No. 23-

IN THE

Supreme Court of the United States

DEVON TINIUS, *et al.*,

Petitioners,

v.

LUKE CHOI, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DC CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the District of Columbia's curfew law is unconstitutional because it violates fundamental rights and because it is overbroad and void for vagueness.

PARTIES

Petitioners are Devon Tinius, Brandon Brown, Christopher Green, Victor Ajokubi, Kensy Maradiga, Haley Southee, and Kwelly Smith.

Respondents are District of Columbia Metropolitan Police Officers Luke Choi, Jose Maneechai, Carlton Smith, Carlin Kern, Jermaine Perez, Briana Varga, and the District of Columbia

RELATED PROCEEDINGS

Tinius v Choi, et al., 77 F.4th 691 (D.C. Cir. July 7, 2023, denial rehearing en banc 9/13/2023).

Consolidated cases:

Brown v. Choi, et al., 22-cv-7053 (D.C. Cir. July 7, 2023, denial rehearing en banc 9/13/2023.

Maradiga v. Kern, et al., 22-cv-7050 (D.C. Cir. July 7, 2023, denial rehearing en banc 9/13/2023).

Smith v. Perez, et al., 22-cv-7049 (D.C. Cir. July 7, 2023, denial rehearing en banc, 9/13/2023).

Southee v. Varga, et al., 22-cv-7051 (D.C. Cir. July 7, 2023, denial rehearing en banc 9/13/2023).

Green v. Smith, et al., 22-cv-7052 (D.C. Cir. Jul7 7, 2023, denial rehearing en banc 9/13/2023).

Ajokubi v. Maneechai, et al., 22-cv-7048 (D.C. Cir. July 7, 2023, denial rehearoing en banc, 9/13/2023).

Tinius v Choi, et al., 2022 WL 899238 (D.D.C. 3/28/2022).

Consolidated cases:

Brown v. Choi, et al., 22-CV-00441 (D.D.C. 3/28/2022).

Maradiga v. Kern, et al., 21-cv-01460 (D.D.C. 3/28/20222).

Smith v. Perez, et al., 21-cv-00986 (D.D.C. 3/28/2022).

Southee v. Varga, et al., 21-cv-01461 (D.D.C. 3/28/2022).

Green v. Smith, et al., 21-cv-02377 (D.D.C. 3/28/2022).

Ajokubi v. Maneechai, et al., 21-cv-00909 (D.D.C. 3/28/2022).

CORPORATE DISCLOSURE STATEMENT

None of the Petitioners are corporations.

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STATUTES

I. PETITION FOR A WRIT OF CERIORARI

Petitioners petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

II. OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the District of Columbia Circuit, Tinius v Choi, et al., 77 F.4th 691 (D.C. Cir. July 7, 2023, is attached, Appx p. 1a. The District of Columbia Circuit's Order denying Petitioners' Petition For Rehearing, *en banc*, is attached hereto. Appx, p. 83a. The decision of the United States District Court for the District of Columbia dismissing Petitioners' complaint Tinius v Choi, et al., 2022 WL 899238 (D.D.C. 2022) Appendix. P. 29a.

III. JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit denied Petitioners' appeal on July 7, 2023, Appendix p. 1a) and issued an Order denying Petitioners' Petition for a Rehearing En Banc on September 13, 2023, Appendix p. 83a. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution which provides in pertinent part that: Congress shall make no law … abridging the freedom of speech…"

The Fourth Amendment to the United States Constitution which provides in pertinent part that: "The right of the people to be secure in their persons, houses, papers, papers and effects against unreasonable searches and seizures shall not be violated …"

42 U.S.C. Section 1983 which provides in pertinent part that: "Every person who under color of any statute, ordinance, regulation, custom , or usage, of any state or territory, or the District of Columbia, subjects … any citizen of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution and its laws shall be liable to the party injured in an action at law …"

V. STATEMENT OF THE CASE

On or about June 1, 2020, District of Columbia Mayor Muriel Bowser imposed a curfew. Citing the fact numerous businesses, vehicles, and government buildings had been vandalized, burned or looted and that rioting had occurred in Northeast and Northwest D.C in the two days prior to June 1, 2020, Mayor Bowser imposed a "District-wide" curfew from Monday, June 1, 2020 beginning at 7:00 p.m. to Tuesday, June 2, 2020 at 6:00 a.m. and from Tuesday, June 3, 2020 beginning at 7:00 p.m. to Wednesday, June 3, 2020 at 6:00 a.m.

The curfew imposed by Mayor Bowser prohibited people from walking, biking, running, loitering, standing or driving on any street, alley, park, or other public place during the hours of the curfew. Anyone caught violating the curfew would be subject to a criminal fine up to $300.00 and a prison term of up to ten days in jail.

On or about June 1, 2020, at approximately 11:00 p.m., plaintiffs were near the 1400 block of Swann Street, N.W., Washington, D.C., in front of the White House, protesting the treatment of African-American citizens by police. They were shouting "Black Lives Matter" and saying the names of individuals that they believed had been killed by police officers without legal justification including George Floyd and Breonna Taylor. As such, Plaintiffs were engaged in the type of political speech meant to be protected by the First Amendment. Despite the fact that Plaintiffs were not engaged in any criminal activity, they were arrested and charged with violation of the curfew law.

Plaintiffs subsequently filed suit in D.C. Superior Court alleging that the curfew law was unconstitutional because it was vague and overbroad and because it violated their First Amendment right to freedom of speech. Plaintiffs further alleged that they had been assaulted, battered, and falsely arrested. The case was subsequently removed to the U.S. District Court for the District of Columbia.

Defendants moved to dismiss. On March 28, 2022, U.S. District Judge Amy Berman Jackson issued a decision and order granting defendants' motion. Plaintiffs noted their appeal to the United States Court of Appeals for the District of Columbia Circuit on April 25, 2022. The United States Court of Appeals for the District of Columbia Circuit denied Petitioners' appeal on July 7, 2023 and issued an Order denying Petitioners' Petition for a Rehearing En Banc. On September 13, 2023.

VI. REASONS FOR GRANTING THE WRIT

A Writ should be granted because the decision by the United States' Court of Appeals for the District of Columbia Circuit decision not to apply strict scrutiny in considering the constitutionality of the curfew law at issue is in conflict with the decision of the United States Supreme Court in Papachristou v. City of Jacksonville, 405 U.S. 164, 192 (1972). In Papachristou, the Supreme Court held that curfew laws should receive strict scrutiny because they touch upon *fundamental rights,* i.e., "the right to walk the streets, or to meet publicly with one's friends for a noble purpose or for no purpose at all and to do whatever one pleases" which is "an integral component of life in a free and ordered society." It is for this reason, and not because of any consideration of content or time and place, that curfew laws are subject to strict scrutiny.

A Writ should also be granted because the decision by the United States' Court of Appeals for the District of Columbia Circuit that the curfew law in this case was not void for vagueness due to its inclusion of the term "loitering" is in conflict with the decision of the United States Supreme Court in City of Chicago v. Morales, 527 U.S. 41, 57 (1999). In Morales, 527 U.S. 41, 57 (1999), the U.S. Supreme Court held that a curfew law containing the term "loitering" was void for vagueness.

1. The United States District Court Committed Reversible Error By Failing to Analyze the District's Curfew Law Under Strict Scrutiny and By Failing to Allow Appellants to Develop Evidence to Establish the Appropriate Level of Scrutiny.

The issue of whether or not a statute is constitutional is a question of law subject to de novo review. U.S. v Popa, 187 F.3d 672, 674 (D.C. Cir. 1999). In order to determine whether the District of Columbia's curfew law is unconstitutional because it violated plaintiff's First Amendment right to freedom of speech, this Court must first determine the appropriate level of scrutiny to apply. NAACP v. Burton, 371 U.S. 415, 438 (1963). In this case, Judge Jackson concluded that a strict scrutiny analysis was not warranted because the curfew law allegedly imposed only time, manner, and place restrictions rather than content-based restrictions.

Judge Jackson's decision not to apply a strict scrutiny analysis is clearly erroneous. In Papachristou v. City of Jacksonville, 405 U.S. 164, 192 (1972), which is that the curfew laws should receive strict scrutiny because they touch upon *fundamental rights,* i.e., "the right to walk the streets, or to meet publicly with one's friends for a noble purpose or for no purpose at all and to do whatever one pleases" which is "an integral component of life in a free and ordered society." It is for this reason, and not because of any consideration of content or time and place, that curfew laws are subject to strict scrutiny. Nunez v. City of San Diego, 114 F.3d 935, 946 (9th Cir. 1997).

2. The United States District Court Committed Reversible Error by Concluding that the District of Columbia's Curfew Law is Not Unconstitutional Under the Standard Set Out in Ward v. Rock Against Racism.

Even if this Court were to employ the standard set out in Ward v. Rock Against Racism, rather than strict scrutiny, the District of Columbia's curfew law is still unconstitutional, According to the U.S. District Court, Ward v. Rock Against Racism requires that a law must be: 1) content neutral; 2) narrowly tailored to serve a significant governmental interest; and 3) leave open ample alternative channels for communication of the information to be constitutional. The District's curfew law fails *all* of these tests.

First, as noted above, the curfew law was certainly not "content-neutral". What could *possibly* be a more effective way of suppressing content than a law which suppresses *all* content?

Second, the curfew law is clearly not "narrowly tailored." The curfew law is overbroad because it does not contain an exception for the exercise of First Amendment rights. See, Nunez v. San Diego, 114 F.3d 935, 951 (9th Cir. 1997) ("The ordinance is not narrowly tailored because it does not sufficiently exempt legitimate First Amendment activities from the curfew."). This principle has also been recognized in the District of Columbia. In Waters v. Barry, 711 F.Supp. 1125, 1128-1130 (D.D.C. 1989), for example, a curfew law which did *not* contain an exception for the exercise of First Amendment rights was found to violate the First Amendment. Id.

The District of Columbia's curfew law is also overbroad because it criminalizes legal as well as illegal activity. Although the curfew law was intended to prevent looting, rioting, burning and vandalism, it instead ended up criminalizing normally completely legal activities like walking, biking, running, standing and driving. Given the fact that there is no rational relationship between what the statute is trying to prevent and what it criminalizes, the statute is overbroad and thus unconstitutional. See, e.g., Seattle v. Pullman, 82 Was. 2d 794, 795 514 P.2d. 1059, 1061 (Wash., 1973).

Plaintiffs also disagree with the District Court's contention that the curfew law was narrowly tailored because it was limited to nighttime hours and was in effect for two nights only. The curfew had a devasting effect on plaintiff' right to free speech because it destroyed their ability to speak at a time when what they had to say was most effective and would actually *mean something.*

There was also no basis for the U.S. District Court to conclude that the curfew left open "ample alternative channels for communication of the information". Although the Court speculated that there were ample alternative channels because "the protesters were able to spread their message during the thirteen hours of the day not covered by the curfew", this is undoubtedly not true since *most* people have to work during the day.

3. The District Court Committed Reversible Error by Concluding that the Curfew Laws is Not Unconstitutionally Vague.

A law can be found to be void for vagueness if it fails to give fair notice as to the type of conduct which is proscribed by the law and\or if it gives unfettered discretion to law enforcement officials. In Papachristou v. City of Jacksonville, 405 U.S. 1256 (1972), for example, a case in which the defendants were arrested for "loitering", the Supreme Court found that the ordinance at issue was unconstitutional because it "fail[ed] to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." Id. at 162. The Court also found the ordinance to be unconstitutional because it gave unfettered discretion to law enforcement officials and as such would "encourage arbitrary and erratic arrests and convictions to such an extent that an individual could be arrested simply for behavior which a police officer considered to be an affront to police authority." Id. at 166-167.

The District of Columbia curfew law is similarly vague because it, too, seeks to criminalize "loitering". Virtually *every* Court which has encountered a statute with the term "loitering" in it has found the law to be vague and unconstitutional.

In City of Chicago v. Morales, 527 U.S. 41, 57 (1999), for example, the U.S. Supreme Court struck down a curfew law containing the term loitering because the definition of the term "loitering" which was contained in the law, i.e., "to remain in any one place with no apparent purpose" was vague. The Court stated: "It is difficult to imagine

how any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an "apparent purpose". Id. The Court further noted that "No one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. (citations omitted) … If the police are able to decide arbitrarily, which members of the public they will order to disperse, then the Chicago ordinance becomes indistinguishable from the law we held invalid."

See also, Nunez v. San Diego, 114 F.3d 935 (9th Cir. 1997) (Curfew ordinance which made it unlawful for minors to loiter, idle, wander, stroll or play" held to be unconstitutional); In Re Mosier, op cit. at 97 and 376 (Curfew ordinance which made it unlawful for minors to loiter, idle, wander or play held to be unconstitutional); KLJ v. State, 581 So.2d 920, 922 (Fla. Dist. Ct. 1991) (Curfew ordinance which made it unlawful to loiter, idle, stroll or play" held to be unconstitutional); In Re Doe, 54 Haw. 647, 650, 513 P.2d 1385, 1388 (Hawaii 1973) (Curfew ordinance which made it illegal to loiter in public places held to be unconstitutional).

4. Given the fact that the curfew law is unconstitutional, plaintiffs have stated sufficient facts to state a claim for assault, battery, false arrest, and violation of their Fourth Amendment rights.

An arrest is only lawful when a police officer has the legal authority to make an arrest. Mesgleski v. Oraboni, 330 N.J. Super. 10, 24, 748 A.2d 1130, 1138 (S. Ct. N.J. 2000). In this case, plaintiff's arrests were false arrests, because the defendant police officers had no authority to make the arrests because the curfew law is unconstitutional and,

therefore, void *ab initio.* Since an unconstitutional law is void *ab initio,* any police officer acting thereon has no authority to make an arrest. See, Norton v. Shelby, 118 U.S. 425, 442 (1885) (An unconstitutional statute is not a law; it confers no rights; it imposes no duties; it affords no protection; it is in legal contemplation, as inoperative as if it had never been passed.").

Since the defendant police officers had no authority to arrest plaintiffs, they had no legal right to touch plaintiffs and the touching which did occur would constitute an assault and battery. See, Etheridge v. District of Columbia, 635 A.2d 898, 916 (D.C. 1983).

Since the defendant police officers had no legal right to arrest Appellants due to the fact that the District's curfew law was unconstitutional, there was no probable cause for the arrests and plaintiffs did, therefore, clearly state sufficient facts to state a case for violation of their Fourth Amendment rights to be free from arrest without probable cause. Sherman v. United States, 356 U.S. 369, 372 (1958).

In this case, the use of force was also clearly excessive. Since Appellants had not committed a crime, any touching of Appellants was unlawful. Graham v. O'Connor 490 U.S. 386, 394 (1989).

5. The Appellees Are Not Entitled to Qualified Immunity on the 42 Section 1983 Claims or the Defense of Privilege on the Common Law Claims.

A police officer is entitled to qualified immunity unless a plaintiff can show that the officer's conduct violated

a clearly established constitutional right or that the officer was on notice of the illegality of his or her actions. Turpin v. Ray, 319 F. Supp. 3d 191, 200 (D.D.C. 2018). At the time that plaintiffs were arrested, it was clearly established that entrapment was illegal and it was also clearly established that Appellants had the right to be free from being arrested without legal authority or the use of excessive force. Megleski v. Orabni, 330 N.J. Super 10, 24, 748 A.2d 1130, 1138 (S.Ct. N.J. 2000); Sherman v. United States, 356 U.S. 369, 372 (1958);

At the time that plaintiffs were arrested, they were trying to comply with the curfew law by leaving the scene. They were prevented from doing so by the defendant police officers who blocked plaintiffs from leaving the scene. These acts by the police quite literally constituted entrapment.

Since the defendant police officers entrapped plaintiffs and arrested plaintiffs without probable cause and used excessive force, they could not have had a good faith belief that their conduct was reasonable at the time they arrested plaintiffs and thus they are not entitled to qualified immunity.

6. Even if the Defendant Police Officers Had Probable Cause and A Good Faith Belief That Their Actions Were Lawful, They Can Still Be Held Liable For False Arrest, Since They Had No Legal Authority to Arrest Appellants.

Since the defendant police officers had no legal authority to arrest Appellants, their actions were illegal, and they are liable for false arrest. Yale College v. Sanger,

62 F. 177, 179 (D.Conn. 1894) ("It is well settled that an officer of the state … cannot, in a suit against him for his tort … successfully justify his conduct upon the ground that he is acting in obedience to the authority of an unconstitutional statute…").

Although this result may seem harsh to an officer claiming good faith reliance upon an existing statute, the opposite result would be equally harsh since it would leave those injured as a result of an unlawful arrest based upon an unconstitutional law without a remedy. Given the inequity of this result, an officer will not be permitted to avoid liability by claiming that he or she relied upon what he or she believed to be a valid law. See, Yale College v. Sanger, 62 F. 177, 179 (D. Conn. 1894) ("It is well settled that an officer of the state … cannot, in a suit at

law against him for his tort … *when adequate relief cannot be otherwise afforded*, successfully justify his conduct upon the ground that he is acting in obedience to the authority of an unconstitutional statute.").

CONCLUSION

In conclusion, for all of the reasons stated above, Petitioners request that a Writ of Certiorari be granted.

Respectfully Submitted

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED JULY 7, 2023

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-7047

Consolidated with 22-7048, 22-7049,
22-7050, 22-7051, 22-7052, 22-7053

DEVON TINIUS,

Appellant

v.

LUKE CHOI, D.C. METROPOLITAN
POLICE OFFICER, *et al.*,

Appellees.

January 12, 2023, Argued;
July 7, 2023, Decided

Consolidated with 22-7048, 22-7049, 22-7050, 22-7051,
22-7052, 22-7053

Appeals from the United States District Court
for the District of Columbia
(No. 1:21-cv-00907)
(No. 1:21-cv-00909)
(No. 1:21-cv-00986)
(No. 1:21-cv-01460)

Appendix A

(No. 1:21-cv-01461)
(No. 1:21-cv-02377)
(No. 1:22-cv-00441).

Before: PILLARD and PAN, Circuit Judges, and EDWARDS, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge PILLARD.

PILLARD, *Circuit Judge*: Devon Tinius and six other Plaintiffs were arrested for violating a citywide temporary curfew in Washington, D.C., in June 2020. At the time of their arrests, Plaintiffs were standing on a public street peacefully protesting police killings of Black Americans. The protest was part of a nationwide wave of demonstrations sparked by the police killing of George Floyd on May 25 of that year. Not all responses to the killing were peaceful. A surge of rioting, vandalism, arson, and looting accompanied the mass protests in the District of Columbia and several other cities. Seeking to quell the violence and destruction, D.C. Mayor Muriel Bowser imposed a one-night curfew on May 31. The curfew barred virtually all activities in public spaces from 11:00 P.M. to 6:00 A.M. As increased nighttime crime continued, the mayor renewed the curfew for two more nights, extending it from 7:00 P.M to 6:00 A.M. Ms. Tinius and the other Plaintiffs allege they were out on the streets four hours after the start of the curfew on June 1, 2020, when they were arrested for violating the mayor's order.

Plaintiffs sued the arresting officers and the city for damages. Their principal claim is that, because they

were engaging in peaceful public protests, their arrests for breaking the curfew violated their First Amendment rights. The district court granted the Defendants' motions to dismiss, holding that the June 1 curfew order was a constitutionally valid time, place, and manner restriction. The court held that the remaining claims also failed because they were contingent on the order's asserted invalidity under the First Amendment. We affirm.

BACKGROUND

On May 25, 2020, Minneapolis police officer Derek Chauvin kneeled on the neck of George Floyd, an unarmed Black man, for nearly ten minutes. While Mr. Floyd gasped and cried for help, the officer suffocated him to death. *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 821 (9th Cir. 2020); *State v. Chauvin*, No. 27-cr-20-12646, 2021 WL 2621001, at *4, *6 (Minn. Dist. Ct. June 25, 2021). A witness's video showing the final minutes of Mr. Floyd's life quickly circulated online. In cities and towns across the United States, masses of people poured onto the streets to express their outrage against police killings of Mr. Floyd and other Black Americans. *Index Newspapers LLC*, 977 F.3d at 821.

In Washington, D.C., as in some other cities, peaceful demonstrations coincided with incidents of rioting, vandalism, looting, and arson. On May 31, 2020, D.C. Mayor Muriel Bowser moved to protect public safety by imposing a one-night curfew order (the May 31 Order). The Order recognized the "outrage that people [felt] following the murder of George Floyd in Minnesota"

the previous week, along with grief over "hundreds of years of institutional racism." J.A. 29. The May 31 Order also recounted that vandalism and other crimes had occurred in the city's downtown area over the previous several nights: In downtown D.C., "numerous businesses and government buildings were vandalized, burned, or looted" and officials observed a "glorification of violence, particularly during later hours of the night." J.A. 29. The Order stated that the "health, safety, and well-being of persons within the District of Columbia [were] threatened and endangered by the existence of these violent actions." J.A. 30. The Order also invoked the need to protect public health during the state of emergency then in place in response to the COVID-19 pandemic. It recounted that, contravening an emergency order already in effect, "[m] any protesters are not observing physical distancing requirements and many protestors are not wearing masks or face coverings." J.A. 30.

The May 31 Order imposed a curfew from 11:00 P.M. that night until 6:00 A.M. the following day. During those hours, the order stated, "no person, other than persons designated by the Mayor, shall walk, bike, run, loiter, stand, or motor by car or other mode of transport upon any street, alley, park, or other public place within the District." J.A. 30. The curfew exempted "[i]ndividuals performing essential duties as authorized by prior Mayor's Orders, including working media with their outlet-issued credentials and healthcare personnel." J.A. 30.

On June 1, after another night of destruction, Mayor Bowser renewed the curfew for that night and the next.

The new curfew order incorporated the May 31 Order's statements and included some new ones. According to the June 1 Order, in "multiple areas" of the city, "numerous businesses, vehicles, and government buildings" were "vandalized, burned, or looted," and over 80 people had been arrested "in connection with [those] incidents, with the majority charged with felonies." J.A. 31. The June 1 Order recounted that, "[o]n the night of May 31, 2020," despite the initial curfew, "looting and vandalism occurred at multiple locations throughout the city, in addition to the rioting in the downtown area." J.A. 31. "Vandals smashed windows in Northeast DC, upper Northwest DC stretching to Georgetown, and caused extensive damage in the Golden Triangle Business Improvement District, Downtown DC Business Improvement District, and Mount Vernon Triangle Community Improvement District." J.A. 32. The June 1 Order stated that "[r]ioting and looting affected the operations of District government agencies." J.A. 32. As for public health, the Order reiterated that gatherings of more than ten people violated the COVID-19 emergency declaration. *Id.*; *see* District of Columbia Office of the Mayor, *Extensions of Public Emergency and Public Health Emergency and Preparation for Washington, DC Reopening* at 7 (May 13, 2020), https://perma.cc/N8ZF-V9FN (last updated June 27, 2023).

The June 1 curfew started earlier than the previous night's, at 7:00 P.M. instead of 11:00 P.M. And it added to the previous order's carveout for "essential" media and healthcare workers a new exemption for individuals "who are voting and participating in election activities." J.A. 32. Violators of the June 1 Order could face

misdemeanor penalties: a fine of up to $300, or up to ten days' imprisonment. J.A. 33. The Order did not require police officers to give people an opportunity to disperse before arresting them for violating the curfew.

Plaintiffs allege that, at "approximately 11:00 P.M." on June 1, "near Lafayette Park and the White House," Devon Tinius and the other Plaintiffs were "standing with a group of like-minded citizens protesting the treatment of African American citizens by the police." J.A. 36-37 (Compl. ¶ 8). Members of the group were "shouting 'Black Lives Matter' and saying the names of individuals" including George Floyd and Breonna Taylor, whom they "believed had been killed by police officers without legal justification." J.A. 36-37 (Compl. ¶ 8). D.C. Metropolitan Police arrested Plaintiffs for violating the June 1 Order. Before their arrests, Plaintiffs "attempted to leave the area and to return home," but the police officers "continually blocked the path of the demonstrators and refused to allow them to leave." J.A. 37 (Compl. ¶ 9). Plaintiffs were arrested, detained overnight, and released after arraignment the next morning. In October 2020, the government dismissed all the charges against Plaintiffs.

In 2021, the seven individual Plaintiffs each sued the arresting officers under 42 U.S.C. § 1983 for First, Fourth, and Fourteenth Amendment violations. (As the district court noted, the complaints contain "substantially identical" allegations. *Tinius v. Choi*, No. 21-cv-0907, 2022 U.S. Dist. LEXIS 55632, 2022 WL 899238, at *1 n.1 (D.D.C. Mar. 28, 2022)). For simplicity, we cite to the Tinius complaint.) Plaintiffs claimed that, by arresting them while they were peacefully protesting, the officers

violated their First Amendment rights to freedom of speech and assembly. They argued that the June 1 Order is invalid under the First Amendment because it did not exempt people engaging in public protests or other expressive activity. They did not, however, challenge the Order's limited exemptions as content based. Asserting that the June 1 Order was invalid, they claim the officers lacked probable cause to arrest them and that the arrests amounted to excessive force in violation of the Fourth Amendment. Alongside those constitutional claims, Plaintiffs asserted common-law claims of false arrest, assault, and battery against the officers and, on a theory of *respondeat superior*, against the District of Columbia. Defendants removed the suits to federal court and moved to dismiss the complaints.

The district court consolidated seven Plaintiffs' complaints and granted Defendants' motion to dismiss. Starting with the First Amendment challenge, the court first considered whether the June 1 Order restricted Plaintiffs' expression. The order addressed "a broad swath of pure conduct" so arguably need not be scrutinized as "a restriction on expression at all." *Tinius*, 2022 U.S. Dist. LEXIS 55632, 2022 WL 899238, at *9. But the court acknowledged that "the curfew was enacted in the specific context of ongoing public protests and counter-protests" and reached some expressive conduct. *Id.* Viewing it as a close question whether the order was a time, place, and manner restriction of speech or merely had the incidental effect of curtailing speech, the court noted that "the Supreme Court has made it clear that 'the *O'Brien* test in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions.'"

Id. (citing *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968), and quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 798, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989)). Proceeding "in an abundance of caution" to apply First Amendment intermediate scrutiny appropriate to time, place, and manner restrictions, *see Ward*, 491 U.S. at 791, the district court sustained the June 1 Order, concluding that the curfew was narrowly tailored to significant government interests in public safety and public health and left open the alternative of daytime protests. 2022 U.S. Dist. LEXIS 55632, [WL] at *9, *12.

Plaintiffs' remaining claims are largely contingent on their assertion that the June 1 Order was void as an unconstitutional speech restriction, so once the district court rejected the First Amendment claim, it dismissed the other claims as well. Finally, because the June 1 Order plainly stated what it prohibited, the district court denied as futile Plaintiffs' motion to amend the complaints to add vagueness and overbreadth challenges.

Plaintiffs appealed. The appeal presses their freedom-of-expression and vagueness challenges to the curfew order, and their claims that the consequent invalidity of the curfew order renders their arrests unlawful under both the Constitution and D.C. common law.

DISCUSSION

Plaintiffs allege that they were engaged in expressive activity on public sidewalks in the District of Columbia during curfew hours on June 1, 2020, when the D.C. Police arrested them. They do not assert that their conduct

complied with the terms of the June 1 Order. Their First Amendment challenge rests on their contention that, because they were peacefully "engaged in the type of political speech meant to be protected by the First Amendment," Appellants' Br. 4, the June 1 Order should have been subjected to strict scrutiny. Plaintiffs do not, however, claim they were arrested based on their expression.

Alternatively, Plaintiffs argue that the order fails the intermediate scrutiny applicable to restrictions on the time, place, and manner of expression. They do not dispute the substantiality of the government's interests in protecting public safety by quelling an outbreak of violent crime, but contend the order was neither content-neutral nor narrowly tailored. Plaintiffs also contend that the curfew order was unconstitutionally vague because it included public "loitering" among the nighttime activities it barred. Based on their view that the curfew they violated was itself invalid, Plaintiffs challenge their arrests on constitutional and common-law grounds as unsupported by probable cause and an exercise of excessive force. Finally, they argue the June 1 Order violated their right to travel within the District of Columbia, but they made no such claim in the district court so forfeited it.

On behalf of the officers, the District of Columbia responds that, to the extent the temporary, content-neutral curfew order limited Plaintiffs' expressive activities, it was a valid time, place, and manner restriction: "[T]he curfew satisfied the First Amendment because it was narrowly tailored to serve the District's critically important interest in suppressing the surge in violence and destruction across

the city during the nighttime hours." Appellees' Br. 34. The District points out that Plaintiffs' constitutional and common-law challenges to the arrests depend on the success of their claim that the June 1 Order violates the First Amendment. In the absence of any allegations that the officers used unnecessary force in effecting the arrests, the District argues that the arrest claims fail with the challenge to the June 1 Order.

On *de novo* review, *Shaffer v. George Washington Univ.*, 27 F.4th 754, 762, 456 U.S. App. D.C. 137 (D.C. Cir. 2022), we affirm the district court's judgment dismissing the complaints for failure to state a claim. In this posture, we accept the facts and all reasonable inferences that may be drawn from them in Plaintiffs' favor. *See id.* at 763. As did the district court, we treat the existence and content of the legally operative public curfew orders as common ground. We see no need to invoke doctrines of judicial notice or incorporation by reference in order to reference the curfew orders as we would any source of local law.

We hold that the June 1 Order was a constitutionally valid time, place, and manner restriction that gave fair notice of the prohibited conduct. The balance of Plaintiffs' claims depends on the asserted invalidity of the curfew order. In light of our decision to sustain the order, we also affirm the dismissal of the remaining claims.

A.

The District of Columbia does not dispute that Plaintiffs engaged in First Amendment-protected expression, so we

first consider the appropriate level of scrutiny to apply to the June 1 Order. *See Green v. DOJ*, 54 F.4th 738, 745 (D.C. Cir. 2022). We apply strict scrutiny to content-based restrictions on expression, and intermediate scrutiny to content-neutral restrictions. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-42, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994). Intermediate scrutiny applies here because the governmental interest supporting the June 1 Order was "unrelated to the suppression of free expression," *O'Brien*, 391 U.S. at 377, and did not "appl[y] to particular speech because of the topic discussed or the idea or message expressed," *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015) (defining content-based regulations). The mayor adopted the curfew as a short-term emergency measure to prevent nighttime vandalism, arson, and looting. The challenged order prohibited people from going out in public during specified hours; it barred virtually all nighttime public activity, without regard to its expressive character or message. And it did so in a limited, appropriately tailored way that left room for Plaintiffs' expression.

On appeal, Plaintiffs do not dispute that the June 1 Order was content-neutral on its face. They claim strict scrutiny is appropriate because they were in fact engaged in peaceful public expression. In the alternative, they argue that they should have had an opportunity through discovery to develop a claim that the curfew was selectively enforced against them based on their speech. Their first rationale does not support strict scrutiny, and the second was not raised in the district court.

Treating the curfew order as a content-neutral time, place, and manner restriction, we apply intermediate scrutiny. To determine whether the Order comports with the First Amendment, we ask whether it served significant government interests, was narrowly tailored to those interests, and left open ample alternative channels for speech. *Turner Broadcasting*, 512 U.S. at 642; *Ward*, 491 U.S. at 791. Plaintiffs do not dispute that the interests stated in the Order—"to protect the safety of persons and property in the District" and "to reduce the spread of [COVID-19] and to protect the public health," J.A. 32—are significant government interests unrelated to the suppression of expression. Our analysis therefore turns on the second and third requirements: whether the June 1 Order was narrowly tailored to serve the identified public safety and public health interests, and whether the two-night curfew allowed ample alternative channels for protestors to communicate their messages opposing police violence against Black people.

A time, place, or manner restriction on speech is "narrowly tailored" so long as it does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799. Such a restriction may survive as narrowly tailored even if it is not "the least restrictive or least intrusive means" of serving the government interest. *Id.* at 798.

Mayor Bowser imposed the limited, temporary curfew order in an incremental process in response to a spike in serious crime. As the Order explained, "numerous businesses, vehicles, and government buildings [had]

been vandalized, burned, or looted." J.A. 31. In the two days preceding the June 1 Order, more than 80 people were arrested in connection with the vandalism, burning, and looting, "with the majority charged with felonies." *Id.* The order recounted that "looting and vandalism occurred at multiple locations throughout the city," and "[r]ioting and looting affected the operations of District government agencies." J.A. 31-32. The initial May 31 Order, incorporated into the June 1 Order by reference, noted that these crimes were particularly prevalent "during later hours of the night." J.A. 29. Mayor Bowser imposed a one-night curfew on May 31, and only after looting and vandalism continued that night did she impose the two-night curfew at issue here. That measured approach shows tailoring to the public safety interest: The mayor imposed a two-night, eleven hour-long curfew only after a one-night curfew lasting seven hours had failed to fully restore order.

Plaintiffs challenge the Order's tailoring by arguing that it should have included an exception for First Amendment activity. They point to the First Amendment exceptions in long-term juvenile curfews, including the juvenile curfew we upheld in *Hutchins v. District of Columbia*, 188 F.3d 531, 546, 338 U.S. App. D.C. 11 (D.C. Cir. 1999), to argue that the June 1 Order should have exempted individuals exercising their First Amendment rights. But the ordinance at issue in *Hutchins* operates differently and serves interests distinct from those supporting the temporary June 1 Order.

In *Hutchins*, we reviewed a juvenile-only curfew of unlimited duration that the D.C. Council put in place after "determining that juvenile crime and victimization in the District was a serious problem." *Hutchins*, 188 F.3d at 534; *see* D.C. Code §§ 2-1542, 2-1543. Unlike the two-day emergency order under review here, that curfew was not time limited—indeed, it remains on the books. It bars minors ages 16 and under from venturing out in public without adult supervision after 11:00 P.M. on weeknights and after midnight on weekends, subject to eight broad exceptions. *Hutchins*, 188 F.3d at 534. To "ensure that the ordinance does not sweep all of a minor's activities into its ambit but instead focuses on those nocturnal activities most likely to result in crime or victimization," *id.* at 545, the juvenile curfew allowed young people to go out alone at night for the purpose of attending official school activities, "going to or from employment," or "exercising First Amendment rights." *Id.* at 535. The curfew's limitation to minors without adult supervision, and its generous allowance for unaccompanied minors to go out during curfew hours for various activities that the Council deemed age-appropriate and constructive, serve the curfew's overall purpose to "protect the welfare of minors by reducing the likelihood that minors will perpetrate or become victims of crime and by promoting parental responsibility." *Id.* at 541-42.

The June 1 Order imposed a very different kind of curfew. It sought to temporarily clear the streets at night to curb a sudden rise in rioting, vandalism, arson, and looting. It applied to adults and minors alike, with narrow exceptions for essential activities. If the Order had

excepted expressive activity, as Plaintiffs argue the First Amendment required, it would have left D.C. officials in the same position as before the curfew: hindered by the unusual volume of people on the streets from stemming the vandalism and looting. An expressive-activity exception would have effectively enabled public circulation of people intent on looting, so long as they traveled with demonstrators, wore protest messages, shouted political slogans, or carried placards.

The curfew challenged here is more like the temporary restriction the Ninth Circuit upheld in *Menotti v. City of Seattle*, 409 F.3d 1113, 1118 (9th Cir. 2005), than the permanent but porous juvenile curfew at issue in *Hutchins*. *Menotti* sustained as a constitutional time, place, and manner restriction an order temporarily barring most public access to parts of downtown Seattle during the 1999 World Trade Organization conference. *Id.* at 1117-18. City officials imposed that order after vandalism and violence broke out during large-scale nonviolent protests, *id.* at 1120, 1123, "mutual insecurity among police and protestors caused the situation to spiral out of control," *id.* at 1122, and routine policing proved inadequate because offenders "were able to elude capture" by escaping into crowds of nonviolent protestors, *id.* at 1132. Faced with an "emergency situation" in which "law-breaking and law-abiding protestors were often indistinguishable," *id.* at 1135, the City's imposition of access restrictions was appropriately tailored to the government's public safety interest, *id.* at 1137. Like the restriction sustained in *Menotti*, the temporary June 1 Order enabled the city to restore order in the face of a wave of vandalism occurring in the midst of large-scale peaceful protests.

The public health interest in preventing large gatherings also supported the District of Columbia's decision to choose a curfew on June 1, 2020, over other methods of addressing the wave of nighttime crime. That spring, the COVID-19 pandemic in the United States was in an acute phase. Centers for Disease Control and Prevention, *Previous U.S. COVID-19 Case Data* (Aug. 27, 2020), https://perma.cc/L35Z-8KHR (last updated June 27, 2023). In mid-March, President Trump had declared the novel coronavirus a national emergency. White House Archives, *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak* (Mar. 13, 2020), https://perma.cc/7FRL-2L2W (last updated June 27, 2023). The vaccines were not yet available; public health policy then in effect for the United States and the District of Columbia called for physical distancing and limiting large gatherings. *See In re Approval of Jud. Emergency Declared in Cent. Dist. of California*, 955 F.3d 1140 (9th Cir. 2020) (citing April 2020 guidance of the U.S. Centers for Disease Control and Prevention); District of Columbia Office of the Mayor, *Extensions of Public Emergency and Public Health Emergency and Preparation for Washington, DC Reopening* at 7 (May 13, 2020), https://perma.cc/N8ZF-V9FN (last updated June 27, 2023) (barring gatherings of more than ten people not from the same household). An alternative to the curfew that might have served the public safety interest alone, like a protected zone for nighttime peaceful protests, would have impeded the city's interest in preventing the spread of COVID-19 by directing protestors to congregate in protest zones.

Plaintiffs do not challenge the citywide scope of the curfew. They make no argument that, to be narrowly tailored, the order should have been limited to the neighborhoods in which city officials reported violence had already taken place. In any event, the order recounted that vandalism had occurred across multiple areas of the city: "smashed windows in Northeast DC, upper Northwest DC stretching to Georgetown" and "extensive damage in the Golden Triangle Business Improvement District, Downtown DC Business Improvement District, and Mount Vernon Triangle Community Improvement District." J.A. 32. Plaintiffs were arrested near Lafayette Park, within the very Business Improvement Districts the Curfew Order identified. Even if they had chosen to press for narrower geographic tailoring, it is unclear in view of those allegations whether Plaintiffs would have had standing to challenge the order's applicability to areas the order did not cite as having been hit by violence because those were not areas in which they sought to protest.

Finally, the Order leaves open ample alternative channels of communication. The relevant expressive channels are those within the same forum. *Initiative and Referendum Inst. v. U.S. Postal Serv.*, 417 F.3d 1299, 1310-11, 368 U.S. App. D.C. 50 (D.C. Cir. 2005). In the areas covered by the challenged Order, protestors had two alternatives: They were free to protest during the day between the hours of 6:00 A.M. and 7:00 P.M., and to protest at night after the two-day curfew expired. The Plaintiffs never alleged or argued that they could not have taken advantage of either opportunity.

In sum, the June 1 Order is a valid time, place, and manner restriction. It satisfies the applicable intermediate scrutiny. The Order is content neutral, barring virtually everyone from the public streets without distinctions based on their topic or message or, indeed, whether they engaged in any expression at all. Public safety and preventing the spread of COVID-19, the two justifications the Order cites, are both undisputedly significant government interests. The curfew was narrowly tailored to those interests. The restrictions were calibrated to serve the government's stated interests. They were limited to nighttime hours, applied for just two nights, and were only imposed after the city's earlier, one-night curfew failed to quell the wave of crime. Including an expressive-activity exception in the curfew would have allowed more hours of speech by protestors, but it also would have impeded the public safety and public health objectives of the curfew. The government met its burden to show that the curfew was not "substantially broader than necessary" and did not "burden substantially more speech than [was] necessary" to achieve the public safety interest. *Ward*, 491 U.S. at 799-800. And the nighttime-only restrictions left open ample alternative channels by allowing daytime protests or protests on ensuing nights.

Plaintiffs argue that the district court erred in dismissing the complaints before discovery. But they still have not explained how discovery could have been relevant to their facial challenges to the Order. Plaintiffs cite *Epps v. City & Cnty. of Denver*, 588 F. Supp. 3d 1164 (D. Col. 2022), in which the plaintiffs obtained discovery that revealed that a facially speech-neutral curfew was

enforced in practice to retaliate against protesters based on their speech. *Id.* at 1172-73. But *Epps* is inapposite. Plaintiffs in *Epps* alleged that police practiced a targeted enforcement policy that differed from the neutral text of the policy as written; the Complaints in this case made no such claims.

Plaintiffs argue that the two-night curfew "destroyed their ability to speak at a time when what they had to say was most effective," Appellants' Br. 16, *i.e.*, in the immediate aftermath of the murder of George Floyd. But "[e]ven protected speech is not equally permissible in all places and at all times." *Snyder v. Phelps*, 562 U.S. 443, 456, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011) (quoting *Frisby v. Schultz*, 487 U.S. 474, 479, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988)). For example, even though an ordinance barring "any noise or diversion which disturbs or tends to disturb" learning during school hours curbed speech at a time and place that the protesters reasonably preferred, the Supreme Court upheld it as a fitting means to serve important interests in avoiding disruption of classwork inside the building. *Grayned v. City of Rockford*, 408 U.S. 104, 108, 117-21, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). The Court likewise sustained an ordinance banning picketing "directed at a single residence" as appropriately tailored to the city's interest in "protecting the well-being, tranquility, and privacy of the home." *Frisby*, 487 U.S. at 483-84, 488. A ban on sleeping in national parks comported with the First Amendment even when "applied to prohibit demonstrators from sleeping in Lafayette Park and the [National] Mall . . . to call attention to the plight of the homeless," because it was content-neutral and sufficiently

tailored to the "Government's substantial interest in maintaining the parks in the heart of our Capital in an attractive and intact condition." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 289, 296, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984).

The right to gather together in public spaces, call out injustice, and demand action is fundamental to a free and democratic society. Throughout our history, the people and groups that make up our fractious pluralism have shown up and spoken out. The First Amendment protects those rights. But it does not privilege expression irrespective of its timing, location, or mode. Our Constitution provides for ordered liberty. Even though the June 1 Order limited some valuable opportunities for public speech and association, the public interest in keeping the peace by responding effectively to a surge in vandalism, arson, and looting was not directed at the suppression of expression, and it justified the June 1 Order's temporary restriction on nighttime activity in public spaces.

B.

We next consider Plaintiffs' vagueness challenge. The June 1 Order stated in plain terms that it generally forbade people from venturing out in public during curfew hours on June 1 and 2, 2020. The relevant portion of the Order states: "During the hours of the curfew, no person, other than persons designated by the Mayor, shall walk, bike, run, loiter, stand, or motor by car or other mode of transport upon any street, alley, park, or other public place within the District." J.A. 32 (June 1 Order). The Order thereby gave fair notice to members of the public of the

conduct it prohibited and afforded sufficient guidance to law enforcement.

Plaintiffs' sole vagueness challenge is that the June 1 Order "seeks to criminalize 'loitering.'" Appellants' Br. 18. They argue that inclusion of "loitering" on the list of prohibited public activities rendered the order fatally vague. A statute is unconstitutionally vague under the Due Process Clause if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008). Plaintiffs see both types of vagueness in the Order: They assert that an ordinary person would not know what conduct counts as prohibited "loitering," and that the Order "leav[es] it up to *the police* to decide what the term 'loitering' means." Appellants' Br. 18-19 (emphasis in original). Both arguments miss the mark. The June 1 Order did not target loitering in isolation, and the order's temporary ban on all kinds of nighttime public activity made "clear what the [Order] as a whole prohibits." *Grayned*, 408 U.S. at 110.

First, the Order gave notice "that will enable ordinary people to understand what conduct it prohibits." *City of Chicago v. Morales*, 527 U.S. 41, 56, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999). "Loiter" means "to remain in an area for no obvious reason," *Loiter*, Merriam-Webster's Dictionary, https://perma.cc/JW2F-27RW (last updated July 3, 2023), or "to linger idly about a place," *Loiter*, Oxford English Dictionary, https://perma.cc/PBK7-

YQXB (last updated July 3, 2023). To determine whether the statute provided fair notice, we read "loiter" in context, applying the *noscitur a sociis* canon: "a word is known by the company it keeps." *See United States v. Bronstein*, 849 F.3d 1101, 1108, 428 U.S. App. D.C. 27 (D.C. Cir. 2017). Ordinary people reading "loiter" among the list of other activities the curfew order prohibited, including "walk," "run," and "stand," would understand that they were generally prohibited from being in a public place during curfew hours. Indeed, Plaintiffs allege that they were "standing" in a public place after curfew hours, J.A. 37 (Compl. ¶ 8), so their conduct would have been prohibited even if the activities the order listed had not included loitering. *See Holder v. Humanitarian L. Project*, 561 U.S. 1, 20, 130 S. Ct. 2705, 177 L. Ed. 2d 355 (2010); *Hodge v. Talkin*, 799 F.3d 1145, 1172, 419 U.S. App. D.C. 111 (D.C. Cir. 2015).

Second, the Order did not "authorize" or "encourage arbitrary and discriminatory enforcement." *Morales*, 527 U.S. at 56. Including loitering in a list of prohibited activities that also generally bars walking, biking, running, standing, or "motor[ing] by car or other mode of transport" in any public place during curfew hours, J.A. 32 (June 1 Order), does not confer "vast discretion" on the police to draw their own distinctions between violative and lawful conduct. *Morales*, 527 U.S. at 61. If anything, including a prohibition on loitering in the curfew order reduced police discretion by filling any potential gaps in the ban on public activities. "As always, enforcement requires the exercise of some degree of police judgment, but, as confined, that degree of judgment here is permissible." *Grayned*, 408 U.S. at 114.

The challenged curfew order is wholly different from "loitering" provisions that empower officers to make unguided distinctions between criminal loitering and innocent hanging out. Plaintiffs claim that "*[e]very* Court" to have addressed "a statute with the term 'loitering' in it" has held it to be unconstitutionally vague. Appellants' Br. 19 (emphasis in original). They are mistaken. The word "loitering" is not a First Amendment poison pill. In *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 86 S. Ct. 211, 15 L. Ed. 2d 176 (1965), for example, the Supreme Court rejected a vagueness challenge to a law making it unlawful "to so stand, loiter or walk upon any street or sidewalk in the city as to obstruct free passage" insofar as the statute had been authoritatively construed to apply to persons who "block[ed] free passage." *Id.* at 88, 91. And the cases invalidating laws that criminalized loitering, including *City of Chicago v. Morales*, 527 U.S. 41, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999), and *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972), did not involve general curfews. Rather, they addressed provisions targeting "loitering" as such, framed in ways that conferred impermissible discretion on arresting officers.

The ordinance in *Morales* defined "loitering" in subjective terms, as "remain[ing] in any one place with no apparent purpose," and banned two or more "criminal street gang members" from "loitering" in a public place after a police officer ordered them to disperse. 527 U.S. at 47. Because it gave police officers "absolute discretion" to make "inherently subjective" distinctions between people with an "apparent purpose" and those without one, the

Court held the ordinance unconstitutionally vague. *Id.* at 61-62, 66. The June 1 Order, however, requires no law enforcement officer's assessment of anyone's "apparent purpose."

The ordinance challenged in *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S. Ct. 839, 31 L. Ed. 2d 110, similarly invited an unconstitutional degree of discretion on the part of police enforcing its "loitering" ban. The ban applied to people the ordinance classed as "vagrants," including "common drunkards," "habitual loafers," and "persons wandering or strolling around from place to place without any lawful purpose or object." *Id.* at 156 n.1, 162 (internal citations and quotation marks omitted). Those terms were not objective indicia of observable behavior that could give fair notice to potential violators or inform arresting officers. *Id.* at 162. The June 1 Order, in contrast, prohibited virtually all activities in public spaces during curfew hours, not an undefined and indistinct subset of activities deemed somehow nefarious. Because it thereby provided adequate notice to the public and controlled officers' discretion, we hold it was not unconstitutionally vague.

C.

Plaintiffs' remaining claims depend on their primary contentions that the curfew was an unjustified speech restriction or wholly vague, so legally void. If the curfew order they violated was unlawful, they claim, their arrests infringed the Fourth Amendment prohibition against "unreasonable . . . seizures," U.S. CONST. amend. IV, and the arresting officers' contact with them amounted

to assault and battery. But Plaintiffs do not dispute that they were present in public in violation of the terms of the curfew, which was justification enough. The legal insufficiency of the common law and Fourth Amendment claims follows from our dismissal of the First Amendment claim.

"Constitutional and common law claims of false arrest are generally analyzed as though they comprise a single cause of action." *Amobi v. D.C. Dep't of Corrections*, 755 F.3d 980, 989, 410 U.S. App. D.C. 338 (D.C. Cir. 2014). We analyze the legal sufficiency of both types of claims by asking whether, assuming the truth of the facts in the complaint, the police had probable cause to arrest. *Id.* Probable cause justifies arrest "where the facts and circumstances within the arresting officer's knowledge, of which [the officer] had reasonably trustworthy information, are sufficient in themselves to warrant a reasonable belief that an offense has been or is being committed." *Id.* at 990 (quoting *Rucker v. United States*, 455 A.2d 889, 891 (D.C. 1983)); *see Maryland v. Pringle*, 540 U.S. 366, 371, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003). Probable cause is a question of law for the court to decide "where the facts are undisputed." *Amobi*, 755 F.3d at 990; *see Ornelas v. United States*, 517 U.S. 690, 696-97, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996).

Plaintiffs allege that they were "standing" in public at 11:00 P.M. on June 1, four hours after the curfew ended. J.A. 37 (Compl. ¶ 8). That allegation alone confirms that the police had probable cause to arrest Plaintiffs for violating the June 1 Order, under which no person was allowed to "stand" in any "public place within the District" after 7:00

P.M. on June 1. J.A. 32. Plaintiffs argue that the police should have given them an opportunity to "comply with the curfew law by leaving the scene." Appellants' Br. 25. But, unlike a temporary curfew order issued by Mayor DeBlasio in New York City around the same time, *see In re N.Y.C. Policing During Summer 2020 Demonstrations*, 548 F. Supp. 3d 383, 408, 416 (S.D.N.Y. 2021), the District of Columbia's June 1 Order did not require police to give curfew violators an opportunity to avoid arrest by agreeing to disperse. Plaintiffs accordingly fail to state claims of arrest without probable cause in violation of the Fourth Amendment, or of common-law false arrest.

Plaintiffs' claims of excessive force in violation of the Fourth Amendment and their common-law assault and battery claims also fall short. We evaluate claims of excessive force by considering whether an officer's use of force was "reasonable" under the "facts and circumstances of [the] particular case . . . judged from the perspective of a reasonable officer." *Cnty. of Los Angeles v. Mendez*, 581 U.S. 420, 428, 137 S. Ct. 1539, 198 L. Ed. 2d 52 (2017) (quoting *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)). The parallel common-law claims turn on whether an officer committed assault through "an intentional and unlawful attempt or threat, either by words or acts, to do physical harm to the plaintiff" or committed battery through "an intentional act that causes a harmful or offensive bodily contact." *Smith v. District of Columbia*, 882 A.2d 778, 787 (D.C. 2005) (quoting *Holder v. District of Columbia*, 700 A.2d 738, 741 (D.C. 1997)). Under D.C. law, a "police officer has a qualified privilege to use reasonable force to effect

an arrest, provided that the means employed are not in excess of those which the [officer] reasonably believes to be necessary." *Scales v. District of Columbia*, 973 A.2d 722, 730 (D.C. 2009) (quoting *Evans-Reid v. District of Columbia*, 930 A.2d 930, 937 (D.C. 2007)).

Plaintiffs allege that, by arresting them, the officers "touch[ed] [them] without [their] consent and without having legal justification." J.A. 39 (Complaint ¶ 24). But, again, the officers had legal justification to arrest Plaintiffs: The officers saw them gathered in public after 11:00 P.M., in violation of the constitutionally valid June 1 Curfew Order. Plaintiffs make the conclusory allegation that the officers "use[d] excessive force while arresting [them]," J.A. 40 (Compl. ¶ 33), but their complaint describes no unconsented touching or use of force beyond the bare fact of their arrests. Plaintiffs included an allegation that their overnight detention in handcuffs injured their wrists, but they sued the arresting officers, not persons responsible for the conditions of their detention. That allegation thus does not support an excessive force claim against these Defendants. We accordingly affirm the district court's dismissal of Plaintiffs' claims of excessive force and assault and battery.

D.

Finally, Plaintiffs argue that the June 1 Order violated their fundamental right to travel, but that claim is forfeited. Plaintiffs neither pleaded nor pressed a right-to-travel claim in the district court. Br. in Opp'n to Defs.' Mot. to Dismiss at 4-5, 7-8, *Tinius v. Choi*, No. 21-cv-907, 2022 U.S. Dist. LEXIS 55632, 2022 WL 899238 (D.D.C.

Mar. 28, 2022).[1] We have previously declined to resolve the unsettled question whether the Constitution protects a right to intrastate travel. *Hutchins*, 188 F.3d at 536-41 (plurality opinion). The circuits are split on the point, and the Supreme Court has yet to resolve it. *See Cole v. City of Memphis*, 839 F.3d 530, 535 & n.3 (6th Cir. 2016) (collecting cases); *Morales*, 527 U.S. at 53-54 (three-justice plurality) (describing "an individual's decision to remain in a public place of his choice" as a fundamental right protected by the Due Process Clause). Given Plaintiffs' failure to preserve the issue, the unsettled state of the law, and the officers' entitlement to qualified immunity against claims not clearly established, *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009), we decline to exercise our discretion to consider the unpreserved claim of violation of an asserted right to travel.

* * *

For the foregoing reasons, we affirm the district court's judgment dismissing Plaintiffs' claims.

So ordered.

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1. Plaintiffs Ajokubi, Maradiga, Smith, and Southee filed opposition briefs identical to Tinius' in their cases. Br. in Opp'n to Defs.' Mot. to Dismiss, *Ajokubi v. Maneechai*, No. 21-cv-909; Br. in Opp'n to Defs.' Mot. to Dismiss, *Maradiga v. Kern*, No. 21-cv-1460; Br. in Opp'n to Defs.' Mot. to Dismiss, *Smith v. Perez*, No. 21-cv-986; Br. in Opp'n to Defs.' Mot. to Dismiss, *Southee v. Varga*, No. 21-cv-1461. Plaintiffs Brown and Green filed different opposition briefs, but those, too, made no mention of the fundamental right to interstate travel. Br. in Opp'n to Defs.' Mot. to Dismiss, *Brown v. Choi*, No. 22-cv-441; Br. in Opp'n to Defs.' Mot. to Dismiss, *Green v. Smith*, No. 21-cv-2377.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED MARCH 28, 2022

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

March 28, 2022, Decided;
March 28, 2022, Filed

Civil Action No. 21-0907 (ABJ);

DEVON TINIUS,

Plaintiff,

v.

LUKE CHOI, D.C.
Metropolitan Police Officer, et al.,

Defendants.

Civil Action No. 21-0909 (ABJ);

VICTOR AJOKUBI,

Plaintiff,

v.

JOSE MANEECHAI,
D.C. Metropolitan Police Officer, et al.,

Defendants.

Appendix B

Civil Action No. 21-0986 (ABJ);

KELLY SMITH,

Plaintiff,

v.

JERMAINE PEREZ,
D.C. Metropolitan Police Officer, et al.,

Defendants.

Civil Action No. 21-1460 (ABJ)

KENSY MARADIGA,

Plaintiff,

v.

CARLIN KERN,
D.C. Metropolitan Police Officer, et al.,

Defendants.

Civil Action No. 21-1461 (ABJ)

HALEY SOUTHEE,

Plaintiff,

v.

Appendix B

BRIANA VARGA
D.C. Metropolitan Police Officer, et al.,

Defendants.

Civil Action No. 21-2377 (ABJ)

CHRISTOPHER GREEN,

Plaintiff,

v.

CARLTON SMITH
D.C. Metropolitan Police Officer, et al.,

Defendants.

Civil Action No. 22-0441 (ABJ)

BRANDON BROWN,

Plaintiff,

v.

LUKE CHOI,
D.C. Metropolitan Police Officer, et al.,

Defendants.

Appendix B

MEMORANDUM OPINION

Plaintiffs in this set of seven consolidated cases were each arrested for violating a citywide curfew while "protesting the treatment of African American citizens by the police" during the summer of 2020. Compl. [Dkt. # 1-2] ¶ 8.[1] They brought actions against their arresting officers from the D.C. Metropolitan Police Department ("MPD") and against the District of Columbia, alleging that the individual officers arrested them without probable cause, committed assault and battery, and violated their First, Fourth, and Fourteenth Amendment rights, and that the District is vicariously liable for its employees' torts. Compl. ¶ 13. Defendants filed motions to dismiss the complaints pursuant to Federal Rule of Civil Procedure 12(b)(6). *See* Defs.' Mot. to Dismiss Compl. [Dkt. # 7] ("Mot."). On November 10, 2021, the Court consolidated the cases for consideration of the dispositive motions. Min. Order (Nov. 10, 2021).[2] The matter is fully briefed. *See* Pl.'s Opp. to Mot. [Dkt. # 12] ("Opp."); Defs.' Reply to Opp. [Dkt. # 16] ("Reply"); Pl.'s Reply to Defs.' Reply [Dkt. # 17] ("Surreply").

In their oppositions to the motions to dismiss, plaintiffs complained that the curfew at issue "was and

1. The Court has reviewed the pleadings in each case and has determined that they are substantially identical. Unless otherwise indicated, docket citations in this opinion are to the pleadings in the first of the seven cases filed: *Tinius v. Choi*, No. 21-907.

2. The seventh case, *Brown v. Choi*, No. 22-cv-441, was consolidated pursuant to the parties' agreement in a minute order docketed in that case on March 15, 2022.

is vague and overly broad," Opp. at 1, and the Court then ordered plaintiffs to identify "which count or counts in the complaint challenge the curfew on the specific grounds that it is void for vagueness and in which paragraphs in each count that can be found." Min. Order (Dec. 9, 2021). In response, each plaintiff filed a motion to amend their complaint, *see, e.g.*, Pl. Devon Tinius' Mot. for Leave to Amend her Compl. [Dkt. # 25] ("Mot. to Amend"), which defendants have opposed on the grounds that amendment would be futile. *See* Defs. Consolidated Opp. to Mot. to Amend [Dkt. # 27] ("Opp. to Mot. to Amend") at 1. Because even the proposed amended complaints fail to state a claim upon which relief can be granted, the Court will **DENY** the motions for leave to amend and **GRANT** the motions to dismiss.

BACKGROUND

I. Factual Background

On the evening of June 1, 2020, plaintiffs took to the streets of the District of Columbia to participate in the widespread demonstrations and protests that followed the murder of George Floyd by Derek Chauvin, a former police officer. *See* Plaintiff Devon Tinius' Am. Complaint, Ex. 1 to Mot. to Amend [Dkt. # 25-1] ("Proposed Am. Compl.") ¶ 7 ("Plaintiff was shouting 'Black Live[s] Matter' and saying the names of individuals that plaintiff believed had been killed by police officers without legal justification such as George Floyd and Breonna Taylor.").[3] On that day, though,

3. Though the alleged facts in the proposed amended complaint are virtually identical to the facts in the original complaint, the

the Mayor of the District of Columbia, Muriel Bowser, had announced the extension of a curfew put in place the night before. *See* Mayor's Order 2020-069 (June 1, 2020), Ex. 1 to Mot. [Dkt. # 7-1] ("Mayor's Order," "curfew," or "June 1 Order") at 1;[4] *see also* Mayor's Order 2020-068 (May 31, 2020), Ex. 2 to Mot. [Dkt. # 7-2] ("May 31 Order").[5]

The June 1 Order stated:

> For the past several nights, our police, firefighters, and members of the public safety team for Washington, DC . . . have been working to make sure people may exercise their First Amendment rights, while not defacing, damaging, or destroying churches, monuments,

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numbering of the paragraphs is slightly different, and the Court will cite the proposed amended complaint throughout the opinion for simplicity's sake.

4. The original curfew ordinance is located on the D.C. Mayor's website, at https://mayor.dc.gov, and a PDF version of the Mayor's Order is located at https://mayor.dc.gov/sites/default/files/dc/sites/mayormb/release_content/attachments/Mayor%27s%20Order%202020-069.pdf. The curfew is incorporated in the complaints at numerous points, and the parties do not dispute the substance of the ordinance.

5. The Court takes judicial notice of this public document, as it was explicitly incorporated as part of the challenged ordinance. *See* Mayor's Order at 1 ("The findings of Mayor's Order 2020-068, dated May 31, 2020, are incorporated herein."). A PDF copy of the May 31, 2020 Order is also located on the D.C. government website, dcregs.dc.gov, located at dcregs.dc.gov/common/NoticeDetail.aspx?noticeID=N0093754 (click on "View text").

> parks, businesses, and government offices in Washington, DC.
>
> In multiple areas throughout the District of Columbia, numerous businesses, vehicles, and government buildings have been vandalized, burned, or looted. More than eighty (80) individuals were arrested over the past two (2) days in connection with these incidents, with the majority charged with felonies.
>
> On the night of May 31, 2020, looting and vandalism occurred at multiple locations throughout the city, in addition to the rioting in the downtown area. Vandals smashed windows in Northeast DC, upper Northwest DC stretching to Georgetown, and caused extensive damage in the Golden Triangle Business Improvement District, Downtown DC Business Improvement District, and Mount Vernon Triangle Community Improvement District. Rioting and looting affected the operations of District government agencies.

Mayor's Order at 1-2.

The order incorporated the findings of the order issued the day before. The May 31 order had also established a curfew – from 11 p.m. on Sunday, May 31 through 6:00 am on June 1 – and it announced:

> Washington, DC, is the proud host of demonstrations and peaceful protests, and as

> Mayor of Washington, DC, I am proud of our city.
>
> For the past two nights, our police, and firefighters, and members of the public safety team for Washington, DC, along with our federal partners, have been working to make sure people may exercise their First Amendment rights, while not destroying Washington, DC.
>
> I recognize and empathize with the outrage that people feel following the murder of George Floyd in Minnesota last week. We are grieving hundreds of years of institutional racism – systems that require Black Americans to prove their humanity, just for it to be disregarded.
>
> In the downtown area of the District of Columbia, numerous businesses and government buildings were vandalized, burned, or looted. Over the past nights, there has been a glorification of violence, particularly during later hours of the night. This violence is not representative of peaceful protest or individuals exercising their lawful First Amendment rights.
>
> The health, safety, and well-being of persons within the District of Columbia are threatened and endangered by the existence of these violent actions.

May 31 Order at 1-2.

In addition, the Mayor noted in both orders that the District was "under a declared public health state of emergency due to COVID-19." Mayor's Order at 2; *see also* May 31 Order at 2 ("Many protesters are not observing physical distancing requirements and many protesters are not wearing masks or face coverings, putting the public health at further risk."). The June 1 Order identified specific locations where "rioting" and "looting and vandalism occurred," and it "impose[d] a new curfew, in order to protect the safety of persons and property in the District." Mayor's Order at 2.

The new curfew was to be in effect from 7:00 p.m. on Monday, June 1 through 6:00 a.m. on June 2, and again from 7:00 pm on the evening of Tuesday, June 2 through 6:00 a.m. on June 3, 2021. Mayor's Order at 2. The order specified that "[d]uring the hours of the curfew, no person . . . shall walk, bike, run, loiter, stand or motor by car or other mode of transportation upon any street, alley, park, or other public place within the District." Mayor's Order at 2. Any person found in violation of the order was subject to a three-hundred dollar fine ($300) or imprisonment for not more than ten (10) days. Mayor's Order at 3.[6]

Plaintiffs acknowledge in their complaints that they were standing in a public place well after 7:00 p.m. on June

6. Exemptions were provided for: (1) essential workers, such as "healthcare personnel" who were "engaged in essential functions"; (2) individuals who were voting and participating in election-related activities; and (3) those traveling to a hospital or urgent care facility. Mayor's Order at 2.

1. *See* Proposed Am. Compl. ¶ 7 (plaintiffs were protesting "at approximately 11:00 p.m."). However, they allege that "[p]rior to the time that [they were] arrested, plaintiff[s] had attempted to leave the area and to return home in compliance with the curfew law, but [were] prevented from doing so" by members of MPD "who continually blocked the path of the demonstrators and refused to allow them to leave." Proposed Am. Compl. ¶ 8.[7] All plaintiffs were handcuffed and arrested, transported to the Blue Plains Police Academy, and "held with [their] hands handcuffed behind [their] back[s] until [they were] arraigned and released the next morning." Proposed Am. Compl. ¶ 9. By October 2020, all charges against the plaintiffs had been dismissed. Proposed Am. Compl. ¶ 10.

II. The Complaints

Each complaint consists of the same eight counts:

- Count I, against the individual officers and the District, asserts the common law tort of false arrest, alleging that plaintiffs were arrested "without legal justification." Proposed Am. Compl. ¶ 17.

- Count II, against the officers and the District, asserts the common law tort of assault, alleging that the defendant police officers caused plaintiffs

7. The complaints in each of the seven cases repeat the same factual allegations on behalf of each plaintiff and contain no specific information concerning any interaction between an individual officer and an individual plaintiff.

to reasonably apprehend that they would be subjected to imminent harmful and offensive contact. Proposed Am. Compl. ¶ 22.

- Count III, against the officers and the District, asserts the common law tort of battery, alleging that the defendant police officers touched plaintiffs without their consent and "without having legal justification for doing so." Proposed Am. Compl. ¶ 27.

- Count IV is brought under 42 U.S.C. § 1983 against the individual officers only, and it asserts that plaintiffs were arrested without probable cause in violation of the Fourth Amendment. Proposed Am. Compl. ¶ 31.

- Count V, brought against the officers under 42 U.S.C. § 1983, asserts that the officers used excessive force when arresting plaintiffs in violation of the Fourth Amendment. Proposed Am. Compl. ¶ 34.

- Count VI, brought against the officers under 42 U.S.C. § 1983, alleges that plaintiffs' arrests violated their First Amendment right to freedom of speech. Proposed Am. Compl. ¶ 38.

- Count VII, brought against the officers under 42 U.S.C. § 1983, alleges that plaintiffs' arrests violated their First Amendment right of freedom of assembly. Proposed Am. Compl. ¶ 42.

- Count VIII, brought against the officers under 42 U.S.C. § 1983, alleges that plaintiffs' arrests violated the Equal Protection Clause of the Fifth and Fourteenth Amendments. Proposed Am. Compl. ¶ 46.

III. Proposed Amendment

The proposed amended complaints would not include any new factual allegations, but plaintiffs seek to add paragraphs expanding upon their legal theories.[8] The changes would be:

- Paragraph seven – which had alluded to plaintiffs' overbreadth and vagueness theories – would be deleted, and the theories would be included in two new paragraphs. *Compare* Compl. ¶ 7 *with* Proposed Am. Compl. ¶¶ 12-13.

- Proposed paragraph twelve would state, "[t]he curfew law issued by Mayor Bowser on June 1, 2020 is unconstitutional because it is vague," and explain the legal theory. *See* Proposed Am. Compl. ¶ 12 ("The term loitering is vague because . . .").

- The new paragraph thirteen would state, "[t]he District of Columbia's Curfew law was unconstitutional because it was overbroad."

8. There are some additional minor changes that are not noted here because they are either stylistic, *e.g.*, changes to capitalization or phrasing, or simply appear to be typos.

Proposed Am. Compl. ¶ 13. Proposed paragraph thirteen then explains the legal theory. *See* Proposed Am. Compl. ¶ 13 ("The . . . curfew law was overbroad because . . .").

- Proposed paragraph nine alleges that "plaintiff was transported to the Blue Plain Police Academy where plaintiff was held with plaintiff's hands behind plaintiff's back until plaintiff was arraigned and released the next morning." Proposed Am. Compl ¶ 9. This is substantially similar to Compl. ¶ 10, but proposed paragraph nine would also add a new sentence: "[t]his conduct was clearly excessive because Officer Choi had no legal justification for touching plaintiff and also because plaintiff was held overnight with plaintiff's hands handcuffed behind plaintiff's back." Proposed Am. Compl. ¶ 9.

- Adding sentences to Counts I and IV (arrest without probable cause), III (battery), V (excessive force), VI (freedom of speech), and VII (freedom of assembly) asserting that each of those claims is predicated on the vagueness and overbreadth theories. *See e.g.*, Proposed Am. Compl. ¶ 17 (the curfew law upon which the arresting officer was relying was "void because it was unconstitutional because it was vague and overbroad"); *see also* Proposed Am. Compl. ¶¶ 18, 26, 27, 31, 34, 38, and 42.

Appendix B

STANDARD OF REVIEW

"To survive a [Rule 12(b)(6)] motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (internal quotation marks omitted); *accord Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). In *Iqbal*, the Supreme Court reiterated the two principles underlying its decision in *Twombly*: "First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." 556 U.S. at 678. And "[s]econd, only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 679.

A claim is facially plausible when the pleaded factual content "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* A pleading must offer more than "labels and conclusions" or a "formulaic recitation of the elements of a cause of action," *id.*, quoting *Twombly*, 550 U.S. at 555, and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

When considering a motion to dismiss under Rule 12(b)(6), the Court is bound to construe a complaint liberally in the plaintiff's favor, and it should grant the

plaintiff "the benefit of all inferences that can be derived from the facts alleged." *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276, 305 U.S. App. D.C. 60 (D.C. Cir. 1994). Nevertheless, the Court need not accept inferences drawn by the plaintiff if those inferences are unsupported by facts alleged in the complaint, nor must the Court accept plaintiff's legal conclusions. *See id.* ; *Browning v. Clinton*, 292 F.3d 235, 242, 352 U.S. App. D.C. 4 (D.C. Cir. 2002). In ruling upon a motion to dismiss for failure to state a claim, a court may ordinarily consider only "the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint, and matters about which the Court may take judicial notice." *Gustave-Schmidt v. Chao*, 226 F. Supp. 2d 191, 196 (D.D.C. 2002) (citations omitted).

Federal Rule of Civil Procedure 15(a)(2) provides that a party may amend its pleading with the court's leave, and that "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). The Supreme Court has emphasized this standard: "In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.'" *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). But a court "may deny a motion to amend a complaint as futile if the proposed claim would not survive a motion to dismiss." *Hettinga v. United States*, 677 F.3d 471, 480, 400 U.S. App. D.C. 218 (D.C. Cir. 2012).

Appendix B

ANALYSIS

I. Plaintiffs' Constitutional Claims

Since federal subject matter jurisdiction in these cases is predicated on the claims brought under 42 U.S.C. § 1983, the Court will consider them first.[9]

Section 1983, enacted as part of the Civil Rights Act of 1871, provides:

> 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.

42 U.S.C. § 1983.

Thus, "[t]o state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the

9. Paragraph four of the complaints alleges that the Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331, but that provision would not necessarily supply a basis for hearing the pendent common law tort claims in Counts I, II, and III if the federal claims were dismissed. Proposed Am. Compl. ¶ 4.

alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988).

The section 1983 claims are brought against the individual police officer defendants only. Proposed Am. Compl. ¶¶ 30-47. In their motions to dismiss, defendants assert that the police officers are shielded from liability because they are entitled to qualified immunity. *See* Mot. at 5-7. Determining whether an official is afforded qualified immunity is a two-step inquiry. First, the threshold question is: "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). Second, the Court must determine whether "the right was clearly established." *Id.*; *Lederman v. United States*, 291 F.3d 36, 46, 351 U.S. App. D.C. 386 (D.C. Cir. 2002).

The question of whether a right is "clearly established" involves an analysis of "whether the Supreme Court, the District of Columbia Circuit, and, to the extent that there is a consensus, other circuits have spoken clearly on the lawfulness of the conduct at issue." *Butera v. Dist. of Columbia*, 235 F.3d 637, 652, 344 U.S. App. D.C. 265 (D.C. Cir. 2001). In other words, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). If it would "'be clear to a reasonable officer that his conduct was unlawful in the situation he confronted,'" the right is considered clearly

established. *Groh v. Ramirez*, 540 U.S. 551, 563, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004), quoting *Saucier*, 533 U.S. at 202. "Although 'this Court's caselaw does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate.'" *Kisela v. Hughes*, 138 S. Ct. 1148, 1152, 200 L. Ed. 2d 449 (2018).

The Supreme Court recently reiterated the importance of this principle:

> We have repeatedly told courts not to define clearly established law at too high a level of generality. It is not enough that a rule be suggested by then-existing precedent; the rule's contours must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted.

City of Tahlequah v. Bond, 142 S. Ct. 9, 11, 211 L. Ed. 2d 170 (2021) (per curiam) (citations and internal quotation marks omitted).

This Court is "permitted to exercise [its] sound discretion" in deciding which of the two *Saucier* prongs should be addressed first. *See Pearson v. Callahan*, 555 U.S. 223, 236, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). But the Supreme Court has emphasized "that it is often beneficial" to answer the predicate constitutional question, as it "promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a

qualified immunity defense is unavailable." *Id.* The Court has encouraged trial courts to resolve qualified immunity issues "at the earliest possible stage of litigation." *Id.* at 232, quoting *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (per curiam).

A. Counts VI and VII – The First Amendment Claims

Counts VI and VII allege that the arresting officers are liable under 42 U.S.C. § 1983 because they infringed upon plaintiffs' First Amendment rights to freedom of speech and freedom of assembly. Proposed Am. Compl. ¶¶ 36-43.

Plaintiffs allege "[d]efendant police officer[s] knowingly deprived plaintiff[s] of [their] First Amendment Right to freedom of speech" when they arrested plaintiffs pursuant to the curfew ordinance. Proposed Am. Compl. ¶ 38; *see also* Proposed Am. Compl. ¶ 42 ("[d]efendant police officer[s] knowingly deprived plaintiff[s] of [their] First [A]mendment Right to lawful assembly").

The First Amendment prohibits, among other things, laws "abridging the freedom of speech . . . or the right of the people peaceably to assemble." U.S. Const. amend. I. The Supreme Court has determined that this restriction applies not only to Congress but also to municipal governments. *Lovell v. City of Griffin*, 303 U.S. 444, 450-51, 58 S. Ct. 666, 82 L. Ed. 949 (1938). However, a city government "may sometimes curtail speech when necessary to advance a significant and legitimate

state interest." *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984), citing *Schenck v. United States*, 249 U.S. 47, 52, 39 S. Ct. 247, 63 L. Ed. 470, 17 Ohio L. Rep. 26, 17 Ohio L. Rep. 149 (1919). And it is well-established that "[e]xpression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions." *Clark v. Cmty. for Creative Nonviolence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984). "[R]estrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Id.*, citing *United States v. Grace*, 461 U.S. 171, 177, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983) and *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983); *see also Cmty. for Creative Non-Violence v. Kerrigan*, 865 F.2d 382, 390, 275 U.S. App. D.C. 163 (D.C. Cir. 1989).

Determining the standard of review to be applied in this case, though, depends upon a preliminary assessment of whether the ordinance involved is in fact a restriction on expression, or whether it merely regulates conduct.

The Supreme Court has consistently recognized a distinction between content-based laws that must satisfy strict scrutiny, *see, e.g., Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163-64, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015), and those that are intended to further other governmental interests but have an incidental impact on

expressive activity. In *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968), the petitioner and three others burned their draft cards on the steps of the South Boston Courthouse, and O'Brien challenged his criminal conviction for willfully and knowingly destroying a Selective Service registration certificate on First Amendment grounds. *Id.* at 369-70. The Court reviewed its prior rulings on expressive conduct and explained:

> This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 376-77 (internal citations omitted). The Court observed that the law in question "deals with conduct[,]

having no connection with speech," and it "no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records." *Id.* at 375. But given its application to an expressive act on O'Brien's part, and the indication in the legislative history that the statute was intended, at least in part, to stem this form of protest, *id.* at 385-86, the Court applied the test for regulations that impose an incidental burden on expressive conduct and ruled that O'Brien's conviction did not offend the Constitution. *Id.* at 386.

After *O'Brien*, the Supreme Court emphasized that an activity affected by a generally applicable governmental regulation must have "a significant expressive element" to warrant First Amendment protection. *See Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706-07, 106 S. Ct. 3172, 92 L. Ed. 2d 568 (1986). In *Arcara*, the district attorney brought an action under a New York public nuisance statute to shut down an adult bookstore, alleging that the owners were aware that the solicitation of prostitution and sexual activity were occurring openly on the premises. *Id.* at 698-99. The owners of the store opposed the action on First Amendment grounds, arguing that the closure of the establishment would interfere with their First Amendment right to sell books. *Id.* at 700. The New York Court of Appeals held that it was necessary to analyze the regulation under the *O'Brien* test because the closure order would impose an incidental burden on the owners' bookselling activities. *Id.* at 701. But the Supreme Court disagreed and distinguished the circumstances before it from the symbolic draft card burning in *O'Brien*.

Id. at 705. It explained that the Court had subjected governmental restrictions to scrutiny in the past "only where it was conduct with a significant expressive element that drew the legal remedy in the first place, as in *O'Brien*, or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity." *Id.* at 706-07. It found that the legislation resulting in the closure of the store was directed at conduct that had nothing to do with expression, and it was not moved by the fact that the implementation of the provision could have "some conceivable burden" on First Amendment activities. *Id.*

Thereafter, though, in *Ward v. Rock against Racism*, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989), the Court took up a regulation that "require[d] bandshell performers to use sound-amplification equipment and a sound technician provided by the city." *Id.* at 784. This was an "attempt to regulate the volume of amplified music at the bandshell." *Id.* But the regulation effectively prevented the plaintiff from using the bandshell to broadcast its message, and the Supreme Court "granted certiorari to clarify the legal standard applicable to governmental regulation of the time, place, or manner of protected speech." *Id.* at 789 (citation omitted). The Court reiterated that when a law restricts protected speech, it "must be narrowly tailored to serve the government's legitimate, contentneutral interests," but it also explained that it "need not be the least restrictive or least intrusive means of doing so." *Id.* at 798.

Given those precedents, the D.C. Circuit concluded that a District of Columbia law imposing a permanent

curfew on juveniles did not regulate expressive conduct at all, and therefore, it was not subject to First Amendment scrutiny.

> [T]he curfew does not itself regulate or proscribe expression, and thus would only be subject to scrutiny under the First Amendment if it regulated "conduct that has an expressive element," or if it "impose[d] a disproportionate burden upon those engaged in protected First Amendment activity." The curfew regulates the activity of juveniles during nighttime hours; it does not, by its terms, regulate expressive conduct. Nor can the curfew, on its face, be said to burden disproportionately those engaged in expressive conduct—the curfew covers all activities and provides a specific defense for juveniles engaged in First Amendment activities.

Hutchins v. Dist. of Columbia, 188 F.3d 531, 548, 338 U.S. App. D.C. 11 (D.C. Cir. 1999), quoting *Arcara*, 478 U.S. at 703-04.[10]

The government suggests that the curfew in this case is simply intended to control conduct as well, and it argues that the less stringent rational basis test should be applied in this case. *See* Reply at 2, citing *United States v. Chalk*,

10. The Court of Appeals did subject the juvenile curfew to intermediate scrutiny, but that was based on the allegation that the curfew restricted other fundamental rights. *Hutchins*, 188 F.3d at 541.

441 F.2d 1277, 1281 (4th Cir. 1971). *Chalk* involved a local proclamation declaring a state of emergency during a time of unrest, and the Fourth Circuit reviewed *O'Brien* and other precedents and accurately observed that "[t]he standard [that] has developed where regulation of conduct has an incidental effect on speech is that the incidental restriction on First Amendment freedoms can be no greater than is essential to the furtherance of the government interest which is being protected." 441 F.2d at 1280. But then *Chalk* went further, stating that "the scope of our review in a case such as this must be limited to a determination of whether the mayor's actions were taken in good faith and whether there is some factual basis for [her] decision that the restrictions [s]he imposed were necessary to maintain order." *Id.* at 1281. The D.C. Circuit has not adopted the *Chalk* formulation, though, and it has not spoken directly to this issue.[11]

The Order in this case prohibited people from walking, biking, running, loitering, standing, or driving on "any street, alley, park, or other public place within the District." Mayor's Order at 2. It thereby prevented them from engaging in the public protests described in the

11. In the Court's view, the *Chalk* opinion is of little utility here. Those defendants were charged with possessing prohibited firearms, as well as the makings of an incendiary bomb, after their car was stopped for a curfew infraction and searched. 441 F.2d at 1279. Defendants challenged the legality of the stop on the basis that the curfew was overbroad and constitutionally infirm. *Id.* at 1280. The court upheld the mayor's exercise of emergency powers, but the case did not involve the application of the curfew to individuals engaged in First Amendment expression.

Order itself during the hours the curfew was in effect. One could argue that because the curfew is directed at a broad swath of pure conduct, and it does not have "the inevitable effect of singling out those engaged in expressive activity," *Arcara*, 478 U.S. at 707, it is not a restriction on expression at all and need not satisfy a higher level of scrutiny. But the curfew was enacted in the specific context of ongoing public protests and counter-protests, and it is plain on the face of the ordinance that the Mayor was endeavoring to balance First Amendment concerns and public safety under temporary, exigent circumstances. Moreover, there is no exception for First Amendment activities as in the *Hutchins* curfew, and the Mayor's Order was invoked here to stop the plaintiffs from engaging in protected activities during particular times in particular places. Therefore, the situation is more akin to *Rock Against Racism* than *Hutchins* or *Arcara*, and the Court will decline to apply the more deferential standard of review described in *Chalk*.[12] Even if the Court were inclined to say that the Order was not a pure time, place, and manner restriction directed *towards* speech, but it merely had the incident *effect* of curtailing speech, the Supreme Court has made

12. Moreover, "to the extent it articulates a more deferential test, *Chalk* matters only if [the] curfew failed the ordinary rule," and, as explained below, this curfew passes intermediate scrutiny under *Rock Against Racism*. *See Larson v. City of Minneapolis*, No. 21-cv-714, 568 F. Supp. 3d 997, 2021 U.S. Dist. LEXIS 202194, 2021 WL 4895275, at *7 (D. Minn. Oct. 20, 2021) ("The Eighth Circuit has not addressed this question, but for purposes of this case, it makes better sense just to apply ordinary constitutional analysis. If Mayor Frey's curfew didn't violate the First Amendment according to the usual standards, then it didn't violate the more deferential approach under *Chalk*.").

it clear that "the *O'Brien* test 'in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions.'" *Rock Against Racism*, 491 U.S. at 798, quoting *Clark*, 468 U.S. at 298.

Therefore, in an abundance of caution, the Court will follow the approach in *Rock Against Racism*, and apply the well-established test for time, place, and manner restrictions.[13] The Court notes that other district courts faced with similar ordinances have also applied the standard set forth in *Rock Against Racism. See, e.g., Sasso v. City of Dallas*, No. 20-cv-1398, 2020 U.S. Dist. LEXIS 94754, 2020 WL 2839217, at *3 (N.D. Tex. June 1, 2020) (stating the test is whether ordinances "are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information."), quoting *Rock Against Racism*, 491 U.S. at 791; *NAACP of San Jose/Silicon Valley v. City of San Jose*, No. 21-cv-1705, 562 F. Supp. 3d 382, 2021 U.S. Dist. LEXIS 183480, 2021 WL 4355339 (N.D. Cal. Sept. 24, 2021), at *11 ("to be constitutional, those restrictions must be: (1) 'without reference to the content of the regulated speech,' i.e., content neutral,

13. The DC Circuit has differentiated the time, place, and manner standard from what has been referred to as "intermediate scrutiny," suggesting that the former is a more stringent standard. *See Hutchins*, 188 F. 3d at 541 ("To withstand intermediate scrutiny, the curfew must be 'substantially related' (rather than narrowly tailored) to the achievement of 'important' (rather than compelling) government interests."), citing *Craig v. Boren*, 429 U.S. 190, 197, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976) and *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724, 102 S. Ct. 3331, 73 L. Ed. 2d 1090 (1982).

(2) 'narrowly tailored to serve a significant government interest,' and must (3) 'leave open ample alternative channels for communication of the information.'"), quoting *Rock Against Racism*, 491 U.S. at 791.[14]

The first question to be considered, then, is whether the curfew was content-neutral. "The principal inquiry

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14. Plaintiffs argue that strict scrutiny applies, and they cite a 1978 Ohio state court decision and a 1992 Maryland state court opinion as support. *See* Opp. at 4, citing *In re Mosier*, 59 Ohio Misc. 83, 89, 394 N.E.2d 368 (Common Pleas Ohio 1978) and *Brown v. Ashton*, 93 Md. App. 25, 611 A.2d 599, 606 (Md. Ct. Spec. App. 1992); *see also* Surreply at 3-4. Of course, this Court is not bound by state court opinions, but plaintiffs' failure to grapple with Supreme Court precedent is a more significant problem. It is true that the *In re Mosier* opinion endeavored to summarize the state of Supreme Court case law at the time, but it did so as of 1978, and this Court must follow the case law that has developed since then, such as *Arcara, Rock Against Racism, Clark*, and their progeny. Furthermore, the intermediate appellate decision in *Brown* that plaintiffs would have this Court follow was vacated by the Court of Appeals of Maryland, *see Ashton v. Brown*, 339 Md. 70, 660 A.2d 447, 455 (1995) ("the judgment of the circuit court must be vacated"), which then found that "the ordinance violate[d] both the Due Process Clause of the Fourteenth Amendment and Article 24 of the Maryland Declaration of Rights" without mentioning strict scrutiny. *Id.* Finally, plaintiffs insist in their surreply that "time, place, and manner" analysis should not be applied to the Mayor's Order because "the curfew law at issue in this case has the effect of blocking all speech entirely . . . . [I]f a person cannot be in public, it is axiomatic that there will be no opportunity to speak in public." Surreply at 3. But this completely ignores the word "time" in the phrase "time, place, and manner." While the curfew prohibited plaintiffs from being in public during certain hours, they were free to engage in the protected activities at other times.

in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Rock Against Racism*, 491 U.S. at 791. Thus, the "government's purpose is the controlling consideration." *Id.*; *see also id.*, quoting *Clark*, 468 U.S. at 293 ("Government regulation of expressive activity is content neutral so long as it is 'justified without reference to the content of the regulated speech.'"). Moreover, "a regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* at 791.

Plaintiffs have not alleged that the Mayor enacted this curfew "because of" disagreement with the message they wished to spread. Indeed, the order – which took pains to "recognize" and "empathize" with the message – is quite explicit: the curfew was enacted to ensure public safety and protect property after several nights of vandalism, fires, and looting, and to reduce crowds during the pre-vaccine period of the pandemic. Mayor's Order at 1-2. Nor have plaintiffs argued in their oppositions that the order was directed at the content of any covered expression. *See generally* Opp. This is a content-neutral regulation.

The second question is whether the curfew was narrowly tailored to serve a significant government interest. *Clark*, 468 U.S. at 293. As defendants have noted, "public safety and the prevention of a pandemic are significant governmental interests, and Plaintiff does not

contend otherwise." Reply at 3. Both interests are well-established; "[i]t is a traditional exercise of the States' police powers to protect the health and safety of their citizens." *Hill v. Colorado*, 530 U.S. 703, 715, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000) (internal quotation marks omitted). The curfew was directly tied to these interests: it identified the areas where damage had been sustained ("[v]andals smashed windows in Northeast DC, upper Northwest DC stretching to Georgetown, and caused extensive damage" throughout downtown areas); it noted the continued health threat posed by COVID-19 ("the District continues to be under a declared public health state of emergency due to COVID-19"); and it announced that the Mayor was exercising her "authority to impose a new curfew, in order to protect the safety of persons and property in the District." *See* Mayor's Order at 2. The Mayor added that "[t]he health, safety, and well-being of persons within the District of Columbia are threatened and endangered by the existence of these violent actions." *Id.* Based on this record, and in the absence of any argument from plaintiffs to the contrary, the Court is satisfied that the order served significant governmental interests in health and safety. *See also Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67, 208 L. Ed. 2d 206 (2020) ("Stemming the spread of COVID-19 is unquestionably a compelling interest.").

As for the third prong of the test, plaintiffs argue that the curfew was not narrowly tailored and that it left insufficient alternative channels available for the expression of ideas. Surreply at 4. But time, place, manner restrictions "are not invalid 'simply because there is some

imaginable alternative that might be less burdensome on speech.'" *Rock Against Racism*, 491 U.S. at 797, quoting *United States v. Albertini*, 472 U.S. 675, 689, 105 S. Ct. 2897, 86 L. Ed. 2d 536 (1985). The Court does not have to agree with "the responsible decisionmaker concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted"; "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest, [] the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800 (internal quotation marks and citation omitted); *see also White House Vigil for ERA Comm. v. Clark*, 746 F.2d 1518, 1529, 241 U.S. App. D.C. 201 (D.C. Cir. 1984) ("[I]t is not the province of the court to 'finetune' the regulations so as to institute the single regulatory option the court personally considers most desirable.").

Here, the Court finds that the order was appropriately tailored and not broader than necessary since it was limited to the nighttime hours, and it was put in place for two nights only. Moreover, the efforts to combat looting, arson, and vandalism "would be achieved less effectively absent the regulation." *Rock Against Racism*, 491 U.S. at 799. The behavior the curfew was meant to stem had been prevalent "particularly during later hours of the night." May 31 Order at 1. On May 31, the Mayor attempted a less restrictive option with a shorter time frame, and the June 1 order reported that, unfortunately, the "looting and vandalism," along with "smashed windows," in

neighborhoods ranging from "Georgetown," "the Golden Triangle Business Improvement District, Downtown DC Business Improvement District, and Mount Vernon Triangle Community Improvement District," had continued the night before. Mayor's Order at 2. Thus, the connection between the hours the curfew was in force and the interest it was meant to further – reducing violence and the risk to people and property – is clear.

That justification alone is sufficient to support the order. But while the connection between preventing the spread of COVID-19 and the curfew is more tenuous, the Order did serve that purpose as well. On May 31, the Mayor expressed serious concerns: "[m]any protesters are not observing physical distancing requirements and many protesters are not wearing masks or face coverings, putting the public health at further risk." May 31 Order at 2. The June 1 order reiterated that "the District continues to be under a declared public health state of emergency due to COVID-19, and gatherings of more than ten (10) persons are currently prohibited in order to reduce the spread of the disease and to protect the public health." Mayor's Order at 2.

Plaintiffs point out that curbing gatherings during certain hours was unlikely to defeat the pandemic. *See* Surreply at 5 ("It is laughable, to say the least, that Defendants are now trying to claim that a two day curfew would somehow have solved the covid pandemic."). But plaintiffs' snide hyperbole does not accurately characterize the District's contention, and that is not the standard governing the constitutionality of the curfew in

any event. This Court is only empowered to ask whether the interest "would be achieved less effectively absent the regulation." *Rock Against Racism*, 491 U.S. at 799. And given the "especially broad" latitude given to government officials "to act in areas fraught with medical and scientific uncertainties," *Marshall v. United States*, 414 U.S. 417, 427, 94 S. Ct. 700, 38 L. Ed. 2d 618 (1974), and the fact that the "Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect,'" *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613, 207 L. Ed. 2d 154 (2020), quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 38, 25 S. Ct. 358, 49 L. Ed. 643 (1905), the Mayor's findings suffice to show a nexus between human health and the curfew that provides additional support for its validity.[15]

The Court also finds that the Order was not broader than necessary because there were ample alternative channels available to plaintiffs. The curfews did not contemplate a complete bar on First Amendment activities; the May 31 Order stated that:

> For the past two nights, our police, and firefighters, and members of the public safety team for Washington, DC, along with our federal partners, have been working to make sure people may exercise their First Amendment rights, while not destroying Washington, DC.

15. The Court's review of the orders belies plaintiffs' assertion that protecting people from covid "was never even mentioned in the original reasons for the curfew," Surreply at 5, as COVID-19 was mentioned in both. *See* May 31 Order at 2; Mayor's Order at 2.

> I recognize and empathize with the outrage that people feel following the murder of George Floyd in Minnesota last week. We are grieving hundreds of years of institutional racism – systems that require Black Americans to prove their humanity, just for it to be disregarded.

May 31 Order at 1. Under the June 1 Order, protesters were able to spread their message during the thirteen hours of the day not covered by the curfew, and this is a circumstance that has led other district courts to uphold similar curfews. *See, e.g.*, *In re New York City Policing During Summer 2020 Demonstrations*, 548 F. Supp. 3d 383, 413 (S.D.N.Y. 2021) ("That tailoring left protesters' First Amendment rights intact. Significantly, protesters were not restricted from gathering to exercise their First Amendment rights during the day. They were barred from the streets only between the hours of 11:00 PM on June 1, 2020, until 5:00 AM on June 2, 2020 [], and between the hours of 8:00 PM and 5:00 AM from June 2 until June 7.").

Therefore, the Court finds that the curfew was narrowly tailored to further a significant governmental interest and that Counts VI and VII must be dismissed for failure to state a claim.

B. Count VIII – the Equal Protection Clause

In Count VIII, plaintiffs complain that the officers did "not permit[] plaintiff[s] to peaceably disperse prior to the time that" they were arrested, while "others accused of violating the District of Columbia's curfew laws" were

permitted to disperse. Proposed Am. Compl. ¶ 46. In particular, they assert that "[t]his treatment by the police is, of course[], in marked contrast to the manner in which the individuals who invaded the United States Capitol on January 6, 2021 were treated." Proposed Am. Compl. ¶ 8.

Though the Equal Protection Clause, by its terms, applies to states, "the Equal Protection Clause of the Fourteenth Amendment applies to the District of Columbia through the Due Process Clause of the Fifth Amendment." *Dixon v. Dist. of Columbia*, 666 F.3d 1337, 1339, 399 U.S. App. D.C. 70 (D.C. Cir. 2011). "To establish selective prosecution, [plaintiffs] must prove that (1) [they were] singled out for prosecution from among others similarly situated and (2) that the prosecution was improperly motivated, *i.e.*, based on race, religion or another arbitrary classification." *Branch Ministries v. Rossotti*, 211 F.3d 137, 144, 341 U.S. App. D.C. 166 (D.C. Cir. 2000) (citation, brackets, and internal quotation marks omitted). "This burden is a demanding one because 'in the absence of clear evidence to the contrary, courts presume that government prosecutors have properly discharged their official duties.'" *Id.* (brackets omitted), quoting *United States v. Armstrong*, 517 U.S. 456, 464, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996).

Here, plaintiffs do not support their conclusory allegation with any facts that would give rise to a plausible claim that there were others who were similarly situated to them or that the police officers named as defendants singled them out on an improper basis or even singled them out at all. The complaint contains no facts about

anyone who protested on January 6th, let alone what they did on that date, what curfew was in place on January 6th, whether or when any individuals were observed to be in violation of it, or how they were treated by the officers. The reference to "people who invaded the Capitol" appears to relate to those who were inside the building, and not on a public street or park, and in any event, there is no time frame given for when the protesters were permitted to disperse on that date or where they were located at the time.[16]

Thus, plaintiffs' summary allegations are insufficient to state a plausible claim that they were similarly situated

16. Notwithstanding plaintiffs' breezy assertion that "it is undisputed, based on common knowledge . . . that both the plaintiff[s] and the insurrectionists who invaded the United States Capitol on January 6 were in public at a time when a District of Columbia curfew was in effect[,]" Opp. at 14, this is not "common knowledge" at all. It is a matter of public record that the Capitol was breached in broad daylight around 2:00 p.m., *see, e.g., United States v. Chrestman*, 525 F. Supp. 3d 14, 19 (D.D.C. 2021) ("Shortly after 2:00 p.m., a violent mob of rioters 'forced entry' into the Capitol"), and that the Mayor imposed a twelve-hour curfew that began on January 6 at 6:00 p.m., *after* the Capitol was attacked. *See Mayor Bowser Orders Citywide Curfew Beginning at 6PM Today*, Government of the District of Columbia (Jan. 6, 2021), https://mayor.dc.gov/release/mayor-bowser-orders-citywide-curfew-beginning-6pm-today . So it is not clear that anyone who was simply outside on the Capitol grounds was committing an offense at all, or that anyone who entered the closed building unlawfully and was directed to leave so that it could be secured – and the constitutionally mandated process of certifying the results of the 2020 election could resume – was similarly situated to plaintiffs who were protesting at 11:00 p.m. on a public street hours after a curfew took effect.

to anyone who protested in the middle of the day on January 6th. Moreover, Count VIII is a section 1983 claim brought against the individual arresting officers, and not against the District. And plaintiffs have not alleged that any of the individual defendants were at the Capitol on January 6th, or treated anyone differently at all, much less for an improper purpose. This is especially problematic when, as the D.C. Circuit has emphasized, proof of improper motivation is necessary to plead this claim. *See Branch Ministries*, 211 F.3d at 144.

Plaintiffs' argument in response is that "it has not, at this time, been proven that [the arresting officer] was *not* involved in both incidents." Opp. at 14 (emphasis added). But this turns the inquiry on its head; defendants have no obligation to disprove facts that are not included in the complaint. Defendants have moved to dismiss under Rule 12(b)(6), and the Court is charged with assessing the sufficiency of the facts that plaintiffs have put forward. Because Count VIII is nothing more than a conclusory allegation supported by no facts, it will be dismissed.

C. Proposed Amendments to the Complaint – Overbreadth and Vagueness

Plaintiffs propose to amend their complaints to add that "[t]he curfew law . . . is unconstitutional because it is vague," and that the "curfew law was unconstitutional because it was overbroad." Proposed Am. Compl. ¶¶ 12-13. Plaintiffs seek to incorporate these theories into six counts notwithstanding the fact that only two of them invoke the First Amendment. *See* Proposed Am. Compl.

¶¶ 17 (Count I), 26 (Count III), 31 (Count IV), 34 (Count V), 38 (Count VI), and 42 (Count VII).

The vagueness and overbreadth doctrines are related concepts, and their application depends upon the impact of the particular order or regulation in question on conduct covered by the First Amendment. The Supreme Court has instructed that:

> In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge.

Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 494-95, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982) (footnotes omitted).

A "showing that a law punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep,' suffices to invalidate *all* enforcement of that law, 'until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.'" *Virginia v. Hicks*, 539 U.S. 113, 118-19, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003), quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973) (emphasis in original). The overbreadth doctrine is an "expansive

remedy out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions." *Id.* at 119.

The Mayor's Order did not punish a substantial amount of expressive conduct in relation to its plainly legitimate sweep, and therefore, it was not overbroad. The curfew applied to anyone who was out and about within the defined times; as the Supreme Court put it when considering a trespass statute in *Hicks*, the law would "apply to strollers, loiterers, drug dealers, roller skaters, bird watchers, soccer players, and others not engaged in constitutionally protected conduct—a group that would seemingly far outnumber First Amendment speakers." 539 U.S. at 123. Indeed, the Supreme Court noted, "[r]arely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)." *Id.* at 124; *see also Broadrick*, 413 U.S. at 612 (explaining that the overbreadth doctrine is most often invoked in "cases involving statutes which, by their terms, seek to regulate 'only spoken words.'"). This is not that rare case, as this statute has a wide, plainly legitimate sweep, and it is not primarily directed towards protected speech.

That brings the Court to the vagueness doctrine. "The Due Process Clause protects individuals from laws that are so vague that they cannot be understood with reasonable consistency—whether by the people who must obey the law or the officials charged with applying

it." *Agnew v. Gov't of the Dist. of Columbia*, 920 F.3d 49, 55, 440 U.S. App. D.C. 189 (D.C. Cir. 2019). Laws can be constitutionally infirm and void for vagueness in two ways: if they fail to provide fair notice of what is prohibited, or if the language is so broad that it encourages arbitrary and discriminatory enforcement. *Id.*

Traditionally, to succeed on a facial vagueness challenge, a plaintiff had to show that "the enactment [was] impermissibly vague in all of its applications." *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 735, 423 U.S. App. D.C. 183 (D.C. Cir. 2016), quoting *Hoffman*, 455 U.S. at 495. That rule was grounded in the notion that a "plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Holder v. Humanitarian L. Project*, 561 U.S. 1, 20, 130 S. Ct. 2705, 177 L. Ed. 2d 355 (2010), quoting *Hoffman*, 455 U.S. at 495. The Supreme Court, however, recently expressed some skepticism about that framework, noting that its prior holdings "squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Johnson v. United States*, 576 U.S. 591, 602, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015).

Since that time, the D.C. Circuit has held that the guidance set forth in *Holder* does not apply to a vagueness challenge to a statute premised on the argument that the statute encourages arbitrary and discriminatory enforcement. *See Act Now to Stop War & End Racism Coal. v. Dist. of Columbia*, 846 F.3d 391, 410, 427 U.S.

App. D.C. 296 (D.C. Cir. 2017). "A law invites arbitrary and discriminatory enforcement when 'there are no standards governing the exercise of the discretion' it grants." *Agnew*, 920 F.3d at 55, quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972). "This category includes laws whose application turns on subjective judgments or preferences either of officers or of third parties." *Id.* But a law may "require law enforcement officers to use their discretion without being unconstitutionally vague" because "[e]nforcing criminal laws necessarily 'requires the exercise of some degree of police judgment.'" *Id.*, quoting *Grayned v. City of Rockford*, 408 U.S. 104, 114, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).

Plaintiffs complain about the Order on both grounds. They argue first that the Order is unconstitutionally vague "because it prohibits loitering," and "[t]he term loitering . . . cannot be readily defined and . . . fails to give a person of ordinary intelligence fair notice that his or her contemplated conduct is forbidden by statute." Proposed Am. Compl. ¶ 12.

The mere use of the word "loiter" in the list of prohibited activities does not make the Order unfairly vague. The word itself is not antiquated or obscure; it appears without definition elsewhere in the D.C. Code, *see, e.g.*, D.C. Code § 32-221, and its general meaning is commonly understood. *See, e.g., Loiter*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/loiter (last visited March 28, 2022) (defining the term as "to remain in an area for no obvious reason," "to lag behind,"

or "to delay an activity with idle stops and pauses"). But even if the familiar term is not sufficiently specific to delineate the boundaries of prohibited conduct when standing alone, here it is part of a series, and it gains meaning from that context: "no person . . . shall walk, bike, run, loiter, stand, or motor by car or other mode of transport upon any street, alley, park, or other public place within the District." Mayor's Order at 2; *see Agnew*, 920 F.3d at 56 (emphasizing that words in the incommoding statute should be "read together in context").[17]

A person of ordinary intelligence had fair notice and could easily ascertain that the curfew was a curfew; no person could be in any "public place within the District" during the hours it was in force. If anything, the inclusion of the word "loiter" served to put people on notice that they were prohibited from being outside doing *anything*, even just standing around. As the government puts it, during the times indicated by the curfew, "there was no 'criminal' loitering or standing that could be confused with 'innocent' loitering or standing." Reply at 4.

Plaintiffs also assert that the term loitering is vague "because it fails to create an ascertainable standard of guilt and would encourage arbitrary and erratic arrest

17. The Supreme Court has made clear that "[i]t is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000), quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809, 109 S. Ct. 1500, 103 L. Ed. 2d 891 (1989).

and convictions to the extent that an individual could be arrested simply for behavior which a police officer considered to be an affront to police authority." Proposed Am. Compl. ¶ 12. But when the Supreme Court found a loitering statute to be constitutionally infirm, it made it quite clear that the problem was not the use of the verb: "the vagueness that dooms this [loitering] ordinance is not the product of uncertainty about the normal meaning of 'loitering,' but rather about what loitering is covered by the ordinance and what is not." *City of Chicago v. Morales*, 527 U.S. 41, 57, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999). In that case, the municipality supplied a definition for the term – "to remain in any one place with no apparent purpose" – and the Court concluded that while "the term 'loiter' may have a common and accepted meaning," the ordinance's definition of that term did not. *Id.* at 56. It was the use of the word "apparent" that made the officer's subjective judgment – and not the nature of the conduct – the determining factor, and that was the flaw that facilitated discriminatory enforcement and offended the Constitution. *Id.* at 61-63.

By contrast, the D.C. Mayor's Order was absolute and unequivocal. The plain terms of the ordinance could be enforced against anyone who was in any public place during the designated hours and was not subject to any of the delineated exceptions. Mayor's Order at 2. The list of prohibited activities does not call for any "subjective judgments or preferences either of officers or of third parties," *Agnew*, 920 F.3d at 55; the only question is whether a person is in a public place during the prohibited hours.

Because the order is easily understood and it does not encourage arbitrary or discriminatory enforcement, it is not void for vagueness. For that reason, amending the complaint to add the overbreadth and vagueness theories to multiple counts would be futile.

D. Counts I and IV – False Arrest

Count I asserts a claim of false arrest against the individual officers, *e.g.*, Proposed Am. Compl. at 6 (identifying Luke Choi), and the District of Columbia is named as a defendant under the doctrine of respondeat superior. Proposed Am. Compl. ¶ 19. Count IV, brought via 42 U.S.C. § 1983 and only against individual officers, also asserts that plaintiffs were arrested without probable cause in violation of the Fourth Amendment. Proposed Am. Compl. ¶ 27.[18]

"Common-law and constitutional claims of false arrest are generally analyzed as though they comprise a single cause of action." *Dingle v. Dist. of Columbia*, 571 F. Supp. 2d 87, 95 (D.D.C. 2008), citing *Scott v. Dist. of Columbia*, 101 F.3d 748, 753-54, 322 U.S. App. D.C. 75 (D.C. Cir. 1996). "The elements of a constitutional claim for false arrest are substantially identical to the elements of a common-law false arrest claim." *Scott*, 101 F.3d at 753; *see also Dist. of Columbia v. Minor*, 740 A.2d 523, 531 (D.C. 1999) (false arrest "standard resembles the section 1983 probable cause and qualified immunity standards discussed above

18. The proposed amended complaint labels this paragraph twenty-seven, but it comes after paragraph thirty and the next paragraph is labeled paragraph thirty-one.

(with the added clear articulation of the requirement of good faith)").

"To avoid liability for common law false arrest, a police officer may justify an arrest by demonstrating either (1) that he or she had probable cause to make the arrest or (2) that he or she believed in good faith that the arrest was lawful and that this belief was reasonable." *Minor*, 740 A.2d at 531. Similarly, Fourth Amendment false arrest claims are defeated by a showing of probable cause. *Dellums v. Powell*, 566 F.2d 167, 175, 184 U.S. App. D.C. 275 (D.C. Cir. 1977) ("The focal point of the action is the question whether the arresting officer was justified in ordering the arrest of the plaintiff; if so, the conduct of the arresting officer is privileged and the action fails . . . . Justification can be established by showing that there was probable cause for arrest of the plaintiff on the grounds charged.").

"A police officer has probable cause . . . when the facts available to [the officer] would warrant a person of reasonable caution in the belief that contraband or evidence of a crime is present." *Florida v. Harris*, 568 U.S. 237, 243, 133 S. Ct. 1050, 185 L. Ed. 2d 61 (2013). "Probable cause is more than bare suspicion but is less than beyond a reasonable doubt and, indeed, is less than a preponderance of the evidence." *United States v. Burnett*, 827 F.3d 1108, 1114, 424 U.S. App. D.C. 42 (D.C. Cir. 2016). "Probable cause is an objective standard 'to be met by applying a totality-of-the-circumstances analysis.'" *Id.*, quoting *United States v. Vinton*, 594 F.3d 14, 21, 389 U.S. App. D.C. 199 (D.C. Cir. 2010).

Plaintiffs' initial contention is that there was no legal justification for their arrests because the statute was not only unconstitutional, but so clearly so that the officers could not rely on it in good faith. Opp. at 8-9. But this Court has already found that the Mayor's order was constitutionally valid, so the only remaining question is whether the officers had probable cause to arrest the plaintiffs for violating it at the time. And the answer can be found on the face of the complaints: each complaint specifically alleges that plaintiffs were standing in a public place within the District at 11:00 p.m. on June 1, 2020. *See* Proposed Am. Compl. ¶ 7 ("On or about June 1, 2020, at approximately 11:00 p.m., while at or near the 1400 block of Swann Street, N.W., plaintiff was standing with a group of like-minded citizens protesting the treatment of African American citizens by the police."); *see also* Opp. at 3 ("at approximately 11:00 p.m.," plaintiffs were "standing with a group . . . protesting the treatment of African-American citizens by police" "at or near the 1400 block of Swann Street, N.W . . . . near Lafayette Park in front of the White House.").[19] Plaintiffs' admitted actions at that hour were prohibited by the plain terms of the curfew order, *see* Mayor's Order at 2 ("During the hours of the curfew, no person . . . shall walk, bike, run, loiter, stand, or motor by car . . . upon any street, alley, park, or

19. The Court accepts the assertion in the complaint that plaintiffs were in the 1400 block of Swann Street, NW as true, but it need not accept the geographically inaccurate statement in the opposition that this placed them "near Lafayette Park in front of the White House." Opp. at 3. But whether they were on Swann Street or a mile away at the White House, the plaintiffs were in a public place in the District at a time when the curfew was in force.

other public place within the District."), so the facts before the Court support a finding that there was probable cause for the arrests.

Though the complaints establish that officers observed plaintiffs violating the curfew, plaintiffs also argue that, even if the law was constitutional, reasonable officers could not have concluded from the totality of the circumstances that there was probable cause to believe they had committed a crime because plaintiffs were "not violating the law at the time [they were] arrested, but, rather, trying to comply with it." Opp. at 10; *see also* Proposed Am. Compl. ¶ 8. Plaintiffs maintain, without citing any legal authority, that "[i]n such a case where a police officer, himself, has prevented an individual from complying with the law, plaintiff[s] can not be said to have committed a crime and [the arresting officer] could not have had a good faith belief that plaintiff had committed a crime." Opp. at 10 (emphasis removed). They add:

> Should defendants contend that plaintiff should not have been on the street at all [] or near the time of the curfew, this argument, too, would lack any merit since it would not have been illegal to be on the street prior to the time that the curfew went into effect and, if the law is to be given any common sense application at all, any individual who is on the street at the moment the curfew becomes effective should, at the very least, as a practical matter, be given the opportunity to be able to leave in order to comply with the law.

Opp. at 10-11. Plaintiffs fail to provide any authority for this long-winded proposition either, but even if one were inclined to agree with it, it has absolutely nothing to do with the particular complaints that are the subject of the pending motions to dismiss.

The curfew went into effect at 7:00 p.m., and the plaintiffs allege that they were arrested on the streets of the District four hours later. They do not allege that they were rounded up at or just before 7:00 p.m. – or even five, ten, or even thirty minutes later. They simply allege that they attempted to leave at some unspecified time "prior to" their arrest. This does not negate the presence of probable cause.

Whatever the wisdom of the curfew, or of the decision to enforce it – at least in part – by arresting peaceful protesters, these plaintiffs do not state a claim that they were arrested without probable cause. Therefore, Counts I and IV in these complaints must be dismissed.

E. Counts II, III, and V – Assault and Battery and Excessive Force

Counts II and III are brought against the individual officers and the District and they allege that the officers and the District, as their employer, are liable for both assault and battery for the officers' actions at the time of plaintiffs' arrests. *See* Proposed Am. Compl. ¶¶ 21-29. Count V is brought against the individual officers only under section 1983, and it seeks damages for an alleged violation of the Fourth Amendment because plaintiffs were

arrested with excessive force. *See* Proposed Am. Compl. ¶ 34. Because these claims all implicate the manner in which plaintiffs were arrested, the Court will address them together.

Generally, "[a]n assault is 'an intentional and unlawful attempt or threat, either by words or acts, to do physical harm to the plaintiff.'" *Smith v. Dist. of Columbia.*, 882 A.2d 778, 787 (D.C. 2005). "In contrast, 'a battery is an intentional act that causes a harmful or offensive bodily contact.'" *Id.*

But here, plaintiffs allege that they were assaulted by police officers. "A police officer has a qualified privilege to use reasonable force to effect an arrest, provided that the means employed are not 'in excess of those which the actor reasonably believes to be necessary.'" *Holder v. Dist. of Columbia*, 700 A.2d 738, 741 (D.C. 1976); *see also Dist. of Columbia v. Chinn*, 839 A.2d 701, 706 (D.C. 2003) ("Strictly speaking, a police officer effecting an arrest commits a battery. If the officer does not use force beyond that which the officer reasonably believes is necessary, given the conditions apparent to the officer at the time of the arrest, he is clothed with privilege.").

Excessive force claims under section 1983 and the Fourth Amendment are "properly analyzed under the Fourth Amendment's objective reasonableness standard, which tracks the constitutional text by asking whether the force applied was reasonable." *Johnson v. Dist. of Columbia*, 528 F.3d 969, 973, 381 U.S. App. D.C. 351 (D.C. Cir. 2008) (citations and internal quotation marks

omitted). In asking whether force was "reasonable," the Court considers "such factors as the need for the application of force, the relationship between the need and the amount of force that was used, and the extent of injury inflicted." *Id.* at 974 (citation and brackets omitted). The Court must "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Id.* And even if there is a constitutional intrusion, officers may still be entitled to qualified immunity under the same standard outlined above.

The Court has already determined that plaintiffs' arrests were supported by probable cause; as a result, the assault and battery claims can only proceed if the means employed to effect the arrests were excessive, making both counts overlap substantially with the excessive force claim. But plaintiffs' complaints are wholly lacking in any non-conclusory allegations regarding the arrests.

Paragraph eight in the facts section of the proposed amended complaint asserts that the officers "had no lawful authority" to arrest the plaintiffs, but it does not describe the means that were used to accomplish the arrests or make any assertions whatsoever about any force that was applied at the time. *See* Proposed Am. Compl. ¶ 8.

Paragraph nine then alleges:

> At the time that plaintiff was arrested, plaintiff was transported to the Blue Plain

> Police Academy where plaintiff was held with plaintiff's hands behind plaintiff's back until plaintiff was arraigned and released the next morning. This conduct was clearly excessive because Officer Choi had no legal justification for touching plaintiff and also because plaintiff was held overnight with plaintiff's hands handcuffed behind plaintiff's back.

Proposed Am. Compl. ¶ 9.

Count II – assault – consists of four paragraphs. Proposed paragraph twenty-one incorporates the prior paragraphs, but those are devoid of factual allegations concerning the arrest. *See* Proposed Am. Compl. ¶ 21. Paragraph twenty-two states that "[t]he Defendant police officer assaulted plaintiff by causing plaintiff to reasonably apprehend that plaintiff would be subjected to imminent harmful and offensive contact." Proposed Am. Compl. ¶ 22. Paragraph twenty-three asserts that the District is liable for actions taken by individual officers under the doctrine of respondeat superior. Proposed Am. Compl. ¶ 23. And paragraph twenty-four states "[a]s a result of the false arrest, plaintiff suffered the loss of plaintiff's liberty and experienced severe mental and emotional distress." Proposed Am. Compl. ¶ 24.

Since it is well established that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," *Iqbal*, 556 U.S. at 678, this claim must be dismissed against all defendants.

Count III – battery – also consists of five conclusory paragraphs. Proposed paragraph twenty-five incorporates the prior paragraphs, which do not mention how any plaintiff was handled during their arrests. Proposed Am. Compl. ¶ 25. Paragraph twenty-six asserts that there was "no legal justification for touching plaintiff because the curfew law . . . was vague and overbroad." Proposed Am. Compl. ¶ 26. Paragraph twenty-seven states that the officer "touch[ed] plaintiff without plaintiff's consent." Proposed Am. Compl. ¶ 27. Paragraph twenty-eight asserts that the District is liable for actions taken by individual officers under the doctrine of respondeat superior. Proposed Am. Compl. ¶ 28. And paragraph twenty-nine states that "plaintiff suffered the loss of plaintiff's liberty and Experienced severe mental and emotional distress." Proposed Am. Compl. ¶ 29. Since this Count fails to include a single factual allegation and merely recites the elements of battery, it also must be dismissed against all defendants.[20]

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20. In its reply in support of its motion to dismiss, the District points the Court to *Barham v. Ramsey*, 338 F. Supp. 2d 48, 67 (D.D.C. 2004), *aff'd in part*, 434 F.3d 565, 369 U.S. App. D.C. 146 (D.C. Cir. 2006). In that case, the court observed: "[i]t is undoubtedly reasonable to handcuff arrestees during a mass arrest, especially when they are being transported via an unsecured bus to a holding facility. Moreover, due to the lack of clearly established law in this Circuit or other circuits, the Court cannot find that it would 'be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Id.*, quoting *Groh v. Ramirez*, 540 U.S. 551, 563, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004). Since the complaints here are too conclusory to state a claim, the Court need not determine if it agrees with the *Barham* court on the merits.

Count V suffers from the same defects. Proposed paragraph thirty-three incorporates the previous paragraphs. Proposed Am. Compl. ¶ 33. Paragraph thirty-four states that arrests effectuated with "excessive force" violate the Fourth Amendment, adding that this right was "clearly established [] at the time [that] plaintiff was arrested." Proposed Am. Compl. ¶ 34. At this point, plaintiff repeats a paragraph number; the second proposed paragraph thirty-four states that the officer violated plaintiffs' rights "by using excessive force during the [course] of an arrest and by touching plaintiff without having any legal justification for doing so." Proposed Am. Compl. ¶ 34. And paragraph thirty-five adds that "plaintiff experienced pain and suffering and experienced severe mental and emotional distress" as a result of this arrest. Proposed Am. Compl. ¶ 35. The Court has already found that the arrests were legally justified; since the complaints do not allege any facts to support the notion that officers used more force than was necessary to effectuate the arrests, Count V also must also be dismissed.[21]

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21. The complaint does provide some detail concerning the conditions of plaintiffs' detention overnight. *See* Proposed Am. Compl. ¶ 9 ("At the time that plaintiff was arrested, plaintiff was transported to the Blue Plain Police Academy where plaintiff was held with plaintiff's hands behind plaintiff's back until plaintiff was arraigned and released the next morning."). This is similar to an issue addressed in *Barham*, 338 F. Supp. 2d at 67-68; there, the district court was asked to grant judgment in defendants' favor on a claim alleging that the somewhat different conditions of the plaintiffs' detention – the overnight use of flexi-cuffs to cuff one wrist to the opposite ankle – violated their constitutional rights. The Court ruled in favor of the District, but the issue was presented in a motion for summary judgment, and the court had the benefit of a full record to

Appendix B

CONCLUSION

Plaintiffs have failed to state a claim upon which relief can be granted, and their proposed amendments to the complaint would be futile as plaintiffs still would not state a claim. Therefore, the motions to dismiss will be **GRANTED** and the motions to amend will be **DENIED**.

Separate orders will issue in each individual case.

/s/ Amy Berman Jackson
AMY BERMAN JACKSON
United States District Judge

DATE: March 28, 2022

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consider. That difference is of little moment here, though, because the complaints in these cases contain no such claim; Counts II and III allege assault and battery at the time of arrest and Count V alleges the use of excessive force at the time of arrest, and even the proposed amended complaint does not take on the conditions of the plaintiffs' confinement.

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED SEPTEMBER 13, 2023

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-7047

September Term, 2023

1:21-cv-00907-ABJ

Consolidated with 22-7048, 22-7049,
22-7050, 22-7051, 22-7052, 22-7053

DEVON TINIUS,

Appellant

v.

LUKE CHOI, D.C. METROPOLITAN
POLICE OFFICER, *et al.*,

Appellees

Filed On: September 13, 2023

BEFORE: Srinivasan, Chief Judge; Henderson, Millett, Pillard, Wilkins, Katsas, Rao, Walker, Childs, Pan, and Garcia, Circuit Judges; and Edwards, Senior Circuit Judge

Appendix C

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk