UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(GREENBELT DIVISION)

HISPANIC NATIONAL LAW ENFORCEMENT ASSOCIATION NCR, *et al.*, *Plaintiffs*, **v.** **PRINCE GEORGE'S COUNTY, *et al.***, *Defendants*.	Case No. 8:18-cv-03821-TDC

REPLY BRIEF OF THE PRINCE GEORGE'S COUNTY OFFICE OF THE PUBLIC DEFENDER IN SUPPORT OF ITS MOTION TO INTERVENE AND UNSEAL

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INTRODUCTION

The County's response to the Office of the Public Defender's (OPD) motion to intervene is more notable for what it does not say than what it does. For instance, the County does not cite a single case in which a court has denied a party leave to intervene for the purpose of unsealing judicial records. Nor does the County dispute that it must satisfy the First Amendment's stringent standard for sealing judicial records (rather than the lower common-law standard). And, perhaps most notably, the County does not cite any authority to support its novel theory that the public's *constitutional* right of access to judicial records must yield to a *state statute* shielding certain public records from disclosure. These shortcomings in the County's position yield only one outcome: that OPD's motion to intervene and unseal the Graham report be granted.

ARGUMENT

I. The County fails to identify any valid basis for denying OPD's intervention motion.

A. Maryland law does not preclude OPD from intervening here.

The County contends that OPD lacks authority to intervene in this matter. *See* Defendants' Consolidated Objections to Motions to Intervene (ECF No. 322), at 9–11. Specifically, it argues that OPD has "cited no statute, rule, or case law *authorizing* it" to intervene under Maryland law. *Id.* at 10 (emphasis in original).[1] But that argument

[1] To the extent that the County intended to argue that OPD cited no "statute, rule, or case law" authorizing intervention under *federal* law, that argument is flatly contradicted by OPD's opening brief, which cited numerous federal cases permitting

Continued on next page.

ignores a basic tenet of federal civil procedure: that a state agency need not identify any authority under *state* law in order to intervene in a *federal* case. As numerous cases and commentators have recognized, "[i]t is wholly clear that the right to intervene in a civil action pending in a United States District Court is governed by Rule 24 and not by state law." 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1905 (3d ed. 2020) (collecting cases).

Indeed, federal courts—including courts in this District—have long permitted state agencies to intervene in cases without requiring them to identify some specific provision of state law authorizing them to do so. *See, e.g.*, *Mitchell v. Singstad*, 23 F.R.D. 62, 64 (D. Md. 1959) (permitting Maryland State Roads Commission to intervene in employment matter where, *inter alia*, the agency had "a real interest in seeing that its views with respect to the issues involved in this case are brought to the court's attention, that sufficient evidence is produced to support its contentions, and that an appeal be taken from any decision adverse to its position"). "While a public official may not intrude in a purely private controversy, permissive intervention is available when sought because an *aspect of the public interest with which he is officially concerned* is involved in the litigation." *Nuesse v. Camp*, 385 F.2d 694, 706 (D.C. Cir. 1967) (emphasis added). Nothing in Rule 24 requires that "aspect of the public interest" to be explicitly identified in some independent state statute authorizing intervention. *See id.* (permitting Wisconsin state

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parties to intervene in order to unseal court records. *See* OPD's Motion to Intervene & Unseal (ECF No. 282-1), at 5–9.

banking official to intervene in federal action without inquiring into whether Wisconsin law authorized the official to intervene in federal actions).

In any event, even if Maryland law did have some bearing on OPD's ability to intervene in federal court (and it does not), the County's characterization of the relevant statutory provisions is simply wrong. Maryland law grants the Office of the Public Defender broad authority to undertake actions to protect the rights of indigent criminal defendants. The statutory title delineating the Office's duties specifically states that it is "the policy of the State to: (1) provide for the realization of the constitutional guarantees of counsel in the representation of indigent individuals, *including related necessary services* and facilities, in criminal and juvenile proceedings in the State." *See* Md. Code, Crim. Proc. § 16-201 (emphasis added). In addition, the statute explicitly directs OPD to "consult and cooperate with professional groups about the causes of criminal conduct and the development of effective means to: . . . administer criminal justice." *Id.* § 16-207. That sweeping mandate plainly encompasses OPD's efforts to remedy the ongoing failure of both the County and local prosecutors to disclose material information about police misconduct to criminal defendants—a failure that even the State's Attorney's Office itself now acknowledges.[2]

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[2] The Maryland Rules of Professional Conduct also provide that attorneys "should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession." Md. Rule 19-300.1[6]. OPD's efforts to call public attention to potential violations of countless indigent defendants' constitutional rights, thus, also comports with the OPD attorneys' broader ethical responsibilities.

Rather than acknowledging OPD's broad statutory authority, the County focuses instead on a single statutory provision that authorizes OPD to represent certain clients in federal court. *See* Md. Code Ann., Crim. Proc. § 16-206(a). But even that provision does not preclude OPD from intervening here. To state the obvious: a statute that *authorizes* an agency to participate in one type of federal litigation does not *prohibit* that agency from participating in all other types of federal litigation. *See generally EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015) (recognizing that a court cannot "add words to the law to produce what is thought to be a desirable result"). Like other independent agencies, OPD can—and, as a practical matter, does—participate in various types of federal matters that are not identified in any state statute but that nevertheless implicate OPD's interests. *See, e.g.*, *Martinez v. Sessions*, 892 F.3d 655 (4th Cir. 2018) (appearing as amicus curiae in immigration matter); *White v. Maryland Office of the Pub. Def.*, 170 F.R.D. 138 (D. Md. 1997) (appearing as a defendant in a Title VII matter). And, contrary to the County's implicit assumption, OPD's litigation efforts are not limited to cases in which one of its clients is a party. *See, e.g.*, *Office of Pub. Def. v. State*, 993 A.2d 55 (Md. 2010) (defending OPD attorney against contempt sanctions); *Forster v. Hargadon*, 920 A.2d 1049, 1049 (Md. 2007) (pursuing mandamus relief). The County's strained reading of isolated statutory language cannot be squared with these basic realities.

B. The County's remaining arguments against intervention are similarly unavailing.

The County asserts that OPD's interests in unsealing the Graham report are not sufficient to justify intervention. In particular, it argues that OPD's interests are "not

sufficiently unique" to satisfy the requirements of Rule 24.[3] Defendants' Consolidated Objections to Motions to Intervene (ECF No. 322), at 15. That argument fails for several reasons.

First, the Fourth Circuit has made clear that parties who seek to intervene for the sole purpose of unsealing judicial records need not show that their interests in those records are unique. In *Company Doe v. Pub. Citizen*, the court cited numerous cases in which a party's "informational interests, *though shared by a large segment of the citizenry*, became sufficiently concrete to confer Article III standing when they sought and were denied access to the information that they claimed a right to inspect." 749 F.3d 246, 264 (4th Cir. 2014) (emphasis added) (permitting advocacy groups to intervene for the purpose of unsealing court records). As previously explained, OPD's interests in unsealing the Graham report are more than sufficient under *Public Citizen* to justify intervention. *See* OPD's Motion to Intervene & Unseal (ECF No. 282-1), at 5–9.

Furthermore, OPD's interests in unsealing the Graham report *are* unique. OPD's opening brief identified several concrete examples of PGPD misconduct in the public version of the Graham report that had never previously been disclosed to OPD—even when OPD had explicitly requested discovery related to the officers involved. *See* OPD's Motion to Intervene & Unseal (ECF No. 282-1), at 25–28 (describing prosecutors' failure

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[3] Notably, the County's assertion that OPD's interests are not unique is undermined by the County's subsequent concession—on the same page of its brief—that OPD "may have different and unique reasons for seeking access to the Graham Report (as compared to the Plaintiffs or the other Proposed Intervenors)." Defendants' Consolidated Objections to Motions to Intervene (ECF No. 322), at 15.

to disclose misconduct involving PGPD Officers Wynkoop, Popielarcheck, and Rushlow). Those examples directly contravene the County's assertion that OPD's interests in uncovering potential *Brady* violations are "based on pure speculation and without identifying any specific criminal case or facts in the Graham Report." Defendants' Consolidated Objections to Motions to Intervene (ECF No. 322), at 10. And the State's Attorney's Office's subsequent filings in this case—which validate OPD's concerns—only further undermine the County's efforts to downplay OPD's interests in unsealing the report.[4]

Not surprisingly, the County fails to identify a single case in which a court has refused to let a party intervene for the purpose of unsealing judicial records—the sole basis for intervention at issue here. Instead, the County relies on a handful of cases in which courts refused to let private parties intervene for the purpose of defending state laws or policies. *See* Defendants' Consolidated Objections to Motions to Intervene (ECF No. 322), at 12–13. Those decisions all turned on the fact that a governmental defendant was already defending the challenged law or policy. As the Fourth Circuit explained in *Stuart v. Huff* (the case on which the County relies most heavily), when a party seeks to intervene on behalf of a governmental entity to defend government action, that would-be

[4] Even setting aside the absurdity of the County's assertion that OPD failed to submit concrete evidence demonstrating its interests, the County is mistaken in suggesting that a proposed intervenor must submit such evidence in the first place. Courts routinely permit parties to intervene to unseal court records without submitting any evidence to justify their intervention. The County has cited no authority to justify deviating from that approach here.

intervenor faces a heavier burden to show that its interests are not adequately represented by the existing government defendant. *See* 706 F.3d 345, 351 (4th Cir. 2013) (explaining that "a more exacting showing of inadequacy should be required where the proposed intervenor shares the same objective as a government party"); *id.* ("[T]he government is simply the most natural party to shoulder the responsibility of defending the fruits of the democratic process."). That logic simply has no application here. After all, OPD is seeking to intervene not on *behalf* of a governmental litigant but, rather, in *opposition* to one. Moreover, OPD is not seeking to litigate the merits of the underlying dispute but, rather, a collateral issue with no bearing on Plaintiffs' underlying claims. The County's cited cases are thus inapposite.

II. The County has not met its burden to justify sealing the Graham report.

As previously explained, the public's First Amendment right of access imposes a heavier burden on a party seeking to seal a court record than the common-law right of access. While the common-law standard requires the party to show that its interest in sealing heavily "outweigh[s]" the public's interest in access, the First Amendment standard requires the party to demonstrate that its sealing request is "narrowly tailored" to serve a "compelling governmental interest." *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 180 (4th Cir. 1988).

Here, the County does not dispute that the Graham report is subject to the more stringent First Amendment right of access. *See* Defendants' Consolidated Objections to Motions to Intervene (ECF No. 322), at 18 (acknowledging that its sealing request must

overcome both the First Amendment right of access and the common-law right of access).[5] Rather, it seeks to show that it has satisfied that standard.[6] To do that, the County relies on the Maryland Public Information Act (MPIA), which purportedly protects the sealed portions of the Graham report against public disclosure. As explained below, however, that argument is unavailing.

A. The County's continued reliance on the MPIA, without more, does not establish a compelling justification for sealing the Graham report.

The County's rationale for sealing the Graham report is surprisingly simple. It argues that "[t]he existence of a state statute specifically protecting police personnel records from public disclosure is . . . a 'compelling' reason not to make those records, or information derived therefrom, publicly available." Defendants' Consolidated Objections to Motions to Intervene (ECF No. 322), at 19. The flaw in that rationale is

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[5] Even if the County had argued that the Graham report is not subject to the First Amendment right of access, that argument would have been short-lived. Last week, Plaintiffs and Defendants filed notices stating that they both intend to move for summary judgment, and Plaintiffs previously indicated that they plan to re-file the Graham report in connection with those motions. Thus, even if the Graham report were not currently subject to the First Amendment right of access, the report would indisputably become subject to that right upon re-filing at the summary-judgment stage. *Public Citizen*, 749 F.3d at 267 ("[T]he First Amendment right of access attaches to materials filed in connection with a summary judgment motion.").

[6] The County appears at times to conflate the First Amendment standard with the common-law standard by asserting that the public's First Amendment and common-law rights are both "heavily outweighed by a compelling interest in individual privacy." Defendants' Consolidated Objections to Motions to Intervene (ECF No. 322), at 18. In any event, the County's confusion about the governing legal standard is ultimately irrelevant here because its core argument—that the public's First Amendment right of access must yield to the MPIA—fails on its own terms.

equally simple: if the mere "existence of a state statute" were sufficient to defeat the public's First Amendment right of access, then states could simply legislate their way around the Constitution's mandatory public-access requirements. Such a result would contravene our basic constitutional hierarchy.

Numerous courts have recognized that a party cannot justify sealing a judicial record merely by pointing to the existence of a statute that would otherwise shield the record from public view. Indeed, courts have rejected such arguments even when the statute at issue is much weightier than the MPIA. In *Matter of N.Y. Times*, for instance, the Second Circuit reversed a pair of district-court orders sealing various pretrial filings that discussed wiretap evidence obtained by the government under Title III of the Omnibus Crime Control Act. *See* 828 F.2d 110, 112 (2d Cir. 1987). Although the court acknowledged that "the right of privacy protected by Title III is extremely important," the court nevertheless held that "where a qualified First Amendment right of access exists, it is not enough simply to cite Title III." *Id.* at 115. The court's reasoning was straightforward: "Obviously, a statute cannot override a constitutional right." *Id.* Thus, while the existence of a statute may be *relevant* in assessing a party's justification for sealing a document, it cannot conclusively resolve the issue. *See, e.g.*, *Gregory v. City of Vallejo*, No. 2:13-cv-00320, 2014 WL 4187365, at *3 (E.D. Cal. Aug. 21, 2014) (denying an unopposed motion to seal police personnel records despite a state law shielding such records from disclosure).

Rather than simply deferring to statutory enactments, courts require parties seeking to seal judicial records to identify some concrete harm that would actually result from the disclosure of such records. *See Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1185 (9th Cir. 2006) ("Simply invoking a blanket claim, such as privacy or law enforcement, will not, without more, suffice to exempt a document from the public's right of access."). But the County has not even attempted to do that here. To the contrary, it seems to concede that the real-world impact of unsealing the Graham report would be minimal. *See, e.g.*, Defendants' Consolidated Objections to Motions to Intervene (ECF No. 322), at 18 ("[E]mbarrassment is not at all the concern here."). Instead, the County relies on a more abstract notion of privacy—one entirely untethered to the actual consequences of disclosure. *Cf. Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 614 (4th Cir. 2020) (holding that school board's privacy-based justifications for a new rule were "based on sheer conjecture and abstraction" where the board cited "no incident" of harm justifying the rule and "ignore[d] the growing number of school districts across the country" without such a rule).

The County's failure to identify a concrete justification for sealing the Graham report is hardly surprising. After all, numerous states disclose law-enforcement personnel records to the public without any adverse consequences. *See* OPD's Motion to Intervene & Unseal (ECF No. 282-1), at 20 n.8 (citing various states that permit the disclosure of police-personnel records). The growing number of states that permit public access to these records demonstrates that there is nothing inherently harmful about

disclosing them. Nor is the information contained in such records—or in the personnel records of public employees more generally—inherently private. *Cf. Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976) ("Congress also made clear [in the Freedom of Information Act] that nonconfidential matter was not to be insulated from disclosure merely because it was stored by an agency in its 'personnel' files.").[7]

The parties' positions in this case only reaffirm that the County's sealing request cannot be justified by a compelling government interest. As the County acknowledges, OPD is itself a *government* agency—as is the State's Attorney's Office, which also opposes the County's position in this case.[8] If there were truly a compelling government interest in sealing the Graham report, then it is unlikely that the three government litigants in this case would hold such different views on the propriety of the County's sealing request.

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[7] *See also, e.g.*, *Chasnoff v. Mokwa*, 466 S.W.3d 571, 573 (Mo. Ct. App. 2015) ("Because we conclude that the police officers lack a protectable privacy interest in these records of their substantiated on-the-job police misconduct, we affirm the judgment ordering the records' release."); *Rutland Herald v. City of Rutland*, 84 A.3d 821, 825 (Vt. 2013) ("Assuming that the [officers] have some privacy interest at stake, we agree with the trial court that it is heavily outweighed by the public interest in disclosure."); *City of Baton Rouge v. Capital City Press*, 4 So. 3d 807, 821 (La. Ct. App. 2008) (holding that police internal-affairs records must be disclosed because "the public has a strong, legitimate interest in [their] disclosure" and the officers lacked a reasonable expectation of privacy in their on-the-job conduct); *Burton v. York Cty. Sheriff's Dep't*, 594 S.E.2d 888, 895 (S.C. Ct. App. 2004) (holding that law-enforcement personnel records must be disclosed because "the manner in which the employees of the Sheriff's Department prosecute their duties [is] a large and vital public interest that outweighs their desire to remain out of the public eye").

[8] Although the State's Attorney's Office has suggested that it should be granted special access to the Graham report (without making the report fully available to the public), it has not cited any authority to support that arrangement.

Similarly, if the County's claims of officer privacy interests were so weighty, then it is unlikely that Plaintiffs—who are comprised of several PGPD officers and two police affinity groups—would also oppose the County's sealing request.

The County's effort to use the MPIA to constrain the public's First Amendment right of access also raises a host of practical problems. Among other things, it suggests that the public's *First Amendment* right of access to federal-court records varies from state to state. Under the County's view, for instance, the public would have access to police personnel records filed in connection with a Title VII case in the Southern District of New York (where state law does not shield such records from public view). But, in other district courts—such as this one—such records would have to be sealed.

The County's position also suggests that Maryland lawmakers could re-define the scope of the public's First Amendment access rights at any time, even during the course of this litigation. This is not an abstract concern: the Maryland General Assembly is currently considering a repeal of the State's "Law Enforcement Officer Bill of Rights"—the same legislation that produced the MPIA provision on which the County relies. *See* Ovetta Wiggins, *As Decision Nears on Reform Proposals, Maryland Lawmakers Struggle Over Police 'Bill of Rights,'* Wash. Post (Oct. 1. 2020), https://perma.cc/N6ZM-3NLG. If the General Assembly ultimately amends that provision, then the County's entire justification for sealing the Graham report would cease to exist. The County never explains how a "compelling governmental interest" can disappear so quickly—at the whim of a handful

of state legislators—or how such a change would affect any sealing orders entered in this case.

B. The County's justifications for sealing are not narrowly tailored.

Even if the County's stated justifications for sealing the Graham report were compelling—which they are not—those justifications still would not justify sealing the vast amount of material at issue here. Once again, the County's primary rationale for sealing the report is that it contains material that the MPIA purportedly protects against public disclosure. But, under the County's broad reading of the MPIA, the statute shields *all* police personnel records from public view, under *all* circumstances, *regardless of their content*. Simply put, a statutory instrument that blunt cannot satisfy the First Amendment's narrow-tailoring requirement.

Nor can the County rely on its purported concern for the privacy interests of non-officer witnesses and victims of PGPD abuse. *See* Defendants' Consolidated Objections to Motions to Intervene (ECF No. 322), at 17. To the extent that the Graham report actually identifies the names of any specific non-officer witnesses or victims—and it is not clear that the report does so—those names can easily be redacted. But the County cannot rely on those names to justify sweeping redactions to the rest of the report. As previously explained, the County must provide particularized justifications for sealing every aspect of the report that it seeks to shield from public view. It has not made any serious attempt to do that here.

CONCLUSION

For the foregoing reasons, the Office of the Public Defender respectfully asks that the Court grant its motion to intervene and unseal all of the briefs and exhibits filed in connection with Defendants' motion in limine.

Respectfully submitted,

Dated: October 28, 2020

/s/ Nicolas Y. Riley

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[9] Jonathan de Jong, a second-year law student at Georgetown University Law Center, assisted in the preparation of this brief (under the supervision of counsel).

CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2020, I electronically filed the foregoing brief with the Clerk of the U.S. District Court for the District of Maryland by using the CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

/s/ Nicolas Y. Riley
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