

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

*Plaintiffs,*

v.

DISTRICT OF COLUMBIA,

*Defendant.*

Case No.: 1:20-cv-3346-JEB

**PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiffs the Frederick Douglass Foundation, Students for Life of America, William Cleveland, Robert L. Gurley, Jr., and Angela Whittington cross-move for summary judgment under Federal Rule of Civil Procedure 56. A combined memorandum of points and authorities and opposition to Defendant's Motion for Summary Judgment (ECF No. 66), as well as an affirmative statement of undisputed facts, a responsive statement of undisputed facts, and proposed order are filed herewith. Because this Cross-Motion is dispositive, the Plaintiffs have not sought Defendant's consent under Local Civil Rule 7(m).

Plaintiffs request oral argument on this motion.

Dated: September 29, 2025

Respectfully submitted,

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT AND  
OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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## PRELIMINARY STATEMENT

Pursuant to Federal Rule of Civil Procedure 56(a) and Local Rule 7(h), Plaintiffs the Frederick Douglass Foundation, Students for Life of America, Angela “Tina” Whittington, Robert “J.R.” Gurley, Jr., and William “Bill” Cleveland (the “Advocates”) hereby move for summary judgment. They also oppose the motion for summary judgment filed by Defendant District of Columbia (the “Government”) for the reasons below.

## INTRODUCTION

Two groups engaged in unlawful speech on public property. The first group, supporting “Black Lives Matter” (“BLM”), spray-painted messages on public and private surfaces—on a large scale, in plain view, and often with permanent paint. Law enforcement made only “several” arrests despite the widespread, frequent, and public nature of the conduct. The second group, supporting “Black Pre-Born Lives Matter,” wrote brief messages in washable sidewalk chalk—“easily take[n] care of with some water and some brooms.” Pls.’ Statement of Undisputed Material Facts (“Pls.’ SUMF”) ¶ 33. The police “showed up in force” and arrested them immediately.

No one would suggest that a child chalking hopscotch should face arrest for defacing public property. Because “where is the wisdom in locking up a six or seven-year-old child for ... chalking a hopscotch, right?” *Id.* Yet that is effectively what occurred here. The Government punished sidewalk chalking because of its message—all while letting others spray-paint city streets with impunity. The only meaningful distinction between the groups lies in the content of their messages. One message was tolerated—even endorsed—by the Government; the other, suppressed.

This differential treatment violates well-settled constitutional law. The government may not enforce neutral laws in a way that discriminates against speech based on viewpoint.

The record conclusively establishes that Plaintiff advocates were similarly situated to BLM protestors who peacefully assembled and engaged in the same conduct. The similarities are many: “both groups gathered about matters of public concern and sought to disseminate a political message .... The locations of the gatherings were also the same .... And the events were proximate in time.” *Frederick Douglass Found., Inc. v. District of Columbia*, 82 F.4th 1122, 1138 (D.C. Cir. 2023) (“*FDF*”). The relevant prosecutorial factors are also similar: “the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan.” *Id.* at 1137–38. And, as the D.C. Circuit already instructed, “The comparison is not only between the [Advocates’] single, small rally and the large Black Lives Matter protests that occurred over weeks. Rather, we consider whether the plaintiffs were similarly situated to any individuals against whom the defacement ordinance was not enforced.” *Id.* at 1139.

Undisputed evidence also demonstrates that the Government repeatedly refused to enforce the Defacement Ordinance against BLM protestors, even in peaceful contexts. Def.’s Br. at 4 (acknowledging limited arrest record). Rather than making arrests, the Government embraced BLM protestors’ messages like “= Defund the Police,” or made plans to erase other unlawful BLM markings with pressure washers. Policymakers knew about the disparate treatment but never stopped it. The evidence on this point is one-sided.

The Government speculates that protest conditions may have impaired officers’ ability to act or justified selective enforcement. But the record tells a different story. Officers consistently declined to enforce the Defacement Ordinance,

even at peaceful gatherings showing no discernible threat of violence. At minimum, when the facts are viewed most favorably to the nonmovant, the legitimacy of Defendant’s alleged prosecutorial discretion remains in genuine dispute.

This case is about ensuring that the law is applied evenly, regardless of viewpoint. All relevant evidence points to the same conclusion: the Government engaged in unlawful viewpoint discrimination by refusing to enforce the Defacement Ordinance against individuals painting “Black Lives Matter,” while enforcing it against others similarly situated. The D.C. Circuit already determined that this is unconstitutional. *FDF*, 82 F.4th at 1150.

### **BACKGROUND**

In the summer and fall of 2020, the District of Columbia became a canvas for expressive activity supporting the “Black Lives Matter” movement. Pls.’ SUMF ¶¶ 1–2. Following the tragic death of George Floyd, protestors flooded the streets, covering them with paint, chalk, and other forms of expression. *Id.* ¶¶ 1–2, 7. Even though the Government’s Defacement Ordinance (D.C. Code § 22-3312.1) prohibits such markings, *id.* ¶ 4, the Government largely refrained from enforcing the law against these messages. *Id.* ¶¶ 6, 12, 14.

Meanwhile, the Frederick Douglass Foundation and Students for Life of America (“the Advocates”) attempted to chalk a related message—“Black *Pre-Born* Lives Matter”—on a city sidewalk in front of a Planned Parenthood facility. *Id.* ¶ 31. Unlike the tolerated “Black Lives Matter” expression, this viewpoint landed the Advocates in handcuffs. *Id.*

The Advocates sued the Government under 42 U.S.C. § 1983, asserting that the Government’s enforcement of the Defacement Ordinance constituted viewpoint discrimination in violation of the First Amendment, as well as a denial of equal protection under the Fifth Amendment. This Court dismissed the suit, holding the

Advocates had failed to plead discriminatory intent. *Frederick Douglass Found., Inc. v. District of Columbia*, No. CV 20-3346 (JEB), 2021 WL 3912119, at \*12 (D.D.C. Sept. 1, 2021), *aff'd in part, rev'd in part and remanded*, 82 F.4th 1122 (D.C. Cir. 2023).

On appeal, the D.C. Circuit affirmed dismissal of the equal protection claim but reversed dismissal of the First Amendment claim, recognizing that discriminatory intent need not be shown for a First Amendment selective enforcement viewpoint discrimination claim. *FDF*, 82 F.4th at 1131. Concluding that “the police effectively exempted advocates of the ‘Black Lives Matter’ message from the ordinance,” the D.C. Circuit warned: “The government may not enforce the laws in a manner that picks winners and losers in public debates. It would undermine the First Amendment’s protections for free speech if the government could enact a content-neutral law and then discriminate against disfavored viewpoints under the cover of prosecutorial discretion.” *Id.* at 1142. The D.C. Circuit remanded for further proceedings on that claim, and this Court allowed the case to proceed on the First Amendment count.

Fact discovery closed on April 30, 2025, and the Government moved for summary judgment in its favor. The Advocates respectfully request that the Court grant their cross-motion—on the ground that no genuine issue of material fact exists—and deny the Government’s motion.

### **LEGAL STANDARD**

Under Rule 56(a) of the Federal Rules of Civil Procedure, a party is entitled to summary judgment if it shows “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” A fact is material if it could affect the outcome of the case. And a dispute is genuine if a

reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In ruling on summary judgment, courts must view the record in the light most favorable to the nonmovant. *Robinson v. Pezzat*, 818 F.3d 1, 8 (D.C. Cir. 2016); *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 135 (2000). Courts must not weigh evidence or make credibility determinations—those are functions reserved for the jury. *Reeves*, 530 U.S. at 135. Thus, courts must “disregard all evidence favorable to the moving party that the jury is not required to believe.” *Id.*

When parties cross-move for summary judgment, each motion must be evaluated independently and in the light most favorable to the nonmovant. *Lerch Bates, Inc. v. Michael Blades & Assocs., Ltd.*, No. CV 20-2223 (BAH), 2023 WL 6276643, at \*9 (D.D.C. Sept. 26, 2023). But filing a cross-motion does not mean conceding the opposing party’s version of the facts. *CEI Wash. Bureau, Inc. v. Dep’t of Just.*, 469 F.3d 126, 129 (D.C. Cir. 2006). Rather, “each side concedes that no material facts are at issue only for the purposes of its own motion.” *Sherwood v. Wash. Post*, 871 F.2d 1144, 1147 n.4 (D.C. Cir. 1989).

The Court should grant the Advocates’ cross-motion because the material facts supporting it are undisputed and the law entitles them to judgment. In contrast, the Court should deny the Government’s motion because it relies on disputed facts and an incomplete reading of the record.

## ARGUMENT

### I. **Undisputed material facts show the Government had a persistent practice of not enforcing the Ordinance against BLM messages while enforcing the Ordinance against those similarly situated.**

No amount of prosecutorial discretion allows the executive to “selectively enforce the law in a way that violates the Constitution.” *FDF*, 82 F.4th at 1137. Selective enforcement is established where plaintiffs show (1) they were similarly

situated in material respects to others against whom the law was *not* enforced, and (2) the government’s decision to target them infringed their constitutional right to speak. *See id.* at 1136. In the First Amendment context, viewpoint-based censorship is unconstitutional even if cloaked in good intentions. *Id.* at 1144–45. These principles compel summary judgment in Plaintiffs’ favor.

**A. The Advocates are similarly situated to BLM protestors who were not arrested.**

The similarly-situated requirement ensures that courts respect executive discretion while policing unconstitutional favoritism. Individuals are similarly situated “when their circumstances present no distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to them.” *FDF*, 82 F.4th at 1137 (quoting *Branch Ministries v. Rossotti*, 211 F.3d 137, 144 (D.C. Cir. 2000)). These factors “may include” case strength, deterrence, or enforcement priorities. *Id.*

The Advocates are similarly situated to the other protestors in all relevant respects.

**1. The conditions at the Advocates’ protest mirror those at peaceful BLM protests where officers made no arrests.**

To begin, the conditions at the Advocates’ August 1 event mirror those at most BLM protests, where no arrests were made. The record confirms what the D.C. Circuit observed: the Advocates and the peaceful BLM protestors who faced no arrests both gathered to speak out on “the problems of racial justice” and “sought to disseminate a political message, in one instance that ‘Black Lives Matter,’ and in the other that ‘Black Pre-Born Lives Matter.’” *FDF*, 82 F.4th at 1138; *see also* Pls.’ SUMF ¶¶ 5–6, 10, 13, 15, 27. Both groups also gathered on “public streets and sidewalks” across the District. *FDF*, 82 F.4th at 1138; Pls.’ SUMF ¶¶ 2, 6, 15, 27, 29. And both groups spoke out during the summer and fall of 2020, when “the

problems of racial injustice” were a focal point across the District. *FDF*, 82 F.4th at 1138; Pls.’ SUMF ¶¶ 1–2, 10, 14, 27. In short, both groups peacefully wrote political messages on city streets during the same time period. All that varied was the viewpoint of their message.

**2. The cases against BLM protestors were as strong as the one against the Advocates.**

Indeed, the cases against BLM protestors who wrote political messages on city property were just as strong as the one against the Advocates. It is undisputed that “both groups violated the defacement ordinance.” *FDF*, 82 F.4th at 1138; *see also* Pls.’ SUMF ¶¶ 7–8, 28. The record squarely contradicts the Government’s assertion that no evidence shows officers knew of active lawbreaking or could have enforced the Defacement Ordinance safely. *See* Def.’s Br. at 10–11, Dkt. No. 66-1. Metro police officers and officials Bagshaw, Glover, Carroll, Newsham, and Caron all testified that they were present at BLM-related events in the summer and fall of 2020 and witnessed protestors spray-paint the public streets and sidewalks. Pls.’ SUMF ¶ 8. Body-worn camera footage from August 16 captures officers observing protestors spray-painting “I can’t breathe” on a public street near the Chamber of Commerce. *Id.* ¶¶ 11–13. And emails and video evidence indicate officers witnessed protestors who spray-painted on city streets “in front of the DOJ” on August 28. *Id.* ¶¶ 14–15.

The officers all testified that they knew of no permits authorizing protestors to mark the streets as they did. *Id.* ¶¶ 16. Despite these “pretty clear[] violation[s]” of the Defacement Ordinance, *id.* ¶ 16, the officers testified that they were unaware of a single arrest made at either event, and the Government admitted that no defacement arrests were made in connection with the “= Defund the Police” protest addendum. *Id.* ¶¶ 6, 11–12, 14. And the Government produced neither permits nor arrest records related to these events. *Id.* ¶¶ 9, 12, 14.

**3. The Government’s selective enforcement cannot be justified by deterrence when BLM protestors’ violations went unpunished.**

Deterrence cannot possibly be a justification for the Government’s selective enforcement against the Advocates because similar BLM protest speech went largely unpunished. From May 30 through September 6, 2020, the Government arrested only four individuals for defacing public or private property. *Id.* ¶ 17.<sup>1</sup> Yet all Metropolitan Police Department (“MPD”) witnesses testified to widespread and persistent defacement at BLM events throughout that summer. These events ranged in size, but testimony indicates most of them—perhaps up to 70 percent of them—were “peaceful” or presented no clear concerns about violence. *Id.* ¶ 3.

The Government cannot wave away its viewpoint-based selective enforcement by pointing to a few larger BLM protests with elements of violence. On the contrary, the Government repeatedly refused to enforce its Defacement Ordinance against protest activity that was far more egregious than that of the Advocates. In short, enforcing the law against large-scale, visible defacement—especially when it is repeated and widespread—has obvious deterrence value. But if the Government ignored prolonged and prominent violations while promptly penalizing a small, washable chalk message, the inconsistency undermines any claim that deterrence value guided the Government’s enforcement decision. As the D.C. Circuit put it, this “lopsided prosecutorial response” suggests “improper selective enforcement.” *FDF*, 82 F.4th at 1138. But even so, “[t]he comparison is not only between the [Advocates’] single, small rally and the large [BLM] protests that occurred over weeks,” but rather against “any individuals against whom the defacement ordinance was not enforced.” *Id.* at 1139. And the Government has offered no evidence of enforcement of the Ordinance even at smaller BLM events.

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<sup>1</sup> The Government cites three additional arrests outside of that time frame, one of which includes a charge for the higher offense of assaulting a police officer. Def.’s SUMF ¶¶ 14, 16, 40–46.

In fact, the Government not only declined to punish the BLM violators, but it also endorsed their message. The Government commissioned a large street mural proclaiming “Black Lives Matter,” covering 16th Street for more than a city block. Pls.’ SUMF ¶ 5. And the Government permitted the protestors’ “= Defund the Police” addendum to remain attached to it for *over two months* before it was removed for construction. *Id.* ¶ 6.

For other BLM messages, in lieu of making arrests, the Government elected to have Department of Public Works employees on standby to just power-wash the defacement away. *Id.* ¶ 26 Even at considerable expense. *Id.* Not so for the Advocates’ washable chalk. They were prohibited from finishing the communication of their message on the sidewalk or marking on the street even though it would have vanished within minutes of a summer storm or with “some water and some brooms.” *Id.* ¶ 33. Yet BLM protesters expressed their message on streets and sidewalks, and the Government cleaned it up afterwards. The Advocates would have been satisfied with that same treatment.

**4. The Government’s enforcement priorities and broader enforcement plan do not justify targeting the Advocates while ignoring comparable speakers.**

Even when the Government had “sufficient resources,” “arrests [could] be made without endangering officer or public safety,” and “probable cause to arrest exist[ed],” the Government claims that the risk of “enflame[ing] the passions” at BLM events could justify not making an arrest. Def.’s Br. at 5. That rationale does not hold water. For one thing, even though the Government’s witnesses *theorized* that safety and availability of resources factor into an officer’s decision about whether to make an arrest, nothing in the record suggests that the events at issue raised those concerns. In fact, record evidence confirms the opposite: that the events at which officers observed BLM defacement were largely peaceful. Pls.’ SUMF ¶ 3. It also confirms that the violence tied to BLM in the first weeks of June had largely

passed by August when the Chamber of Commerce and Department of Justice events occurred. *Id.* ¶ 2.

The Government's broad "enflaming-passions" theory belies the MPD's Standard Operating Procedures for First Amendment Assemblies, which require officers to make arrests whenever the law is violated and it is safe to do so. *Id.* ¶ 43. It is also contradicted by record evidence showing that the Government *did* arrest at least one person for defacement despite it taking place at a large BLM event with riot conditions. *Id.* ¶ 25. That arrest alone refutes the Government's unsupported assertion that individuals who defaced property while committing more serious offenses were charged only with the greater crime. Def.'s Br. at 6. And it makes no sense: it would allow violent lawbreakers to go free while only peaceful protestors like the Advocates wind up in jail.

At bare minimum, a jury could find that the Government's broader enforcement priorities simply do not justify targeting the Advocates while ignoring comparable protests. Video evidence shows that the Government made no defacement arrests at small, peaceful BLM demonstrations like the August 2020 Chamber of Commerce and DOJ events, despite officers being present. These facts present a genuine question of material fact about whether the scale and intensity of protests justified ignoring defacement at all BLM-related events.

**B. Advance notice of defacement does not distinguish the speakers.**

"Advance notice' of defacement does not distinguish the speakers." *FDF*, 82 F.4th at 1139. Yet the Government alleges that advance notice of the Advocates' event gave the Government sufficient time to allocate resources to enforce the Defacement Ordinance, unlike at BLM-related events. Def.'s Br. at 10. But the D.C. Circuit already rejected that rationale because "officers were present at the Black Lives Matter protests, ... vandalism and protest art were ubiquitous, and ... the

protests were long running.” *FDF*, 82 F.4th at 1139. Further, Chief Newsham testified that roughly half of the BLM-related events in the summer of 2020 were planned. Pls.’ SUMF ¶ 67. The Special Operation Division produced daily and weekly lists of planned, but not “permitted” assemblies, many of which were BLM-related and based on open-source information, including social media. *Id.* ¶ 39. And the Government endeavored to have officers present at all of them, despite a lack of official notice. *Id.* ¶ 40, 61. The Advocates’ compliance with the Government’s permitting process does not excuse its selective enforcement against disfavored viewpoints.

The Government’s testimony contradicts its claim that a lack of notice justifies its selective enforcement. For spontaneous events, the Government testified that it deployed ready-made “contingency plans for all First Amendment Assemblies.” *Id.* ¶ 68. These plans could be general “ways to mobilize officers” or “very specific” to the event. *Id.* And they included having Department of Public Works employees with pressure washers on standby for some BLM events where defacement was expected to occur. *Id.* ¶ 26. These plans conclusively refute the Government’s claim that it had insufficient time to allocate resources.

The Government had both the means and the opportunity to respond effectively at similar BLM-related events—whether the events were planned or spontaneous—and its pattern of nonenforcement only encouraged further violations.

**C. The Government engaged in impermissible viewpoint discrimination by enforcing the Ordinance against individuals chalking “Black-Pre-Born Lives Matter” but not against individuals painting “Black Lives Matter” messages.**

The First Amendment prohibits the government from favoring one viewpoint over another. Even when a law is facially neutral, its enforcement may still violate the Constitution if it is applied in a way that discriminates based on viewpoint. *FDF*, 82 F.4th at 1141. The principle is well settled: the government may not use

enforcement discretion as a tool to silence disfavored views. *Id.* at 1142. “Granting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional.” *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 325 (2002). Likewise, the government may not tilt the playing field by giving “one side of a debatable public question an advantage in expressing its views to the people.” *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 785 (1978). In short, the First Amendment forbids what happened here: applying a neutral law unevenly to suppress one message while allowing others expressing the view the Government favors to be heard. Because the undisputed facts show that the Government declined to enforce the law against BLM protestors based on the viewpoint of their message, the Court should grant summary judgment for the Advocates—or at least deny the Government’s motion due to a genuine dispute of material fact.

Both parties agree that the Advocates’ speech occurred public on streets and sidewalks in the District—a traditional public forum where the First Amendment “applies with particular force” and “government regulation on the basis of viewpoint is prohibited.” *FDF*, 82 F.4th at 1138, 1141 (citing *Minn. Voters All. v. Mansky*, 585 U.S. 1 (2018)); Pls.’ SUMF ¶ 29. They disagree, however, that the Government’s lack of enforcement of the Defacement Ordinance against BLM protestors turned on viewpoint. Undisputed facts show that it did.

The D.C. Circuit put it this way: “By making no arrests, the police effectively exempted advocates of the ‘Black Lives Matter’ message from the requirements of the ordinance. In contrast, the police showed up in force at the Foundation’s small rally and arrested individuals who chalked ‘Black Pre-Born Lives Matter’ on the sidewalk.” *FDF*, 82 F.4th at 1142. The record confirms that disparity. For months, the Government permitted open and widespread defacement—often in full view of law enforcement—with a message the Government had already expressly endorsed, having itself conveyed the same message by installing a mural in the heart of

Downtown D.C. Pls.’ SUMF ¶ 5. The Government even made preparations to remove others’ BLM defacement promptly once it had served its purpose. This conduct was anticipated, visible to officers, and often executed in *permanent paint*. Yet only “several” arrests for defacement appear in the record. Pls.’ SUMF ¶ 18. Commander Glover, who had authority over BLM protest arrests during the relevant period, testified that he neither made nor ordered any arrests for defacement in the summer of 2020. *Id.* ¶ 58. Compare that policy to the one applied to the Advocates, who were arrested and threatened with arrest for attempting to write their message—“Black Preborn Lives Matter”—in *washable sidewalk chalk*, easily erased with some water and a broom. *Id.* ¶¶ 31–33.

This selective enforcement is underscored by the Government’s policy manual for “Handling First Amendment Assemblies and Mass Demonstrations,” which expressly considers the identity of demonstration leaders when determining how to police First Amendment events. *Id.* ¶ 44. This manual was in effect in the summer of 2020, *id.* ¶ 41–42, and that policy violates free speech. *Reed v. Town of Gilbert*, 576 U.S. 155, 169 (2015) (“speech restrictions based on the identity of the speaker are all too often simply a means to control content”) (citation modified).

The Government’s ostensibly even-handed treatment of other pro-life speakers does not cure its selective enforcement against the Advocates. The other pro-life speakers whom the Government allowed to speak around this time either (1) did not deface public or private property, or (2) did not speak messages addressing the problems of racial justice in the summer of 2020. This sets the Advocates apart from other pro-life speakers—such as the March for Life—who regularly hold First Amendment events in the District. Pls.’ SUMF ¶ 70. Reverend Mahoney, for example, often chalking pro-life messages (lacking any racial element) throughout the city, including in front of Planned Parenthood, without facing arrest. *Id.* ¶ 71.

Because the Government routinely overlooked similar violations by preferred speakers, and its enforcement of the Defacement Ordinance in a traditional public forum was inconsistent, no genuine issue of material fact remains: the enforcement was impermissibly based on viewpoint. At a minimum, however, the record would allow a reasonable jury to reach the same conclusion.

**II. The Government is liable because its policy and practice consistently favored one viewpoint over another.**

The Supreme Court held in *Monell v. Dep't of Soc. Servs. of N.Y.C.*, 436 U.S. 658, 690–94 (1978), that municipalities are liable under 42 U.S.C. § 1983 for constitutional violations caused by official policies or customs enacted by “lawmakers or by those whose edicts or acts may fairly be said to represent official policy.” *Thompson v. District of Columbia*, 832 F.3d 339, 347 (D.C. Cir. 2016) (quoting *Monell*, 436 U.S. at 694). The term “official policy” encompasses several categories: (1) decisions by a government’s lawmakers; (2) actions by its policymakers; and (3) practices so persistent and widespread as to have the force of law. *FDF*, 82 F.4th at 1148. An official policy can also exist if the government failed to respond to a risk that constitutional rights will be violated in a way that shows deliberate indifference to the risk. *See FDF*, 82 F.4th at 1148.

Liability can attach from a single act so long as that act is performed by an official vested with final policymaking authority over the relevant subject matter. *See Thompson*, 832 F.3d at 347–48. This principle ensures that municipalities cannot evade responsibility when their own official actions or omissions inflict constitutional harm.

Here, policymakers “were behind the uniform and unexplained policy exempting individuals expressing ‘Black Lives Matter’ from enforcement of the defacement ordinance.” *FDF*, 82 F.4th at 1149 The Government was on clear notice

of this pattern yet took no steps to ensure that alternative viewpoints received comparable treatment.

**A. Government policymakers' actions led to a lack of enforcement of the Defacement Ordinance against BLM protestors.**

Policymaker status depends not on what an official did in a particular case, but on whether that official possessed final authority as a matter of state law or municipal structure. *Jett v. Dall. Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989). The critical inquiry is whether the official had unreviewed, unconstrained authority over the relevant subject matter—in this case, viewpoint-based arrest decisions.

*Thompson*, 832 F.3d at 348. That authority can also be delegated by an official who possesses it. *Id.* at 350; *see also Phillips v. District of Columbia*, No. CV 22-277 (JEB), 2022 WL 1302818, at \*8 (D.D.C. May 2, 2022). By this standard, Assistant Chief Carroll and the commanding officers of the Special Operations Division—Commanders Glover or Rivera, depending on the time and nature of the protest—had policymaking authority over BLM protest arrests.

Final policymaking authority does not turn on an official's job title, but on whether the official has the authority to make final decisions on the government's behalf in the particular area of the government's business in question. *Thompson*, 832 F.3d at 348; *see also Singletary v. District of Columbia*, 766 F.3d 66, 73 (D.C. Cir. 2014) (“The key inquiry is whether the official had final authority over the subject matter at issue in the plaintiff's claim.”). The Government's Standard Operating Procedures for First Amendment Assemblies (the “SOPs”) constituted the official policies of the Government in the summer and fall of 2020. Pls.' SUMF ¶ 41. All officers were expected to follow the SOPs. *Id.* ¶ 42.

The SOPs grant the chief of police final authority to enforce the Government's ordinances at First Amendment events and “exclusive authority to approve assembly plans.” *Id.* ¶ 45. But by express provision, he may delegate that

responsibility to certain subordinates “or his designee.” *Id.* ¶ 46. In the summer of 2020, Chief Newsham designated Assistant Chief Carroll and SOD Commander Robert Glover to “review and evaluate all information pertaining to the civil disorder and make a determination as to which level of mobilization shall be implemented.” *Id.* ¶¶ 47, 52. Assistant Chief Carroll oversaw all branches of the Homeland Security Division, including the Special Operations Division, led by Commander Guillermo Rivera, or by acting Commander Robert Glover during Commander Rivera’s injury leave from March 1 through mid-June. *Id.* ¶¶ 48–49.

The SOPs state that the SOD commander, under the chief’s direction, prepares the details and tactical plans for First Amendment assemblies. *Id.* ¶ 50. The SOD commander is also “designated” by rule “as the CDU Commanding Official and shall coordinate, command, and direct all CDU and SOD activities.” *Id.* ¶ 51. Permits, for instance, are reviewed and signed by the SOD commander. *Id.* ¶ 53. Commanders Rivera and Glover were thus “entrusted with the ability to approve and deny requests.” *Id.* ¶ 54. In practice, Chief Newsham took no direct role in staffing demonstrations, leaving that decision to Assistant Director Carroll or another designee. *Id.* ¶ 55. From May to December 2020, Commander Glover was designated the “overall incident commander” with full authority over BLM demonstrations. *Id.* ¶ 56.

In this role, Commander Glover exercised unreviewed discretion in overseeing and coordinating staffing for First Amendment events, and none of his command decisions were reversed or reviewed by superiors. *Id.* ¶ 57. In effect, he was the last word on enforcement in the field. And he neither made nor ordered any arrests for defacement in the summer of 2020. *Id.* ¶ 58.

This matters. As the D.C. Circuit explained in *Thompson*, 832 F.3d at 350, liability attaches where an official acts with final decision-making authority even in a narrow domain. Here, Commander Glover made tactical decisions on the ground,

in real time, with no further approval necessary. And there is no evidence that Commander Glover's superiors ever invoked their latent authority "to constrain [Commander Glover's] policymaking." *Id.* at 350. Rather, his superiors empowered his choices, as permitted by the SOPs. Pls.' SMF ¶ 59. This is thus unlike the parole board that lacked policymaking authority in *Singletary* because it had not "been granted final policymaking authority under D.C. law in the area of parole revocation." *Singletary*, 766 F.3d at 74. In contrast, the SOPs expressly grant enforcement authority over First Amendment assemblies to the Chief of Police and the SOD Commander, and the Chief of Police in turn expressly delegated his authority to Commander Glover. Pls.' SUMF ¶ 52.

That the SOPs vest *final* authority in the Chief of Police is immaterial. The policy also permits the Chief to delegate that authority—and in practice, that is what he did. *See Thompson*, 832 F.3d at 349 (holding that an official was a policymaker under § 1983 based on actual decision-making authority and established custom, notwithstanding contrary formal policies). The Supreme Court has also made clear that, when an official's discretionary decisions are not constrained by official policies and are not subject to meaningful review, that official acts as a policymaker. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988). That principle applies here.

Further, even a *subordinate's* decisions can be manifested as a "custom or usage" if "the supervisor could realistically be deemed to have adopted a policy that happened to have been formulated or initiated by a lower-ranking official." *Id.* at 130. In other words, the acts of a municipal policymaker represent the acts of official government policy regardless of whether the Chief of Police—or, here, his designees—"adopted" the policy of nonenforcement himself "or merely ratified the custom or practice of his subordinates." *Phillips*, 2022 WL 1302818, at \*8. Thus, even if Assistant Chief Carroll is considered the relevant policymaker, Commander

Glover’s repeated policy and practice of not arresting BLM protestors for open defacement was known to him and thus can be attributed to him. Pls.’ SUMF ¶ 65.

Commander Glover’s actions at the BLM protests were not just discretionary—they were unconstrained and effectively unreviewable. *Id.* ¶¶ 57, 59. And they had to be. Commander Glover testified that assessing whether an arrest is warranted requires being on the ground—personally observing crowd dynamics in real time. *Id.* ¶ 60. Indeed, Commander Glover was physically present at 95 percent of the BLM-related events from May through August 2020. *Id.* ¶ 61. Because of this extensive experience, he maintained operational command authority even after Commander Rivera returned on limited desk duty. *Id.* ¶ 62.

The Government’s rigid view—that only the Mayor or the Council can qualify as a policymaker (Def.’s Br. at 13–14)—conflicts with settled precedent. In fact, the cases it cites for this proposition found *other* officers to be policymakers under *Monell* because they had practical decision-making authority over a specific policy. For example, this Court made clear in *Phillips* that a municipal official “may not be a final policymaker for all purposes,” but that District law can “clearly render[] him one for the purposes of this suit.” 2022 WL 1302818, at \*8 (finding the Chief of Police was a policymaker). It also recognized that “[p]olicymaking authority can be ... ‘delegated by an official who possesses such authority,’” and that an official “need only be the final policymaker with respect to the subject matter at hand.” *Id.*

Similarly, *Coleman v. District of Columbia* emphasized the Mayor’s “expressly reserved supervisory powers” in holding that a fire chief was not a final policymaker because, unlike this case, there was “no specific grant of authority to the Fire Chief to set final policy.” 828 F. Supp. 2d 87, 91–92 (D.D.C. 2011). Later decisions have clarified that reasoning. In *Steinberg v. District of Columbia*, for example, the court expressly held that a fire chief was a final policymaker when exercising the “inherent power of his office” to resist implementing administrative

decisions—distinguishing situations where he merely follows established personnel policies. 901 F. Supp. 2d 63, 71 (D.D.C. 2012). The same logic applies here: the written policy expressly gives the chief of police final decision-making authority and may designate others to act on his behalf. Pls.’ SUMF ¶ 45. Even *Miner v. District of Columbia* does not foreclose the possibility that someone other than the Mayor can be a Government policymaker. But in that case, the plaintiffs “submitted no evidence” that the assistant chief was “imbued with the final authority necessary to qualify as a ‘policymaker’ for *Monell* purposes.” See 87 F. Supp. 3d 260, 267 (D.D.C. 2015).

It also cannot be right that Mayor Muriel Bowser is the policymaker over defacement enforcement at First Amendment events because the Mayor’s office expressly ceded its authority over those events to the MPD. Pls.’ SUMF ¶ 63. The Mayor’s office never even issued rules to guide MPD’s discretion when considering applications for First Amendment assemblies, as required by the SOP. *Id.* ¶ 64. Rather, the Mayor delegated these duties to MPD. And, from approximately May 2020 through the middle of December 2020, Commander Glover was designated the “overall incident commander for MPD ... for things that were happening or centered around First Amendment activities and protest activities around BLM.” *Id.* ¶ 56. Commander Glover was thus vested with authority to “make decisions on who would get resources and which resources were going to be going and things like that,” all the while “keep[ing] Assistant Chief Carroll abreast.” *Id.* ¶ 65.

It was these policymakers’ decisions that led to a lack of enforcement of the Defacement Ordinance against BLM protestors. While Commander Glover was acting as overall incident commander in the summer and fall of 2020, the Government made only “several” arrests for defacement. *Id.* ¶ 18. Many officers watched BLM protestors violate the Defacement Ordinance at peaceful events without making arrests. *Id.* ¶¶ 8–9, 11, 12, 14. Instead, under Commander Glover’s

direction, the Government employed pressure washers to mitigate expected defacement. *Id.* ¶ 26. By choosing to employ alternative tactics rather than arrest BLM protestors, policymakers established a custom or practice of non-enforcement—but one applied solely to that particular viewpoint. Such selective treatment is impermissible under the Constitution, as the Advocates were not afforded the same leniency.

Even assuming that Commander Glover is not a policymaker, the undisputed facts establish that the Government maintained a persistent and widespread custom of declining to enforce the ordinance against certain speakers. The Government’s failure to arrest individuals who spray-painted BLM messages on public streets and sidewalks while continuing to arrest individuals who spoke other messages constitutes “repeated behavior by D.C. municipal employees that have reached the level of a custom.” *Givens v. Bowser*, 111 F.4th 117, 122 (D.C. Cir. 2024).

**B. The Government was deliberately indifferent to the risk that the Advocates’ First Amendment rights would be infringed.**

The Government’s decision not to enforce the Defacement Ordinance against BLM protestors—despite their clear violations—reflects a deliberate indifference to the risk that the Advocates’ First Amendment rights would be infringed and is another indication of an unconstitutional policy. *See Warren v. District of Columbia*, 353 F.3d 36, 39 (D.C. Cir. 2004). That indifference is evident for two reasons. *First*, the infringement of the Advocates’ rights was the obvious and foreseeable consequence of that enforcement decision. *Second*, the Government and its policymakers knew or should have known of the disparate treatment yet took no steps to prevent the resulting constitutional harm.

Far from simply making a constitutional violation “more likely,” the Government’s practice of non-enforcement meant that it had effectively carved out a

single viewpoint for favored treatment. In other words, the “plainly obvious consequence of the decision” not to enforce the Ordinance against BLM protestors was that enforcing it against others similarly situated would be viewpoint discriminatory. *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 411 (1997). The Government had opened “Pandora’s box” by carving out and favoring BLM speech, Pls.’ SUMF ¶ 66, creating an environment where infringement of the Advocates rights was not only foreseeable, but the obvious consequence of its action. *See Baker v. District of Columbia*, 326 F.3d 1302, 1307 (D.C. Cir. 2003)

“[F]aced with actual or constructive knowledge that its agents [would] probably violate constitutional rights,” the Government adopted a policy of inaction against only BLM speakers. *Warren*, 353 F.3d at 39. It is undisputed that the Government had actual, advance notice of the Advocates’ intent to engage in the same conduct from their permit submitted a week before the event. Pls.’ SUMF ¶ 34. It also had explicit notice that the Government’s viewpoint-based disparate enforcement was likely unconstitutional. *Id.* ¶ 35. Yet the Government deliberately failed to ensure that the Advocates would be treated the same as the similarly situated BLM protestors who were not arrested for the same conduct. Commander Glover expressly recognized these enforcement inconsistencies and the overall scheme of allowing BLM messages but not others. *Id.* ¶ 66. Yet Commander Glover made the same decision not to allow the Advocates to participate in the same conduct in a subsequent March 27, 2021, event. *Id.* ¶38. The Government’s inaction in the face of clear notice amounts to deliberate indifference, satisfying the objective standard required by the D.C. Circuit.

## CONCLUSION

Because there are no genuine disputes of material fact regarding Plaintiffs’ underlying First Amendment injuries or the Government’s municipal liability and

the Advocates are entitled to judgment as a matter of law, Plaintiffs respectfully ask the Court to grant their cross-motion for summary judgment—or, at the very least, to deny the Government’s motion.

Respectfully submitted this 29th day of September, 2025.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

*Plaintiffs,*

v.

DISTRICT OF COLUMBIA,

*Defendant.*

Case No.: 1:20-cv-3346-JEB

**PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS IN  
SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**

Under Local Rule 7(h), Plaintiffs submit this Statement of Undisputed Material Facts in support of their Cross-Motion for Summary Judgment.

1. In the wake of George Floyd's death on May 25, 2020, in Minneapolis, demonstrations associated with the Black Lives Matter ("BLM") movement erupted nationwide. In the District of Columbia, riots began at the end of May and persisted through the beginning of June. Ex. 1, Deposition of Commander Jason Bagshaw ("Bagshaw Dep.") 55:21–56:6 (Oct. 8, 2024); Ex. 2, Deposition of Chief Jeffrey Carroll ("Carroll Dep.") 78:2–82:7, 83:9–12 (Apr. 8, 2025); Ex. 3, Deposition of Commander Robert T. Glover ("Glover Dep.") 43:22–44:9, 45:4–8 (Apr. 30, 2025); Ex. 4, Deposition of Peter Newsham ("Newsham Dep.") 86:16–87:2 (Oct. 7, 2024); see also Def.'s Statement of Undisputed Material Facts ("Def.'s SUMF") ¶¶ 1–2, Dkt. No. 66-3.

2. After that time, the rioting gave way to sustained racial justice-related demonstrations that continued intermittently through April or May 2021. Ex. 1, Bagshaw Dep. 64:5–65:6; 87:1–2. But by September 2020, the focus of protests in the District had transitioned primarily to the election cycle. Ex. 3, Glover Dep. 46:22–47:22. Many of the BLM demonstrations took place on public streets and sidewalks. Ex. 4, Newsham Dep. 82:1–8, 98:14–99:4, 102:4–14, 108:7–16, 110:12–14; Ex. 5, Deposition of Michelle Caron (“Caron Dep.”) 70:5–11 (Oct. 10, 2024).

3. There was some criminal activity at BLM-related events following the riots, including defacement, but the events were otherwise mostly peaceful or presented no discernible concerns about violence. Ex. 1, Bagshaw Dep. 64:1–4; Ex. 3, Glover Dep. 41:10–17, 42:3–8, 45:13–20, 49:11–20, 93:17–94:11; Ex. 5, Caron Dep. 67:3–68:8, 69:1–10, 78:3–6; Ex. 6, Deposition of Walter Fleming (“Fleming Dep.”) 70:18–20 (Apr. 15, 2025); *see also* Def.’s SUMF ¶ 3. Commander Glover estimated that up to 70 percent of the BLM events in the summer and fall of 2020 were peaceful. Ex. 3, Glover Dep. 94:1–11.

4. The District of Columbia code includes a Defacement Ordinance that outlaws “willfully and wantonly ... writ[ing], mark[ing], draw[ing], or paint[ing], 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...” D.C. Code § 22-3312.1; *see also* Ex. 10, Defacement Ordinance

(Newsham Dep. Ex. 2). This ordinance was in effect in the summer of 2020. Ex. 4, Newsham Dep. 40:13–22.

5. Following the events of late May and early June, District of Columbia Mayor Muriel Bowser commissioned a painting of “Black Lives Matter” in large yellow letters on 16th Street. Answer ¶ 36, Dkt. No. 43; Ex. 11, Pls.’ First Am. Compl. ¶ 35 (Newsham Dep. Ex. 12); Ex. 3, Glover Dep. 143:4–22, 146:1–3. The following is a picture of the BLM mural commissioned by Mayor Bowser. Ex. 2, Carroll Dep. 86:22–87:12; Answer ¶ 36.



6. Following the installation of the BLM mural commissioned by the Mayor, on June 6, 2020, BLM protestors appended “= Defund the Police” on the street in similar yellow paint. Answer ¶ 36. The Government did not grant a permit for the “= Defund the Police” mural, and officers were unaware of any other permits for this activity, nor did the Government produce any. Answer ¶ 41. Ex. 3, Glover Dep. 144:5–16, 154:13–20; Ex. 4, Newsham Dep. 82:9–15, 83:16–84:1. The mural remained in place for upwards of two months before it was removed for construction. Ex. 3, Glover Dep. 146:9–16; Ex. 12, Email from Jason Bagshaw to Walter Fleming, *et al.*, (Aug. 14, 2020, at 10:47 a.m. ET), DC\_2020-cv-03346-

00001528 (Bagshaw Dep. Ex. 42). No one was cited and no arrests were made for violating the Defacement Ordinance at this event. Answer ¶ 42.

7. BLM protestors repeatedly violated the Defacement Ordinance in the summer and fall of 2020. Ex. 4, Newsham Dep. 83:16–84:17, 102:11–16, 108:7–22, 144:1–13; Ex. 2, Carroll Dep. 90:4–9, 105:21–106:7, 117:5–8; Ex. 7, Deposition of Commander Guillermo Rivera (“Rivera Dep.”) 82:7–15 (April 24, 2025); Ex. 1, Bagshaw Dep. 71:1–17; Ex. 3, Glover Dep. 145:13–20; Ex. 5, Caron Dep. 106:7–107:10.

8. BLM protestors defaced public or private property in the summer and fall of 2020 in the presence of police officers. Ex. 13, Email from MPD Press to Dustin Sternbeck and Kristen Metzger (Aug. 29, 2020, 10:22 a.m. ET) (“Email from MPD to Sternbeck and Metzger”), DC\_2020-cv-03346-00001237–1238 (Newsham Dep. Ex. 13); Ex. 1, Bagshaw Dep. 85:11–14, 88:5–90:5; Ex. 3, Glover Dep. 138:12–13; Ex. 2, Carroll Dep. 88:6–15, 117:13–15, 118:3–16; Ex. 4, Newsham Dep. 112:11–21; Ex. 6, Fleming Dep. 67:4–17; Ex. 5, Caron Dep. 38:9–20, 42:1–5, 70:5–11, 73:18–76:15.

9. Any arrests made at BLM events in the summer and fall of 2020 are recorded in an official arrest report and are a matter of public record. Ex. 1, Bagshaw Dep. 92:18–93:1, 96:13–97:2; Ex. 4, Newsham Dep. 104:12–18, 115:3–116:3; Ex. 2, Carroll Dep. 89:18–20; Ex. 14, Email from Leeann Turner to Peter Newsham (Sept. 6, 2020, 12:31 p.m. ET) (“Unrest Arrest Summary”), DC\_2020-cv-

03346-00013906–13916 (Carroll Dep. Ex. 72); Ex. 7, Rivera Dep. 97:22–98:18, 178:5–7.

10. Body-worn camera footage from August 16, 2020, captures two BLM protestors spray-painting messages, including “I can’t breathe,” in blue and red spray paint directly in front of officers near the Chamber of Commerce. Ex. 15, Body-Worn Camera Footage, DC\_2020-cv-03346-00001294, at 14:26:14–14:30:06 ET (Carroll Dep. Ex. 62); Ex. 1, Bagshaw Dep. 88:5–90:5; Ex. 8, Deposition of Lieutenant Kenneth Taylor (“Taylor Dep.”) 42:2–43:18 (April 23, 2025).

11. Officers did not stop the defacement or issue a warning to the individuals spray-painting, despite there being no disrupting or threatening behavior. Ex. 15, Body-Worn Camera Footage, DC\_2020-cv-03346-00001294, at 14:26:14–14:30:06 ET; Ex. 5, Caron Dep. 70:12–14; Ex. 8, Taylor Dep. 42:2–43:18, 44:1–14; Ex. 3, Glover Dep. 165:3–7.

12. The Government did not produce any arrest records for defacement in connection with this event. The Government’s “Unrest Arrest Summary” detailing arrests made between May 30 through September 6, 2020, indicates that MPD made zero arrests on August 16, 2020. Ex. 14, Unrest Arrest Summary, DC\_2020-cv-03346-00013906–13916.

13. The following are screenshots from said body-worn camera footage.



14. Officers witnessed BLM protestors spray-paint messages “in front of the DOJ” during a peaceful event on August 28, 2020, and made no arrests. Ex. 13, Email from MPD to Sternbeck and Metzger, DC\_2020-cv-03346-00001238–1237; Ex. 16, Video Linked in Newsham Dep. Ex. 13, *Leftist Spray-Paints ‘Black Lives*

*Matter, 'Jacob Blake' Outside Department of Justice During 2020 March on Washington*, available at <https://jwp.io/s/wU4Xrxd2> (last visited Sept. 9, 2025) (“Exhibit 13 Video”) (Taylor Dep. Ex. 86). The Government’s Unrest Arrest Summary indicates that MPD made two arrests on August 28, 2020, neither for defacement. Ex. 14, Unrest Arrest Summary, DC\_2020-cv-03346-00013906–13916.

15. The following are screenshots from the above-referenced video of MPD officers looking on as BLM protestors spray-paint “Black Lives Matter” and “Reopen the Cases” on the street in front of them. Ex. 16, Exhibit 13 Video.





16. Officers knew of no permits issued to the BLM protestors who marked the public streets and sidewalks with First Amendment messages in the summer and fall of 2020. Ex. 4, Newsham Dep. 83:16–18; Ex. 1, Bagshaw Dep. 74:8–75:11, 79:10–80:11. Marking the public streets and sidewalks is “clearly a violation” of the Defacement Ordinance. Ex. 4, Newsham Dep. 102:4–14.

17. The Government’s “Unrest Arrest Summary” recorded four “unrest arrests” at BLM events for defacing public or private property between May 20, 2020, and September 6, 2020. Ex. 14, Unrest Arrest Summary, DC\_2020-cv-03346-00013915–13916; Ex. 2, Carroll Dep. 215:6–216:8.

18. The Government made “several” arrests for defacement in the summer and fall of 2020. Ex. 14, Unrest Arrest Summary, DC\_2020-cv-03346-00013915; Ex. 2, Carroll Dep. 118:3–16, 216; Ex. 7, Rivera Dep. 97:22–98:18, 178:5–9; *see also* Def.’s SUMF ¶ 15.

19. On May 30, 2020, at 2200 hours, MPD arrested Henry Chen for defacing public or private property. The arrest report does not indicate whether the defacement was related to BLM, and it does not appear to be part of a protest since it occurred in a fenced off area and the suspect was the only person there. Ex. 17, Henry Chen Arrest Report, DC\_2020-cv-03346-00000488–502; *see also* Def.’s SUMF ¶ 40.

20. On May 31, 2020, at 1950 hours, MPD arrested Raphael Snead for defacing public or private property. His arrest report indicates that he spray-painted the number “12” on several buildings. Ex. 18, Raphael Snead Arrest Report, DC\_2020-cv-03346-00000378–386; *see also* Def.’s SUMF ¶ 41.

21. On June 8, 2020, at 0039 hours, MPD arrested Kayla Cureton for defacing public or private property. Her arrest report indicates that she spray-painted on a traffic control box but omits what or whether any message was spray-painted. Ex. 19, Kayla Cureton Arrest Report, DC\_2020-cv-03346-00000503–518; *see also* Def.’s SUMF ¶ 42.

22. On July 7, 2020, at 2240 hours, MPD arrested Tayvon Turner for defacing public or private property. His arrest report indicates that he spray-painted on Department of Public Works concrete barriers during a First Amendment assembly but omits what or whether any message was spray-painted. Ex. 20, Tayvon Turner Arrest Report, DC\_2020-cv-03346-000000519–536; *see also* Def.’s SUMF ¶ 43.

23. On September 26, 2020, at 2202 hours, MPD arrested Mohamed Elsherbiny for defacing public or private property by spray-painting “ACAB” on a structure during a First Amendment assembly. Ex. 21, Mohamed Elsherbiny Arrest Report, DC\_2020-cv-03346-00000537–557; *see also* Def.’s SUMF ¶ 44.

24. On September 12, 2020, at 0845 hours, MPD arrested Russel Powden for defacing public or private property after he was observed spray-painting, among other things, “ACAB” onto the wall of a building. Ex. 22, Russel Powden Arrest Report, DC\_2020-cv-03346-00000400–407; *see also* Def.’s SUMF ¶ 45.

25. On October 31, 2020, at 2215 hours, MPD arrested Jeremy Rivera for assaulting a police officer. Ex. 23, Jeremy Rivera Arrest Report, DC\_2020-cv-03346-00000420 (Mejia Dep. Ex. 54). His arrest packet also includes a charge for defacing public or private property based on “recent still images” showing Rivera spray-painting concrete dividers. *Id.* The arrest was made during riot conditions, and the report omits what Rivera spray-painted on the dividers. *Id.*; Ex. 2, Carroll Dep. 130:13–131:21, 132–33; Ex. 8, Taylor Dep. 66; Ex. 7, Rivera Dep. 196–97; *see also* Def.’s SUMF ¶ 46.

26. For BLM-related demonstrations where defacement of public or private spaces was expected to occur, the Government asked Department of Public Works employees to remain on standby to remove the markings with power-washers at the Government’s expense after the speakers’ message was communicated. Ex. 3, Glover Dep. 156–62; Ex. 1, Bagshaw Dep. 161:19–162:22; Ex.

12, Email from Jason Bagshaw to Walter Fleming, *et al.*, DC\_2020-cv-03346-00001528.

27. On August 1, 2020, advocates from the Frederick Douglass Foundation and Students for Life (the “Advocates”) gathered on a public sidewalk in front of a Planned Parenthood in the District of Columbia to proclaim that “Black Pre-Born Lives Matter.” Ex. 24, MPD Assembly Plan Permit Approval, July 23, 2020 (“July 2020 MPD Permit Approval”), DC\_2020-cv-03346-00002242–2243 (Newsham Dep. Ex. 15); Ex. 4, Newsham Dep. 123:11–124:14; Ex. 25, Body-Worn Camera Footage, DC\_2020-cv-03346-00001287, at 07:25:33–07:30:29 ET.

28. The Advocates’ actions violated the Defacement Ordinance. Ex. 4, Newsham Dep. 108:17–22; Ex. 9, Mejia Dep. 80:1–6.

29. The Advocates’ speech occurred in a traditional public forum. Ex. 1, Bagshaw Dep. 77:12–15; Answer ¶¶ 2, 7, 65.

30. The Advocates’ event was peaceful. Ex. 9, Mejia Dep. 77:20–78:10; Ex. 2, Carroll Dep. 156:10–157:2; Ex. 4, Newsham Dep. 123:11–124:14.

31. On August 1, 2020, “approximately 30 officers” mobilized in advance for the Advocates’ event. Def.’s SUMF ¶ 23. The Advocates were arrested and threatened with arrest for attempting to write their message—“Black Pre-Born Lives Matter”—in washable sidewalk chalk. Answer ¶¶ 3, 7, 65, 70; Ex. 25, Body-Worn Camera Footage, DC\_2020-cv-03346-00001287, at 07:25:33–07:30:29 ET; *see also* Def.’s SUMF ¶¶ 27–28.

32. The following is a screenshot of body-worn camera footage at the August 1, 2020, event, just before the Advocates' arrests.



33. Sidewalk chalk can easily be washed away using some water and brooms. Ex. 3, Glover Dep. 153:9–13. Commander Glover stated of washable sidewalk chalk: “the intent of that statute does not allow for [it], but where is the wisdom in locking up a six or seven-year-old child for ... chalking a hopscotch, right?” Ex. 3, Glover Dep. 153:14–17.

34. The Advocates submitted a permit application to MPD’s Special Operations Division (“SOD”) a week before their event, on July 20, 2020. The application asked for a permit for a First Amendment demonstration outside of Planned Parenthood (1225 4th St., NE, Washington, D.C.) beginning at 6 a.m. on August 1, 2020. Ex. 24, July 2020 MPD Assembly Plan Permit Approval, DC\_2020-

cv-03346-00002242–2243; Ex. 26, Email from Tina Whittington to Mayor Muriel Bowser, *et al.*, (July 21, 2020, at 16:16 ET) (“Email from Whittington to Bowser, *et al.*”), DC\_2020-cv-03346-00000764 (Bagshaw Dep. Ex. 37); Ex. 2, Carroll Dep. 152, 174; *see also* Def.’s SUMF ¶ 18.

35. On July 20, 2020, the Advocates submitted a letter to the Mayor, copying SOD and Chief Newsham, requesting to paint “Black Pre-Born Lives Matter” on public property. The letter also warned that the Government’s decision to allow protestors to paint “Defund the Police” “opened the streets up as a public forum,” and that the Government was “not permitted to discriminate on the basis of viewpoint in making determinations relating to public assemblies in public fora.” *See* Ex. 27, Letter from Kristan Hawkins and Rev. Dean Nelson to Mayor Bowser *et al.* (July 20, 2020), DC\_2020-cv-03346-00000680–681 (Newsham Dep. Ex. 14); Ex. 26, Email from Whittington to Bowser, *et al.*, DC\_2020-cv-03346-00000764; *see also* Def.’s SUMF ¶ 19.

36. On July 23, 2020, MPD SOD issued a permit to the Advocates, but stated that “marking or painting the street is not permitted by the Metropolitan Police Department.” Ex. 24, July 2020 MPD Permit Approval, DC\_2020-cv-03346-00002242–2243; *see also* Def.’s SUMF ¶ 20.

37. The permit also directed the Advocates to the DC Department of Transportation for a possible permit to mark or paint on the street. Ex. 28, Declaration of Angela Whittington (“Whittington Decl.”) ¶ 1. But when the

Advocates later made that request, the DDOT referred them back to MPD. Ex. 28, Whittington Decl. ¶ 2.

38. Commander Glover made the same decision not to allow the Advocates to participate in the same conduct in a subsequent March 27, 2021, event. Ex. 29, MPD Assembly Plan Permit Approval, March 23, 2021, (Bagshaw Dep. Ex. 43); Ex. 3, Glover Dep. 247–48.

39. In the summer and fall of 2020, MPD’s Special Operations Division produced daily and weekly lists of planned, but not “permitted” assemblies, many of which were BLM-related and based on open-source information, including social media. Ex. 30, Homeland Sec. Bureau, JSTACC Div, Intel. Branch, Upcoming Assemblies Report (July 31, 2020), DC\_2020-cv-03346-00000565–573 (Newsham Dep. Ex. 3); Ex. 31, Homeland Sec. Bureau, JSTACC Div, Intel. Branch, Upcoming Assemblies Report (Aug. 21, 2020), DC\_2020-cv-03346-00000774–784 (Newsham Dep. Ex. 4); Ex. 32, MPD Intel. Branch, Upcoming Assemblies Report (Aug. 21, 2020) (Newsham Dep. Ex. 5); Ex. 33, Memorandum from Commander of the MPD Special Operations Div. to the Assistant Chief of Police and Homeland Sec. Bureau (July 31, 2020) (“MPD SOD Memorandum”), DC\_2020-cv-03346-00000643–647 (Newsham Dep. Ex. 6); Ex. 34, Am. Memorandum from Commander of the MPD Special Operations Div. to the Assistant Chief of Police and Homeland Sec. Bureau (July 31, 2020) (“Amended MPD SOD Memorandum”), DC\_2020-cv-03346-00000732–736 (Newsham Dep. Ex. 7); *see also* Ex. 1, Bagshaw Dep. 42:17–43:4, 74:16.

40. The Government’s policy was to send at least one officer to every event featured in the Government’s daily reports. Ex. 33, MPD SOD Memorandum, DC\_2020-cv-03346-00000643–647; Ex. 34, Amended MPD SOD Memorandum, DC\_2020-cv-03346-00000732–736; Ex. 1, Bagshaw Dep. 47:2–48:6; *see also* Def.’s SUMF ¶ 22.

41. The Government’s Standard Operating Procedures for Handling First Amendment Assemblies and Mass Demonstrations (“First Amendment SOPs”) were in effect and considered the official policy of the Government in the summer and fall of 2020. Ex. 1, Bagshaw Dep. 30:22–31:3; Ex. 4, Newsham Dep. 27:14–19, 30:4–9; *see also* Def.’s SUMF ¶ 7.

42. All officers were expected to comply with the First Amendment SOPs. Ex. 4, Newsham Dep. 28:9–14.

43. Under the First Amendment SOPs, “[i]n a violent civil disturbance, the primary objectives of the incident commander shall” include “[d]eploy[ing] personnel to isolate and contain the people within a crowd who are acting unlawfully and effect the arrest of those individual law violators based on probable cause.” Ex. 35, MPD Standard Operating Procedures, DC\_2020-cv-03346-00000090 (Newsham Dep. Ex. 1); Ex. 3, Glover Dep. 199:14–16.

44. The First Amendment SOPs expressly consider the identity of demonstration leaders when determining how to police First Amendment events. *See* Ex. 35, MPD Standard Operating Procedures, DC\_2020-cv-03346-00000098; Ex. 3, Glover Dep. 104.

45. The chief of police is “the commanding official of the MPD” who “oversee[s] all police activities during a [Civil Disturbance Unit] activation,” has final authority to enforce the Government’s ordinances at First Amendment events, and has “exclusive authority to approve assembly plans.” Ex. 35, MPD Standard Operating Procedures, DC\_2020-cv-03346-00000093, DC\_2020-cv-03346-00000108–109; Ex. 4, Newsham Dep. 33:11–22; 34:1–35:13.

46. The chief of police may delegate his responsibility to enforce the Government’s ordinances and approve assembly plans to certain subordinates “or his designee.” Ex. 35, MPD Standard Operating Procedures, DC\_2020-cv-03346-00000093, DC\_2020-cv-03346-00000108–109; Ex. 1, Bagshaw Dep. 31:8.

47. In the summer of 2020, Chief Newsham designated Assistant Chief Carroll and SOD Commander Robert Glover to “review and evaluate all information pertaining to the civil disorder and make a determination as to which level of mobilization shall be implemented.” Ex. 3, Glover Dep. 76:21–77:14; Ex. 4, Newsham Dep. 33:11–22, 34:1–35:13.

48. Assistant Chief Carroll oversaw all branches of the Homeland Security Division, including the SOD. Ex. 4, Newsham Dep. 68:15–22.

49. In the summer and fall of 2020, Commander Guillermo Rivera led the SOD. Commander Rivera took injury leave from March 1 through mid-June 2020, at which time Commander Robert Glover became acting SOD commander. Ex. 4, Newsham Dep. 68:15–22; Ex. 3, Glover Dep. 87:5–15; Ex. 7, Rivera Dep. 24:17–25:12.

50. The SOD commander, under the chief's direction, prepares the details and tactical plans for First Amendment assemblies. Ex. 35, MPD Standard Operating Procedures, DC\_2020-cv-03346-00000085–86; Ex. 7, Rivera Dep. 36:11–37:1.

51. The SOD commander is “designated as the [Civil Disturbance Unit (“CDU”)] Commanding Official and shall coordinate, command, and direct all CDU and SOD activities.” Ex. 35, MPD Standard Operating Procedures, DC\_2020-cv-03346-00000093.

52. The First Amendment SOPs grant enforcement authority over First Amendment assemblies to the Chief of Police and the SOD Commander, and the Chief of Police in turn expressly delegated his authority to Commander Glover. *See* Ex. 35, MPD Standard Operating Procedures, DC\_2020-cv-03346-00000086, DC\_2020-cv-03346-00000091.

53. The SOD commander reviews and signs permits for First Amendment assemblies. Ex. 1, Bagshaw Dep. 34:10–22.

54. In the summer and fall of 2020, Commanders Rivera and Glover were “entrusted with the ability to approve and deny requests” for a permit to assemble for First Amendment events. Ex. 4, Newsham Dep. 121–122; Ex. 7, Rivera Dep. 106.

55. In the summer and fall of 2020, Chief Newsham left all decisions concerning staffing at First Amendment demonstrations to Assistant Director Carroll or another designee. Ex. 4, Newsham Dep. 53:15–54:8.

56. From approximately May to the middle of December 2020, Commander Glover was the “overall incident commander for MPD ... for things that were happening or centered around First Amendment activities and protest activities around BLM.” Ex. 3, Glover Dep. 17–18, 22:9–12, 21–23, 26:13–14; 59:5–7, 136; Ex. 1, Bagshaw Dep. 58:12–13.

57. As “overall incident commander” for BLM demonstrations, Commander Glover oversaw and coordinated staffing for First Amendment events, and none of his superiors reviewed or reversed his command decisions. Ex. 3, Glover Dep. 87–88, 90; Ex. 1, Bagshaw Dep. 13:21–14:12; Ex. 7, Rivera Dep. 48:17–49:16.

58. Commander Glover neither made nor ordered any arrests for defacement in the summer of 2020. Ex. 3, Glover Dep. 43–44.

59. Commander Glover’s command assignments and related decisions were never reversed by his superiors, and he was “supported in [his] efforts to handle [his] responsibilities.” Ex. 3, Glover Dep. 87:20–89:11, 112:6–10.

60. Assessing whether an arrest is warranted requires observing crowd dynamics in real time. Ex. 3, Glover Dep. 64:19–22, 79:21–22.

61. Commander Glover was physically present at roughly 95 percent of the BLM-related events from May through August 2020. Ex. 3, Glover Dep. 138:12–13.

62. Commander Glover maintained operational command authority after Commander Rivera returned from injury leave in the summer and fall of 2020. Ex. 7, Rivera Dep. 26:18–22.

63. The Mayor's office expressly delegated authority over First Amendment assemblies to MPD. Ex. 36, Email from Lamont Akins to Shawn Townsend and Lyn Stout, *et al.* (Oct. 5, 2020, at 10:34 ET) DC\_2020-CV-03346-00013601-13602; Ex. 3, Glover Dep. 212:14–20; Ex. 7, Rivera Dep. 39:19–41:6.

64. The Mayor's office did not promulgate rules to guide MPD's discretion when considering applications for First Amendment assemblies, as required by the First Amendment SOPs. Ex. 35, MPD Standard Operating Procedures, DC\_2020-cv-03346-00000110; Ex. 4, Newsham Dep. 39:6–40:1.

65. Commander Glover had final authority to “make decisions on who would get resources and which resources were going to be going and things like that,” and kept “Assistant Chief Carroll abreast.” Ex. 3, Glover Dep. 24:20–25:1, 24:7–8.

66. In a July 21, 2020, email to his superiors, forwarding for their situational awareness an email from Plaintiff Tina Whittington to the Mayor, Commander Glover stated “Pandora's box begins.” Ex. 37, Email from Robert Glover to Jeffrey W. Carroll, *et al.* (July 21, 2020, at 20:20 ET), DC\_2020-cv-03346-00000678–679 (Bagshaw Dep. Ex. 32). Commander Glover thus raised his concern that, by choosing not to enforce the ordinance against BLM-related messages, the Government would prompt others like SFLA to seek similar treatment. Ex. 3, Glover Dep. 229–230; *see also* Ex. 1, Bagshaw Dep. 121:12–22.

67. Roughly half of the BLM-related events in the summer of 2020 were planned. Ex. 4, Newsham Dep. 71:22–72:20.

68. The Government had prepared “contingency plans for all First Amendment Assemblies in the event they were no longer peaceful” that ranged from general “ways to mobilize officers” to “very specific” to the event. Ex. 4, Newsham Dep. 68:7–10; Ex. 1, Bagshaw Dep. 61:1–14.

69. Individuals “do not need a permit to exercise [their] First Amendment rights in the District of Columbia.” Ex. 1, Bagshaw Dep. 37:8–10.

70. The March for Life is traditionally a peaceful event, but there are no allegations that its message is tied to racial injustice. Ex. 2, Carroll Dep. 51; Ex. 1, Bagshaw Dep. 49:16–22.

71. Reverend Patrick Mahoney often chawks pro-life messages around the District of Columbia, including in front of Planned Parenthood, without arrest. There are no facts indicating that Reverend Mahoney’s message includes a racial element. Ex. 1, Bagshaw Dep. 125–28; Ex. 3, Glover Dep. 232:19–233:17; Ex. 38, Email from Reverend Patrick Mahoney to Scott Earhardt (Aug. 13, 2020, at 14:23 ET), DC\_2020-cv-03346-00001168-1170 (Bagshaw Dep. Ex. 33); Ex. 39, Email from Reverend Patrick Mahoney to Scott Earhardt (July 6, 2020, at 10:46 ET), DC\_2020-cv-03346-00000574 (Bagshaw Dep. Ex. 34).

Dated: September 29, 2025

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

*Plaintiffs,*

v.

DISTRICT OF COLUMBIA,

*Defendant.*

Case No.: 1:20-cv-3346-JEB

**PLAINTIFFS' RESPONSES TO DEFENDANT'S STATEMENT OF  
UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT**

Under Local Rule 7(h), Plaintiffs submit this response to Defendant's Statement of Material Facts Not in Dispute filed with its Motion for Summary Judgment.

1. Not disputed for purposes of summary judgment.
2. Not disputed for purposes of summary judgment.
3. Not disputed for purposes of summary judgment.
4. Not disputed for purposes of summary judgment.
5. Not disputed for purposes of summary judgment.

6. Disputed. The Government's Standard Operating Procedures for Handling First Amendment Assemblies and Mass Demonstrations state that the indicent commander's primary objectives during a civil disturbance include "[d]eploy[ing] personnel to isolate and contain the people within a crowd who are

acting unlawfully and effect the arrest of those individual law violators based on probable cause.” Pls.’ Statement of Undisputed Material Facts (“Pls.’ SUMF”) ¶ 43. And Metropolitan Police Department (“MPD”) officials reiterated in July 2020 that officers should arrest individuals who were observed defacing property if possible. Defendant’s Statement of Undisputed Material Facts (“Def.’s SUMF”) ¶ 14. Instead, evidence shows that MPD officers repeatedly did not arrest individuals defacing public or private property at Black Lives Matter (“BLM”) events in the summer and fall of 2020, Pls.’ SUMF ¶¶ 6, 9, 11, 14, 17–18, even when they observed the defacement, *id.* ¶ 8, and even at peaceful events with no discernable threat of violence, *id.* ¶¶ 3, 11, 14. MPD even preemptively deployed Department of Public Works pressure washers to remove anticipated BLM defacement. *Id.* ¶ 26. All arrests are recorded in an official arrest report and are a matter of public record, *id.* ¶ 9, yet for the summer and fall of 2020, the Government produced only “several” arrests for defacement at BLM events, *id.* ¶ 18. Commander Glover even recognized the “Pandora’s box” the Government had opened by endorsing BLM messages and declining to enforce the Defacement Ordinance against BLM-related messages marked on public and private property. *Id.* ¶ 66.

7. Not disputed for purposes of summary judgment.
8. Not disputed for purposes of summary judgment.
9. Not disputed for purposes of summary judgment.
10. Not disputed for purposes of summary judgment.
11. Disputed. See paragraph 6 above.

12. Not disputed for purposes of summary judgment.

13. Disputed. See paragraph 6 above.

14. Disputed insofar as this paragraph is used to demonstrate a policy of arresting individuals who were observed defacing property when possible. This policy was not born out. MPD officers testified that they repeatedly declined to arrest individuals for openly defacing public or private property at BLM events in the summer and fall of 2020, even at peaceful events with no discernable threat of violence. See paragraph 6 above.

15. Disputed insofar as Defendant characterizes the arrests discussed in Commander Bagshaw's deposition as arrests for defacement. Commander Bagshaw testified that the individuals arrested in the cited examples were *not* charged with defacing public or private property. Ex. 1, Deposition of Commander Jason Bagshaw ("Bagshaw Dep.") 84:84:20–85:10, 112:13–15 (Oct. 8, 2024).

16. Not disputed for purposes of summary judgment.

17. Disputed. The Government produced records of "several" arrests for individuals charged with defacing public or private property in the summer and fall of 2020. Pls.' SUMF ¶ 18. At least one of those individuals was arrested for the more serious crime of assaulting a police officer during riotous conditions. *Id.* ¶ 25. He was later also charged with defacing public or private property after video footage showed him spray-painting public property. *Id.* Another individual arrested for defacing public or private property was also charged with failure to appear in family court pursuant to an outstanding warrant. *Id.* ¶ 22.

18. Not disputed for purposes of summary judgment.

19. Not disputed for purposes of summary judgment.

20. Not disputed for purposes of summary judgment.

21. Disputed. Commander Guillermo Rivera testified that, although it may not have been unusual to send 16 officers (two squads) to staff the Advocates’ planned August 1 demonstration with less than 50 people, he was unsure how “approximately 30” officers ended up mobilizing for the event. Ex. 7, Deposition of Guillermo Rivera (“Rivera Dep.”) 116:14–121:14 (Apr. 24, 2025); Def.’s SUMF ¶ 23.

22. Not disputed for purposes of summary judgment.

23. Not disputed for purposes of summary judgment.

24. Not disputed for purposes of summary judgment.

25. Not disputed for purposes of summary judgment.

26. Not disputed for purposes of summary judgment.

27. Not disputed for purposes of summary judgment.

28. Not disputed for purposes of summary judgment.

29. Not disputed for purposes of summary judgment.

30. Disputed. There is at least a genuine issue of fact about whether MPD officers were present while “=Defund the Police” was appended in yellow paint to the existing “Black Lives Matter” mural commissioned by the Government. The Government’s mural was painted on June 6, 2020, at the epicenter of protest activity within the District of Columbia. Pls.’ SUMF ¶¶ 5–6; Def.’s SUMF ¶ 39; Ex. 6, Deposition of Walter Fleming (“Fleming Dep.”) 131:21–132:9 (Apr. 15, 2025).

During this time, there were full mobilizations of law enforcement throughout the District. Ex. 1, Bagshaw Dep. 69:3–22. Commander Glover testified that he assumed that MPD had assigned officers to the general area. Ex. 3, Glover Dep. 144:21–145:5. And Chief Carroll stated that he “could have been there” when it was painted. Ex. 2, Carroll Dep. 87:13–88:2. Finally, MPD would generally send at least one officer to each First Amendment assembly. Pls.’ SUMF ¶ 40.

31. Disputed. A video posted by the Washington Post describes and provides video footage of BLM protestors painting the “= Defund the Police” mural on 16th Street NW at night during the summer of 2020. Video located at Rebecca Tan, et al., *Protesters paint ‘defund the police’ right next to D.C.’s ‘Black Lives Matter’ mural*, Washington Post (June 7, 2020), <http://bit.ly/3ILcYB3>.

32. Disputed. Defendant has already admitted that MPD did not grant a permit for the “= Defund the Police” addition to the Government’s BLM mural, and that no arrests were made for violating the Defacement Ordinance during this event. Pls.’ SUMF ¶ 6.

33. Disputed. Commander Glover testified that the Chamber of Commerce did not file a complaint with law enforcement about the signage posted on its private property. Ex. 3, Glover Dep. 148:4–22. He also testified that the street and sidewalk in front of the Chamber of Commerce are not private property, but rather public space. *Id.* 149:1–7. And there is ample record evidence showing BLM protestors defacing the public spaces in front of the Chamber of Commerce. Pls.’ SUMF ¶¶ 10–13. Officers testified that they were aware of no permits issued to

BLM protestors who marked the public streets and sidewalks with First Amendment messages in the summer and fall of 2020. *Id.* ¶ 16.

34. Disputed. Body-worn camera footage from August 16, 2020, captures two BLM protestors spray-painting BLM-related messages directly in front of officers near the Chamber of Commerce. *Id.* ¶¶ 10–13.

35. Disputed. See paragraphs 33 and 34 above.

36. Disputed. Then-Assistant Chief Jeffery Carroll was aware of the Advocates’ desire to paint in front of Planned Parenthood, as he asked then-Lieutenant Bagshaw to gather details about the intended paint, Ex. 40, Email from Jason Bagshaw to Jeffery Carroll, DC\_2020-CV-03346-00000770-772 (Bagshaw Dep. Ex. 38), and was copied on the draft response submitted to the Advocates advising them that painting is not permitted by MPD, Ex. 41, Email from Guillermo Rivera to Jason Bagshaw, *et al.* (July 25, 2020, 3:47 p.m. ET), DC\_2020-cv-03346-00002251. Lieutenant Jason Bagshaw also circulated an email prior to the Advocates’ event suggesting “mov[ing] two CDU squads (or whatever you see fit)” to the planned demonstration site by 3:00 a.m. on August 1, 2020, and asked officers to “[k]eep Chief Carroll” and himself updated. Ex. 42, Email from Jason Bagshaw to Walter Fleming, *et al.* (Aug. 1, 2020, 2:06 a.m. ET), DC\_2020-cv-03346-00001544. And the night before the August 1 event, Assistant Chief Carroll spoke with officers Mejia, Fleming, and Parker by phone and told them not to allow any defacement at the event. Ex. 9, Deposition of Carlos Mejia 58:10–59:14 (Oct. 9, 2024).

37. Disputed. The Advocates copied Mayor Bowser on their request to paint “Black Pre-Born Lives Matter” in front of Planned Parenthood on August 1, 2020. Pls.’ SUMF ¶ 35. In addition, the Government’s Standard Operating Procedures for Handling First Amendment Assemblies and Mass Demonstrations (“First Amendment SOPs”) were in effect and considered the official policy of the Government in the summer and fall of 2020 with which all officers had to comply. *Id.* ¶¶ 41–42. The First Amendment SOPs explicitly directed officers to arrest lawbreakers based on probable cause. *Id.* ¶ 43. Chief Newsham oversaw and had final authority to enforce the Government’s ordinances at First Amendment events, and he delegated that responsibility, per the SOPs, to Assistant Chief Carroll and Special Operations Division (“SOD”) acting Commander Robert Glover or Commander Guillermo Rivera, depending on the time. *Id.* ¶¶ 45–47, 49, 52, 54. And, in July 2020, Commander Rivera explicitly instructed SOD officers to arrest and charge with defacement whenever officers observed “tagging in progress.” Exhibit 43, Email from Guillermo Rivera to Duncan Bedlion, *et al.* (July 14, 2020, 2:17 p.m. ET), DC\_2020-cv-03346-00002146 (Glover Dep. Ex. 98).

38. Disputed. Evidence shows that the Government favored the Black Lives Matter message. Following the events of late May and early June, District of Columbia Mayor Muriel Bowser commissioned a painting of “Black Lives Matter” in large yellow letters on 16th Street NW and allowed BLM protestors’ “=Defund the Police” addendum to remain in place for upwards of two months before it was removed for construction. Pls.’ SUMF ¶¶ 5–6.

39. Not disputed for purposes of summary judgment.

40. Not disputed for purposes of summary judgment.

41. Not disputed for purposes of summary judgment.

42. Not disputed for purposes of summary judgment.

43. Not disputed for purposes of summary judgment.

44. Disputed for the limited purpose of correcting the date of arrest, which the arrest report indicates is September 26, 2020. *Id.* ¶ 23. Otherwise not disputed for purposes of summary judgment.

45. Not disputed for purposes of summary judgment.

46. Not disputed for purposes of summary judgment.

47. Disputed. In an email from Lieutenant Carlos Mejia to others at MPD, dated August 23, 2020, he describes that a group of demonstrators tagged the walls of an underpass and that the demonstrators carried large umbrellas to block the view. He adds that “[i]t wasn[’t] until after we passed that we noticed what they had done.” Ex. 44, Email from Carlos Mejia to Darnell Robinson, *et al.* (Aug. 23, 2020, 6:08 a.m.), DC\_2020-cv-00002149–2150. This indicates that officers were not “thwarted” in making arrests—they were simply unaware of the defacement until it was too late to act. The issue was not interference or obstruction, but rather the timing of the discovery, which prevented an immediate response. And there is no evidence that Defendant ever attempted to identify these individuals after the fact with video from traffic cameras, etc. as they did for Jeremy Rivera. *See* Ex. 23, Jeremy Rivera Arrest Report, DC\_2020-cv-03346-00000420 (Mejia Dep. Ex. 54).

Dated: September 29, 2025

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