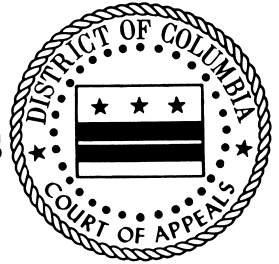


IN THE DISTRICT OF COLUMBIA COURT OF APPEALS



Clerk of the Court  
Received 03/04/2022 11:41 AM

---

No. 21-CV-511

---

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

**Appellant,**

**v.**

**DISTRICT OF COLUMBIA, ET AL.,**

**Appellees,**

---

Appeal from the Superior Court for the District of Columbia  
(Case No. 2020 CA 003492 B)  
(Hon. William M. Jackson)

---

**AMICUS BRIEF IN SUPPORT OF AFFIRMANCE FILED ON BEHALF OF  
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, PUBLIC  
DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA, AMERI-  
CAN CIVIL LIBERTIES UNION OF THE DISTRICT OF COLUMBIA,  
AND WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS  
AND URBAN AFFAIRS**

---

Jon Greenbaum (D.C. Bar # 489887)  
Arthur Ago (D.C. Bar # 463681)  
Alexander Brooks (C.A. Bar # 340178)\*  
Lawyers' Committee for Civil Rights Under Law  
1500 K Street N.W., Suite 900  
Washington, D.C. 20005  
(202) 662-8340  
\*Admitted in California only. Practicing under the  
supervision of D.C. Bar members.

Paul J. Kiernan (D.C. Bar # 385627)  
Holland & Knight LLP  
800 17<sup>th</sup> Street, N.W., Suite 1100  
Washington, D.C. 20006  
(202) 663-7276  
Paul.Kiernan@hklaw.com  
*Counsel for Lawyers' Committee for Civil Rights  
Under Law*

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

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

Washington Lawyers' Committee for Civil Rights  
and Urban Affairs  
700 14th St N.W., Suite 400  
Washington, DC 20005  
(202) 319-1000

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1, none of the amici curiae are entities that issue stock or that have parent corporations. There is no public ownership of any of the amicus parties.

/s/ Paul J. Kiernan

Paul J. Kiernan

## TABLE OF CONTENTS

	<b>Page</b>
INTERESTS OF AMICI CURIAE.....	1
SUMMARY OF ARGUMENT .....	3
ARGUMENT .....	5
1.    THE 2020 ACT IS SQUARELY WITHIN THE LEGISLATIVE POWER OF THE DISTRICT COUNCIL AND IT ADDRESSES ISSUES OF VITAL PUBLIC INTEREST.....	5
a. Prior history of police secrecy and its consequences.....	5
b. The Act is intended to bring greater transparency and accountability to the supervision of the Metropolitan Police Department.....	9
2.    THE ACT DOES NOT VIOLATE THE SEPARATION-OF-POWERS DOCTRINE BECAUSE THE ACT DOES NOT LIMIT ANY EXECUTIVE FUNCTION OR TRANSFER ANY EXECUTIVE FUNCTION TO THE LEGISLATURE.....	13
3.    POLICE OFFICERS HAVE NO PRIVACY INTEREST IN PUBLIC RECORDS OF THEIR PUBLIC DUTIES.....	17
CONCLUSION .....	20

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
 <b>Cases</b>	
<i>Bergman v. District of Columbia</i> , 986 A. 2d 1208 (D.C. 2010).....	16
<i>District of Columbia v. Fraternal Order of Police</i> , 75 A.3d 259 (D.C. 2013) .....	18
<i>Fraternal Order of Police Metropolitan Police Labor Committee v. District of Columbia</i> , 124 A.3d 69 (D.C. 2015) .....	7, 18
<i>Fraternal Order of Police v. District of Columbia</i> , No. 2020 CA 003492 (D.C. Super. Ct. July 16, 2021).....	15, 17, 18
<i>Garrison v. Louisiana</i> , 379 U.S. 64 (1964).....	20
<i>Patrolmen’s Benevolence Ass’n of City of New York v. DeBlasio</i> , 171 A.D. 3d 636 (1st Dep’t, 2019), <i>leave to appeal denied</i> , 35 N.Y.S. 3d 979 (2020).....	18
<i>United States v. Wecht</i> , 484 F.3d 194 (3d Cir. 2007) .....	20
 <b>Statutes</b>	
D.C. Code § 5-331.08 .....	14
D.C. Code § 5-331.09 .....	14
D.C. Code § 5-331.11(b).....	14
D.C. Code § 5-337.01 .....	17
D.C. Code §§ 22-3501 et seq.....	14
D.C. Law § 10-151.....	14
D.C. Code § 2-534(a)(2) .....	7

D.C. Code § 5-331.01 et seq. ....	14
D.C. Code § 5-101.03 .....	13

## **INTERESTS OF AMICI CURIAE**

Amici are nonprofit organizations with a demonstrated interest in questions of police reform, public accountability and transparency, civil rights, and the equal protection of the laws for all members of the community. On behalf of their members, the organizations have been active in advocating for police reform and accountability, including by participating in lawsuits aimed at upholding efforts at reform. Amici were permitted to participate as amici in the Superior Court action below.

The Lawyers' Committee for Civil Rights Under Law is a national nonprofit legal organization based in the District of Columbia. The Lawyers' Committee focuses on combating racial discrimination in core areas, including racism in the criminal justice system, police brutality and misconduct, mass incarceration of Black and Brown people, and the criminalization of poverty. As an organization that seeks to uphold the equal protection of the law, especially the Black Americans who have disproportionately borne the brunt of the District's criminal justice and policing systems, the Lawyers' Committee has information which should be useful to the Court in assessing the legislation under review and the arguments in support of the law.

The Public Defender Service for the District of Columbia is a federally funded, independent organization that provides and promotes quality legal representation to indigent adults and children facing a loss of liberty in the District of Columbia, thereby protecting society's interest in the fair administration of justice. As

an organization servicing the population that often experiences the most frequent and violent interactions with members of the police union, PDS has important interests in the decision of the Court.

The American Civil Liberties Union of the District of Columbia is the local affiliate of the ACLU, an organization that is dedicated to protecting and expanding the civil rights and civil liberties of all Americans. ACLU-DC has a demonstrated interest in criminal-justice reform and in protecting people's right to be free from law-enforcement misconduct.

The Washington Lawyers' Committee for Civil Rights and Urban Affairs works to create legal, economic, and social equity through litigation, education, and public-policy advocacy. Nowhere is systemic racism more pronounced or more harmful than in our criminal-justice system, including policing practices which have resulted in both under- and over-policing of communities of color and the disproportionate incarceration of Black Americans. Based on its longstanding efforts to reform policing practices and the criminal system, it is WLC's strongly held view that such reform requires transparency and accountability to the public.

### **SUMMARY OF ARGUMENT**

This Court should affirm the trial court's judgment dismissing the challenge filed by appellant Fraternal Order of Police (FOP) to the constitutionality of Subtitle



B of the Comprehensive Policing and Justice Reform Amendment Act of 2020 (the Act).<sup>1</sup>

Section 103 of the Act requires the Mayor to “publicly release the names and body-worn camera recordings of all officers who committed [an] officer-involved death or serious use of force within five business days of such an event.” D.C. Act 23-336, 67 D.C. Reg. 9148. The FOP filed suit in the Superior Court, arguing that Section 103 violates the separation of powers by removing the Mayor’s discretion to release the recordings and that it violates the substantive due process rights of District police officers. The Superior Court granted the District’s motion to dismiss on July 16, 2021, holding that FOP lacked standing and that its complaint failed to state a claim. JA 448-58. On appeal, the FOP argues that its complaint adequately stated substantive due process claims and claims for violation of the separation of powers.

The subject matter of the Act is properly one for legislative action. The District has a vital interest in strengthening public confidence in law enforcement and in using transparency to promote fair and lawful police activities. The Act represents an advance in transparency and accountability which are vital ingredients in making

---

<sup>1</sup> D.C. Act 23-336, 67 D.C. Reg. 9148. As noted in the District’s Brief, the law has been re-enacted as emergency and temporary legislation, and permanent legislation has been introduced. *See* District Brief at 2 n.1. The substantive provisions discussed in the amici curiae’s brief have remained unchanged through these re-enactments.

policing fairer and the justice system more just, in particular with regard to the treatment of Black and Brown people in the District. 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.

Assuming for discussion that FOP has associational standing,<sup>2</sup> its challenge nevertheless fails. The Act does not violate the separation-of-powers doctrine because it does not undermine or otherwise impinge upon the executive powers of the Mayor.

The Act does not violate substantive due process rights because District police officers do not have a right to privacy regarding their public activities. The public has a paramount public interest in the disclosure of information about whether police officers conduct themselves properly while acting under color of law.

## **ARGUMENT**

### **1. The 2020 Act is squarely within the legislative power of the District Council and it addresses issues of vital public interest.**

#### ***a. Prior history of police secrecy and its consequences.***

---

<sup>2</sup> Amici are not separately briefing the issue of the FOP's standing.

As the technology became available, police departments in the District and around the country began requiring that officers wear body-worn cameras and record their interactions with the public. In recent years, more jurisdictions have encouraged or mandated the use of body-worn cameras, including at least seven states which mandate them.<sup>3</sup> Research shows that body-worn cameras decrease racial disparities in police disciplinary processes and increase the likelihood that citizen complaints against police lead to the discipline of police officers involved.<sup>4</sup>

In the District, there was a long history of violent and deadly encounters between police officers and members of the public. As far back as November 1998, the *Washington Post* reported that the Metropolitan Police Department shot and killed “more people per resident in the 1990s than any other large American police force.”<sup>5</sup>

---

<sup>3</sup> See generally National Conference of State Legislatures, “Body-Worn Camera Laws Database,” (April 30, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/body-worn-cameras-interactive-graphic.aspx>.

<sup>4</sup> Suat Çubukçu, Nusret M. Sahin, Erdal Tekin & Volkan Topalli, National Bureau of Economic Research, “Body-Worn Cameras and Adjudication of Citizen Complaints of Police Misconduct”, (July 2021), [https://www.nber.org/system/files/working\\_papers/w29019/w29019.pdf](https://www.nber.org/system/files/working_papers/w29019/w29019.pdf) (finding that body-worn cameras significantly decrease rates of dismissal of investigations of citizen complaints against police officers, significantly increase disciplinary actions against police officers, and decrease racial disparities in the category of ‘unsustained’ complaints).

<sup>5</sup> See series of five articles beginning with David Jackson, Jo Craven and Sari Horwitz, *Washington Post*, “D.C. Police Lead Nation In Shootings - Lack of Training, Supervision Implicated as Key Factors,” (Nov. 15, 1998), <https://www.washingtonpost.com/wp-srv/local/longterm/dcpolice/deadlyforce/police1page1.htm>.

In January 1999, Mayor Williams and Police Chief Ramsey asked the U.S. Department of Justice to review MPD's use of force and its policies.<sup>6</sup> Following a sweeping review which disclosed, among other things, that MPD lacked a comprehensive program to 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. The MOA with DOJ was intended to start the reversal of decades of misconduct and secrecy.<sup>7</sup>

The lack of transparency into MPD's operations had ripple effects in police-disciplinary matters. Prior to the Act, the system had chronic problems, including

---

<sup>6</sup> 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>.

<sup>7</sup> Although the formal camera program was not rolled out during the time frame of the MOA (2001-2008), the principles underlying that program 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](https://www.justice.gov/crt/memorandum-agreement-united-states-department-justice-and-district-columbia-and-dc-metropolitan#_1_34).

delays in adjudicating misconduct complaints and the forced rehiring of officers who had committed misconduct. Between 2006 and 2017, for example, the District was forced to rehire approximately 20 fired officers who had engaged in misconduct because MPD missed deadlines to conclude its internal investigations.<sup>8</sup> Prior to the passage of the Act, evidence possessed by the MPD of potential police misconduct—including use of serious force—was screened from the public.<sup>9</sup> The Act’s strengthened requirements affecting public access to information will increase the push for accountability.

Even after the introduction of body-worn-cameras at MPD, there was a regrettable track record where delays in disclosure or failure to disclose footage led to suspicion, delayed responses, and harm to victims or survivors. To name one 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<sup>10</sup>—the mother of Marquese Alston, who had been killed by MPD officers in June 2018—demanded again

---

<sup>8</sup> 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/>.

<sup>9</sup> Section 2-534(a)(2) of the District’s Freedom of Information Act shields 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).

<sup>10</sup> Amicus Washington Lawyers’ Committee represented Ms. Alston in connection with her efforts to secure body-worn camera footage from the city.

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.<sup>11</sup> 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.<sup>12</sup>

The police department’s tight grip on body-worn-camera footage—and the presumption against openness and disclosure—may have contributed to why it took so long for the District to remove Officer 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.<sup>13</sup>

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

---

<sup>11</sup> Sophie Kaplan, The Washington Times, “D.C. police’s refusal to release body-camera footage blasted,” (Oct. 21, 2019), <https://www.washington-times.com/news/2019/oct/21/dc-polices-re-fusal-release-body-camera-footage-bla/>.

<sup>12</sup> *Id.* The Alston footage was not made public until after the 2020 Act was adopted.

<sup>13</sup> 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.

publicly against a proposed audit of police-involved shootings.<sup>14</sup> This internal resistance to independent checks on MPD’s actions on the streets of the city underlines the critical importance of public disclosure.

***b. The Act is intended to bring greater transparency and accountability to the supervision of the Metropolitan Police Department.***

The Act’s disclosure requirements aim to correct issues involving the history of ineffective handling of police misconduct, delayed disclosure, and the lack of transparency and accountability that have plagued the District. After studying this history, the D.C. Police Reform Commission presented a report to the Council which found that “[s]ecretive internal investigations and disciplinary processes leave the public in the dark—skeptical, doubting, and unable to hold the department or individual officers to account.” The Commission therefore advised that “[t]he Council and the mayor should revise the Freedom of Information Act (FOIA) and explicitly make officers’ disciplinary records public, as other jurisdictions have done.”<sup>15</sup> While

---

<sup>14</sup> 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-review-ing-fatal-shootings-by-district-police/2020/09/15/c8ffd3b2-f75e-11ea-a275-1a2c2d36e1f1\\_story.html](https://www.washingtonpost.com/local/public-safety/dc-auditor-review-ing-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.”).

<sup>15</sup> DISTRICT OF COLUMBIA POLICE REFORM COMM’N, DECENTERING POLICE TO IMPROVE PUBLIC SAFETY: A REPORT OF THE DC POLICE REFORM COMMISSION DELIVERED TO THE COUNCIL OF THE DISTRICT OF COLUMBIA, 26 (April 1, 2021), available

the Act does not go as far as the Commission advised, it does meaningfully respond to the specific history at issue in the District. The Act's provisions also respond to the national outcry over the use of serious or deadly force by police officers against Black people and other communities of color. Correcting the District's issues with delayed disclosure realigns the District's camera 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 greatest enemies.

The lack of transparency and accountability has disproportionately harmed Black communities. Historically, there have been significant disparities between White and Black people in terms of arrests and jailing.<sup>16</sup> The disproportionate incarceration of Black residents leads to reduced job opportunities and perpetuates “a

---

at <https://dccouncil.us/wp-content/uploads/2021/04/Police-Reform-Commission-Full-Report.pdf> (hereinafter “Commission Report”).

<sup>16</sup> A report prepared by amicus Washington Lawyers' Committee for Civil Rights and Urban Affairs, determined that between 2009 and 2011, 80% of arrests in the District were of Black residents who comprise only 50.7% of the District's population. Racial Disparities in Arrests in the District of Columbia, 2009-2011, at 2-3, 7 (Jul. 2013), [https://www.washlaw.org/pdf/wlc\\_report\\_racial\\_disparities.pdf](https://www.washlaw.org/pdf/wlc_report_racial_disparities.pdf). During the same time period, about 90% of the people incarcerated by the Department of Corrections were Black. See D.C. Department of Corrections, Facts and Figures (Washington, D.C.: District of Columbia Department of Corrections, 2010).



toxic cycle of poverty, unemployment, and incarceration.”<sup>17</sup> Black people are also much more likely to be killed by legal intervention in the District compared with other large metropolitan areas in the United States.<sup>18</sup>

The Act provides the District with additional tools to work towards resolving these racial disparities and respond to adverse impacts. Many community organizations and victims’ families have called for the routine release of body-worn-camera footage. After Mayor Bowser released footage from body-worn-cameras linked to the high-profile killings of Marquese Alston, D’Quan Young, and Jeffrey Price, D.C. Black Lives Matter criticized the Mayor, saying she “could have released all of these videos on her own at any point if in the public interest. She did not.”<sup>19</sup> Organizer April Goggins asked “[i]f MPD really believes that all of these [shootings] are justified, why not release them?”<sup>20</sup> And after a 20-year-old Black father was

---

<sup>17</sup> Justice Policy Institute, “A Capitol Concern: The disproportionate impact of the justice system on low-income communities in D.C.,” (July 2010), [https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/10-07\\_exs\\_capitolconcern\\_ac-ps-rd-dc.pdf](https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/10-07_exs_capitolconcern_ac-ps-rd-dc.pdf).

<sup>18</sup> Karen Hopkins, “*Deadly Force*” Revisited: Transparency and Accountability for D.C. Police Use of Force, 72 No. 3 NAT’L LAWYERS GUILD REV. Review 139 (Fall 2015).

<sup>19</sup> Danielle Cheslow and Martin Auster Muhle, DCist, “D.C. Releases Body Camera Footage From Three Police Killings of Black Man,” (July 31, 2020), <https://dcist.com/story/20/07/31/d-c-releases-body-camera-footage-from-three-police-killings-of-black-men/>.

<sup>20</sup> Martin Auster Muhle, WAMU 88.5, “Critics Question Whether Body Cameras Have Lived Up To Their Promise In D.C.,” (Oct. 22, 2019),

killed in traffic after being chased on his moped by MPD (in violation of MPD policies), frustrated organizers demanded accountability from the officers involved as well as the release of body-worn-camera footage.<sup>21</sup> The Act’s provisions mandating the release of body-worn-camera footage are a direct response to the community’s calls for change.

The Act also increases transparency for the District’s police operations, as other jurisdictions have done. For example, the Seattle Police Department releases the names of officers who discharged a firearm and within 72 hours generally releases both SPD-produced and private video that provides a general overview of what occurred.<sup>22</sup>

A body-worn-camera program functioning with the right safeguards—including the swift disclosure requirements of the Act—can also help correct for personal

---

<https://wamu.org/story/19/10/22/critics-question-whether-body-cameras-have-lived-up-to-their-promise-in-d-c/>.

<sup>21</sup> CBS News, “Unrest in D.C. after death of Black moped driver Karon Hylton in police chase,” (Oct. 28, 2020), <https://www.cbsnews.com/news/dc-unrest-karon-hylton-death-black-moped-driver-police-chase/>.

<sup>22</sup> SPD Manual 1.115-POL (Media Release: Officer-Involved Shooting) §§ 1-7, effective June 1, 2017, <https://www.seattle.gov/police-manual/title-1---department-administration/1115---media-release-officer-involved-shooting> (accessed March 1, 2022). *See also* Commission Report at 181 (“The DC emergency legislation’s requirement that the Mayor release BWC footage of shootings and serious uses of force, subject to the consent of next of kin or the subject of the force, is consistent with current trends.”).

biases, lack of training, and institutional deficiencies. Video evidence of police interactions can help to resolve complaints quickly and efficiently. Timely disclosure also means that police officers can more quickly and credibly be cleared when their conduct is justified. Prompt and full public disclosure provides an independent check on the investigation of alleged misconduct within MPD—allowing the public and elected officials a better opportunity to supervise the work of the police department. These are core concerns squarely within the legislative purview of the D.C. Council.

**2. The Act does not violate the separation-of-powers doctrine because the Act does not limit any executive function or transfer any executive function to the legislature.**

The FOP argues that the Act impermissibly burdens the Mayor’s power to “preserve the peace,” “prevent crimes and arrest offenders,” and “protect the rights of persons and of property.” FOP Brief at 31. The FOP writes that the Mayor has “exclusive” authority regarding these duties—*see id.*, citing D.C. Code §5-101.03—but in fact that statute nowhere states that the Mayor’s duties regarding public safety are “exclusive” or to the exclusion of the role of the Council (or of the judiciary for that matter). The FOP’s separation-of-powers argument hinges on this flawed reading of Section 5-101.03 and the improper importation of the idea of “exclusivity” regarding the Mayor’s public-safety role. Under the D.C. Code, the Council has the legislative role of making the laws, D.C. Code § 1-204.04(b), and the Mayor the executive role of enforcing them. D.C. Code § 1-204.22. Section 5-101.03 does not

contain a public safety exception. Given that the Council plays an important role regarding issues of public safety and that Section 103 does not limit any executive function or transfer any “exclusively” executive function to the legislature, it is apparent that the FOP’s separation-of-powers claim falls apart. The disclosure (or non-disclosure) of body-worn-camera footage or identifying information about police incidents is the product of a statutory scheme, not an inherent power of the executive.

As part of its legislative duties, the Council has long had a paramount role in establishing the public policy of the District of Columbia regarding the creation, preservation, and access to public records as well as in establishing the public policy of the District regarding criminal justice and policing. The Council adopted and amended the Freedom of Information Act; it has abolished or redefined certain crimes and modified the penalties for crimes.<sup>23</sup> It has imposed various direct restrictions on police activities and tactics.<sup>24</sup> None of these actions have been deemed

---

<sup>23</sup> 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.

<sup>24</sup> 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.

to violate separation of powers or to obstruct the executive's authority or ability to preserve the public peace, prevent crimes and arrest offenders, and protect the rights of persons and property. The District Council is acting solidly in the core of its powers in enacting legislation regarding the criminal-justice system, policing, and the creation and disclosure of public records.

In both the previous regime (providing the Mayor with discretion about whether and when to disclose information) and the current regime (requiring automatic disclosure of certain information), the Mayor's authority is derived from a statute which the Council has the authority to enact or amend. As the lower court noted, the FOP "[did] not dispute that the Council possesses the legislative authority to determine public policy outcomes on issues such as the disclosure of public records." *Fraternal Order of Police v. District of Columbia*, No. 2020 CA 003492 at 9-10 (D.C. Super. Ct. July 16, 2021). Indeed, the FOP does not challenge the constitutionality of the regime before the enactment of Section 103, namely when the Council granted to the Mayor discretion to release footage or not. As it is uncontroverted that the Council possesses the power to grant the Mayor discretion regarding the disclosure of public records, it follows that the Council likewise has the authority to remove or modify that discretion. The FOP's argument that the Council has violated the separation of powers principle by changing the status of certain body-worn-

camera footage from discretionary disclosure to mandatory disclosure does not rest on any logical foundation.

The Council, in its role as the policy-making branch of government, responded to the public's concerns regarding police accountability and transparency, and made the decision that the previous regime, affording the Mayor discretion about whether and when to disclose certain information, should be replaced by a regime where such information is automatically disclosed. The Council was acting within its traditional sphere of legislative authority regarding the creation and dissemination of what are concededly public records. The Council did not usurp or undermine any executive power. Rather, the responsibility for public safety is a shared responsibility between the branches and the Council acted within its lane. *Cf. Bergman v. District of Columbia*, 986 A. 2d 1208, 1225 (D.C. 2010) (rejecting argument that judiciary had exclusive power to regulate attorneys; Council has authority under its police power to enact legislation to protect the public from exploitative practices of attorneys).

As a pleading matter, the FOP's Amended Complaint set forth legal arguments, speculative concerns, and policy positions, but not well-pleaded facts which could support a plausible claim for violation of the separation of powers. For instance, the FOP argues on appeal that the mandatory release of body-worn-camera footage "make[s] it more difficult to investigate serious officer-involved death or

serious use of force.” FOB Brief at 32. But that argument does not track with the facts alleged in the Amended Complaint and there is nothing alleged in the record to support the conclusion that mandatory publication of footage or related information impedes investigations or, more pertinently, invades the Mayor’s ability to prevent crimes and arrest offenders. As the lower court noted, “[t]he Mayor still maintains all the resources that she currently possesses, and the statute simply pushed for greater transparency.” *Fraternal Order of Police*, No. 2020 CA 003492 at 10.

**3. Police officers have no privacy interest in public records of their public duties.**

Police activities are conducted in the name of the public. The names of police officers and descriptions of their public actions are matters that are generally available to the public. Officers are generally required to identify themselves to members of the public by name and badge number<sup>25</sup> and members of the public are generally allowed to observe and record police activities in public.<sup>26</sup> Indeed, as the lower court wrote: “if the public is legally able to record officers during official business, it is

---

<sup>25</sup> See D.C. Code § 5-337.01 (“Every member of the Metropolitan Police Department (“MPD”), while in uniform, shall wear or display the nameplate and badge issued by the MPD”).

<sup>26</sup> GO-OPS-304.19 (“The Metropolitan Police Department (MPD) recognizes that members of the general public have a First Amendment right to video record, photograph, and/or audio record MPD members while MPD members are conducting official business or while acting in an official capacity in any public space, unless such recordings interfere with police activity.”).

unclear how any reasonable officer can assume that they have a right to privacy when conducting said official business.” *Fraternal Order of Police*, No. 2020 CA 003492 at 11.

The right to decide how to treat information about public police activities belongs to the government and is not a right belonging to individual officers.<sup>27</sup> 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 [the 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), *leave to appeal denied*, 35 N.Y.S. 3d 979 (2020). When Darnella Frazier recorded the killing of George Floyd, she was not impinging on any privacy right of the of-

---

<sup>27</sup> Appellants cite two decisions of this Court to support their argument that MPD employees have a privacy interest in the nondisclosure of their names and other identifying information. FOP Br. at 37-38. *See District of Columbia v. Fraternal Order of Police*, 75 A.3d 259, 268 (D.C. 2013); *Fraternal Order of Police/Metro. Police Labor Comm. v. District of Columbia*, 124 A.3d 69, 77 (D.C. 2015). However, those decisions are inapposite. Those cases did not arise in the context of the use of force against members of the public, and the decisions turned on the scope of the personal-privacy exemption of FOIA.



officers involved—and had she *not* recorded what happened, the residents of Minneapolis and the rest of the country would not have learned so swiftly — and perhaps would never have learned — about the public conduct of Derek Chauvin or the activities of the other officers.

The FOP contends that the mandatory disclosure of body-worn-camera footage “will place D.C. Police Union members at immediate risk of significant bodily harm.” FOP Brief at 32. Obviously, the safety of police officers is an issue of common concern. But the Amended Complaint did not allege facts sufficient to support a plausible challenge to the validity of the Act. The pleading is devoid of well-pleaded facts establishing a link between the release of footage and instances of harm to officers or the non-speculative substantial increased risk of harm to officers. Moreover, this is not an issue regarding the legal sufficiency of the Act but a matter of policy choices that the FOP can take up with the Council, which has the authority and responsibility to set the parameters for use of public records. Again, the footage was available for public dissemination under prior law, and the Amended Complaint only set forth speculation about why mandatory timely disclosure of footage might increase the risk to officers.

Finally, the Act shines a spotlight on the activities of police officers when they are engaged in activities involving serious bodily harm or death. 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 public interest” manifestly extends to information about whether police officers conduct themselves properly while acting under color of law. *Id.* See also *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.”). After all, police officers are not file clerks. 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, the public has a strong interest in ensuring that they carry out these functions in accordance with the law.

#### CONCLUSION

Collecting and releasing information about the activities of officers who are using force and even violence against members of the public helps foster accountability and transparency in government agencies and the police department in particular. 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. Residents of the District have been trying to correct issues of police transparency and accountability for decades. The Council could properly conclude that the mandated disclosure of body-worn-camera footage advances the vital causes of transparency and accountability. For these reasons, the Court should affirm.

Respectfully submitted,

/s/ Arthur Ago

Jonathan Greenbaum (D.C. Bar # 489887)  
Arthur Ago (D.C. Bar # 463681)  
Alexander Brooks (C.A. Bar # 340178)\*  
Lawyers' Committee for Civil Rights Under  
Law

1500 K Street N.W., Suite 900

Washington, DC 20005

202.662.8340

[jgreenbaum@lawyerscommittee.org](mailto:jgreenbaum@lawyerscommittee.org)

[aago@lawyerscommittee.org](mailto:aago@lawyerscommittee.org)

[abrooks@lawyerscommittee.org](mailto:abrooks@lawyerscommittee.org)

\*Admitted in California only. Practicing under the supervision of D.C. Bar members.

/s/ Paul J. Kiernan

Paul J. Kiernan (D.C. Bar # 385627)

Holland & Knight LLP

800 17<sup>th</sup> Street, N.W., Suite 1100

Washington, D.C. 20006

(202) 663-7276

[Paul.Kiernan@hkllaw.com](mailto:Paul.Kiernan@hkllaw.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)

Public Defender Service for the District of  
Columbia

633 Indiana Avenue, N.W.

Washington, D.C. 20004

(202) 628-1200

[KSemyonova@pdsdc.org](mailto:KSemyonova@pdsdc.org)

[JAnderson@pdsdc.org](mailto:JAnderson@pdsdc.org)

/s/ Arthur B. Spitzer

Arthur B. Spitzer (D.C. Bar # 235960)

American Civil Liberties Union Foundation  
of the District of Columbia  
915 15<sup>th</sup> St. N.W., 2<sup>nd</sup> Floor  
Washington, D.C. 20005  
(202) 457-0800  
[artspitzer@gmail.com](mailto:artspitzer@gmail.com)

/s/ Jonathan Smith

---

Jonathan Smith  
Jacqueline Kutnik-Bauder  
Washington Lawyers' Committee for Civil  
Rights and Urban Affairs  
700 14th St NW Suite 400  
Washington, DC 20005  
(202) 319-1000  
[Jonathan\\_Smith@washlaw.org](mailto:Jonathan_Smith@washlaw.org)  
[Jacqueline\\_Kutnik-Bauder@washlaw.org](mailto:Jacqueline_Kutnik-Bauder@washlaw.org)

## CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of March 2022, I filed a copy of the foregoing Amicus Curiae Brief in Support of Affirmance with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

/s/ Paul J. Kiernan  
Paul J. Kiernan  
Holland & Knight LLP  
800 17th Street, N.W.  
Suite 1100  
Washington, D.C. 20006  
(202) 663-7276  
Paul.kiernan@hklaw.com

# District of Columbia Court of Appeals

## REDACTION CERTIFICATE DISCLOSURE FORM

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

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

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:
  - An individual’s social-security number
  - Taxpayer-identification number
  - Driver’s license or non-driver’s’ license identification card number
  - Birth date
  - The name of an individual known to be a minor
  - Financial account numbers, except that a party or nonparty making the filing may include the following:
    - (1) the acronym “SS#” where the individual’s social-security number would have been included;
    - (2) the acronym “TID#” where the individual’s taxpayer-identification number would have been included;
    - (3) the acronym “DL#” or “NDL#” where the individual’s driver’s license or non-driver’s license identification card number would have been included;
    - (4) the year of the individual’s birth;
    - (5) the minor’s initials; and
    - (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.
3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.
4. Information about protection orders, restraining orders, and injunctions that “would be likely to publicly reveal the identity or location of the protected party,” 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining “protection order” to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).
5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.
6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Paul Kiernan

\_\_\_\_\_  
Signature

Paul Kiernan

\_\_\_\_\_  
Name

Paul.Kiernan@hklaw.com

\_\_\_\_\_  
Email Address

No. 21-cv-511

\_\_\_\_\_  
Case Number(s)

03/04/2022

\_\_\_\_\_  
Date