IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

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

MEDIA INTERVENORS' REPLY IN SUPPORT OF THEIR EMERGENCY MOTION TO INTERVENE TO MODIFY PROTECTIVE ORDER AND OBTAIN PUBLIC ACCESS TO COURT RECORDS AND PROCEEDINGS

It is well settled that the press and public have a strong, presumptive right to inspect judicial records and attend judicial proceedings in civil lawsuits. *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978); *Balt. Sun Co. v. Mayor & City Council of Balt.*, 755 A.2d 1130, 1134 (Md. 2000); *State v. Cottman Transmission Sys., Inc.*, 542 A.2d 859, 864 (Md. Ct. Spec. App. 1988). This litigation—which presents issues of undeniable importance to the public—is proceeding in secret in violation of that right. For this reason, the Reporters Committee for Freedom of the Press (the "Reporters Committee") and The Washington Post (the "Post") (together, "Media Intervenors") have moved to intervene for the limited purpose of obtaining public access to court filings and hearings in this case. Defendant Montgomery County (the "County") agrees the Court should grant all the relief sought by Media Intervenors' motion. Plaintiffs Officer John Doe and the Fraternal Order of Police of Montgomery County, on the other hand, misstate the law, ignore decades of precedent firmly establishing the right of members of the press and public to intervene to challenge denials of their right of access to

judicial records and proceedings, and resort to frivolous *ad hominem* attacks on Media Intervenors and their counsel. This Court should reject Plaintiffs' baseless arguments and grant Media Intervenors' Motion in full.

I. Media Intervenors must be permitted to intervene for the limited purpose of seeking access to judicial records and proceedings.

Media Intervenors have a well-established right to intervene in this litigation for the limited purpose of asserting their right of access to judicial records and proceedings. As the Maryland Court of Appeals has explained, "[w]hen a court restricts public access to judicial proceedings or documents, Maryland law authorizes a newspaper to intervene for the limited purpose of challenging the restrictions as long as it acts with reasonable promptness." *Mayor & City Council of Balt.*, 755 A.2d at 1137. Such intervention "furnishes the trial court with the benefit of argument by an advocate of First Amendment interests[,]" which parties often, as here, do not provide. *News Am. Div., Hearst Corp. v. State*, 447 A.2d 1264, 1272 (Md. 1982).

Plaintiffs incorrectly claim that "where there has been no violation of the First Amendment, news organizations do not have standing to intervene." Pls.' Opp'n at 4. But Maryland courts have rejected this argument, recognizing it as an improper "attempt to have one of the elements of the merits decided in the guise of a standing argument." *News Am. Div., Hearst Corp.*, 447 A.2d at 1269. Instead, courts routinely permit news media entities to intervene to challenge access restrictions independent of any subsequent ruling a court may make on the merits of the access questions presented. *See, e.g.*, *id.*; *Mayor & City Council of Balt.*, 755 A.2d at 1137; *Balt. Sun Co. v. State*, 667 A.2d 166, 169 (Md. 1995); *Balt. Sun Co. v. Colbert*, 593 A.2d 224, 229 (Md. 1991); *Balt. Sun Co. v. Univ. of Md. Med. Sys. Corp.*, 584 A.2d 683, 684 (Md. 1991); *Buzbee v. Journal Newspapers, Inc.*, 465 A.2d 426, 430 (Md. 1983); *State v. WBAL-TV*, 975 A.2d 909, 921 (Md. Ct. Spec. App. 2009); *Balt. Sun v. Thanos*, 607 A.2d 565,

574 (Md. Ct. Spec. App. 1992); *Doe v. Shady Grove Adventist Hosp.*, 598 A.2d 507, 511 (Md. Ct. Spec. App. 1991); *Hearst Corp. v. State*, 484 A.2d 292, 294 (Md. Ct. Spec. App. 1984).

Here, Media Intervenors have standing to intervene to challenge the access restrictions imposed by the Protective Order, as the County correctly recognizes. *See* Def.'s Resp. at 1. The Post and the Reporters Committee, like all members of the press and public, have standing to advocate for their right of access to judicial records and proceedings in this case. And the Post, in particular, seeks such access to inform its ongoing reporting about this litigation—reporting that is unquestionably in the public interest and that has been impeded by the Protective Order. Plaintiffs' attempt to cast the Post's newsgathering and reporting as some nefarious, profit-driven endeavor—and even as purported grounds to deny intervention—is factually and legally meritless. *See* Pls.' Opp'n at 1, 4, 7–10.[1] And, contrary to Plaintiffs' arguments, whether or not the Court grants any future motion for leave to file an amicus brief in this matter is irrelevant to whether Media Intervenors must be permitted to intervene for the limited purpose of challenging the Protective Order's access restrictions—though public access to the parties' arguments certainly would inform any amicus brief sought to be filed in this case. *Cf. id.* at 9–11.

Last, intervention would not unduly delay the litigation or prejudice the parties—again, a matter only Plaintiffs (not the County) dispute. *Id.* at 3. Filed on a timely basis and seeking

[1] Plaintiffs' frivolous claims—which they also assert in opposition to the motions for special admission of attorneys Katie Townsend and Sasha Dudding—that Media Intervenors' counsel have violated the Maryland Rules of Professional Conduct are baseless, offensive, and should be firmly rejected by this Court. *Cf. id.* at 7–9, Ex. 1. As is clear from the plain language of Rule 19-304.2 (as well as the ABA's similar Model Rule 4.2), that rule applies *only* to communications *by attorneys*; indeed, it *expressly states* that parties may communicate directly with each other. Any Post reporter who seeks comment from or asks to interview Plaintiffs in connection with the Post's ongoing coverage of this case is engaged in constitutionally protected newsgathering activity and—plainly—is not an attorney bound by Rule 19-304.2. That Plaintiffs' counsel would stoop to accusing (in multiple filings to the Court) counsel for Media Intervenors of violating their ethical obligations on the basis of an obvious misreading of the text of the relevant rule is regrettable, and it is conduct that should not be countenanced by the Court.

important but narrow relief that they are clearly entitled to, Media Intervenors' Motion can be quickly adjudicated without delay, as Media Intervenors' concurrently filed response to Plaintiffs' and Defendant's Joint Motion for Modified Briefing Schedule demonstrates.[2]

II. The Court should modify the Protective Order and grant public access to judicial records and proceedings in this case.

Media Intervenors' Motion seeks access to judicial records and proceedings that are presumptively open to the public under the First Amendment, Article 40 of the Maryland Declaration of Rights, and the common law. *See Nixon*, 435 U.S. at 597; *Mayor & City Council of Balt.*, 755 A.2d at 1134; *Shady Grove Adventist Hosp.*, 598 A.2d at 511; *Cottman Transmission Sys., Inc.*, 542 A.2d at 863; Md. Rules 16-902(c)(1)(D), 16-904(a). The County recognizes—as it must—this well-settled proposition. Def.'s Resp. at 1. Plaintiffs, on the other hand, seek to obscure it by citing inapposite cases involving documents that were never filed with a court (unlike the judicial records to which Media Intervenors seek access). *See* Pls.' Opp'n at 5–7 (citing *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 781 (3d Cir. 1994) (unfiled settlement agreement); *Am. C.L. Union v. Holder*, 652 F. Supp. 2d 654, 662 (E.D. Va. 2009) (statutorily sealed *qui tam* complaints filed *in camera*); *Armstrong v. Exec. Off. of President*, 830 F. Supp. 19, 23 (D.D.C. 1993) (unfiled classified documents); *Tanis v. Crocker*, 678 A.2d 88, 94 (Md. Ct. Spec. App. 1996) (tax returns requested in discovery)). As even the cases Plaintiffs cite make clear, however, the "right of access to judicial proceedings and judicial records . . . is

[2] Far from seeking to delay proceedings, Media Intervenors have consistently sought to have their Motion heard as expeditiously as possible. Media Intervenors filed their Motion seeking emergency relief on September 27. *See* Media Intervenors' Mot. at 2 (filed Sept. 27, 2022) (respectfully requesting that Media Intervenors "be heard on this Motion as soon as possible"). *But see* Judge McAuliffe Mem. (filed Oct. 6, 2022) (taking the Motion off emergency track). Plaintiffs, despite complaining of supposed delay, have not sought to have the Motion heard more quickly, and have instead asked that it be consolidated with the later-filed motions to intervene on the merits. *See* Joint Mot. for Modified Briefing Schedule (filed Oct. 13, 2022).

beyond dispute." *Pansy*, 23 F.3d at 780–81 (citation and internal quotation marks omitted); *see also Holder*, 652 F. Supp. 2d at 666 ("[A] pleading filed with the court . . . is properly characterized as a judicial document and therefore is subject to a common law presumption of access."). And that right applies to Plaintiffs' September 14 memorandum and supporting exhibits, the County's reply memorandum, and all future filings and proceedings in this case.

The Protective Order violates the public's presumptive right of access to judicial records and proceedings. Protective Order at 1–2. It seals the facts and legal arguments that will affect the Court's interpretation of a new statute—Anton's Law—that aimed to increase accountability and transparency in policing following the murder of George Floyd and, in Maryland, the death of Anton Black at the hands of police and that Plaintiffs now apparently intend to argue to this Court is unconstitutional. *See* Steve Thompson, *When She Sought Answers About an Officer, This Maryland Police Union Sued*, Wash. Post (Sept. 5, 2022), https://perma.cc/3JFN-PUNV. The Protective Order also bars access to the identity of Officer Doe, despite the fact that his name already has been published in the Post. *Id.* And, because it requires future hearings to be held in a manner that would conceal Officer Doe's name and information about his disciplinary records, the Protective Order will likely require courtroom closures. The public's interest in contemporaneous access to these records and hearings is urgent; the Protective Order is hindering newsgathering and reporting about active litigation that could have significant ramifications for the public. *See* Steve Thompson, *In Lawsuit Over Police Transparency, Groups Ask for . . . More Transparency*, Wash. Post (Oct. 5, 2022), https://perma.cc/PQ97-8HKX (reporting on case developments); *Courthouse News Serv. v. Schaefer*, 2 F.4th 318, 328 (4th Cir. 2021) (explaining that the press and public have a right of contemporaneous access); *contra* Pls.' Opp'n at 11 (claiming there is no urgent public interest in access).

Because the Protective Order restricts access to presumptively open judicial records and proceedings, it is permissible *only* if Plaintiffs—the sole proponents of closure—show it "is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Cottman Transmission Sys., Inc.*, 542 A.2d at 863 (citation omitted); *see also* Md. Rule 16-934(e)(5) (orders barring "inspection of the particular case record" require a "special and compelling reason"). Where, as here, near-total sealing is sought, that burden is particularly heavy. *Ayala v. Speckard*, 131 F.3d 62, 70 (2d Cir. 1997) (en banc). Procedurally, closure must be preceded by a publicly docketed hearing at which opponents may be heard and accompanied by on-the-record findings. *See Sumpter v. Sumpter*, 50 A.3d 1098, 1106 (Md. 2012); *Mayor & City Council of Balt.*, 755 A.2d at 1136–37; *Colbert*, 593 A.2d at 229; Md. Rule 16-934(e).[3]

As the County correctly acknowledges, to the extent a compelling interest supports sealing any narrow part of a filing, that filing must be made public, and any redactions must be no broader than necessary to serve that interest. *See* Def.'s Resp. at 1–2; *Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 510 (1984); *Colbert*, 593 A.2d at 231; Md. Rule 16-934(e)(5). Here, Plaintiffs have failed to meet their burden to demonstrate *any* compelling interest that would justify the extensive secrecy imposed by the Protective Order. Their argument that "this case cannot proceed *without* a sealing Order," Pls.' Opp'n at 2, is wrong, and based on a misreading of Media Intervenors' Motion, which seeks access to the judicial records, including briefs, filed with the Court, not the immediate disclosure of Doe's disciplinary records that are the subject of

[3] Plaintiffs incorrectly claim the Protective Order need only satisfy Rule 2-403, which requires that protective orders restricting access to *unfiled* discovery materials be supported by a showing of good cause. Pls.' Opp'n at 5 & n.1. The instant Protective Order seals judicial records filed with the Court and provides for the closure of proceedings to which the right of access attaches; accordingly, it must instead satisfy the strict standards set forth *supra*. *Cf. Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33–34 (1984) (distinguishing unfiled discovery from judicial records); *Tanis*, 678 A.2d at 95 (even Rule 2-403 "protective orders are not to be granted liberally").

the underlying MPIA request at issue. Plaintiffs also wrongly imply that the right of public access is weaker in MPIA cases and those involving police. *Id.* at 5–7. The opposite is true. Both types of cases routinely proceed in open court, with no closure or sealing at all, and the public has a particularly *strong* interest in access in cases involving law enforcement. *See, e.g.*, *Offen v. Brenner*, 935 A.2d 719, 725–26 (Md. 2007) (describing how access to information about police misconduct "serve[s] a public function of vital importance" and ensures that "abusers [are] held accountable" (citation omitted)); *Prince George's Cnty. v. Wash. Post Co*., 815 A.2d 859, 869 (Md. Ct. Spec. App. 2003) (MPIA "reflect[s] the legislative intent that citizens of the State of Maryland be accorded wide-ranging access to public information concerning the operation of their government" (citation omitted)).

Plaintiffs point to no specific, particularized concerns that would overcome the presumptive right of access in this case and also fail to establish any compelling privacy interest in concealing Officer Doe's name. Nor could they. No such interests exist and Officer Doe's identity is <u>already public</u>. *See Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 190 (2d Cir. 2008) (asking "whether the plaintiff's identity has thus far been kept confidential"); *Doe v. Megless*, 654 F.3d 404, 409 (3d Cir. 2011) (same); *Bennett v. Porter*, No. 1092 (Sept. Term), 2022 WL 1939831, at *4 (Md. Ct. Spec. App. June 3, 2022) (finding that pseudonymity is a closure that must be supported by a compelling interest); Thompson, *When She Sought Answers About an Officer*, *supra* (naming Doe); Pls.' Opp'n at 8 (by complaining that Post reporters have "ma[de] direct contact with" Officer Doe, confirming that Officer Doe is named in the Post's reporting).

CONCLUSION

For the foregoing reasons and those set forth in Media Intervenors' September 27, 2022

memorandum of law, the Court should grant Media Intervenors' 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 17, 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.

Dated: October 21, 2022

Respectfully submitted,

/s/ Lisa Zycherman

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MARYLAND RULE 1-313 CERTIFICATION

Pursuant to Md. Rule 1-313, I hereby certify that I am a member in good standing of the Bar of Maryland.

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MARYLAND RULE 20-201(f) CERTIFICATION

Pursuant to Md. Rule 20-201(f)(1), I hereby certify that this submission and the accompanying materials do not contain any restricted information.

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CERTIFICATE OF SERVICE

Pursuant to Md. Rule 20-201(g)(3), I hereby certify that, on this 21st day of October 2022, I directed that a copy of Media Intervenors' Reply in Support of Their Emergency Motion to Intervene to Modify Protective Order and Obtain Public Access to Court Records and Proceedings be served on all parties entitled to service in this matter via the Court's MDEC e-filing system.

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