

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 Number: 2020 CA 003492 B
Judge William M. Jackson

Next Event: Initial Scheduling Conference
November 6, 2020


* * * * *

EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

The Plaintiff, Fraternal Order of Police, Metropolitan Police Department Labor Committee, D.C. Police Union (“D.C. Police Union”), by and through its undersigned counsel, and in accordance with DCR-Civil 65, hereby moves for a Temporary Restraining Order against the District of Columbia (“District”) and Muriel Bowser, in her official capacity as Mayor of the District of Columbia (“Mayor Bowser”) (collectively, the “Defendants”) to enjoin Defendants from enforcing certain unlawful provisions contained in the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020. The grounds and authorities for this Motion are set forth more fully in the attached Memorandum of Law.

WHEREFORE, the D.C. Police Union respectfully requests that the Court grant its Emergency Motion for Temporary Restraining Order and enter the accompanying Temporary Restraining Order.

Respectfully submitted,



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**MEMORANDUM OF LAW IN SUPPORT OF
EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER**

The Plaintiff, Fraternal Order of Police, Metropolitan Police Department Labor Committee, D.C. Police Union (“D.C. Police Union”), by and through its undersigned counsel, and in accordance with DCR-Civil 65, hereby moves for a Temporary Restraining Order against the District of Columbia (“District”) and Muriel Bowser, in her official capacity as Mayor of the District of Columbia (“Mayor Bowser” or “the Mayor”) (collectively, the “Defendants”) to enjoin Defendants from enforcing certain unlawful provisions contained in the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020 (the “Act”) mandating that Mayor Bowser publicly release the following:

(I) Within 5 business days after an officer-involved death or serious use of force, publicly release the names and body-worn camera recordings of all officers who committed the officer-involved death or serious use of force; and

(II) By August 15, 2020, publicly release the names and body-worn camera recordings of all officers who have committed an officer-involved death since the Body-Worn Camera Program was launched on October 1, 2014.

In support, D.C. Police Union states the following:

I.
Introduction

An emergency injunction is necessary in this matter to prevent the Defendants from significantly and irreparably harming members of the D.C. Police Union and the citizens of the District, through the August 15, 2020 release of certain body-worn camera footage and names of officers. Subtitle B of the Act impermissibly intrudes on the Mayor's exclusive power and duty to "preserve the public peace," "prevent crimes and arrest offenders," and "protect the rights of persons and of property" by requiring her to release body-worn camera footage and names of officers, even if it will jeopardize the arrest of criminals, the prosecution of crimes, place citizens of the District and police officers at immediate risk of significant bodily harm, and permanently tarnish the reputation and good name of police officers. Subtitle B of the Act has removed the necessary discretion the Mayor must have in executing her specifically-delegated executive duties in violation of the separation of powers of the District of Columbia government recognized in the Home Rule Act and D.C. Code § 1-301.44(b). The Act was passed as emergency legislation and artificially established August 15, 2020, as a deadline imposed in Subtitle B for the public release of body-worn camera footage and names of officers. As a result of this approaching deadline, the members of the D.C. Police Union and citizens of the District will suffer immediate irreparable harm unless an emergency injunction is issued by the Court.

II.
Factual Background

The executive power of the District of Columbia is vested in the Mayor who is the chief executive officer of the District government. *See* D.C. Code § 1-204.22. As such, "it shall be the duty of the Mayor of the District of Columbia . . . (1) To preserve the public peace; (2) To prevent crime and arrest offenders; (3) To protect the rights of persons and of proper; . . . (10) To enforce and obey all laws and ordinances in force in the District, or any part thereof, which are

properly applicable to police or health, and not inconsistent with the provisions of this title.” D.C. Code § 5-101.03. Additionally, Pursuant to the Comprehensive Merit Personnel Act (“CMPA”) the Metropolitan Police Department (“MPD”) is a “subordinate agency” under “the direct administrative control of the Mayor.” D.C. Code §1-603.01(17)(L).

On or about October 2014, the MPD established a Body-Worn Camera program. D.C. Code § 5-116.32 sets for the following authority of the Mayor to establish rules regarding public access to body-worn camera recordings:

(a) The Mayor, pursuant to subchapter I of Chapter 5 of Title 2, and in accordance with this section, shall issue rules regarding the Metropolitan Police Department’s Body-Worn Camera Program. The rules, at a minimum, shall provide:

(1) Standards for public access to body-worn camera recordings.

D.C. Code § 5-116.32.

As such, 24 DCMR §3900.10 set forth the following rule regarding public release of body-worn camera recordings:

The Mayor may, on a case-by-case basis in matters of significant public interest and after consultation with the Chief of Police, the United States Attorney’s Office for the District of Columbia, and the Office of the Attorney General, release BWC recordings that would otherwise not be releasable pursuant to a FOIA request. Examples of matters of significant public interest include officer-involved shootings, serious use of force by an officer, and assaults on an officer requiring hospitalization.

24 DCMR §3900.10.

On July 7, 2020, the Council of the District of Columbia approved and signed the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020 (the “Act”). See **Exhibit 1**. The Act was passed on an emergency basis without any of the public notice and participation in rulemaking required for the passage of a law on a non-emergency basis. The Chair of the Council of the District of Columbia, Phil Mendelson, transmitted the Act to Mayor Bowser on July 9, 2020. On July 22, 2020, Mayor Bowser signed the Act.

Subtitle B of the Act amends D.C. Code § 5-116.33 by adding new subsections, which state as follows:

(B) The Mayor:

(i) Shall, except as provided in paragraph (2) of this subsection:¹

(I) Within 5 business days after an officer-involved death or serious use of force, publicly release the names and body-worn camera recordings of all officers who committed the officer-involved death or serious use of force; and

(II) By August 15, 2020, publicly release the names and body-worn camera recordings of all officers who have committed an officer-involved death since the Body-Worn Camera Program was launched on October 1, 2014.

Subtitle B of the Act also amends 24 DCMR §3900.10 by adding the following:

(a) Notwithstanding any other law, the Mayor:

(1) Shall, except as provided in paragraph (b) of this subsection:

(A) Within 5 business days after an officer-involved death or serious use of force, publicly release the names and BWC recordings of all officers who committed the officer-involved death or serious use of force; and

(B) By August 15, 2020, publicly release the names and BWC recordings of all officers who have committed an officer-involved death since the Body-Worn Camera Program was launched on October 1, 2014.

Exhibit I at 3-5.

¹ Paragraph 2 is inapplicable to this Motion, and states as follows:

(2)(A) The Mayor shall not release a body-worn camera recording pursuant to paragraph (1)(B)(i) of this subsection if the following persons inform the Mayor, orally or in writing, that they do not consent to its release:

(i) For a body-worn camera recording of an officer-involved death, the decedent's next of kin; and
(ii) For a body-worn camera recording of a serious use of force, the individual against whom the serious use of force was used, or if the individual is a minor or unable to consent, the individual's next of kin.

(B)(i) In the event of disagreement between the persons who must consent to the release of a body-worn camera recording pursuant to subparagraph (A) of this paragraph, the Mayor shall seek a resolution in the Superior Court of the District of Columbia.

(ii) The Superior Court of the District of Columbia shall order the release of the body-worn camera recording if it finds that the release is in the interests of justice.

On June 8, 2020, Michael R. Sherwin, Acting United States Attorney for the District of Columbia, sent correspondence to Councilmember Charles Allen expressing serious concerns regarding the Act's provisions relating to the public release of body worn-camera footage and officer's names. *See Exhibit 2*. Specifically, U.S. Attorney Sherwin expressed the following serious concerns:

USAO is concerned that this modification would, in fact, make it more difficult to investigate a serious officer-involved death or serious use of force. . . . The early publication of BWC could create a narrative that makes it difficult to conduct an investigation, as it may lead witnesses to a conclusion that affects their testimony.

Further, early release of BWC could inadvertently publicize the identities of the witnesses. . . . If the BWC were released unredacted, civilian privacy could be compromised, as BWC often contains personal details from civilians, including names, dates of birth, and contact information such as home addresses and telephone numbers.

Exhibit 2 at 3-4 (emphasis in original).

U.S. Attorney Sherwin further expressed significant concern regarding the mandatory language in the Act requiring the Mayor to release body-worn camera recordings and removing any discretion from the Mayor, as follows:

Because there are situations where it could be appropriate for the Mayor, in consultation with the relevant agencies, to release BWC footage, the mandatory language of the bill ("shall") should be changed to permissive language ("may"), allowing the Mayor discretion to release BWC footage at an appropriate time, balancing the needs of the community to see the footage with the needs of prosecutors to accurately investigate what happened, and the security and privacy rights of civilian witnesses.

Exhibit 2 at 4.

U.S. Attorney Sherwin further expressed significant concern that the Act's requirement that the Mayor release the body-worn camera footage name of the officer involved would result in "unjust reputational harm" and would "unjustly malign an officer," as follows:

Finally, the prosecution and the government should not malign any suspect, including an officer, while an investigation is pending. Indeed, as a rule, police and prosecutors do not publicly release the name of any individual under investigation unless and until the individual is charged. Thus, if the evidence does not support charges, the target of the investigation, who is presumed innocent, does not suffer unjust reputational harm. In contrast, when an officer is charged with a crime, his or her name is released. Because, after thorough investigation, a police-involved death or serious use of force investigation may not ultimately result in the criminal charge of an officer, a requirement that the Mayor categorically release all names of officers after 72 hours, regardless of the facts of the case or the nature of the officer's actions, could unjustly malign an officer.

Exhibit 2 at 4 (emphasis added).

The release of the body-camera footage and names of officers will result in unjust reputational harm and will unjustly malign and permanently tarnish the reputation and good name of any officer that may never be charged, but instead is later cleared of misconduct concerning the use of force. The affected officer will have no ability to salvage his reputation after the immediate release of his name and the body-worn camera footage. In addition to unjustly maligning an officer, the mandatory release of the names of officers and body-worn camera footage will place officers and the public at immediate risk of significant bodily harm. When officers justifiably use force against a criminal suspect, the immediate public release of the officer's name and the body-worn camera footage will allow the suspect and their associates to identify the officer and potentially seek retribution against the officer and his or her family. Equally concerning is that the officer is known by the criminal suspect to be a primary witness for the prosecution, and thus a potential target of violence to obstruct the officer's testimony. This threat of violence would apply equally to any civilian witnesses identified by criminal suspects on the body-worn camera footage whom they want to prevent from testifying against them at a criminal trial. The release of the officer's name and other identifying information

contained in the body-worn camera footage will further impermissibly invade the officer's fundamental right to privacy.

III. **Argument**

A. Standard of Review

In considering a request for a temporary restraining order, this Court must weigh four factors: (1) whether the movant is likely to succeed on the merits, (2) whether the movant is likely to suffer irreparable harm in the absence of preliminary relief, (3) whether the balance of equities tips in the movant's favor, and (4) whether an injunction is in the public interest. See Winter v. Natural Res. Def. Council, 555 U.S. 7 (2008); see also Wieck v. Sterenbuch, 350 A.2d 384, 387 (D.C. 1976). "The decision to grant or deny preliminary injunctive relief is committed to the sound discretion of the trial court." Stamenich v. Markovic, 462 A.2d 452, 456 (D.C. 1983) (citations omitted).

B. The D.C. Police Union is Likely to Succeed on the Merits

1. Subtitle B of the Act Impermissibly Intrudes on the Mayor's Exclusive Authority in Violation of the Separation of Powers

Subtitle B of the Act clearly and impermissibly intrudes on the Mayor's exclusive powers and duties in violation of the separation of powers of the District of Columbia government recognized in the Home Rule Act and D.C. Code § 1-301.44(b), therefore, the D.C. Police Union is likely to succeed on the merits of its claim. In D.C. Code § 1-301.44(b), the Council declared that it "recognizes the principle of separation of powers in the structure of the District of Columbia government." Pursuant to that principle, the Court of Appeals has held that the Council cannot "take action which would interfere with the Mayor's exercise of his exclusive executive and administrative authority, for such action would violate the separation of powers." *Convention Center Referendum Committee v. District of Columbia Board of Elections and*

Ethics, 441 A.2d, 871, 881 (1980) (emphasis added). The Court of Appeals has recognized the standard set forth by the Supreme Court for considering a separation of powers challenge as, “whether a particular measure impermissibly undermine[s] the powers of the Executive Branch or disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions.” *Hessey v. Burden*, 584 A.2d 1, 5 (1990).

Subtitle B of the Act, which orders the Mayor to release body-worn camera footage and the names of officers involved in officer-involved death or serious use of force, impermissibly undermines the Mayor’s exclusive power and duty to “preserve the public peace,” “prevent crimes and arrest offenders,” and “protect the rights of persons and of property,” as well as the Mayor’s “direct administrative control” over her subordinate agency, the MPD. Specifically, Subtitle B of the Act impermissibly undermines the Mayor’s ability to carry out her executive functions to “preserve the public peace” and “prevent crimes and arrest offenders,” because the immediate, mandatory release of body-worn camera footage and names of officers will “make it more difficult to investigate a serious officer-involved death or serious use of force.” **Exhibit 2** at 3 (emphasis in original). This is because it would be virtually impossible for prosecutors to conduct a full investigation prior to the mandatory release of the body-worn camera footage. The early release of body-worn camera footage could be viewed by witnesses and suspects and “could create a narrative that makes it difficult to conduct an investigation, as it may lead witnesses to a conclusion that affects their testimony.” *Id.*

Subtitle B of the Act further impermissibly undermines the Mayor’s ability to carry out her executive function to “protect the rights of persons and of property,” because the immediate, mandatory release of body-worn camera footage and names of officers will compromise the privacy rights of District citizens because “BWC often contains personal details from civilians,

including names, dates of birth, and contact information such as home addresses and telephone numbers.” **Exhibit 2** at 4. In addition, criminal suspects will have the ability to review the body-worn camera footage to identify civilian witnesses to their crimes, which will cause these civilian witnesses to become the potential targets of threats or violence to prevent their testimony, thereby impermissibly undermining the Mayor’s ability to carry out her executive functions to “preserve the public peace” and “prevent crimes and arrest offenders.”

Since the inception of the body-worn camera program in the District in 2014, the Mayor has always retained discretion to decide whether a full or partial release of any body-worn camera footage, as well as the timing of the release, was in the best interest of the District and all relevant stakeholders. Subtitle B of the Act, removes the necessary discretion the Mayor must have in releasing body-worn camera footage, which directly impacts and impermissibly undermines her ability to carry out her executive duties. The Council’s elimination of the Mayor’s discretion precludes the Mayor from properly balancing “the needs of prosecutors to accurately investigate what happened, and the security and privacy rights of civilian witnesses.” **Exhibit 2** at 4. As a result, the Mayor’s ability to carry out her executive duties to “preserve the public peace,” “prevent crimes and arrest offenders,” and “protect the rights of persons and of property” are impermissibly undermined.

Legislative acts that altogether remove of an executive’s discretion in performing the executive’s duties have been consistently struck down by the United States Supreme Court and the highest State courts as impermissible violations of the separation of powers. For example, in *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1 (2015), Congress passed an act that required the State Department to list the birthplace of any U.S. citizen born in Jerusalem as “Israel” on that citizen’s passport, upon the request of that citizen. The Supreme Court determined that the recognition of foreign states and territorial borders is a power exclusively committed to the

Executive branch. *Id.* at 28. The Supreme Court then considered the question of whether Congress' act of mandating the President, through the executive agency of the State Department, to designate "Israel" as the sovereign of Jerusalem upon a citizen's request violated the separation of powers between Congress and the President by infringing upon the President's power to recognize the territorial expanse of foreign states. *Id.* at 28-29. The Supreme Court held that the law violated the separation of powers doctrine because, even though Congress has vast powers in enacting legislation concerning passports, it could not "aggrandize[e] its power at the expense of another branch by requiring the President to contradict an earlier recognition determination in an official document issued by the Executive Branch." *Id.* at 31-32 (internal quotation marks omitted) (emphasis added).

Similarly, in *In re Opinion of the Justices*, 162 N.H. 160 (2011), the Supreme Court of New Hampshire struck down a law passed by the New Hampshire House of Representatives that required New Hampshire's attorney general to join the State in a federal lawsuit challenging the Affordable Care Act. Based upon the Governor of New Hampshire's responsibility for "the faithful execution of the laws," the New Hampshire Supreme Court held that requiring the Attorney General (a member of the executive branch) to challenge a specific law and join a lawsuit was an unconstitutional violation of the separation of powers. *Id.* at 867, 871. Specifically, the New Hampshire Supreme Court held as follows:

It is the executive, not the legislative branch, in which the constitution vests the "supreme executive" authority to determine whether it is in the public interest to litigate a particular matter. Necessarily, this includes the decision *not* to initiate a specific civil action on the part of the State.

Accordingly, for all of the above stated reasons, we conclude that HB 89, which removes entirely from the executive branch the decision as to whether to join the State as a party to litigation, would usurp the executive branch's power to execute and enforce the law.

Id. at 869, 871 (emphasis in original).

Likewise, in *Communications Workers of America, AFL-CIO v. Florio*, 130 N.J. 439 (1992), the Supreme Court of New Jersey struck down a law passed by the New Jersey Legislature that required the Governor to reduce managerial and other exempt, executive personnel. Because the law took power and discretion away from the Governor, the Supreme Court of New Jersey held:

[T]he taking of power is more prone to abuse and therefore warrants an especially careful scrutiny. The case before us is one in which the Legislature has taken for itself a power normally lodged in the executive branch. Therefore, our deference to the Legislature must be accompanied by the most thorough and careful review to guard against the encroachment of one co-equal branch of government on another.

Id. at 457. Applying this careful scrutiny, the Supreme Court of New Jersey struck down the violating provision of the law because it prevented the executive branch from carrying out its constitutionally-assigned function to staff executive agencies. *Id.* at 463-64.

Like in *Zivotofsky*, *In re Opinion of the Justices*, and *Florio*, the mandate that the Mayor release body-worn camera footage and names of officers under strict timeframes without being permitted to exercise any discretion or consult with the Chief of Police, the U.S. Attorney, and the Attorney General on the propriety of the release, impermissibly infringes on her ability to execute her duties to “preserve the public peace,” “prevent crimes and arrest offenders,” and “protect the rights of persons and of property.” The MPD is a subordinate agency under “the direct administrative control of the Mayor.” D.C. Code §1-603.01(17)(L). By requiring that the Mayor take a specific action regarding the release of body-worn camera footage in a way that precludes the Mayor from exercising any discretion, the Council has improperly usurped the Mayor’s ability to administratively control her subordinate agency. Notably, in *Free Enterprise Fund v. Public Accounting Oversight Board*, 561 U.S. 477 (2010), the Supreme Court held that a

violation of the separation of powers does not depend on the views of individual members of the executive branch or whether the encroached-upon branch approves of the encroachment, as follows:

Perhaps an individual President might find advantages in tying his own hands. But the separation of powers does not depend on the views of individual Presidents, nor on whether “the encroached-upon branch approves the encroachment,” *New York v. United States*, 505 U.S. 144, 182, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). The President can always choose to restrain himself in his dealings with subordinates. He cannot, however, choose to bind his successors by diminishing their powers, nor can he escape responsibility for his choices by pretending that they are not his own.

Id. at 497 (internal citation omitted). The D.C. Council’s encroachment on the Mayor’s executive powers through Subtitle B of the Act is clear and therefore should be struck down by the Court. For all of the foregoing reasons, the D.C. Police Union is likely to succeed on the merits of its claim challenging Subtitle B of the Act as a violation of the separation of powers.

2. Subtitle B of the Act Violates D.C. Police Union Members’ and District Citizens’ Fundamental Right to Privacy

Subtitle B of the Act violates the fundamental right to privacy held by D.C. Police Union members and citizens of the District through the immediate, mandatory release of the names of officers and body-worn camera footage that will include further identifying, personal information about the officers and witnesses captured in the footage. The District of Columbia Home Rule Act, D.C. Code § 1-203.02 states that “the legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of this chapter subject to all the restrictions and limitation imposed upon the states by the 10th section of the 1st article of the Constitution of the United States.” The Constitution guarantees a right to personal privacy. *Roe v. Wade*, 410 U.S. 113, 152-53 (1973). Where a law infringes upon the fundamental right to privacy, the constitutional standard of strict scrutiny applies, meaning that the law infringing upon the right is only upheld if it is

justified by a “compelling state interest” and the law is “narrowly drawn” to further that state interest. *Id.* at 155 (citations omitted). Moreover, the United States District Court for the District of Columbia has recognized that “as a general matter, body-worn camera footage is likely to contain sensitive information in which witnesses and others depicted on the footage -- who, in all likelihood, would include police officers -- have a legitimate privacy interest.” *United States v. Kingsbury*, 325 F.Supp.3d 158, 160 (D.D.C. 2018) (citing *United States v. Johnson*, 314 F.Supp.3d 248, 257 (D.D.C. 2018)) (emphasis added).

There is no compelling government interest for requiring the Mayor to immediately release body-worn camera footage and the names of police officers involved in serious use of force or officer-involved deaths without any discretion. Instead, there are numerous compelling reasons *not* to require the Mayor to immediately release the footage and names and to instead permit the Mayor to exercise discretion in the release of body-worn camera footage and the timing of the release. Namely, the indiscriminate release of body-worn camera footage and names of officers could result in significant bodily harm to officers because it will allow criminal suspects and their associates to identify the officer and potentially seek retribution against the officer and his or her family. These same threats of violence apply equally to witnesses identified in the body-worn camera footage because criminal suspects will have the ability to review the body-worn camera footage to identify civilian witnesses to their crimes, which will cause these civilian witnesses to become the potential targets of violence to prevent their testimony. The release of the body-worn camera footage and names of officers will unjustly malign officers, cause unjust reputational harm, and permanently tarnish the reputation and good name of any officer that is never charged with and is later cleared of any misconduct concerning the use of force. The immediate release of the body-worn camera footage will also make it much more difficult to investigate and prosecute crimes and will “create a narrative that makes it

difficult to conduct an investigation, as it may lead witnesses to a conclusion that affects their testimony.” **Exhibit 2** at 3. The immediate release of the body-worn camera footage and names of officers will further compromise privacy rights of citizens through the release of names, dates of birth, home addresses and telephone numbers.

Even if the District can identify a compelling state interest for the immediate release of the body-worn camera footage and names of officer, the Act is not narrowly tailored to achieving any compelling purpose. Instead, the Act must provide the Mayor with the ability and discretion to consult with the Chief of Police, the U.S. Attorney, and the Attorney General of the District of Columbia before releasing any body-worn camera footage so she can ensure that the release and the timing of the release will not jeopardize the serious threats to public safety and privacy and the ability to investigate and prosecute crimes. As such, the D.C. Police Union is likely to succeed on the merits of its due process right to privacy claim.

C. The D.C. Police Union and the Citizens of the District Will Suffer Irreparable Harm if an Injunction is not Granted.

Members of the D.C. Police Union and citizens of the District will suffer irreparable harm if the Defendants are not enjoined from releasing body-worn camera footage pursuant to Subtitle B of the Act. The release of the body-camera footage and names of officers prior to the U.S. Attorney having adequate time conduct an investigation will result in unjust reputational harm and will unjustly malign and permanently tarnish the reputation and good name of any officer that is never charged with and is later cleared of any misconduct concerning the use of force. The affected officer will be irreparably harmed and have no ability to salvage his reputation after the immediate release of his name and the body-worn camera footage.

In addition to unjustly maligning an officer, the mandatory release of body-worn camera footage and names of officers will place officers and the public at immediate risk of significant

bodily harm. Officers and civilian witnesses identified by criminal suspects on the body-worn camera footage could be targeted by criminals to prevent them from testifying at a criminal trial. The release of the body-worn camera footage will also cause irreparable harm to citizens of the District through the release of their names, dates of birth, and contact information such as home addresses and telephone numbers that is captured during police interviews conducted on body-worn camera footage.

In addition, the Act does not contain any mechanism for police officers, the D.C. Police Union or its members, or general members of the public to challenge the release of the body-worn camera footage or the names of officers. Thus, without the injunction sought in this matter, there is no mechanism for D.C. Police Union members or members of the public to prevent the irreparable harm that will result from the publication of the body-worn camera footage and the names of officers set to occur on August 15, 2020. For all of the foregoing reasons, the D.C. Police Union and the citizens of the District will suffer irreparable harm unless this Court grants an injunction.

D. The Balance of Hardships Weighs Decisively in Favor of Granting Injunctive Relief in this Action.

The relief sought by the D.C. Police Union will not result in any harm or hardship to the Defendants. Indeed, if the injunction were granted, and the Subtitle B of the Act is ultimately ruled as violating the separation of powers, the Mayor would revert to having the discretion to release body-worn camera footage involving serious use of force. Prior to the Act's revisions to 24 DCMR §3900.10, the Mayor had the discretion to release body-worn camera footage, as follows:

The Mayor may, on a case-by-case basis in matters of significant public interest and after consultation with the Chief of Police, the United States Attorney's Office for the District of Columbia, and the Office of the Attorney General, release BWC recordings that would otherwise not be releasable pursuant to a

FOIA request. Examples of matters of significant public interest include officer-involved shootings, serious use of force by an officer, and assaults on an officer requiring hospitalization.

24 DCMR §3900.10. As recognized by the U.S. Attorney for D.C., the Mayor's discretion in releasing this footage after consulting with Chief of Police, the United States Attorney's Office, and the Office of the Attorney General is critical to allowing her to ensure that investigations and prosecutions will not be compromised, and public safety and privacy will be protected. Thus, an injunction will cause no harm to the Defendants whatsoever, and, even if Subtitle B of the Act is invalidated, the Mayor will still be permitted to release body-worn camera footage and identity of the officers involved after appropriate and reasonable consultation with law enforcement officials. When compared to the irreparable harm that will be suffered by D.C. Police Union members and the citizens of the District in the absence of injunctive relief, it is evident that the balance of hardships weighs decisively in favor of the Plaintiff's requested relief.

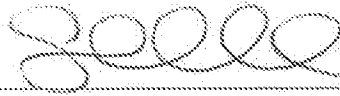
E. The Public Interest Supports the Grant of Injunctive Relief.

Granting the injunctive relief requested would serve the public interest by ensuring that the personal safety and privacy rights of D.C. Police Union members and citizens of the District are protected from the hasty, mandatory release of body-worn camera footage and officer names while the Court considers the validity of Subtitle B of the Act. The public interest is further served by ensuring that crimes in the District of Columbia can be properly investigated and prosecuted without witness testimony being compromised through the mandatory release of body worn camera footage. It is also in the public interest for constitutional issues involving the separation of powers to be resolved prior to the implementation of the emergency Act, which is critical to the maintenance of the democratic tripartite system of the District. Thus, granting injunctive relief would serve the public interest.

IV.
Conclusion

For the reasons stated above, and for the reasons set forth in the D.C. Police Union's Verified Complaint, which is incorporated herein fully by reference, the D.C. Police Union respectfully request that this Court grant the Emergency Motion for Temporary Restraining Order, and issue a temporary restraining order preventing the release of body-worn camera footage and names of officers on August 15, 2020.

Respectfully submitted,



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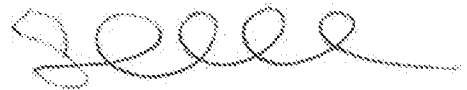
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of August, 2020, I caused the foregoing to be served upon the following individuals or office via electronic mail:

Mayor Muriel Bowser
1350 Pennsylvania Avenue, N.W.
Washington, DC 20004

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Attorney General
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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 Number: 2020 CA 003492 B
Judge William M. Jackson

Next Event: Initial Scheduling Conference
November 6, 2020

* * * * *

TEMPORARY RESTRAINING ORDER

The plaintiff, Fraternal Order of Police, Metropolitan Police Department Labor Committee, D.C. Police Union (“D.C. Police Union”), having moved for a Temporary Restraining Order against the Defendants, The District of Columbia (“District”) and Mayor Muriel Bowser (“Mayor Bowser”) (collectively, the “Defendants”) to enjoin Mayor Bowser from publicly releasing body-worn camera recordings and the names of officers involved in officer-involved death or serious use of force, and the Court having considered Plaintiff’s Verified Complaint, papers, and other evidence in support of their Motion, and

IT APPEARING to the Court that immediate, substantial, and irreparable harm will result to Plaintiff if Defendants are not temporarily restrained as set forth below before a full adversary hearing can be held.

NOW THEREFORE, effective this _____ day of August 2020, it is hereby,

ORDERED, pursuant to D.C. Rule of Civil Procedure 65, that for a period of _____ days, unless this Court earlier rules on a motion for preliminary injunction, that Defendants, their

officers, agents, representative, employees, and all other persons acting for, on behalf of, or in concert with Defendants who receives actual notice of this Order by personal service or otherwise, are hereby TEMPORARILY ENJOINED AND RESTRAINED during the pendency of this Order, the terms of which are set forth below:

An order and an injunction, temporary until a hearing on the merits, restraining Defendants, their agencies and officers, agents, representatives, employees, and all other persons acting for, on behalf of, or in concert with Defendants from publicly releasing body-worn camera recordings and the names of officers involved in officer-involved death or serious use of force.

IT IS FURTHER ORDERED that this Court shall retain jurisdiction to enforce the terms of this Order, and any party affected by this Order may apply for modification or dissolution of this Order.

Dated:

Hour of Issuance:

.....
Judge

Exhibit

1

AN ACT
D.C. ACT 23-336

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

JULY 22, 2020

To provide, on an emergency basis, for comprehensive policing and justice reform for District residents and visitors, and for other purposes.

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BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020".

TITLE I. IMPROVING POLICE ACCOUNTABILITY AND TRANSPARENCY
SUBTITLE A. PROHIBITING THE USE OF NECK RESTRAINTS

Sec. 101. The Limitation on the Use of the Chokehold Act of 1985, effective January 25, 1986 (D.C. Law 6-77; D.C. Official Code § 5-125.01 *et seq.*), is amended as follows:

(a) Section 2 (D.C. Official Code § 5-125.01) is amended to read as follows:

"Sec. 2. The Council of the District of Columbia finds and declares that law enforcement and special police officer use of neck restraints constitutes the use of lethal and excessive force. This force presents an unnecessary danger to the public. On May 25, 2020, Minneapolis Police Department officer Derek Chauvin murdered George Floyd by applying a neck restraint to Floyd with his knee for 8 minutes and 46 seconds. Hundreds of thousands, if not millions, of people in cities and states across the world, including in the District, have taken to the streets to peacefully protest injustice, racism, and police brutality against Black people and other people of color. Police brutality is abhorrent and does not reflect the District's values. It is the intent of the Council in the enactment of this act to unequivocally ban the use of neck restraints by law enforcement and special police officers."

(b) Section 3 (D.C. Official Code § 5-125.02) is amended as follows:

(1) Paragraph (1) is repealed.

(2) Paragraph (2) is repealed.

(3) A new paragraph (3) is added to read as follows:

"(3) 'Neck restraint' means the use of any body part or object to attempt to control or disable a person by applying pressure against the person's neck, including the trachea or carotid artery, with the purpose, intent, or effect of controlling or restricting the person's movement or restricting their blood flow or breathing."

(c) Section 4 (D.C. Official Code § 5-125.03) is amended to read as follows:

"Sec. 4. Unlawful use of neck restraints by law enforcement officers and special police officers.

"(a) It shall be unlawful for:

"(1) Any law enforcement officer or special police officer ('officer') to apply a neck restraint; and

"(2) Any officer who applies a neck restraint and any officer who is able to observe another officer's application of a neck restraint to fail to:

"(A) Immediately render, or cause to be rendered, first aid on the person on whom the neck restraint was applied; or

"(B) Immediately request emergency medical services for the person on whom the neck restraint was applied.

"(b) Any officer who violates the provisions of subsection (a) of this section shall be fined no more than the amount set forth in section 101 of the Criminal Fine Proportionality Amendment Act of 2012, effective June 11, 2013 (D.C. Law 19-317; D.C. Official Code § 22-3571.01), or incarcerated for no more than 10 years, or both."

Sec. 102. Section 3 of the Federal Law Enforcement Officer Cooperation Act of 1999, effective May 9 2000 (D.C. Law 13-100; D.C. Official Code § 5-302), is amended by striking the phrase "trachea and carotid artery holds" and inserting the phrase "neck restraints" in its place.

SUBTITLE B. IMPROVING ACCESS TO BODY-WORN CAMERA VIDEO RECORDINGS

Sec. 103. Section 3004 of the Body-Worn Camera Regulation and Reporting Requirements Act of 2015, effective October 22, 2015 (D.C. Law 21-36; D.C. Official Code § 5-116.33), is amended as follows:

(a) Subsection (a)(3) is amended by striking the phrase "interactions;" and inserting the phrase "interactions, and the results of those internal investigations, including any discipline imposed;" in its place.

(b) New subsections (c), (d), and (e) are added to read as follows:

"(c)(1) Notwithstanding any other law:

“(A) Within 5 business days after a request from the Chairperson of the Council Committee with jurisdiction over the Metropolitan Police Department, the Metropolitan Police Department shall provide unredacted copies of the requested body-worn camera recordings to the Chairperson. Such body-worn camera recordings shall not be publicly disclosed by the Chairperson or the Council;

“(B) The Mayor:

“(i) Shall, except as provided in paragraph (2) of this subsection:

“(I) Within 5 business days after an officer-involved death or the serious use of force, publicly release the names and body-worn camera recordings of all officers who committed the officer-involved death or serious use of force; and

“(II) By August 15, 2020, publicly release the names and body-worn camera recordings of all officers who have committed an officer-involved death since the Body-Worn Camera Program was launched on October 1, 2014; and

“(ii) May, on a case-by-case basis in matters of significant public interest and after consultation with the Chief of Police, the United States Attorney's Office for the District of Columbia, and the Office of the Attorney General, publicly release any other body-worn camera recordings that may not otherwise be releasable pursuant to a FOIA request.

“(2)(A) The Mayor shall not release a body-worn camera recording pursuant to paragraph (1)(B)(i) of this subsection if the following persons inform the Mayor, orally or in writing, that they do not consent to its release:

“(i) For a body-worn camera recording of an officer-involved death, the decedent's next of kin; and

“(ii) For a body-worn camera recording of a serious use of force, the individual against whom the serious use of force was used, or if the individual is a minor or unable to consent, the individual's next of kin.

“(B)(i) In the event of a disagreement between the persons who must consent to the release of a body-worn camera recording pursuant to subparagraph (A) of this paragraph, the Mayor shall seek a resolution in the Superior Court of the District of Columbia.

“(ii) The Superior Court of the District of Columbia shall order the release of the body-worn camera recording if it finds that the release is in the interests of justice.

“(d) Before publicly releasing a body-worn camera recording of an officer-involved death, the Metropolitan Police Department shall:

“(1) Consult with an organization with expertise in trauma and grief on best practices for creating an opportunity for the decedent's next of kin to view the body-worn camera recording in advance of its release;

“(2) Notify the decedent's next of kin of its impending release, including the date when it will be released; and

"(3) Offer the decedent's next of kin the opportunity to view the body-worn camera recording privately in a non-law enforcement setting in advance of its release, and if the next of kin wish to so view the body-worn camera recording, facilitate its viewing.

"(e) For the purposes of this subsection, the term:

"(1) "FOIA" means Title II of the District of Columbia Administrative Procedure Act, effective March 25, 1977 (D.C. Law 1-96; D.C. Official Code § 2-531 *et seq.*);

"(2) "Next of kin" shall mean the priority for next of kin as provided in Metropolitan Police Department General Order 401.08, or its successor directive; and

"(3) "Serious use of force" shall have the same meaning as that term is defined in MPD General Order 901.07, or its successor directive."

Sec. 104. Chapter 39 of Title 24 of the District of Columbia Municipal Regulations is amended as follows:

(a) Section 3900 is amended as follows:

(1) Subsection 3900.9 is amended to read as follows:

"3900.9. Members may not review their BWC recordings or BWC recordings that have been shared with them to assist in initial report writing."

(2) Subsection 3900.10 is amended to read as follows:

"3900.10. (a) Notwithstanding any other law, the Mayor:

"(1) Shall, except as provided in paragraph (b) of this subsection:

"(A) Within 5 business days after an officer-involved death or the serious use of force, publicly release the names and BWC recordings of all officers who committed the officer-involved death or serious use of force; and

"(B) By August 15, 2020, publicly release the names and BWC recordings of all officers who have committed an officer-involved death since the BWC Program was launched on October 1, 2014; and

"(2) May, on a case-by-case basis in matters of significant public interest and after consultation with the Chief of Police, the United States Attorney's Office for the District of Columbia, and the Office of the Attorney General, publicly release any other BWC recordings that may not otherwise be releasable pursuant to a FOIA request.

"(b)(1) The Mayor shall not release a BWC recording pursuant to paragraph (a)(1) of this subsection if the following persons inform the Mayor, orally or in writing, that they do not consent to its release:

"(A) For a BWC recording of an officer-involved death, the decedent's next of kin; and

"(B) For a BWC recording of a serious use of force, the individual against whom the serious use of force was used, or if the individual is a minor or is unable to consent, the individual's next of kin.

"(2)(A) In the event of a disagreement between the persons who must consent to the release of a BWC recording pursuant to subparagraph (1) of this paragraph, the Mayor shall seek a resolution in the Superior Court of the District of Columbia.

"(B) The Superior Court of the District of Columbia shall order the release of the BWC recording if it finds that the release is in the interests of justice.

"(c) Before publicly releasing a BWC recording of an officer-involved death, the Department shall:

"(1) Consult with an organization with expertise in trauma and grief on best practices for creating an opportunity for the decedent's next of kin to view the BWC recording in advance of its release;

"(2) Notify the decedent's next of kin of its impending release, including the date when it will be released; and

"(3) Offer the decedent's next of kin the opportunity to view the BWC recording privately in a non-law enforcement setting in advance of its release, and if the next of kin wish to so view the BWC recording, facilitate its viewing."

(b) Section 3901.2 is amended by adding a new paragraph (a-1) to read as follows:

"(a-1) Recordings related to a request from or investigation by the Chairperson of the Council Committee with jurisdiction over the Department;"

(c) Section 3902.4 is amended to read as follows:

"3902.4. Notwithstanding any other law, within 5 business days after a request from the Chairperson of the Council Committee with jurisdiction over the Department, the Department shall provide unredacted copies of the requested BWC recordings to the Chairperson. Such BWC recordings shall not be publicly disclosed by the Chairperson or the Council."

(d) Section 3999.1 is amended by inserting definitions between the definitions of "metadata" and "subject" to read as follows:

"Next of kin" shall mean the priority for next of kin as provided in MPD General Order 401.08, or its successor directive.

"Serious use of force" shall have the same meaning as that term is defined in MPD General Order 901.07, or its successor directive."

SUBTITLE C. OFFICE OF POLICE COMPLAINTS REFORMS

Sec. 105. The Office of Citizen Complaint Review Establishment Act of 1998, effective March 26, 1999 (D.C. Law 12-208; D.C. Official Code § 5-1101 *et seq.*), is amended as follows:

(a) Section 5(a) (D.C. Official Code § 5-1104(a)) is amended by striking the phrase "There is established a Police Complaints Board ("Board"). The Board shall be composed of 5 members, one of whom shall be a member of the MPD, and 4 of whom shall have no current affiliation with any law enforcement agency." and inserting the phrase "There is established a Police Complaints Board ("Board"). The Board shall be composed of 9 members, which shall include one member from each Ward and one at-large member, none of whom, after the

expiration of the term of the currently serving member of the MPD, shall be affiliated with any law enforcement agency." in its place.

(b) Section 8 (D.C. Official Code § 5-1107) is amended as follows:

(1) A new subsection (g-1) is added to read as follows:

"(g-1)(1) If the Executive Director discovers evidence of abuse or misuse of police powers that was not alleged by the complainant in the complaint, the Executive Director may:

"(A) Initiate the Executive Director's own complaint against the subject police officer; and

"(B) Take any of the actions described in subsection (g)(2) through (6) of this section.

"(2) The authority granted pursuant to paragraph (1) of this subsection shall include circumstances in which the subject police officer failed to:

"(A) Intervene in or subsequently report any use of force incident in which the subject police officer observed another law enforcement officer, including an MPD officer, utilizing excessive force or engaging in any type of misconduct, pursuant to MPD General Order 901.07, its successor directive, or a similar local or federal directive; or

"(B) Immediately report to their supervisor any violations of the rules and regulations of the MPD committed by any other MPD officer, and each instance of their use of force or a use of force committed by another MPD officer, pursuant to MPD General Order 201.26, or any successor directive."

(2) Subsection (h) is amended by striking the phrase "subsection (g)" and inserting the phrase "subsection (g) or (g-1)" in its place.

SUBTITLE D. USE OF FORCE REVIEW BOARD MEMBERSHIP EXPANSION

Sec. 106. Use of Force Review Board; membership.

(a) There is established a Use of Force Review Board ("Board"), which shall review uses of force as set forth by the Metropolitan Police Department in its written directives.

(b) The Board shall consist of the following 13 voting members, and may also include non-voting members at the Mayor's discretion:

(1) An Assistant Chief selected by the Chief of Police, who shall serve as the Chairperson of the Board;

(2) The Commanding Official, Special Operations Division, Homeland Security Bureau;

(3) The Commanding Official, Criminal Investigations Division, Investigative Services Bureau;

(4) The Commanding Official, Metropolitan Police Academy;

(5) A Commander or Inspector assigned to the Patrol Services Bureau;

(6) The Commanding Official, Recruiting Division;

(7) The Commanding Official, Court Liaison Division;

(8) Three civilian members appointed by the Mayor, pursuant to section 2(e) of the Confirmation Act of 1978, effective March 3, 1979 (D.C. Law 2-142; D.C. Official Code § 1-523.01(e)), with the following qualifications and no current or prior affiliation with law enforcement:

(A) One member who has personally experienced the use of force by a law enforcement officer;

(B) One member of the District of Columbia Bar in good standing; and

(C) One District resident community member;

(9) Two civilian members appointed by the Council with the following qualifications and no current or prior affiliation with law enforcement:

(A) One member with subject matter expertise in criminal justice policy; and

(B) One member with subject matter expertise in law enforcement oversight and the use of force; and

(10) The Executive Director of the Office of Police Complaints.

Sec. 107. Section 2(e) of the Confirmation Act of 1978, effective March 3, 1979 (D.C. Law 2-142; D.C. Official Code § 1-523.01(e)), is amended as follows:

(a) Paragraph (38) is amended by striking the phrase “; and” and inserting a semicolon in its place.

(b) Paragraph (39) is amended by striking the period and inserting the phrase “; and” in its place.

(c) A new paragraph (40) is added to read as follows:

“(40) Use of Force Review Board, established by section 106 of the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020, passed on emergency basis on July 7, 2020 (Enrolled version of Bill 23-825).”.

SUBTITLE E. ANTI-MASK LAW REPEAL

Sec. 108. The Anti-Intimidation and Defacing of Public or Private Property Criminal Penalty Act of 1982, effective March 10, 1983 (D.C. Law 4-203; D.C. Official Code § 22-3312 *et seq.*), is amended as follows:

(a) Section 4 (D.C. Official Code § 22-3312.03) is repealed.

(b) Section 5(b) (D.C. Official Code § 22-3312.04(b)) is amended by striking the phrase “or section 4 shall be” and inserting the phrase “shall be” in its place.

Sec. 109. Section 23-581(a-3) of the District of Columbia Official Code is amended by striking the phrase “sections 22-3112.1, 22-3112.2, and 22-3112.3” and inserting the phrase “sections 22-3112.1 and 22-3112.2” in its place.

SUBTITLE F. LIMITATIONS ON CONSENT SEARCHES

Sec. 110, Subchapter II of Chapter 5 of Title 23 of the District of Columbia Official Code is amended by adding a new section 23-526 to read as follows:

"§ 23-526. Limitations on consent searches.

"(a) In cases where a search is based solely on the subject's consent to that search, and is not executed pursuant to a warrant or conducted pursuant to an applicable exception to the warrant requirement, sworn members of District Government law enforcement agencies shall:

"(1) Prior to the search of a person, vehicle, home, or property:

"(A) Explain, using plain and simple language delivered in a calm demeanor, that the subject of the search is being asked to voluntarily, knowingly, and intelligently consent to a search;

"(B) Advise the subject that:

"(i) A search will not be conducted if the subject refuses to provide consent to the search; and

"(ii) The subject has a legal right to decline to consent to the search;

"(C) Obtain consent to search without threats or promises of any kind being made to the subject;

"(D) Confirm that the subject understands the information communicated by the officer; and

"(E) Use interpretation services when seeking consent to conduct a search of a person:

"(i) Who cannot adequately understand or express themselves in spoken or written English; or

"(ii) Who is deaf or hard of hearing.

"(2) If the sworn member is unable to obtain consent from the subject, refrain from conducting the search.

"(b) The requirements of subsection (a) of this section shall not apply to searches executed pursuant to a warrant or conducted pursuant to an applicable exception to the warrant requirement.

"(c)(1) If a defendant moves to suppress any evidence obtained in the course of the search for an offense prosecuted in the Superior Court of the District of Columbia, the court shall consider an officer's failure to comply with the requirements of this section as a factor in determining the voluntariness of the consent.

"(2) There shall be a presumption that a search was nonconsensual if the evidence of consent, including the warnings required in subsection (a), is not captured on body-worn camera or provided in writing.

"(d) Nothing in this section shall be construed to create a private right of action."

SUBTITLE G. MANDATORY CONTINUING EDUCATION EXPANSION;
RECONSTITUTING THE POLICE OFFICERS STANDARDS AND TRAINING BOARD

Sec. 111. Title II of the Metropolitan Police Department Application, Appointment, and Training Requirements of 2000, effective October 4, 2000 (D.C. Law 13-160; D.C. Official Code § 5-107.01 *et seq.*), is amended as follows:

(a) Section 203(b) (D.C. Official Code § 5-107.02(b)) is amended as follows:

(1) Paragraph (2) is amended by striking the phrase "biased-based policing" and inserting the phrase "biased-based policing, racism, and white supremacy" in its place.

(2) Paragraph (3) is amended to read as follows:

"(3) Limiting the use of force and employing de-escalation tactics;"

(3) Paragraph (4) is amended to read as follows:

"(4) The prohibition on the use of neck restraints;"

(4) Paragraph (5) is amended by striking the phrase "; and" and inserting a semicolon in its place.

(5) Paragraph (6) is amended by striking the period and inserting a semicolon in its place.

(6) New paragraphs (7) and (8) are added to read as follows:

"(7) Obtaining voluntary, knowing, and intelligent consent from the subject of a search, when that search is based solely on the subject's consent; and

"(8) The duty of a sworn officer to report, and the method for reporting, suspected misconduct or excessive use of force by a law enforcement official that a sworn member observes or that comes to the sworn member's attention, as well as any governing District laws and regulations and Department written directives."

(b) Section 204 (D.C. Official Code § 5-107.03) is amended as follows:

(1) Subsection (a) is amended by striking the phrase "the District of Columbia Police" and inserting the phrase "the Police" in its place.

(2) Subsection (b) is amended as follows:

(A) The lead-in language is amended by striking the phrase "11 persons" and inserting the phrase "15 persons" in its place.

(B) A new paragraph (2A) is added to read as follows:

"(2A) Executive Director of the Office of Police Complaints or the Executive Director's designee;"

(C) Paragraph (3) is amended to read as follows:

"(3) The Attorney General for the District of Columbia or the Attorney General's designee;"

(D) Paragraph (8) is amended by striking the period and inserting the phrase "; and" in its place.

(E) Paragraph (9) is amended to read as follows:

"(9) Five community representatives appointed by the Mayor, one each with expertise in the following areas:

"(A) Oversight of law enforcement;

"(B) Juvenile justice reform;

"(C) Criminal defense;

"(D) Gender-based violence or LGBTQ social services, policy, or advocacy; and

"(E) Violence prevention or intervention."

(3) Subsection (i) is amended by striking the phrase "promptly after the appointment and qualification of its members" and inserting the phrase "by September 1, 2020" in its place.

(c) Section 205(a) (D.C. Official Code § 5-107.04(a)) is amended by adding a new paragraph (9A) to read as follows:

"(9A) If the applicant has prior service with another law enforcement or public safety agency in the District or another jurisdiction, information on any alleged or sustained misconduct or discipline imposed by that law enforcement or public safety agency;"

SUBTITLE H. IDENTIFICATION OF MPD OFFICERS DURING FIRST AMENDMENT ASSEMBLIES AS LOCAL LAW ENFORCEMENT

Sec. 112. Section 109 of the First Amendment Assemblies Act of 2004, effective April 13, 2005 (D.C. Law 15-352; D.C. Official Code § 5-331.09), is amended as follows:

(a) Designate the existing text as subsection (a).

(b) Add a new subsection (b) to read as follows:

"(b) During a First Amendment assembly, the uniforms and helmets of officers policing the assembly shall prominently identify the officers' affiliation with local law enforcement."

SUBTITLE I. PRESERVING THE RIGHT TO JURY TRIAL

Sec. 113. Section 16-705(b)(1) of the District of Columbia Official Code is amended as follows:

(a) Subparagraph (A) is amended by striking the phrase "; or" and inserting a semicolon in its place.

(b) Subparagraph (B) is amended by striking the phrase "; and" and inserting the phrase "; or" in its place.

(c) A new subparagraph (C) is added to read as follows:

"(C)(i) The defendant is charged with an offense under:

"(I) Section 806(a)(1) of An Act To establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1322; D.C. Official Code § 22-404(a)(1));

"(II) Section 432a of the Revised Statutes of the District of Columbia (D.C. Official Code § 22-405.01); or

"(III) Section 2 of An Act To confer concurrent jurisdiction on the police court of the District of Columbia in certain cases, approved July 16, 1912 (37 Stat. 193; D.C. Official Code § 22-407); and

"(ii) The person who is alleged to have been the victim of the offense is a law enforcement officer, as that term is defined in section 432(a) of the Revised Statutes of the District of Columbia (D.C. Official Code § 22-405(a)); and".

SUBTITLE J. REPEAL OF FAILURE TO ARREST CRIME

Sec. 114. Section 400 of the Revised Statutes of the District of Columbia (D.C. Official Code § 5-115.03), is repealed.

SUBTITLE K. AMENDING MINIMUM STANDARDS FOR POLICE OFFICERS

Sec. 115. Section 202 of the Omnibus Police Reform Amendment Act of 2000, effective October 4, 2000 (D.C. Law 13-160; D.C. Official Code § 5-107.01), is amended by adding a new subsection (f) to read as follows:

"(f) An applicant shall be ineligible for appointment as a sworn member of the Metropolitan Police Department if the applicant:

"(1) Was previously determined by a law enforcement agency to have committed serious misconduct, as determined by the Chief by General Order;

"(2) Was previously terminated or forced to resign for disciplinary reasons from any commissioned or recruit or probationary position with a law enforcement agency; or

"(3) Previously resigned from a law enforcement agency to avoid potential, proposed, or pending adverse disciplinary action or termination.".

SUBTITLE L. POLICE ACCOUNTABILITY AND COLLECTIVE BARGAINING AGREEMENTS

Sec. 116. Section 1708 of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-617.08), is amended by adding a new subsection (c) to read as follows:

"(c)(1) All matters pertaining to the discipline of sworn law enforcement personnel shall be retained by management and not be negotiable.

"(2) This subsection shall apply to any collective bargaining agreements entered into with the Fraternal Order of Police/Metropolitan Police Department Labor Committee after September 30, 2020.".

SUBTITLE M. OFFICER DISCIPLINE REFORMS

Sec. 117. Section 502 of the Omnibus Public Safety Agency Reform Amendment Act of 2004, effective September 30, 2004 (D.C. Law 15-194; D.C. Official Code § 5-1031), is amended as follows:

(a) Subsection (a-1) is amended as follows:

(1) Paragraph (1) is amended by striking the phrase "subsection (b) of this section" and inserting the phrase "paragraph (1A) of this subsection and subsection (b) of this section" in its place.

(2) A new paragraph (1A) is added to read as follows:

"(1A) If the act or occurrence allegedly constituting cause involves the serious use of force or indicates potential criminal conduct by a sworn member or civilian employee of the Metropolitan Police Department, the period for commencing a corrective or adverse action under this subsection shall be 180 days, not including Saturdays, Sundays, or legal holidays, after the date that the Metropolitan Police Department had notice of the act or occurrence allegedly constituting cause."

(3) Paragraph (2) is amended by striking the phrase "paragraph (1)" and inserting the phrase "paragraphs (1) and (1A)" in its place.

(b) Subsection (b) is amended by striking the phrase "the 90-day period" and inserting the phrase "the 90-day or 180-day period, as applicable," in its place.

Sec. 118. Section 6-A1001.5 of Chapter 10 of Title 6 of the District of Columbia Municipal Regulations is amended by striking the phrase "reduce the penalty" and inserting the phrase "reduce or increase the penalty" in its place.

SUBTITLE N. USE OF FORCE REFORMS

Sec. 119. Use of deadly force.

(a) For the purposes of this section, the term:

(1) "Deadly force" means any force that is likely or intended to cause serious bodily injury or death.

(2) "Deadly weapon" means any object, other than a body part or stationary object, that in the manner of its actual, attempted, or threatened use, is likely to cause serious bodily injury or death.

(3) "Serious bodily injury" means extreme physical pain, illness, or impairment of physical condition, including physical injury, that involves:

(A) A substantial risk of death;

(B) Protracted and obvious disfigurement;

(C) Protracted loss or impairment of the function of a bodily member or

organ; or

(D) Protracted loss of consciousness.

(b) A law enforcement officer shall not use deadly force against a person unless:

(1) The law enforcement officer reasonably believes that deadly force is immediately necessary to protect the law enforcement officer or another person, other than the subject of the use of deadly force, from the threat of serious bodily injury or death;

(2) The law enforcement officer's actions are reasonable, given the totality of the circumstances; and

(3) All other options have been exhausted or do not reasonably lend themselves to the circumstances.

(c) A trier of fact shall consider:

(1) The reasonableness of the law enforcement officer's belief and actions from the perspective of a reasonable law enforcement officer; and

(2) The totality of the circumstances, which shall include:

(A) Whether the subject of the use of deadly force:

(i) Possessed or appeared to possess a deadly weapon; and

(ii) Refused to comply with the law enforcement officer's lawful order to surrender an object believed to be a deadly weapon prior to the law enforcement officer using deadly force;

(B) Whether the law enforcement officer engaged in de-escalation measures prior to the use of deadly force, including taking cover, waiting for back-up, trying to calm the subject of the use of force, or using non-deadly force prior to the use of deadly force; and

(C) Whether any conduct by the law enforcement officer prior to the use of deadly force increased the risk of a confrontation resulting in deadly force being used.

SUBTITLE O. RESTRICTIONS ON THE PURCHASE AND USE OF MILITARY WEAPONRY

Sec. 120. Limitations on military weaponry acquired by District law enforcement agencies.

(a) Beginning in Fiscal Year 2021, District law enforcement agencies shall not acquire the following property through any program operated by the federal government:

(1) Ammunition of .50 caliber or higher;

(2) Armed or armored aircraft or vehicles;

(3) Bayonets;

(4) Explosives or pyrotechnics, including grenades;

(5) Firearm mufflers or silencers;

(6) Firearms of .50 caliber or higher;

(7) Firearms, firearm accessories, or other objects, designed or capable of launching explosives or pyrotechnics, including grenade launchers; and

(8) Remotely piloted, powered aircraft without a crew aboard, including drones.

(b)(1) If a District law enforcement agency requests property through a program operated by the federal government, the District law enforcement agency shall publish notice of the request on a publicly accessible website within 14 days after the date of the request.

(2) If a District law enforcement agency acquires property through a program operated by the federal government, the District law enforcement agency shall publish notice of the acquisition on a publicly accessible website within 14 days after the date of the acquisition.

(c) District law enforcement agencies shall disgorge any property described in subsection (a) of this section that the agencies currently possess within 180 days after the effective date of this act.

SUBTITLE P. LIMITATIONS ON THE USE OF INTERNATIONALLY BANNED CHEMICAL WEAPONS, RIOT GEAR, AND LESS-LETHAL PROJECTILES

Sec. 121. The First Amendment Assemblies Act of 2004, effective April 13, 2005 (D.C. Law 15-352; D.C. Official Code § 5-331.01 *et seq.*), is amended as follows:

(a) Section 102 (D.C. Official Code § 5-331.02) is amended as follows:

(1) Paragraphs (1) and (2) are redesignated as paragraphs (2) and (4) respectively.

(2) A new paragraph (1) is added to read as follows:

“(1) “Chemical irritant” means tear gas or any chemical that can rapidly produce sensory irritation or disabling physical effects in humans, which disappear within a short time following termination of exposure, or any substance prohibited by the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, effective April 29, 1997.”

(3) A new paragraph (3) is added to read as follows:

“(3) “Less-lethal projectiles” means any munition that may cause bodily injury or death through the transfer of kinetic energy and blunt force trauma. The term “less-lethal projectiles” includes rubber or foam-covered bullets and stun grenades.”

(b) Section 116 (D.C. Official Code § 5-331.16) is amended to read as follows:

“Sec. 116. Use of riot gear and riot tactics at First Amendment assemblies.

“(a)(1) No officers in riot gear may be deployed in response to a First Amendment assembly unless there is an immediate risk to officers of significant bodily injury. Any deployment of officers in riot gear:

“(A) Shall be consistent with the District’s policy on First Amendment assemblies; and

“(B) May not be used as a tactic to disperse a First Amendment assembly.

“(2) Following any deployment of officers in riot gear in response to a First Amendment assembly, the commander at the scene shall make a written report to the Chief of Police within 48 hours, and that report shall be available to the public.

“(b)(1) Chemical irritants shall not be used by MPD to disperse a First Amendment assembly.

"(2) The Mayor shall request that any federal law enforcement agency operating in the District refrain from the use of chemical irritants to disperse a First Amendment assembly.

"(c)(1) Less-lethal projectiles shall not be used by MPD to disperse a First Amendment assembly.

"(2) The Mayor shall request that any federal law enforcement agency operating in the District refrain from the use of less-lethal projectiles to disperse a First Amendment assembly."

SUBTITLE Q. POLICE REFORM COMMISSION

Sec. 122. Police Reform Commission.

(a) There is established, supported by the Council's Committee of the Whole, a Police Reform Commission ("Commission") to examine policing practices in the District and provide evidence-based recommendations for reforming and revising policing in the District.

(b)(1) The Commission shall be comprised of 20 representatives from among the following entities:

- (A) Non-law enforcement District government agencies;
- (B) The Office of the Attorney General for the District of Columbia;
- (C) Criminal and juvenile justice reform organizations;
- (D) Black Lives Matter DC;
- (E) Educational institutions;
- (F) Parent-led advocacy organizations;
- (G) Student- or youth-led advocacy organizations;
- (H) Returning citizen organizations;
- (I) Victim services organizations;
- (J) Social services organizations;
- (K) Mental and behavioral health organizations;
- (L) Small businesses;
- (M) Faith-based organizations; and
- (N) Advisory Neighborhood Commissions.

(2) The Chairman of the Council shall:

- (A) Appoint the Commission representatives no later than July 22, 2020;

and

(B) Designate a representative who is not employed by the District government as the Commission's Chairperson.

(c)(1) The Commission shall submit its recommendations in a report to the Mayor and Council by December 31, 2020.

(2) The report required by paragraph (1) of this subsection shall include analyses and recommendations on the following topics:

- (A) The role of sworn and special police officers in District schools;

(B) Alternatives to police responses to incidents, such as community-based, behavioral health, or social services co-responders;

(C) Police discipline;

(D) The integration of conflict resolution strategies and restorative justice practices into policing; and

(E) The provisions of the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020, passed on emergency basis on July 7, 2020 (Enrolled version of Bill 23-825).

(d) The Commission shall sunset upon the delivery of its report or on December 31, 2020, whichever is later.

SUBTITLE R. METRO TRANSIT POLICE DEPARTMENT OVERSIGHT AND ACCOUNTABILITY

Sec. 123. Section 76 of Article XVI of Title III of the Washington Metropolitan Area Transit Regulation Compact, approved November 6, 1966 (80 Stat. 1324; D.C. Official Code § 9-1107.01(76)), is amended as follows:

(a) Subsection (f) is amended by adding a new paragraph (1A) to read as follows:

"(1A) prohibit the use of enforcement quotas to evaluate, incentivize, or discipline members, including with regard to the number of arrests made or citations or warnings issued;"

(b) A new subsection (i) is added to read as follows:

"(i)(1) The Authority shall establish a Police Complaints Board to review complaints filed against the Metro Transit Police.

"(2) The Police Complaints Board shall comprise eight members, two civilian members appointed by each Signatory, and two civilian members appointed by the federal government.

"(3) Members of the Police Complaints Board shall not be Authority employees and shall have no current affiliation with law enforcement.

"(4) Members of the Police Complaints Board shall serve without compensation but may be reimbursed for necessary expenses incurred as incident to the performance of their duties.

"(5) The Police Complaints Board shall appoint a Chairperson and Vice-Chairperson from among its members.

"(6) Four members of the Police Complaints Board shall constitute a quorum, and no action by the Police Complaints Board shall be effective unless a majority of the Police Complaints Board present and voting, which majority shall include at least one member from each Signatory, concur therein.

"(7) The Police Complaints Board shall meet at least monthly and keep minutes of its meetings.

"(8) The Police Complaints Board, through its Chairperson, may employ qualified persons or utilize the services of qualified volunteers, as necessary, to perform its work, including the investigation of complaints.

"(9) The duties of the Police Complaints Board shall include:

"(A) Adopting rules and regulations governing its meetings, minutes, and internal processes; and

"(B) With respect to the Metro Transit Police, reviewing:

"(i) The number, type, and disposition of citizen complaints received, investigated, sustained, or otherwise resolved;

"(ii) The race, national origin, gender, and age of the complainant and the subject officer or officers;

"(iii) The proposed and actual discipline imposed on an officer as a result of any sustained citizen complaint;

"(iv) All use of force incidents, serious use of force incidents, and serious physical injury incidents; and

"(v) Any in-custody death.

"(10) The Police Complaints Board shall have the authority to receive complaints against members of the Metro Transit Police, which shall be reduced to writing and signed by the complainant, that allege abuse or misuse of police powers by such members, including:

"(A) Harassment;

"(B) Use of force;

"(C) Use of language or conduct that is insulting, demeaning, or humiliating;

"(D) Discriminatory treatment based upon a person's race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, physical disability, matriculation, political affiliation, source of income, or place of residence or business;

"(E) Retaliation against a person for filing a complaint; and

"(F) Failure to wear or display required identification or to identify oneself by name and badge number when requested to do so by a member of the public.

"(11) If the Metro Transit Police receives a complaint containing subject matter that is covered by paragraph (10) of this subsection, the Metro Transit Police shall transmit the complaint to the Police Complaints Board within 3 business days after receipt.

"(12) The Police Complaints Board shall have timely and complete access to information and supporting documentation specifically related to the Police Complaints Board's duties and authority under paragraphs (9) and (10) of this subsection.

"(13) The Police Complaints Board shall have the authority to dismiss, conciliate, mediate, investigate, adjudicate, or refer for further action to the Metro Transit Police a complaint received under paragraph (10) of this subsection.

"(14)(A) If deemed appropriate by the Police Complaints Board, and if the parties agree to participate in a conciliation process, the Police Complaints Board may attempt to resolve a complaint by conciliation.

"(B) The conciliation of a complaint shall be evidenced by a written agreement signed by the parties which may provide for oral apologies or assurances, written undertakings, or any other terms satisfactory to the parties. No oral or written statements made in conciliation proceedings may be used as a basis for any discipline or recommended discipline against a subject police officer or officers or in any civil or criminal litigation.

"(15) If the Police Complaints Board refers the complaint to mediation, the Board shall schedule an initial mediation session with a mediator. The mediation process may continue as long as the mediator believes it may result in the resolution of the complaint. No oral or written statement made during the mediation process may be used as a basis for any discipline or recommended discipline of the subject police officer or officers, nor in any civil or criminal litigation, except as otherwise provided by the rules of the court or the rules of evidence.

"(16) If the Police Complaints Board refers a complaint for investigation, the Board shall assign an investigator to investigate the complaint. When the investigator completes the investigation, the investigator shall summarize the results of the investigation in an investigative report which, along with the investigative file, shall be transmitted to the Board, which may order an evidentiary hearing.

"(17) The Police Complaints Board may, after an investigation, assign a complaint to a complaint examiner, who shall make written findings of fact regarding all material issues of fact, and shall determine whether the facts found sustain or do not sustain each allegation of misconduct. If the complaint examiner determines that one or more allegations in the complaint is sustained, the Police Complaints Board shall transmit the entire complaint file, including the merits determination of the complaint examiner, to the Metro Transit Police for appropriate action.

"(18) Employees of the Metro Transit Police shall cooperate fully with the Police Complaints Board in the investigation and adjudication of a complaint. An employee of the Metro Transit Police shall not retaliate, directly or indirectly, against a person who files a complaint under this subsection.

"(19) When, in the determination of the Police Complaints Board, there is reason to believe that the misconduct alleged in a complaint or disclosed by an investigation of a complaint may be criminal in nature, the Police Complaints Board shall refer the matter to the appropriate authorities for possible criminal prosecution, along with a copy of all of the Police Complaints Board's files relevant to the matter being referred; provided, that the Police Complaints Board shall make a record of each referral, and ascertain and record the disposition of each matter referred and, if the appropriate authorities decline in writing to prosecute, the Police Complaints Board shall resume its processing of the complaint.

"(20) Within 60 days before the end of each fiscal year, the Police Complaints Board shall transmit to the Board and the Signatories an annual report of its operations, including any policy recommendations."

TITLE II. BUILDING SAFE AND JUST COMMUNITIES.

SUBTITLE A. RESTORE THE VOTE

Sec. 201. The District of Columbia Election Code of 1955, approved August 12, 1955 (69 Stat. 669; D.C. Official Code § 1-1001.01 *et seq.*), is amended as follows:

(a) Section 2(2) (D.C. Official Code § 1-1001.02(2)) is amended as follows:

(1) Subparagraph (C) is amended by striking the semicolon and inserting the phrase "; and" in its place.

(2) Subparagraph (D) is repealed.

(b) Section 5(a) (D.C. Official Code § 1-1001.05(a)) is amended by adding new paragraphs (9B) and (9C) to read as follows:

"(9B) In advance of any applicable voter registration or absentee ballot submission deadlines, provide, to every qualified elector in the Department of Corrections' care or custody, and, beginning January 1, 2021, endeavor to provide to every qualified elector in the Bureau of Prisons' care or custody:

"(A) A voter registration form;

"(B) A voter guide;

"(C) Educational materials about the importance of voting and the right of an individual currently incarcerated or with a criminal record to vote in the District; and

"(D) Without first requiring an absentee ballot application to be submitted, an absentee ballot;

"(9C) Beginning January 1, 2021, upon receiving information pursuant to section 7(k)(3), (4), or (4A) from the Superior Court of the District of Columbia, the United States District Court for the District of Columbia, or the Bureau of Prisons, notify a qualified elector incarcerated for a felony of the qualified elector's right to vote;"

(c) Section 7(k) (D.C. Official Code § 1-1001.07(k)) is amended as follows:

(1) Paragraph (1) is amended by striking the phrase "registrant, upon notification of a registrant's incarceration for a conviction of a felony" and inserting the phrase "registrant," in its place.

(2) A new paragraph (4A) is added to read as follows:

"(4A) Beginning on January 1, 2021, at least monthly, the Board shall request from the Bureau of Prisons the name, location of incarceration, and contact information for each qualified elector in the Bureau of Prisons' care or custody."

Sec. 202. Section 8 of An Act To create a Department of Corrections in the District of Columbia, effective April 26, 2019 (D.C. Law 22-309; D.C. Official Code § 24-211.08), is amended by adding a new subsection (b-1) to read as follows:

“(b-1) Within 10 business days after the effective date of the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020, passed on emergency basis on July 7, 2020 (Enrolled version of Bill 23-825) (“act”), the Department shall notify eligible individuals in its care or custody of their voting rights pursuant to section 201 of the act.”.

**TITLE III. REPEALS; APPLICABILITY; FISCAL IMPACT STATEMENT;
EFFECTIVE DATE**

Sec. 301. Repeals.

The Comprehensive Policing and Justice Reform Emergency Amendment Act of 2020, passed on emergency basis on June 9, 2020 (Enrolled version of Bill 23-774), is repealed.

Sec. 302. Applicability.

(a) Section 110 shall apply as of August 15, 2020.

(b) Section 123 shall apply after the enactment of concurring legislation by the State of Maryland and the Commonwealth of Virginia, the signing and execution of the legislation by the Mayor of the District of Columbia and the Governors of Maryland and Virginia, and approval by the United States Congress.

(c) Section 301 shall apply as of July 7, 2020.

Sec. 303. Fiscal impact statement.

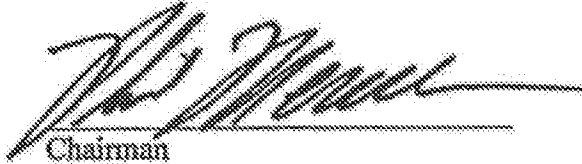
The Council adopts the fiscal impact statement of the Budget Director as the fiscal impact statement required by section 4a of the General Legislative Procedures Act of 1975, approved October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

Sec. 304. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), and shall remain in effect for no longer than 90 days, as provided for emergency acts of the Council of the District of Columbia in section

ENROLLED ORIGINAL

412(a) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 788;
D.C. Official Code § 1-204.12(a)).



Chairman
Council of the District of Columbia



Mayor
District of Columbia

APPROVED
July 22, 2020

Exhibit

2



U.S. Department of Justice

Michael R. Sherwin
Acting United States Attorney

District of Columbia

*Judiciary Center
555 Fourth St., N.W.
Washington, D.C. 20530*

June 8, 2020

VIA ELECTRONIC MAIL

The Honorable Charles Allen
Chairman
Committee on the Judiciary and Public Safety
Council of the District of Columbia
1350 Pennsylvania Avenue, NW
Suite 110
Washington, DC 20004

Dear Chairman Allen:

Thank you for the opportunity to submit comments on behalf of the United States Attorney's Office for the District of Columbia on Bill 23-774 (the "Comprehensive Policing and Justice Reform Emergency Amendment Act of 2020"). As members of this community, we are deeply disturbed by the death of George Floyd, and the circumstances surrounding his death. We support the fair and equitable treatment of individuals, regardless of race. In this time, we recommit ourselves to our duty as prosecutors—that is, to uphold the Constitution and the laws of the District of Columbia, and to serve justice for all. We support many of the goals of this emergency bill, which include ensuring accountability for police misconduct, and we commend the Council for its role in furthering this goal.

At the outset, we are concerned that by designating all of these proposals as emergency legislation, the Council is limiting the opportunity for the meaningful public and governmental input that the regular legislative process affords. Some of the proposals in this bill are significant policy proposals, and merit fulsome public engagement.

The U.S. Attorney's Office for the District of Columbia (USAO) also has concerns regarding proposals in this bill relating to body-worn camera (BWC) footage. First, the bill

proposes modifying D.C. Municipal Regulation 24-3900.9 as follows: “Members may not review their BWC recordings or BWC recordings that have been shared with them to assist in initial report writing, ~~except in cases involving a police shooting.~~”

As a threshold matter, it bears emphasizing that the existing Regulation already contains an exception for cases involving a police shooting. This means that, where there is a police shooting, an MPD member is precluded from reviewing his or her own BWC recording before writing an initial report. Indeed, in certain situations, the online platform storing MPD BWC footage “locks” the videos for review by officials, precluding officers from viewing that footage, and precluding others from viewing that footage without permission. USAO supports expanding the exception in the existing Regulation to encompass cases involving officer conduct that result in serious injury or death, even where there is no firearm involved. USAO therefore supports amending the Regulation as follows: “Members may review their BWC recordings or BWC recordings that have been shared with them to assist in initial report writing, except in cases involving a police shooting, or in cases involving officer-involved death or serious bodily injury.”

USAO’s concerns below, therefore, only apply to cases that do not involve a police shooting, or officer-involved death or serious bodily injury. These include homicides, sexual abuse, domestic violence, robberies, burglaries, assaults, and other violent crimes committed by civilians against other civilians.

USAO’s primary objective is to ensure the accuracy of the initial police report. Particularly in less serious cases, where a detective may not be assigned, the initial police report is a crucial way to inform prosecutors, the defense, and judges about the facts of the case. Officer accuracy in report writing is paramount, and USAO is concerned about any change in law that could infringe on accuracy. Frequently, the language in the initial police report is the same language used in a *Gerstein* affidavit filed in court or in an arrest or search warrant, upon which judges rely when making decisions that affect a person’s liberty and privacy.¹ The accuracy of an affidavit establishing probable cause or in support of an arrest or search warrant is essential.

Although not all officers currently rely on their BWC footage in preparing their initial police reports, there is good reason why officers may rely on their BWC footage in preparing their initial police reports. Such use is often to be encouraged in that it has the capacity to improve the accuracy of the report. Officers often capture civilian conduct and interviews on BWC. Civilian interviews can be lengthy, and may be difficult to remember in detail or to record in officer notes. It is important that officers accurately capture in their initial reports what civilian victims, witnesses, and defendants have said. Inaccuracies in capturing civilian witness statements will not only inappropriately undermine officer credibility at a hearing or at trial, but may also inappropriately undermine civilian credibility at a hearing or trial, when the defense attempts to impeach a civilian witness based on the conflicting statements as documented in the

¹ A *Gerstein* affidavit, which is sworn to by a law enforcement officer, is a document filed in court setting forth the facts of a case that provides a basis for the judicial finding of probable cause. A judicial finding of probable cause is required for pretrial detention.

officer's initial report. Further, BWC footage may contain exculpatory material, and it is very important that officers capture exculpatory material in their initial reports. This could include exculpatory statements made by civilian witnesses, exculpatory evidence captured on video, and exculpatory suspects that could exonerate the accused.

The bill also eliminates an officer's ability to review another officer's BWC footage in preparing an initial police report. Review of another officer's BWC footage can be an important investigatory step in not only ascertaining the full scope of conduct, but in ascertaining what charges would be appropriate. Further, the bill is unclear as to whether a detective may review a patrol officer's BWC while preparing the detective's initial report, which is often a more comprehensive report. Such review should not be precluded inadvertently by this bill.

Finally, if officers are not permitted to review BWC footage before writing a report, officers may be incentivized to write very brief initial reports that do not contain meaningful details, to the detriment of prosecutors seeking to make just charging decisions, defense counsel arguing probable cause and release conditions, and judges making probable cause and hold determinations.

Second, the bill proposes modifying D.C. Municipal Regulation 24-3900.10 as follows: "Notwithstanding any other law, the Mayor: (a) Shall: (1) Within 72 hours after an officer-involved death or the serious use of force, publicly release the names and BWC recordings of all officers who committed the officer-involved death or serious use of force; and (2) By July 1, 2020, publicly release the names and BWC recordings of all officers who have committed an officer-involved death since the BWC Program was created; and (b) may, on a case-by-case basis in matters of significant public interest and after consultation with the Chief of Police, the United States Attorney's Office for the District of Columbia, and the Office of the Attorney General, publicly release any other BWC recordings that may not 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, and assaults on an officer requiring hospitalization."

USAO is concerned that this modification would, in fact, make it more difficult to investigate a serious officer-involved death or serious use of force. Such a result, of course, would be contrary to our shared goal of ensuring officer accountability for misconduct. Once the BWC footage is public, both the officer involved and any civilians involved would be able to watch it. It would be virtually impossible for USAO to conduct a full investigation within 72 hours, as a full investigation could include all relevant parties, including involved civilians, testifying before the grand jury.² The early publication of BWC could create a narrative that makes it difficult to conduct an investigation, as it may lead witnesses to a conclusion that affects their testimony.

² For example, for an officer-involved death or serious use of force case that occurred at 5:00 p.m. on a Friday, 64 of the allotted 72 hours would pass before a grand jury was even sitting again to begin hearing witness testimony.

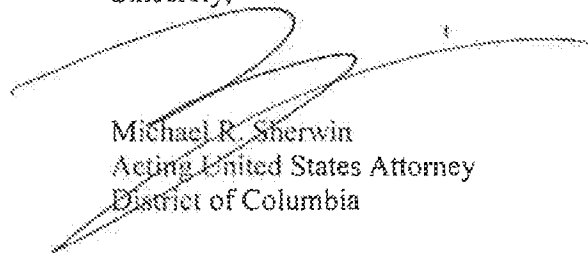
Further, early release of BWC could inadvertently publicize the identities of the witnesses. To ensure police accountability, it is crucial that witnesses cooperate. Even with redaction of witness names (which the proposed legislation does not currently provide for), the neighborhood or location where an incident took place would be visible, which could lead to a situation where witness identities were improperly exposed. Further, even if redactions are permitted by the legislation, 72 hours may not be enough time to conduct redactions of all relevant BWC footage, particularly if there is extensive BWC footage of an incident from numerous officers. If the BWC were released unredacted, civilian privacy could be compromised, as BWC often contains personal details from civilians, including names, dates of birth, and contact information such as home addresses and telephone numbers.

Because there are situations where it could be appropriate for the Mayor, in consultation with the relevant agencies, to release BWC footage, the mandatory language of the bill ("shall") should be changed to permissive language ("may"), allowing the Mayor discretion to release BWC footage at an appropriate time, balancing the needs of the community to see the footage with the needs of prosecutors to accurately investigate what happened, and the security and privacy rights of civilian witnesses.

Finally, the prosecution and the government should not malign any suspect, including an officer, while an investigation is pending. Indeed, as a rule, police and prosecutors do not publicly release the name of any individual under investigation unless and until the individual is charged. Thus, if the evidence does not support charges, the target of the investigation, who is presumed innocent, does not suffer unjust reputational harm. In contrast, when an officer is charged with a crime, his or her name is released. Because, after thorough investigation, a police-involved death or serious use of force investigation may not ultimately result in the criminal charge of an officer, a requirement that the Mayor categorically release all names of officers after 72 hours, regardless of the facts of the case or the nature of the officer's actions, could unjustly malign an officer.

We look forward to continuing to work with the Council to ensure that our laws are just and equitable.

Sincerely,



Michael R. Sherwin
Acting United States Attorney
District of Columbia

cc: The Honorable Muriel Bowser, Mayor
The Honorable Kevin Donahue, Deputy Mayor
for Public Safety and Justice and Deputy City Administrator

The Honorable Phil Mendelson, Chairman
The Honorable Kenyan McDuffie, Chairman Pro Tempore
The Honorable Anita Bonds, Councilmember, Judiciary Committee
The Honorable Mary M. Cheh, Councilmember, Judiciary Committee
The Honorable Vincent C. Gray, Councilmember, Judiciary Committee
The Honorable David Grosso, Councilmember
The Honorable Brianne Nadeau, Councilmember
The Honorable Elissa Silverman, Councilmember
The Honorable Brandon T. Todd, Councilmember
The Honorable Robert C. White, Jr., Councilmember
The Honorable Trayon White, Sr., Councilmember
The Honorable Karl A. Racine, Attorney General for the District of Columbia