

No. 17-2444

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

ASHLEY AMARIS OVERBEY; BALTIMORE BREW

Plaintiffs – Appellants,

v.

**MAYOR AND CITY COUNCIL OF BALTIMORE; BALTIMORE CITY
POLICE DEPARTMENT,**

Defendants – Appellees.

On appeal from the United States District Court for the District of Maryland
(Marvin J. Garbis, District Judge)

**BRIEF OF *AMICI CURIAE* PUBLIC JUSTICE CENTER, WASHINGTON
LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS,
NATIONAL WOMEN'S LAW CENTER, AND TAWANDA JONES
IN SUPPORT OF PLAINTIFFS–APPELLANTS**

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May 29, 2018

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? YES NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ K'Shaani Smith

Date: 5/29/2018

Counsel for: Amici Curiae

CERTIFICATE OF SERVICE

I certify that on 5/29/2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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The Public Justice Center, Washington Lawyers' Committee for Civil Rights and Urban Affairs, National Women's Law Center, and Tawanda Jones respectfully submit this brief as *amici curiae*. This brief will aid in informing the Court of the larger context for non-disparagement clauses in settlement agreements and how they contribute to the lack of police accountability in Baltimore, a city that is notorious for police violence.¹

IDENTITY AND INTERESTS OF *AMICI CURIAE*

The **Public Justice Center**² (PJC) is a non-profit civil rights and anti-poverty legal services organization dedicated to protecting the rights of the under-represented. Established in 1985, the PJC uses impact litigation, public education, and legislative advocacy to accomplish law reform for its clients and has established an Appellate Advocacy Project to expand and improve the representation of indigent and disadvantaged persons and civil rights issues before the Maryland state and federal appellate courts. It has also created a Race Equity Project to focus its legal advocacy on the disparities caused by institutional and structural racism. The PJC is committed to supporting the rights of victims of police violence. *See Sizer v. State*, No. 1 (Md. Ct. App. 2017); *Jacome de Espina v. Jackson*, 442 Md. 311 (2015); *Md. Dep't of State Police v. Dashiell*, No. 84,

¹ No person or party other than *amici* contributed money for or participated in the preparation or submission of this brief.

² The Public Justice Center and Public Justice are not affiliated entities.

(Md. Ct. App. 2014). The PJC has an interest in this case because of its commitment to ensuring that victims of police violence are able to speak freely about their experiences to advance accountability and reform.

The Washington Lawyers' Committee for Civil Rights and Urban Affairs (WLC) is a non-profit organization founded in 1968 to address issues of racial discrimination and entrenched poverty in the greater Washington D.C. area. The WLC is committed to ending all forms of discrimination, including in the criminal justice system. The WLC has an interest in this case because people of color have disproportionate interaction with law enforcement than their white counterparts.

The National Women's Law Center (NWLC) is a non-profit legal advocacy organization dedicated to the advancement and protection of women's legal rights and the rights of all people to be free from sex discrimination. Since 1972, NWLC has worked to secure equal opportunity for women and has advocated to ensure that women can live free of sexual assault, harassment, and discrimination in arenas including the workplace, schools, and in healthcare settings. NWLC has participated as counsel or *amicus curiae* in a range of cases before the Supreme Court and the federal Courts of Appeals to secure the equal treatment of women under the law. The Center has long sought to ensure that all

individuals, including in particular women of color, enjoy the full protection against sex discrimination as promised by the law.

Tawanda Jones is a civil rights advocate pursuing police reform and demanding that violent Baltimore City police officers be held accountable for their misconduct. Since her brother, Tyrone West, was killed in police custody in July 2013, Ms. Jones has been protesting police violence and abuse every Wednesday in Baltimore. She and Mr. West's children filed a wrongful-death lawsuit against the city and state of Maryland based on police misconduct and excessive force. When Mr. West's children settled the case, which required them to enter into a non-disparagement agreement with the city, Ms. Jones removed herself from the lawsuit to preserve her ability to speak about the brutality her brother endured. Ms. Jones has an interest in this case because she seeks to hold Baltimore City Police officers accountable for their violent and brutal attacks on city residents.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Baltimore City Police Department's (BPD) proclivity for unwarranted violence against civilians is well-known, particularly after the unrest that erupted surrounding Baltimore resident Freddie Gray, Jr.'s death while in BPD custody in April 2015. At the same time, the BPD continues to conceal other continued incidents of similar violence with the city's longstanding policy of including non-disparagement clauses or "gag orders" in settlement agreements with victims of

police violence. Between 2011 and 2014, the city entered into these settlements with over 100 people, totaling about \$5.7 million. Mark Puente, *Undue Force*, Balt. Sun, Sept. 28, 2014, <http://data.baltimoresun.com/news/police-settlements>. Due to the city's policy, the allegations of police brutality are suppressed and the news media, and more importantly, the public has been left in the dark, unaware of systemic racial discrimination and targeted violence against Black men, women, and children, and incapable of truly holding the offending officers and the entire department accountable for their behavior.

Most victims of police violence in this country and in Baltimore specifically are Black. Though they constantly file complaints regarding police misconduct, their voices and stories are ignored or silenced. It is only when their stories are publicized that law enforcement officials can be held accountable and implement effective initiatives for substantive reform. But with a policy that requires victims of police brutality who enter into settlement agreements to remain silent about the violence they have endured, the BPD shields itself from being transparent and accountable for its misbehavior and allows city residents to remain vulnerable to continuous and unrestrained brutality. This appeal presents this Court with an opportunity to invalidate a policy that infringes on the First Amendment rights of victims of police violence and permits officers to evade the accountability that is necessary for effective reform.

ARGUMENT

I. **BALTIMORE CITY'S POLICY OF REQUIRING SETTLEMENTS TO INCLUDE GAG ORDERS PERMITS LAW ENFORCEMENT TO SHEILD THEMSELVES FROM PUBLIC SCRUTINY, PREVENTS ACCOUNTABILITY, AND REDUCES THE INCENTIVE FOR POLICE REFORM.**

A. **The Deterrent Effect of Civil Rights Litigation.**

Since the Supreme Court's decision in *Monroe v. Pape* 365 U.S. 167 (1961), analyzing constitutional torts under 42 U.S.C. § 1983, courts have declared that civil rights actions will deter constitutional violations in various ways. Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement*, 57 UCLA L. Rev. 1023, 1031 (2010). "Being named in a suit discourages officers from engaging in future misconduct; judgments against municipalities cause policymakers to 'discharge...offending officials' and make policy changes; and even the threat of suit will make officers and policymakers conform their conduct to the law." *Id.* (quoting *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269 (1981)). The Supreme Court even contends that the deterrent power of lawsuits is so strong, that "the threat of litigation and liability" will deter misconduct "no matter that [officers] may enjoy qualified immunity, are indemnified by the employing agency or entity, or are acting pursuant to an entity's policy." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001) (citations omitted) (discussing the deterrent effect of *Bivens* actions on federal officials).

Nonetheless, scholars have debated for decades whether and to what extent lawsuits seeking damages do actually deter government actors. Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. Rev. 1144, 1151 (2016). It is generally assumed that, any deterrent effect of lawsuits stems from the prospective financial burden of settlements and judgments. See *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 727 (1999) (Scalia, J., concurring) (stating that Section 1983 “is designed to provide compensation for injuries arising from the violation of legal duties, and thereby, of course, to deter future violations”).

However, some critics have found that lawsuits under-deter government conduct because those officials tend not to respond to financial pressures. *Myths, supra* at 1033. “[G]overnment actors respond to political incentives, not financial ones,’ and so will make post-litigation personnel and policy changes only if those changes protect or further their political interests.” *Id.* (quoting Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. Chi. L. Rev. 345 (2000)). The political environment may overlook or reward lawbreaking that appears to advance policy goals such as crime control. *Id.* In the law enforcement context: the costs of litigation are outweighed by “perceived gains” from aggressive policing. Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 Geo. Wash. L. Rev. 453, 475 (2004). At times,

after costly lawsuits, local government officials “reward police with larger budgets, since the political returns for higher police funding and appearing tough on crime may be worth the budgetary cost.” *Myths, supra* at 1033.

But most observers seem to agree that lawsuits can create “nonfinancial pressures” by generating publicity and revealing previously unknown details about allegations of misconduct. See Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 Ga. L. Rev. 845, 858–67 (2001). “The information revealed during litigation and the symbolic power of a judgment or settlement tend to influence behavior.” See *Myths, supra* at 1032. Scholars have also observed that high litigation costs can create political pressures for law enforcement to improve. See Lawrence Rosenthal, *Municipal Law Symposium: Panel IV: Viewing Litigation Through Different Lenses: Gaining a Better Understanding of Municipal Liability and Immunities*, Chap. U. Sch. L. (2015), <http://ibc.chapman.edu/Mediasite/Play/96133e00335946708b3c6f053402f8a81d>. “To be sure, large litigation payouts may well have political consequences for law enforcement agencies [because] local newspapers may publicize settlements in police misconduct cases and describe their budgetary impact.” *How Governments Pay, supra* at 1175.

B. Confidential Settlement Agreements Negate the Deterrent Effect.

In litigation against government actors, settlement agreements requiring confidentiality likely negate the deterrent effect of lawsuits. Such settlements employ “non-disparagement” clauses or “gag orders,” which condition payment on the parties’ complete silence regarding the matter (as the gag is not limited to disparaging comments). Bree Bernwanger, *How Settlement Culture is Hurting Us All*, Life of the Law, Sept. 21, 2013, <http://www.lifeofthelaw.org/2013/09/how-settlement-culture-is-hurting-us-all>. Significantly, a party who violates a gag order can be forced to return any money or benefits received in the settlement. *Id.* These gag orders thus prevent the public from knowing both the details of that specific instance of misconduct and any systemic wrongful conduct.

Settlements with non-disclosure clauses allow a climate where police departments continue to resist necessary reforms. Specifically, Baltimore has a longstanding practice of requiring victims of police violence to sign confidentiality agreements as a condition of settlement. *See* Heather Cobun, *Federal judge dismisses lawsuit over Baltimore police settlement ‘gag order’ clauses*, The Daily Record, Oct. 5, 2017, <https://thedailyrecord.com/2017/10/05/aclu-gag-lawsuit-dismissed>.

The BPD also has, not coincidentally, a longstanding history of unwarranted violence against city residents. And the city continuously faces litigation for its

unlawful and brutal tactics. For instance, after the tragic death of Freddie Gray, Jr., a 25-year-old Baltimore resident who died in April 2015 after sustaining a severe spinal cord injury while in police custody, the city agreed to pay his family \$6.4 million in a settlement. In fact, as of October 2015, the city had paid nearly \$13 million in settlements and court judgements arising from alleged police misconduct since 2011. David A. Plymyer, *Baltimore 'gag orders' may make police look worse than they are*, Balt. Sun, Oct. 9, 2017, <http://www.baltimoresun.com/news/opinion/oped/bs-ed-op-1010-city-gag-orders-20171009-story.html>.

Non-disparagement clauses serve only to spare police departments from public scrutiny. For the BPD specifically:

There is something particularly galling about the city trying to suppress unflattering information when the city and state are on track to spend tens of millions of dollars on a consent decree that was necessary because of a pattern of misconduct by officers that should have been brought to light and fixed many years ago.

Id. These clauses silence the victims of heinous acts of state-sponsored violence and insulate police officers from accountability to the individual and the residents they are required to serve. Instead of the lawsuits leading to necessary and system-wide improvements and less wrongful conduct on the part of the police, the end result of confidential settlement agreements is more secrecy and less accountability.

C. Public Interest in Police-Violence Litigation.

There is a strong public interest in police-violence litigation, which is “confirmed by the public actor on one side of the lawsuit [with] correspondingly few privacy interests at stake.” Marc L. Miller et al., *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 Buffalo L. Rev. 757, 760 (2004). Typically when these cases settle, all that is revealed is the fact that lawsuits were filed and resolved, and perhaps the amount of the settlement. *Id.* But the existence of a settlement alone does not provide the public with the information needed to hold officers accountable and produce sustainable reform.

The public needs to know more. “Other critical questions include who pays any monetary settlement or judgment, what efforts (if any) the parties made to link the settlement to future police practices, and whether patterns or bad practices emerge involving individual officers or units in a department[or departmental cultures.]” *Id.* Full disclosure of the nature and outcome of all civil claims against the police and settlements in anticipation of litigation is necessary for revealing patterns and practices that would lead to internal or external investigations, the creation of review boards, investigative reporting, or additional lawsuits. *Id.* This information would allow the press to more robustly perform its watchdog function and inform the public of police department behavior. Widespread public awareness leads to community oversight of policing and improvements in policing,

such as the increased use of body cameras by police, a technology that has played an important role in fostering greater accountability by law enforcement agencies. See Justin Fenton, *Baltimore Police officer who turned off body camera charged with tampering with evidence; others cleared*, Balt. Sun., Jan. 24, 2018, <http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-body-camera-tampering-20180124-story.html> (discussing a BPD officer indicted for misconduct and fabricating evidence due to body camera footage showing him plant drugs).

II. GAG ORDERS HINDER EFFECTIVE POLICE REFORM DESPITE THE INCREASED VISIBILITY OF INCIDENTS OF POLICE VIOLENCE.

A. Police Violence in America.

Police violence is occurring at epidemic levels and has been since at least 1976 when the FBI began tracking the number of times police officers shot and killed someone in the line of duty. Joshua Hegarty, *Who Watches the Watchmen? How Prosecutors Fail to Protect Citizens From Police Violence*, 37 Hamline J. Pub. L. & Pol'y 305, 315 (2017). Since then, the FBI's data suggests that there has not been a single year with fewer than 300 lethal police shootings. *Id.* And despite recent attention, the picture is getting worse, not better. In 2017, 987 people were shot to death by police officers in the United States, across every state except for Rhode Island. Julie Tate, *Fatal Force: Police Shootings Database*, Wash. Post, <https://www.washingtonpost.com/graphics/2018/national/police-shootings->

2018/?utm_term=.4a24e6b7ea9a (last updated May 3, 2018). So far this year, 399 people have been killed by the police. *Id.*

Given the number of lives lost at the hands of police, law enforcement across the country have faced increased criticism and scrutiny. When police officers are accused of misbehavior, they tend to adopt a “code of silence,” protecting each other and defending their actions. Armacost, *supra* at 453. If the misconduct is found to be true, moreover, their departments deem the wrongdoers “rogue cops” whose conduct does not reflect negatively on the entire organization. *Id.*

Despite all of the attention that has been paid to this issue in recent years—extensive news coverage, lawsuits, task forces, commissions, and consent decrees—recurring incidents of police brutality have led many to question why very little seems to change. *Id.* at 454. Over the years, many prominent police departments have made efforts toward reform, usually in response to reports made by independent commissions convened to investigate incidents of alleged police misconduct. See Robert Reinhold, *Violence and Racism Are Routine In Los Angeles Police, Study Says*, N.Y. Times, July 10, 1991, <https://archive.nytimes.com/www.nytimes.com/books/98/02/08/home/rodney-report.html?mcubz=2>. Yet police misconduct seems pervasive, and serious, lasting reform appears unattainable.

B. Police Violence and Use of Force Disproportionately Impacts Black Residents.

Extreme racial disparities exist in how police use force in this country. In 2014, the world witnessed a surge in the visibility of police brutality and its disproportionate impact on Black people in the United States. In July 2014, Eric Garner, a Black man in Staten Island, New York, was choked to death by white police officers as he pleaded, “I can’t breathe.” Gene Demby, *What We See in the Eric Garner Video, And What We Don’t*, NPR, July 29, 2014, <http://www.npr.org/sections/codeswitch/2014/07/29/335847224/what-we-see-in-the-eric-garner-video-and-what-we-don-t>. The next month, Michael Brown, a Black teenager from Ferguson, Missouri, was killed by a white police officer. Emily Brown, *Timeline: Michael Brown Shooting in Ferguson, Mo*, USA Today, Dec. 2, 2014, <http://www.usatoday.com/story/news/nation/2014/08/14/michael-brown-ferguson-missouri-timeline/14051827>. These incidents, and many others, sparked a national Movement for Black Lives. Sara Sidner, *The rise of Black Lives Matter: Trying to break the cycle of violence and silence*, CNN, Dec. 28, 2015, <http://www.cnn.com/2015/12/28/us/black-lives-matter-evolution>.

With rallying cries like “Hands Up, Don’t Shoot,” advocates garnered attention to the many Black people disproportionately killed by police without repercussion. Cheryl Corley, *Whether History or Hype, “Hands Up, Don’t Shoot” Endures*, NPR, Aug. 8, 2015, <http://www.npr.org/2015/08/08/430411141/whether->

history-or-hype-hands-up-dont-shoot-endures. Soon after, the U.S. Department of Justice (DOJ) initiated investigations of the Ferguson police department and President Barack Obama convened the President's Task Force on 21st Century Policing. Jasmine Sankofa, *Mapping the Blank: Centering Black Women's Vulnerability to Police Sexual Violence to Upend Mainstream Police Reform*, 59 How. L.J. 651, 652–53 (2016). Later, in April 2015, after the death of Freddie Gray, Jr. at the hands of the BPD, the DOJ initiated an investigation of the BPD to determine whether officers committed systemic constitutional violations against the city's residents. Sari Horwitz, *Justice Department launches broad investigation of Baltimore police*, Wash. Post., May 8, 2015, <https://www.washingtonpost.com/world/national-security/justice-department-launches-federal-investigation-of-baltimore-police/2015/05/08>.

Of the nearly 1,000 people killed by police in 2017, 25 percent were Black, despite making up only 13 percent of the population. MAPPING POLICE VIOLENCE, POLICE VIOLENCE MAP, <https://mappingpoliceviolence.org> (last updated Apr. 19, 2018). In fact, Black people are three times more likely to be killed by police than white people. *Id.* This disparity is due in part to law enforcement practices and policies calling for over-policing of predominately black neighborhoods and racial profiling. And the resulting police violence reflects the presence of racial discrimination in our criminal justice system. Sankofa, *supra* at 658. Racial

profiling is defined as the “discriminatory practice by law enforcement officials of targeting individuals for suspicion of crime based on the individual’s race, ethnicity, religion or national origin.” *Id.* (quoting *Racial Profiling: Definition*, ACLU, <https://www.aclu.org/racial-profiling-definition>). This overt and deeply entrenched racism existing within police departments, as well as implicit biases, clearly informs policing strategies. *Id.*; *see, e.g.*, U.S. DEP’T OF JUST., CIV. RIGHTS DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 47–48 (2016) (discussing DOJ’s investigation of the BPD finding “a pattern or practice” of unconstitutional conduct in which officers target Black residents, leading to severe and unjustified racial disparities in uses of force).

Additionally, structural racism, the kind of racism that is woven into laws and policies, is a significant predictor of police violence against unarmed Black people throughout the country.³ *See* Aldina Mesic et al., *The Relationship Between Structural Racism and Black-White Disparities in Fatal Police Shootings at the*

³ Structural racism is further defined as

A system in which public policies, institutional practices, cultural representations, and other norms work in various, often reinforcing ways to perpetuate racial group inequity. It identifies dimensions of our history and culture that have allowed privileges associated with “whiteness” and disadvantages associated with “color” to endure and adapt over time.

THE ASPEN INST., ROUNDTABLE ON COMMUNITY CHANGE: GLOSSARY FOR UNDERSTANDING THE DISMANTLING STRUCTURAL RACISM/PROMOTING RACIAL EQUITY ANALYSIS 1 (2004).

State Level, 110:2 J. Nat'l Med. Ass'n 106–116 (2018). One study analyzed five key indicators of structural racism—racial segregation, incarceration rate gaps, educational attainment gaps, the economic disparity, and employment disparity gaps—and determined that if states exhibit these indicators and have a high per capita rate of unarmed Black residents shot and killed by police, then structural racism serves as a worthy explanation for police violence in those states. *Id.*

Another study found that police disparately use force when interacting with Black residents even when comparing only whites and Blacks involved in violent arrests. PHILLIP A. GOFF ET AL., *THE SCIENCE OF JUSTICE: RACE, ARRESTS, AND POLICE USE OF FORCE*, CTR. FOR POLICING EQUITY 4 (2016), http://policingequity.org/wp-content/uploads/2016/07/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf. In Maryland, specifically, from 2010 to 2014 at least 109 people died in police encounters, and while Blacks made up 29 percent of the state's population, they were 69 percent of those killed. J. W. Hutto et al., *Social Movements Against Racist Police Brutality and Department of Justice Intervention in Prince George's County, Maryland*, 93 J. Urb. Health: Bulletin of N.Y. Academy of Med. 89–121 (2016), <http://doi.org/10.1007/s11524-015-0013-x>. In other words, the rate at which Black residents were killed by the police in Maryland was five times that of white residents. *Id.* This finding is even more

disturbing because the number of *unarmed* Black Marylanders who died (36) exceeded the *total* number of white residents killed (30), armed or otherwise. *Id.*

C. Police Violence Against Black Women and Members of the LGBTQ Community.

There is also an extensive history of police violence specifically against Black women, dating back to slavery, involving attempts to control Black women's behavior and punish them for defiance through force and sexual assault. Michelle S. Jacobs, *2017 Special Issue: Enhancing Women's Effect on Law Enforcement in the Age of Police and Protest: The Violence State: Black Women's Invisible Struggle Against Police Violence*, 24 Wm. & Mary J. of Women & L. 39, 40–41 (2017). Both Black men *and* women could be killed, maimed, or mutilated at the whim of the slaveholder. *Id.* But, Black women were also violently raped and sexually abused by both the slaveholder and his employees. *See* Jennifer Hallam, *The Slave Experience: Men, Women, and Gender*, PBS (2004), <https://www.pbs.org/wnet/slavery/experience/gender/history.html>.

Black women's interaction with the state, through law enforcement, is marked by violence. Black women are murdered by the police. They are assaulted and injured by the police. They are arrested unlawfully by the police; and finally they are tried, convicted and incarcerated for defending themselves against nonpolice violence. State violence against Black women is long-standing, pervasive, persistent, and multilayered

Jacobs, *supra* at 41. Law enforcement has uniquely, and almost always, inflicted disproportionate harm on women of color when compared to men of color. During

the civil rights movement, police used force to intimidate Black women activists. In her speech at the Democratic National Convention in 1964, civil rights activist Fannie Lou Hamer described being beaten by police for openly advocating for voting rights and opposing white supremacy. Cara McClellan, *The Deafening Silence Around Police Violence Against Black Women And Girls*, Huffington Post, May 5, 2018, https://www.huffingtonpost.com/entry/opinion-mcclellan-black-women-police_us_5aeb5b6be4b0ab5c3d634fd5. She also spoke about the officer purposefully exposing her by pulling up her dress. *Id.* “Whether a woman of color is read as a drug user, courier, or distributor, a disorderly person, an undesirable immigrant, a security threat, or some combination of these, various policies have, over time, created a web of criminalization that ensnares women in devastating ways, from being assaulted during a stop-and-frisk (a fraught practice in itself) to being forced by cops into sexual acts to stave off arrest.” ANDREA J. RITCHIE, *INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR* (2017).

But the lives of Black women are routinely erased from the overall discussion of police violence. Educating the public about violence against Black women proves difficult because mainstream media rarely discusses it. “The stories of their deaths may be newsworthy, but the fact that the victim or survivor is a Black woman may be buried.” Jacobs, *supra* at 52. In fact, most police reports rarely

even specifically identify the victims of police violence as Black women. During the DOJ's investigation of the BPD, it found that the police conducted over sixty strip searches in violation of the resident's rights. Lynh Bui et al., *Strip searches, "lock up all the Black hoodies": Excerpts from Justice Dept. report on Baltimore PD*, Wash. Post, Aug. 10, 2016, https://www.washingtonpost.com/news/true-crime/wp/2016/08/10/excerpts-from-the-justice-departments-report-on-practices-of-the-baltimore-police-department/?utm_term=.58d514ad5af5. When Black men were the targets of illegal police conduct, they were specifically mentioned as African-American or Black. U.S. DEP'T OF JUST., *supra* at 32. Female victims were rarely identified as African-American or Black, unless the police said something specific such as "Black b***h." *Id.* at 70. Yet, Baltimore is a city that is 63 percent Black. *Id.* at 12. It is improbable that most of the incidents of abuse towards women were not incidents involving Black women.

Mainstream discussions rarely mention the experiences of anyone other than cisgender,⁴ heterosexual Black men. See McClellan, *supra* (comparing the news media's immediate attention to the arrest to two Black men at a Philadelphia Starbucks in April 2018, which led to quick corporate response, to the lack of

⁴ Cisgender relates to one's gender identity and is defined as "of, relating to, or being a person whose gender identity corresponds with the sex the person had or was identified as having at birth." Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/cisgender> (last visited May 25, 2018).

attention paid to the arrest of a Black woman, Chikesia Clemons, in May 2018, in which an officer wrestled her to the ground, pulled her shirt down revealing her breasts, and left her chest bare as she was handcuffed). However, several organizations and movements have been applying an intersectional lens to police violence to challenge the erasure of these experiences. These movements include #SayHerName #BlackWomenMatter, #BlackGirlsMatter, and #BlackTransLivesMatter, and seek to raise awareness for Black women who have been victims of police violence in this country. *See* KIMBERLÉ CRENSHAW ET AL., AFRICAN AMERICAN POLICY FORUM, SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN 7 (2015), <http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/555cced8e4b03d4fad3b7ea3/1432145624102/mergeddocument2+%281%29.pdf>.

Scholars and activists like Andrea J. Ritchie and Kimberlé Crenshaw, and members of feminist groups such as INCITE! and the Audre Lorde Project, have worked to combat police violence. Sankofa, *supra* at 662. By elevating the names of Black women murdered by law enforcement, these activists have reminded us that Black men and boys are not the only victims. *Id.*; *see also* Evette Dionne, *Police Kill Black Women All the Time, Too - We Just Don't Hear About It*, Bustle, Aug. 12, 2014, <http://www.bustle.com/articles/52433-police-kill-black-women-all-the-time-too-we-just-dont-hear-about-it>.

Black women and LGBTQ individuals are also disproportionately vulnerable to gender- and sexuality-based police violence such as sexual harassment, assault, rape, or extortion. Sankofa, *supra* at 662. Police sexual violence includes “situations in which a [person] experiences a sexually degrading, humiliating, violating, damaging, or threatening act committed by a police officer through the use of force or police authority.” *Id.* (quoting Peter B. Kraska et al., *To Serve and Pursue: Exploring Police Sexual Violence Against Women*, 12 *Just. Q.* 1, 87 (1995), <http://dx.doi.org/10.1080/07418829500092581>). “Police sexual violence operates on a continuum, from invasions of privacy to body cavity searches, from sexual extortion to rape.” *Id.* at 668–69. One study found that police sexual violence is the second highest reported police complaint, after use of force, with over half of the complaints “involving forcible non-consensual sexual activity such as sexual assault or sexual battery.” CATO INST., 2010 ANNUAL REPORT 4, 7–8, <http://www.policemisconduct.net/statistics/2010-annual-report/#SexualMisconduct>. Officers usually assaulted the adult victims while on duty. *Id.*

Police culture and authority encourages this type of misconduct. “Police work has primarily been a male-dominated profession and has had its own distinct culture; both of which are conducive to violent behavior against women and children.” Sandra N. Heib, *Police Officers as Perpetrators of Crimes Against Women and Children*, Women’s Justice Center of Sonoma County, California 2, 7

(2013), <http://justicewomen.com/wjc-project-final.pdf>. Officers receive training that “emphasizes being in control, gaining compliance through various levels of force, and behaving in an authoritative manner.” *Id.* Because “[i]t is clear that police work continues to be a male-dominated profession and women are thought to be second class and continue to be openly objectified,” and law enforcement’s code of silence culture is pervasive, *id.* at 13–15, Black women will continuously face threats of police violence unless significant and substantial reform is undertaken. But any major transformation of such systemic misconduct requires cooperation, accountability, and transparency.

D. Gag Orders Contribute to a Lack of Accountability for Police Brutality and Sexual Violence Against Black People, and Black Women Specifically.

The increased visibility of police brutality, discriminatory targeting of Black residents, and sexual violence against Black women and LGBTQ individuals has undoubtedly spurred calls for much needed reform. Yet such reform appears stagnant. Martin Kaste, *Police Reform Is Happening, But It’s Hard to Track*, Nat’l Public Radio, Sept. 22, 2016, <https://www.npr.org/2016/09/22/495023234/police-reform-is-happening-but-its-hard-to-track> (stating that progress appears slow due to a lack of decent statistics tracking government agents use of force, difficulty in scheduling new training including community policing, implicit bias, and de-escalation, and changing officers’ ingrained habits). Although the public may hear

of *some* instances of police violence, *every* incident is not publicized. At times, any media coverage of these occurrences may be overshadowed by other newsworthy information. In many instances, the victims of police violence are prevented from speaking about their experiences because they entered into a settlement agreement that included a non-disclosure clause. These clauses require victims of state-sponsored violence and harassment to remain silent and effectively erase their voices and experiences.

Such an erasure only leaves room for more violence to occur. For instance, in 2012, former BPD director of education and training, John King, was forced to resign after a female staff member accused him of groping her in a patrol car. Jessica Miller, *Five women now say they were sexually harassed or assaulted by former Provo Police Chief John King –and a new criminal investigation could be coming*, Salt Lake Tribune, Mar. 3, 2018, <https://www.sltrib.com/news/2018/03/02/five-women-now-say-they-were-sexually-harassed-or-assaulted-by-former-provo-police-chief-john-king-and-a-new-criminal-investigation-could-be-coming>. The victim entered into a confidential settlement agreement, prohibiting her from ever discussing the assault she experienced. Luke Ramseth, *A month before he led Provo police, Baltimore paid \$24K to settle a sex assault case against John King*, Salt Lake Tribune, Aug. 2, 2018, <https://www.sltrib.com/news/2017/08/01/sex-assault-allegations-against-provos-former-police-chief-not-the-first>. A year later,

King was hired in Provo, Utah as the Police Chief, and recently was forced to resign because he sexually harassed and assaulted up to five women. Miller, *supra*. The nondisclosure agreement allowed King to move to another state and continue to sexually assault women as he pleased. Baltimore's policy of silencing victims of police violence, specifically sexual violence against women, has already proven to undermine any meaningful accountability for BPD officers.

Some victims and their family members refuse to be silenced and have their experiences erased. For example, Tawanda Jones is the sister of Tyrone West, a Black man who died while in BPD custody after a traffic stop on July 18, 2013. Juliet Linderman, *Report: Heart condition didn't cause Tyrone West's death in custody*, Balt. Sun, Apr. 30, 2016, <http://www.baltimoresun.com/news/maryland/bs-md-custody-death-20160430-story.html>. Ms. Jones and Mr. West's children filed a lawsuit against the city alleging police misconduct and excessive force because BPD officers tackled Mr. West to the ground and suffocated him, causing his death. *Id.* Four years later, the city entered into a confidential settlement agreement with Mr. West's children, but Ms. Jones removed herself from the case to ensure that she could continue to publicly discuss the violence her brother endured and pursue substantive police reform. Luke Broadwater, *\$1M settlement planned for family of Tyrone West*, Balt. Sun., July 26, 2017, <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-west-settlement-20170726-story.html>. She

proclaimed, “They will not tell me what I can and cannot say I will never, ever settle for anything. *I’m on the right side of justice.*” *Id.* (emphasis added). Yet because so many other cases are suppressed from public scrutiny by confidential settlements, Ms. Jones’s lone voice has not yet carried the day.

This Court should follow Ms. Jones’s lead. Justice for victims of police violence should not remove their constitutional right to speak freely and discuss their experiences with state-sponsored brutality. Justice for these victims should not remove their ability to contribute vital information to an important national discussion on police reform and a local conversation on the BPD’s notorious misconduct and much-needed improvements. Justice for victims like Appellant Ashley Overbey requires this Court to reverse the district court and allow her to publicize her painful experience so that she may contribute to necessary change.

CONCLUSION

For the foregoing reasons, *Amici* respectfully requests that this Court reverse and vacate the district court’s dismissal of Appellants’ claims.

Dated: May 29, 2018

Respectfully submitted,

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Dated: May 29, 2018

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K'Shaani Smith

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