," but instead could redact the plaintiff's name and conduct open proceedings but have participants refer to him "only as 'John Doe' or 'plaintiff.'" *Shady Grove Adventist Hosp.*, 598 A.2d at 514. The protective order in this case sweeps far more broadly, permitting the sealing of the parties' memoranda, which contain their principal legal arguments and supporting facts, as well as contemplating the closure of future proceedings to the public. Likewise, the parties argue that cases brought by police officers to block the disclosure of their disciplinary records merit pseudonymity, but the sole case they cite involved *named plaintiffs* (and the very MPIA provisions amended by Anton's Law). Consent Motion at 2 (citing *Montgomery Cnty. v. Shropshire*, 23 A.3d 205, 216 (Md. 2011)). The parties cite no case upholding such an overbroad sealing and closure order in civil proceedings, nor do they cite any personalized interests in closure so compelling as to warrant one.

Nor did the parties invite the Court to consider alternatives to such extensive closure, such as filing the briefs on the public docket but keeping Doe's name and the disputed disciplinary records out of the public record while the case proceeds. The use of a pseudonym—which is, itself, a type of closure that requires showing "some serious harm or injury"—is a mechanism to avoid more extensive sealing and closure, enabling the public to learn the central facts and legal arguments in a case.[2] *Shady Grove Adventist Hosp.*, 598 A.2d at 514; *see also*

[2] It is not at all clear that Doe has met his burden to justify pseudonymity. Because pseudonymity "limit[s] the public's access to court proceedings," it is permissible "only in limited circumstances" where it is "necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Bennett v. Porter*, 2022 WL 1939831, at *4 (Md. Ct. Spec. App. June 3, 2022) (citation omitted); *see also James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993) (describing presumption against pseudonymity). Doe's name has already been publicly reported in connection with this case, severely undermining any claim that pseudonymity would effectively protect his privacy. *See* Thompson, *When She Sought Answers*

*Press-Enter. Co*.., 464 U.S. at 513 ("The trial judge should seal only such parts of the transcript as necessary to preserve the anonymity of the individuals sought to be protected.").

Moreover, the Court erred in failing to follow any of the procedural prerequisites to closure, such as holding a hearing or making on-the-record findings explaining why it found closure was justified and less restrictive alternatives were inadequate. These procedures provide essential protections for the public's rights of access. *See Sumpter*, 50 A.3d at 1107 (remanding case to trial court that did not follow prerequisites to closure, where "effective review [of closure order] . . . is not possible given the paucity of the present record"); *Baltimore Sun v. Thanos*, 607 A.2d 565, 574 (Md. Ct. Spec. App. 1992) (same).

Given the strong presumption in favor of public access to judicial records and proceedings, as well as the absence of any countervailing "special and compelling reason" supporting the parties' requested closure, Md. Rule 16-912(d)(3), the Court should unseal Plaintiffs' September 14, 2022 memorandum and supporting exhibits in its entirety, modify the Protective Order to require the parties to file future memoranda and supporting documents on the public docket, and conduct future proceedings in open court.

## III. Even if restricting access to some portions of the filings or proceedings is necessary, any such closure must be narrowly tailored and supported by specific, on-the-record findings.

Even assuming, *arguendo*, that the parties could demonstrate a countervailing interest necessitating some form of closure, any such access restrictions must be no broader than necessary to "serve that interest." *Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 510 (1984);

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*About an Officer*, *supra.* Police officers suing to block the disclosure of their disciplinary records do so in open court; Doe has not shown how his case is different. *See Shropshire*, 23 A.3d at 216. Moreover, to the extent Doe is concerned disclosure will affect his career, "concerns by plaintiffs that they will suffer adverse economic consequences unless permitted to proceed anonymously have not persuaded courts to conceal the identity of a litigant." *King v. State Farm Mut. Auto. Ins. Co*., 850 A.2d 428, 434 (Md. Ct. Spec. App. 2004).

*accord.* Md. Rule 16-912(d)(3) (closure order "shall be as narrow as practicable in scope and duration to effectuate the interest sought to be protected by the order"). Thus, even if the sealing of a portion of the parties' memoranda or supporting documents were justified, targeted redaction—not automatic, permanent, wholesale sealing—is warranted. *See Colbert*, 593 A.2d at 231 ("The court should consider alternatives to a broad seal, including the option of redacting portions of pleadings or transcripts, and the precise limitation on the duration of the seal order."). As discussed above, pseudonymity can be used as an alternative to sealing and courtroom closure where warranted by compelling reasons. *See Shady Grove Adventist Hosp.*, 598 A.2d at 514.

## CONCLUSION

For the foregoing reasons, Media Intervenors respectfully request that the Court grant their motion to intervene and enter an order (1) unsealing all previously filed, sealed judicial records in the above-captioned matter, including the September 14 memorandum and supporting exhibits filed by Plaintiffs; and (2) modifying the August 16, 2022 Protective Order to require the parties to file on the public docket complete, unredacted copies of all future filings, including future memoranda, supporting papers and affidavits, and direct that future proceedings in this matter are to be held in open court. To the extent any party meets its high burden to demonstrate that sealing of some portion of a filing or filings in this case is necessitated by a compelling, countervailing interest, said filing or filings should be unsealed and made available to Media Intervenors and the public with tailored redactions supported by specific factual findings. Media Intervenors respectfully request that they be heard on this Motion as soon as possible.

Dated: September 27, 2022

Respectfully submitted,

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