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SB 786

TO: The Honorable Chair and Members of the Judicial Proceedings Committee

FROM: James L. Shea, Baltimore City Solicitor

DATE: February 11, 2021

RE: SB 786 - Baltimore City - Control of Police Department of Baltimore City

POSITION: **SUPPORT**

Chairman Smith, Vice-Chairman Waldstreicher, and members of the committee, please be advised that the Baltimore City Law Department **supports** SB 786 and believes that this bill would have minimal impact on overall civil liability exposure of the Baltimore Police Department ("BPD").

This legislation, if fully implemented, would make BPD an agency of the Mayor and City Council of Baltimore ("City"), thereby ending BPD's current status as an agency of the State of Maryland and bringing BPD fully within the City's political control. Prior legislative attempts to make this change have failed in part due to concern that, by ceasing to be a state agency, BPD would lose sovereign immunity as a defense to civil lawsuits, thereby significantly increasing civil liability exposure to BPD and the City. This testimony addresses that concern.

After reviewing this question with the City lawyers most experienced in handling these matters, it is my view that, although the transition to City control would eliminate BPD's sovereign immunity defense going forward, **this change will not have a significant effect on the amount of money actually paid out by the City in civil lawsuits**.

INTRODUCTION

A full analysis of any change in the City's civil liability exposure through BPD requires comparing both direct and indirect liability that BPD faces in lawsuits in both state and federal courts. In most instances, in both those courts, BPD is already *indirectly* liable to pay civil litigation damages awarded against BPD employees (which the City then pays). Thus, the loss of BPD's sovereign immunity defense against *direct* liability (i.e. suits against BPD itself) for the same violations will cause little change in the total amount of liability since a plaintiff may only recover the full amount of damages once. In addition, although BPD would be losing the blanket sovereign immunity defense to state claims, several other immunities, defenses, or limits on liability will apply when BPD becomes a City agency. Moreover, BPD's sovereign immunity defense has not been recognized in the federal courts, so it is unlikely that the loss of this defense will have any effect on federal claims at all. Each of these points is discussed in more detail below, as they relate to claims against BPD under both

state and federal law. This analysis leads the Baltimore City Law Department to conclude that the loss of BPD's sovereign immunity defense is unlikely to increase materially the amount that the City pays in damages resulting from alleged police misconduct.

I. DAMAGES FROM STATE LAW CLAIMS ARE UNLIKELY TO INCREASE.

A. Double Damages Are Not Permitted Under State Law.

In the vast majority of lawsuits where BPD could face *direct* liability as a result of this change, BPD already faces the same liability *indirectly* through lawsuits against its employees. A plaintiff can only be paid damages once for a single injury. *See, e.g.*, *Beall v. Holloway-Johnson*, 446 Md. 48, 70 (2016) ("[A] plaintiff is entitled to but one compensation for her loss and that satisfaction of her claim prevents further action against another for the same damages."). Adding direct liability on top of indirect liability, therefore, does not increase the amount of damages that will be paid for a given alleged injury.

Under Maryland's Local Government Tort Claims Act ("LGTCA"), BPD is already defined as a local government, Md. Code, Cts. & Jud. Proc. § 5-301(d)(21), and is required to pay judgments against its officers resulting from torts committed within the scope of their employment, *id.* at § 5-303(b). The Maryland Court of Appeals recently interpreted this "scope of employment" broadly, holding that BPD potentially faces indirect LGTCA liability for even the grossly criminal acts of the Gun Trace Task Force officers. *See Baltimore City Police Dep't v. Potts*, 468 Md. 265, 312 (2020) (rejecting a bright-line rule that seriously criminal willful conduct is necessarily outside of the scope of employment, and instead holding that the scope of employment question requires a multi-factor, "fact-intensive, case-by-case" resolution).

Thus, for example, although the loss of sovereign immunity may allow a plaintiff to sue BPD directly in the future for a policy or practice that resulted in the plaintiff's allegedly wrongful arrest, the plaintiff can already sue the officer who made the allegedly wrongful arrest. If the plaintiff prevails, BPD will be liable to pay the same amount of money (the damages caused by the arrest) only once, either way.

B. Other Protections Will Still Limit BPD Liability Exposure to State Claims.

i. <u>The LGTCA Caps BPD Liability for State Law Claims.</u>

In addition to requiring BPD and the City to pay judgments against their employees, the LGTCA also caps damages awarded on state claims against local governments and their employees at $400,000 per individual claim and $800,000 per total claims that arise from the same occurrence. Md. Code, Cts. & Jud. Proc. § 5-303(a)(1). BPD's loss of the sovereign immunity defense will not change this. These caps apply to both direct and indirect liability, even for state constitutional torts. *See, e.g.*, *Espina v. Jackson*, 442 Md. 311, 324 (2015) (holding that "[t]he current language of the LGTCA plainly appears to encompass constitutional torts" and reducing a more than $11 million verdict against a Prince George's County officer to $400,000, the LGTCA limit for total claims at that time); *see also id.* at 330 ("[C]larifying that the monetary limits on the liability of a local

government under the [LGTCA] apply to claims against local governments when named as defendants."). Thus, in the unlikely event that a plaintiff could successfully establish direct liability against BPD without also establishing indirect liability through a suit against a BPD officer, the amount of that additional liability would be capped by statute.

ii. Governmental Immunity Bars Common Law, But Not Constitutional, State Law Liability.

Even though blanket sovereign immunity may no longer apply, the more limited governmental immunity will still apply to the same extent it currently applies to the City and local governments in Maryland. "[U]nless its immunity is legislatively waived, [a local government] is immune from liability for tortious conduct committed while the entity is acting in a governmental capacity." *DiPino v. Davis*, 354 Md. 18, 47 (1999). Because enforcing criminal law "is quintessentially governmental in nature[, t]here is . . . no *common law* liability on the part of the City" for operating a police department. *Id.* (emphasis in original). The BPD will therefore still be immune from direct claims "for common law tort liability, including for the torts of negligent hiring, retention, or entrustment regarding" police misconduct. *Clark v. Prince George's Cty.*, 211 Md. App. 548, 559 (2013). To be clear, this immunity does not protect against direct claims that a BPD policy or practice caused a violation of a plaintiff's state *constitutional* rights, as "neither the local government official nor a local governmental entity has available any governmental immunity in an action based on rights protected by the State Constitution." *DiPino*, 354 Md. at 51.

iii. Statutory Municipal Official Immunity Will Bar Simple Negligence State Law Claims.

The Maryland Code also provides a limited tort immunity for municipal officials that heretofore has been unavailable to BPD officers:

> An official of a municipal corporation, while acting in a discretionary capacity, without malice, and within the scope of the official's employment or authority shall be immune as an official or individual from any civil liability for the performance of the action.

Md. Code, Cts. and Jud. Proc. § 5-507(a)(1). In 2010, the Court of Appeals ruled that "municipal official immunity under [this provision] does not apply" to BPD officers because a BPD officer "is an employee of a state agency and not a municipal agency." *Houghton v. Forrest*, 412 Md. 578, 588–89 (2010). Thus, making BPD a municipal agency instead of a state agency will make this statutory immunity available to BPD officers as a defense (and thereby shield BPD from indirect liability in some instances).

This statutory immunity would remain limited in several respects. The Court of Appeals has explained that this provision's purpose "was to codify existing public official immunity, and not to extend the scope of qualified immunity beyond its Maryland common law boundaries." *Lee v. Cline*, 384 Md. 245, 258 n.2 (2004). *See also Lovelace v. Anderson*, 366 Md. 690, 704 (2001); *Ashton v. Brown*, 339 Md. 70, 116 n. 23 (1995). "The Maryland public official immunity doctrine is quite limited and is generally applicable only in negligence actions or defamation actions based on allegedly negligent conduct." *Lee*, 384 Md. at 258. Specifically, the immunity codified in this statute "has no application in tort actions based upon alleged violations of state constitutional rights or tort actions based upon most so-called 'intentional torts.'" *Id.* Moreover, by the terms of the statute, this immunity does not apply when there is a showing of malice, which has been defined as "the

performance of an unlawful act, intentionally or wantonly, without legal justification or excuse but with an evil or rancorous motive influenced by hate; the purpose being to deliberately and willfully injure the plaintiff." *Drug Fair of Md., Inc. v. Smith*, 263 Md. 341, 352 (1971).

While these limits to state law tort liability are not absolute, the City's burden would remain equal to its present burden because of the "one recovery" principle described in Section I.A. above.

II. DAMAGES FOR FEDERAL LAW CLAIMS ARE UNLIKELY TO INCREASE.

A. Federal Law Does Not Currently Recognize BPD's Sovereign Immunity Defense.

Although most lawsuits against BPD or its employees seek only state law claims, BPD faces its greatest per-claim liability exposure from federal law claims filed under 42 U.S.C. § 1983 alleging violations of federal constitutional rights, as no damages caps apply to such claims. Accordingly, damages awards for these lawsuits can run well into the millions of dollars. However, changing BPD to a City agency is unlikely to significantly alter BPD's liability exposure under federal law because the local federal court has not recognized BPD's claim to sovereign immunity under federal law anyway. Although BPD has argued repeatedly that it *should* qualify for such federal sovereign immunity, this argument has not yet succeeded and may never succeed, even if BPD remains a state agency. *See, e.g.*, *Burley v. Balt. Police Dep't*, 422 F.Supp.3d 986, 1023–26 (D. Md. 2019) (denying BPD sovereign immunity); *Munyiri v. Haduch*, 585 F.Supp.2d 670, 676 (D. Md. 2008) (same).[1]

Whereas sovereign immunity against state law claims is largely determined by Maryland statutory law – i.e., the General Assembly declared BPD a state agency, so it has sovereign immunity – the application of sovereign immunity against federal claims depends on a multi-factor analysis to determine whether federal courts consider the agency asserting immunity close enough to the sovereign to be an arm of the state. *See, e.g.*, *S.C. Dep't of Disabilities & Special Needs v. Hoover Universal, Inc.*, 535 F.3d 300, 303 (4th Cir. 2008) (setting out a "nonexclusive list of four factors to be considered," including the effect of judgment on the state treasury, the agency's degree of autonomy, whether the agency deals with state or local concerns, and how the agency is treated under state law). *See also Mancuso v. New York State Thruway Auth.*, 86 F.3d 289, 293 (2d Cir. 1996) ("The jurisprudence over how to apply the arm-of-the-state doctrine is, at best, confused."). *See, generally*, Alex E. Rogers, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 Colum. L. Rev. 1243 (1992). BPD's attempts to shield itself from direct liability under this test have been unsuccessful to date. *See, e.g.*, *Burley*, 422 F.Supp.3d at 1023–26; *Munyiri*, 585 F.Supp.2d at 676.

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[1] In two unpublished decisions, a single judge on the federal district court did find that BPD had sovereign immunity. *See Whetstone v. Mayor & City Council of Baltimore*, ELH-18-738, 2019 WL 1200555, at *12 (D. Md. Mar. 13, 2019); *McDougald v. Spinnato*, ELH-17-2898, 2019 WL 1226344, at *11 (D. Md. Mar. 15, 2019). However, the same judge subsequently declared that these findings in her previous decisions were "not outcome determinative, [and therefore] dicta." *Estate of Bryant v. Baltimore Police Dep't*, ELH-19-384, 2020 WL 673571, at *32 (D. Md. Feb. 10, 2020) (denying BPD sovereign immunity).

The question of BPD's claim to sovereign immunity has not been decided by the Fourth Circuit, because the practical question of whether or not BPD is subject to direct *Monell*[2] liability has not arisen and is unlikely to arise due to two factors discussed in more detail below: the need for an individual violation as a predicate to *Monell* liability, and the BPD's contractual obligation to pay for most individual violations. Generally, a plaintiff will either win (and get paid for her damages) or lose entirely during the individual violation portion of litigation (or settle at some point during this process). Accordingly, the ultimate question of *Monell* liability is rarely fully tested, much less appealed.

Thus, because BPD's sovereign immunity defense has not been recognized (and may never be recognized) under federal law, the loss of this defense due to BPD becoming a City agency is unlikely to have a material practical effect on how much BPD pays in damages on federal claims.

B. Double Damages Are Not Permitted Under Federal Law Either.

Even if BPD ultimately prevailed on its sovereign immunity arguments in federal court, thereby barring plaintiffs from suing BPD directly under *Monell*, plaintiffs would still be able to sue individual BPD officers in their individual capacities for alleged violations of federal constitutional rights done under color of law and within the scope of their employment with BPD. *See, e.g., Hafer v. Melo*, 502 U.S. 21, 31 (1991) ("We hold that state officials, sued in their individual capacities, are 'persons' within the meaning of § 1983. The Eleventh Amendment does not bar such suits, nor are state officers absolutely immune from personal liability under § 1983 solely by virtue of the 'official' nature of their acts.").

Under Article 15 of the Memoranda of Understanding ("MOU") between BPD, the City, and the Baltimore City Lodge #3 of the Fraternal Order of Police ("FOP") – the bargaining agent for BPD officers – BPD is already contractually obligated to pay judgments against its officers (in both state and federal courts) "in litigation arising out of acts within the scope of his or her employment." As this language parallels the LGTCA scope of employment language discussed above, the broad interpretation of scope of employment set forth in *Potts* likely applies. Although, in theory, this contract could be revised to eliminate or reduce BPD's indemnification obligations, as a practical matter, it is unlikely that the FOP would agree to modify this MOU provision materially. Moreover, if the FOP were to agree to such a change, it would presumably require concessions of equal or greater monetary value for its membership in exchange, thereby leaving BPD in no better a fiscal position.

Establishing direct *Monell* liability against a municipal police department requires an underlying constitutional violation by an individual officer. *See, e.g., City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (noting that no case "authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the [fact finder] has concluded that the officer inflicted no constitutional harm"); *Grayson v. Peed*, 195 F.3d 692, 697 (4th Cir. 1999)

[2] In *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), the Supreme Court held that federal claims for constitutional violations under 42 U.S.C.A. § 1983 could be brought directly against municipalities when the local government's practice, custom, usage, or "official policy, 'causes' an employee to violate another's constitutional rights." 436 U.S. at 692.

(recognizing that, if "there are no underlying constitutional violations by any individual, there can be no municipal liability"). So lawsuits that seek to establish direct *Monell* liability against BPD would need to first establish that an individual BPD officer violated the plaintiff's constitutional rights. If a plaintiff can establish such a violation, a damages judgment can be obtained against the individual BPD officer, which BPD is contractually obligated to indemnify. The same principle against double recovery of damages that applies under Maryland law is also applicable to federal claims. *See, e.g.*, 1 Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* § 4:15 (4th ed. 2013) ("The general bar against double recovery for the same injury is also applicable to § 1983 cases."). Thus, removing direct *Monell* liability from BPD would not significantly decrease the amount of damages that will be paid for a given alleged injury because indirect contractual liability will remain.[3]

CONCLUSION

In summary, BPD is unlikely to face significantly increased civil liability exposure stemming from the loss of the sovereign immunity defense for three primary reasons:

1. In both state court and federal court, in almost all instances of alleged police misconduct, BPD already faces the same damages via indirect liability that it could face via direct liability after the change, so the bar on double damages will prevent an increase in liability.
2. Federal law does not currently recognize BPD's sovereign immunity defense, so the loss of that defense will have little practical effect on liability from federal claims.
3. In the rare instance of a state claim where a plaintiff can establish direct liability against BPD that is neither barred by governmental immunity nor duplicative of the indirect liability established against a BPD officer, the newly available damages are capped by statute.

For all these reasons, legislation making BPD an agency of the City is unlikely to materially increase the amount of money that the City has to pay in damages or settlements in civil lawsuits against BPD and its employees. The City may see a modest increase in litigation expenses stemming from increased discovery (record productions, deposition transcripts, etc.) due to BPD's remaining a defendant in state court actions, rather than being dismissed outright, but even this could be largely avoided if state court judges follow the lead of their federal counterparts and bifurcate such trials to allow the claims against individual officers to be litigated first. There also may be a temporary

[3] In theory, BPD could face direct *Monell* liability where it did not already face indirect contractual liability if a departmental practice caused a constitutional violation and the officer involved had qualified immunity because the constitutional rule had not previously been established. *See Int'l Ground Transp. v. Mayor and City Council of Ocean City*, 475 F.3d 214, 219–20 (4th Cir. 2007) (noting that "a finding of no liability on the part of the individual municipal actors can co-exist with a finding of liability on the part of the municipality" in such a scenario). Such scenarios are very uncommon (involving changes to constitutional law), and the unconstitutionality of more common allegations of police misconduct (excessive force, wrongful arrest, withholding evidence, etc.) is well established.

increase in volume of cases following the change as a result of the *incorrect perception* that the change makes greater damage awards available, but this would likely subside as the bar gains greater familiarity with the factors discussed above. Thus, while there are other legal questions that may arise from this change in the law, concerns about increases in the City's civil liability are ultimately misplaced.

For these reasons, the Baltimore City Law Department urges a **favorable** report on SB 786.