DISTRICT OF COLUMBIA COURT OF APPEALS

No. 21-CV-511

FRATERNAL ORDER OF POLICE
METROPOLITAN POLICE DEPARTMENT LABOR COMMITTEE,

Appellant,

v.

THE DISTRICT OF COLUMBIA, *et al.*,

*Appellee*s.

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

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

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A. The D.C. Police Union Has Standing to Prosecute Its Claims.

The District concedes that, on a motion to dismiss, standing may be supported by "**general factual allegations** of injury . . .". Dist. Br. at 19 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)) (emphasis added); *accord Grayson v. AT&T Corp.*, 15 A.3d 219, 245 (D.C. 2011). Applicable to each theory of standing at issue in this case, "the critical question is whether . . . [the plaintiff] has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of [the] court['s] jurisdiction." *OneWest Bank, FSB v. Marshall*, 18 A.3d 715, 721 (D.C. 2011) (alterations in original) (quoting *Horne v. Flores*, 557 U.S. 433, 445 (2009)). The factual allegations in the Amended Complaint, accepted as true, and the reasonable inferences therefrom are sufficient to demonstrate that the D.C. Police Union and its members have a personal stake in this controversy necessary to confer standing.

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

The District disputes only the first element of associational standing: whether the D.C. Police Union's members would have standing to sue in their own right. *See* Dist. Br. at 26-27. This element requires: (1) injury-in-fact; and (2) that the injury is traceable to the conduct at issue and redressable through the Court. *See Equal Rights Ctr. v. Properties Int'l*, 110 A.3d 599, 603 (D.C. 2015).

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

Injury-in-fact may be established through "[a]n allegation of **future** injury. . . . if the threatened injury is 'certainly impending' **or there is a 'substantial risk' that the harm will occur.**" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quoting in part *Clapper v. Amnesty Int'l*, 568 U.S. 398, 414 n. 5 (2013)) (emphasis added). Supreme Court precedent "do[es] not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about." *Clapper*, 568 U.S. at 414 n. 5. Furthermore, "[a] plaintiff is not required to wait for an injury to occur in order to satisfy Article III standing requirements." *Jibril v. Mayorkas*, 20 F.4th 804, 817 (D.C. Cir. 2021); *accord Am. Fuel & Petrochemical Mfrs. v. E.P.A.*, 937 F.3d 559, 593-94 (D.C. Cir. 2019).

Concerning reputational harm, the District argues that the D.C. Police Union's allegations of reputational harm are "conclusory," thereby ignoring the other material facts in the Amended Complaint and the reasonable inferences that must be drawn in the D.C. Police Union's favor. Dist. Br. at 27. Significantly, the Amended Complaint includes a formal positional letter authored by Acting U.S. Attorney Michael R. Sherwin, who explicitly stated that "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. 271 (emphasis in original). Furthermore, the social media posts

appended to the Amended Complaint reflect the reasonable inference, explicitly stated by U.S. Attorney Sherwin, that premature and categorical release of BWC footage and the identifies of involved officers will cause broad public maligning of those officers.

The District also asserts that "the Mayor has released over thirty officer names in conjunction with BWC recordings," appearing to argue that the failure to identify an actual injury resulting from those releases is a *per se* bar to the D.C. Police Union's standing. Dist. Br. at 27. This argument fails for several reasons. As an initial matter, the releases referenced by the District – which are not supported by any citation – cannot be considered in ruling upon the motion to dismiss, as they are facts outside of the Amended Complaint: "[A] defendant raising a 12(b)(6) defense cannot assert any facts which do not appear on the face of the complaint itself." *Herbin v. Hoeffel*, 727 A.2d 883, 886 (D.C. 1999). Furthermore, the majority of the releases referenced by the District occurred *after* the Amended Complaint was filed. *See* JA 244 (reflecting that the Amended Complaint was filed on October 27, 2020); *see also* https://mpdc.dc.gov/page/community-briefing-videos (last accessed June 1, 2022) (providing the dates of all incidents for which Subtitle B disclosures were made). On this point, it is fundamentally unfair to argue that certain factual allegations are

absent from the Amended Complaint when it was filed before such events even occurred.

Moreover, "[a] plaintiff is not required to wait for an injury to occur in order to satisfy Article III standing requirements." *Jibril*, 20 F.4th at 817. Indeed, "a plaintiff seeking prospective and injunctive relief," as is the case here, "'may not rest on past injury alone.'" *Id.* at 814 (quoting *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015)). Thus, it is of little consequence that no specific instances of reputational harm have been alleged.

Concerning the increased risk of significant bodily harm, the District asserts that the "sole factual support in the amended complaint . . . is three anonymous, undated social media posts following the officer-involved death of Deon Kay." Dist. Br. at 29. However, none of the social media posts concerning Mr. Kay are anonymous, as they clearly indicate the usernames of all persons involved in those posts. *See* JA 277-79. Furthermore, any anonymity is irrelevant, as the veracity and substance of those posts must be accepted as true at the motion to dismiss stage. *See Grayson*, 15 A.3d at 228 (citation omitted). On this point, the District's assertion that there are doubts as to whether the threats carried "any actual intent to harm anyone" or posed a "real threat" to police officers is misplaced. *See* Dist. Br. at 30. Indeed, the threat was credible enough to cause the MPD to coordinate with local law enforcement to protect the safety of those officers. *See* JA 255. The only

inference favorable to the D.C. Police Union to be drawn from those social media posts is that they carry the weight of credible threats and reflect actual risk of harm posed to officers identified through Subtitle B. This inference is supported by undisputed facts concerning the MPD's deployment of its resources and consultation with local law enforcement, as stated in the Amended Complaint:

> [After Subtitle B was implemented], 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 . . . . **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[, including] 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.** Several of the officers involved accepted the MPD's offer to contact local law enforcement and local law enforcement increased the patrolling in their neighborhoods in the days surrounding the release of the footage.

JA 255 (emphasis added); *see also* Dist. Br. at 30 n. 9 (conceding that this outreach occurred). The District argues that the MPD's request for the deployment of police officers to the neighborhoods of MPD officers whose identities were publicized through Subtitle B was merely "proactive" and does not imply that there was any actual risk of harm to those identified officers. *See* Dist. Br. at 30 n. 9. However, the inference that must be drawn in the D.C. Police Union's favor is that the deployment of such police officers was a reaction to the credible and substantial risk of bodily harm that was posed to MPD officers as a result of their

identification through Subtitle B. Indeed, it is reasonable to infer that a local law enforcement agency would not deploy its limited resources for the benefit of individuals who were not exposed to any risk of bodily harm. Notably, these allegations also refute the District's argument that the "sole" factual support for the risk of physical harm at issue is the social media posts in the record. *See* Dist. Br. at 29.

Concerning psychological harm, the District first appears to argue that "psychological harm alone" cannot support standing. *See* Dist. Br. at 31. As an initial matter, the D.C. Police Union does not allege only psychological harm, but, as discussed herein, also alleges a substantial risk of bodily harm, reputational injuries, and violation of privacy rights. Furthermore, the term "psychological harm" referenced by the Seventh Circuit in the cases cited by the District refers only to a feeling of personal offense to one's beliefs, rather than actual manifestations of psychological harm. *See Freedom From Religion Found., Inc. v. Zielke*, 845 F.2d 1463, 1468 (7th Cir. 1988) (citation omitted).[1] In this case, the psychological harm alleged is not mere indignation or a feeling of offense, but is,

[1] Notably, although the District quotes the Seventh Circuit for the proposition that the psychological harm alleged here is insufficient, the Seventh Circuit has articulated that "the injury-in-fact requirement can be satisfied by a threat of future harm or by an act which harms the plaintiff **only by increasing the risk of future harm** that the plaintiff would have otherwise faced." *Randolph v. ING Life Ins. & Annuity Co.*, 973 A.2d 702, 707 n. 7 (D.C. 2009) (quoting *Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629, 634 (7th Cir. 2007)) (emphasis added).

rather, a substantial risk of actual psychological suffering resulting from involvement in serious and deadly uses of force, of such gravity that the Mayor's own executive agency has affirmatively advised identified officers of the services of a clinical psychologist to help cope with this psychological harm. *See* JA 274-75.

The District further argues that "Dr. Anderson's opinions are just that – opinions – and lack any factual support." Dist. Br. at 31. This argument is meritless and again controverts the presumption of truth to which the D.C. Police Union's allegations were entitled on a motion to dismiss. Moreover, Dr. Anderson's affidavit provides the factual basis for her opinions, namely, through her significant academic and experiential qualifications, including two masters degrees, two doctorate degrees, holding the position as Clinical Director of the Metropolitan Police Employee Assistance Program, and specializing "in police trauma psychology." JA 274. Based on this substantial experience and expertise, Dr. Anderson stated: "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 275. Any argument that this factual basis is insufficient conflicts with the standard of review for a motion to dismiss.

Relatedly, the District argues that the D.C. Police Union "does not allege a single incident of psychological harm resulting from the release of such footage . . .". Dist. Br. at 32. However, as detailed above, the law is clear that actual harm is not required to establish standing for prospective relief. Rather, the D.C. Police Union need only allege that it is plausible that there is a substantial risk of future psychological harm. That substantial risk is amply supported by the allegations in the Complaint and Dr. Anderson's unrebutted affidavit.

As to the privacy injuries at issue, it must be noted that the question of standing is distinct from the merits. *Grayson*, 15 A.3d at 229; *see also Warth v. Seldin*, 422 U.S. 490, 500-501 (1975). Thus, it is well-settled that where a party alleges the violation of a constitutional right, the applicability and existence of that right is presumed. *See In re U.S. Office of Personnel Mgmt. Data Sec. Breach Litig.*, 928 F.3d 42, 54 (D.C. Cir. 2019) ("For standing purposes, we **assume** that [plaintiffs] have, as they claim, a '**constitutional right to informational privacy**' that was violated") (emphasis added); *see also Turner v. U.S. Agency for Global Media*, 502 F.Supp.3d 333, 358 (D.D.C. 2020). In turn, the only question is whether there are sufficient allegations of an injury to that presumed right. *See Turner*, 502 F.Supp.3d at 358. The D.C. Police Union has asserted a Due Process claim specifying that its members enjoy a fundamental privacy right that guards against the disclosures at issue. *See* JA 263-64. The Amended Complaint also

explicitly alleges that "[t]he release of the officer's name and other identifying information contained in the [BWC] footage will further impermissibly invade the officer's fundamental right to privacy." JA 254. Thus, the D.C. Police Union has, as a matter of law, sufficiently alleged an injury-in-fact sufficient to confer standing.[2]

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

The District's contention of what is considered an injury that is "fairly traceable" is incorrect and overly strict. *See* Dist. Br. at 28, 32-33. It is well-settled that a plaintiff maintains standing despite the fact that there are extraneous (*i.e.*, "independent") factors that could produce the same harm, so long as the offensive act at issue "contributes" to the alleged injury. *See Massachusetts v. E.P.A.*, 549 U.S. 497, 523-24 (2007). It is also well-settled that a plaintiff

[2] The District asserts, in a footnote, that the D.C. Police Union has waived any reliance on this alleged injury to establish standing. *See* Dist. Br. at 34 n. 13. However, this Court, in the case cited by the District, ruled that a party waived any assertion of the "complex question" of intersectional discrimination when such discrimination was never actually argued, but was only obliquely referenced in the party's reply brief and at oral argument. *See McFarland v. George Washington U.*, 935 A.2d 337, 351 (D.C. 2007). By contrast, the D.C. Police Union's Opening Brief discusses the privacy injury at issue with particular and detailed reference to the elements of traceability and redressability. *See* Br. at 28-29. Furthermore, this privacy injury was explicitly alleged in the Amended Complaint and was developed through argument on the District's Motion to Dismiss filed with the Superior Court. *See* JA 254, 363-64.

maintains standing even though there is a chain of causation that includes actions by third parties. *See In re Navy Chaplaincy*, 697 F.3d 1171, 1177 (D.C. Cir. 2012) (finding sufficient causation where discrimination by third parties was alleged to "likely result" from governmental policies); *see also Bennett v. Spear*, 520 U.S. 154, 168-70 (1997); Indeed, the Supreme Court has held that even an "**attenuated** line of causation" is sufficient to establish standing on a motion to dismiss. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688 (1973) ("*SCRAP*") (emphasis added). Specifically, the Supreme Court ruled that the following line of causation was sufficient to support standing for residents of Washington, D.C. alleging only generalized claims of recreational and aesthetic harm:

> [That] a general [railroad freight surcharge] rate increase would allegedly cause increased use of nonrecyclable commodities as compared to recyclable goods, thus resulting in the need to use more natural resources to produce such goods, some of which resources might be taken from the Washington area, and resulting in more refuse that might be discarded in national parks in the Washington area.

Id.

Concerning reputational harm, the District argues that the alleged harm is not a "direct[ ]" result of Subtitle B, but that the alleged harm is instead caused by the perception of the public. Dist. Br. at 28. As indicated above, standing does not require "direct" causation, but is satisfied when the offending action, here Subtitle

B, merely contributes to or constitutes an "incremental step" towards the alleged harm. *See Massachusetts*, 549 U.S. at 524; *see also Foretich v. United States*, 351 F.3d 1198, 1214 (D.C. Cir. 2003) ("injury that **derives** directly" will support standing) (emphasis added). Significantly, the Supreme Court has ruled that the government's labeling of a film as "political propaganda," despite the fact that the filmmaker's reputation depended upon the public's opinion irrespective of that label, created a risk of reputational harm fairly traceable to that label sufficient for standing on a motion for summary judgment. *Meese v. Keene*, 481 U.S. 465, 473-76 (1987). Analogous to that case and consistent with the foregoing principles, the Amended Complaint, and particularly U.S. Attorney Sherwin's report, adequately alleges that public maligning of the identified officers, and consequent harm to their reputations, derives directly from the identification of those officers and disclosure of BWC footage pursuant to Subtitle B. *See* JA 253-54.

Similarly, the District argues that any physical harm against identified officers is too attenuated from the identification of those officers and their BWC footage pursuant to Subtitle B. *See* Dist. Br. at 32-33. However, far more tenuous chains of causation have conferred standing. *See SCRAP*, 412 U.S. at 688. Furthermore, the chain of causation described by the District is not theoretical, but is supported by factual allegations in the Amended Complaint. U.S. Attorney Sherwin has stated that the premature release of BWC footage before an

investigation is conducted – which is required by Subtitle B – can lead to a negative view of the identified officer. *See* JA 271. In turn, the record contains several explicit examples of "third parties [who] wish harm upon the officers depicted." *See* JA 277-79, 378-380. The only remaining link is that a third party may take affirmative action to harm an identified officer. On this point, the District erroneously argues that injury-in-fact must be proven, however, applicable precedent does not require actual injury or "that it is literally certain that the harms . . . will come about." *Clapper*, 568 U.S. at 414 n. 5; *see also Jibril*, 20 F.4th at 817. Rather, it is sufficient, particularly at the motion to dismiss stage, to allege and/or infer that there is a substantial risk of that ultimate harm. *Jibril*, 20 F.4th at 814. Accepting these well-pleaded allegations as true, it is appropriate to infer that Subtitle B is a direct catalyst for the substantial risk of physical harm at issue.[3]

As to the alleged psychological harm, the District conflates injury-in-fact with traceability, arguing that Dr. Anderson's affidavit should be disregarded as

[3] Furthermore, the Supreme Court has held that purely independent actions satisfy traceability when the offending act has a "determinative or coercive effect" upon those independent actions. *Bennett*, 520 U.S. at 168-170 (1997) (ruling that plaintiffs had standing to challenge a non-binding advisory opinion, where the facts demonstrated that the advisory opinion would persuade the agency's action). The reasonable inference to be drawn from the allegations in the Amended Complaint is that Subtitle B, because it demands the near-immediate release of BWC footage and the names of officers during the initial days following use of force incidents, will have an effect on the risk of physical harm posed by third parties. Indeed, the identities of involved officers and their particular connection to an incident would be unknown to nearly the entire public but-for Subtitle B.

conclusory. *See* Dist. Br. at 33. For the same reasons discussed above, this argument is meritless. Moreover, Dr. Anderson's affidavit clearly indicates that the disclosures made pursuant to Subtitle B will cause or contribute to the psychological harm of the D.C. Police Union's members. Specifically, Dr. Anderson has explicitly stated that the particular vulnerability experienced by officers "[i]n the early days following a serious use of force incident or incident concerning an officer involved death" is "exacerbated by the public release of the [BWC] footage of the incident." JA 275. Thus, Dr. Anderson has stated that the trauma experienced in the days that follow the events that are subject to Subtitle B can be exacerbated by the exact disclosure required by Subtitle B. *See id.*

Finally, redressability rises and falls with the element of traceability in this particular case. Should the Court determine that Subtitle B creates a substantial risk of the alleged injuries, then the consequent logical conclusion is that enjoining Subtitle B would eliminate the substantial risk of the various harms that are alleged. Indeed, the violation of an officer's right to privacy would be immediately rectified by enjoining Subtitle B.

2. The D.C. Police Union Has Organizational Standing.

The District agrees that an organization suffers a cognizable injury when the organization's activities relating to its mission have been "affected in a sufficiently specific manner," which includes "diver[sion of] resources to counteract the

effects" of Subtitle B. Dist. Br. at 20 (quoting *Equal Rights Ctr. v. Properties Int'l*, 110 A.3d 599, 604 (D.C. 2015)). Nevertheless, the District argues that expenditures on activities already pursued by the D.C. Police Union are insufficient. *See id.* at 21. However, this Court has held that organizational standing depends on whether the organization "undertook the expenditures **in response to, and to counteract, the effects of the defendants' alleged** discrimination rather than in anticipation of litigation." *Equal Rights Ctr. v. Post Properties, Inc.*, 633 F.3d 1136, 1140 (D.C. Cir. 2011) (emphasis added). In this case, the Amended Complaint states that Subtitle B will result in the **additional** expenditure of limited resources by the D.C. Police Union that are designed to "counteract" the effects of Subtitle B. *See* JA 256-57, ¶ 19-20.

Regarding traceability, the District argues, similar to its arguments concerning associational standing, that any expenditure of resources is attenuated and depends upon the actions of third parties. *See* Dist. Br. at 24-25. As discussed above, on a motion to dismiss, even attenuated chains of causation are sufficient to confer standing. *See SCRAP*, 412 U.S. at 688. Furthermore, the Amended Complaint does not leave this Court to speculate as to the necessary steps of causation, but, rather, provides specific allegations regarding why and how various expenditures will be made as a necessary response to Subtitle B. *See* JA 256-57, ¶ 19-20. For example, the Amended Complaint states that Subtitle B forces the D.C.

Police Union to raise additional challenges to proposed discipline against officers identified through Subtitle B, which necessarily requires the additional expenditure of funds that could otherwise be used in furtherance of other union goals. *See* JA 257, ¶ 19.

Relatedly, the nature of these expenditures demonstrates that such harm is redressable through the relief sought in the Amended Complaint. Although, as the District asserts, BWC footage could be released without Subtitle B through D.C. FOIA, the additional challenges that must be raised and that require additional resources stem solely from the immediate disclosures mandated by Subtitle B. *See id.* Thus, enjoining Subtitle B would obviate the need to assert such challenges and, in turn, expend additional resources.

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

In arguing that the Amended Complaint fails to state a claim for violation of separation of powers, the District argues that the Mayor does not have exclusive authority over matters concerning "public safety" and that "FOP is wrong . . . to think that public safety writ large is an 'exclusive executive function' over which the Council may never legislate." Dist. Br. at 36. However, D.C. Police Union has not argued that the Mayor has exclusive authority over the broad subject of "public safety" as a whole. *See* Br. at 30-37. Rather, the Amended Complaint narrowly states, and the District concedes, that the Mayor has the authority and duty to

"preserve the public peace," "prevent crime and arrest offenders," and "protect the rights of persons and property." JA at 258-59, ¶ 24 (quoting D.C. Code § 5-101.03); Dist. Br. at 36. Significantly, D.C. Code § 5-101.03 does not confer authority over these matters to any other branch of government besides the executive branch. *See* D.C. Code § 5-101.03. Indeed, this Court has stated that "the exclusive constitutional authority to execute the laws . . . lies in the executive branch." *Carter v. United States*, 684 A.2d 331, 343 (D.C. 1996).

The District further argues that the separation of powers between the Mayor and the Council is only violated when the Council acts on a subject "over which the Council may **never** legislate," or when executive authority exists "such that 'the legislature is **precluded** from playing any role.'" Dist. Br. at 36 (emphasis added) (citation omitted). Contrary to the District's argument, the separation of powers between the branches of government is not absolute. *See Mistretta v. United States*, 488 U.S. 361, 380-81 (1989). As such, it is permissible for one branch of government to touch upon subjects that are committed to another branch of government. *See id.*; *see also Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 441-42 (1977). However, this Court has made clear that a branch of government may not do so when its actions would "impermissibly burden" the power of the other branch of goverment. *Hessey v. Burden*, 584 A.2d 1, 5 (D.C. 1990).

It is for this reason that the District's arguments fail. The bare fact that the Council has legislated on subjects that touch upon policing and the MPD is irrelevant. Rather, the question is whether Subtitle B, in specifically removing *all* of the Mayor's *discretion and power* over the release of BWC footage and the identities of officers involved in highly sensitive police actions, impermissibly burdens the Mayor's executive authority over the management of her subordinate agency and the matters committed to her under D.C. Code § 5-101.03. *See id.* As detailed in the D.C. Police Union's Initial Brief, the Amended Complaint contains numerous factual allegations that demonstrate that such total removal of discretion impermissibly burdens the Mayor's executive power. *See* Br. at 32 (quoting JA 260-61).

For the same reasons, the District's arguments portraying Subtitle B as a "public-records law" are also unavailing. *See* Dist. Br. at 38. There is no dispute that the preexisting D.C. FOIA permitted the disclosure of BWC footage, including footage of use of force incidents. However, D.C. FOIA preserved the Mayor's ability to control the timing of the release of sensitive police materials as well as to deny a public records requests for BWC footage in whole or in part. *See* D.C. Code § 2-532(c)(2)(A). Notably, D.C. FOIA also explicitly states that the Mayor's denial can be based on matters within the scope of D.C. Code § 5-101.03, including a determination that disclosure would interfere with the impartiality of

disciplinary proceedings or that disclosure would endanger the safety of officers. *See* D.C. Code § 2-534(a)(3). As such, D.C. FOIA allowed the Mayor to retain her executive authority and discretion over the timing and ultimate release of BWC footage, in sharp contrast to Subtitle B.

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

The District fails to cite any caselaw that holds, as a matter of law, that the D.C. Police Union's members do not maintain a right to privacy in the specific circumstances of this case, such that the Amended Complaint fails to state a substantive due process claim. *See* Dist. Br. at 40. Instead, this Court has already held that police officers have "**far more** than a *de minimis* privacy interest in not being publicly identified." *Fraternal Order of Police/Metro. Police Labor Comm. v. District of Columbia*, 124 A.3d 69, 77 (D.C. 2015) (emphasis added); *see also District of Columbia v. Fraternal Order of Police*, 75 A.3d 259, 268 (D.C. 2013). The District attempts to distinguish these holdings by arguing that this Court has not held that there is a "free-standing right to informational privacy." Dist. Br. at 41. While true, this matter does not concern a "free-standing" privacy right. Rather, Subtitle B categorically mandates the disclosure of the personal identity of an officer in tandem with BWC footage that further marks the officer as having been involved in either a serious or deadly use of force incident. *See* JA 252. The Amended Complaint adequately alleges that the intimate relationship of an

officer's personal identity to such serious incidents is within the scope of an officer's right to privacy, or, at the very least, is actionable in the immediate time that follows such incidents, due to the public fervor that is often associated with these incidents in that time and the exacerbation of serious psychological injury caused by personal identification. *See* JA 255-56.

The District also argues, assuming that there is a cognizable right to privacy, that there is a compelling governmental interest in promoting accountability and transparency, fostering police-community relations, and promoting public safety, and that such interest "far outweighs" members' privacy rights. Dist. Br. at 43. This argument is flawed on two fronts. First, the District has failed to cite any precedent that demonstrates that the aforementioned goals constitute a compelling governmental interest. *See* Dist. Br. at 43. While the one case cited by the District states in passing that the public has an interest in responsible prosecutorial action, there is no statement in that case that such an interest is compelling. *See Gentile v. State Bar of Nv.*, 501 U.S. 1030, 1036 (1991).

Second, a statute may only burden fundamental rights when the statute furthers a compelling governmental interest *and* it is narrowly tailored to achieve that interest. *See Reno v. Flores*, 507 U.S. 292, 301-302 (1993). The District does not argue that Subtitle B is narrowly tailored to achieve the purported purpose of accountability and transparency. *See* Dist. Br. at 43. Instead, existing D.C. law

demonstrates that Subtitle B is not narrowly tailored to any such purpose. Specifically, the District concedes that D.C. FOIA already provided the public the ability to obtain BWC footage and to also obtain the names of police officers involved in any given incident. *See id.* at 38, 42. Unlike Subtitle B, however, D.C. FOIA is narrowed by providing procedural safeguards to the disclosure of such information, including providing the Mayor with the discretion to temporarily or permanently shield information that would improperly invade personal privacy. *See* D.C. Code § 2-534(a)(3). Indeed, the executive branch is permitted to deny a request for BWC footage in its entirety or to segregate portions of the same to be deleted before production. *See* D.C. Code §§ 2-532(c)(2)(A), 2-534(b). Given that safeguards contained in D.C. FOIA that reasonably balance transparency with privacy rights, it cannot be argued that Subtitle B, which contains no such provisions or exceptions, is narrowly tailored to any compelling interest in transparency, accountability, or public safety.

CONCLUSION

For the foregoing reasons and the reasons expressed in the D.C. Police Union's Opening Brief, 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 strike the offensive statutory provision being challenged.

Dated: June 3, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2022, the foregoing Reply 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. McCartin

Signature

21-CV-511

Case Number(s)

Daniel J McCartin (D.C. Bar No. 976580)

Name

6/3/2022

Date

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