No. 21-CV-511

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

FRATERNAL ORDER OF POLICE
METROPOLITAN POLICE DEPARTMENT LABOR COMMITTEE,
APPELLANT,

V.

THE DISTRICT OF COLUMBIA, *et al.*,
APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES THE DISTRICT OF COLUMBIA AND MURIEL BOWSER

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GLOSSARY OF ABBREVIATIONS

The Act	Comprehensive Policing and Justice Reform Second Emergency Act of 2020
BWC	Body-Worn Camera
D.C. FOIA	District of Columbia Freedom of Information Act
FOP	Fraternal Order of Police, Metropolitan Police Department Labor Committee, D.C. Police Union
MPD	Metropolitan Police Department

STATEMENT OF THE ISSUES

In the wake of protests following the murder of George Floyd and other police misconduct, the District enacted comprehensive police reform legislation to increase accountability and transparency. Section 103 of the reform legislation, titled "Improving Access to Body-Worn Camera Video Recordings," amended the reporting requirements of the Metropolitan Police Department ("MPD") Body-Worn Camera ("BWC") Program. Prior to the legislation, the Mayor could release the names and BWC footage of all officers implicated in an officer-involved death or serious use of force at any time. Section 103 now requires the Mayor to release such footage within five business days of an incident. The Fraternal Order of Police, Metropolitan Police Department Labor Committee, D.C. Police Union ("FOP") sued the District and Mayor Muriel Bowser (collectively, "the District") to enjoin Section 103. The Superior Court granted the District's motion to dismiss, and FOP timely appealed. The issues presented are:

1. Whether FOP has standing to challenge Section 103 where FOP's unsupported allegations of harm are speculative, are not directly traceable to Section 103, and are not redressable by this Court.

2. Whether Section 103, a public-records law, violates the separation of powers where the Council and the Mayor both have authority to establish policies

regarding public safety and information reporting, and the Council has exercised similar authority over MPD records in the past.

3. Whether officers have a substantive due process right to prevent the release of their names along with body-worn camera footage that is recorded while officers are publicly engaged in their official duties.

STATEMENT OF THE CASE

For more than half a decade, officer names and footage from body-worn cameras have been subject to public release on the Mayor's own volition or through D.C. Freedom of Information Act ("D.C. FOIA") requests. In the summer of 2020, the District enacted the Comprehensive Policing and Justice Reform Second Emergency Act of 2020 (the "Act") to enhance police accountability and transparency.[1] Section 103 of the statute requires the Mayor to "publicly release the names and body-worn camera recordings of all officers who committed [an] officer-involved death or serious use of force within five business days of such an event." D.C. Act 23-336, 67 D.C. Reg. 9148. FOP filed suit in the Superior Court challenging this provision, arguing that Section 103 violates the separation of powers

[1] As described below, the legislation has since been re-enacted as emergency and temporary legislation. The statute currently in effect is the Comprehensive Policing and Justice Reform Temporary Amendment Act of 2021, D.C. Act 24-89, D.C. Law 24-23, 68 D.C. Reg. 5837, which expires April 16, 2022. The Council has introduced permanent legislation containing an identical provision. *See* Comprehensive Policing and Justice Reform Amendment Act of 2021, D.C. Bill 24-320.

by removing the Mayor's discretion to release the recordings and that it violates substantive due process. The Superior Court granted the District's motion to dismiss on July 16, 2021, finding that FOP lacked standing and, in any event, had failed to state a claim. JA 448-58. On July 23, FOP timely appealed.

STATEMENT OF FACTS

The following facts, taken from the amended complaint and public records, are presumed true for the purpose of this brief.

1. The District's Body-Worn Camera Program.

MPD established the BWC Program in 2014 to "improv[e] police services, increas[e] accountability for individual interactions, and strengthen[] police-community relations." MPD, *A Report on MPD's Use of Body-Worn Cameras* 1 (Oct. 2015), https://bit.ly/35KW6Xj. Under the program, MPD has deployed over 3,100 BWCs to officers in public contact positions. MPD, *A Report on MPD's Use of Body-Worn Cameras* 1 (June 2021), https://bit.ly/3otUyaR. Officers are required to activate their cameras in nearly all public-contact situations, including traffic stops, arrests, and investigatory encounters, from the beginning of the service call until the scene is cleared. *See* MPD General Order 302-13, at 8-11 (Mar. 11, 2016), https://bit.ly/34wVxjk. When practicable, the officer informs an individual that they are being recorded and the camera beeps every two minutes to remind the officer that recording is in progress. *Id.* at 3. Under MPD guidelines, officers may not

record "personal activity," "on private space unless present for a lawful purpose," "conversations of members without their knowledge during routine non-enforcement related activities," or "in places where a reasonable expectation of privacy exists, such as locker rooms or restrooms" unless necessary for official duties. *Id.* at 4-6.

Prior to Section 103's enactment, BWC footage was publicly available through three means. First, BWC footage is, like other public records, subject to D.C. FOIA requests. *See* D.C. Code § 2-532(c)(2)(A). Like any other FOIA request, BWC footage is subject to redactions for privacy and personal information as well as withholding if disclosure would interfere with an ongoing investigation. *Id.* § 2-534(a). Second, District regulations allow individuals who are the subject of a BWC recording to view the footage at a police station. 24 DCMR § 3902.5. Third, regulations provided that the Mayor could, "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" "in matters of significant public interest," which may include "officer-involved shootings, serious use of force by an officer, and assaults on an officer requiring hospitalization." 24 DCMR § 3900.10 (2019).[2]

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[2] Serious use of force is defined by reference to MPD General Order 901.07 (Jan. 1, 2022), https://bit.ly/34ATaMg.

Through FOIA or the Mayor's own decision, MPD released over 150 BWC recordings between 2016 and 2019. *See generally* MPD, *Reports on MPD's Use of Body-Worn Cameras*, https://bit.ly/34ytXlJ.[3]

During the summer of 2020, the Council began crafting comprehensive police reform legislation. Part of that effort included improving public access to body-worn camera footage concerning an officer-involved death or a serious use of force. To that end, the original bill, the Comprehensive Policing and Justice Reform Emergency Amendment Act of 2020, required the Mayor to publicly release the names and BWC footage of officers responsible for an officer-involved death or serious use of force within 72 hours of such incidents. D.C. Bill 23-774, § 103. In a letter to the Council, Acting United States Attorney for the District of Columbia Michael Sherwin expressed concerns that the 72-hour release provision would "make it *more* difficult to investigate a serious officer-involved death or serious use of force" because the United States Attorney's Office would not be able to "conduct a full investigation within 72 hours" and public viewing of the footage could "lead witnesses to a conclusion that affects their testimony." JA 74. Further, Sherwin

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[3] District law requires MPD to report bi-annually to the Council the number of FOIA requests received during each six-month time period and "the outcome of each request." D.C. Code § 5-116.33(a)(7). MPD's reports provide the number of FOIA requests granted (in whole or in part), but do not classify the releases by the type of footage, e.g., officer-involved death or use of force.

expressed concern that 72 hours would not be enough time to redact relevant BWC footage if necessary. JA 75. Sherwin also noted that typically a suspect—including an officer—is not publicly named unless and until she is charged to avoid "unjust reputational harm," but recommended that the Council retain the permissive language "allowing the Mayor discretion to release BWC footage" "[b]ecause there are situations" where it is "appropriate" for the Mayor to release recordings. JA 75. The bill was later postponed indefinitely.

A month later, the Council enacted the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020. The Act, which amends D.C. Code § 5-116.33, provides for the public release of information of both future and past incidents of officer-involved deaths and serious use of force. The Act requires the Mayor to:

> (I) Within 5 business days after an officer-involved death or the 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.[4]

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[4] FOP originally challenged both subsection I (governing prospective incidents) and subsection II (governing past incidents). On July 31, 2020, the Mayor complied with Section 5-116.33(c)(B)(i)(II) and released BWC recordings and names for officer-involved deaths and serious use of force incidents since October 1, 2014. JA 336-37. FOP conceded below that its Section 103(II) claims are therefore moot. JA 347.

D.C. Code § 5-116.33(c)(1)(B)(i). The Act retains the Mayor's discretion to publicly release other BWC footage "in matters of significant public interest . . . that may not otherwise be releasable pursuant to a FOIA request." *Id.* § 5-116.33(c)(1)(B)(ii). The Act further prevents the Mayor from releasing a BWC recording if the next of kin of a person who died in an officer-involved death or the individual against whom serious use of force was used does not consent to the release. *Id.* § 5-116.33(c)(2)(A). As emergency legislation, the Act expired in October 2020; the Council has enacted an identical Section 103 in further emergency and temporary legislation. *See, e.g.*, Comprehensive Policing and Justice Reform Temporary Amendment Act of 2021, D.C. Act 24-89, 68 D.C. Reg. 10,055. Currently, the provision remains in effect until April 16, 2022. *Id.* § 302(b).

On the day of enactment, the Mayor's office completed its release of names and BWC recordings from the inception of the BWC program. JA 336-37. Of the ten officer-involved fatalities with BWC footage since October 2014, the Mayor released three recordings. JA 336-37. Three had previously been released, and in four instances, the family objected to release.[5] JA 336-37.

Since August 2020, the Mayor has released an additional twenty-seven BWC recordings pursuant to the Act. *See* MPD, *Community Briefing Videos*,

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[5] In one instance, the family later consented, and that footage was then released. JA 306.

https://bit.ly/3rx6ryz. As alleged in the amended complaint, prior to the Mayor's July 31, 2020 release of recordings, MPD proactively (1) contacted the officers whose names or footage would be released pursuant to the Act and offered increased patrolling by local law enforcement in their neighborhoods; and (2) had a clinical psychologist contact "all of the officers involved in incidents involving officer-involved deaths" to inform them that their names and BWC footage would be publicly released and to remind them of MPD's counselling services. JA 255-56.

2. Procedural History.

FOP is a labor union that acts as the "exclusive representative of all [MPD] police officers, sergeants, investigators, detectives, and detective sergeants." JA 250. One week after the Act was passed, FOP filed this suit in the Superior Court for injunctive relief. JA 2. Concurrent with the complaint, FOP moved for a temporary restraining order, which the trial court denied. JA 165-68. In October 2020, FOP filed an amended complaint to reflect the new temporary legislation. JA 245.

FOP alleges that Section 103 harms the union and its members. As to itself, FOP alleges that mandatory release of BWC footage within five days will force it to "expend more resources" to defend its members publicly. JA 256. FOP also alleges that Section 103 will force it to "expend additional resources to pursue grievances" in two ways. JA 257. First, FOP claims that the mandatory release "will result in

immediate violations of the disciplinary guidelines" in MPD's Collective Bargaining Agreement. JA 256. That agreement requires "employee[s] . . . engaged in either investigating or proposing corrective or adverse action on behalf of management" to "maintain the appropriate confidentiality of an investigation." JA 256. According to FOP, the Mayor's release of BWC footage will "eliminat[e] the confidentiality of the investigation" and it will have to "expend additional resources to pursue grievances based upon public release of these materials" and "assert[] challenges to the proposed discipline of its members." JA 257. Second, FOP claims that immediate release of BWC footage "will make it more difficult for [d]etectives . . . to secure witness cooperation," which will lead to a lower closure rate and "negative career consequences" for detectives, which, in turn, FOP will be required to challenge. JA 257.

The amended complaint also alleges that Section 103 will injure FOP's members and the public. FOP asserts that 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." JA 254. Further, FOP claims that "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" because a "suspect and their associates" can use the video to "identify the officer

and potentially seek retribution against the officer and his or her family." JA 254. The amended complaint references social media posts after the September 2, 2020 officer-involved death of Deon Kay. The day after Mr. Kay's death, the Mayor released the BWC footage from the incident and the officer's name. The amended complaint alleges that an anonymous tweet stated "#GREENLIGHT ON ALL #DCPOLICE #KIDS #SINCE THEY #KILLING #OUR #FAMILY #KILL #THEM #NEXT #LETSGO #SOUTHSIDE." JA 258. It also alleges that anonymous Instagram comments contained similar statements. JA 279 (Instagram comment asking for the officer's "picture so we can see who he is" and stating "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 278 (Instagram comment stating that it was "gone be turnt up when we found out address and where children go to school at"). FOP alleges that these comments show that "credible death threats were made against the officer," JA 258; the amended complaint does not provide a date for these social media posts.

FOP also relies on an affidavit from Dr. Beverly Anderson, the Clinical Director of MPD's confidential counseling services program. JA 274-75. Dr. Anderson stated that MPD's Chief Operating Officer contacted her prior to the Mayor's July 31 release of BWC footage and "requested that [she] contact every officer involved in officer-involved deaths so they would not be blindsided by the

release of body-worn camera footage." JA 274-75. Dr. Anderson did so. She opined that public release of BWC footage in an officer-involved death "can inflict serious psychological trauma on the officer" and releasing footage during "the early days" after a serious use of force incident or officer-involved death can "exacerbate[]" the risk of psychological harm to officers. JA 275.

The amended complaint includes two counts for declaratory and injunctive relief. Count I asserts that Section 103 violates separation-of-powers principles because it "improperly usurp[s] 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'" and interferes with the Mayor's "direct administrative control" over MPD, a subordinate executive agency. JA 259. Count II alleges that the "immediate, mandatory release of the names of officers and" BWC footage "violates the fundamental right to privacy" of MPD officers and "all citizens of the District." JA 263-64.

In November 2020, the District moved to dismiss the amended complaint, arguing that (1) FOP lacks standing because the complaint does not allege sufficient injury to itself or its members, is not traceable to Section 103, and cannot be redressed by a court; (2) Section 103 does not violate the separation of powers because the release of BWC footage does not interfere with the Mayor's exercise of her supposed exclusive authority over public safety; and (3) officers do not have a

substantive due process right to withhold their names or BWC footage captured in the course of their official, public duties. JA 300-34.

Following a hearing, the trial court granted the District's motion to dismiss. JA 448-58. The court first found that FOP did not have organizational standing because "publicly defending its members is part of [FOP's] mission as an organization," and FOP did not allege that Section 103 creates "any impediment to its ability to continue that mission." JA 453. FOP's allegations that it will have to use more resources, the court found, do "not amount to a concrete and imminent injury" because the union did not allege that Section 103 "prevent[s it] from performing tasks or actions that [it] could" before. JA 453-54. The court further found that FOP's purported injury that it will have to "expend[] resources to challenge" negative career consequences for detectives is "too speculative to establish organizational standing" because it is "based on a series of potential future events." JA 454. Specifically, FOP's claim depends on "a chain of events that essentially start from the Mayor's release of the footage, to less witnesses willing to testify, to a more difficult investigation, to a lower closure rate, to potential transfers or disciplinary action, and then to plaintiff's decision whether to represent the officer, assuming that the officer is one of plaintiff's members." JA 454. "[P]laintiff's pure speculation about potential future harm," the court found, "is insufficient to establish organizational standing." JA 454.

Similarly, the trial court found that FOP lacked associational standing because, like the alleged organizational harms, the allegations of reputational harm and the risk of significant bodily harm "are purely speculation and conclusory." JA 455. Regarding reputational harm, the court reasoned that it "is equally likely for someone [viewing BWC footage] to reach the conclusion that an officer was justified in utilizing force in a particular instance." JA 455-56. And as to physical harm, the court rejected FOP's references to an "anonymous social media post and two comments made in relation" to the post as "insufficient" because the threat was not "real and immediate." JA 456. Additionally, the court concluded that FOP failed to allege how such purported harms could be fairly traceable to the District, which is "not in control of public opinion and cannot be held responsible if" a member of the public "criticizes or condemns an officer's use of force in a particular incident." JA 456.[6]

Although the court found that FOP lacked standing, it also addressed the merits of the amended complaint. First, the court rejected FOP's separation-of-powers argument because the Council has "legislative authority to determine public

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[6] The trial court also found that FOP lacks third-party standing to challenge the privacy interests of the public at large. JA 455. FOP expressly stated below that it was not relying on third-party standing, and it does not challenge the trial court's ruling here. JA 352 ("The D.C. Police Union's claims do not rest on third-party standing.").

policy on issues such as the disclosure of public records," and the Mayor and Council do not "operate with complete independence . . . of the other." JA 456-57. Because Section 103 "simply pushes for greater transparency and requires that the public have greater access to information in incidents where serious uses of police force w[ere] utilized," the court found that it does not "impermissibly burden[]" the Mayor's duties under the Home Rule Act. JA 457.

The court also dismissed FOP's claim that Section 103 violates the due process privacy interests of officers. After noting that there is no recognized right to "safeguard personal information from the criminal acts of third parties," the court pointed to MPD policy, which "explicitly states that members of the general public have a First Amendment right to record MPD members during official business, unless they interfere with police activity." JA 458. Given that any member of the public can legally record officers, the court found it "unclear how any reasonable officer can assume they have the right to privacy when conducting said official business." JA 458.

STANDARD OF REVIEW

This Court reviews a trial court's dismissal of a complaint for lack of standing and for failure to state a claim upon which relief can be granted de novo. *Equal Rts. Ctr. v. Props. Int'l*, 110 A.3d 599, 603 (D.C. 2015). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim

to relief that is plausible on its face." *Bereston v. UHS of Del., Inc.*, 180 A.3d 95, 99 (D.C. 2018). This "plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*. Rather, a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. In assessing the pleadings, this Court accepts the plaintiff's well-pleaded and supported factual allegations as true but mere "conclusions . . . are not entitled to the assumption of truth." *Id.*

SUMMARY OF ARGUMENT

1. FOP states that it will have to expend its resources to defend officers publicly and in possible grievance hearings if the Mayor is required to release BWC footage, but these speculative allegations do not meet the three requirements for organizational standing. First, unsupported predictions regarding increased expenditures on its day-to-day activities—the only harm that FOP claims it will suffer as an organization under Section 103—do not establish a cognizable injury. FOP's primary role is to defend officers publicly and in disciplinary hearings; having to perform that function when footage is released after a use-of-force incident cannot be an injury-in-fact to the organization. Further, and notably, FOP provides no allegation of any concrete harm to its operations from the dozens of BWC footage videos that have already been released since 2016. In any event, this alleged harm cannot be directly traced to the District because it hinges on the hypothetical acts of

third parties reacting to the footage. And FOP's theory of causation requires this Court to assume a series of speculative events that may or may not come to pass. Finally, any harm is not redressable by this Court because if Section 103 were invalidated, the Mayor would continue to retain discretion to release BWC footage at any time and the public would continue to have the right to record use-of-force incidents in any event. Accordingly, every harm that FOP alleges can occur with or without Section 103, and its challenges to that provision are purely academic, not concrete.

For many of the same reasons, FOP did not sufficiently allege any of the required elements for associational standing—that is, standing on behalf of one of its members. To begin, FOP's assertion that Section 103 will cause officers reputational harm is unsupported by any facts or evidence. Nor does the amended complaint connect this purported injury to Section 103's provisions, as opposed to the hypothetical reaction of the public to released BWC footage, which the District cannot control. The amended complaint also fails to show how this Court can redress any harm, given the Mayor's continued ability to release any footage under pre-existing law and the public's right to record those same incidents.

FOP's allegations of threatened physical or psychological harm to its members from the immediate release of BWC footage are also too speculative to confer standing. Three undated, anonymous comments on social media do not raise

a plausible fear that public release of BWC footage within five business days will place officers in danger of future physical harm. Indeed, the Mayor has released over thirty officer names and BWC recordings—many within five business days—but FOP has not alleged a single specific incident of actual or imminent physical harm. So too with psychological harm: FOP alleges no evidence of officers facing psychological injury from the many prior releases of BWC footage. Nor has FOP alleged how such harms, which again rely on the hypothetical acts of third parties outside of the District's control, are directly traceable to Section 103. Finally, just as with FOP's organizational standing argument, any decision by this Court will not redress these harms. Enjoining Section 103 will not prevent the Mayor from deciding to immediately release BWC footage, as she did even before the provision went into effect, or the public from recording and releasing its own footage.

2. Even assuming FOP has standing, the amended complaint fails to state a separation-of-powers claim. FOP is correct that separation-of-powers principles apply in the District, including that the Mayor exercises executive power. However, the Mayor does not, as FOP asserts, have exclusive control over public safety, policing, or MPD. Public safety is a shared responsibility between all three branches of government and the Council can, and has, implemented myriad laws that affect policing generally and MPD specifically. These include laws that restrict MPD's powers of investigation, and they also include requirements that mandate the

retention and release of a number of different types of records that MPD generates. There is simply no basis to hold that a requirement that MPD release certain types of records—BWC footage and the names of officers involved—amounts to a separation-of-powers violation.

3. FOP also fails to state a substantive due process claim based on an alleged invasion of privacy. At the outset, neither the Supreme Court nor this Court has recognized a free-standing informational privacy right under the Due Process Clause. Even assuming that such a right exists, police officers engaged in their official duties in the public sphere would not fall under its purview. Indeed, FOP's theory would prevent the dissemination of BWC footage of officers in *any* context, not solely under Section 103, and could sweep even more broadly, covering all manner of public records that depict public officials engaging in their public-facing duties. Finally, even assuming police officers had a sufficient privacy interest here, that interest is far outweighed by the government's interest in police transparency and accountability.

ARGUMENT

I. FOP Lacks Organizational And Associational Standing To Challenge Section 103.

"Standing is a threshold jurisdictional question which must be addressed prior to and independent[ly] of the merits of any party's claim." *Equal Rts. Ctr.*, 110 A.3d at 603. This Court, while not an Article III court, generally applies the same standing

requirements. *Friends of Tilden Park, Inc. v. District of Columbia*, 806 A.2d 1201, 1206 (D.C. 2002). To establish standing, a plaintiff "must state a plausible claim that [it has] suffered an [1] injury in fact [2] fairly traceable to the actions of the defendant that is [3] likely to be redressed by a favorable decision on the merits." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015). The elements of standing are not "mere pleading requirements but rather an indispensable part of the plaintiff's case" that the plaintiff "must support" at the motion-to-dismiss stage with at least "general factual allegations of injury resulting from the defendant's conduct." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). These allegations must "raise a right to relief above the speculative level." *OneWest Bank, FSB v. Marshall*, 18 A.3d 715, 722 (D.C. 2011).

FOP has not alleged facts to support organizational or associational standing. Under either theory, the trial court correctly found that the amended complaint does not allege a cognizable injury caused by the District and redressable by a court.

A. FOP does not have organizational standing.

To assert standing as an organization, FOP must satisfy the same standing requirements as an individual. That is, it must show "actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision." *People for the Ethical Treatment of Animals v. U.S.*

Dep't of Agric., 797 F.3d 1087, 1093 (D.C. Cir. 2015). FOP's arguments fail on all three prongs.

1. FOP has not alleged a cognizable injury.

A "concrete and particularized," "actual or imminent" injury is the "essence" of standing. *Teva Pharms. USA, Inc. v. Novartis Pharms. Corp.*, 482 F.3d 1330, 1337 (Fed. Cir. 2007). For an organization, standing requires a "demonstrable injury" that is "far more than simply a setback to the organization's abstract social interests." *People for the Ethical Treatment of Animals*, 797 F.3d at 1093 (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)).

FOP's generalized allegations that Section 103 will cause it to "expend more resources" both publicly defending its members and "pursu[ing] grievances based on [the] public release" of BWC footage, JA 256-57, are not sufficient to show injury under established standing doctrine. Organizational standing "turns on whether the organization's activities in pursuit of [its] mission have been affected in a sufficiently specific manner." *Equal Rts. Ctr.*, 110 A.3d at 604. This standard requires a showing that the organization "divert[ed] resources to counteract the effects" of unlawful actions. *Id.* The "consequent drain" on an organization's resources must be for something other than the costs "normally expended to carry out its advocacy mission." *Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 12 (D.C. Cir. 2011); *see Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428,

1434 (D.C. Cir. 1995) (rejecting an organization's "self-serving observation that it has expended resources to educate its members" about a challenged statute because the organization did not show that it "expend[ed] resources in a manner that keeps [it] from pursuing its true purpose").

FOP has not alleged—and cannot allege—that Section 103 "perceptibly impair[s]" its programs." *Conn. Citizens Def. League, Inc. v. Lamont*, 6 F.4th 439, 447 (2d Cir. 2021). FOP's primary activity (indeed, the reason it exists) is to represent and defend its members, whether publicly or though grievance procedures. FOP "cannot convert its ordinary program costs into an injury in fact." *Nat'l Taxpayers*, 68 F.3d at 1434; *see Conn. Citizens Def. League*, 6 F.4th at 447 (holding that an organization's alleged resource expenditures did not show an injury in fact because they were "precisely" its "current activities"). FOP has alleged nothing more than costs "normally expended to carry out its advocacy mission" supporting its officers, *Nat'l Ass'n of Home Builders*, 667 F.3d at 12, and those ordinary costs cannot support an organization's injury-in-fact. That is particularly true here, where the legislation addresses officer-involved deaths and serious uses of force specifically, both of which are likely to result in costs for FOP regardless of the status of the BWC footage.

In any event, FOP's claim that it will have "to expend additional resources related to representing its members in grievances," JA 257, in response to Section

103 is utterly unsupported and makes little sense. *See Kareem v. Haspel*, 986 F.3d 859, 866 (D.C. Cir. 2021) (noting that a court does not "accept inferences that are unsupported by the facts set out in the complaint"). FOP reasons that because the Collective Bargaining Agreement between FOP and MPD requires officers to "maintain the appropriate confidentiality of an investigation," Section 103's mandatory release provision "will result in immediate violations of the disciplinary guidelines," causing FOP to "pursue grievances based on 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," as well as resources to "challenge[] the proposed discipline of its members." JA 256-57. But Section 103 requires *the Mayor* to release certain BWC footage, not *officers*. Indeed, MPD guidelines prohibit officers from releasing such footage, and Section 103 does not alter that rule. MPD General Order 302-13, at 8-11, *supra*. FOP thus fails to allege facts to "support a plausible inference" that the Mayor's release of BWC footage—which she already had the discretion to release prior to Section 103—would subject officers to discipline under the Collective Bargaining Agreement or otherwise interfere with due process. *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 548 (D.C. 2011).

Finally, even if this kind of harm were cognizable, FOP's allegations are too speculative to support standing. To satisfy standing requirements, an injury must be

"concrete and particularized as well as actual or imminent." *Carney v. Adams*, 141 S. Ct. 493, 498 (2020). Injuries that are "conjectural or hypothetical" are insufficient. *Id.* When, as here, a plaintiff alleges future injury, it must show that such "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).

FOP has not alleged that any monetary or programmatic injury is "certainly impending" or that there is a "substantial risk" that such harm will occur. To begin, this is not a pre-enforcement challenge or a case where the court must guess as to how and whether any injury will occur. Although Section 103 changes the mechanism by which the Mayor releases BWC footage, the Mayor has been releasing BWC footage and officer names since at least 2016, often soon after the incident in question. Moreover, since Section 103 passed, the Mayor has released over two dozen BWC recordings pursuant to that provision. FOP has not alleged that any of the harms it predicts, like increased spending to defend officers, has *ever* happened after the numerous releases of BWC footage prior to or after Section 103's enactment. Just as "past wrongs may serve as evidence bearing on whether there is a real and immediate threat of repeated injury," *Jibril v. Mayorkas*, 20 F.4th 804, 814 (D.C. Cir. 2021), the absence of harm when a law has already been in effect for years casts doubt of any future harm being imminent. *See Corbett v. TSA*, 930 F.3d 1225, 1235-36 (11th Cir. 2019) (holding that passenger's claims of future TSA

screening were "conjectural and speculative," especially since the passenger had taken 150 flights "without incident"). FOP's alleged injury from the Council's decision to change BWC footage releases from discretionary to mandatory is therefore "too speculative to support standing." *Ass'n of Am. Physicians & Surgeons, Inc. v. Schiff*, No. 21-5080, 2022 WL 211219, at *3 (D.C. Cir. Jan. 25, 2022).

2. FOP has not alleged causation or redressability.

Even assuming FOP has alleged an adequate injury-in-fact, it fails the other two prongs of standing analysis: traceability and redressability. The crux of FOP's allegation that mandatory, as opposed to discretionary, releases of BWC footage and officer names will cause it to spend more resources publicly defending its members hinges not on Section 103 itself, but on acts of third parties. FOP's alleged injuries would only come to pass if: (1) the Mayor releases BWC footage that she otherwise, in her discretion, would not have; (2) public reaction is negative and affects particular officers in a meaningful way; (3) FOP publicly responds on behalf of its members; and (4) that response diverts resources from FOP's other activities. "Even if the causal links in that attenuated chain were adequately alleged, the decisions of" third parties "lack any legitimate causal connection to the challenged policies." *Arpaio v. Obama*, 797 F.3d 11, 20 (D.C. Cir. 2015); *see Ass'n of Am. Physicians &*

Surgeons, Inc., 2022 WL 211219, at *2 (holding that an alleged injury cannot be "the result [of] the independent action of some third party not before the court").

FOP's alleged injury is also not redressable by this Court. Even without Section 103, the Mayor has discretion to publicly release BWC footage, so a favorable ruling from this Court will not necessarily redress FOP's alleged injuries. *See Am. Chemistry Council v. Dep't of Transp.*, 468 F.3d 810, 820 (D.C. Cir. 2006) (holding that petitioners who "never explain[ed] how" a favorable court ruling would redress the alleged injury lacked standing). Indeed, as FOP acknowledges, the Mayor immediately released BWC footage from an officer-involved death in 2020 during a period of time in which Section 103 was not in force. Br. 9. And beyond that, members of the public are free to record and release videos of officers involved in public encounters regardless of the availability of BWC footage.

FOP's allegation that it will spend more resources defending its members in disciplinary or grievance proceedings is even more tenuously connected to Section 103's mandatory disclosure requirement. As the Superior Court explained, FOP's claim depends on "a chain of events that essentially start from the Mayor's release of the footage, to less witnesses willing to testify, to a more difficult investigation, to a lower closure rate, to potential transfers or disciplinary action, and then to [FOP's] decision whether to represent the officer, assuming the officer is one of [its] members." JA 454. But again, the Mayor already has discretion to publicly release

BWC footage. And any consequences regarding how such disclosures will affect the ability of officers to complete investigations, how that effect might impact their job performance, whether it will result in disciplinary action, and how any such disciplinary action will affect FOP's operations is purely speculative. As noted above, FOP has failed to offer any evidence as to how prior releases of BWC footage have affected its operations, let alone shown that any of these fanciful outcomes regarding officer discipline have come to pass. Its allegations therefore do not come close to meeting the requirements of causation and redressability.

B. FOP does not have associational standing.

FOP similarly fails to allege associational standing. "[A]n association has standing to bring suit on behalf of its members when . . . its members would otherwise have standing to sue in their own right." *Richman Towers Tenants' Ass'n, Inc. v. Richman Towers LLC*, 17 A.3d 590, 599 (D.C. 2011); *see Am. Chemistry Council*, 468 F.3d at 820 (stating that an organization "must show that at least one specifically-identified member has suffered an injury-in-fact" when it brings a claim based on associational standing). FOP alleges three harms to its members: (1) reputational harm, (2) risk of physical harm, and (3) potential psychological

harm. JA 254. As alleged, these are not cognizable injuries that are traceable to Section 103 and redressable by this Court.[7]

1. FOP's alleged reputational harm is insufficient to show standing.

FOP's conclusory assertion that Section 103 will cause its members reputational injury, JA 254, "does not satisfy the [standing] requirement for specific, concrete facts demonstrating injury, and particularized allegations of fact," *Block v. Meese*, 793 F.2d 1303, 1308 (D.C. Cir. 1986). As explained above, the Mayor has released over thirty officer names in conjunction with BWC recordings, yet FOP fails to identify a single specific instance of reputational injury, even where the officer's actions are later deemed justified. *See Am. Chemistry Council*, 468 F.3d at 820 (noting that even when "actual harm is absent" the plaintiff must allege "the imminent nature of a specific harm to a specific party"). Such conclusory allegations of reputational harm without any evidence or even assertion that officers have faced such reputational harms in the past are not enough to confer standing.

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[7] The District did not, as FOP claims, concede that FOP has associational standing. *See* Br. 18. The District simply "acknowledged" the legal rule "that an association *can* establish standing" by showing an injury to its members. *See* Br. 18 (quoting JA 124 (TRO Hearing)) (emphasis added). The District argued, however, that here, FOP has not established such an injury because the amended complaint "reli[es] purely on speculation and conclusory allegations." D.C. TRO Opp. at 12. And the trial court ultimately agreed. JA 455 ("Similar to organizational standing, the plaintiff's claims fail largely as a result of the requirement for concrete injury.").

FOP's purported reputational harms also do not "derive[] directly from government action." *Foretich v. United States*, 351 F.3d 1198, 1214 (D.C. Cir. 2003). Just as with FOP's organizational harms, the release of the BWC footage does not "directly" cause the purported harm. *Id.* (holding that a plaintiff had standing because a statute "directly damage[d]" his reputation by "effectively branding him a child abuser and unfit parent"). Section 103 requires only the release of BWC footage, which does not, by itself, make *any* normative judgments about the officers involved. It is only if the public—that is, third parties—react negatively and think differently about a particular officer that this harm will come to pass. *See Crawford v. U.S. Dep't of Treasury*, 868 F.3d 438, 457 (6th Cir. 2017) (holding that "an injury that results from the third party's *voluntary and independent* actions or omissions does not" "suffice for standing"). In any event, there is no reason to think that the release of BWC footage will on balance diminish—rather than bolster—officers' reputations. As the Superior Court reasoned, it "is equally likely for someone to reach the conclusion that an officer was justified in utilizing force in a particular instance, which would not result in any reputational harm." JA 455-56.[8]

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[8] Notably, a recent study suggests that viewing police camera footage does not cause many viewers to change their minds, but simply ingrains predisposed beliefs about police conduct. *See* Roseanna Sommers, *Will Putting Cameras on Police Reduce Polarization?*, 125 Yale L.J. 1304, 1312 (2016) (concluding that "video evidence remains susceptible to significant viewer bias and simultaneously causes

Finally, the purported reputational harm is also not redressable by this Court. As explained above, even if this Court were to invalidate Section 103, the Mayor still retains the discretion to publicly release BWC footage for any officer-involved death or serious use of force, as she has for over half a decade. And the public similarly may record and disseminate videos of incidents involving police.

2. The alleged physical and psychological harm to FOP's members is insufficient to show standing.

FOP also asserts that Section 103 will "place officers and the public at immediate risk of significant bodily harm" and cause psychological harm to officers. JA 254. To begin, FOP does not have standing to assert claims on behalf of "the public." *See Exec. Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 731 (D.C. 2000) (noting the "general prohibition on a litigant's raising another person's legal rights"). And, while FOP can assert such a claim on behalf of officers, it still has not alleged that any harm is imminent, caused by the District, or redressable by this Court.

The sole factual support in the amended complaint for FOP's allegation that Section 103 poses an immediate risk of physical harm to its members is three anonymous, undated social media posts following the officer-involved death of

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some fact finders—namely those who feel a strong affinity with police officers—to become more certain of their judgments and more resistant to persuasion by others who disagree").

Deon Kay.[9] *See* JA 258. But these posts are insufficient to show a "concrete" or "imminent" threat of physical injury. *Lujan*, 504 U.S. at 560. As the Superior Court explained, "one anonymous social media post and two comments made in relation to said post" are "insufficient" to show a "real and immediate" threat of injury. JA 456. FOP offers no allegations about when these comments were posted in relation to the release of the footage, who the individuals who posted these messages are, whether they had any actual intention to harm anyone, and whether officers faced any real threat from the posts. Indeed, the posts do not name *any* individual officer, but state general frustration with all MPD officers. The amended complaint is simply devoid of factual allegations to support an inference of real or immediate threat of injury.[10] *Cf. High v. United States*, 128 A.3d 1017, 1021 (D.C. 2015) (holding that arrestee's statement to officer to "take that gun and badge off and I'll fuck you up" was not a credible threat because "an ordinary hearer" would not "reasonably fear imminent or future serious bodily harm or injury"); *Lewis v. United*

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[9] MPD's proactive offer of local law enforcement patrols for officers identified in BWC releases does not, as FOP suggests, show that the release "will result in a risk of significant bodily harm." Br. 21. The District took affirmative steps to ensure that its officers receive appropriate support; such actions do not concede that any threat is immediate or imminent.

[10] FOP also appended another social media post to its opposition to the District's motion to dismiss. JA 378-79; *see* Br. 19. The amended complaint does not mention this post, let alone allege that the picture of the officer was obtained from the public release of BWC footage pursuant to Section 103. In any event, it suffers from the same infirmities as the posts after Mr. Kay's death.

States, 95 A.3d 1289, 1291 (D.C. 2014) (similar). "If [FOP's] claim to standing arises out of safety concerns for [its] members, [it] should easily have access to information concerning whether any one of [its] members has been harmed or faces a substantial probability of being harmed by" Section 103; this Court should "decline to assume missing links." *Am. Chemistry Council*, 468 F.3d at 819-20.

Similarly, FOP's allegations of psychological harm cannot support associational standing. FOP relies on the affidavit from Dr. Beverly Anderson, the Clinical Director of the Metropolitan Police Employee Assistance Program, which provides counseling services to MPD officers. JA 242. Dr. Anderson opined that public release of BWC footage showing an officer-involved death "can inflict serious psychological trauma on the officer" and officers are "particularly vulnerable to psychological harm" in the "early days following a serious use of force incident or incident concerning an officer involved death, . . . which would be exacerbated by the public release of the body-worn camera footage of the incident." JA 243. Even assuming psychological harm alone can suffice for standing, *United States v. All Funds on Deposit with R.J. O'Brien & Assocs.*, 783 F.3d 607, 616 (7th Cir. 2015) (stating that "purely psychological harm" is insufficient for standing), Dr. Anderson's opinions are just that—opinions—and lack any factual support. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (court is not required to accept "naked assertions devoid of further factual enhancement"). The Mayor has released dozens

of BWC recordings and officer names over the past few years, but FOP does not allege a single incident of psychological harm resulting from the release of such footage, let alone harm caused by the video as opposed to the trauma of the underlying incident itself.[11] *See Am. Chemistry Council*, 468 F.3d at 819-20.

Even if FOP had alleged a cognizable injury, the amended complaint does not allege that these injuries are caused by the District or could be redressed by this Court.[12] Regarding the supposed threat of physical harm, FOP asserts that such harm is "directly traceable to the District" because "the release of BWC recordings and officers' names . . . 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."

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[11] FOP's reliance on *D.C. Library Renaissance Project v. D.C. Zoning Commission*, 73 A.3d 107 (D.C. 2013), and *Dupont Circle Association v. Barry*, 455 A.2d 417 (D.C. 1983), is inapposite. Those cases involved administrative appeals, which do not "depend on the elements of standing that judicial review would require." *D.C. Lib. Renaissance Proj.*, 73 A.3d at 113; *see Economides v. D.C. Bd. of Zoning Adjustment*, 954 A.2d 427, 434 (D.C. 2008) (noting "the more relaxed standard of standing enjoyed by those who appeal administrative decisions rather than those of the courts").

[12] FOP's reliance on *Massachusetts v. EPA*, 549 U.S. 497, 523 (2007), Br. 28-29, is misplaced. The Supreme Court did not, as FOP asserts, hold that anytime a "defendant's action 'contributes' to the plaintiff's injury, the causation element of standing is met." Br. 28. Rather, in that case the EPA did "not dispute the existence of a causal connection" between the challenged action and the purported injury. *Massachusetts*, 549 U.S. at 523. The Supreme Court has, however, repeatedly affirmed that an injury that is "th[e] result [of] the independent action of some third party not before the court" does not suffice for standing absent a showing of "injury produced by a determinative or coercive effect upon the action of someone else." *Bennett v. Spear*, 520 U.S. 154, 169 (1997). FOP has made no such allegations here.

Br. 27-28. But MPD's proactive approach to a possible—even if implausible—threat from third parties cannot in itself prove standing. Indeed, the chain of inferences between Section 103 and any potential physical harm to officers is far too tenuous: this Court must assume that BWC footage would place the depicted officers in a bad light, that the footage would spur third parties to wish harm upon the officers depicted, and that these third parties would in fact take affirmative steps to break the law and harm them. This speculative chain of events is too indirect to meet the traceability element. *See Crawford*, 868 F.3d at 457; *cf. Romero v. Nat'l Rifle Ass'n of Am., Inc.*, 749 F.2d 77, 81 (D.C. Cir. 1984) (noting "the general rule of nonliability at common law for harm resulting from the criminal acts of third parties").

With regard to psychological harm, FOP relies on Dr. Anderson's affidavit that immediate public release would "exacerbate" already-occurring psychological trauma. Br. 28-29. But FOP has made no effort to explain the "causal connection" between immediate public release and increased psychological harm. *Id.* (quoting *Lujan*, 504 U.S. at 560). Dr. Anderson's conclusory opinion, without explanation of why it is legitimate, cannot form a basis for finding standing. *See Iqbal*, 556 U.S. at 681 (noting that conclusory allegations are "not entitled to be assumed true").

Similarly, FOP has not explained how invalidating Section 103 will redress any of these alleged harms. Br. 29. The core of FOP's alleged harm is that the *immediate* release of BWC footage or officer names will inflict an injury. As

explained repeatedly, however, under preexisting law which FOP does not challenge, the Mayor can release any BWC footage covered by Section 103 at any time, and members of the public can—and do—record and publicly release video of police officers in the line of duty all the time. FOP has not alleged that it is "likely, as opposed to merely speculative" that *any* of the alleged injuries "will be redressed by a favorable decision."[13] *Glennborough Homeowners Ass'n v. USPS*, 21 F.4th 410, 417 (6th Cir. 2021) (quoting *Lujan*, 504 U.S. at 560).

* * *

FOP and its members have a policy disagreement with Section 103: they believe that releases of body-worn camera footage should be discretionary, not mandatory, as the Act requires. But the Council and the Mayor thought differently, and standing doctrine exists to "prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398,

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[13] FOP has waived any argument asserting a free-standing privacy injury by failing to develop it in its opening brief. *See* Br. 28 (stating, without explanation, that the "allegation that the District's action 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"); *McFarland v. George Wash. Univ.*, 935 A.2d 337, 351 (D.C. 2007) ("Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."). FOP has not alleged how Section 103 can injure an officer when the nature of police work necessarily means that officer's names and actions are subject to public view and, in any event, such an injury is not redressable for the same reasons that FOP's other purported injuries fail.

408 (2013). Indeed, the Supreme Court's "standing inquiry has been especially rigorous when reaching the merits of the dispute would force [the court] to decide whether an action taken by one of the other two branches . . . was unconstitutional." *Id.* The alleged injuries of FOP and its members are simply too speculative to confer standing, and this Court should affirm for that reason.

II. Section 103 Does Not Violate The Separation Of Powers.

Even assuming FOP has standing, its claims fail on the merits. FOP first argues that because Section 103 requires the Mayor to release BWC footage, it somehow violates the separation of powers because it usurps the executive's "distinct, exclusive power over policing in the District of Columbia and her subordinate agency, the MPD." Br. 33. But public safety and overseeing MPD are not, as FOP repeatedly asserts, within the "sole[]" or "exclusive" province of the Mayor. Br. 30-33; *see generally Grayson v. AT&T Corp.*, 140 A.3d 1155, 1162 (D.C. 2011) ("Although for the purposes of [a Rule 12(b)(6) motion] to dismiss we must take all the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation.").

FOP is correct that separation-of-powers principles apply in the District of Columbia much like they do in the federal tripartite system. *See* D.C. Code § 1-301.44(b) ("The Council recognizes the principle of separation of powers in the structure of the District of Columbia government."); *see District of Columbia v.*

Wash. Home Ownership Council, Inc., 415 A.2d 1349, 1367 (D.C. 1980) (en banc) (Gallagher, J., concurring) (referencing the Home Rule Act as the District's "constitutional analog"); *Zukerberg v. D.C. Bd. of Elections & Ethics*, 97 A.3d 1064, 1072 (D.C. 2014) (District Charter is "[c]omparable to a state constitution"). The District Charter vests executive power in the Mayor. D.C. Code § 1-204.22. This Court has explained that, given the structure of the District's government, "it is reasonable to infer from this tripartite structure and the vesting of the respective power in each branch that the same general principles should govern the exercise of such power in the District Charter as are applicable to the three branches of government at the federal level." *Wilson v. Kelly*, 615 A.2d 229, 231 (D.C. 1992). Thus, the Mayor enjoys certain prerogatives as the District's chief executive, like the power to direct subordinates and the power to exert privileges over certain communications. *E.g.*, *Trump v. Thompson*, 20 F.4th 10, 26 (D.C. Cir. 2021).

FOP is wrong, however, to think that public safety writ large is an "exclusive executive function" over which the Council may never legislate. Br. 31. Although the Home Rule Act vests the Mayor with "the duty" to "preserve the public peace," "prevent crime and arrest offenders," and "protect the rights of persons and property," D.C. Code § 5-101.03, she does not have "exclusive" authority over public safety and policing such that "the legislature is precluded from playing any role," *Bergman v. District of Columbia*, 986 A.2d 1208, 1225 (D.C. 2010) (rejecting

an argument that judiciary had the exclusive power to regulate attorneys). Indeed, this Court has recognized the Council's "police power to enact legislation for the protection of residents of the District of Columbia." *Id.* at 1229.

Similarly, while FOP's assertion that the "executive power of the Mayor includes and requires discretion over the regulation, operation, and management" of MPD, Br. 12, is true in part, it does not tell the whole story. Although the Mayor "appoint[s] to office" and assigns "duties" to MPD officers, D.C. Code § 5-105.01(a), the Council can—and has—legislated extensively with respect to MPD and policing. *See* Reorganization Plan No. 3 of 1967, Pub. L. No. 90-623, § 7(B), 82 Stat. 1315 (giving the Council the authority to "[m]ak[e] and modify[] rules and regulations for the proper government, conduct, discipline, and good name of the Metropolitan Police force"). The Council has the authority to "define the powers, duties, and responsibilities" of MPD and can "abolish" the agency altogether. *Id.* § 1-204.04(b). The Council determines the basic structure of MPD, including how its personnel are selected and relevant probationary periods, the composition of the force, age limitations, acceptable uniforms, minimum education and physical standards, and continuing education requirements. *Id.* §§ 5-107.01 to 5-107.04, 5-111.01. Indeed, the Home Rule Act "authorize[s] and empower[s]" the Council "to make and modify . . . all needful rules and regulations for the proper government, conduct, discipline, and good name" of MPD. *Id.* § 5-127.01. Accordingly, laws

limit the ways in which officers may seize individuals, cabin how investigations can be conducted, and prohibit MPD officers from affiliating with certain organizations. *See, e.g.*, *id.* §§ 5-115.01 (limiting initial questioning of arrestees to 3 hours), 5-125.01 (prohibiting certain chokeholds), 5-123.01 (prohibiting affiliation with an organization advocating strikes). These many laws regulating MPD and the conduct of MPD officers demonstrate that the Council plays a substantial role in overseeing MPD through legislation. Section 103 plainly fits within that power.

Further, Section 103 is a public-records law, a subject squarely within the Council's domain. Indeed, District law *already* requires MPD, through the Mayor, to keep extensive records of complaints, lost or stolen property, personnel records, arrests, warrants, stops and searches, and use-of-force incidents, many of which are "open to public inspection." *Id.* §§ 5-113.01, 5-113.06; *see Fraternal Order of Police v. District of Columbia*, 139 A.3d 853, 861 (D.C. 2016) (litigation concerning FOP FOIA request for MPD emails). Likewise, D.C. FOIA requires the public disclosure of most government records unless they fall within a particular FOIA exemption. *Id.* at 860 ("D.C. FOIA is a sunshine law that codifies, as '[t]he public policy of the District,' the entitlement of 'all persons . . . to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.'" (quoting D.C. Code § 2-531)). Much like these other public-access laws, Section 103 mandates public disclosure

of certain records. FOP's argument puts in constitutional jeopardy every law that requires the disclosure of records generated by the executive branch. That cannot be right.

Nor does Section 103 "impermissibly burden or unduly interfere" with the Mayor's "authority to exercise [her] core functions." *Bergman*, 986 A.2d at 1230. FOP claims that mandatory release of BWC footage and officer names will "make it *more* difficult" for officers to investigate serious officer-involved death or serious use of force incidents because "criminal suspects will have the ability to review" the BWC footage and "identify civilian witnesses" and the officers which will subject them to threats or violence. JA 260. Even taking FOP's dubious allegations as true, this does not amount to a separation-of-powers violation. *Cf. Houchins v. KQED, Inc.*, 438 U.S. 1, 12 (1978) (noting that public access to government activities is a "legislative task" and a "question of policy which a legislative body might appropriately resolve one way or the other"). Legislation can, and often does, affect policing, and FOP apparently believes that this legislation is a detriment to MPD's power to investigate crime. But regardless of the wisdom of Section 103, its limitations on the Mayor's discretion to withhold BWC footage do not amount to a constitutional violation. FOP's separation-of-powers claim is unfounded.

III. Section 103 Does Not Violate Substantive Due Process.

Finally, FOP argues that Section 103 violates the substantive due process rights of its members. Not so. Substantive due process protects "certain fundamental rights and liberty interests." *Jordan v. United States*, 235 A.3d 808, 815 (D.C. 2020). The Supreme Court—and this Court—have found "comparatively few rights and liberties to be 'fundamental' for due process purposes." *In re W.M.*, 851 A.2d 431, 449 (D.C. 2004) (citing *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)). Notably, neither this Court nor the Supreme Court has recognized a general due process right of informational privacy, *see Nat'l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 147 (2011) (assuming without deciding that such a right exists), and courts have repeatedly "exercise[d] the utmost care" in "extending" those rights deemed fundamental and consequently protected by due process, *Jordan*, 235 A.3d at 815. The "zones of privacy" protected by the Constitution have rather been limited to family and personal intimacy—"matters relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Paul v. Davis*, 424 U.S. 693, 713 (1976); *see King v. Montgomery County*, 797 F. App'x 949, 959 (6th Cir. 2020) (noting due process privacy right "against disclosure of deeply personal matters").

Even assuming an informational privacy right exists, it certainly would not extend to public records generated by public employees engaging in their public-

facing duties, as BWC recordings and the names of officers involved in such incidents are. Indeed, MPD guidelines prohibit officers from recording "personal activity," "conversations of members without their knowledge during routine non-enforcement related activities," or "in places where a reasonable expectation of privacy exists, such as locker rooms or restrooms" unless necessary for official duties. *See* MPD General Order 302-13, *supra*.

Contrary to FOP's suggestion, this Court has not held that officers have a "cognizable privacy interest in their names and identifying information" in all circumstances. Br. 37 (quoting *District of Columbia v. Fraternal Order of Police*, 75 A.3d 259, 268 (D.C. 2013)). First, the case FOP cites concerned D.C. FOIA's personal-privacy exemption and whether *that exemption* could prevent the District from disclosing the names of officers who confidentially emailed the Chief of Police with certain concerns. *Id.* at 262. That case had nothing to do with a free-standing right to informational privacy under the Due Process Clause. Moreover, this Court found that there was a privacy interest under the personal-privacy exemption because the officers who sent their "personal concerns" to the Chief "relied on the government's pledge of confidentiality," and the emails detailed sensitive information. *Id.* at 267-68. That rationale is inapposite here, where officers are well aware that BWC footage is subject to public disclosure per District law.

Further, FOP cannot credibly claim that its members have a reasonable and constitutionally protected expectation of privacy in interactions that occur in public, while the officer is on duty, and where any individual member of the public can record the officer's activity on their own. Importantly, MPD rules specifically state that the public can record MPD interactions and release them publicly so long as doing so does not interfere with the officer's job. MPD General Order 302-13, *supra*; *see also Gilk v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (recognizing a First Amendment right to film police officers "engaged in their duties in a public place"). If per District law (and the U.S. Constitution) officers can be recorded at any time while engaged in their public duties and such video can be released publicly, they surely do not have a privacy interest in *government*-created videos of that same public-facing conduct.

Notably, FOP's privacy argument would render constitutionally suspect *all* laws that require or permit the disclosure of BWC footage and the names of officers involved. Thus, under FOP's theory, the law in effect before Section 103's enactment, which left the Mayor with discretion to disclose BWC footage, would also raise constitutional privacy concerns. (That law is still in effect today for BWC footage that does not fall within Section 103's bounds.) And D.C. FOIA, which requires the disclosure of public records—including BWC footage—subject to certain exemptions would apparently raise the same concerns. Indeed, FOP's theory

has no limiting principle and could prevent the disclosure of myriad other records that show the activity of public officials performing their public-facing duties, from camera footage of government buildings to court recordings involving government officials. The limitless sweep of FOP's theory should render it suspect.

Finally, even if there were a reasonable expectation of privacy, "compelling" government and public "interests outweigh privacy concerns." *Skinner v. Railway Labor Exec. Ass'n*, 489 U.S. 602, 633 (1989); *Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425, 458 (1977) (noting that "any intrusion must be weighed against the public interest" in the information). The purpose of Section 103 and the BWC Program in general is "to promote accountability and transparency, foster improved police-community relations, and ensure the safety of both MPD members ('members') and the public." 24 DCMR § 3900.2. This interest far outweighs any privacy interest a police officer has in her conduct while engaged in public-facing duties. *Cf. Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1036 (1991) (noting that the "public has an interest" in the "responsible exercise" of discretion given to police officers).

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted,

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February 2022

REDACTION CERTIFICATE DISCLOSURE FORM

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.

/s/ Megan D. Browder
Signature

21-CV-511
Case Number

Megan D. Browder
Name

February 24, 2022
Date

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CERTIFICATE OF SERVICE

I certify that on February 24, 2022, this brief was served through this Court's electronic filing system to:

Anthony M. Conti
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/s/ Megan D. Browder
MEGAN D. BROWDER