

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

ALEXANDER CAMERON *et al.*, on behalf of  
themselves and all others similarly situated

*Plaintiffs,*

v.

Civil Action No. 21-cv-02908

DISTRICT OF COLUMBIA,

*Defendant.*

**PLAINTIFFS' OPPOSITION TO DEFENDANT'S SECOND MOTION TO DISMISS**

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## INTRODUCTION

District officers arrested Plaintiffs at a protest, seized their cell phones and, despite releasing Plaintiffs without charges, held the phones for at least nine months, and in some cases far longer. The D.C. Circuit held that Plaintiffs plausibly alleged that the length of the phone seizures violated the Fourth Amendment, rejecting the District's efforts to dismiss Plaintiffs' Fourth Amendment claim on its merits.

Now, the District moves to dismiss again, asserting that Plaintiffs have not plausibly alleged that it is culpable for their injuries. While acknowledging that a municipality can face liability for its employees' constitutional torts when the misconduct arises from a widespread and persistent custom, the District alleges that Plaintiffs have not pleaded one here. It advances this argument even though the Complaint alleges in detail over 200 prior incidents where, as here, MPD officers arrested individuals, seized their phones incident to the arrest, and retained the phones for months or even years after the justification for confiscating the phones expired. The District contends that those allegations don't suffice—not even when combined with the Complaint's discussion of a large bin MPD reserves for cell phones it seized but did not return, a Police Complaints Board report documenting officers' repeated violations of MPD's written property return policies, and an article in *The Atlantic* interviewing local practitioners and concluding that the type of misconduct that occurred here is routine.

In contending that all of this is not enough to plead a custom, the District makes legal errors and relies on hairsplitting and speculation. It asserts that Plaintiffs did not allege a “pervasive” custom because they failed to allege that a sufficient percentage of MPD's property seizures are unlawful. ECF No. 47-1 (Mem. & Points of Authority in Support of Def.'s Mot. To Dismiss) 13 (“MTD”). But the District cites no authority holding that proving a custom claim—to

say nothing of merely pleading one—requires plaintiffs to make the impractical showing that constitutional violations occur some defined percentage of the time. In fact, this Circuit’s precedent strongly suggests that no such showing is needed. Here, Plaintiffs have plausibly alleged far more evidence of a custom than courts generally require.

The District also contends that Plaintiffs’ examples are insufficiently detailed to reflect a discernible custom. But it insists on the kind of detail about each incident that one might expect if each example were *itself* the subject of the lawsuit. The District demands: How many people requested their phones back? Whom did they ask? Did they face charges? MTD 9-10. These queries are largely addressed by the Complaint but, in any case, are irrelevant. Again, the District cites no authority for the proposition that courts should hold mini-trials (or entertain mini-12(b)(6) motions) on each example adduced in support of a custom. What matters is that Plaintiffs plausibly alleged that, in a discrete and specific type of situation, MPD officers retain seized cell phones in a discrete and specific way that violates the Fourth Amendment. These commonalities establish a custom.

## BACKGROUND

Taking all of the Complaint’s well-pleaded allegations as true, on August 13, 2020, Plaintiffs were participating in a racial justice protest when MPD officers charged at them and surrounded them. Compl. ¶ 19-20. The officers arrested approximately 40 people, including Plaintiffs and putative class members, seized their cell phones and other property incident to the arrest, and held Plaintiffs and the putative class members overnight. *Id.* ¶¶ 20-21. The next day, after the United States Attorney’s Office (USAO) declined to press charges, MPD released Plaintiffs and the putative class members but retained their phones. *Id.* ¶¶ 20-23. Despite multiple requests, MPD continued holding each Plaintiff’s phone for nine months or more after seizing it.

*Id.* ¶¶ 37-42. As of today, the District has provided no indication that it returned all the putative class members' phones.

The length of time MPD retained Plaintiffs' phones was unexplained and unjustified. The officers lacked any basis to think the phones were stolen, given that Plaintiffs were arrested as part of the clearing of a protest, hardly a context associated with phone heists. Moreover, Plaintiffs have no reason to think their phones contained data related to a crime. Even if the police did, such suspicions would not have justified the length of the seizures. MPD policy requires officers planning to search a seized cell phone to apply for a warrant no later than 48 hours after the seizure. *Id.* ¶ 28 (citing Metro. Police Dep't, Special Order 15-08, *Cell Phone Recovery Process* § III.C (Apr. 14, 2015)). And MPD has access to Cellebrite Kiosk technology, "which generally can extract data from a cell phone in about 30 minutes without damaging the phone or requiring the phone's continued retention for authentication purposes." *Id.* ¶ 29. Because MPD has the administrative and technological capacity to search a cell phone and extract its data within a few days, any interest it had in doing so here would not have justified holding the phone for months or years.

The District's prolonged retention of Plaintiffs' phones was no aberration; MPD routinely extends phone seizures far longer than warranted. In 2017, a few years before the incidents at issue, MPD arrested 200 people at Inauguration Day protests, seized phones from "all or nearly all" of them and held the phones "for at least eight months." *Id.* ¶ 53(a). It did so even though, as here, the circumstances of the arrests provided no basis to think the phones were stolen; MPD's technological and administrative capacity allowed it to extract any data within days; and many of the owners requested their phones back. *See id.* A year later, MPD arrested someone at another protest and held their cell phone and iPad for at least three years after releasing them, even though

doing so was, for similar reasons, unjustified. *Id.* ¶ 53(b). MPD also retained a cell phone from Oyoma Asinor, an individual arrested at a different 2020 protest, for over 11 months in similar circumstances. *Id.* ¶ 53(c).

MPD has unreasonably retained cellphones seized from people arrested for offenses besides ones related to protesting. In November 2019, officers seized cell phones from a theft suspect and held the phones “for approximately eight months, despite requests for their return and despite the fact that the cell phones were unrelated to the theft charge.” *Id.* ¶ 53(f). In June 2020, officers seized a robbery suspect’s phone and held it, “despite requests for its return,” for at least 18 months “after a trial, at which the cell phone was not introduced as evidence.” *Id.* ¶ 53(e). In November 2020, MPD took a phone belonging to a person charged with unauthorized use of a vehicle and held it for at least a year even though MPD “agreed that the cell phone should be released.” *Id.* ¶ 53(g). MPD retained a robbery suspect’s phone that “had no evidentiary value” for 15 months after the individual pleaded guilty, *id.* ¶ 53(d); two phones for over four months after releasing the owner without charges, *id.* ¶ 53(h); and another individual’s phone for “over a year and a half after the charges [against that individual] were dismissed,” *id.* ¶ 53(i).

The frequency with which MPD retains arrested persons’ phones without reason has led it to obtain a “large plastic bin” that it filled with cell phones seized but not returned. *Id.* ¶ 53(a)(i), (a)(ii). On one occasion, when a former arrestee sought her phone back and officers referred her to the bin, she could not find the phone she was looking for but did locate one seized from her on another occasion. *Id.* ¶ 53(a)(ii). Officers did not allow her to reclaim it. *Id.*

MPD’s mishandling of property has generated local and national attention. The District’s Police Complaints Board published a report in 2019 raising concerns that MPD officers failed to return property in violation of the Department’s written policies. *Id.* ¶ 54. After interviewing

several local criminal defense attorneys, *The Atlantic* published an article concluding that MPD routinely retains phones for long periods of time, amounting to what one attorney described as “legal robbery.” *Id.* ¶ 54.

On November 4, 2021, Plaintiffs sued the District for the length of time it held their phones. The lawsuit asserted Fourth Amendment, Fifth Amendment, and conversion claims and sought injunctive, declaratory, and compensatory relief on behalf of the Plaintiffs and classes of similarly situated individuals who were arrested at the same protests and had their phones seized and retained without justification. The government successfully moved to dismiss. Plaintiffs then appealed the dismissal of the Fourth Amendment claim as well as the Court’s denial of supplemental jurisdiction over the conversion claim (which was predicated on the dismissal of the federal claims) and the denial of class certification (which was predicated on the dismissal of the case as a whole).

The D.C. Circuit reversed. In an opinion that decided this case in consolidation with *Asinor v. District of Columbia*, a matter raising similar issues, the court held that “[w]hen the government seizes property incident to a lawful arrest, the Fourth Amendment requires that any continued possession of the property must be reasonable.” *Asinor v. District of Columbia*, 111 F.4th 1249, 1252 (D.C. Cir. 2024). The court further held that the plaintiffs in both cases stated Fourth Amendment claims for violating this requirement because they “have alleged that the seizures at issue, though lawful at their inception, later came to unreasonably interfere with their protected possessory interests in their own property.” *Id.* at 1255, 1261. Additionally, because this Court’s rulings on the conversion claim and class certification derived from its constitutional holding, the Circuit vacated those judgments and remanded. The District now moves to dismiss for a second time, raising arguments solely on municipal liability and supplemental jurisdiction.

## LEGAL STANDARD

A complaint need only provide “a short and plain statement . . . showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). In ruling on a motion to dismiss, the Court must accept as true all facts plausibly pleaded in the complaint, drawing all reasonable inferences in plaintiffs’ favor. *Hurd v. District of Columbia*, 864 F.3d 671, 678 (D.C. Cir. 2017). “Plausibility does not mean certainty,” only that the claim “rises ‘above the speculative level.’” *Sandvig v. Sessions*, 315 F. Supp. 3d 1, 11 (D.D.C. 2018) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). To the extent inferences must be drawn to show that the defendant is liable, they must merely be reasonable, *Hurd*, 864 F.3d at 678 (citing *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015)), and need not be the only possible inferences. *Evangelou v. District of Columbia*, 901 F. Supp. 2d 159, 170 (D.D.C. 2012). The standard for plausibly pleading a claim is a “relatively low bar.” *Holt v. Walsh Grp.*, 316 F. Supp. 3d 274, 282 (D.D.C. 2018).

## ARGUMENT

Plaintiffs have plausibly alleged that the District is liable for the prolonged retention of their phones; consequently, there is no basis to dismiss Plaintiffs’ Fourth Amendment claims (Part I). As to the conversion claims, because they arise from the same nucleus of operative facts as the Fourth Amendment ones, this Court has supplemental jurisdiction over them and they should proceed as well (Part II).

### I. Plaintiffs Have Stated a Claim for Municipal Liability.

Stating a claim for District liability under 42 U.S.C. § 1983 requires plausibly alleging, first, a predicate constitutional violation, and second, a District custom or policy that caused it. *See Baker v. District of Columbia*, 326 F.3d 1302, 1306 (D.C. Cir. 2003). The D.C. Circuit’s ruling on

appeal resolved the first element. *Asinor*, 111 F.4th at 1255. Thus, the District contests only the second. *See* MTD 9.

A plaintiff can plead that element in several ways. *Baker*, 326 F.3d at 1306-07. Here, Plaintiffs advanced a custom theory, alleging that the District adopted “a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law.” *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (plurality opinion) (cleaned up). Pleading a custom requires plausibly alleging that the custom comprises incidents that “coalesce into a discernible policy,” as opposed to a series of unrelated events, *Carter v. District of Columbia*, 795 F.2d 116, 123 (D.C. Cir. 1986); that the custom is “persistent and widespread,” *Hurd v. District of Columbia*, 997 F.3d 332, 338 (D.C. Cir. 2021) (quoting *Connick v. Thompson*, 563 U.S. 51, 61 (2011)); and that it was the “moving force” behind the predicate constitutional violation, *see Baker*, 326 F.3d at 1306 (citing *City of Canton, Ohio v. Harris*, 489 U.S. 378, 389 (1989)). As explained below, plausibly alleging these elements is a “relatively low bar,” *Holt*, 316 F. Supp. 3d at 282 (Part A); Plaintiffs have cleared it (Part B); and the District’s arguments do not show otherwise (Part C). Thus, Plaintiffs have plausibly alleged that the District is responsible for their injuries.

**A. Plausibly alleging a custom claim is not a demanding task.**

*Frederick Douglass Foundation, Inc. v. District of Columbia*, 82 F.4th 1122 (D.C. Cir. 2023), the D.C. Circuit’s most recent custom case, explained the proper approach for reviewing custom claims at the pleading stage. There, the court held that the plaintiff plausibly alleged a custom theory (along with several other bases for municipal liability) by “alleg[ing] facts *suggesting*” that the violation at issue arose from a “persistent and widespread” practice. *Id.* at 1148-49 (emphasis added). Although the court’s custom analysis focused on the

“persistent and widespread” inquiry, nothing in the opinion indicates that a different standard applies to the other elements of a custom claim.<sup>1</sup> Indeed, this Court, in assessing how plaintiffs can plead a practice cohesive enough to plausibly reflect a discernible “custom” (as opposed to a scattered set of incidents), has concluded that a plaintiff must allege “*facially similar* past wrongdoing.” *Leach v. District of Columbia*, 2022 WL 1316436, at \*13 (D.D.C. May 3, 2022) (emphasis added). This approach aligns with *Frederick Douglass Foundation*.

The District’s analysis does not. It argues that pleading a discernible custom requires alleging not merely “facially similar” past acts but rather “concentrated, fully packed, precisely delineated scenarios.” MTD 9. This test arises from *Carter v. District of Columbia*, but that decision reviewed a directed verdict, not a motion to dismiss, 795 F.2d at 125, as did the only other D.C. Circuit decision to invoke that standard, *see Parker v. District of Columbia*, 850 F.2d 708, 711-12 (D.C. Cir. 1988). Neither *Frederick Douglass Foundation*, *see* 82 F.4th at 1148-49, nor any other D.C. Circuit motion-to-dismiss decision has ever mentioned *Carter*’s “precisely delineated scenario” test, and the court has never implied that pleading a discernible custom requires alleging past incidents of wrongdoing that meet it.

This reluctance to apply the *Carter* standard at the pleading stage comports with the way courts generally assess municipal liability when reviewing motions to dismiss. In discussing “failure to train,” an alternative theory of municipal liability, the D.C. Circuit explained that “alleging municipal liability under section 1983 for failure to train, is to be judged not by the standards that would govern a decision on the merits, but by the liberal standard of Rule 8.” *Atchinson v. District of Columbia*, 73 F.3d 418, 421 (D.C. Cir. 1996); *see also Odom v. District of*

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<sup>1</sup> The court noted in passing that the District’s execution of the challenged practice was “unvarying,” but, in making this descriptive observation, the court did not indicate that it was articulating a pleading requirement. *See Frederick Douglass Foundation*, 82 F.4th at 1149.

*Columbia*, 248 F. Supp. 3d 260, 267 (D.D.C. 2017) (recognizing *Atchinson*’s vitality post *Iqbal*). Other courts have reached similar conclusions. *Adkins v. City of New York*, 143 F. Supp. 3d 134, 142 (S.D.N.Y. 2015) (declining to rely on *Carter* or other decisions involving summary judgment or directed verdicts because they “applied different standards than those the Court is charged with applying” at the pleading stage); *see also Owens v. Baltimore City State’s Att’y’s Off.*, 767 F.3d 379, 403 (4th Cir. 2014) (observing that pleading a municipal liability claim is “by definition, easier” than proving one and that the factual allegations underlying it “need not be particularly detailed”). And, while this Court had sporadically applied the *Carter* standard to motions to dismiss, *compare Woods v. District of Columbia*, 2020 WL 6392775, at \*5 (D.D.C. Nov. 2, 2020) (invoking it in that setting), *with Leach*, 2022 WL 1316436, at \*13 (omitting it), *Frederick Douglass Foundation* confirms that doing so is improper. At this stage, that decision’s lenient standard for plausibly alleging a custom, and not the *Carter* “concentrated, fully packed, precisely delineated” requirement, controls.

**B. Plaintiffs have plausibly alleged a custom claim under *Frederick Douglass Foundation* and under *Carter* as well.**

Plaintiffs have plausibly alleged that their injuries arose from a District custom of “retaining cell phones seized from arrestees, where officers have no basis to believe the cell phones constitute physical evidence of a crime or contain contraband, for longer than is reasonably necessary for any legitimate law enforcement purpose.” Compl. ¶ 51. The Complaint’s allegations plausibly show (1) the conduct composing the custom is sufficiently similar to “coalesce into a discernible policy,” *Carter*, 795 U.S. at 123; (2) that the custom is “persistent and widespread,” *Hurd*, 997 F.3d at 338; and (3) that the custom was the “moving force,” *Baker*, 326 F.3d at 1306, behind the predicate constitutional violation: the prolonged seizure of Plaintiffs’ phones.

Starting with the first issue, the Complaint’s examples coalesce into a discernable custom. As plausibly alleged in the Complaint, the 200-plus prior incidents of unreasonable seizures all arose in the same context: a seizure of a cell phone (or in one case, an iPad) effectuated incident to an arrest.<sup>2</sup> Additionally, as plausibly alleged, they all involved the same injury (prolonged deprivation of a device), offended the same constitutional provision (the Fourth Amendment), violated the same legal principle arising from that constitutional guarantee (the prohibition on retaining seized items when the initial justification expires and no new one emerges), and did so in a similar way: officers held each seized item after any concerns about officer safety expired, after any basis for suspecting it stolen dissipated, and for far longer than needed for any evidentiary purpose (extracting its data or introducing it in court). *See* Compl ¶ 53(a)-(i). Further, the Complaint offers no basis to think a new justification arose after those others dissipated. *See id.*

These commonalities not only tie Plaintiffs’ examples to each other but also link the examples to the incidents giving rise to Plaintiffs’ own claims. Plaintiffs’ examples of past misconduct involve the same law enforcement interests that the D.C. Circuit found implicated in the seizures of Plaintiffs’ phones. In the examples, as in Plaintiffs’ experiences, MPD’s acquisition of the devices incident to arrest gave it interests in holding the seized items to “protect the safety of arresting officers and [] prevent any destruction of evidence.” *Asinor*, 111 F.4th at 1255.

Additionally, the seizures in both Plaintiffs’ examples and in their experiences, the seizures outlasted the government’s interests in similar ways. The government’s safety interest would have expired when MPD either released the owner or had the ability to allow the owner’s designee to

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<sup>2</sup> As to each example in the Complaint, Plaintiffs either state expressly that the device seizure occurred incident to arrest, *see* Compl. ¶ 53(a)-(c), or describe the seizure in terms that clearly imply that it was incident to arrest—for instance, that the device was seized from a “suspect” of a particular crime, *see e.g., id.* ¶ 53(d)-(g), from a person who was “no-papered,” *id.* ¶ 53(h), or from a person who was charged with a crime, *see id.* ¶ 53(i).

collect the item. These circumstances would have alleviated the officers' need to store the item for safekeeping while they detained the owner. Yet, in each of Plaintiffs' examples (and in Plaintiffs' cases), MPD retained the seized item for months or years after releasing the owner without charges or after the owner's case concluded via trial or plea. *See* Compl. ¶ 53(a)-(i). Thus, MPD extended the seizures longer than the officer-safety justification allowed. *See Asinor*, 111 F.4th at 1255 (concluding in Plaintiffs' cases that MPD's "legitimate interests" in Plaintiffs' phones, including the safety one, dissipated long months before it returned the phones).

As for the government's interest in preserving evidence, both for Plaintiffs themselves and in the examples they describe, any investigatory objective or interest in evidence preservation expired long before the seizures concluded. As common consumer items, the devices were not contraband, and so MPD had no basis to keep them on that basis. *See id.* at 1260-61 (observing that police can keep contraband but nonetheless holding the seizure of Plaintiffs' phones unreasonable). Plaintiffs also plausibly allege that MPD retained all the devices after it lacked any reasonable basis to believe they were stolen. *See* Compl. ¶¶ 20-21 (alleging that MPD seized Plaintiffs' cell phones after arresting them in the context of breaking up a protest, not a setting likely to involve stolen goods); *id.* ¶ 53(a)-(c) (other incidents starting with protest arrests); *id.* ¶ 53(d), (f), (h), (i) (alleging that the device had "no evidentiary value," was "unrelated" to the owner's charges, or that the seizure continued after the owner was released or had charges dismissed); *id.* ¶ 53(g) (MPD retained phone after agreeing it should be returned); *id.* ¶ 53(e) (MPD retained a phone over a year after the owner's trial, where it "was not introduced as evidence").

To the extent any device could have otherwise had law enforcement value, the only conceivable reason, based on the Complaint's allegations, is that police expected its data to contain evidence or information that could assist with an investigation. *See id.* ¶ 53(a)-(i). As to that

possibility, Plaintiffs plausibly alleged that MPD could have obtained a warrant within days and extracted the data within minutes, all without damaging the phone or needing to keep it for authentication purposes. *See id.* ¶¶ 28-30, 52. Yet, for both Plaintiffs and the individuals discussed in their examples, MPD retained the devices for months and years. *See id.* ¶¶ 28-30, 53(a)-(i). The Complaint offers no basis for concluding that another justification emerged in that time. *See id.* Thus, Plaintiffs’ own cases and their examples all violated the Fourth Amendment under *Asinor* for similar reasons. *See* 111 F.4th at 1255-56 (holding that a seizure violates the Fourth Amendment when it continues past its original justification without a new rationale arising).

Turning to the second element of a custom claim, the Complaint plausibly alleges that the pattern or policy that unites Plaintiffs’ experiences and the Complaint’s other examples is widespread and persistent. Plaintiffs have identified over 200 similar incidents where MPD retained an arrestee’s cell phone for months or years after the justification for seizing it expired and no new one emerged. Compl. ¶ 53(a)-(i). Plaintiffs have also alleged that MPD had to obtain “large bin” just to hold the phones it seized but failed to give back, *id.* at ¶ 53(a)(i)-(a)(ii); that the Police Complaints Board documented repeated instances where MPD officers improperly failed to return property in violation of the Department’s written policies, *id.* ¶ 54; and that an *Atlantic* article found that MPD frequently engages in prolonged property seizures like the ones that occurred here, *see id.* These allegations make the existence of a widespread and pervasive custom plausible.

Finally, Plaintiffs have plausibly alleged that the custom was the moving force behind the predicate Fourth Amendment violation. The allegations discussed above plausibly show that, when the District arrests someone and takes their cell phone, its “standard operating procedure,” *Hurd*, 997 F.3d at 338 (quoting *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989)), is to retain the

phone long after its officers have a legitimate reason for doing so. That is precisely what occurred here. *See Asinor*, 111 F.4th at 1255-56 (holding Plaintiffs plausibly alleged the seizure violated the Fourth Amendment on such grounds). Given the similarity between Plaintiffs’ claims and the challenged practice, *see pp. 9-12, supra*, it is reasonable to infer that MPD retained Plaintiffs’ phones as long as it did because that’s just how MPD does business. For these reasons, Plaintiffs have pleaded a plausible custom claim under *Frederick Douglass*.

Moreover, even if, contrary to that decision, the burden of showing “concentrated, fully packed, precisely delineated scenarios” applied at the pleading stage, Plaintiffs have met it. That framework serves to distinguish a set of “scattered” incidents that “do not line up” from ones that “coalesce into a discernible ‘policy.’” *Carter*, 795 F.2d at 123-24. The Complaint accomplishes this objective because all its examples involve the same specific “scenario.” In each one, officers first conduct an arrest. Then, they seize an electronic device that has law enforcement value, if at all, because (a) the police need to hold it for safekeeping while the owner is detained, (b) it might have been stolen, or (c) its data may have investigatory or evidentiary uses. Finally, the officers retain the device after (a) releasing the owner or having an opportunity to give the phone to a designee so they no longer need to keep it for safekeeping, (b) determining it wasn’t stolen, and (c) months or years longer than necessary to lawfully extract that data—all without any new justification emerging. This case, thus, differs from *Carter* itself, where the plaintiff attempted to establish a custom of “excessive force” based on incidents where officers used quite different degrees of force in very different settings, ranging from arrests to custodial detentions. *See id.* Those incidents lacked a common form; here, the Fourth Amendment violations in Plaintiffs’ examples share the same contours. Plaintiffs thus satisfy *Carter* by doing what the plaintiff in that case did not: presenting a “pattern or policy [that] a trier could see.” *Id.* at 125.

In sum, Plaintiffs have plausibly alleged that their injuries were caused by a widespread, pervasive practice of MPD officers retaining cell phones seized from arrested persons long after the rationales for holding the items expired. They have thus stated a custom claim.

### **C. The District's Arguments for Dismissal Are Unpersuasive.**

The government contends that Plaintiffs' custom examples are not pleaded with adequate specificity to form a discernible custom and that there are not enough of them to plausibly contend that the challenged practice is widespread and persistent. Neither is correct.

#### **1. The District is wrong that Plaintiffs failed to allege a discernable custom.**

The District's demand for details is flawed for several reasons. For starters, the government bases this argument on the *Carter* standard which, as discussed above, does not apply. More fundamentally, the District offers little analysis as to the relevance of the facts it contends Plaintiffs omitted. A complaint could always allege more. The key question is whether it alleged enough.

Here, it has. As explained above, the Complaint recounts past examples with sufficient detail to plausibly allege that, in each one, officers violated the Fourth Amendment in the same discrete and specific manner. Especially at the pleading stage, this suffices to establish a discernible practice. For instance, in *Owens v. Baltimore City State's Att'ys Off.*, 767 F.3d 379, 403 (4th Cir. 2014), the Fourth Circuit held that the plaintiff plausibly alleged a custom of police officers withholding exculpatory evidence by averring the existence of "reported and unreported cases and numerous successful motions" involving *Brady* violations from around the same time as the *Brady* violations in his own criminal case. The plaintiff did not describe the circumstances of the other cases and motions; he did not specify whether they involved officers withholding evidence intentionally or negligently, whether the officers acted on orders from the prosecutors, or whether the type of evidence withheld in the other cases was similar to the type of evidence withheld in his

own. *See id.* at 403-04. Nonetheless, the court deemed his allegations sufficient to plead a custom claim. *Id.* The First Circuit recognized a custom claim in similar circumstances. *See Haley v. City of Bos.*, 657 F.3d 39, 53 (1st Cir. 2011); *see also Owens*, 767 F.3d at 403-04 (discussing *Haley*). Plaintiffs here have gone further, alleging a set of incidents that not only violate the same constitutional rule but also do so in the same way. No further details are necessary.

This conclusion is bolstered by examining the four types of facts that the District asserts Plaintiffs omitted. Each type is either plausibly alleged by the Complaint, irrelevant, or both. First, the government suggests that Plaintiffs' past examples should count only if they involve individuals who, like Plaintiffs, were released without charges. MTD at 9-10. The District provides no reason for demanding this overlap, and the constitutionality of Plaintiffs' examples does not depend on it. Even if some examples involved people facing active investigations, the Complaint's allegations, and reasonable inferences therefrom, plausibly show that the seizures of those individuals' phones lasted longer than any such investigation would have justified and did so for similar reasons. Specifically, the Complaint plausibly alleges that, in each example, the seizure persisted after its original rationales concluded and without any new one emerging: officers retained the devices after they no longer needed to hold it for safekeeping, after the officers dispelled suspicions that the phone was stolen, and longer than reasonably necessary to lawfully extract any data (which, in each example, was the only source of investigative or evidentiary value the device could conceivably have had). *See* Compl. ¶ 53(a)-(i). Thus, to the extent some examples involve people facing charges, the length of the phone seizure still violated the Fourth Amendment in the same fundamental way as in Plaintiffs' experience and in the other examples.

Second, the District suggests that Plaintiffs' examples fail to consistently allege that owners asked for the return of their phones. MTD 9-10. Yet the Complaint's examples repeatedly describe

how the seizures persisted after owners “requested” their device back (or that MPD “refused” to return the device, which in turn implies that there was a request to be declined). Compl. ¶ 53(a)-(i). The District’s only counterpoint is that the allegations about the 2017 Inauguration Day protests allege that “many” protestors asked for their phones back without supplying a specific number. MTD 9-10. This objection is trivial. Many means a “large but indefinite number,”<sup>3</sup> and even a “large” share of the 200 extended phone seizures arising from the Inauguration Day protests would exceed the number of examples courts generally require to establish a custom, which may be under 10, as discussed in the cases cited in Part I.C.2, below.

More fundamentally, the duration of a property seizure can be unreasonable even if owners do not request the return of their items. Officers have an affirmative duty to release property when the justification for holding it terminates. The D.C. Circuit made this clear: “If the rationales that justified the initial retention of the plaintiffs’ effects dissipated, and if no new justification for retaining the effects arose, *then the Fourth Amendment obliged the MPD to return the plaintiffs’ effects.*” *Asinor*, 111 F.4th at 1257 (emphasis added); *see also id.* at 1255, 1261 (holding that Plaintiffs’ stated a prolonged seizure claim without mentioning their requests for the return of their phones). Thus, it is ultimately irrelevant whether the individuals in Plaintiffs’ examples asked for their items back. MPD officers had an obligation to return them when the rationale for the seizure terminated, which the Complaint plausibly alleges they did not do.

Third, the District errs in contending that the Court must strike Plaintiffs’ examples because they fail to plead that officers refused to return individuals’ property. MTD 9-10. The District insists on this detail in part because it assumes Plaintiffs defined their custom as one of where

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<sup>3</sup> *Many*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/many> (last visited Nov. 19, 2025).

“MPD could have returned their property but *refused*” to do so. MTD 10. In fact, the Complaint defines the custom as one of officers “retaining cell phones seized from arrestees . . . longer than reasonably necessary,” whether a refusal was involved or not. Compl. ¶ 51. Thus, Plaintiffs’ articulation of the custom does not inherently require officers to refuse to return seized items.

The District’s emphasis on “refusals” also appears to reflect a view that a seizure’s duration violates the Fourth Amendment only if police extended it through affirmative, intentional conduct. *See* MTD 10. Even if such a requirement existed (which, as discussed below, it does not), Plaintiffs’ examples meet it. Those incidents, as noted, generally involve MPD retaining phones after requests for the item’s return. *See* Compl. ¶ 53(a)-(i). Granting Plaintiff reasonable inferences, that makes it plausible that MPD officers affirmatively and intentionally caused the seizure to persist. The District makes much of the fact that two of Plaintiffs’ examples involve MPD losing individuals’ phones, MTD 10, but its assertion that the rest of the examples could have arisen from similar circumstances is pure speculation, at best reflecting an alternative plausible account that does not justify dismissal given that Plaintiffs’ explanation is plausible too, *see Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015) (“A complaint survives a motion to dismiss even if there are two alternative explanations, one advanced by the defendant and the other advanced by the plaintiff, both of which are plausible.” (cleaned up)).

More fundamentally, the District is wrong to suggest that the Fourth Amendment bars prolonged seizures only when the extension arises from officers’ affirmative, intentional acts. Affirmative conduct is not required to make property retention unlawful: omissions (like failing to facilitate the return of an item) can be just as unconstitutional as actions (like refusing to give the phone back). *See United States v. Place*, 462 U.S. 696, 709-10 (1983) (holding that officers’ failure to “diligently pursue their investigation” made property seizure unreasonable). Nor is

intentionality required to make a seizure unreasonable. While officers must act intentionally to *initiate* a seizure, *Brower v. Cnty. of Inyo*, 489 U.S. 593, 596 (1989), the reasonableness of their conduct is an objective inquiry, *see Whren v. United States*, 517 U.S. 806, 813-14 (1996). Basic Fourth Amendment doctrine thus make clear that, although officers cannot seize a person or an item unintentionally, the seizure can be unreasonable even absent intent to violate the Fourth Amendment.

Cases from the Supreme Court and federal appeals courts regularly apply this principle. Courts have held seizures of property unlawful based on their duration even when the officer did not intend to prolong the seizure or did not do so based on affirmative conduct. *See Place*, 462 U.S. at 710; *United States v. Mitchell*, 565 F.3d 1347, 1353 (11th Cir. 2009) (holding that officers unreasonably extended seizure where they prolonged it because they “simply believed that there was no rush” to secure a warrant). Courts likewise do not consider intent in evaluating person seizures, a related setting, *see Asinor*, 111 F. 4th at 1256-57. Officers who detain arrested persons for more than 48 hours without a hearing, thereby violating *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) cannot avoid liability by saying “I forgot.” *See Brown v. Knapp*, 75 F.4th 638, 651-52 (6th Cir. 2023) (rejecting argument that establishing *Riverside* violations requires intentional conduct). These cases refute the District’s contention that the Complaint must allege prolonged seizures arising from affirmative, intentional actions (though, in any case, Plaintiff largely did so).

Fourth and finally, the District errs in its assertion that Plaintiffs’ examples can inculcate the District only if they rule out the possibility that “any delay” in the device’s return was “attributable to USAO” holds on the seized items. MTD 11. In discussing its examples, the Complaint consistently alleges it was MPD that did not return the phones (or, sometimes, “the

government,” which when read in context, can reasonably be inferred to mean the same). Compl. ¶ 53(a)-(i). This makes it plausible that MPD acted at least partially on its own. In any case, nothing in the Complaint suggests that USAO holds were the sole or even partial cause of the prolonged retention in Plaintiffs’ examples. Once again, the District’s speculation that they might have been, at best, provides an alternative, plausible account, which offers no basis for dismissal given that Plaintiffs’ version of events is plausible as well. *See Banneker Ventures*, 798 F.3d at 1129.

Moreover, as a legal matter, the District is wrong to assert that the USAO’s possible role in the duration of the seizures insulates the District from liability. The District had physical custody of the devices in all the examples Plaintiffs identified. When the initial rationale for retaining the devices dissipated and no new justification arose, as Plaintiffs plausibly alleged was the case in each incident, then then the Fourth Amendment “obliged *the MPD* to return” the devices. *Asinor*, 111 F.4th at 1256 (emphasis added). Even if the USAO instructed MPD to retain the items, the officers’ decision to obey that unlawful order, and shirk their affirmative Fourth Amendment duties, was a “substantial factor,” and therefore a “moving force” behind the custom that led to Plaintiffs’ injuries. *Parker v. District of Columbia*, 850 F.2d 708, 714 (D.C. Cir. 1988); *see Northington v. Marin*, 102 F.3d 1564, 1569 (10th Cir. 1996) (observing that joint and several liability is permissible under § 1983 and collecting circuit cases to that effect); *accord Hedgepeth ex rel. Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148, 1153 (D.C. Cir. 2004) (Roberts, J.).

In the context of prolonged person seizures, which as noted is a related setting, *see Asinor*, 111 F. 4th at 1256-57, courts have rejected arguments similar to the one the District advances. For example, the Seventh Circuit held that a county sheriff’s office violated the Fourth Amendment through a policy of refusing to release individuals brought to its jail by other law enforcement

agencies unless “directed to do so by a judge or prosecutor.” *Luck v. Rovenstine*, 168 F.3d 323, 325, 327 (7th Cir. 1999). “In the final analysis,” the court reasoned, “the sheriff is the custodian of the persons incarcerated in the jail, and as such, it is he who is answerable for the legality of their custody.” *Id.* at 326. Other courts have reached similar conclusions. *See, e.g., Bernard v. City of Palo Alto*, 699 F.2d 1023, 1027 (9th Cir. 1983) (holding that county, as the entity “responsible for operating the jail [that] has custody over arrestees,” could not pass the buck for prolonged detentions to other agencies); *Nelson v. Myren*, 2014 WL 2946220, at \*6 (D.S.D. June 30, 2014) (“Even if the sheriff is not responsible for the delay in bringing an arrestee before a magistrate, he must release an arrestee who has been held longer than is reasonable.” (citation omitted)); *Blumel v. Mylander*, 954 F. Supp. 1547, 1557 (M.D. Fla. 1997) (reaching similar conclusion). Thus, because Plaintiffs alleged that the District physically held the devices at issue in their examples, any speculation that the USAO extended the seizures is immaterial. This argument, like the others the District advances, fails to undercut Plaintiffs’ plausible allegations of a cohesive, discernible custom.

**2. The District errs in arguing that, as alleged, the custom is not widespread and persistent.**

The government’s second major argument, that Plaintiffs have not pleaded a widespread and persistent custom, is similarly deficient. It is wrong to assert that several of Plaintiffs’ examples should be discounted because they are “effectively” pleaded on information on belief. MTD 11. The phrase “information and belief” never appears in the Complaint, and the government never defines what it means for allegations to invoke that standard “effectively” rather than actually. Nor do the cases it cites, which make no mention of this distinction. *See Kareem v. Haspel*, 986 F.3d 859, 866 (D.C. Cir. 2021); *United States ex rel. Conteh v. IKON Off. Sols., Inc.*, 103 F. Supp. 3d 59, 66 (D.D.C. 2015). Indeed, the examples the government assails are pleaded not on

“information and belief” but rather on information obtained from the device owners’ attorneys, *see* Compl. 53(d)-(i), a plainly plausible foundation.

The District also offers no persuasive reason to disregard Plaintiffs’ other evidence of the custom’s pervasiveness. The District emphasizes that the Police Complaints Board report covers different types of property abuses than the ones at issue here, MTD 11; however, the report’s relevance is in showing that officers repeatedly violate MPD’s property policies, a fact that supports the plausibility of Plaintiffs’ custom allegations generally. As for *The Atlantic* article, the District says nothing at all.

The District’s most sweeping argument—that Plaintiffs’ examples constitute too small a percentage of the total number of MPD seizures to plausibly allege a custom, MTD 13—is wrong as well. The D.C. Circuit has cast significant doubt on this line of argumentation, explaining that proving (let alone pleading) a custom does not require meeting a specific statistical target and therefore no “numerical standard” controls. *Carter*, 795 F.2d at 124. A contrary rule would impose massive discovery and investigative burdens on plaintiffs, making the possibility of custom claims illusory. At the pleading stage, these considerations are even more salient: Plaintiffs have had no opportunity to assess the total number of property seizures the District effected.

Perhaps for these reasons, cases evaluating custom claims, both at the pleading stage and at later phases, do so based on an absolute number of examples, not percentages. The 200-plus instances of misconduct Plaintiffs identify far exceed the number of examples courts have required. Indeed, even if Plaintiff had alleged only “a dozen or so examples,” the sum the District contends arguably survive its (misguided) culling efforts, MTD 12-13, Plaintiffs would still have pleaded many more incidents than courts generally demand. *See, e.g., Frederick Douglass Found., Inc. v. District of Columbia*, 82 F.4th 1122, 1148-49 (D.C. Cir. 2023) (holding that plaintiff alleged a

custom of selective enforcement by identifying one instance where MPD acted on a law that it had generally overlooked); *Lipman v. Budish*, 974 F.3d 726, 748 (6th Cir. 2020) (holding six examples of the custom sufficient); *Henry v. Cnty. of Shasta*, 132 F.3d 512, 518 (9th Cir. 1997), *op. amended on denial of reh’g*, 137 F.3d 1372 (9th Cir. 1998) (four instances sufficient to survive summary judgment); *Powe v. City of Chicago*, 664 F.2d 639, 651 (7th Cir. 1981) (holding that plaintiff adequately alleged municipal custom arising from four arrests “based upon the same, allegedly invalid, warrant” which “was prepared, promulgated, and executed by various employees”); *cf.* *Robinson v. District of Columbia*, 130 F. Supp. 3d 180, 196 (D.D.C. 2015) (holding that plaintiff established “sufficiently widespread” practice to survive summary judgment on deliberate indifference claim—another theory of municipal liability—based on 22 past examples of misconduct, and noting that eight incidents might have sufficed).

The District offers no case holding that Plaintiff must meet a particular statistical cutoff. The authorities it cites either rejected custom claims that were based primarily on two or fewer examples close in time to the plaintiff’s injury, *see Page v. Mancuso*, 999 F. Supp. 2d 269, 284-86 (D.D.C. 2013) (two incidents plus several seven-year-old examples insufficient); *Tabb v. District of Columbia*, 605 F. Supp. 2d 89, 96 (D.D.C. 2009) (one prior incident), or rejected claims that relied on evidence having nothing to do with the harms the plaintiff alleged, *see Egudu v. District of Columbia*, 72 F. Supp. 3d 34, 42 (D.D.C. 2014) (report raising concerns about racial disparities in arrests did not support custom of First Amendment violations); *Hunter v. District of Columbia*, 824 F. Supp. 2d 125, 133 (D.D.C. 2011) (seven-year-old report alleging “higher than average,” though not necessarily wrongful, arrests for disorderly conduct did not support custom leading to plaintiff’s allegedly unlawful detention on a different charge).

In sum, the Plaintiffs have plausibly alleged that their injuries arose from a District custom of retaining arrestees' cell phones longer than reasonably necessary for any law enforcement purpose. The District's arguments to the contrary are baseless.

## **II. Supplemental Jurisdiction Over Plaintiffs' Conversion Claim Is Proper.**

The government contends the Court should decline supplemental jurisdiction over Plaintiffs' conversion claim if "the Court dismisses Plaintiffs' Fourth Amendment claim." MTD 13. Because the Court should not dismiss that claim, and because the District offers no other reason for denying supplemental jurisdiction, the conversion claim should not be dismissed either.

## **CONCLUSION**

For the foregoing reasons, the District's motion should be denied.

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Respectfully Submitted,

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