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**IN THE
COURT OF APPEALS OF MARYLAND**

SEPTEMBER TERM, 2019

MISC. NO. 6

**BALTIMORE CITY POLICE DEPARTMENT, et al.,
Appellants,**

v.

**IVAN POTTS,
Appellee.**

**ON CERTIFIED QUESTION FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MARYLAND**

**BRIEF OF *AMICI CURIAE* VICTIMS OF THE BALTIMORE POLICE
DEPARTMENT IN SUPPORT OF APPELLEE**

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INTRODUCTION

The Baltimore Police Department argues that it cannot be liable for its officers' conduct because their actions "fail[ed] to advance any legitimate law enforcement purpose." Appellants' Br. 20. But whether the Gun Trace Task Force and officers who perpetuated similar abuses acted in furtherance of any "legitimate" purpose is not the question before this Court. The question is whether they acted within the scope of their employment—regardless of whether the conduct BPD authorized, condoned, or willfully ignored served legitimate law enforcement purposes. If proven, the facts about plainclothes officers reported in public documents show that officers were acting within the scope of their employment when they used their BPD-issued badges and guns to perpetuate violence against their victims, targeted African Americans for unjustified stops and false arrests, and planted evidence and perjured themselves to get perceived "bad guys" off the streets.

In November 2018, the City Solicitor acknowledged that unreleased records from BPD showed "'a lot of complaints' against at least some of the officers" in the GTTF, "prosecutors and judges had been aware of problems with the officers," "[t]here were lots of red flags all over the place," and "[t]his was a systemic failure of the criminal justice system." Amici App. 103. Nevertheless, BPD now contends that the conduct at issue cannot be attributed to "any of BPD's training, . . .

policies, standard operating procedures, general orders, or guidelines,” but rather was the fault of a few rogue officers who successfully “conceal[ed] their illegitimate and illegal conduct from City officials and from their superiors.” Appellants’ Br. 11. That position contradicts previous admissions and public information regarding the GTTF and the plainclothes units that preceded it, namely that:

1. BPD plainclothes units have long been plagued by scandal and complaints of unconstitutional and criminal conduct, including false arrests, excessive force, planted evidence, and perjury;
2. BPD incentivized these abuses by telling officers to maximize their arrest numbers and pursue “bad guys with guns” without concern for the means; and
3. BPD officials knew about such abuses and allowed them to continue.

Public records establish that the stipulated facts in this case are, at best, an incomplete account of BPD’s role in the abuses committed by its plainclothes officers for the past two decades. BPD has acknowledged that “until an appropriate review has been performed, . . . neither the BPD nor the Baltimore community can be comfortable that the full scope of the problem has been identified.” Motion to Approve Investigation of Gun Trace Task Force Scandal 1, *United States v. BPD*, No. 1:17-cv-00099-JKB (D. Md. Oct. 23, 2019), ECF No. 251. No information is

available regarding what underlying support for the stipulated facts exists. BPD victims, including amici curiae, are entitled to the benefit of discovery to identify the full extent of the problem within BPD and determine whether the plainclothes officers who harmed them acted within the scope of their employment.

Therefore, while the Court should conclude that BPD is not absolved from liability in this matter, any ruling as to liability in this case, on these sparse stipulations, should not bind future litigants seeking justice from BPD.

STATEMENT OF INTEREST

Amici curiae are a collection of victims who, like Appellee, had their life and liberty violated by BPD's plainclothes officers. They each have lawsuits currently pending against BPD officers and former officers. *See Amici App. 1.* Amici have a strong interest in ensuring that this Court has a full history of Appellants' knowledge, approval, and promotion of the conduct in which its plainclothes officers have engaged for at least the last two decades.¹

¹ This brief is submitted pursuant to Rule 8-511(a)(1). All parties to this appeal have provided written consent for the submission of this brief. No person, other than amici and their attorneys, has made a monetary or other contribution to the preparation or submission of this brief.

ARGUMENT

I. PLAINCLOTHES BPD OFFICERS WHO FALSELY ARRESTED BLACK CIVILIANS, USED EXCESSIVE FORCE, AND PLANTED EVIDENCE AND PERJURED THEMSELVES TO SECURE CONVICTIONS ACTED WITHIN THE SCOPE OF THEIR EMPLOYMENT.

Even if the actions of the GTTF were criminal, served no legitimate law enforcement purpose, and were motivated at least in part by personal gain, they were still within the scope of employment. An employee's actions are within the scope of employment when they are "incident to the performance of the duties entrusted to him by the master, even though in opposition to his express and positive orders." *Sawyer v. Humphries*, 322 Md. 247, 255 (1991) (citation omitted). The relevant inquiry focuses on the time, place, and manner of the employee's actions,² and also whether the conduct was, at its core: (a) commonly undertaken by employees; (b) similar to that authorized by the employer;

² The abuses committed against Ivan Potts and William James, as well as those described in amici's complaints (if proven true), undisputedly occurred during times and in places the defendants were authorized to be on duty and were effectuated by their authority as police officers and through the performance of police functions, including conducting investigatory stops and searches, issuing citations, making arrests, swearing out reports, and giving testimony. Considering whether the conduct was "of the kind the servant is employed to perform," whether it "occur[red] during a period not unreasonably disconnected from the authorized period of employment in a locality not unreasonably distant from the authorized area," and "whether or not the instrumentality by which the harm is done has been furnished by the master to the servant," *Sawyer*, 322 Md. at 255–56 (citations omitted), therefore overwhelmingly favors finding that the actions at issue were within the scope of BPD officers' employment.

(c) “expectable or foreseeable,” and (d) “actuated *at least in part* by a purpose to serve the master.” *Id.* at 255–56 (emphasis added) (citations omitted). The conduct’s criminality does not end the analysis: “An act may be within the scope of employment although forbidden or done in a forbidden manner; although consciously criminal or tortious; although done in part to serve the purposes of the servant or a third person.” *Fid. First Home Mortg. Co. v. Williams*, 208 Md. App. 180, 204 (2012) (citation omitted). Where supervisors knew or should have known about an employee’s criminal actions, or where bad conduct was incentivized by the employer or motivated by the employee’s “desire to increase his standing” with the employer, conduct may be within the scope of employment. *Rubin v. Norwich Commercial Grp., Inc.*, No. CV DKC 14-3246, 2016 WL 1597157, at *7 (D. Md. Apr. 21, 2016); *accord Fid. First*, 208 Md. App. at 206.

For at least the past two decades, BPD officers have engaged in the same conduct as the GTTF, including pursuing criminal cases without probable cause and using violence against their victims. These problems have been particularly acute in BPD’s plainclothes units and can be traced to BPD’s policies and training, including emphasizing officers’ arrest and gun confiscation rates and instructing them to get perceived “bad guys” off the street without regard for how officers did so. This behavior has been well known to BPD. Nevertheless, BPD never appropriately disciplined or supervised its officers or took steps to eradicate its

employees' criminal abuses. Officers therefore reasonably assumed that their illegal tactics served BPD's interests, as well as their own. These practices were therefore within the scope of employment.

A. BPD officers commonly engaged in the abuses perpetuated by the GTTF.

Mr. Potts and amici claim that plainclothes BPD officers brutalized them and initiated and pursued false criminal proceedings against them. Similar unconstitutional and criminal conduct by BPD officers has been distressingly common over the last two decades. As then-commissioner Anthony Batts wrote in 2015, BPD has been stuck in a "cycle of scandal, corruption and malfeasance." Amici App. 4. The frequency of bad conduct by BPD officers, left unchecked, *see infra* Part B.3, made the abuses suffered by Mr. Potts and amici foreseeable.

1. BPD officers profiled and instituted false criminal proceedings against African Americans.

BPD officers frequently targeted individuals for criminal enforcement without any lawful reason. BPD's pedestrian stops rarely revealed evidence of criminal activity: The United States Department of Justice found that only 3.7% of stops from November 2010 to July 2015 resulted in a criminal citation or arrest. E. 67. During that time, "BPD officers made 10,163 arrests that authorities immediately determined did not merit prosecution—an average of roughly 200

arrests per month.” E. 74. In approximately 20% of these cases, prosecutors explicitly found that the arrests lacked probable cause. E. 74.

BPD officers did not perpetrate illegal stops and false arrests at random; rather, they targeted people like Mr. Potts and amici—African-American men—as presumptively criminal. BPD officers used stops without reasonable suspicion in the hopes of finding people with outstanding warrants or contraband, E. 67, and “[t]here is overwhelming statistical evidence of racial disparities in BPD’s stops, searches, and arrests,” E. 87. BPD officials concentrated their stops in black neighborhoods, E. 104, and they stopped and arrested black residents at higher rates than white residents. From January 2010 to June 2015, “BPD officers made 520 stops for every 1,000 black residents in Baltimore, but only 180 stops for every 1,000 Caucasian residents.” E. 87. “African Americans in Baltimore were charged with one offense for every 1.4 residents, while individuals of other races were charged with only one offense per 5.1 residents.” E. 94.

2. BPD officers used excessive force and other tactics designed to terrorize Baltimoreans.

BPD is no stranger to the methods of the GTTF, including the use of brutal violence and other means to terrorize Baltimore residents. Then-commissioner Batts admitted that BPD’s use of unnecessary force “didn’t take place or [was] not built in the last two years.” Amici App. 291. “Officers frequently resort to physical force . . . even where the subject poses no imminent threat to the officer or others.”

E. 47. BPD used violence against citizens when they had no reasonable suspicion justifying a stop, much less an arrest. *See, e.g.*, E. 70 (recounting violent stop of man because he was walking in area “known for violent crime and narcotics distribution” and fled from questioning); Amici App. 291 (recounting an incident where officers pulled a woman out of a car and assaulted her after she filmed them beating another person). A study by an organization working in West Baltimore found that 57% of police encounters reported by study participants included “acts of physical violence.” Amici App. 310. BPD’s use of excessive force has been particularly common against African Americans, who accounted for “[n]early 90 percent of the excessive force incidents” DOJ identified, E. 86, a rate “significantly higher than the proportion of African Americans in Baltimore’s population,” E. 100.

BPD officers engaged in other practices designed to terrify and degrade. Supervisors instructed officers to force groups congregating in public places to disperse, and officers attacked, searched, and/or arrested those who refused. *E.g.*, E. 56, 68–69, 81–82, 104–05. The stated purpose of these tactics was to keep people BPD believed to be criminal—but most of whom were not—in a state of fear. *See* Amici App. 53 (“Police commanders argue that the in-your-face tactic reduces crime by scaring criminals into thinking they could be searched at any moment.”); Amici App. 249 (former acting commissioner Anthony Barksdale

stating, “This city is going to keep getting its ass kicked until criminals don’t know whether the car coming down the street has some [plainclothes officers] in it.”).

3. These abuses were particularly acute in plainclothes units.

The GTTF is but one iteration of a long line of plainclothes BPD units that have been a frequent and recurrent source of similar unconstitutional conduct. As a former deputy commissioner acknowledged, the BPD’s plainclothes culture foreseeably resulted in abuses: “You have to be careful what you ask of your officers, because they’ll get it for you, and the ends do not justify the means.” Amici App. 143. DOJ investigators “received a large number of anecdotes specifically identifying plainclothes officers enforcing violent crime and vice offenses . . . as particularly aggressive and unrestrained in their practice of stopping individuals without cause and performing public, humiliating searches. A disproportionate share of complaints likewise accuse plainclothes officers of misconduct.” E. 84. BPD has repeatedly broken up and reconstituted its plainclothes units in reaction to scandal. Amici App. 149. While the names of BPD plainclothes units have changed over time, their essential character—and often personnel—have not. Amici App. 136, 138, 149.

Accusations against plainclothes officers have persisted since at least the early 2000s. In 2006, the *Baltimore Sun* reported that plainclothes “flex squads” were accused of “planted drugs and troublesome practices about how suspects

were treated and charged.” Amici App. 46. Drugs, drug paraphernalia, multiple weapons (including four BB guns), and other contraband were seized from a flex squad office. Amici App. 64, 66–67. The entire Southwestern District flex squad was replaced in early 2006 “because most of its officers ha[d] been suspended amid investigations of rape, drug possession and illegal gambling.” Amici App. 64.

Months later, another plainclothes unit—this time referred to as a “special enforcement team” (“SET”)—was disbanded due to misconduct related to “the truthfulness of the charging documents they wrote to justify arrests they made of people on gun and drug charges.” Amici App. 61; *see also* Amici App. 24. This included cases where photos contradicted officers’ accounts. Amici App. 61. One former officer reported that when he worked on a SET from 2006 to 2008, “we stopped just about every adult we saw on the street to check their names for open warrants.” Amici App. 237.

Despite these problems, in 2007 BPD formed a new plainclothes unit known as the Violent Crime Impact Section (“VCIS”), or at times the Violent Crime Impact Division (“VCID”), “to target high-crime areas.” Amici App. 226, 267, 281. While it existed, VCIS was a source of many excessive force lawsuits against BPD, as well as accusations of perjury and planting evidence. Amici App. 260–62, 267. Examples include: Michael Woodlon, whom the *Baltimore Sun* exposed for filing false charging documents, Amici App. 281; Adam Lewellen, who was

convicted of perjury, Amici App. 44, 87;³ and Kendell Richburg, who falsified arrest documents, searched a victim without probable cause and robbed him, and trafficked in stolen property, Amici App. 289. The City had earlier settled claims that Richburg and his partner broke a 63-year-old black man’s nose. Amici App. 35. The FBI found that multiple VCIS officers had “written false reports.” Amici App. 58. The City paid a \$200,000 settlement in 2009 and a \$100,000 settlement in 2011 to men who were beaten by VCIS officers. Amici App. 33, 288. VCIS officers were also accused of throwing a citizen to the ground during an arrest with such force that his “spleen ruptured, and he died a short time later.” Amici App. 268. A former VCID detective received a settlement in 2016 after suffering serious retaliation, including from his lieutenant, when he reported VCID officers for beating a suspect. E. 191–92. His decision to report cost the detective a promotion to a violent repeat offender squad where, his lieutenant said, officers were expected to “do things in the gray area.” E. 191.

As GTTF members made clear, misconduct was rampant within BPD and practically a prerequisite to joining a plainclothes unit.

[P]lainclothes units were hard to break into unless you had connections. A way to build connections, [Maurice Ward] said, was to show you could be trusted—which meant covering for others. “I can say that I stole money before Jenkins, not because I was poor or struggling,” Ward told The Sun. Rather, it was “just because

³ The Circuit Court for Baltimore City held that Lewellen’s actions were within the scope of his employment. Amici App. 286.

everybody else was doing it, and I wanted to feel accepted and trusted to get into a specialized unit and out of patrol.”

Amici App. 130 (alteration omitted). While “neither committing perjury nor planting weapons on innocent people” may be “‘commonly done’ by police officers,” Appellants’ Br. 38, they were commonly done by BPD plainclothes officers and, thus, were not a “departure from the normal method” of BPD policing. *Sawyer*, 322 Md. at 256. If the public reporting is proven true, this conduct was foreseeable and within the scope of employment.

B. The abuses common to plainclothes BPD officers flowed from BPD policies and culture.

BPD plainclothes officers’ use of excessive force and pursuit of baseless criminal cases against Baltimoreans, particularly African Americans, had its roots in BPD policies and culture. For at least two decades, BPD has encouraged its officers to go after “bad guys with guns and drugs” without regard for how they did so. *See* Amici App. 216; *accord* Amici App. 117–118. It has evaluated its officers based on the number of arrests they made rather than the quality of their police work. BPD has turned a blind eye to known abuses by its plainclothes units because it valued their results—by whatever means.

1. “It’s all about numbers, and it doesn’t matter how you get them.”

The GTTF’s illegal conduct was directed by and the predictable consequence of BPD’s zero tolerance policies, culture, and training. An employer

that incentivizes criminal conduct may bring that conduct within the scope of employment. *Fid. First*, 208 Md. App. at 206; *Rubin*, 2016 WL 1597157, at *7.

Under BPD’s zero tolerance regime, which began at least by the late 1990s, BPD “prioritized officers making large numbers of stops, searches, and arrests—and often resorting to force—with minimal training and insufficient oversight from supervisors or through other accountability structures.” E. 44. The stated purpose of this strategy was “to seize guns and narcotics and deter crime.” E. 80.

“Productivity, in BPD, has always reigned supreme,” explained former commissioner Kevin Davis. “If you’re productive and you go out and hunt and gather and get bad guys with guns and drugs, people are inclined to give those all-star players the benefit of the doubt.” *Amici App.* 216. During the period in which the GTTF was active, BPD supervisors “continue[d] to focus on the raw number of officers’ stops and arrests,” E. 17, as well as the number of guns confiscated, *Amici App.* 117; *see also* E. 63, 81, 192 (recounting official encouragement for zero tolerance methods in 2015 and 2016); E. 198 (“Commanders say they want community policing, but then they come back around and ask ‘How many arrests you made?’”). Senior BPD officials themselves were willing to break the law to increase productivity, authorizing illegal overtime as a reward for seizing a gun. *Amici App.* 110–11.⁴

⁴ One lieutenant who allegedly authorized illegal overtime has been in charge of

Officers trained in zero tolerance policing faced enormous pressure to improve their stats. *See Amici App. 52, 56.* As Officer Richburg (*see supra* Part I.A.3) explained, he and other crooked officers “were motivated by intense pressure to make arrests. Officers with many arrests were praised, he said, while those with fewer were punished.” *Amici App. 59.* To perform to their command’s standards, officers often pursued stops and arrests against individuals without legal justification. As the police union president put it, “It’s all about numbers, and it doesn’t matter how you get them.” *Amici App. 56.* Officers who objected or failed to perform faced retaliation from senior BPD officials. For example, in 2015, after an officer was temporarily banned from working overtime for objecting to her sergeant’s request to “clear corners”—i.e., arrest people standing in groups on public sidewalks—the major in charge of her district “defended the punishment by stating that the officer ‘hadn’t made stats for six days.’” E. 192; *see also* E. 68 (explaining the term “clear corners”).

BPD supervisors not only promoted policies that incentivized officers to make false arrests but actively encouraged those practices. In 2015, Commissioner Davis convened a meeting of plainclothes units where Deputy Commissioner Dean Palmere told the attendees “to go out and do whatever it took to reduce crime.” *Amici App. 128.* Supervisors instructed officers to “clear corners” in black

BPD Internal Affairs since 2015. *Amici App. 69, 173.*

neighborhoods. E. 102–03; *see* Amici App. 52–53 (reporting that stop-and-frisk was being used “with little oversight from senior commanders and virtually no tracking of its effectiveness . . . mostly in neighborhoods besieged by crime, and where a high concentration of minorities live”). These policies were so unremarkable within BPD that during a ride-along with DOJ officials, a sergeant instructed a patrol officer to “make something up” in order to question and disperse a group of black men on a street corner. E. 68. Another told DOJ that “she stops and disperses youth standing on sidewalks because ‘it looks bad.’” E. 104. Officers have received “explicitly discriminatory orders, such as a lieutenant directing a shift to arrest ‘all the black hoodies’ in a neighborhood.” E. 103, 105. A shift commander circulated a template for describing trespassing arrests on housing development property that gave a facially unconstitutional explanation for the arrest—the arrestee could not give “a valid reason” for being there—and presumed the arrestee would be a black male. E. 76, 105.

BPD policies also stoked the persistent violence deployed by its officers. “BPD trains officers to be aggressive, inculcating an adversarial mindset in its recruits” E. 114. Not only did BPD encourage an “‘us-versus-them’ mentality,” E. 118, 196; *see* Amici App. 309, it also taught officers the wrong legal standard, suggesting that some incidents of excessive force were merely “perceived” or “unintentional” and therefore might be constitutional, E. 114, 140.

BPD’s purported “community policing” training taught officers to be “warriors,” not “guardians.” E. 200. At the time the GTTF was active, BPD lacked critical use-of-force and de-escalation policies and training. E. 114, 119, 137–38. A former deputy commissioner lamented that “[a]ny attempts to make the force become less of a warrior and more of a guardian was looked at terribly” by BPD commanders. Amici App. 158. As a result of this training, “[o]fficers seemed to view themselves as controlling the city rather than as a part of the city” and to “approach[] policing in Baltimore like it is a war zone.” E. 196.

The ethos of misconduct was so ingrained in BPD that supervisors retaliated against officers who objected or attempted to report it. For example,

[i]n 2014, a BPD lieutenant placed several signs next to the desk of an African-American sergeant with a reputation for speaking out about alleged misconduct in the Department. Among the signs were warnings to “stay in your lane,” “worry about yourself,” “mind your own business!!” and “don’t spread rumors!!!” After the sergeant filed a complaint about the signs, the lieutenant admitted to creating them and placing them next to the sergeant’s desk. Yet BPD took no meaningful corrective action.

E. 191. A sergeant who objected to a lieutenant’s instruction to “‘lock up all the black hoodies’ . . . received an ‘unsatisfactory’ performance evaluation and was transferred to a different unit.” E. 105. She reported the incident, “but BPD never took action against the lieutenant for giving the order to target ‘black hoodies’ for enforcement.” E. 105. In 2016, BPD settled a lawsuit initiated by a former detective who experienced severe retaliation from his supervisors—including the

placement of a decapitated rat on his windshield—after reporting an incident of excessive force. E. 191–92.

2. “Command created the monster and allowed it to go unchecked.”

In support of zero tolerance, BPD rewarded plainclothes officers for the fruits of their abuses. Former commissioner Davis explained, “Plainclothes officers ‘made the most arrests, they seized the most drugs and money, assets That creates a culture . . . that those guys should be given a pass.’” Amici App. 149. BPD focused only on plainclothes officers’ arrest volume, not quality: for example, from 2012–2016, “even as [GTTF Sgt. Wayne Jenkins] was being praised for the volume he was bringing forward,” 40 percent of his arrests were dropped, compared to the 25 percent average drop rate in BPD. Amici App. 143. Multiple supervisors within BPD concluded that GTTF officers continued to be promoted and rewarded because of the high volume of arrests they made, without reference to other metrics of proper policing. Noting that Jenkins was rewarded because he gave “150 percent on the street,” Lt. Marjorie German declared, “Command created the monster . . . and allowed it to go unchecked.” Amici App. 151; *see also* Amici App. 100 (statement from retired Sgt. Chad Ellis that “officers were promoted to detective too easily. Their arrest statistics . . . were given too much consideration.”).

3. “Should someone have known about it? Absolutely they should have known. The culture here contributes to it.”

When supervisory officials knew, or should have known, of an employee’s illegal acts and failed to take corrective action, such acts may be within the scope of employment. *Blue Rider Fin., Inc. v. Harbor Bank Md.*, No. CIV.A. ELH-11-3101, 2013 WL 1196204, at *7, *11 (D. Md. Mar. 22, 2013). Of the GTTF, then-commissioner Davis said, “Should someone have known about it? Absolutely they should have known. The culture here contributes to it.” Amici App. 111. BPD was on notice from complaints by the police union, State’s Attorney, and hundreds of citizens that its plainclothes officers were abusing and falsely arresting citizens, planting evidence, and perjuring themselves. It did nothing.

As early as 2005, the Fraternal Order of Police (“FOP”) stated publicly that BPD’s zero tolerance policies were leading to constitutional violations: “Some call stop-and-frisks a ‘VCR detail’—for violation of civil rights,” the FOP president told the *Baltimore Sun*. Amici App. 52. In 2012, FOP notified BPD that “Comstat numbers drive everything in the BPD, which has led to misplaced priorities. As a result, officers in the BPD feel pressure to achieve numbers for perception’s sake . . .” Amici App. 16–17. FOP told BPD to “discontinue the practice of rewarding statistically driven arrests.” Amici App. 20. Meanwhile, the State’s Attorney’s Office maintained a “Do Not Call” list of officers who were not credible due to misconduct and thus could not be called to testify in criminal cases. E. 85.

Prosecutors shared the names with BPD, but BPD neither investigated their conduct nor took any other action. *See* E. 190.

Dozens of lawsuits and criminal prosecutions related to excessive force, false arrests, planted evidence, and perjury have been initiated against BPD officers since the institution of zero tolerance policing. From 2008 to 2011, the City spent \$7.25 million to settle police misconduct lawsuits. Amici App. 11. From 2011 to 2014, 317 suits were filed alleging that “police officers brazenly beat up alleged suspects,” most of whom were never convicted of a crime, and during that time the City paid an additional \$5.7 million in settlements and court judgments in response to over 100 such claims. Amici App. 258, 262; *see also* Amici App. 290–96 (recounting claims of police brutality and false arrests). The cases included several in which officers were accused of planting evidence or perjuring themselves. Amici App. 293. The department has also received numerous complaints alleging bias against Baltimore’s black citizens. E. 106–07.

BPD has done little to root out the problems in its ranks. For example, DOJ reported in 2016 “that numerous officers had recurring patterns of misconduct that were not adequately addressed,” including that “in the past five years, 25 BPD officers were separately sued four or more times for Fourth Amendment violations.” E. 175. DOJ found that “[o]f the 1,382 allegations of excessive force that BPD tracked from 2010 through 2015, only 31 allegations, or 2.2 percent were

sustained.” E. 185.⁵ BPD classified only one complaint from 2010–2016 as involving a racial slur,⁶ but DOJ investigators found 60 more just in which BPD officers were accused of using one well-known racial epithet. E. 101. “Throughout our interviews and ride-alongs with officers,” DOJ reported, “we heard officers express that discipline is only imposed if an incident makes it into the press or if you were on the wrong side of a supervisor, not because of the magnitude of the misconduct.” E. 185.⁷ Similarly, BPD’s own 2013 strategic plan found that, “[d]iscipline has not always been a priority for the Baltimore Police Department.” Amici App. 361; *see* Amici App. 354.

In the face of the “red flags” acknowledged last year, BPD continued to employ and promote plainclothes officers even when they were accused of criminal behavior. This behavior was not limited to a single, corrupt unit. Wayne Jenkins amassed a long history of misconduct complaints before he joined the GTTF as its leader in 2015. He was sued four times from 2006 to 2009, resulting in

⁵ Because use-of-force investigations proceeded up the chain of command until late 2014, senior BPD officials knew about these complaints and their resolutions. E. 141. DOJ identified at least one instance in which senior officials “may have attempted to cover up [a] report that identified potentially problematic officer conduct.” E. 144–45.

⁶ That complaint was administratively closed without any evidence of investigation. E. 209.

⁷ For example, Internal Affairs investigated the retaliation against the officer described *supra* Part B.1 only “after the incident received substantial media coverage.” E. 192.

three settlements or jury verdicts. Amici App. 118, 137, 154.⁸ In one case, he and his supervisor fractured a man's eye socket, then gave perjured testimony. Amici App. 151. In the only lawsuit in which BPD escaped payment for Jenkins's deeds, Jenkins's account of a disputed arrest was contradicted by security camera footage. Amici App. 153.

These lawsuits "triggered no internal punishment." Amici App. 148. At the trial of two GTTF officers, witnesses testified that Jenkins "had pretty good connections within the hierarchy," was "untouchable," a "prince," and a "golden boy." Amici App. 110, 221–22. In 2014, after surveillance video contradicted Jenkins's account of one incident and Jenkins's partner contradicted Jenkins's account of another, internal affairs investigators recommended suspension and demotion. Then-deputy commissioner (and future commissioner) Darryl De Sousa "intervened to prevent the punishment." Amici App. 137, 148.

Other members of the GTTF also amassed long records of misconduct without incurring appropriate discipline. Jemell Rayam admitted to making false statements regarding the theft of \$11,000 during a 2009 traffic stop. He was "cleared by a police trial board, returned to duty and promoted." Amici App. 90–91. Before that, he was involved in three shootings in 20 months, one of which resulted in a lawsuit that settled for \$100,000. Amici App. 91, 239. A

⁸ BPD accepted liability for Jenkins in these matters, as well as for its officers in the settlements referenced above.

whistleblower reported in 2013 that Rayam and Momodu Gondo were taking money and drugs during traffic stops. Amici App. 120. In January 2016, prosecutors informed BPD that a judge found that Rayam “had not given credible testimony.” Amici App. 28. Yet he remained on the street.

Daniel Hersl was the subject of three lawsuits resulting in settlements paid by BPD totaling \$149,000. Amici App. 120. By 2006, he had amassed dozens of complaints. Amici App. 120. He was not disciplined: to the contrary, in the eyes of Barksdale, the former deputy commissioner over operations and, later, acting commissioner, complaints against officers were a sign that they were “harder-working.” Amici App. 216.

Nor has BPD changed the leadership of its plainclothes units, despite the repeated need to disband and reform them after scandal. Dean Palmere oversaw the plainclothes units under former commissioner Frederick Bealefeld III, then was promoted to deputy under Batts and Davis. Amici App. 215. Palmere retained senior leadership positions despite the continued misconduct of the officers under his command, until he resigned in 2018 following testimony that he coached Rayam “on what to say to avoid punishment following a fatal shooting in 2009.” Amici App. 182, 229.

Outside of GTTF officers, BPD regularly failed to discipline employees who engaged in serious misconduct. For example, Maryland’s federal district court

found one officer swore out an affidavit of “knowing lies.” Amici App. 38. That officer remained on the force. Ten years later, he was charged with perjury and sued for lying on a search warrant affidavit. Amici App. 186, 293. Although the officer is still with BPD, the State’s Attorney’s Office will not call him and tries to work around him to make their cases. Amici App. 187–88. Participants in the West Baltimore study reported that police were cavalier and seemingly unafraid of discipline when using violence: “One witness stated, ‘the whole neighborhood was outside when he did it. It was a summer afternoon, but he didn’t care. He felt like his badge made him God.’ During another incident of physical assault, a witness observed the officers who were involved stating, ‘go ahead and film us.’” Amici App. 314.

Here, the “previous relations between the master and the servant,” *Sawyer*, 322 Md. at 256, would have led any BPD plainclothes officer to believe that s/he could act with almost complete impunity so long as s/he appeared to be making stats. Where an employer tolerates misconduct so long as the employee is getting the job done, the misconduct is within the scope of employment. *Fid. First*, 208 Md. App. at 205–06. Mr. Potts and amici were each attacked and persecuted by officers with previous records of misconduct who had been rewarded for their behavior. BPD has incentivized its officers to pursue men like Mr. Potts and amici regardless of their criminality. It has known that its policies risk serious criminal

misconduct by its officers. It has done nothing to change course. If the facts recounted in the public record are proven true, they show that the behavior of the defendant officers in Mr. Potts and amici's cases were within the scope of their employment.

C. Plainclothes officers intended their criminal conduct to further BPD's interests.

Against the backdrop of these official policies and practices, plainclothes officers' use of excessive force and initiation of false criminal proceedings, including by planted evidence and perjury, were motivated "at least in part by a purpose to serve [BPD]." *Sawyer*, 322 Md. at 255 (citation omitted). GTTF officers testified that their illegal tactics, including false stops, searches, arrests, and undue aggression, were designed to scare up guns, drugs, and money. "We learned very quickly that it was a numbers game—the more people you come in contact with, the greater your chances of getting a gun," Ward testified. Amici App. 130. As described by the *Baltimore Sun*, Hersl testified that "the quickest way to get results" was "to swoop in on people not actually suspected of a crime, get into their cars and search." Amici App. 118. Jenkins profiled cars he believed were popular with drug dealers and instructed his squad to stop men with backpacks because, Ward testified, "Jenkins surmised that men that age were likely to have no reason to carry a backpack other than to transport illicit items." Amici App. 83. Ward testified that the squad frequently recovered guns using tactics

designed to terrify civilians, such as driving fast at groups and slamming on the brakes then detaining and searching anyone who ran. Amici App. 123.

BPD’s protestations that it had no interest in prosecuting innocent civilians, Appellants’ Br. 20, ring hollow in light of its decision to train and instruct officers that it was “us-versus-them,” to control the city, and that certain people, particularly black men, were likely criminals, *see supra* Part B.1. BPD motivated officers to use all available means to get individuals assumed to be criminals off the streets, even if there was no evidence of a crime. *See, e.g.*, Amici App. 53 (Stop-and-frisk “is aimed mostly at loiterers or people who officers believe are involved, even if not at that moment, in something illegal.”). Thus, GTTF officers intentionally sent presumptively criminal but factually innocent civilians to jail.⁹ BPD also enhanced its reputation through its officers’ misconduct by publicizing “busts” to the public.¹⁰ Groomed by BPD’s expectations, encouragement, and

⁹ Misconduct by police officers to get perceived antisocial people off the streets, commonly called “noble cause corruption,” has been well documented. *E.g.*, Jessica S. Henry, *Smoke but No Fire: When Innocent People Are Wrongly Convicted of Crimes That Never Happened*, 55 Am. Crim. L. Rev. 665, 671 (2018).

¹⁰ A search of BPD’s Twitter account during the years amici were attacked (2010 and 2014–2016) for the terms “gun(s),” “drug(s),” “firearm(s)” “weapon(s)” “narcotic(s),” or “heroin” returns hundreds of posts and pictures touting confiscated contraband. Since March 2009, BPD has boasted of its success against “bad guys with guns” on Twitter at least 29 times. @BaltimorePolice, Twitter (last verified Dec. 13, 2019).

unwillingness to discipline them, plainclothes officers reasonably believed that their illegal tactics served both their interests and BPD's.

II. BPD'S STIPULATED FACTS SHOULD NOT BIND LITIGANTS IN FUTURE CASES.

BPD concedes that it has not determined how far the corruption in the department spread. The independent investigation to identify "the full scope of the problem" has just begun. Mot. Approve Investigation, *supra*, at 1. Commissioner Michael Harrison explained recently that BPD has avoided "a deep dive to make the assessment of what happened" because doing so would encourage litigation—i.e., reveal additional facts that would support indemnification. Amici App. 253–54.

The Court should not accept BPD's invitation to bind future litigants to any analysis based on facts handpicked by BPD to worm its way out of a "disadvantageous legal position," Amici App. 255; *see* Joint Motion to Certify Question of Law 31, *Potts v. BPD*, No. 8:16-cv-03187-CBD (D. Md. Aug. 28, 2019), ECF No. 110 (suggesting that the Court's decision in this case "is likely to provide invaluable guidance, in the form of binding precedent, to the resolution of scores if not hundreds of pending and soon-to-be filed cases"). Without access to BPD's policies, training materials, disciplinary records, and other documents through discovery, and without access to deposition testimony from the officers involved and those with knowledge of BPD's operations, the Court has only BPD's

word—and self-interest—to justify the stipulations. Amici have the right to put BPD’s assertions to the test.

CONCLUSION

Mr. Potts was not the victim of rogue police officers whose actions were unforeseeable to BPD. His experience is sadly familiar to amici because BPD has long allowed and encouraged its plainclothes units to target and terrorize Baltimore citizens in the name of “stats.” The officers who violated Mr. Potts’s rights and dignity acted in service of BPD’s goals and priorities and were thus acting within the scope of their employment. Similarly, amici should have the opportunity to prove these facts in a court of law, and BPD should be liable to them if they do so.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on this 16th day of December, 2019, two copies of Brief of *Amici Curiae* Victims of the Baltimore Police Department in Support of Appellee in the above-captioned case was sent via first-class mail, postage prepaid to:

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**CERTIFICATION OF WORD COUNT
AND COMPLIANCE WITH RULE 8-112**

I hereby certify that:

1. This brief contains 6,476 words, excluding the parts of the brief exempted from the word count by Rule 8-503.
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