

[ORAL ARGUMENT NOT YET SCHEDULED]
No. 26-7032

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

FREDERICK DOUGLASS FOUNDATION, INC.; STUDENTS FOR LIFE OF
AMERICA; WILLIAM CLEVELAND; ROBERT L. GURLEY, JR.; AND
ANGELA WHITTINGTON,

Plaintiffs-Appellants,

v.

DISTRICT OF COLUMBIA,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia
Case No. 1:20-cv-03346-JEB / Hon. James E. Boasberg

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES, AND CORPORATE DISCLOSURE STATEMENT

A. Parties and Amici

The following parties and amici appeared before the district court in this matter or will be appearing in the appeal before this court:

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B. Rulings Under Review

Plaintiffs-Appellants seek review of the U.S. District Court for the District of Columbia Memorandum Opinion and Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment, dated February 24, 2026.

C. Related Cases

Plaintiffs-Appellants are not aware of any related cases currently pending before this court. This case was previously before this court as appeal number 21-7108.

D. Disclosure Statement

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Appellants state that there are no parent companies, subsidiaries, or affiliates of any of the named Appellants with outstanding public securities.

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GLOSSARY

BLM	Black Lives Matter
DDOT	District Department of Transportation
MPD	Metropolitan Police Department
SOD	Special Operations Division

INTRODUCTION

This Court has already held—in this very case—that the “First Amendment prohibits the government from favoring some speakers over others” in law enforcement. *Frederick Douglass Found., Inc. v. District of Columbia*, 82 F.4th 1122, 1150 (D.C. Cir. 2023) (“*FDF*”). A reasonable jury could conclude that is just what the District of Columbia did here. Officers prevented Plaintiffs—two pro-life groups and their leaders—from writing “Black Pre-Born Lives Matter” in washable chalk on a public sidewalk outside Planned Parenthood and arrested the two chalkers for defacement of public property. Meanwhile, protesters spray-painted streets and sidewalks all over the city that summer and fall with Black Lives Matter messages. Yet none of the city’s arrest reports shows even a *single* arrest of a protester for BLM defacement.

A reasonable jury could therefore find for Plaintiffs on their First Amendment selective-enforcement claim. Video footage and other record evidence supports the conclusion that Plaintiffs were similarly situated—a classic jury question—to Black Lives Matter protesters who were not arrested for defacement. For example, camera footage shows officers standing by while a protester peacefully spray-painted “I can’t breathe” on the street near the Chamber of Commerce only 15 days after officers arrested those chalking at Plaintiffs’ event. Such uneven, viewpoint-based application of the law is “an ‘egregious’ assault” on the First Amendment. *Chiles v. Salazar*, 146 S. Ct. 1010, 1029 (2026).

The evidence also supports the conclusion that the District is liable for that constitutional violation under Section 1983. The record suggests that the same District policymaker—Assistant Chief of Police Jeffery Carroll—called the shots at Plaintiffs’ event and the Chamber of Commerce event. In addition, officers’ repeated failure to arrest *anyone* who painted a Black Lives Matters message—in stark contrast to their vigorous enforcement of the ordinance against Plaintiffs—reveals a consistent custom in the Metropolitan Police Department (“MPD”) for which the District is liable. At minimum, the District knew or should have known of the constitutional risk of selective enforcement yet carried on undeterred.

The district court’s decision—granting the District summary judgment because of Plaintiffs’ purported lack of proof on the similarly situated prong—is incorrect. The district court failed to follow summary-judgment first principles. Rather than viewing the evidence in the light most favorable to Plaintiffs and leaving any weighing of the evidence for the jury, the court consistently drew inferences with which a reasonable jury might disagree. On top of that, the court applied too strict a legal standard. Comparators need only be similar in material respects, not identical. And Plaintiffs need only prove their claim by a preponderance of the evidence.

This Court should therefore reverse and remand for a jury to decide this case.

JURISDICTIONAL STATEMENT

Plaintiffs brought a First Amendment free-speech selective-enforcement claim in the district court under 42 U.S.C. § 1983. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. The district court entered an order, together with an accompanying memorandum opinion, granting Defendant's motion for summary judgment and denying Plaintiffs' motion for summary judgment, dated February 24, 2026. That order entered judgment for Defendant. Plaintiffs timely filed a notice of appeal on March 20, 2026. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court erred in granting Defendant's motion for summary judgment against Plaintiffs' First Amendment claim.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the addendum filed with this brief.

STATEMENT OF THE CASE

A. Factual background

1. Protests proliferate across the city in the summer and fall of 2020.

In the summer and fall of 2020, the District of Columbia erupted in protests. Those protests stemmed in large part from George Floyd's tragic death in late May 2020. JA399. Protesters flooded the streets, many in support of the Black Lives Matter movement. JA399; JA217 ("demonstrations related to ... that cause continued on throughout the summer"); JA656–57. Officers testified that some protests continued into 2021. JA332–33, 438. In early June, Mayor Bowser added the District's voice of approval to the protesters' petitions, commissioning a block-long "Black Lives Matter" mural in permanent yellow paint. JA1262.

In the first week or two after George Floyd's death, some protests turned violent. Officers faced "unprecedented[ed]" rioting, looting, and other destructive behavior. JA673–75, 713. Thankfully, over the rest of the summer and fall, protests largely remained peaceful. JA675. Inspector Robert Glover, who spent much of the summer acting as the commander of MPD's Special Operations Division ("SOD"), testified that he was at approximately "95 percent" of the events that took place. JA736.

He estimated that about “70 percent” were safe—even with the “unprecedented[ed]” “harm and destruction” of the first couple weeks. JA713.¹

The protests varied in size. Some had hundreds or even thousands of people. JA1196–1204, 1228–32. Many times, though, events drew fewer than 50 people. *Id.* And sometimes only a handful of people gathered. *Id.*; see JA731 (discussing event with “two participants”).

The summer and fall of 2020 also gave rise to a variety of messages. Protestors upset about George Floyd’s tragic death did not speak with one voice. Rather, one MPD officer, Lieutenant Jason Bagshaw, testified that “a lot of different branches”—*i.e.*, messages—stemmed from “the George Floyd stuff.” JA323. “Black Lives Matter” might have been the primary message, but Bagshaw said not “everything” fit into that category. *Id.* There were also “anti-police” and “police reform” offshoots. *Id.* Peter Newsham, the Chief of Police, likewise refused to conflate “anti-police” and “Black Lives Matter” messages. JA161.

2. Many protests include defacement, but officers make no arrests for those painting Black Lives Matter messages.

No matter the precise message, many of the protests featured a common communication instrument. Protesters around the city wrote or drew their messages on public sidewalks, streets, and buildings. All this

¹ This brief refers to District and MPD officials by their titles at the time of the events in question in the summer and fall of 2020.

violated the District’s defacement ordinance, which makes it unlawful “to write, mark, draw, or paint” on public or private property without permission. D.C. Code § 22-3312.01.

For example, soon after Mayor Bowser added “Black Lives Matter” to the street, protesters appended “= Defund the Police” to the mural in yellow paint. JA1262–63. A video also captures part of an August 16 event outside the Chamber of Commerce where officers stood by as two individuals peaceably spray-painted messages—including “I can’t breathe,” a Black Lives Matter message—on the street. Aug. 16 Body-Worn Camera Footage (“Aug. 16 Video”); JA1266–67; JA423.² Captain Michelle Caron, the SOD official in charge on the scene, testified that she “handle[d]” the event based on “guidance” from Assistant Chief Carroll and others. JA401, 436. And another video shows a protester spray-painting “Black Lives Matter” at a gathering outside the Department of Justice. *Leftist Spray-Paints ‘Black Lives Matter,’ ‘Jacob Blake’ Outside Department of Justice During 2020 March on Washington*, Breitbart, <https://jwp.io/s/wU4Xrxd2> (last visited July 9, 2026) (“Aug. 28 Video”).

Those are not the only examples. Assistant Chief of Police Jeffery Carroll, who oversaw SOD, similarly testified that he was “present” at “Black Lives Matter protests in 2020” where “there was defacement of

² The Aug. 16 Video is being submitted to the Court alongside this brief. See *Procedures Regarding Submission of Audio or Video Files* (June 3, 2024).

public or private property.” JA233. Lieutenant Bagshaw acknowledged the pervasiveness of the defacement: “[I]t absolutely happened.” JA354; *see* JA624. “There was defacement going on in reference to Black Lives Matter events, yes.” JA438; *see* JA405 (“I did” see “defacement of property in the summer or fall of 2020” that “[i]n some cases” was “related to the Black Lives Matter protests.”). Indeed, protesters often covered whole streets with messages from end to end.



None of that acknowledged defacement led to arrests. MPD documents all arrests in arrest reports. *E.g.*, JA152, 225, 271, 739. Despite numerous violations of the defacement ordinance, the record does not show that MPD arrested *a single protestor* for defacement with a Black Lives Matter message.

3. Officers swiftly arrest two people chalking Black Pre-Born Lives Matter at Plaintiffs' event.

MPD's approach changed, however, when Plaintiffs asked permission to paint a related pro-life message: "Black Pre-Born Lives Matter." In July 2020, Plaintiffs submitted an application requesting approval for up to 49 participants to gather and "declare that Black Pre-Born Lives Matter." JA915. Alongside the formal application, Plaintiffs sent a letter to Mayor Bowser and MPD asking to "add [their] voices to those concerned about the treatment of people of color in America." JA919–20. Specifically, they "request[ed] permission to paint Black Pre-Born Lives Matter" outside the D.C. Planned Parenthood. *Id.* The letter noted that the Mayor had "opened the streets of your city for public expression" and called on her to avoid "viewpoint" discrimination. *Id.* Upon reading the letter, Inspector Glover forwarded it to Assistant Chief Carroll and other SOD staff, noting: "Pandora's box begins." JA1235.

SOD issued Plaintiffs a permit to gather but refused to allow "[m]arking or painting the street." JA922. Though officers told at least one person that MPD's "policy" permits chalking, JA1238, MPD told

Plaintiffs they needed permission from the District Department of Transportation (“DDOT”) to write on the sidewalk or street, even in chalk, JA343; JA249. Following this instruction, Plaintiff Tina Whittington requested DDOT’s permission. JA1185–90. But DDOT issued a circular response: It “[w]ithdr[ew]” her application because this “scope of work falls” to SOD. JA1192.

When Plaintiffs arrived outside Planned Parenthood on August 1 for their permitted event, about 30 officers awaited them. JA1276. Body-worn camera footage documents the key events. Aug. 1 Body-Worn Camera Footage (“Aug. 1 Video”).³ As soon as two event participants began to write “Black Pre-Born Lives Matter”—in washable chalk—on the sidewalk, JA1276, Lieutenant Carlos Mejia directed they be arrested and charged with defacement. Aug. 1 Video. Lieutenant Mejia later testified that he had discussed with Assistant Chief Carroll and another officer that they would not permit defacement. JA629–31.

Plaintiffs’ arrest sparked attention. News outlets ran the story. *See, e.g.,* Emily Davies, *Two protesters arrested while chalking ‘Black Pre-Born Lives Matter’ on sidewalk*, Wash. Post (Aug. 1, 2020), perma.cc/PAN8-R2AN; Valerie Richardson, *Police stop pro-lifers from painting on street ‘Black Preborn Lives Matter,’ arrest two*, Wash. Times

³ The Aug. 1 Video is being submitted to the Court alongside this brief. *See Procedures Regarding Submission of Audio or Video Files* (June 3, 2024).

(Aug. 1, 2020), perma.cc/BKN3-SMFS. Several congressmen, including the current Speaker of the House, sent the Mayor’s office a letter expressing concerns that the District was “allow[ing] some political messages to be painted or marked on public property but not others.” Letter from James Comer, Jim Jordan, Chip Roy, and Mike Johnson to Mayor Muriel Bowser (Aug. 17, 2020), perma.cc/ZD7B-CY6N (“Aug. 17 Letter”).⁴ And after officers failed to warn or arrest a defacement-ordinance violator outside the Department of Justice in late August, a reporter asked MPD to “explain the discrepancy.” JA1178–81. Chief Newsham directed MPD to respond that it was “looking into it.” *Id.*

Noting the uneven enforcement of the defacement ordinance, Plaintiffs filed suit against the District in November 2020. Among other things, they asserted First Amendment viewpoint-discrimination claims challenging the District’s inconsistency. Dkt. 1 ¶¶ 71–90.

Even that did not deter the District. Plaintiffs again applied for a permit to chalk outside Planned Parenthood in March 2021. JA1279. And the District again denied the request, allowing Plaintiffs to gather but not to chalk the sidewalk. JA1194. The district court denied Plaintiffs’ motion for a preliminary injunction, *Frederick Douglass Found., Inc. v. District of Columbia*, 531 F. Supp. 3d 316 (D.D.C. 2021), so they held the event without chalking any messages.

⁴ This Court may take judicial notice of this letter. *See Kaspersky Lab, Inc. v. DHS*, 909 F.3d 446, 464 (D.C. Cir. 2018).

B. Procedural history

In April 2021, Plaintiffs filed the operative amended complaint to add details regarding their March event. Dkt. 24 at 1. They continued to assert their First Amendment selective-enforcement claim. JA48–51.

The district court granted the District’s motion to dismiss. The court held that Plaintiffs failed to allege an “*intentionally* viewpoint-discriminatory pattern of enforcement” as needed to prevail on their First Amendment claim. *Frederick Douglass Found., Inc. v. District of Columbia*, No. 20-3346, 2021 WL 3912119, at *6, *10 (D.D.C. Sep. 1, 2021) (emphasis added). And the court said that Plaintiffs also failed to include allegations that would render the District liable for any constitutional violation under Section 1983. *Id.* at *10–12.

This Court reversed. Faulting the district court for treating “First Amendment and equal protection claims” as “essentially the same,” the Court explained that Plaintiffs need not “allege discriminatory intent” to prevail under the First Amendment. *FDF*, 82 F.4th at 1131, 1144. Instead, a plaintiff must allege that “(1) he was similarly situated in material respects to other individuals against whom the law was not enforced, and (2) the selective enforcement infringed a constitutional right.” *Id.* at 1136.

This Court held that Plaintiffs stated a claim under the proper standard. “Given the scope of the Black Lives Matter protests, the extent of graffiti around the city, and the lack of enforcement by District

police,” the Court concluded, “we can readily infer that the Foundation's members were at times similarly situated to Black Lives Matter proponents” “against whom the defacement ordinance was not enforced.” *Id.* at 1139. And it explained that the District’s “unequal enforcement plausibly turned on viewpoint” in violation of the First Amendment—“the government cannot pick and choose between speakers ... when enforcing the laws.” *Id.* at 1141–43. Finally, the Court held that Plaintiffs plausibly alleged multiple theories under which the District is liable for that constitutional violation. *Id.* at 1148–50.

Back in district court, the parties completed discovery and filed cross-motions for summary judgment. The district court again sided with the District. It addressed only the first prong of the First Amendment selective-enforcement claim, holding that Plaintiffs failed to put forward evidence of any similarly situated comparators. *Frederick Douglass Found., Inc. v. District of Columbia*, 821 F. Supp. 3d 47 (D.D.C. 2026). The court concluded that “each of Plaintiffs’ proffered comparator events involved fundamentally different trade-offs among officer priorities” and that it could not “second-guess” the officers’ “enforcement discretion.” *Id.* at 61.

Plaintiffs timely appealed.

SUMMARY OF ARGUMENT

The First Amendment prohibits the District from favoring one viewpoint over another. But the record evidence suggests the District did just that.

At this stage, Plaintiffs must put forward evidence from which a reasonable jury could conclude that: (1) Plaintiffs were similarly situated in relevant respects to other people against whom the defacement ordinance was not enforced; (2) the selective enforcement violated a constitutional right; and (3) the constitutional violation was pursuant to an official custom or policy of the District. *FDF*, 82 F.4th at 1136, 1148. The evidence supports a finding for Plaintiffs on each element.

I. A reasonable jury could conclude that Plaintiffs were similarly situated to others who were not arrested for defacement. *Id.* at 1139. Similarly situated does not mean identical. Rather, individuals are similarly situated when they are alike in “material respects.” *Id.* at 1136–37. That “fact-intensive” question, *id.* at 1138, belongs to a jury if “reasonable persons ... could differ” as to the answer, *McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991).

There are several comparators to which a reasonable jury could find Plaintiffs similarly situated. The record reveals numerous instances in which protestors painted or marked Black Lives Matter messages on D.C. public and private property over the summer and fall of 2020—but were not arrested. Most notably, a jury could conclude that

Plaintiffs' Black Pre-Born Lives Matter event was comparable to a protest outside the Chamber of Commerce, where police stood by as two people peaceably spray-painted Black Lives Matter messages on the public street. In both cases, dozens of officers were confronted with peaceful but vocal crowds that video evidence and officer testimony indicates were comparable, yet officers *arrested* people chalking at Plaintiffs' event while *ignoring* those spray-painting at the Chamber of Commerce. That's the definition of selective enforcement.

The district court's contrary conclusion is wrong. It distinguished the Chamber of Commerce event from Plaintiffs' on factual grounds with which a reasonable jury could disagree. But that is not a summary-judgment court's job. The court also dismissed the other comparator events out of hand. And it applied too demanding a legal standard: Unlike a selective-prosecution plaintiff, a selective-enforcement plaintiff need only prove its claim by a preponderance of the evidence.

II. The evidence shows that the District's enforcement of the defacement ordinance discriminated based on viewpoint in violation of the First Amendment. Viewpoint discrimination is "poison." *FDF*, 82 F.4th at 1141 (quoting *Iancu v. Brunetti*, 588 U.S. 388, 399 (2019) (Alito, J., concurring)). Officers nonetheless persistently enforced the defacement ordinance against Plaintiffs, prohibiting them from writing "Black Pre-Born Lives Matter" in washable chalk on the sidewalk and arresting two people who attempted to do so. Yet there is no evidence in the

record suggesting that MPD arrested even a single Black Lives Matter speaker for defacement over the summer and fall of 2020. Because “both messages ... are political speech” expressing differing perspectives on the same issue, “[a]llowing the expression of one message while silencing another is quintessential viewpoint discrimination,” as this Court has already explained once in this case. *Id.* at 1142.

III. A reasonable jury could also conclude that the District is liable under Section 1983 because this constitutional violation was caused by its own custom or policy. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690–91 (1978). That is so for at least three distinct reasons.

First, the evidence suggests that Assistant Chief Carroll—who set District policy for law-enforcement practices at First Amendment assemblies—directed the selective enforcement at the Planned Parenthood and Chamber of Commerce events.

Second, a jury could conclude that MPD’s consistent refusal to permit Plaintiffs to chalk “Black Pre-Born Lives Matter” paired with its consistent non-enforcement against those painting Black Lives Matter messages established a District custom of unconstitutional viewpoint discrimination.

Third, the record supports the conclusion that the District knew or should have known of the risk of that constitutional problem—the District received several warnings that its viewpoint-discriminatory

approach violated the First Amendment, and Inspector Glover noted that the District had opened Pandora's box—but stayed the course.

Accordingly, this Court should again reverse the district court and remand this case for trial.

STANDARD OF REVIEW

This Court reviews de novo the district court's decision to grant the District's motion for summary judgment. *Lin v. District of Columbia*, 47 F.4th 828, 838 (D.C. Cir. 2022). Under Rule 56, summary judgment is appropriate only if the moving party shows “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A material-fact dispute is “genuine” if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Courts thus serve a limited role at the summary-judgment stage. They must view the record in the light most favorable to the nonmoving party. *Lin*, 47 F.4th at 843, 846. That means they cannot independently “weigh the evidence,” make “credibility determinations,” or “draw” their own “inferences.” *Anderson*, 477 U.S. at 249, 255. Rather than “determine the truth of the matter,” courts “determine whether there is a genuine issue for trial.” *Id.* at 249. Courts should thus proceed “with caution in granting summary judgment.” *Id.* at 255.

ARGUMENT

“The executive cannot selectively enforce the law in a way that violates the Constitution.” *FDF*, 82 F.4th at 1137. The district court erred in granting the District’s summary-judgment motion on Plaintiffs’ free-speech selective-enforcement claim.

As this Court previously explained in this very case, a selective-enforcement claim against the District under Section 1983 has three elements: (1) the plaintiff “was similarly situated in material respects to other individuals against whom the law was not enforced,” (2) “the selective enforcement infringed a constitutional right,” and (3) the constitutional violation was “pursuant to an official custom or policy.” *Id.* at 1136, 1148. As to each of those elements, the record evidence reveals—at best, for the District—a factual dispute that only a jury may resolve.

I. A factual dispute precludes summary judgment on the similarly situated prong.

The record shows that Plaintiffs, two of whom were arrested for chalking “Black Pre-Born Lives Matter” on a public sidewalk, were similarly situated to protesters who were not arrested for spray-painting Black Lives Matter messages on public streets and sidewalks around the city.

The district court rightly observed that the similarly situated determination “ordinarily presents a question of fact for the jury.” *FDF*, 821 F. Supp. 3d at 52 (quoting *Steele v. Vought*, No. 24-cv-763, 2025 WL

3687598, at *8 (D.D.C. Dec. 19, 2025) (quoting *George v. Leavitt*, 407 F.3d 405, 414 (D.C. Cir. 2005)); accord *FDF*, 82 F.4th at 1138 (question is “fact-intensive”). And this case fits that norm. The district court nonetheless assumed the jury’s mantle, sifting the conflicting evidence to reach its own conclusions. The court’s hyper-scrutiny of the evidence also shows it applied too strict a legal standard.

A. A jury could reasonably conclude that Plaintiffs were similarly situated to others not arrested for defacement.

The similarly situated element strikes a “balance between executive discretion and judicial enforcement of constitutional rights.” *FDF*, 82 F.4th at 1137. “[L]aw enforcement officers necessarily exercise discretion.” *United States v. Yu*, 161 F.4th 25, 44 (1st Cir. 2025). But the “executive cannot selectively enforce the law in a way that violates the Constitution.” *FDF*, 82 F.4th at 1137. Out of respect for both interests, a selective-enforcement plaintiff must “demonstrate he was singled out for enforcement from among others similarly situated.” *Id.* (citation modified).

Individuals are similarly situated when no “legitimate,” “relevant” law-enforcement interests distinguish them in “material respects”—*i.e.*, “justify making different ... decisions” in the two circumstances. *Id.* at 1136–37 (citation modified). Legitimate law-enforcement interests include—among other things—“police resources,” “public safety,” “the

strength of the case,” “deterrence value,” and “enforcement priorities.” *Id.* at 1137, 1139 (citation modified).

Importantly, comparators “need not be identical,” just similar in “relevant respects.” *Blount v. Stanley Eng’g Fastening*, 55 F.4th 504, 511 (6th Cir. 2022) (citation modified); *FDF*, 82 F.4th at 1136 (“material respects”); see *Hu v. City of New York*, 927 F.3d 81, 96 (2d Cir. 2019) (same); *Dalton v. Reynolds*, 2 F.4th 1300, 1310 (10th Cir. 2021) (similar). They can be “roughly equivalent.” *Harvard v. Cesnalis*, 973 F.3d 190, 206 (3d Cir. 2020). “[D]oppelganger-like sameness”—or even a “nearly identical standard”—is “*too strict*.” *Lewis v. City of Union City*, 918 F.3d 1213, 1226 & n.10 (11th Cir. 2019) (en banc).

This Court has emphasized that the similarly situated determination “will be a fact-intensive and case-specific comparative inquiry.” *FDF*, 82 F.4th at 1138. Unsurprisingly, then, that determination typically belongs to the jury. *George*, 407 F.3d at 414; see *Wheeler v. Georgetown Univ. Hosp.*, 812 F.3d 1109, 1115 (D.C. Cir. 2016) (same); *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1555 (D.C. Cir. 1997) (same); *Harvard*, 973 F.3d at 206 (same); *FDF*, 821 F. Supp. 3d at 52 (same). Summary judgment is therefore appropriate “only where it is clear that no reasonable jury could find that the similarly situated requirement has been satisfied.” *Eaton v. Ind. Dep’t of Corr.*, 657 F.3d 551, 558 (7th Cir. 2011); see *McDermott*, 498 U.S. at 356.

Viewing the record here in the light most favorable to Plaintiffs, a reasonable jury could conclude that Plaintiffs were similarly situated to others who were not arrested for painting Black Lives Matter messages.

The Chamber of Commerce event. The record evidence shows striking similarities between Plaintiffs' event and another event outside the Chamber of Commerce. The videos of each event provide the most accurate detail. *See Scott v. Harris*, 550 U.S. 372, 378–81 (2007). Both events involved political messages related to Black Lives Matter. JA919–20, 922, 1266–67. Both events took place during the daytime on public sidewalks and streets. *See* Aug. 1 Video; Aug. 16 Video. And they occurred only 15 days apart during the summer of 2020. *See* Aug. 1 Video; Aug. 16 Video.

At each event, there were “dozens” of officers present, though protesters “outnumbered” officers. *FDF*, 821 F. Supp. 3d at 58 (Aug. 16 event); *id.* at 52–53 (Aug. 1 event); *see* Aug. 1 Video; Aug. 16 Video; JA1276 (“approximately 30 officers were present on August 1”); JA634 (about 38–45 participants on August 1).

Neither event posed safety concerns for the advocates. At Plaintiffs' event, those demonstrating were on the public sidewalk; at the Chamber of Commerce event, the spray-painters and others were standing in the lane of a public street cordoned off by yellow police tape. Aug. 1 Video at 0:01–3:00; Aug. 16 Video at 1:35–3:42.

Nor did the events present different safety concerns for police: Video evidence shows and officers testified that both events remained peaceful, though certain individuals at both expressed displeasure with police actions. Aug. 1 Video at 1:59–5:30; Aug. 16 Video; JA416–17 (Chamber of Commerce protesters were “peaceful” and “compliant”); JA636.

Finally, both events involved actions—taken in clear view of the police—that violated the District’s defacement ordinance. At Plaintiffs’ event, two individuals attempted to write on the public sidewalk with washable chalk. Aug. 1 Video at 1:25–2:00; JA1276. At the Chamber of Commerce event, two individuals spray-painted the public street. Aug. 16 Video at 1:35–3:42.

To be sure, the Black Pre-Born Lives Matter protestors used chalk, whereas the Black Lives Matter protestors used paint. But that favors Plaintiffs. The evidence suggests that MPD had a general “policy” of not enforcing the defacement ordinance against those who “chalk.” JA1238. That’s likely because chalk is “easily removed” and the ordinance would otherwise prohibit “children chalking a hopscotch outline on a sidewalk.” JA750. A reasonable jury could therefore conclude that the “deterrence value,” *FDF*, 82 F.4th at 1138, of enforcement against those spray-painting outside the Chamber of Commerce is as high as or higher than the deterrence value of enforcement against Plaintiffs.

That leaves only two differences between the events: the view-point expressed and the police response. Plaintiffs attempted to chalk “Black Pre-Born Lives Matter,” *see* JA1276, while the protesters outside the Chamber of Commerce spray-painted Black Lives Matter messages like “I can’t breathe,” JA423. In response, the police arrested the individuals who chalked at Plaintiffs’ event immediately after they started writing, *see* Aug. 1 Video at 1:15–2:05, while officers did nothing—issued no warnings, made no arrests, nothing—to the individuals who spray-painted the street outside the Chamber of Commerce, *see* Aug. 16 Video at 1:40–3:40; *see also* JA445–51, 1268.

In short, a reasonable jury could find that the two events are alike in all material, relevant respects—except those that prove the constitutional violation.

Other events. Other comparators exist. Myriad Black Lives Matter-related events occurred over the summer and fall of 2020. JA399; JA217 (“demonstrations related to ... that cause continued on throughout the summer”); JA656–57. The vast majority—particularly after the first week or two—were peaceful. JA675, 713, 736. Many of the events were also relatively small. *See* JA1196–1204, 1228–32; *see also* JA731. And MPD sent at least one officer to every event of which it was aware. JA315–16; *see* JA731 (sending officer to two-person event); *see also* JA1228–32.

Numerous officers testified that, across those events, protesters consistently violated the defacement ordinance. For example, Captain Caron testified: “There was defacement going on in reference to Black Lives Matter events, yes.” JA438. And: “I did” see “defacement of property in the summer or fall of 2020” that “[i]n some cases” was “related to the Black Lives Matter protests.” JA405. Assistant Chief Carroll similarly testified that was he “present” at “Black Lives Matter protests in 2020” where “there was defacement of public or private property.” JA233. Lieutenant Bagshaw echoed the refrain: “[I]t absolutely happened” that he was “present” at events in 2020 where “individuals were spray-painting the street or the sidewalk or the wall.” JA354. Lieutenant Mejia also said he remembered defacement from the protests. JA624.

Yet despite those similarities and despite arresting the two individuals who chalked Black Pre-Born Lives Matter, MPD officers did not arrest a single Black Lives Matter speaker for defacement. Officers repeatedly stated that all arrests would be documented in arrest reports. JA152, 225, 271, 739. Consistent with officers’ testimony that they did not remember making arrests for BLM-related defacement in the summer and fall of 2020, *see* JA233, 673, the arrest reports show that—apart from the arrests at Plaintiffs’ event—only seven defacement arrests occurred during that time. *See* JA997–1158, 1271–73. None of

those reports suggests that the arrestee wrote a Black Lives Matter message. *See* JA997–1158.

* * *

In short, the evidence bears out what this Court stated at the pleadings stage: The District’s “lopsided prosecutorial response—several arrests for small, chalked pro-life messages and no arrests for widespread ‘Black Lives Matter’ messages—does not comport with the deterrence value or culpability associated with the number of protesters and the scope of defacement, suggesting improper selective enforcement.” *FDF*, 82 F.4th at 1138. As other courts have held in similar circumstances, a reasonable jury could conclude that Plaintiffs were similarly situated at times to others who violated the defacement ordinance and were not arrested. *See Eaton*, 657 F.3d at 556–57 (reversing grant of summary judgment where record showed employees’ conduct in refusing work assignments was similar); *Humphries v. CBOCS W., Inc.*, 474 F.3d 387, 406 (7th Cir. 2007) (same where employees were similarly situated although one left “safe unlocked during the *daytime*” while other “left it unlocked during the *nighttime*”); *Ballentine v. Tucker*, 28 F.4th 54, 62 (9th Cir. 2022) (similarly situated evidence sufficient where police had not arrested some individuals chalking at the same time as plaintiffs who were arrested). This Court should reverse.

B. The district court erred in taking this question away from the jury.

In reaching the opposite conclusion, the district court erred twice over. *First*, the court wrongly discounted comparator evidence that a reasonable jury could have credited. *Second*, and relatedly, the district court required too high a standard of proof on the selective-enforcement claim.

1. The district court wrongly played the role of juror, weighing the evidence to reach its own findings.

The district court rejected Plaintiffs' proposed comparators as a matter of law. That was error.

a. The Chamber of Commerce event. As explained, the Black Lives Matter gathering outside the Chamber of Commerce serves as a close analog to Plaintiffs' demonstration. Yet taking the weighing of evidence into its own hands, the district court deemed the events "markedly different" based on "two factors." *FDF*, 821 F. Supp. 3d at 59. A reasonable jury could find otherwise.

Open street. The "[m]ost notabl[e]" difference between the Plaintiffs' event and the Chamber event, according to the district court, was that "MPD closed the street prior to Plaintiffs' planned, permitted event," while the "street outside the Chamber of Commerce ... remained open to traffic." *Id.* Even accepting that assertion as true, the district

court's finding does not follow. And the street outside Planned Parenthood *was* in fact open to traffic during Plaintiffs' event.

Start with the district court's improper factfinding. According to the district court, the officers at the Chamber of Commerce event "themselves" provided a "buffer" between "the gathered protesters and the cars traversing the block." *Id.* The court surmised that arresting the spray-painters would have compromised that barrier, presenting different safety concerns than existed at Plaintiffs' event. *Id.*

But a jury could reasonably make a different finding, particularly based on the videos of the two events. The body-worn camera footage does not reveal extensive traffic outside the Chamber of Commerce. Aug. 16 Video at 0:01–1:35; 4:21–26. The video also shows that, alongside a large group of officers, there was yellow police tape cordoning off passing cars from the lane in which the spray-painters and others were standing. *Id.* at 0:01–3:40.

Further, the video from Plaintiffs' event demonstrates that a few officers can effect an arrest. Aug. 1 Video at 1:45–2:10. So the officers could have made arrests at the Chamber of Commerce event while *still* providing a traffic buffer. Given the relatively low volume of traffic, the yellow tape, and the number of officers present at the Chamber of Commerce event, a reasonable jury could just as easily conclude that the purported street closure at Plaintiffs' event is not a constitutionally significant distinction from the Chamber event.

In finding otherwise, the district court required too close a comparator. *Contra Chavez v. Ill. State Police*, 251 F.3d 612, 636 (7th Cir. 2001) (“we have also been careful not to define the requirement too narrowly”). As explained, comparators need *not* be identical. *See supra* at 18–19. While officer and pedestrian safety are relevant factors in the enforcement analysis, it is for the jury—not the court—to “weigh the evidence” and find facts. *Anderson*, 477 U.S. at 249. Here, a reasonable jury could conclude that the two events share “relevant similarity”—that they are “roughly equivalent” on this point. *Harvard*, 973 F.3d at 205–06 (citation modified).

The purported street closure provides no basis for distinction for an even more fundamental reason: The body-worn camera footage conclusively establishes that the road in front of Planned Parenthood remained *open* to traffic during Plaintiffs’ event. Throughout the video, cars can be seen driving past the site between where Plaintiffs gathered on the sidewalk and where the officers stood on the other side of the street. *See* Aug. 1 Video at 1:01, 2:20–35, 3:50–4:04, 6:47–50, 7:03–15, 7:45, 9:08–21, 10:30–40, 14:30–50. Confirming this, Lieutenant Mejia said in the video: “This is an open road.” *Id.* at 9:47–55. He thus directed a participant to stay on the sidewalk. *Id.* This “[m]ost notabl[e]”

difference, *FDF*, 821 F. Supp. 3d at 59, was actually no difference at all.⁵

Vocal criticism. The district court also cited a purported vocal-criticism discrepancy between the two events as support for its no-comparability finding. Again, a reasonable jury could find otherwise.

The district court said the two events differed because “vocal criticism of police on August 16 gave rise to specific concerns about maintaining a peaceful protest that were not a factor during the lead-up to

⁵ As support for its contrary finding, the district court relied on after-the-incident deposition testimony from Lieutenant Mejia. *FDF*, 821 F. Supp. 3d at 53. But where that *post hoc* testimony conflicts with his on-the-scene body-camera footage, the video controls. *Scott*, 550 U.S. at 378–81 (court “should have viewed the facts in the light depicted by the videotape”); see *Lash v. Lemke*, 786 F.3d 1, 6 (D.C. Cir. 2015) (similar). The district court also cited paragraph 22 of the District’s statement of undisputed facts as support. *FDF*, 821 F. Supp. 3d at 53. That paragraph reads: “MPD officers regularly attend First Amendment activities both to facilitate the event by, for example, closing the street to vehicular traffic, as was done here, and to protect the participants against potential counter protestors.” JA66. It’s true that Plaintiffs deemed that paragraph “[n]ot disputed for purposes of summary judgment.” JA1168. But Plaintiffs’ agreement to that oblique paragraph also does not supersede the clear video evidence. “When video evidence contradicts a fact put forth by the parties, the Court may rely on the video.” *Holmes v. Hernandez*, 560 F. Supp. 3d 1177, 1184 n.8 (N.D. Ill. 2021); see *Trs. of IAM Nat’l Pension Fund v. M & K Emp. Sols., LLC*, 694 F. Supp. 3d 54, 87 (D.D.C. 2023) (“the Court is not comfortable presenting as true factual contentions—even admissions—that lack independent support and are plainly contradicted by the available documentary evidence”); cf. *Horton v. Pobjecky*, 883 F.3d 941, 944 (7th Cir. 2018) (“When video footage firmly settles a factual issue, there is no genuine dispute about it”).

the arrests at Plaintiffs’ protest.” *FDF*, 821 F. Supp. 3d at 59. But that finding ignores contrary record evidence. The body-worn camera footage shows that others at Plaintiffs’ assembly loudly criticized the officers as they began to effect arrests. Aug. 1 Video at 2:00–3:00. And officers described the crowds at both events similarly—as “peaceful” and “compliant.” JA416–17 (Chamber of Commerce protesters were “peaceful” and “compliant”); JA636.

The district court also pointed to context, noting that the ongoing conversation at the Chamber of Commerce event “revealed a discontent with police presence that—as it had during other protests in the summer of 2020—risked imminently escalating the gathering into a violent affair.” *FDF*, 821 F. Supp. 3d at 60. But the record includes testimony that Planned Parenthood had “been a flashpoint in the past” and that “the contingency of potential violence at an abortion clinic” is heightened. JA727, 729–30. And just because there was “discontent” generally that summer does not mean there was a likelihood of violence at the *Chamber* protest, something a jury must be allowed to evaluate from the event video. The district court wrongly invaded the jury’s province by resolving this “fact-intensive and case-specific comparative inquiry.” *FDF*, 82 F.4th at 1138; *see Anderson*, 477 U.S. at 249, 255.

Moreover, “vocal criticism” is not a legitimate basis for differential treatment. Captain Caron testified that the “demeanor” of “the people themselves”—*e.g.*, if “someone’s angry” or “yelling”—does not affect an

arrest decision. JA401–03. Instead, officers look at whether there is “general tension or violence among the group” as a whole, indicated by the number of people present and whether their actions (such as “the amount of stuff they’re throwing at us”) “rise[] to violent behavior.” *Id.*

Indeed, allowing officers to escape liability based on such minor distinctions creates perverse arrest incentives, especially when the more aggressive offender goes free. For example, such a rule would allow officers to arrest peaceful racial-justice advocates and ignore more belligerent, far-right racial provocateurs without consequence. That sort of inverse heckler’s veto is not—and should not be—the law. *Cf. Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 n.8 (2022) (“Nor under our Constitution does protected speech or religious exercise readily give way to a heckler’s veto.” (citation modified)).

The district court found, based on those two distinctions, that the Planned Parenthood and Chamber of Commerce events “involved fundamentally different trade-offs among officer priorities” sufficient to defeat a selective-enforcement claim as a matter of law. 821 F. Supp. 3d at 61. That expectation of “doppelganger-like sameness” is not the law. *Lewis*, 918 F.3d at 1226 & n.10; *see FDF*, 82 F.4th at 1136–37. If it were, that would be the end of selective-enforcement claims.

A reasonable jury could easily conclude that Plaintiffs were similarly situated to the individuals spray painting the street at the Chamber of Commerce—particularly given the video evidence depicting the

two events, *Compare* Aug. 1 Video, *with* Aug. 16 Video. Based on that comparator alone, the jury could find the similarly situated requirement satisfied. *See Eaton*, 657 F.3d at 556 (“Because the similarly situated analysis does not require numerosity, the plaintiff need offer evidence as to only one similarly situated comparator.”). That’s enough to reverse the district court.

b. Other events. Yet there are additional comparators for the jury to consider. The Chamber of Commerce protest was just one of many similar events Plaintiffs highlighted. As explained, officers testified that they witnessed defacement at numerous Black Lives Matter events over the course of that summer and fall. *See supra* at 22–23. The district court dismissed those other events out of hand, holding that “[o]nly the specific identification of an alleged comparator or specific examples of differential treatment can satisfy this element.” *FDF*, 821 F. Supp. 3d at 54 (citation modified). This Court has already said that’s wrong.

As this Court has explained: “It is not difficult to understand that discrimination might exist even when affected individuals can point to no specific instances of [a defendant’s] discriminatory conduct.” *Segar v. Smith*, 738 F.2d 1249, 1278 (D.C. Cir. 1984). Or as the Sixth Circuit recently said, “evidence outside of ‘virtually identical and identifiable comparators’ can also suffice.” *Grady v. Cratsenburg*, 170 F.4th 995, 1002 (6th Cir. 2026) (quoting *Gonzalez v. Trevino*, 602 U.S. 653, 658

(2024) (per curiam)). “All evidence that a plaintiff presents” is relevant to the selectiveness determination. *Segar*, 738 F.2d at 1278.

In *Gonzalez*, the comparator evidence the Supreme Court credited consisted of a “survey” showing that “no one has ever been arrested for engaging in a certain kind of conduct.” 602 U.S. at 658. In *Segar*, this Court considered multiple-regression statistics showing racial disparities in pay and promotions. 738 F.2d at 1261–63. Here—in addition to the specific instance discussed above—it is detailed arrest records showing that no one communicating a Black Lives Matter message was arrested for defacement, despite testimony that many such instances occurred throughout the summer and fall of 2020.⁶

It makes sense to consider such evidence. In the selective-enforcement context, plaintiffs will often struggle to find specific comparator evidence because such a claim requires “prov[ing] a negative”—“who *could* have been targeted” or “investigated” but “was *not*.” *United States*

⁶ *Gonzalez* and *Grady* addressed retaliatory-arrest claims, rather than selective-enforcement claims. But this Court can rely on those decisions. See *Nieves v. Bartlett*, 587 U.S. 391, 407 (2019) (relying on selective-prosecution case law to explain retaliatory-arrest analysis). The same, similarly situated question arises in—and serves the same function in—both contexts. Compare *FDF*, 82 F.4th at 1137 (it “isolate[es] whether a decision turns on ‘unlawful favoritism,’ rather than lawful [enforcement] considerations” (citation modified)), with *Grady*, 170 F.4th at 1002 (it “serves as a kind of control experiment; it helps isolate the role of an arrestee’s speech by holding constant other variables ... that might alternatively explain an arrest”).

v. Sellers, 906 F.3d 848, 853 (9th Cir. 2018); *see Chavez*, 251 F.3d at 640 (“plaintiffs who allege that they were stopped due to racial profiling would not, barring some type of test operation, be able to provide the names of other similarly situated motorists who were not stopped”). Requiring “specific examples,” as the district court did here, *FDF*, 821 F. Supp. 3d at 54 (citation modified), will too often defeat these claims out of the gate—though, of course, Plaintiffs also point to a specific comparator here.

In the end, the district court exercised none of the “caution” the Supreme Court deemed advisable before granting summary judgment. *Anderson*, 477 U.S. at 255. The similarly situated determination rightly belongs to the jury in this case, and this Court should so hold.

2. The district court applied too high a legal standard.

The district court applied a “particularly demanding” standard to the selective-enforcement claim. *FDF*, 821 F. Supp. 3d at 51 (citation modified). The court’s refusal to credit Plaintiffs’ comparator evidence shows that its legal standard was too high.

Citing selective-prosecution cases, this Court has held that “the standard for proving [a selective-enforcement claim] is particularly demanding.” *FDF*, 82 F.4th at 1137 (quoting *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999)). That is no surprise, given the difficulties discussed with identifying comparators. But this

Court did not hold—and should not now hold—that the standard for selective-enforcement and selective-prosecution claims is the same. While this Court’s previous discussion shows that the two claims are “undoubtedly related,” *Sellers*, 906 F.3d at 852, they remain distinct.

This case involves a selective-enforcement claim. Selective enforcement “occurs when police investigate” or arrest some people but not other “similarly-situated people of a different race,” religion, or viewpoint. *Conley v. United States*, 5 F.4th 781, 789 (7th Cir. 2021). The “constitutional problem” in such a case “precede[s] the prosecutor’s role.” *United States v. Davis*, 793 F.3d 712, 720 (7th Cir. 2015) (en banc). Selective prosecution, by contrast, occurs when “a prosecutor pursues similar cases differently based on” a particular trait “from among the pool of people referred by police.” *Conley*, 5 F.4th at 789.

That fundamental difference in the nature of the claims counsels a lower standard of proof in the selective-enforcement context. The Supreme Court has held that plaintiffs must prove selective-prosecution claims by “clear evidence.” *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (citation modified). That high standard is necessary “to dispel” the longstanding “presumption that a prosecutor” has acted lawfully. *Id.*; see *FDF*, 82 F.4th at 1137 (noting this presumption). But the Supreme Court has been clear that claims against police officers “do not implicate the presumption of prosecutorial regularity.” *Nieves*, 587 U.S. at 402; see *Conley*, 5 F.4th at 791 (“The [Supreme] Court has not

extended the presumption of regularity ... to street-level police investigations.”). Officers and prosecutors differ meaningfully. “[C]ourts exercise greater oversight over the decisions of law enforcement officials than those of prosecutors.” *Yu*, 161 F.4th at 44. Officers, unlike prosecutors, are required to “testify in courts and often must ‘justify their tactics.’” *Id.* (quoting *Conley*, 5 F.4th at 791). And officers are subject to “greater” civil liability than prosecutors. *Id.*

“Because the same presumption of regularity and deference to prosecutorial decision-making policy concerns do not apply in the selective enforcement context,” a less “rigorous” standard applies here. *Sellers*, 906 F.3d at 853; see *Yu*, 161 F.4th at 45; *Conley*, 5 F.4th at 789. Rather than the clear-evidence standard, this Court should apply the preponderance standard to selective-enforcement claims. *Yu*, 161 F.4th at 45; *Conley*, 5 F.4th at 796.

The district court’s flyspecking and weighing of the evidence not only veered into the jury’s lane but also shows that the court was holding Plaintiffs to too high a standard. As explained, a reasonable jury could readily conclude—based on the evidence, including the body-worn camera footage—that Plaintiffs were similarly situated to the BLM protestors who defaced property at the Chamber and on numerous other occasions throughout the summer and fall of 2020. This Court should therefore reverse the district court’s contrary conclusion and remand for a jury to decide this case based on the correct legal standard.

II. The District’s selective enforcement violated the First Amendment.

If the jury finds for Plaintiffs on the similarly situated prong, it follows—as night does day—that the District’s selective enforcement of the defacement ordinance violated the First Amendment. The record shows that the District impermissibly engaged in viewpoint discrimination by enforcing the ordinance against Plaintiffs for their Black Pre-Born Lives Matter message but not enforcing it against others who painted Black Lives Matter messages. Below, the District pointed to a few other defacement arrests, but none helps its cause.

A. The District’s selective enforcement discriminated based on viewpoint.

The First Amendment bars laws “abridging the freedom of speech.” U.S. Const. amend. I. The Amendment “reflects ... a judgment that every American possesses an inalienable right to think and speak freely, and a faith in the free marketplace of ideas as the best means for discovering truth.” *Chiles*, 146 S. Ct. at 1029.

As a result, a government’s restrictions on speech raise constitutional concerns. Restrictions “based on [the] subject matter or ‘communicative content’” of the speech “are ‘presumptively unconstitutional.’” *Id.* at 1021 (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)). The First Amendment problem “is all the more blatant” when the government “also seeks to dictate what particular ‘opinion or perspective’

individuals may express” on a subject. *Id.* (quoting *Rosenberger v. Rec-tor of Univ. of Va.*, 515 U.S. 819, 829 (1995)). That is called “viewpoint discrimination.” *Id.* at 1021, 1029. And it “represents an ‘egregious’ as-sault” on the First Amendment, *id.* at 1029 (citation modified), “irre-spective of the government’s motive” or “intent,” *FDF*, 82 F.4th at 1131, 1144. As this Court put it, viewpoint discrimination is “poison.” *Id.* at 1141 (quoting *Brunetti*, 588 U.S. at 399 (Alito, J., concurring)).

That holds true whether the government is “regulating” or “enforc-ing the laws.” *Id.* at 1141. For example, “granting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional.” *Id.* (quoting *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 325 (2002)) (citation modified). So the government cannot “prevent[]” one person “from speaking ... while someone espous-ing another viewpoint [i]s ... permitted to do so.” *Id.* (citation modified).

The evidence shows that the District’s selective enforcement of the defacement ordinance violated those foundational First Amendment rules. As explained, numerous people painted or tagged public side-walks, public streets, and other public or private property with Black Lives Matter-related messages. Among them: protesters spray-painting on the street outside the Chamber of Commerce messages like “I can’t breathe”—a phrase “significant to the Black Lives Matter movement,” JA423, 827. And Plaintiffs, who attempted to chalk “Black Pre-Born Lives Matter” on the sidewalk outside Planned Parenthood.

The District did not treat those situations the same. Arrest records do not show that the District arrested a single person for defacement based on a Black Lives Matter message. *See* JA997–1158, 1271–73. By contrast, the District jumped into action when Plaintiffs began chalking “Black Pre-Born Lives Matter” on the sidewalk. Aug. 1 Video. The District immediately arrested two individuals and charged them with defacement, silencing their speech and leaving them in legal limbo for over a year before charges were dropped. JA940–95.⁷

As this Court has held, “both messages ... are political speech.” *FDF*, 82 F.4th at 1142. And “[a]llowing the expression of one message while silencing another is quintessential viewpoint discrimination.” *Id.* The District has not tried to—and cannot—justify that differential treatment. Because the evidence bears out Plaintiffs’ allegations on this score, a jury could reasonably conclude that the District’s selective enforcement constitutes viewpoint discrimination and violates the First Amendment.

⁷ The district court asserted that “[t]here is no indication that the protesters were ever charged.” *FDF*, 821 F. Supp. 3d at 50. Not so. The arrest report shows that both arrested participants were charged with defacing public or private property and given a court date of November 3, 2020. JA942, 955. The District did not drop charges until mid-October 2021. *See* Valerie Richardson, *Court rules in favor of pro-life activists arrested for D.C. sidewalk chalking*, Wash. Times (Aug. 15, 2023), perma.cc/NY2B-Y3H3 (“The Office of the U.S. Attorney for the District of Columbia dropped the misdemeanor defacement charges against the two students ... in October 2021.”).

B. The District's counterargument below rings hollow.

Before the district court, the District raised a single argument in response. It asserted that officers did in fact arrest “several individuals for violating the anti-defacement ordinance during the summer of 2020,” citing four specific arrests that occurred between May and September 2020. Dkt. 72 at 10–11. The District argued that those examples “run headlong into Plaintiffs’ argument” of viewpoint discrimination. *Id.*

To be sure, records show that seven defacement arrests occurred in the summer and fall of 2020. But none of them supports the District’s argument that it acted evenhandedly. For some, the evidence provides no detail regarding the substance of the message that the arrestee was attempting to convey, while the other arrests stemmed from writing anti-police messages. None of the arrest reports indicate that the arrestee painted a Black Lives Matter message.

Start with the four arrests the District cited. Tayvon Turner was arrested for painting concrete barriers near Black Lives Matter Plaza, but his arrest report includes no note of *what* he painted. JA1040–57. The other three arrestees painted anti-police messages. Raphael Snead was arrested for painting “12” on a building near Black Lives Matter Plaza. JA1013–21. Officers testified that “12” refers to the police and was often used that summer as a derogatory message. JA439; JA622–23 (“F12” is “a term used against the police”). Mohamed Elsherbiny was arrested near 16th and S Streets NW for painting “ACAB FCK masons”

on the House of the Temple museum. JA1059–79. “ACAB” means “All Cops are Bad.” JA438. Russel Powden was arrested in Columbia Heights for painting “ACAB.” JA1081–88.

The three other defacement arrests noted in public records during that time do not help the District. Henry Chen was arrested at 16th and K Streets NW for painting a building, and Kayla Cureton was arrested at 17th and H Streets NW for painting a traffic-control box. JA997–1011, 1023–38. Neither arrest report indicates what message—if any—they were attempting to convey. *Id.* Finally, Jeremy Rivera was arrested outside the Fourth District police station (6001 Georgia Avenue NW) for throwing eggs at officers and then “shov[ing] an officer to the ground.” JA1090–1158. He was charged with assault on a police officer, throwing objects, and—based on unspecified “still images” from a separate, unspecified incident, JA1091—with defacing unspecified public or private property with an unspecified message.

Below, the District asserted—without record citation—that the first four “individuals were participating in BLM protests.” Dkt. 72 at 10. But nothing in the record, beyond the circumstantial location of some defacement arrests near Black Lives Matter Plaza, supports that assertion. And location is not definitive. As the District’s own examples illustrate, at least some of those protestors (like Raphael Snead) were conveying anti-police messages.

If the District means to equate the Black Lives Matter and anti-police messages, that effort fails. Multiple officers testified that the two messages were distinct. Lieutenant Bagshaw testified that there were “a lot of different” messages stemming from “the George Floyd stuff. You know, anti-police, Black Lives Matter. Just so many different things.” JA323; *see* JA332, 369 (similar). Chief Newsham also distinguished between the two messages. JA161 (message was “definitely anti-police” but not sure if it was “pro Black Lives Matter”).

In short, the evidence does not show that the District effected any arrests for violations of the defacement ordinance by those communicating a Black Lives Matter message. But officers arrested two similarly situated people chalking Black Pre-Born Lives Matter (and others, who communicated other disfavored views, like anti-police messages). A jury could reasonably conclude that the District engaged in viewpoint discrimination that violates the First Amendment. Summary judgment is therefore inappropriate.

III. A jury could conclude that the District is liable for this constitutional violation under Section 1983.

A jury could also reasonably conclude that the District is liable for this constitutional violation for any of three reasons: (1) Assistant Chief Carroll, a District policymaker, called the shots at the August 1 and August 16 events; (2) officers’ repeated failure to arrest *anyone* who painted a Black Lives Matters message, in striking contrast to MPD’s

vigorous enforcement of the ordinance against Plaintiffs, had become a custom for which the District is liable; and (3) the District knew or should have known of the risk of selective enforcement yet carried on undeterred.

Municipalities are “persons to whom § 1983 applies.” *Monell*, 436 U.S. at 690. They can be held liable under Section 1983 “for their *own* illegal acts.” *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986). The constitutional violation at issue here must therefore have been caused by “a policy or custom of the District.” *Thompson v. District of Columbia*, 832 F.3d 339, 344 (D.C. Cir. 2016); *see Monell*, 436 U.S. at 691 (an “action pursuant to official municipal policy” or “governmental ‘custom’” (citation modified)).

Such a policy or custom exists when: (1) the municipality adopts an unconstitutional policy; (2) the violative act was taken by a government policymaker; (3) the unconstitutional acts were “so consistent that they have become a custom of the municipality” of which the policymaker “must have been aware”; or (4) “the municipality knew or should have known of a risk of constitutional violations, but showed deliberate indifference to that risk.” *Hurd v. District of Columbia*, 997 F.3d 332, 337 (D.C. Cir. 2021) (citation modified); *see FDF*, 82 F.4th at 1148. Based on the record evidence here, a jury could reasonably conclude that the District is liable under any of those last three options.

A. Assistant Chief Carroll, who set District policy for First Amendment law-enforcement practices, directed the selective enforcement.

First, the jury could conclude that the District is liable because Assistant Chief Carroll—the final policymaker for law-enforcement decisions at First Amendment assemblies—made the discriminatory enforcement decisions for Plaintiffs’ event and the Chamber of Commerce event.

This Court has explained that “a single action can represent municipal policy where the acting official has final policymaking authority over the particular area, or ... particular issue.” *Thompson*, 832 F.3d at 347–48 (citation modified). Such authority may be delegated. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988) (plurality); *id.* at 137–40 (Brennan, J., concurring in the judgment); *see Thompson*, 832 F.3d at 350–51.

Here, Assistant Chief Carroll exercised delegated authority to set District policy regarding law-enforcement practices at First Amendment assemblies. And a reasonable jury could conclude that—regardless of his motive or intent, *FDF*, 82 F.4th at 1144–45—he exercised that authority to direct officers to make arrests at Plaintiffs’ event and not to make arrests outside the Chamber of Commerce. That single act of viewpoint-based discrimination is enough for the District to be liable. *See Thompson*, 832 F.3d at 347–48.

To begin, Assistant Chief Carroll possessed delegated authority to establish District policy on law-enforcement practices at First Amendment assemblies. The D.C. Code directs the Mayor to “preserve the public peace”; “prevent crime and arrest offenders”; and “protect the rights of persons and of property.” D.C. Code § 5-101.03. But the Code also recognizes that MPD “handl[es]” and “respon[ds] to, all First Amendment assemblies.” *Id.* § 5-331.07(a). And municipal regulations give the Chief of Police “authority to plan and prescribe departmental policy,” to include “all Metropolitan Police programs, services, and operations.” D.C. Mun. Regs. tit. 6-A, § 800.16.

The D.C. Court of Appeals has thus held that the Police Chief is a “policymaker” under Section 1983 for police training. *Fulwood v. Porter* 639 A.2d 594, 602 (D.C. 1994); see *O’Callaghan v. District of Columbia*, 741 F. Supp. 273, 277 (D.D.C. 1990) (“we have no trouble concluding that” a police operation is “attributable to the District itself”); cf. *Goodwin v. District of Columbia*, 579 F. Supp. 3d 159, 170 n.2 (D.D.C. 2022) (District did not dispute that Chief “possessed final policymaking authority regarding the District’s policing practices” (citation modified)). That law-enforcement delegation to the police is no surprise. See *Praprotnik*, 485 U.S. at 140 (Brennan, J., concurring in the judgment) (“the Sheriff could be the final policymaker” as to “law enforcement practices”); *FDF*, 82 F.4th at 1149 (amended complaint’s allegations suggest “the Special Operations Commander is a policymaker”).

The existence of MPD's Standard Operating Procedures for Handling First Amendment Assemblies and Mass Demonstrations provides further evidence that the Chief of Police has policymaking authority over police practices. JA506–613; *see* JA80 (Chief Newsham testifying that “[w]e were responsible as an agency for enforcing all of the criminal statutes in the District of Columbia”). The procedures document “sets forth the policy and procedures for all members carrying out the mission of the MPD” at “demonstrations, rallies, marches, picket lines, or other similar gatherings conducted for the purpose of persons expressing their political, social, or religious views.” JA508.

Within MPD, Chief Newsham delegated “the details of where and when and how to make an arrest” to his assistant chiefs. JA81; *see* D.C. Mun. Regs. tit. 6-A, § 800.20 (“The Chief of Police shall have the power to delegate authority and assign functions to officials and personnel of the department”). The Special Operations Division within MPD handles all First Amendment assemblies. *See* JA105, 1196–1204, 1228–32. And Jeffery Carroll served as the Assistant Chief over that division. JA105, 125, 189. Assistant Chief Carroll therefore had authority to set District policy on where, when, and how to make arrests at First Amendment assemblies.

Before the district court, the District recognized that final policymaking authority may be delegated. Dkt. 72 at 13. But it resisted Plaintiffs’ delegation arguments at each step. *Id.* at 13–15. As just explained,

that position is inconsistent with municipal regulations, the D.C. Court of Appeals' controlling decision, and "the realities of municipal decision-making" in this case, *Thompson*, 832 F.3d at 349 (citation modified). To the extent any factual dispute remains regarding any step in that delegated chain, it is not for a court to weigh the competing evidence. *Anderson*, 477 U.S. at 249, 255. A reasonable jury could find that Assistant Chief Carroll was a final policymaker.

A jury could also find that—exercising that authority—Assistant Chief Carroll made the arrest and non-arrest decisions for Plaintiffs' event and the Chamber event. The night before Plaintiffs' event, Assistant Chief Carroll told Lieutenant Mejia (the on-scene SOD official in charge at the time of the arrests) to "make sure ... to advise [the group] that defacing property was not allowed." JA629–30. They also discussed that, "if the group was engaged in any criminal activity," including "defacing," "if it was safe to do so, we would affect arrests." JA631. Lieutenant Mejia relieved Lieutenant Walter Fleming on scene the next morning, and Carroll had the same conversation with Fleming. JA629–31; *see* JA1252.

True to orders, Lieutenant Mejia quickly warned Plaintiffs that chalking was prohibited and then arrested them for defacement. That was inconsistent with what another officer said was MPD's unwritten "policy on chalk"—to permit sidewalk chalking—which "has not changed." JA1238. That led the officer to state that "the arrests on

August 1 are being investigated.” *Id.* A reasonable jury could find that Lieutenant Mejia’s swift action—contrary to the “policy on chalk”—was ordered.

The exact opposite story played out at the Chamber just 15 days later. Officers witnessed two individuals spray-painting a Black Lives Matter message but issued no warnings and made no arrests. Aug. 16 Video. Captain Caron was the presiding officer at that event. JA762. She attributed her non-arrest and non-warning decisions on scene to “a conversation” “prior to us deploying in that area” about “whether to make discretionary arrests at that event.” JA436. That conversation—which was with Assistant Chief Carroll and others, JA401—empowered her to “handle [the situation] in a certain way ... on-scene.” JA436.

A jury could thus reasonably conclude that Assistant Chief Carroll called the shots at the two events. And the resulting viewpoint-based disparity flouts the First Amendment. The District could therefore be liable.

B. The evidence shows the District had a consistent custom of inconsistent enforcement.

The jury could also conclude that the District is liable because it had a consistent custom of not enforcing the ordinance against those communicating Black Lives Matter messages, while it refused Plaintiffs’ multiple attempts to chalk—and arrested them for chalking—Black Pre-Born Lives Matter.

The District is liable under Section 1983 if it “ignore[d] a practice that was consistent enough to constitute custom.” *Warren v. District of Columbia*, 353 F.3d 36, 39 (D.C. Cir. 2004). This Court has not recognized a clear threshold necessary to prove a custom or practice, but it has provided guidance. In a joint opinion by then-Judge Ruth Bader Ginsburg and Judge Bork, the Court explained that “[e]gregious instances of misconduct, relatively few in number but following a common design, may support an inference that the instances would not occur but for municipal tolerance of the practice in question.” *Carter v. District of Columbia*, 795 F.2d 116, 124 (D.C. Cir. 1986). “[A]ssorted actual instances of misconduct” that “are scattered and do not coalesce” around “a common or widespread pattern,” on the other hand, do not suffice. *Id.* at 123–24. Other courts have recognized that a jury may infer a custom from the actions in the plaintiff’s case, “in conjunction with [some] statistical evidence,” *Sorlucco v. N.Y. City Police Dep’t*, 971 F.2d 864, 872 (2d Cir. 1992), or from “repeated acts of abuse on [a single] night, by several officers in several episodes,” with no after-the-fact discipline, *Grandstaff v. City of Borger*, 767 F.2d 161, 171 (5th Cir. 1985).

Before the district court, the District suggested that some massive number of comparators is required to constitute a custom. Not so. In the case the District cited, the court rejected a “bare assertion” that the challenged practice had “happened 40 other times.” *Givens v. Bowser*, No. 20-cv-307, 2022 WL 4598576, at *7 (D.D.C. Sep. 30, 2022). The only

facts alleged involved a single incident. *Id.* Here, by contrast, the record evidence supports far more. And, at any rate, a “few” instances would suffice. *Carter*, 795 F.2d at 124.

A jury could reasonably infer from the evidence here that the District had a consistent custom of uneven enforcement. As detailed, the District made no defacement arrests of those painting or tagging Black Lives Matter messages, despite widespread defacement that summer and fall. Officers did not make arrests for the spray-painting at Black Lives Matter Plaza, *see* JA1262–63 (“= Defund the Police” appended to “Black Lives Matter”), at the Chamber event, *see* Aug. 16 Video, at the Department of Justice, *see* Aug. 28 Video, or for any other Black Lives Matter painting or tagging. Yet Plaintiffs’ Black Pre-Born Lives Matter sidewalk chalking led to immediate arrests. Aug. 1 Video.

The District’s practice did not stop there. Plaintiffs again tried to chalk in March 2021, and MPD again denied them permission. JA1194. That happened *after* MPD informed at least one third party that its unwritten “policy on chalk” (*i.e.*, to permit sidewalk chalking) “has not changed and the arrests on August 1 are being investigated.” JA1238. That crystal-clear statement also creates a material dispute of fact over whether officers had authority to permit chalking. JA342–44; JA249. (Officers claimed only the District Department of Transportation could grant such permission. JA249, 343.) DDOT itself also cast doubt on the officers’ testimony that MPD could not permit chalking; when Plaintiff

Tina Whittington followed MPD's instructions and asked DDOT for permission to chalk, it referred her back to MPD as the authorizing body. JA1192.

It's true that officers generally testified that arrest decisions were fact-specific, on-scene determinations. *See, e.g.*, JA238–39, 666–67. But the officers' record of arrests (and non-arrests) from the summer of 2020 through at least March 2021 suggests a different practice. In addition, testimony from some officers likewise supports the inference that the District had an unwritten custom of not enforcing the ordinance against Black Lives Matter messages. For example, Assistant Chief Carroll said that “each situation is independent” and requires “split-second decisions.” JA239. He also said he could not “specifically recall” whether he had made or directed any arrests for defacement at “Black Lives Matter protests in 2020.” JA233. Despite all that, he nonetheless asserted: “[W]e probably did not make arrests” at Black Lives Matter protests in “[a] majority of cases.” *Id.* That “demonstrably reflexive assumption” indicates a general practice. *Sorlucco*, 971 F.2d at 871.

Captain Caron's testimony points in the same direction. She was the presiding officer at the event outside the Chamber of Commerce—which post-dated the arrests at Plaintiffs' event. JA762. She said that she would “probably take responsibility” for the decisions made at the Chamber event. JA436. But she “could handle it in a certain way ... on-scene because” she had “a conversation” “prior to us deploying in that

area” about “how to deal with the discretionary part of that event.” *Id.* Indeed, the record shows that MPD had pressure washers on standby to deal with any painting that might occur. JA1176. The result: No defacement arrests for those painting Black Lives Matter messages, and two arrests for those chalking Black Pre-Born Lives Matter messages.

MPD’s enforcement practice is consistent with the District’s preferred political viewpoint. Shortly after George Floyd’s death, the Mayor commissioned a massive, block-long “Black Lives Matter” mural on 16th Street just north of the White House. JA1262–63. The Mayor then renamed that portion of the street “Black Lives Matter Plaza.” *See* News Release (June 9, 2020), perma.cc/B97V-HLS8. And officers, including Assistant Chief Carroll, knew the mural “was painted by the city.” JA222–23.

MPD’s undeviating course, “following a common design”—no arrests for Black Lives Matter defacement, but unrelenting enforcement for Black Pre-Born Lives Matter defacement—“support[s] an inference” that the actions stem from “municipal tolerance of the practice in question.” *Carter*, 795 F.2d at 124.

C. A jury could find that the District was deliberately indifferent.

An additional avenue remains. A jury could find that the District is liable for deliberate indifference.

A municipality is liable under Section 1983 if it “knew or should have known of the risk of constitutional violations, but did not act.” *Warren*, 353 F.3d at 39 (citation modified). In other words, “faced with actual or constructive knowledge that its agents will probably violate constitutional rights, the city may not adopt a policy of inaction.” *Id.*

But that is just what happened here. The widespread protests—and accompanying defacement—in 2020 did not happen in secret. Shortly after the protests began, Mayor Bowser commissioned the Black Lives Matter mural across an entire city block just north of the White House. JA1262. Days later, protesters added “= Defund the Police” to the mural. JA1262–63. The District did not arrest those who painted that message, JA1270–73, and left it in place for over two months, Matt Blitz, *City Says ‘Defund The Police’ Message At BLM Plaza Was Erased Due To Road Work*, DCist (Aug. 17, 2020), perma.cc/AS26-GQQF. Meanwhile, protests and defacement continued, still with no defacement arrests for Black Lives Matter messages.

In July 2020, Plaintiffs asked for permission to write Black Pre-Born Lives Matter and flagged the constitutional concerns for the Mayor and MPD. In a letter, Plaintiffs noted that the Mayor “opened the streets of [the] city for public expression” and that the District cannot “discriminate on the basis of viewpoint in making determinations relating to public assemblies in public fora.” JA919–20. When Inspector Glover saw the letter, he stated: “Pandora’s box begins.” JA1235. He

said he was concerned about how to “navigate other requests.” JA783–84. Yet officers denied Plaintiffs’ request and arrested the two individuals chalking Black Pre-Born Lives Matter.

Those arrests were widely reported. *See, e.g., Davies, supra; Richardson, supra.* And several congressmen, including the current Speaker of the House, sent the Mayor’s office a letter expressing concerns that the District was “allow[ing] some political messages to be painted or marked on public property but not others.” Aug. 17 Letter. They explained that such a practice “unconstitutionally discriminat[es] against speakers on the basis of the viewpoints they express.” *Id.*

Protesters continued painting Black Lives Matter messages in front of police officers without consequence. For example, they painted outside the Chamber of Commerce on August 16. *See Aug. 16 Video.* They painted outside the Department of Justice on August 28. *See Aug. 28 Video.* And there were other instances too. But officers never warned them to stop or arrested them.

A media outlet also flagged the inconsistency. In late August 2020, a reporter asked MPD to “explain the discrepancy.” JA1178–81. Chief Newsham directed MPD to respond that they were “looking into it.” *Id.* But there is no record evidence that MPD did so.

Plaintiffs’ lawsuit against the District in November 2020 also provided notice. The initial complaint alleged that the District violated the First Amendment when “Defendant prohibited Plaintiffs from painting

or chalking their message on the public streets and sidewalks, but permitted similar messages by others to be painted or chalked on the public streets and sidewalks.” Dkt. 1 ¶ 78. “The District’s enforcement of the Defacement Ordinance,” the complaint continued, “is impermissibly content and viewpoint based.” *Id.*

That *still* did not stop the District. It denied Plaintiffs’ request to chalk outside Planned Parenthood in March 2021. JA1194, 1279. And it still made no arrests for BLM defacement, even though officers testified that such defacement continued into March or April 2021. JA332–33, 438.

Through it all, there is no evidence that the District addressed the constitutional concerns. The District could have taken steps to ensure all officers were on the same page—after Plaintiffs’ July 2020 letter, after the August 1 arrests, after the reporter’s late-August inquiry about discrepancies, or after the November lawsuit. Or the District could have simply applied its “policy on chalk” to Plaintiffs. JA1238.

But it refused. Instead, Lieutenant Mejia made immediate warnings and arrests at Plaintiffs’ event, as discussed with Assistant Chief Carroll but inconsistent with the policy on chalk. Then, Captain Caron “handle[d]” the Chamber of Commerce event consistent with her “conversation” with superiors, JA401, 436—and consistent with the District’s non-enforcement against all others painting Black Lives Matter

messages. And the District persisted when Plaintiffs again asked to paint or chalk in March 2021.

The District's primary counterargument below was that Plaintiffs "d[id] not assert any allegations that even arguably advance a theory of municipal liability premised on deliberate indifference." Dkt. 66-1 at 13. That is wrong. It disregards both the operative complaint, *see* JA39–42, 44, 46, 48, and this Court's earlier conclusion that, "[a]t a minimum," the pleadings made it "plausible" "that the District knew or should have known of the risk of constitutional violations and yet deliberately failed to act," *FDF*, 82 F.4th at 1149 (citation modified). The District's only other argument below was that the evidence does not show it had notice. But the District discussed only the July 2020 letter in arguing that point. Dkt. 72 at 20–21. Of course, while the letter is an important piece of the puzzle, it is far from the only piece.

A reasonable jury could find that the District was deliberately indifferent to Plaintiffs' constitutional rights, leading to the violation here.

CONCLUSION

The evidence shows that officers arrested two people peacefully writing Black Pre-Born Lives Matter with washable chalk on a sidewalk but never arrested anyone for painting Black Lives Matter messages at similar events during the same time. A reasonable jury could conclude that such selective enforcement violates the First Amendment and that the District is liable under Section 1983. Accordingly, this Court should reverse and remand for trial.

Respectfully submitted this 13th day of July, 2026.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32 because the brief contains 12,396 words, excluding the parts exempted by Fed. R. App. P. 32(f), as determined by the word counting feature of Microsoft Office 365.

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Dated: July 13, 2026

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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2026, I electronically filed the foregoing Opening Brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

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ADDENDUM

42 U.S.C. § 1983	A.2
D.C. Code § 5-101.03	A.3
D.C. Code § 5-331.07(a)	A.4
D.C. Code § 22-3312.01	A.4
D.C. Mun. Regs. tit. 6-A, § 800.16.....	A.5
D.C. Mun. Regs. tit. 6-A, § 800.20.....	A.5

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

D.C. Code § 5-101.03

It shall be the duty of the Mayor of the District of Columbia at all times of the day and night within the boundaries of said Police District:

- (1) To preserve the public peace;
- (2) To prevent crime and arrest offenders;
- (3) To protect the rights of persons and of property;
- (4) To guard the public health;
- (5) To preserve order at every public election;
- (6) To remove nuisances existing in the public streets, roads, alleys, highways, and other places;
- (7) To provide a proper police force at every fire, in order that thereby the firemen and property may be protected;
- (8) To protect strangers and travelers at steamboat and ship landings and railway stations;
- (9) To see that all laws relating to the observance of Sunday, and regarding pawnbrokers, mock auctions, elections, gambling, intemperance, lottery dealers, vagrants, disorderly persons, and the public health, are promptly enforced; and
- (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. The police shall, as far as practicable, aid in the enforcement of garbage regulations.

D.C. Code § 5-331.07(a)

(a) The MPD's handling of, and response to, all First Amendment assemblies shall be designed and implemented to carry out the District policy on First Amendment assemblies established in § 5-331.03.

D.C. Code § 22-3312.01

It shall be unlawful for any person or persons willfully and wantonly to disfigure, cut, chip, or cover, rub with, or otherwise place filth or excrement of any kind; to write, mark, or print obscene or indecent figures representing obscene or objects upon; to write, mark, draw, or paint, without the consent of the owner or proprietor thereof, or, in the case of public property, of the person having charge, custody, or control thereof, any word, sign, or figure upon:

(1) Any property, public or private, building, statue, monument, office, public passenger vehicle, mass transit equipment or facility, dwelling or structure of any kind including those in the course of erection; or

(2) The doors, windows, steps, railing, fencing, balconies, balustrades, stairs, porches, halls, walls, sides of any enclosure thereof, or any movable property.

D.C. Mun. Regs. tit. 6-A, § 800.16

The Chief of Police shall have the authority to plan and prescribe departmental policy within the limits of overall policy enunciated by the Mayor and the Council to include the coordination, direction and control of all Metropolitan Police programs, services, and operations.

D.C. Mun. Regs. tit. 6-A, § 800.20

The Chief of Police shall have the power to delegate authority and assign functions to officials and personnel of the department in such degree as in his or her judgment is necessary to establish and maintain efficiency and good administration.