


DISTRICT OF COLUMBIA COURT OF APPEALS

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No. 21-CV-511

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FRATERNAL ORDER OF POLICE
METROPOLITAN POLICE DEPARTMENT LABOR COMMITTEE,

*Appellant*,

v.

THE DISTRICT OF COLUMBIA, *et al.*,

*Appellee*s.

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ON APPEAL FROM THE
SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
(Case No. 2020 CA 003492 B)
The Honorable William M. Jackson Presiding

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# BRIEF OF APPELLANT FRATERNAL ORDER OF POLICE/METROPOLITAN POLICE DEPARTMENT LABOR COMMITTEE, D.C. POLICE UNION

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## PARTIES AND COUNSEL

Appellant: Fraternal Order of Police/Metropolitan Police Department Labor Committee, D.C. Police Union

Appellant's Counsel: Anthony M. Conti and Daniel J. McCartin of Conti Fenn LLC

Appellees: (1) The District of Columbia; and (2) District of Columbia Executive Office of the Mayor

Appellees' Counsel: Loren L. AliKhan, Solicitor General of the District of Columbia

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**RULE 26.1 CORPORATE DISCLOSURE STATEMENT**

Pursuant to D.C. Court of Appeals Rule 26.1, Appellant Fraternal Order of Police, Metropolitan Police Department Labor Committee, D.C. Police Union submits the following Corporate Disclosure Statement:

The Fraternal Order of Police, Metropolitan Police Department Labor Committee, D.C. Police Union is a labor organization with no parent corporation, and no publicly held corporation owns 10% or more of stock in the Fraternal Order of Police, Metropolitan Police Department Labor Committee, D.C. Police Union.

Respectfully submitted,

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## STATEMENT OF JURISDICTION

This appeal is from the District of Columbia Superior Court's Order granting Appellees' Motion to Dismiss Appellant Fraternal Order of Police, Metropolitan Police Department Labor Committee, D.C. Police Union's ("D.C. Police Union") Amended Complaint. As such, this appeal is from a final judgment disposing of all of the parties' claims.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

(1) Whether the D.C. Police Union has standing to assert the claims in its Amended Complaint;

(2) Whether Subtitle B of the Comprehensive Policing and Justice Reform Second Temporary Amendment Act of 2020 violates the Separation of Powers between the Mayor of the District of Columbia and the D.C. Council; and

(3) Whether Subtitle B of the Comprehensive Policing and Justice Reform Second Temporary Amendment Act of 2020 violates D.C. Police Union members' fundamental right to privacy under the Due Process guarantees of the D.C. Home Rule Act.

## STATEMENT OF THE CASE

On July 7, 2020, the Council of the District of Columbia (the "Council") approved and signed the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020 (the "Emergency Act"). JA at 251, ¶ 9. On

July 9, 2020, the Council transmitted the Emergency Act to Mayor Bowser, who signed the Emergency Act on July 22, 2020. JA at 251-52, ¶ 9.

Subtitle B of the Emergency Act amended D.C. Code § 5-116.33 to provide new language that removed any discretion from the Mayor regarding the release of certain police Body-Worn Camera ("BWC") recordings and names of officers involved in an officer-involved death or serious use of force and required the release of the recordings and names of officers within five days of the incident. *See* JA at 252, ¶ 10.

The Emergency Act was thereafter renewed through a series of additional emergency, interim, and temporary legislation, all of which contained the same language in Subtitle B. *See* JA at 258, 344-45. Pursuant to the Emergency Act, the Mayor has released several BWC recordings and the names of officers involved in officer-involved deaths and serious use of force incidents. *See* JA at 344-45.

On August 7, 2020, the D.C. Police Union filed a Verified Complaint against the District of Columbia and Muriel Bowser, in her official capacity as Mayor of the District of Columbia (collectively the "District"), claiming that the Act's removal of Mayoral discretion over the public release of BWC recordings and officer names involved in officer-involved death or serious use of force violated the separation of powers between the Mayor and the Council and also

violated the Due Process privacy rights of D.C. Police Union members. JA at 5-19. On October 27, 2020, the D.C. Police Union filed an Amended Complaint. JA at 244-66. On November 10, 2020, the District filed a Motion to Dismiss the Amended Complaint. JA at 300. On November 24, 2020, the D.C. Police Union filed an Opposition to the District's Motion to Dismiss. JA at 341.

On July 16, 2021, the Honorable William M. Jackson granted the District's Motion to Dismiss the Amended Complaint, ruling that the D.C. Police Union did not have standing to raise its claims and that it had failed to state a claim upon which relief could be granted for violations of the separation of powers doctrine and the due process rights of D.C. Police Union members. JA at 448-58.

The D.C. Police Union seeks reversal of the Superior Court's Order on the grounds that D.C. Police Union has organizational and/or associational standing to bring the claims in its Amended Complaint, and that it has sufficiently stated claims for violations of the separation of powers doctrine and the due process rights of its members.

## STATEMENT OF FACTS

The executive power of the District of Columbia is vested in the Mayor, who is the chief executive officer of the District government. JA at 250-51, ¶ 5 (citing D.C. Code § 1-204.22). As the chief executive officer, "it shall be the duty of the Mayor of the District of Columbia . . . (1) To preserve the public peace; (2) To

prevent crime and arrest offenders; (3) To protect the rights of persons and of proper; . . . (10) To enforce and obey all laws and ordinances in force in the District, or any part thereof, which are properly applicable to police or health, and not inconsistent with the provisions of this title." *Id.* (quoting D.C. Code § 5-101.03). Pursuant to the Comprehensive Merit Personnel Act ("CMPA"), the Metropolitan Police Department ("MPD") is a "subordinate agency" under "the direct administrative control of the Mayor." JA at 251, ¶ 6 (quoting D.C. Code §1-603.01(17)(L)).

In October of 2014, the MPD established a Body-Worn Camera program. JA at 251, ¶ 7. The Mayor is solely responsible for establishing rules regarding public access to BWC recordings:

> (a) The Mayor, pursuant to subchapter I of Chapter 5 of Title 2, and in accordance with this section, shall issue rules regarding the Metropolitan Police Department's Body-Worn Camera Program. The rules, at a minimum, shall provide:
>
> (1) Standards for public access to body-worn camera recordings.

*Id.* (quoting D.C. Code § 5-116.32). Similarly, the Mayor was empowered under applicable regulations to exercise her discretion in releasing BWC footage, as follows:

> The Mayor may, on a case-by-case basis in matters of significant public interest and after consultation with the Chief of Police, the United States Attorney's Office for the District of Columbia, and the Office of the Attorney General, release BWC recordings that would otherwise not be releasable pursuant to a FOIA request. Examples of

> matters of significant public interest include officer-involved shootings, serious use of force by an officer, and assaults on an officer requiring hospitalization.

JA at 251, ¶ 8 (quoting 24 DCMR §3900.10).

On July 7, 2020, the Council approved and signed the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020. JA at 251-52, ¶ 9. The Emergency Act was passed on an emergency basis without public notice or participation, and without the participation of the D.C. Police Union's members or any of the District's law enforcement officers directly impacted by the Emergency Act. *Id.* On July 9, 2020, the Council transmitted the Emergency Act to Mayor Bowser, who, on July 22, 2020, signed the Emergency Act. JA at 252, ¶ 9.

Subtitle B of the Emergency Act amended D.C. Code § 5-116.33 to provide the following new language, which removed any discretion from the Mayor regarding the release of certain BWC recordings and names of officers involved in an officer-involved death or serious use of force:

> (B) The Mayor:
>
> (i) Shall, except as provided in paragraph (2) of this subsection:
>
> (I) Within 5 business days after an officer-involved death or serious use of force, publicly release the names and body-worn camera recordings of all officers who committed the officer-involved death or serious use of force; and

(II) By August 15, 2020, publicly release the names and body-worn camera recordings of all officers who have committed an officer-involved death since the Body-Worn Camera Program was launched on October 1, 2014.

JA at 252, ¶ 10. Similarly, Subtitle B of the Emergency Act amended 24 DCMR §3900.10 by adding the following:

(a) Notwithstanding any other law, the Mayor:

(1) Shall, except as provided in paragraph (b) of this subsection:

(A) Within 5 business days after an officer-involved death or serious use of force, publicly release the names and BWC recordings of all officers who committed the officer-involved death or serious use of force; and

(B) By August 15, 2020, publicly release the names and BWC recordings of all officers who have committed an officer-involved death since the Body-Worn Camera Program was launched on October 1, 2014.

JA at 252, ¶ 11.

Shortly after the Emergency Act was passed, the MPD's Intelligence Branch, which is tasked with assessing threats against government officials in the District, contacted all officers who were to be identified pursuant to Subtitle B and asked those officers a series of questions designed to assess the threat level posed against the officers and their families, such as whether the officer had an alarm system, whether the officer's home was equipped with cameras, and whether the officer wanted the MPD to reach out to local law enforcement in the jurisdiction of their residence to have local law enforcement increase patrol of their neighborhood

during the days surrounding the release of the footage. JA at 255, ¶ 16. Several officers accepted the offer of enhanced police patrol of their neighborhood. *Id.* Additionally, the MPD's Chief Operating Officer Leann Turner contacted Dr. Beverly Anderson, the Clinical Director of the Metropolitan Police Employee Assistance Program ("MPEAP"), which provides confidential counseling services to MPD officers and their family members, and advised her that Chief of Police Peter Newsham wanted to ensure that every officer was contacted prior to the release of the body-worn camera footage. JA at 255-56, ¶ 17.

Pursuant to Subtitle B(i)(II) of the Emergency Act, the District publicly released the names and BWC footage of all officers who committed an officer-involved death since the BWC program was launched on October 1, 2014. *See* JA at 305-306. In addition, pursuant to Subtitle B(i)(I) of the Emergency Act, Mayor Bowser released the officer names and BWC footage for three incidents that occurred within two months after passage of the Emergency Act. *See* JA at 306-307.

While the Emergency Act was in effect, the Council enrolled the Comprehensive Policing and Justice Reform Second Temporary Amendment Act of 2020 (the "Temporary Act"). JA at 258, 307. The Temporary Act contains provisions that are identical to Subtitle B of the Emergency Act set forth above.

On August 21, 2020, Mayor Bowser signed the Temporary Act and it was thereafter published in the District of Columbia Register. JA at 258, ¶ 22.

On September 22, 2020, after passage and transmittal of the Temporary Act, the Council enrolled the Comprehensive Policing and Justice Reform Congressional Review Emergency Amendment Act of 2020 (the "Interim Act"). *Id.* The same day, the Council formally approved a resolution explicitly clarifying that the Interim Act was designed to prevent a gap between the expiration of the Emergency Act and the effective date of the Temporary Act. *See* https://lims.dccouncil.us/Legislation/PR23-0948 (last accessed Sept. 21, 2021). The Interim Act contains provisions that are identical to Subtitle B of the Emergency and Temporary Acts.[1] JA at 307-308. On October 20, 2020 the Emergency Act expired. JA at 258, ¶ 22. On October 28, 2020, the Interim Act was signed by Mayor Bowser and became effective.[2] JA at 308.

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[1] Subtitle B of the Emergency Act, Interim Act, and Temporary Act are identical. Therefore, the D.C. Police Union will refer to Subtitle B, in any of its iterations, as "Subtitle B of the Act" throughout this Brief, as it did in the proceedings below.

[2] Since the D.C. Police Union's Amended Complaint was dismissed, the Council has continued to pass legislation that includes the identical provisions of Subtitle B, with Subtitle B currently operating pursuant to the Comprehensive Policing and Justice Reform Congressional Review Emergency Amendment Act of 2021, which was signed by Mayor Bowser and became effective on July 29, 2021. *See* https://lims.dccouncil.us/Legislation/B24-0311 (last accessed Oct. 18, 2021).

On October 29, 2020, pursuant to Subtitle B of the Act, the District released the officer name and BWC footage from an officer-involved death that occurred on October 23, 2020. *Id.* Of note, the October 23, 2020 death occurred during the brief period in which Subtitle B was not in effect, but the District nonetheless released the officer name and BWC footage related to that incident.

Following the disclosures of officer names and BWC footage for the officer-involved deaths that occurred on September 2, 2020 and October 23, 2020, evidence accumulated that demonstrated that such disclosures put D.C. Police Union members, their families, and their children at risk of serious bodily harm. For example, after a justified shooting incident occurred on September 2, 2020, credible death threats were made against the officer involved, his family, and his children, requiring an investigation by the MPD's Intelligence Branch. JA at 257-58, ¶ 21. One death threat stated: "#GREENLIGHT ON ALL #DCPOLICE #KIDS #SINCE THEY #KILLING #OUR #FAMILY #KILL #THEM #NEXT #LETSGO #SOUTHSIDE." JA at 258, 277. Another threat stated "shit gone be turnt up when found out address and where children go to school at!" JA at 258, 278. A similar threat stated: "we need the police officer picture so we can see who he is . . . it's not going to be safe for him no more . . . Street Justice is the best Justice for this cop we need to know who he is a address and everything." JA at 258, 279.

Similarly, in an officer-involved traffic death that occurred on October 23, 2020, flyers were passed out in the District that directly identified the officer involved, and that included veiled threats of violence, which were mirrored on social media. *See* JA at 378-80.

## STANDARD OF REVIEW

The standard of review for an appeal from the Superior Court's dismissal of a complaint pursuant to Sup. Ct. R. 12(b)(6), is *de novo*. *See Johnson-El v. District of Columbia*, 279 A.2d 163, 166 (D.C. 1990); *Drake v. McNair*, 993 A.2d 607, 615 (D.C. 2010). This *de novo* review applies to a dismissal for lack of standing. *See Exec. Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 730 (D.C. 2000). Where a statute is challenged on constitutional grounds, the Court of Appeals also reviews such challenges *de novo*. *See In re Warner*, 905 A.2d 233, 237 (D.C. 2006) (citations omitted); *Unum Life Ins. Co. of Am. V. District of Columbia*, 238 A.3d 222, 226 (D.C. 2020) (citations omitted). *De novo* review of dismissal of a complaint requires the Court of Appeals to apply the same standards that were applied by the Superior Court. *See Solers, Inc. v. Doe*, 977 A.2d 941, 947 (D.C. 2009); *Johnson-El*, 279 A.2d at 166.

Thus, in deciding a motion to dismiss, the Court must accept as true all factual allegations in the Complaint and view them in a light most favorable to the plaintiff. *See*, *e.g.*, *Owens v. Tibert Island Condominium Ass'n*, 373 A.2d 890

(D.C. 1977). Although the Court need not accept legal conclusions as true, it must still accept the veracity of all underlying factual allegations and determine whether the Complaint has facial plausibility. *See Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 544 (D.C. 2011). Dismissal is impermissible unless it appears beyond doubt that the plaintiff can prove no set of facts that would entitle the plaintiff to relief on the plaintiff's claims. *See*, *e.g.*, *Abdullah v. Roach*, 668 A.2d 801 (D.C. 1995).

## SUMMARY OF ARGUMENT

The D.C. Police Union has organizational standing to bring its claims, as it will be forced to divert its resources to publicly defend its members whose identities are disclosed pursuant to Subtitle B, and to pursue grievances on behalf of those members on various grounds relating to those disclosures. These expenditures would not have occurred but-for the District's actions taken pursuant to Subtitle B.

The D.C. Police Union also has associational standing to bring its claims. Associational standing is present where an association's members would have standing to bring the lawsuit themselves. The D.C. Police Union's members have suffered concrete injuries adequately pled in the Amended Complaint, which are traceable to the District's implementation and enforcement of Subtitle B. As such, the D.C. Police Union has associational standing.

The D.C. Police Union adequately alleged facts and law in the Amended Complaint to state a claim for violation of the separation of powers between the Mayor and the Council. The executive power of the Mayor includes and requires discretion over the regulation, operation, and management of the Metropolitan Police Department, which is a subordinate agency within the executive branch. By enacting Subtitle B, the Council impermissibly burdened and encroached upon the Mayor's exclusive executive discretion in violation of the principle of separation of powers codified in D.C. law.

The D.C. Police Union also adequately alleged facts and law in the Amended Complaint to state a claim for violation of its members' fundamental right to privacy under the Due Process guarantees of the D.C. Home Rule Act. This Court has previously held that D.C. Police Union members have a legitimate privacy interest in their names and other identifying information. Subtitle B mandates the disclosure of an officer's name in relation to use of force incidents for which there will necessarily be investigations of the officer, thereby depriving the officer of their legitimate privacy interests.

## ARGUMENT

### A. The D.C. Police Union Has Standing to Prosecute the Claims in the Amended Complaint.

When a plaintiff's standing is challenged in a motion to dismiss, this Court has held that the facts of the complaint must be accepted as true and construed in

favor of the complaining party and the trial court is permitted to "conduct an independent review of the evidence submitted by the parties, including affidavits, to resolve factual disputes concerning whether subject-matter jurisdiction exists." *UMC Dev., LLC v. District of Columbia*, 120 A.3d 37, 43 (D.C. 2015); *see also Grayson v. AT&T Corp.*, 15 A.3d 219, 246 (D.C. 2011). As set forth in the Amended Complaint and supporting affidavits and exhibits, as well as additional information in the record that was presented to the Superior Court, the D.C. Police Union has standing in this matter.

### 1. The D.C. Police Union Has Organizational Standing to Bring this Action.

An organization, like an individual, has standing to bring a lawsuit, "so long as it satisfies the constitutional requirements and prudential prerequisites of traditional standing analysis." *D.C. Appleseed Ctr. for Law & Justice v. D.C. Dep't of Ins., Sec., & Banking*, 54 A.3d 1188, 1205-06 (D.C. 2012). Specifically, the suing organization need only show that resources have been drained or diverted in response to the defendant's unlawful actions:

> [T]he question of standing turns on whether the organization's activities in pursuit of [its] mission have been affected in a sufficiently specific manner as to warrant judicial intervention. This requires a showing that the defendant's unlawful actions have caused a concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources. **Generally, when an organization is forced to divert resources to counteract the effects of another's unlawful acts, it has suffered a sufficiently concrete injury to bestow standing.**

*Equal Rights Ctr. v. Properties Int'l*, 110 A.3d 599, 604 (D.C. 2015) (internal citations and quotation marks omitted) (emphasis added). Moreover, it is irrelevant whether it is the D.C. Police Union's choice to divert those resources, so long as the diversion is caused by the challenged conduct:

> [T]he district court erroneously concluded that the ERC could not establish standing because it "*chose* to redirect its resources to investigate Post's allegedly discriminatory practices." *Equal Rights Ctr.,* 657 F.Supp.2d at 201 (emphasis in original); *see also id.* ("ERC still needs to establish that the injuries it suffered were *not* due to a self-inflicted diversion of resources." (emphasis in original)). That the ERC voluntarily, or "willful[ly]," *id.* at 200, diverts its resources, however, does not automatically mean that it cannot suffer an injury sufficient to confer standing. In both *BMC* and *Spann,* the plaintiff organizations chose to redirect their resources to counteract the effects of the defendants' allegedly unlawful acts; they could have chosen instead not to respond. **In neither case did our standing analysis depend on the voluntariness or involuntariness of the plaintiffs' expenditures. Instead, we focused on whether they undertook the expenditures in response to, and to counteract, the effects of the defendants' alleged discrimination rather than in anticipation of litigation.**

*See Equal Rights Ctr. v. Post Properties, Inc.*, 633 F.3d 1136, 1140 (D.C. Cir. 2011) (emphasis added).

As stated in the Amended Verified Complaint, which was verified by D.C. Police Union Chairman Greggory Pemberton, the release of BWC footage within five days of a serious use of force incident or officer-involved death will cause the D.C. Police Union to expend more resources in publicly defending its members who were involved in the serious use of force incident or officer-involved death.

JA at 256-57, ¶ 19; *see also* JA at 110-113 (Affidavit of Chairman Pemberton). The Amended Complaint also sets forth, in detail, how the release of officer names and BWC footage pursuant to Subtitle B will force the D.C. Police Union to expend additional resources related to representing its members in grievances:

> The release of body-worn camera footage within five days of a serious use of force incident or officer-involved death will result in immediate violations of the disciplinary guidelines contained in the Collective Bargaining Agreement ("CBA") between the D.C. Police Union and the Metropolitan Police Department. For example, Article 12, Section 1(2) requires as follows:
>
> > Any employee who is engaged in either investigating or proposing corrective or adverse action on behalf of management shall maintain the appropriate confidentiality of an investigation.
>
> Body-worn camera footage is often the key piece of evidence in MPD disciplinary investigations. The release of body-worn camera footage within five days of a serious use of force incident or officer-involved death will occur during any MPD investigation concerning the incident, thereby eliminating the confidentiality of the investigation and the evidence contained in the investigation. The D.C. Police Union will expend additional resources to pursue grievances based upon public release of these materials, the adverse effect it will have on pending investigations, and the due process violations that will result through the grievance process for violations of Article 12, Section 1(2) and other provisions in the CBA caused by the release of the body-worn camera footage. The negative disciplinary consequences that result from the release of body-worn camera footage within five days of a serious use of force incident or officer-involved death will further cause the D.C. Police Union to expend more resources asserting challenges to the proposed discipline of its members and unfair labor practices before the Public Employee Relations Board.

*Id*.; *see also* JA at 112-113 (Affidavit of Chairman Pemberton). As such, the D.C. Police Union established injury and a consequent drain to its resources sufficient to establish organization standing. *See Properties Int'l*, 110 A.3d at 605.

Before the Superior Court, the District contended that the D.C. Police Union's allegations of injury to support its standing were insufficient because they are "too speculative." *See* JA at 317, 454. This contention ignored the standard of review for a motion to dismiss. This Court has explicitly held that "[t]he facts on which a party bases its claims to standing, however, are evaluated depending on the stage of litigation." *D.C. Appleseed*, 54 A.3d at 1205. This Court has also held that for purposes of a motion to dismiss, "**general factual allegations** of injury" are sufficient to establish standing. *Grayson*, 15 A.3d at 245 (citation omitted) (emphasis added). Similarly, the U.S. Court of Appeals for the D.C. Circuit has held that "mere allegations" of injury are sufficient to support standing at the pleading stage:

> We note that the burden imposed on a plaintiff at the pleading stage is not onerous. That burden increases, however, as the case proceeds. Whereas [a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, and the court presum[es] that general allegations embrace the specific facts that are necessary to support the claim, at the summary judgment stage the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts, . . . which for purposes of the summary judgment motion will be taken to be true.

*Post Properties*, 633 F.3d at 1141 n. 3 (internal quotation marks omitted). As detailed above, the D.C. Police Union has asserted sufficient allegations of injury in the Amended Complaint that support the D.C. Police Union's organizational standing in this matter.

**2. The D.C. Police Union Has Associational Standing to Bring this Action.**

The D.C. Police Union also has associational standing to bring this action. An association or organization has standing, even if it does not itself suffer actual or imminent injury, "when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose, and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *D.C. Library Renaissance Project/W. End Library Advisory Group v. D.C. Zoning Comm'n*, 73 A.3d 107, 113 (D.C. 2013) (quoting *Friends of Tilden Park, Inc. v. District of Columbia*, 806 A.2d 1201, 1207 (D.C. 2002)). In the proceedings below, the District only contested the first element of associational standing, arguing that: (1) the D.C. Police Union's members have not suffered an injury in fact; and (2) any injury is not fairly traceable to the District's actions or redressable through the requested relief. *See* JA at 320-26. The Superior Court likewise confined its decision on associational standing to the issue of whether the D.C. Police Union's members had standing. JA at 455-56.

Of note, during the hearing on the D.C. Police Union's Motion for Temporary Restraining Order in this case, the Honorable Hiram Puig-Lugo stated:

> [T]he District does acknowledge that an association can establish standing without asserting injury to itself solely as a representative of [its members]. So, the District does acknowledge standing to defend whatever interest you believe the [members] of your organization might have.
> . . . .
> **So, it does appear that the District agrees that you have standing at least in part of your contentions here. Those that relate specifically to the interest of the [members] of the organization**.

JA at 124-25 (emphasis added). In his August 14, 2020 Order, Judge Puig-Lugo further held that the D.C. Police Union has associational standing in this case, as follows: "The Court . . . finds that Plaintiff has associational standing to bring this motion on behalf of its members. . . ." JA at 166.

i. The D.C. Police Union's Members Have Suffered an Injury in Fact that Supports Associational Standing.

As set forth in the Amended Complaint, the harm caused by Subtitle B of the Act was immediately evident through two of the initial public releases made pursuant to Subtitle B of the body-worn camera footage and names of the officers involved in the September 2, 2020 shooting incident and the October 23, 2020 traffic death. After the justified shooting incident that occurred on September 2, 2020, credible death threats were made against the officer involved, his family, and his children including: "#GREENLIGHT ON ALL #DCPOLICE #KIDS #SINCE THEY #KILLING #OUR #FAMILY #KILL #THEM #NEXT #LETSGO

#SOUTHSIDE." JA at 258, 277. Another threat stated: "shit gone be turnt up when found out address and where children go to school at!" JA at 258, 278. A similar threat stated: "we need the police officer picture so we can see who he is…it's not going to be safe for him no more…Street Justice is the best Justice for this cop we need to know who he is a address and everything." JA at 258, 279. Similarly, in an officer-involved traffic death that occurred on October 23, 2020, flyers were passed out in the District that directly identified the officer involved, and that included veiled threats of violence, which were mirrored on social media. *See* JA at 378-80. These death threats to the officers, their families, and especially their children, reveal the serious and concrete nature of the harm caused by Subtitle B of the Act.

This Court has held that "general factual allegations of injury resulting from the defendant's conduct may suffice" to support standing. *Grayson*, 15 A.3d at 245-46 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). This Court has indicated also that, at the motion to dismiss stage, injury in fact is established if, in light of the allegations, "it is easy to presume specific facts under which [the plaintiff] will be injured." *Grayson*, 15 A.3d at 246 n. 75 (quoting *Bennett v. Spear*, 520 U.S. 154, 168 (1997)).

The D.C. Police Union does not simply assert that its members have suffered or will suffer an injury, without further explication, but has made specific

averments as to the particular injuries that are caused by the District's public disclosure of BWC footage and officers' names pursuant to Subtitle B of the Act. In relevant part, the Amended Complaint states the following:

> The release of the body-camera footage and names of officers will result in unjust reputational harm and will unjustly malign and permanently tarnish the reputation and good name of any officer that is later cleared of misconduct concerning the use of force. The affected officer will have no ability to salvage his reputation after the immediate release of his name and the body-worn camera footage. In addition to unjustly maligning an officer, the mandatory release of the names of officers and body-worn camera footage will place officers and the public at immediate risk of significant bodily harm. When officers justifiably use force against a criminal suspect, the immediate public release of the officer's name and the body-worn camera footage will allow the suspect and their associates to identify the officer and potentially seek retribution against the officer and his or her family. Equally concerning is that the officer is known by the criminal suspect to be a primary witness for the prosecution, and thus a potential target of violence to obstruct the officer's testimony. . . . The release of the officer's name and other identifying information contained in the body-worn camera footage will further impermissibly invade the officer's fundamental right to privacy.

JA at 254, ¶ 15.

The Amended Complaint contains numerous additional averments detailing the injuries that D.C. Police Union members will suffer as a result of the public disclosures under Subtitle B of the Act. Specifically, on July 22, 2020, former MPD Chief of Police Peter Newsham informed D.C. Police Union Chairman Greggory Pemberton that the MPD was contacting each of the officers involved in officer involved deaths whose body-worn camera footage was going to be publicly

released pursuant to the Act. JA at 255, ¶ 16; *see also* JA at 111 (Affidavit of Chairman Pemberton). Subsequently, the officers involved in officer involved deaths whose body-worn camera footage was going to be publicly released were contacted by a member of the MPD's Intelligence Branch, such as Lieutenant Shane Lamond. *Id.* Notably, the MPD's Intelligence Branch is tasked with assessing and investigating threats made against government officials. *Id.* When the officers were contacted by the Intelligence Branch, they were asked several questions to assess the threat level posed against the member through the release of the footage such as: whether the member had an alarm system on their home, whether their home was equipped with cameras, and whether they wanted the MPD to reach out to local law enforcement in the jurisdiction of their personal residence to have local law enforcement increase patrol of their neighborhood during the days surrounding the release of the footage. *Id.* Several of the officers involved accepted the MPD's offer to contact local law enforcement and have local law enforcement increase the patrol in their neighborhoods in the days surrounding the release of the footage. *Id.* Thus, the District has conceded, through its actions, that the release of BWC footage will result in a risk of significant bodily harm to D.C. Police Union members that is far from speculative.

Moreover, the MPD's Chief Operating Officer Leann Turner contacted Dr. Beverly Anderson and advised her that Chief Newsham wanted to ensure that

every officer was contacted prior to the release of the body-worn camera footage. JA at 255, ¶ 17; *see also* JA at 274-275 (Affidavit of Dr. Beverly Anderson). Specifically, Ms. Turner requested that Dr. Anderson contact every officer involved in officer-involved deaths so they would not be blindsided by the release of the body-worn camera footage. *Id.*

Dr. Anderson contacted all of the officers involved in incidents involving officer-involved deaths to advise them of the new law, to advise them that the BWC footage and their names would be publicly released, and to remind them of available MPEAP services. JA at 255-56, ¶ 17. Dr. Anderson also stated in her affidavit, attached to the Amended Complaint, that public release of body-worn camera footage depicting a death in which an officer is involved can inflict serious psychological trauma on the officer and their families. JA at 275, ¶ 5. Moreover, Dr. Anderson stated that in the early days following a serious use of force incident or incident concerning an officer involved death, officers are particularly vulnerable to psychological harm, which would be exacerbated by the public release of the body-worn camera footage of the incident. JA at 275, ¶ 6. Indeed, during the hearing on Plaintiff's Motion for Temporary Restraining Order in this case, Judge Puig-Lugo recognized this harm inflicted on D.C. Police Union members as follows:

> And, frankly, I find the District's position sort of minimizing the psychological harm that would come to, to somebody who is involved

> in a death somewhat problematic, and to think that police officers and their families are somehow denied harm of any kind because whatever police force patrols their jurisdiction is parked out in front of their houses.

JA at 161.

Furthermore, the release of body-worn camera footage within five days of a serious use of force incident or officer-involved death will result in the public disclosure of the identities of witnesses to the incident. JA at 257, ¶ 20. This public disclosure of witness identities[3] will make it more difficult for Detectives (who are D.C. Police Union members) to secure witness cooperation. *Id.* Indeed, when Subtitle B of the Act was being considered by the Council, Acting United States Attorney for the District of Columbia Michael R. Sherwin, recognized the harm that would be caused by Subtitle B and sent correspondence to Councilmember Charles Allen expressing serious concerns as follows:

> USAO is concerned that this modification would, in fact, make it more difficult to investigate a serious officer-involved death or serious use of force. . . . The early publication of BWC could create a narrative that makes it difficult to conduct an investigation, as it may lead witnesses to a conclusion that affects their testimony.
> . . . .
> Further, early release of BWC could inadvertently publicize the identities of the witnesses. . . . If the BWC were released unredacted, civilian privacy could be compromised, as BWC often contains

[3] The MPD has blurred some witnesses to protect their identities. However, this is not authorized by the current law. As such, any organization, individual, criminal defense attorney, or Councilmember could rightfully insist on compliance with the Act, which would afford no protection to witnesses.

> personal details from civilians, including names, dates of birth, and contact information such as home addresses and telephone numbers.

JA at 252-253 ¶ 12; 270-271 (emphasis in original).

This will also have the negative consequence of making it more difficult for MPD Detectives to solve crimes, which will in turn negatively affect each of the Detectives' closure rates. JA at 257, ¶ 20. A low closure rate has negative career consequences for Detectives and has been used by the MPD as a basis to transfer or discipline members. *Id.* The D.C. Police Union has expended resources in the past to challenge improper transfers of Detectives based on a low-closure rate, and this will continue and increase in the future as a result of the release of body-worn camera footage within five days of a serious use of force incident or officer-involved death. *Id.* Therefore, the D.C. Police Union has standing to prevent the release of the body-worn camera footage, which will negatively impact the careers of its members.

Significantly, this Court has found far less concrete and particularized allegations to be sufficient to establish associational standing. For example, in *District of Columbia Library Renaissance Project v. District of Columbia Zoning Commission*, 73 A.3d 107 (D.C. 2013), the plaintiff was a non-profit association that was formed for the purpose of protecting a particular library from being demolished as part of a private entity's zoning request. *D.C. Library Renaissance*, 73 A.3d at 111. The plaintiff alleged that demolition of the library "would cause

its members to lose the use and enjoyment of the current library and that the replacement library would be inadequate" and one of the plaintiff's members "expressed concern that the proposed replacement library would lack adequate facilities." *Id.* at 113. Based on these allegations of injury, this Court held that "[s]uch an allegation of specific and concrete interference with the use and enjoyment of a recreational or aesthetic resource suffices to support a conclusion of injury in fact." *Id.* Likewise, this Court has held that the allegation that a proposed building design would "clash . . . with the character of [a] historic district" was sufficient to establish an association's standing in a dispute concerning a building permit. *Dupont Circle Citizens Ass'n v. Barry*, 455 A.2d 417, 418-19, 421-22 (D.C. 1983). Significantly, in so holding, this Court noted: "We recognize that the [plaintiff] could have expanded on its pleading which alleged injury on behalf of its members. Enough was alleged, however, to show standing; were we to conclude otherwise, we would be elevating form over substance." *Id.* at 422 n. 19.

The D.C. Police Union has sufficiently alleged, through its Amended Complaint and supporting affidavits, that Subtitle B of the Act causes actual harm to D.C. Police Union members sufficient to establish associational standing. For purposes of a motion to dismiss, the Court must accept these allegations as true:

> [T]he basic function of the standing inquiry is to serve as a threshold a plaintiff must surmount before a court will decide the merits question

> about the existence of a claimed legal right. If a plaintiff's factual allegations are sufficient to require a court to consider whether the plaintiff has a statutory (or otherwise legally protected right), then the Article III standing requirement has served its purpose; and the correctness of the plaintiff's legal theory—his understanding of the statute on which he relies—is a question that goes to the merits of the plaintiff's claim, not the plaintiff's standing to present it.

*Grayson*, 15 A.3d at 229.

Therefore, for all of the foregoing reasons, sufficient facts have been alleged, and actual events since this action's inception have confirmed, that the District's actions in passing and implementing Subtitle B of the Act have caused actual or imminent injury to D.C. Police Union members.

ii. The D.C. Police Union's Members' Injuries are Traceable to the District's Actions and are Properly Redressable Through the Relief Sought.

The Superior Court ruled that The D.C. Police Union's members' injuries were not fairly traceable to the District's actions, stating that the District is "not in control of public opinion and cannot be held responsible if a citizen or citizens criticizes or condemns an officer's use of force in a particular incident." JA at 456. Critically, the District **is** in control of **when** BWC footage and officers' names are released to the public and whether BWC footage and officers' names should be released at all. Prior to the enactment of Subtitle B, the Mayor had necessary discretion concerning whether and when to release BWC footage after consulting with law enforcement agencies, such as the U.S. Attorneys' Office and the

Metropolitan Police Department. This necessary consultation and discretion allowed the Mayor to withhold producing BWC footage if the release would jeopardize a pending criminal investigation or if the release of the BWC footage would place the officers or witnesses identified in the footage at risk of imminent harm. Indeed, U.S. Attorney Sherwin expressed significant concern regarding the mandatory language in the Emergency Act requiring the Mayor to release BWC recordings, as follows:

> Because there are situations where it could be appropriate for the Mayor, in consultation with the relevant agencies, to release BWC footage, the mandatory language of the bill ("shall") should be changed to permissive language ("may"), allowing the Mayor discretion to release BWC footage at an appropriate time, balancing the needs of the community to see the footage with the needs of prosecutors to accurately investigate what happened, and the security and privacy rights of civilian witnesses.

JA at 253, ¶ 13; 271.

Subtitle B of the Act completely removed this necessary discretion and has left D.C. Police Union members at the mercy of "citizens" who wish to do harm to them based upon their proper and justified use of force in carrying out their police duties. This is the case even in instances when law enforcement agencies have obtained credible intelligence that the release of the BWC footage and names will result in death threats and harm to D.C. Police Union members and their families.

Moreover, as explained above, the D.C. Police Union has alleged numerous injuries in the Amended Complaint that are directly traceable to the District.

Indeed, it was the release of BWC recordings and officers' names that caused the MPD's Intelligence Branch to contact the officers whose names and BWC footage were going to be released to assess the threat level posed against the member and ensure that local law enforcement increased patrol of their neighborhoods during the days surrounding the release of the footage. *See* JA at 255, ¶ 16. Additionally, Dr. Anderson has stated that the release of such information alone, particularly in "the early days following a serious use of force incident or incident concerning an officer involved death," can "inflict serious psychological trauma on the officer." JA at 275, ¶¶ 5-6. Moreover, the D.C. Police Union's allegation that the District's actions "will further impermissibly invade the officer's fundamental right to privacy" is directly traceable to the District's action in releasing the officer's name. None of these injuries are "the result of the independent action of some third party not before the court," but are instead directly traceable to the District's actions pursuant to Subtitle B of the Act and are entirely within the control of the District. *See Lujan*, 504 U.S. at 560.

At the very least, the District's actions contribute to the injuries of D.C. Police Union members. The United States Supreme Court has held that where the defendant's action "contributes" to the plaintiff's injury, the causation element of standing is met. *See Massachusetts v. E.P.A.*, 549 U.S. 497, 523-24 (2007). For example, in *Massachusetts*, the Supreme Court ruled that the minor effects on

Massachusetts' climate resulting from the EPA's decision not to regulate greenhouse gas emissions from new vehicles, was sufficient to establish standing. *See id.* at 523-25. In this case, the injuries caused to the D.C. Police Union and its members are not as remote as the injuries in *Massachusetts*, and are directly traceable to the District's actions pursuant to Subtitle B of the Act.

The injuries caused to the D.C. Police Union and its members are also redressable through the relief requested in the Amended Complaint.[4] The Amended Complaint requests that Subtitle B of the Act be stricken and that the Mayor be enjoined from publicly releasing officer names and BWC footage pursuant to Subtitle B of the Act. JA at 265. The violation of D.C. Police Union members' fundamental privacy rights will be rectified if the proposed relief is granted because such relief would prevent the District from immediately releasing a member's identifying information without discretion. Furthermore, the serious psychological trauma inflicted on an officer by the public release of the BWC footage of an incident involving an officer-involved death in the early days following the incident will be redressed through the requested relief, because such relief would prevent the required release of the footage within five days of the incident without any discretion from the Mayor. *See* JA at 275, ¶ 5.

[4] The Superior Court did not address the element of redressability it its Opinion. *See* JA at 451-56.

The United States Supreme Court has held that "a plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury." *See Larson v. Valente*, 456 U.S. 228, 243 n. 15 (1982) (emphasis in original). The injuries alleged in the Amended Complaint will be redressed through the D.C. Police Union's requested relief, therefore, the D.C. Police Union has met this redressability requirement.

## B. The D.C. Police Union Sufficiently Stated a Claim for Relief for a Violation of Separation of Powers.

The D.C. Police Union sufficiently stated a claim for declaratory judgment that Subtitle B of the Act violates the principle of separation of powers. This Court has accepted the following standard for determining whether a law violates the principle of separation of powers: "whether a particular measure impermissibly undermine[s] the powers of the Executive Branch or disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions." *Hessey v. Burden*, 584 A.2d 1, 5 (D.C. 1990). This Court has further held that the Council cannot "take action which would interfere with the Mayor's exercise of his exclusive and administrative authority, for such action would violate separation of powers." *Convention Ctr. Referendum Comm. v. D.C. Bd. of Elections & Ethics*, 441 A.2d 871, 881 (D.C. 1980).

The Amended Complaint sets forth the Mayor's exclusive executive functions relevant to this action, including that "it shall be the duty of the Mayor of the District of Columbia . . . (1) To preserve the public peace; (2) To prevent crime and arrest offenders; (3) To protect the rights of persons and of property; . . . (10) To enforce and obey all laws and ordinances in force in the District, or any part thereof, which are properly applicable to police or health, and not inconsistent with the provisions of this title." JA at 258-59, ¶ 24 (quoting D.C. Code § 5-101.03). The Amended Complaint further states that the Metropolitan Police Department is a "subordinate agency" under the "direct administrative control of the Mayor." JA at 259, ¶ 25 (quoting D.C. Code § 1-603.01(17)(L)). The Amended Complaint also states that the Mayor is solely tasked under the D.C. Code to "issue rules regarding the Metropolitan Police Department's Body-Worn Camera Program," including rules concerning "[s]tandards for public access to body-worn camera recordings." JA at 259, ¶ 26 (quoting D.C. Code § 5-116.32).

After setting forth the Mayor's exclusive executive functions, the Amended Complaint then sets forth how Subtitle B of the Act impermissibly burdens and interferes with the exclusive power of the Mayor to "preserve the public peace," "prevent crimes and arrest offenders," and "protect the rights of persons and of property," as well as the Mayor's "direct administrative control" over her

subordinate agency, the MPD. JA at 259-62, ¶¶ 28-33. In relevant part, the Amended Complaint states:

- Subtitle B of the Temporary Act improperly infringes on and obstructs the Mayor's ability to carry out her executive functions to "preserve the public peace" and "prevent crimes and arrest offenders," because the immediate, mandatory release of body-worn camera footage and names of officers will "make it more difficult to investigate a serious officer-involved death or serious use of force." JA at 260, ¶ 29.

- [C]riminal suspects will have the ability to review the body-worn camera footage to identify civilian witnesses to their crimes, which will cause these civilian witnesses to become the potential targets of threats or violence to prevent their testimony. JA at 260, ¶ 30.

- The Council's elimination of the Mayor's discretion in executing her executive power precludes the Mayor from properly balancing "the needs of prosecutors to accurate investigate what happened, and the security and privacy rights of civilian witnesses." . . . Subtitle B of the Temporary Act directly infringes on and obstructs the Mayor's ability to carry out her executive functions to "preserve the public peace," "prevent crimes and arrest offenders," and "protect the rights of persons and of property" by requiring her to immediately release body-worn camera footage and names of officers without any discretion permitted by the Mayor in executing her executive function. JA at 260-61, ¶ 31.

- Subtitle B of the Temporary Act improperly infringes on and obstructs the Mayor's ability to carry out her executive functions to "preserve the public peace," "prevent crimes and arrest offenders," and "protect the rights of persons and of property," because the mandatory release of the names and body-worn camera footage will place D.C. Police Union members at immediate risk of significant bodily harm, unjustly malign officers, and unjustly subject officers to substantial reputational harm. JA at 261, ¶ 32.

Thus, the D.C. Police Union alleged sufficient facts to state a claim that the exclusive executive powers of the Mayor are impermissibly burdened by Subtitle B of the Act.

Before the Superior Court, the District argued that because "the Council has the authority to enact statutes governing the disclosure of public records . . . without violating separation of powers, it has the authority to modify them." JA at 328. The District's argument illustrates the constitutional flaw of Subtitle B. Subtitle B of the Act does not concern the general disclosure of public records, but instead concerns BWC footage specifically, which has distinct and unique value to policing in the District. *See* JA at 260-62, ¶¶ 29-33. Subtitle B of the Act also concerns the identities of officers in specific events, which is not a matter of public record but-for disclosure under Subtitle B of the Act. Moreover, the District's argument fails to acknowledge the key infirmity of Subtitle B of the Act: that it has removed **any and all discretion** from the Mayor in whether or not to release BWC footage and officers' names such that her executive functions concerning policing have been impermissibly burdened. *See id.*

The provisions of the D.C. Code cited in the Amended Complaint demonstrate that the Mayor has a distinct, exclusive power over policing in the District of Columbia and her subordinate agency, the MPD. Thus, while it is true that the Council can legislate in a manner that might constrain the Mayor and that might modify statutes already enacted, its power to do so is limited by separation of powers principles when it attempts to constrain the Mayor's exclusive power "[t]o preserve the public peace" and "[t]o prevent crime and arrest offenders" in

the District. Specifically, in enacting legislation that totally removes the Mayor's discretion over a matter of policing so closely intertwined with preserving the public peace, preventing crime, and arresting criminals, such action by the Council is unconstitutional and unlawful. Accepting the allegations in the Amended Complaint as true, the D.C. Police Union has sufficiently stated a claim that Subtitle B of the Act violates the principle of separation of powers.

In addition, the fact that the D.C. Police Union has raised a constitutional claim concerning infringement of the Mayor's executive powers does not affect or negate the D.C. Police Union's standing in this matter. So long as a party satisfies a traditional theory of standing, that party can bring a claim for violation of separation of powers. This principle was clearly set forth by the U.S. District Court for the District of Columbia in *Jafarzadeh v. Nielson*, 321 F.Supp.3d 19 (D.D.C. 2018), in which the Court held as follows:

> Plaintiffs assert that CARRP impermissibly intrudes on Congress's sole authority to "establish an uniform Rule of Naturalization." The government argues that plaintiffs lack standing to pursue this separation of powers claim, because only Congress would be injured by such a violation. **This is an odd argument on the government's part. History provides a list as long as one's arm of cases in which private parties alleged injuries sufficient to bring separation of powers claims—and, indeed, often obtained relief**. See, e.g., Patchak v. Zinke, —— U.S. ——, 138 S.Ct. 897, 903–04, 200 L.Ed.2d 92 (2018); Zivotofsky ex rel. Zivotofsky v. Kerry, —— U.S. ——, 135 S.Ct. 2076, 2083, 192 L.Ed.2d 83 (2015); NLRB v. Noel Canning, —— U.S. ——, 134 S.Ct. 2550, 2557, 189 L.Ed.2d 538 (2014); Free Enter. Fund, 561 U.S. at 487, 513, 130 S.Ct. 3138; City of New York, 524 U.S. at 430–33, 449, 118 S.Ct. 2091; Morrison v.

> Olson, 487 U.S. 654, 670, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988); Bowsher v. Synar, 478 U.S. 714, 721, 736, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986); INS v. Chadha, 462 U.S. 919, 935–36, 959, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582, 72 S.Ct. 863, 96 L.Ed. 1153 (1952).
>
> The reason for this is clear. While Congress would certainly "suffer[ ] an[ ] invasion of a legally protected interest as a result of" a violation of the Uniform Rule of Naturalization Clause, it is not the constitutional violation alone that provides plaintiffs with standing in separation of powers cases. Rather, that violation must itself cause a separate injury to a plaintiff's interests, and it is that harm that provides standing to sue.

*Id*. at 35 (emphasis added) (internal citation omitted).

In *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc*., 501 U.S. 252 (1991), the U.S. Supreme Court held that an organization and individuals had standing to challenge the constitutionality of an Act of Congress on the basis of separation of powers that had transferred operating control of the D.C. airports from the Department of Transportation to the Metropolitan Washington Airports Authority. The potential injury that the Supreme Court found conferred standing on the Citizens for the Abatement of Aircraft Noise was "increased noise, pollution, and danger of accidents" that the Supreme Court found sufficiently alleged "personal injury" to that was "fairly traceable" to the Board's veto power under the Act. *Id*. at 264. In reaching this decision, the Supreme Court stated that "[f]or purposes of ruling on a motion to dismiss for want of standing, both the trial court and reviewing courts must accept

as true all material allegations of the complaint." *Id*. After determining that the Citizens for the Abatement of Aircraft Noise had standing under this standard, the Supreme Court then ruled that the Act violated the separation of powers. *See id*. at 277.

In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), the Supreme Court found that an accounting firm and non-profit organization that had been injured as a result of an unconstitutional law, had standing to challenge the law on separations of powers grounds. *See also District of Columbia v. Beretta U.S.A. Corporation*, 940 A.2d 163 (D.C. 2008) (D.C. Court of Appeals considered claim brought by the District and individuals contending that the Protection of Lawful Commerce in Arms Act violated the separation of powers.). In *Free Enterprise Fund*, the Supreme Court further emphasized the principle that determining whether a law violates the principle of separation of powers does not depend on whether the executive branch approves of the encroachment on its powers, as follows:

> Perhaps an individual President might find advantages in tying his own hands. But the separation of powers does not depend on the views of individual Presidents, nor on whether "the encroached-upon branch approves the encroachment," *New York v. United States,* 505 U.S. 144, 182, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). The President can always choose to restrain himself in his dealings with subordinates. He cannot, however, choose to bind his successors by diminishing their powers, nor can he escape responsibility for his choices by pretending that they are not his own.

*Free Enter. Fund*, 561 U.S. at 497. Thus, whether or not Mayor Bowser signed the Act into law is not determinative of whether Subtitle B of the Act violates the principles of separation of powers. Similarly, in *Bond v. United States,* 564 U.S. 211 (2011), the Supreme Court held that an individual indicted for violating a federal statute had standing to challenge its validity on grounds that Congress had exceeded its powers under the Constitution by enacting it. In ruling that Bond had standing to make her constitutional challenge to the law, the Supreme Court held: "[t]he individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines. Her rights in this regard do not belong to the State." *Id*. at 220. In this case, the D.C. Police Union's right to challenge Subtitle B does not belong to the Mayor, and the D.C. Police Union has standing to seek redress for its injuries caused by Subtitle B of the Act.

### C. The D.C. Police Union Sufficiently Stated a Claim for Relief for Violation of Its Members' Fundamental Right to Privacy.

This Court has specifically recognized that "MPD employees have a cognizable privacy interest in the nondisclosure of their names and other identifying information." *District of Columbia v. Fraternal Order of Police*, 75 A.3d 259, 268 (D.C. 2013). This Court has further held as follows:

> [T]here is no dispute that police officers subject to departmental disciplinary proceedings have far more than a *de minimis* privacy interest in not being publicly identified. The propriety of redactions reasonably necessary to ensure their anonymity is not in doubt. "[E]ven with names redacted," the disclosure of other personal

> information may result in an invasion of their privacy because individuals "can often be identified through other, disclosed information" and the "later recognition of identifying details."

*Fraternal Order of Police/Metro. Police Labor Comm. v. District of Columbia*, 124 A.3d 69, 77 (D.C. 2015). The United States District Court for the District of Columbia has similarly held that BWC footage contains information in which police officers have a privacy interest. *See United States v. Kingsbury*, 325 F. Supp. 3d 158, 160 (D.D.C. 2018) ("as a general matter, body-worn camera footage is likely to contain sensitive information in which witnesses and others depicted on the footage – who, in all likelihood, would include police officers – have a legitimate privacy interest.").

There is no dispute that Subtitle B of the Act mandates disclosure of an officer's BWC footage and identity in relation to certain use of force incidents. U.S. Attorney Sherwin expressed significant concern that Subtitle B's requirement that the Mayor release the name and BWC footage of the officer involved would result in "unjust reputational harm" and would "unjustly malign an officer," as follows:

> Finally, the prosecution and the government should not malign any suspect, including an officer, while an investigation is pending. Indeed, as a rule, police and prosecutors do not publicly release the name of any individual under investigation unless and until the individual is charged. Thus, if the evidence does not support charges, the target of the investigation, who is presumed innocent, does not suffer unjust reputational harm. In contrast, when an officer is charged with a crime, his or her name is released. **Because, after**

> **thorough investigation, a police-involved death or serious use of force investigation may not ultimately result in the criminal charge of an officer, a requirement that the Mayor categorically release all names of officers after 72 hours, regardless of the facts of the case or the nature of the officer's actions, could unjustly malign an officer**.

JA at 253-254, ¶ 14; 271 (emphasis added). Subtitle B of the Act necessarily discloses information for which D.C. Police Union members have legitimate privacy interests and the release of which could result in unjustly maligning an officer and causing unjust reputational harm. As such, the D.C. Police Union identified and alleged the violation of a legitimate, recognized privacy interest in this matter. Accepting the allegations in the Amended Complaint as true, the D.C. Police Union has stated a claim that Subtitle B of the Act violates the D.C. Police Union's members' fundamental right to privacy.

## CONCLUSION

For the foregoing reasons, The D.C. Police Union respectfully requests that this Court reverse the Superior Court's decision granting the District's Motion to Dismiss the Amended Complaint, and remand this matter to the D.C. Superior Court for further proceedings.

Dated: November 24, 2021

Respectfully submitted,

*/s/ Daniel J. McCartin*

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## CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2021, the foregoing Brief of Appellant Fraternal Order of Police, Metropolitan Police Department Labor Committee, D.C. Police Union was filed and served on the following via the Court's electronic filing and service system:

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# District of Columbia
# Court of Appeals

## REDACTION CERTIFICATE DISCLOSURE FORM

**Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.**

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

Daniel J. McCarthy

Signature

21-CV-511

Case Number(s)

Daniel J. McCarthy (Bar No. 976580)

Name

11/24/2021

Date

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Email Address