SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

FRATERNAL ORDER OF POLICE, METROPOLITAN POLICE DEPARTMENT LABOR COMMITTEE, D.C. POLICE UNION, ***Plaintiff*,** **v.** **THE DISTRICT OF COLUMBIA, *et al.*,** ***Defendants*.**	**Case No. 2020 CA 003492B** **(Hon. William M. Jackson)**

BRIEF OF *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA, AMERICAN CIVIL LIBERTIES UNION OF THE DISTRICT OF COLUMBIA, WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS, AND LAW4BLACKLIVES DC IN SUPPORT OF DISTRICT OF COLUMBIA'S MOTION TO DISMISS

In enacting the Comprehensive Policing and Justice Reform Amendment Act of 2020 (the "Act"), the District's elected officials embraced increased accountability and transparency for a city with a troubled history of police abuses and chronic failures to hold officers responsible for their misconduct, particularly when that misconduct affects communities of color. The Council's enactment of the Act reflects a violent reality: Interactions between the police and communities of color are more frequent, more dangerous, and more deadly than interactions between police and white residents. Here in the District, while there is little difference in rates of drug use, there are significant disparities between white and Black people in drug arrests: almost 9 out of 10 arrests for drug possession are of Black people.[1] For young men, police violence is a leading cause of

[1] *See* report prepared by *amicus* Washington Lawyers' Committee for Civil Rights and Urban Affairs, Racial Disparities in Arrests in the District of Columbia, 2009-2011, at 2-3 (Jul. 2013), https://www.washlaw.org/pdf/wlc_report_racial_disparities.pdf.

death, and the violence is not color-blind.[2] About one in every 1,000 Black men can expect to be killed by police—a rate 2.5 times higher than for white men.[3] Black people killed by police are more than twice as likely to be unarmed as white people.[4] And even when the results are not fatal, police use force on Black people nearly four times more often than on white people.[5, 6]

It was against this background that the Council adopted unanimously—and the Mayor signed—legislation that, among other things, establishes new measures for evaluating uses of force, prohibits certain police practices, and makes information about incidents involving the use of force available more quickly, including through a presumption in favor of immediate disclosure of footage from body-worn cameras. The purpose of these disclosure requirements, contained at Title I of the Act, makes plain what the Council was trying to do and how this Court should view the Act: "Improving Police Accountability and Transparency."

The issue before the Court is a narrow one: whether the Act's requirement of disclosure of a limited set of information—the body-worn-camera footage and the names of officers involved

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[2] *See* Frank Edwards, Hedwig Lee & Michael Esposito, Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex, 116 Proc. of the Nat'l Acad. of Sci. 16793, 16793–94 (Aug. 2019), https://www.pnas.org/content/pnas/116/34/16793.full.pdf.

[3] *Id*.

[4] Justin Nix, Bradley A. Campbell, Edward H. Byers & Geoffrey P. Alpert, A Bird's Eye View of Civilians Killed by Police in 2015, 16 Criminology & Pub. Pol'y 309, 309 (Feb. 2017).

[5] Center for Policing Equity, The Science of Justice: Race, Arrests, and Police Use of Force, at 15 (Jul. 2016), https://policingequity.org/images/pdfs-doc/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf.

[6] For additional statistics regarding the racial disparity in policing, see Brief of *Amici Curiae* NAACP Legal Defense and Educational Fund, Inc., Lawyers' Committee for Civil Rights Under Law, LatinoJustice PRLDEF, and Law for Black Lives, *Uniformed Fire Officers Ass'n v. De Blasio*, No. 20-2789 (2d Cir. Sept. 24, 2020), ECF No. 60-2, at 5-7 (listing these and other examples from across the country).

in serious uses of force and death—violates constitutional limitations. Because officers have no privacy interests in their public conduct as public servants and because the public's interest in the public activities of officers sworn to serve and protect the public is so strong, Plaintiff Fraternal Order of Police ("Union") fails to state a privacy-based claim. And because the Act does nothing to modify the roles of the executive and legislative branches, the Union fails to state a separation-of-powers claim.

The Motion to Dismiss filed by the District correctly frames the analysis for this Court. Even assuming that the Union could establish standing, the Complaint fails to state a claim upon which relief can be granted. Accordingly, *amici* join the District in asking the Court to dismiss the Union's complaint.[7]

I. The Court Should Dismiss the Union's Privacy Claim Because the Union's Members Have No Right to Privacy in the Disclosure of Video Footage from Serious Uses of Force and Civilian Killings or in the Disclosure of the Names of the Officers Involved.

The names and activities of police officers conducting police activities are not personal, intimate, or confidential. Accordingly, the Union's members have no right to privacy when officers kill a civilian or use serious force on the District's streets.

Count II of the Complaint alleges that the Act violates the Due Process Clause because it infringes the "fundamental right to privacy held by D.C. Police Union members through the immediate, mandatory release of the names of officers and body-worn camera footage that will include further identifying information about the officers." Complaint ¶ 32. Assuming for purposes of discussion both that the Union has standing to assert this claim and that there is a constitutional

[7] As the Court is aware, the Emergency legislation is slated to expire this week, at which time the Temporary legislation takes effect. Because the relevant language of the Emergency and Temporary versions of the Act are the same, the arguments in favor of the statute's legality and constitutionality are applicable to both versions. The Council is currently considering Permanent legislation.

right of informational privacy covering "personal matters of an intimate or confidential nature," *see* District Memorandum in Support of Motion to Dismiss (District Mem.) at 17-18, the *names* and *activities* of police officers conducting police activities do *not* qualify as "personal," "intimate," or "confidential."[8]

Police officers wear their names and identifying badge numbers. Their activities, especially during times when serious or deadly force might be deployed, are frequently conducted in public where members of the public can view them. Indeed, as the District points out in its Motion, when a police officer dons his or her uniform to go to work, that officer knows well MPD's own internal policies on the public's recording of police activities. *See* District Mem. at 18. As one New York court wrote in rejecting a police Union's argument that body-worn-camera footage should be shielded from public view: "[G]iven its nature and use, the body-worn-camera footage at issue is not a personnel record covered by the confidentiality requirements of [relevant statute, since repealed]. The purpose of body-worn-camera footage is for use in the service of other key objectives of the program, *such as transparency, accountability, and public trust-building*." *Patrolmen's Benevolence Ass'n of City of New York v. DeBlasio*, 171 A.D. 3d 636 (1st Dep't, 2019) (emphasis added), *leave to appeal denied*, 35 N.Y.S. 3d 979 (2020).

In other words, the right to information belongs to the public and is not the province of individual officers. When Darnella Frazier recorded the killing of George Floyd, she was not impinging on any privacy right of the officers involved—and had she *not* recorded what happened, the residents of Minneapolis and the rest of the country would never have learned so swiftly about the conduct of Derek Chauvin or the activities of the other officers.

[8] The Union does not assert its own due-process or privacy interests.

The Act does not require disclosure of personnel records, or the records of misconduct investigations, or anything else that might qualify as "personal," "intimate," or "confidential."[9] An officer's name is not subject to constitutional protections, nor is video footage of that officer's conduct on the job in a public setting. Simply put, the Act does not wrest *intimate* information from *private* citizens. Rather, it shines a spotlight on the *public* activities of police officers' conduct in *public*—information that is not entitled to any constitutional protection from disclosure.

The Union argues that the perpetrators of violence against District residents—whether justified or not—have a "privacy right" not to be scrutinized for actions that any member of the public could view for himself or herself had the member of the public been there. Such an argument does not state a due-process claim.

II. The Court Should Also Reject the Union's Privacy Argument Because Any Asserted Right to Privacy is Overridden by the Public's Overarching Interest in Accountability and Transparency Within the Metropolitan Police Department through the Disclosure of Officer Names and Body-Worn Camera Footage.

There is a "paramount public interest in a free flow of information to the people concerning public officials, their servants." *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964). This "paramount

[9] Even personnel records related to alleged misconduct are not entitled to the level of protection that the Union seeks here. *See Gutierrez v. Benavides*, 292 F.R.D. 401, 404-05 (S.D. Tex. 2013) (observing that "privacy interests are diminished when the party . . . is a public person subject to legitimate public scrutiny, as the public has a substantial interest in the integrity, or lack thereof, of those who serve in public office" and counseling against protection for materials "involv[ing] matters of legitimate public concern or issues relating to public health or safety" (internal quotation and citation omitted)); *King v. Conde*, 121 F.R.D. 180, 191 (E.D.N.Y. 1988) ("Most information requested by civil rights plaintiffs in these lawsuits deals with professional personnel records, such as prior involvement in disciplinary proceedings or citizen complaints filed against the officers. The privacy interest in this kind of professional record is not substantial, because it is not the kind of 'highly personal' information warranting constitutional safeguard."). *See also Martin v. Connor*, 287 F.R.D. 348, 355 (D. Md. 2012) ("[P]olice officers vested with great power must necessarily sacrifice some of their privacy regarding the exercise of that great power when they choose to pursue a career as a law enforcement officer accountable to the public.").

Moreover, the body-worn-camera footage and name information covered by the Act's mandatory-disclosure requirements are not "personnel records."

public interest" manifestly extends to information about whether police officers conduct themselves properly while acting under color of law and while being paid with taxpayer money. *Id.* After all, police officers are not simply public officials. *See United States v. Wecht,* 484 F.3d 194, 210 (3d Cir. 2007) ("[T]he process by which the government investigates and prosecutes its citizens is an important matter of public concern."). They have enormous power and are vested with the authority to stop, detain, arrest, and, in some cases, use deadly force against members of the public. Accordingly, even if the Court found some minimal privacy interest in the information at issue, the Union would still fail to state a claim because of the overwhelming counterbalance of the public's interest in this information.

On too many occasions, meaningful change within MPD has had to come from outside the department: from a Department of Justice investigation, from the D.C. Auditor's Office, and from prior legislation enacted by the Council to remedy abuses of power and misconduct. Releasing information about the activities of officers deploying violence against civilians—including both officer names and body-worn-camera footage—fosters the public's interest in ensuring the proper operation of its government agencies and also provides a continuing counterbalance to institutional inertia and resistance to change. Disclosure also provides an incentive to MPD and other authorities to investigate promptly and not sit on information that officers or the department might find embarrassing or challenging. There is no question that transparency encourages accountability: that is precisely why the District adopted its body-worn-camera program ("BWC Program"), as discussed below. The Act attempts to fulfill the original intent behind the BWC Program—the twin goals of accountability and transparency.

For the reasons discussed below, the public's interest in the disclosure of officer names and body-worn-camera footage is particularly heightened in the District in light of (A) MPD's well-

documented history of secrecy and officer misconduct that make the District a national outlier in more ways than one, (B) MPD's roll-out of a body-worn-camera program that initially failed to achieve its goals, and (C) the opportunity to bring openness and transparency to the program. This background, and the public's corresponding interest in accountability and transparency writ large, weigh against any claimed privacy interest on the part of the Union or its members.

A. The Metropolitan Police Department Has a Long History of Secrecy and Misconduct, Which the Rollout of Body-Worn Cameras Was Meant to Reverse.

In November 1998, the *Washington Post* published a five-part series with a horrifying conclusion: MPD shot and killed "more people per resident in the 1990s than any other large American police force."[10] In January 1999, newly elected Mayor Williams and Police Chief Ramsey asked the U.S. Department of Justice to review MPD's use of force and its policies.[11] Following a sweeping review which disclosed, among other things, that MPD lacked a comprehensive program to

[10] David Jackson, Jo Craven and Sari Horwitz, Washington Post, "D.C. Police Lead Nation In Shootings - Lack of Training, Supervision Implicated as Key Factors (First of five articles)," (Nov. 15, 1998), https://www.washingtonpost.com/wp-srv/local/longterm/dcpolice/deadlyforce/police1page1.htm; *see also* Jeff Leen, Washington Post, "Moving Targets – Despite Department Rules, Officers Often Have Used Gunfire to Stop Drives (Second of five articles)," (Nov. 16, 1998), https://www.washingtonpost.com/wp-srv/local/longterm/dcpolice/deadlyforce/police2page1.htm; David Jackson, "Holes in the Files – Investigations of Police Shootings Often Leave Questions Unanswered (Third of five articles)," (Nov. 17, 1998), https://www.washingtonpost.com/wp-srv/local/longterm/dcpolice/deadlyforce/police3page1.htm; Jeff Leen and Sari Horwitz, Washington Post, "Armed and Unready – City Pays for Failure to Train Officers With Sophisticated Weapon (Fourth of five articles)," (Nov. 18, 1998), https://www.washingtonpost.com/wp-srv/local/longterm/dcpolice/deadlyforce/police4page1.htm; Sari Horwitz, Washington Post, "When Officers Go Too Far – Confrontations Lead to Beatings, Complaints, Lawsuits (Last of five articles)," (Nov. 19, 1998), https://www.washingtonpost.com/wp-srv/local/longterm/dcpolice/deadlyforce/police5page1.htm.

[11] University of Michigan Law School, Civil Rights Litigation Clearinghouse, "Case Profile: DOJ Investigation of the Washington, D.C., Metropolitan Police Department," (Dec. 28, 2006, updated Apr. 9, 2015), https://www.clearinghouse.net/detail.php?id=1026.

minimize the use of excessive force and had an inadequate system for investigating citizen complaints of officer misconduct, the District entered into the 2001 Memorandum of Agreement ("MOA") with DOJ. In addition to compiling recommendations regarding training and the appointment of an independent monitor, the MOA recognized the necessity of transparency and reporting to the public in order to create any sort of sustainable police reform.[12]

After the MOA was entered, change was slow and incomplete. Even when the District had concrete proof of its officers' misconduct, it was forced to keep those officers on the force because of delays in investigating and litigating their discipline cases. Between 2006 and 2017, for example, the District was forced to *rehire* approximately 20 fired officers who engaged in misconduct because MPD missed deadlines to conclude its internal investigations—including the case of an officer who assaulted a store clerk but was rehired when MPD missed its investigation deadline by one week.[13] MPD was also forced to hire back an officer who, according to his ex-girlfriend, attempted to extort her with sexually explicit pictures. Though MPD concluded that he had engaged in gross misconduct and fired him, he was soon back on the force.[14]

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[12] Although the BWC Program was not yet rolled out during the time frame of the MOA (2001-2008), the principles underlying the BWC Program as well as the Act align with the other public-reporting aspects of the MOA. *See* U.S. Department of Justice, "Memorandum of Agreement Between the United States Department of Justice and the District of Columbia and the District of Columbia Metropolitan Police Department," Section IV, subdivision (B), parts 87-91 and Section IX, subdivision 160, (Jun. 13, 2001), https://www.justice.gov/crt/memorandum-agreement-united-states-department-justice-and-district-columbia-and-dc-metropolitan#_1_34.

[13] Kimbriell Kelly, Wesley Lowery and Steven Rich, The Washington Post, "Fired/Rehired," (Aug. 2, 2017), https://www.washingtonpost.com/graphics/2017/investigations/police-fired-re-hired/.

[14] Alan Suderman, Washington City Paper, "Misfired," (Feb. 1, 2013), https://washingtoncitypaper.com/article/210382/misfired-the-dc-government-fired-then-re-hired-then-fired/.

But because MPD's disciplinary proceedings are conducted without readily accessible notice of the hearings,[15] the public only learned about these disciplinary failures after the District was forced to rehire those officers. If a member of the public wanted to find a record of an officer's alleged misconduct, meanwhile, they would likely come up short. This is because prior to the passage of the Act, the District closely guarded information related to allegations of police misconduct (including serious uses of force or killings) as compared to much of the rest of the country.[16]

Nearly 30 states strike a position far more transparent than the District's prior approach.[17] In about 13 states, police-misconduct records are generally available to the public.[18] In Minnesota, the public has access to "the existence and status of any complaints or charges against" an officer, "regardless of whether the complaint or charge resulted in a disciplinary action," as well as "the

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[15] Mitch Ryals, Washington City Paper, "How the D.C. Police Department, DOJ, and D.C. Attorney General's Office Shield Cops' Bad Acts," (Jun. 25, 2020), https://washingtoncitypaper.com/article/304093/how-the-dc-police-department-doj-and-dc-attorney-generals-office-shield-the-bad-actions-of-cops/ ("A schedule posted on the wall outside the hearing room lists the month's agenda. . . . *The schedule does not identify the officers and is not posted online.* Until relatively recently, the only way a member of the public would know about these allegations would be to visit Patrol Services North each month and read the schedule off the wall.").

[16] Section 2-534(a)(2) of the District's Freedom of Information Act has shielded and continues to shield portions of police officers' records from being public. *See, e.g. Fraternal Order of Police Metropolitan Police Labor Committee v. District of Columbia*, 124 A.3d 69 (D.C. 2015). Ironically, in that litigation the Union asserted that the District was not being transparent enough in responding to the Union's FOIA request for information about internal disciplinary proceedings against senior officers in MPD. As described in Section I, *supra*, the information and materials at issue do not qualify as personnel records.

[17] Robert Lewis, Noah Veltman and Xander Landen, WNYC, "Is Police Misconduct a Secret in Your State?, " (Oct. 15, 2015), https://www.wnyc.org/story/police-misconduct-records/ (cataloguing the 50 state approaches to disclosure of police misconduct records as of 2015).

[18] *Id.* These are Alabama, Arizona, Connecticut, Georgia, Florida, Ohio, Maine, Minnesota, North Dakota, Utah, Washington, and Wisconsin. New York recently joined this category in repealing its police-secrecy law.

final disposition of any disciplinary action together with the specific reasons for the action and data documenting the basis of the action." Minn. Stat. 13.43(2). In North Dakota and Ohio, discipline records are similarly public. N.D. Cent. Code § 44-04-18; Ohio Rev. Code § 149.43. Some of these states presume public access but allow for nondisclosure of records which fall under narrow exemptions based on personal privacy. Another 16 or so states adopt various intermediate positions.[19] In Tennessee, "all law enforcement personnel records" are open for inspection by the public, subject to certain special procedures, Tenn. Code § 10-7-503, but "local departments may still withhold such records by claiming they're pertinent to an active or recently-concluded criminal case."[20] In Hawaii, disclosure of police officers' disciplinary records is appropriate where "the public interest in access to the records outweighs [the officer's] privacy interest." *Peer News LLC v. City & Cty. of Honolulu*, 138 Haw. 53, 55 (2016).

It bears repeating that the Act does not address the release of any internal investigations into misconduct or any personnel records, as many of the above-mentioned states' laws do; rather, the Act simply requires the release of footage from, and the names of officers involved in, serious uses of force and killings. So while the Act brings the District *more* in line with jurisdictions across the country, the District still substantially lags behind much of the country in terms of transparency.

While the MOA and the independent monitoring of MPD officially terminated in 2008, a subsequent report prepared at the request of the District of Columbia's Auditor showed that prob-

[19] *Id.* These are Arkansas, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, New Mexico, Oklahoma, South Carolina, Tennessee, Texas, Vermont, West Virginia, and California. (California joined this category following the 2018 passage of SB1421. *See* Rachel Moran, UC Irvine Law Review, "Police Privacy," 10 U.C. Irvine L. Rev. 153, 155 (Oct. 2019), https://scholarship.law.uci.edu/ucilr/vol10/iss1/6.)

[20] *Id.*

lems still persisted, including "insufficiently trained use of force investigators who perform inadequate use of force investigations and produce unsatisfactory use of force investigative reports" and a "system for conducting criminal and administrative investigations [for serious uses of force and killings] [that is] plagued by significant delays that impede the prompt resolution of these cases."[21]

This history of lack of accountability and transparency is what motivated in part the rollout of body-worn cameras across the city.

B. Though It Was Intended to Increase Accountability and Transparency, the Initial Years of the Body-Worn-Camera Program Sometimes Shielded Police Misconduct from Public Scrutiny and Officers from Accountability.

Eight years after MPD was released from federal oversight, the District took steps to move forward. The twin goals of accountability and transparency were enshrined in the regulatory scheme governing these cameras. *See* 24 DCMR § 3900.2 (West 2015) (intent of program is "to promote accountability and transparency, foster improved police-community relations, and ensure the safety of both MPD members and the public.").

Of course, the degree to which body-worn cameras are effective in meeting those twin goals hinges on the policies and procedures governing cameras' use, meaningful disciplinary implications when officers violate policy, and access to footage by the public. This is borne out by the studies of cameras' ineffectiveness in locations *without* strict polices governing their usage.[22]

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[21] The Bromwich Group LLC, Office of the District of Columbia Auditor, "The Durability of Policy Reform – The Metropolitan Police Department and Use of Force: 2008-2015," pp. v, 39-40, (Jan. 28, 2016), http://zd4l62ki6k620lqb52h9ldm1.wpengine.netdna-cdn.com/wp-content/uploads/2018/07/Full-Report_2.pdf, visited Oct. 5, 2020.

[22] Barak Ariel, Alex Sutherland, Darren Henstock, *et al.*, Journal of Experimental Criminology, "Report: Increases in Police Use of Force in the Presence of Body-Worn Cameras Are Driven by Officer Discretion: A Protocol-Based Subgroup Analysis of Ten Randomized Experiments," no. 3 (2016): 453-463, https://link.springer.com/article/10.1007/s11292-016-9261-3.

A study of the District's initial deployment of cameras shows that the program was not the panacea that many were hoping for. A study of the District's pilot program in 2015 and 2016 found that wearing a camera had little impact on an officer's use of force or the number of complaints filed against an officer.[23] Though MPD has since spelled out policies on the use of cameras, officers nonetheless regularly flout those policies, with one-third of cases investigated by the Office of Police Complaints still showing some level of non-compliance with camera regulations.[24] Worse, MPD has imposed few disciplinary consequences for the failure to comply with these orders,[25] essentially rendering them only words of guidance.

Most relevant to this case, prior to the passage of the Act, body-worn-camera footage in cases involving serious uses or force or death was too often kept hidden from the public, undermining a key accountability feature of the program. Prior to the passage of the Act, body-worn-camera footage was released only as an act of mayoral discretion. Despite the then-governing regulation favoring release in serious uses of forces and killing—*see* 24 DCMR § 3100.10 ("The Mayor may, on a case-by-case basis in matters of significant public interest … release BWC recordings that would otherwise not be releasable pursuant to a FOIA request. Examples of matters of significant public interest include officer-involved shootings, serious use of force by an officer,

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[23] David Yokum, Anita Ravishankar, Alexander Coppock, The Lab @ DC, "Evaluating the Effects of Police Body-Worn Cameras: A Randomized Controlled Trial," https://bwc.thelab.dc.gov/TheLabDC_MPD_BWC_Working_Paper_10.20.17.pdf.

[24] Five Years of the Metropolitan Police Department's Body-Worn Camera Program: Reflections and Next Steps, D.C. Council on Judiciary and Public Safety Public Oversight Roundtable, (Oct. 21, 2019) (Statement of Nassim Moshiree, Policy Director, *amicus* ACLU-DC) https://www.acludc.org/en/legislation/aclu-dc-statement-public-oversight-roundtable-five-years-metropolitan-police-departments.

[25] *Id.*

and assaults on an officer requiring hospitalization.")—mayoral decisions in favor of disclosure were unfortunately few and far between.[26]

To name one particularly egregious example, it took MPD over a year to grant partial access to body-worn-camera footage to the mother of a man slain by MPD officers. Kenithia Alston[27]—the mother of Marqueese Alston, who had been killed by MPD officers in June 2018—demanded again and again to see the videos leading up to her son's death. The District demurred and delayed until it finally permitted Ms. Alston to review a selectively edited subset of clips surrounding her son's killing.[28] And when Ms. Alston asked that MPD make the footage public—that is, when the deceased's *next of kin* asked that the department make this footage public—MPD declined.[29]

Before adoption of the Act, if the Mayor did *not* approve the release of footage in a particular case, the public's access to information about serious uses of force or killings was essentially zero. Even when body-worn-camera footage of these types of incidents was turned over in discovery in criminal prosecutions, for example, the United States Attorney's Office would seek (and often secure) protective orders to block criminal defendants and their attorneys from showing the

[26] *See, e.g.*, Ashraf Khalil, "DC releases police footage from 2018 deaths of 3 Black men," Washington Post, (Jul. 31, 2020), https://www.washingtonpost.com/politics/dc-releases-police-footage-from-2018-deaths-of-3-black-men/2020/07/31/ddd8497a-d375-11ea-826b-cc394d824e35_story.html.

[27] *Amicus* Washington Lawyers' Committee represented Ms. Alston in connection with her efforts to secure body-worn camera footage from the city.

[28] Sophie Kaplan, The Washington Times, "D.C. police's refusal to release body-camera footage blasted," (Oct. 21, 2019), https://www.washingtontimes.com/news/2019/oct/21/dc-polices-refusal-release-body-camera-footage-bla/.

[29] *Id.* The Alston footage was not made public until the Act was adopted.

video—or certain portions of the video—to third parties. Instead of operating as a tool supporting accountability and transparency, the District's BWC Program in its early years did not do much to change the status quo.

The tight grip on body-worn-camera footage—and the presumption against openness and disclosure—might indeed be why it took so long for the District to remove Sean Lojacono, whose body-camera footage capturing his sexual assault of a young man was only uncovered after the officer's father (himself a former police commander) asked Lojacono's direct supervisor to review the relevant video from a *different* incident of alleged misconduct.[30] In other words: "If the department's not watching the videos, it doesn't matter that they have them."[31] But had the District been required to make publicly available the body-worn-camera footage from Lojacono's instances of misconduct, it might not have taken 18 months to remove Lojacono from the force; at the very least, MPD would have been forced to confront his heinous misconduct more quickly and decisively, to avoid accusations of department inaction or delay.

Even today, the Union continues to push back against external efforts to monitor its members' use of force and the killing of civilians, with the Union's chairman speaking out publicly

[30] Natalie Delgadillo, DCist, "MPD Officer Fired For An Invasive Stop-And-Frisk Was Investigated For Another Search," (Mar. 8, 2019), https://dcist.com/story/19/03/08/mpd-officer-fired-for-an-invasive-stop-and-frisk-was-investigated-for-another-search/. *Amicus* ACLU-DC represented plaintiff M.B. Cottingham in this *other* instance of alleged misconduct.

[31] As articulated by Emily Gunston, former Deputy Legal Director for *amicus* Washington Lawyers' Committee for Civil Rights and Urban Affairs. *See* Martin Austermuhle, WAMU 88.5, "Critics Question Whether Body Cameras Have Lived Up To Their Promise In D.C.," (Oct. 22, 2019), https://wamu.org/story/19/10/22/critics-question-whether-body-cameras-have-lived-up-to-their-promise-in-d-c/.

against a proposed audit of police-involved shootings.[32] This internal resistance to independent checks on MPD's actions on the streets of the city underlines the critical importance of public disclosure. And the Union and MPD should embrace independent checks of their members' actions. After all, if officers' actions were indeed justified in these incidents, review and publication would operate to clear officers' names.

C. The Act Is a Step toward Bringing Greater Accountability and Transparency to the Metropolitan Police Department.

The Act's disclosure requirements respond to this history of ineffective handling of police misconduct in the District as well as the national outcry over the use of serious or deadly force by police officers against Black people and other communities of color. The Act aims to correct delayed disclosure and realign the District's BWC Program with its original twin goals of accountability and transparency. If the program hinges on the principle that transparency leads to accountability and a more just and effective policing system, then discretion and delay are the worst enemies in that endeavor.

The Act reverses the old presumption against disclosure for the limited category of body-worn-camera footage showing an officer-involved death or serious use of force by officers, reflecting the judgment of the Council that the time has come to make such body-worn-camera footage and the names of officers involved in violence and killings available more widely and more promptly. The Act increases transparency for MPD and brings the District into line with the evolv-

[32] Peter Hermann, The Washington Post, "D.C. auditor reviewing fatal shootings by District police," (Sept. 15, 2020), https://www.washingtonpost.com/local/public-safety/dc-auditor-reviewing-fatal-shootings-by-district-police/2020/09/15/c8ffd3b2-f75e-11ea-a275-1a2c2d36e1f1_story.html (Union Chairman Pemberton: "It's almost like city officials are disappointed that the dispositions have not resulted in a finding of police misconduct. Unfortunately for the anti-police, pro-crime advocates, our members are well-trained and have acted appropriately in these situations.").

ing consensus across the country, as described above. In short, the Act helps implement the promise of the original program, and for a city whose residents of color bear a disproportionate share of encounters with police officers where force is deployed, the promise for accountability and transparency has been too long denied or delayed.

A body-worn-camera program functioning with the right safeguards—including the swift disclosure requirements of the Act—can also help correct for personal biases, lack of training, and institutional deficiencies. In addition to the direct benefits of a camera program consistent with the requirements of the Act, video evidence of a contested police interaction can quickly resolve complaints, freeing up officers to investigate and dedicate resources to other matters.[33] Swift disclosure of also means that police officers can more quickly and credibly be cleared when their conduct is indeed justified.

Just as relevant in light of the District's history with problems in removing officers who have engaged in serious misconduct is the power of public disclosure to ensure swift and sure discipline *against* such officers. The District should not be missing deadlines to discipline officers, and releasing body-worn-camera footage of the most serious incidents between officers and civilians puts an independent pressure on investigators within the Department: to move swiftly, to move surely, and to remove officers from the force who pose a threat to the residents of the District. Said differently, public disclosure provides an independent check on the investigation of alleged misconduct within MPD—a check that has long been needed to ensure meaningful change within the department.

[33] Government of the District of Columbia Police Complaints Board Office of Police Complaints, "Annual Report 2017," p. 19, http://apps.washingtonpost.com/g/documents/local/office-of-police-complaints-says-some-officers-fail-to-follow-body-camera-rules/2612/.

Just as important are the rights of the families of individuals attacked and killed by the police. Kenithia Alston should not have had to wait over a year to watch a selectively edited compendium of clips leading up to her son's death.[34] She should not have been forced to sit silently, unable to show the public what happened between the police and her son, as the chief of the department attacked her son in the press.[35] District residents are entitled to know what is happening on their streets and to their family members and neighbors when they encounter police in a situation where serious use of force is involved. People are entitled to know what is being done in their names; they are entitled to information that separates fact from rumor; they are entitled to the evidence before it has been repackaged, delayed, or tweaked into a "community briefing video."

[34] As the Court knows, the portion of the Union's claim seeking to enjoin the release of body-worn- camera footage and information from incidents predating the Act has been mooted by the disclosure of this information. Unfortunately, even after passage of the Act, MPD is continuing to release selectively edited and slickly produced compendiums of video clips overlaid with commentary (that MPD terms "community briefing videos") reflecting its own perspective of who was in the right and who was in the wrong in incidents involving serious uses of force or death. MPD did so with the footage involving Ms. Alston's son after the Act came into effect, highlighting its selective compendium of events leading up to Mr. Alston's death. *See* MPD, Community Briefing Videos of Officer-Involved Deaths and Serious Use of Force, https://mpdc.dc.gov/page/community-briefing-videos-officer-involved-deaths-and-serious-use-force. MPD only included a more complete set of videos from Ms. Alston's son's death in a link below the department's banner video. This continuing practice of "packaging" footage underlines the public's interest in disclosure of information and footage from uses of force and killings—because even today, MPD is continuing to put a spin or gloss around its officers' actions.

[35] Rachel Chason and Peter Hermann, The Washington Post, "Two years after her son was shot by D.C. police, a mother hopes reforms bring answers," (Jun. 9, 2020), https://www.washingtonpost.com/local/public-safety/two-years-after-her-son-was-shot-by-dc-police-a-mother-hopes-reforms-bring-answers/2020/06/09/ea715c22-a9b7-11ea-a9d9-a81c1a491c52_story.html (Chief Peter Newsham describing Ms. Alston's deceased son as a "convicted offender armed with an illegal gun who shot at a police officer").

The civil rights of not only the victims but of all citizens depends upon accurate and timely disclosure of facts. The Council has decided that the rights of citizens to see the actual footage for themselves outweighs the interests of MPD to delay release or dress-up footage.

Even at the motion-to-dismiss stage, any claim of privacy rights by the Union or its members—and as explained above, the Union's members have no such rights in their actions as public servants in a public setting—is so dramatically outweighed by the public's interest in accountability and transparency that the Union's claim under the Due Process Clause fails.

III. The Court Should Dismiss the Union's Separation-of-Powers Claim Because the Act Does Not Limit Any Executive Function or Transfer Any Such Function to the Legislature.

Even if the Union could establish standing to assert its separation-of-powers claim, the separation-of-powers argument fails. While the Act requires the release of body-worn-camera footage and other information (subject, of course, to the statutory veto of certain persons such as a decedent's next-of-kin), the legislation does not limit any executive function or transfer any executive function to the legislature.

Count I of the Complaint alleges that the Act infringes on the principles of separation of powers because the new law "represents an impermissible intrusion on the Mayor's authority and ability to perform her specifically delegated executive functions." Complaint ¶ 26. The Complaint further alleges that the Act impermissibly "infringes on and obstructs the Mayor's ability to carry out her executive functions to 'preserve the public peace,' 'prevent crimes and arrest offenders,' and 'protect the rights of persons and of property.'" *Id.* ¶ 25. That alleged obstruction of the Mayor's duties stems from the speculation that release of footage and information about incidents create immediate and dangerous consequences for police officers. *Id.* ("The mandatory release of the names and body-worn camera footage will place D.C. Police Union members at immediate

risk of significant bodily harm, unjustly malign officers, and unjustly subject officers to substantial reputational harm.")

But the disclosure (or nondisclosure) of body-worn-camera footage or of identifying information about police incidents is the product of a *statutory scheme*, not an inherent power of the executive. In fact, there are several examples of District legislation that relate to the Mayor's authority to carry out her executive functions but are not deemed to infringe on such authority. One close parallel is the District's Freedom of Information Act ("FOIA"), D.C. Code § 2-536, which creates categories of information that are "specifically made public information." Another example is the prior version of the statute governing body-worn cameras more generally, D.C. Code § 5-116.32, which required the Mayor to consult with certain groups (including many of the *amici* on this brief) prior to issuing regulations regarding body-worn cameras. Indeed, the Union does not allege that FOIA or the earlier version of the body-worn-camera statute (before the 2020 amendment) violated the separation of powers. And if the creation of public-disclosure regimes did not implicate separation-of-powers concerns, the modification of those regimes cannot implicate such concerns either.

This conclusion aligns with case law from the Court of Appeals. In *Vining v. Council of the District of Columbia*, 140 A.3d 439 (D.C. 2016), the Council argued that it would impinge on the separation of powers if the Council were required to provide certain documents in compliance with a FOIA request. The Council invoked the Legislative Privilege Act (a counterpart to the "Speech and Debate Clause") as a basis to withhold documents from public disclosure even though the Council, by statute, was subject to FOIA. The Court of Appeals rejected the Council's argument that separation-of-powers factors overrode the public's right of access to the documents or that the Council retained broad discretion whether to comply: "[B]road administrative discretion

is exactly what the Council sought to remove from public bodies when it first passed D.C. FOIA forty years ago ….” *Id*. at 447.

So too here. The Council has made the decision that the previous regime affording the Mayor discretion about whether to disclose certain information should be replaced by a regime where such information is automatically disclosed. In both instances, the Mayor’s authority is derived from a statute which the Council has the authority to enact or amend.

The Union alleges that this change in disclosure for this information—from discretionary to mandatory—impinges on the separation of powers because mandatory disclosure allegedly “make[s] it more difficult to investigate serious officer-involved death or serious use of force[,]” an area that, according to the Union, is under the Mayor’s purview. Complaint ¶¶ 17, 22, 24. But that allegation does not even track with any facts alleged in the Complaint; there is nothing in the Complaint that details any factual examples of swift publication of police-related information impeding the Mayor’s ability to carry out her duties. Likewise, the June 8, 2020, letter sent by Acting United States Attorney of the District of Columbia to the Honorable Charles Allen (attached to the Complaint) does not detail any such examples.

It follows that any concerns about separation of powers are speculative. In reality, the only change wrought by the Act involves public access to information. The Act does not limit the Mayor’s or MPD’s access to the information, does not limit the Mayor’s or MPD’s use of the information, and does not direct or restrict the executive’s investigation or prosecution of anything.

Contrary to the hazards which the Union alleges—without factual support—the requirements of the Act function as a necessary independent check on the actions of the executive branch. As described above, the Mayor’s office has been inconsistent at best in decisions to release body-worn-camera footage for the shootings of civilians, and MPD itself has been even less transparent.

Disclosure of information and footage enables the *public* to function as a backstop of sorts—to push for change or action when they see a system that may not be functioning correctly. The dissemination of this information better informs the public, tamps down rumors, and builds confidence in the processes of investigation and prosecution—particularly in instances involving a serious use of force or killing at the hands of a police officer. In the end, transparency makes it more likely that the executive can prevent crime and remove problem officers from the force.

But in the end, even if the Union were correct that the quick release of these videos might sometimes make it more difficult to investigate incidents of officer-involved killings or serious uses of force, that would not change the resulted required on its separation-of-powers claim. The existence and parameters of the District's body-worn-camera program are matters of public policy, and it is the Council, not the Mayor, that makes public policy for the District. The Council has abolished or redefined certain crimes and reduced the maximum penalties for others.[36] It has imposed various direct restrictions on police activities and tactics.[37] If the police Union, or even the police Union and the Mayor together, believe those legislative actions obstruct the Mayor's ability to preserve the public peace, prevent crimes and arrest offenders, and protect the rights of persons and property, their recourse is to lobby the Council to amend the law, and ultimately to try to

[36] For example, in 2009 the Council abolished the crime of vagrancy. *See* D.C. Law 18-88 (the Omnibus Public Safety and Justice Amendment Act of 2009) § 216 (repealing D.C. Code §§ 22-3501 *et seq.*). In 1994, the Council reduced the maximum punishment for most misdemeanors from one year to 180 days or less. *See* D.C. Law § 10-151 (the Omnibus Criminal Justice Reform Act of 1994) § 10-151.

[37] For example, in the First Amendment Assemblies Act of 2004, D.C. Code § 5-331.01 *et seq*., the Council instructed the MPD on how to deal with demonstrations. Officers may not use police lines except in certain circumstances. D.C. Code § 5-331.08. They may not handcuff a person's wrist to his or her ankle. D.C. Code § 5-331.11(b). They must have visible nametags or badge numbers, even if wearing riot gear. D.C. Code § 5-331.09.

persuade the electorate to elect different members of the Council, not to ask a court to substitute the Mayor for the Council as the District's policy-making branch of government.

CONCLUSION

Amici urge the court to dismiss the Union's claims. Officers have no privacy interests in how they perform their jobs in public and, even if they did, those interests are outweighed by the public's interest in accountability and transparency. The Union's separation-of-powers claim, meanwhile, misunderstands the law and division of authority between the Council and the Mayor.

The Council has decided that it is time for the District to join the growing trend across the country toward a more accountable and transparent policing system. The Court need decide only a narrow issue: whether the Council's decision to expand and speed up the release of information in the small number of cases in which officers use serious force or cause the death of a civilian violates constitutional standards. It does not.

Amici ask that the Court grant the District's motion to dismiss the Complaint.

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Respectfully Submitted,

/s/ John R. Fowler
Jon Greenbaum (D.C. Bar # 489887)
Arthur Ago (D.C. Bar # 463681)
John R. Fowler (D.C. Bar # 1017595)
Lawyers' Committee for Civil Rights Under Law
1500 K Street N.W., Suite 900
Washington, DC 20005
202.662.8340
jfowler@lawyerscommittee.org

/s/ Paul J. Kiernan
Paul J. Kiernan (D.C. Bar # 385627)
Michelle K. Lee, of counsel
Holland & Knight LLP
800 17th Street, N.W., Suite 1100
Washington, D.C. 20006

(202) 663-7276
paul.kiernan@hklaw.com
michelle.lee@hklaw.com
Counsel for Lawyers' Committee for Civil Rights Under Law

/s/ Katerina Semyonova
Katerina Semyonova (D.C. Bar # 495387)
Jonathan Anderson (D.C. Bar # 475306)
Kavya Naini (D.C. Bar # 1644903)
Public Defender Service for the District of Columbia
633 Indiana Avenue, N.W.
Washington, D.C. 20004
(202) 628-1200

/s/ Arthur B. Spitzer
Arthur B. Spitzer (D.C. Bar # 235960)
American Civil Liberties Union Foundation of the District of Columbia
915 15th St. N.W., 2nd Floor
Washington, D.C. 20005
(202) 457-0800

Washington Lawyers' Committee for Civil Rights and Urban Affairs*
700 14th St NW Suite 400
Washington, DC 20005
(202) 319-1000
amicus curiae

Law4BlackLives DC*
amicus curiae

**Amici* have authorized Lawyers' Committee for Civil Rights Under Law and its counsel to advise the Court that they support and adopt the proposed brief and seek to be recognized as *amici*.