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OPINIONS AND ORDERS

OTHER DOCUMENTS

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT (AUGUST 19, 2022)

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 2, 2022 Decided August 19, 2022

No. 21-7059

FRATERNAL ORDER OF POLICE, METROPOLITAN POLICE DEPARTMENT LABOR COMMITTEE, D.C. POLICE UNION,

Appellant,

v.

DISTRICT OF COLUMBIA AND MURIEL BOWSER, IN HER OFFICIAL CAPACITY AS MAYOR OF THE DISTRICT OF COLUMBIA,

Appellees.

Appeal from the United States District Court for the District of Columbia (No. 1:20-cv-02130)

Before: ROGERS, MILLETT, and KATSAS, Circuit Judges.

Opinion for the Court filed by *Circuit Judge* KATSAS.

KATSAS, *Circuit Judge*:

This case involves federal constitutional challenges to a District of Columbia statute eliminating the right of D.C. police officers to bargain over procedures for disciplining individual officers. The police union contends that the statute violates equal protection principles, the Bill of Attainder Clause, the Contract Clause, and the Fifth Amendment Due Process Clause. We reject all the challenges.

I

The Comprehensive Merit Personnel Act (CMPA) governs collective bargaining by employees of the District of Columbia government. It allows officers of the Metropolitan Police Department, like other D.C. government employees, to unionize and engage in collective bargaining. D.C. Code § 1-617.01(b). They have done so and are represented by the plaintiff in this case, the Fraternal Order of Police, Metropolitan Police Department Labor Committee, D.C. Police Union (FOP).

The CMPA provides that "[a]ll matters shall be deemed negotiable" except for a list of rights reserved to management. D.C. Code § 1-617.08(b). Management rights include the right to "hire, promote, transfer, assign, and retain employees" as well as the right to "suspend, demote, discharge, or take other disciplinary action against employees for cause." *Id.* § 1-617.08(a). The parties have long understood the CMPA to give management full discretion over whether or how to discipline officers who commit wrongdoing, while

allowing for negotiation over the procedures for adjudicating it.

Article 12 of the Metropolitan Police Department's 2017 collective bargaining agreement contained detailed provisions on disciplinary procedure. *See Collective Bargaining Agreement Between the District of Columbia Metropolitan Police Department and the D.C. Police Union*, art. 12 (J.A. 90–95) (2017 Agreement). It also stated that these provisions "shall be incorporated" into successor agreements unless modified by a joint labor-management committee or, in the event of an impasse, an arbitration panel. *Id.* § 2 (J.A. 91).

The 2017 Agreement expired on September 30, 2020. Two months earlier, following the death of George Floyd while in Minneapolis police custody, the D.C. Council passed emergency legislation setting forth a wide range of police reforms. *See* Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020 (Reform Act), D.C. Act 23-336. At issue in this case is section 116 of the Reform Act, which temporarily amends the CMPA to eliminate the right of "sworn law enforcement personnel" to bargain over disciplinary procedure. *See* D.C. Code § 1-617.08(c). The amendment applies to "any collective bargaining agreement entered into with the Fraternal Order of Police/Metropolitan Police Department Labor Committee after September 30, 2020." *Id.*[1]

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[1] As emergency legislation, the original Reform Act expired after 90 days. Since then, the D.C. Council has re-enacted it seven times, with the most recent enactment set to expire on September 26, 2022. *See* D.C. Act 23-336 (July 22, 2020); D.C. Act 23-437 (Oct. 28, 2020); D.C. Law 23-151 (Dec. 3, 2020); D.C. Act 24-76 (May 3, 2021); D.C. Act 24-128 (July 29, 2021); D.C. Law 24-23 (Sept. 3, 2021); D.C. Act 24-370 (Apr. 7, 2022); D.C. Act 24-454 (June

Shortly after section 116 became law, the FOP sued to enjoin its enforcement. The union raised federal constitutional challenges based on equal protection principles, the Bill of Attainder Clause, the Contract Clause, and the Fifth Amendment Due Process Clause.

The district court rejected these claims and dismissed the case without prejudice for failure to state a claim. *Fraternal Ord. of Police, Metro. Police Dep't Lab. Comm., D.C. Police Union v. District of Columbia*, 502 F.Supp.3d 45 (D.D.C. Nov. 4, 2020). The FOP then moved to alter the judgment so that it could amend its complaint. The district court denied the motion as futile.

The FOP appealed both decisions. We have jurisdiction under 28 U.S.C. § 1291.

II

We start with the dismissal order. We review the dismissal of constitutional claims *de novo*. *Patchak v. Jewell*, 828 F.3d 995, 1001 (D.C. Cir. 2016).

A

The FOP first raises an equal-protection challenge. The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The Supreme Court has held that the Fifth Amendment Due Process Clause extends equal-protection principles to actions by the D.C. government. *See Bolling v. Sharpe*, 347 U.S. 497, 498–99 (1954). According to the union, section 116 violates equal

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28, 2022).

protection because it irrationally discriminates between police officers and similarly situated government employees. We disagree.

Legislation that covers some occupations but not others—which neither burdens fundamental rights nor makes suspect classifications—satisfies equal protection if the distinction at issue is "rationally related to a legitimate state interest." *Friedman v. Rogers*, 440 U.S. 1, 17 (1979) (quoting *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)); *see Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955) (optometrists versus opticians). Under rational-basis review, legislation carries "a strong presumption of validity." *Cent. State Univ. v. Am. Ass'n of Univ. Professors*, 526 U.S. 124, 126 (1999) (limitation on bargaining rights for college professors). "Perfection in making the necessary classifications is neither possible nor necessary." *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976) (police retirement age). Absent irrationality, a law does not fail rational-basis review for being over-or under-inclusive. *Nordlinger v. Hahn*, 505 U.S. 1, 16–17 (1992). And because legislative classifications may be grounded in "rational speculation unsupported by evidence or empirical data," a challenger must negate "every conceivable basis" that might support the distinction. *FCC v. Beach Commc'ns*, 508 U.S. 307, 314–15 (1993) (cleaned up).

The FOP has failed to carry that considerable burden. The D.C. Council could rationally have concluded that section 116 furthers a legitimate interest in improving police accountability. By taking disciplinary procedures off the bargaining table, it gave management more flexibility in deciding how to consider allegations of police misconduct. And even if new proce-

dural rules would reduce the protections for accused officers, "equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Beach Commc'ns*, 508 U.S. at 313.

The FOP disputes that police accountability motivated the Council. The union notes that the Reform Act included no legislative findings or explanation supporting the choice to curtail bargaining rights for the police while preserving those rights for other public-sector workers. The union further invokes language in a different provision of the legislation—section 101, which recounts Floyd's death from a neck restraint and then states an intent to ban such restraints in the District of Columbia. *See* D.C. Code § 5-125.01. According to the FOP, this language shows that the Council unfairly sought to impute to D.C. police concerns about misconduct elsewhere.

This argument misunderstands the basics of rational-basis review. Under that level of scrutiny, the legislature's actual motive is "entirely irrelevant"; all that matters is whether there are "plausible reasons" to conclude that the statutory classification furthers a legitimate government interest. *Beach Commc'ns*, 508 U.S. at 313–15 (cleaned up). Likewise, because ordinary legislative choices are not subject to "courtroom fact-finding," the absence of findings, studies, or statements of purpose has "no significance." *Id.* at 315 (cleaned up). In the wake of Floyd's death, the Council could rationally have concluded that the use of neck restraints "presents an unnecessary danger to the public." D.C. Code § 5-125.01. And regardless, it could rationally have concluded that preserving management control over disciplinary procedures would improve police accountability.

The FOP objects that section 116 does not apply to prison guards or protective-services officers. But they differ from police in key respects. Prison guards, for example, operate in a highly regimented and supervised environment. *See* D.C. Code § 24-211.02. Protective-services officers safeguard government agencies and property. *See Cannon v. District of Columbia*, 717 F.3d 200, 203 (D.C. Cir. 2013). Given these differences, the D.C. Council could rationally have concluded that improving accountability for officers who directly police the general public on a daily basis was a more pressing concern. *See Lee Optical*, 348 U.S. at 489 ("Evils in the same field may be of different dimensions and proportions, requiring different remedies."). Likewise, it could rationally have concluded that targeting police discipline was an appropriate first step in improving accountability for all law-enforcement personnel. *Beach Commc'ns*, 508 U.S. at 316 ("the legislature must be allowed leeway to approach a perceived problem incrementally"). And because police officers make up the lion's share of workers that the union claims as similarly situated, it could rationally have concluded that the amendment would be at worst slightly under-inclusive. Under rational-basis review, any of these rationales is good enough.

B

The FOP next contends that section 116 violates the Bill of Attainder Clause, which provides that "[n]o Bill of Attainder or ex post facto Law shall be passed." U.S. Const. art. I, § 9, cl. 3. This is so, according to the union, because the amendment singles out "sworn law enforcement officers" for negative treatment and mentions the FOP by name. *See* D.C. Code § 1-617.08(c)(2). We disagree.

A bill of attainder is a law that "legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977). A law counts as a bill of attainder if it "(1) applies with specificity, and (2) imposes punishment." *Foretich v. United States*, 351 F.3d 1198, 1217 (D.C. Cir. 2003) (cleaned up). We focus on the second element, which turns on this three-part inquiry:

> (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes; and (3) whether the legislative record evinces a[n] . . . intent to punish.

Selective Serv. Sys. v. Minnesota Pub. Int. Rsch. Grp., 468 U.S. 841, 851 (1984) (cleaned up). All three considerations cut against the FOP.

For starters, section 116 lies far from the historical meaning of legislative punishment. In the 1700s, the British Parliament used bills of attainder to sentence specific individuals to death, often as punishment for attempting to overthrow the government. *United States v. Brown*, 381 U.S. 437, 441 (1965). Over time, American courts extended the Bill of Attainder Clause to legislation imposing less severe punishment, like "banishment, imprisonment, denial of the right to vote, or confiscation of property." *Kaspersky Lab, Inc. v. DHS*, 909 F.3d 446, 454 (D.C. Cir. 2018). The change made by section 116—giving management greater control over procedure for disciplining employees—is

not remotely analogous to any of these historically grounded categories.

The second factor turns on whether the statute has "punitive purposes" or "merely burdensome effects." *Kaspersky*, 909 F.3d at 455. It parallels the rational-basis inquiry in some respects, by asking whether the law "reasonably can be said to further nonpunitive legislative purposes," *Nixon*, 433 U.S. at 475–76, and whether it is "overbroad" or "underinclusive," *Kaspersky*, 909 F.3d at 455–56. But we have also described this test as "more exacting" than rational-basis review. *BellSouth Corp. v. FCC*, 144 F.3d 58, 67 (D.C. Cir. 1998). Seeing opportunity in that distinction, the FOP recycles its equal-protection arguments about means-ends scrutiny.

To no avail. Any differences between police and other law enforcement officers fall far short of showing the kind of "grave imbalance" that might suggest a hidden punitive purpose. *Foretich*, 351 F.3d at 1222; *see also Kaspersky*, 909 F.3d at 456 ("the Bill of Attainder Clause does not require narrow tailoring"). Moreover, aspects of section 116 affirmatively undermine any such inference. For one thing, that provision leaves in place significant "protective measures" for police officers, *Foretich*, 351 F.3d at 1222, such as the right not to be "fired, demoted, or suspended without cause," *Burton v. Off. of Emp. Appeals*, 30 A.3d 789, 792 (D.C. 2011); *see* D.C. Code §§ 1-616.51–52. For another, section 116 "lasts only temporarily." *See Kaspersky*, 909 F.3d at 456. And while it has now been reenacted on several occasions, each new iteration has been limited to the 90-day period for emergency legislation or the 225-day period for temporary legislation, thus barring long-term change absent

later legislative action. *See* D.C. Code § 1-204.12(a); *United States v. Alston*, 580 A.2d 587, 590–91 (D.C. 1990). With full view of what section 116 has and has not changed, we cannot infer that the Council acted with an illicit punitive purpose.

The third factor asks whether "the legislative record evinces a[n] . . . intent to punish." *Selective Serv. Sys.*, 468 U.S. at 852. But given the practical and theoretical concerns about using legislative history to divine a legislature's "collective purpose," this factor has weight only if the record shows "unmistakable evidence of punitive intent." *Kaspersky*, 909 F.3d at 463 (quoting *Foretich*, 351 F.3d at 1225).

The FOP offers two arguments to satisfy this heavy burden. First, it again points to section 101, which it says betrays an intent to punish D.C. police officers for the misconduct of officers in Minneapolis. As noted above, section 101 simply expresses the Council's intent to prospectively "ban the use of neck restraints by law enforcement" in the wake of Floyd's death from such a restraint. D.C. Code § 5-125.01. That hardly suggests an intent to punish anyone. Second, the FOP asserts that the Reform Act was passed as emergency legislation without any real emergency. But the Council has significant leeway to pass emergency legislation to protect the public safety or welfare, *see Alston*, 580 A.2d at 590–91, and we deferentially review its decision to do so, *see Barnes v. District of Columbia*, 102 A.3d 1152, 1154 (D.C. 2014). The union makes no serious effort to show that the Council acted beyond its discretion. Again, we can discern no express or hidden intent to punish.

C

The FOP next contends that section 116 violates the Contract Clause, which provides that "[n]o state shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1. The Home Rule Act extends the Contract Clause to the District of Columbia. D.C. Code § 1203.02.

The Contract Clause "applies only to laws with retrospective, not prospective, effect." *Loc. Div. 589, Amalgamated Transit Union v. Mass.*, 666 F.2d 618, 637 (1st Cir. 1981) (Breyer, J.); *see Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827). The initial CMPA amendment had only prospective effect: It became effective in June 2020, and it applied only to collective bargaining agreements entered into after the parties' 2017 Agreement expired on September 30, 2020. D.C. Act 23-336, § 116(c)(2). And the FOP points to no successor agreement allegedly impaired by the later iterations of section 116.

Instead, the union argues that all iterations of section 116 violate the Contract Clause because they impair rights under the expired 2017 Agreement. The FOP points to article 12 of that agreement, which provided that the existing disciplinary procedure "shall be incorporated into any successor" agreement unless changed through a prescribed process. 2017 Agreement, art. 12, § 2 (J.A. 91). According to the union, article 12 made it impermissible for the Council to authorize new rules governing future bargaining over successor agreements.

We disagree. Retrospective laws violate the Contract Clause only if they "substantially" impair existing contract rights. *Sveen v. Melin*, 138 S. Ct. 1815, 1822

(2018). Whether impairment is substantial turns in part on the parties' reasonable expectations. *Id.* Here, the union could not have reasonably expected to insulate itself from legal changes after the 2017 Agreement had expired by its terms. For one thing, the Contract Clause does not give parties the right to contract out of generally applicable laws in perpetuity. *See Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 435 (1934); *Amalgamated Transit*, 666 F.2d at 638 ("It is difficult to believe that the parties to the agreement thought they could bind their successors forever."). Moreover, the D.C. government has heavily regulated collective bargaining for decades, so the union was on notice that future statutory changes were likely. *See Energy Rsrvs. Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983); *Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 38 (1940). When signing the 2017 Agreement, the union could reasonably expect that its terms would last for the duration of the agreement, but not longer.

In addition, we consider whether the law at issue serves a "significant and legitimate public purpose." *Sveen*, 138 S. Ct. at 1822. In many respects, section 116 is like other state laws that have survived past Contract Clause challenges. For one thing, it deals with a "broad, generalized economic or social problem," and it operates in an area "already subject to state regulation." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 249–50 (1978). For another, its changes were neither "immediate" nor "retroactive." *Id.* In sum, section 116's prospectivity, its modest effect on the 2017 Agreement, and its legitimate purposes together doom the challenge here.

D

Finally, the FOP contends that section 116 violates the Due Process Clause of the Fifth Amendment, which provides that "[n]o person shall . . . be deprived of life, liberty, or property without due process of law." U.S. Const. amend. V. The union invokes cases suggesting that laws causing "grave unfairness" violate substantive due process. *Tri Cnty. Indus. v. District of Columbia*, 104 F.3d 455, 459 (D.C. Cir. 1997).

The doctrine of substantive due process is narrow. *See Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach*, 495 F.3d 695, 702 (D.C. Cir. 2007) (en banc). We have found no cases invalidating state action under the grave-unfairness test advocated by the union. And there are several cases rejecting substantive due process claims resting on assertions of grave unfairness.[2] What we have said above is enough to show that section 116 is not gravely unfair: it implicates no fundamental rights, it imposes no punishment, and it has only modest prospective effect on past contractual arrangements. In addition, the union makes no argument that the right to bargain collectively over disciplinary procedures is "deeply rooted in this Nation's history and tradition." *Abigail Alliance*, 495 F.3d at 697 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)).

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[2] *See Zevallos v. Obama*, 793 F.3d 106, 118 (D.C. Cir. 2015); *Elkins v. District of Columbia*, 690 F.3d 554, 561–62 (D.C. Cir. 2012); *Am. Fed'n of Gov't Emps., AFL-CIO, Loc. 446 v. Nicholson*, 475 F.3d 341, 353 (D.C. Cir. 2007); *George Wash. Univ. v. District of Columbia*, 318 F.3d 203, 209 (D.C. Cir. 2003); *Wash. Teachers' Union Local No. 6 v. Bd. of Educ.*, 109 F.3d 774, 781 (D.C. Cir. 1997); *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir. 1988).

III

After the district court rejected the union's claims on the merits, it dismissed the case without prejudice. The FOP sought to amend its complaint, which would have required the court first to amend its judgment under Federal Rule of Civil Procedure 59(e). *See Ciralsky v. CIA*, 355 F.3d 661, 668 (D.C. Cir. 2004). The court refused, concluding that the union's proposed amendments would not cure the flaws in its case. We review *de novo* this determination of futility. *See Osborn v. Visa Inc.*, 797 F.3d 1057, 1062–63 (D.C. Cir. 2015).

Start with the equal protection claim. The proposed amended complaint added allegations that police, prison guards, and protective-services officers all carry firearms and that prison guards are more likely to use force than police. But this minor elaboration hardly negates "every conceivable rationale" for treating police differently. *See Beach Commc'ns*, 508 U.S. at 315. For example, the Council could have concluded that police discipline was more pressing because the police exercise "all the common-law powers of constables" against the population at large, D.C. Code § 5-127.04(a), while prison guards and protective services interact with only a narrow subset of the population.

For the attainder claim, the FOP offers a handful of comments from members of the D.C. Council. The two most noteworthy come from one member who stated that "there are police in the District who are bad actors and who have been going on without the proper penance." J.A. 534. The same member also expressed a desire, after hearing about an officer who

allegedly testified falsely to secure a conviction, "to have some kind of retribution or some kind of justice in this criminal justice system." *Id.*

Neither of these statements suggests that section 116 was punitive. For starters, the statements express no desire to legislatively determine the guilt of individual officers or groups of officers. For another, they express nothing about section 116, as opposed to the many other provisions of the Reform Act. And in any event, "isolated statements" by a single legislator, even if revealing a punitive intent, cannot turn an otherwise valid law into an unconstitutional bill of attainder absent evidence that other legislators shared the desire to punish. *See Kaspersky*, 909 F.3d at 464. The union offers no such evidence here.

The FOP's attempt to rehabilitate its Contract Clause claim also would fail. The proposed complaint alleged that the disciplinary procedures negotiated in article 12 of the 2017 Agreement were important to the union. That may be so, but the union could not reasonably have expected its agreement to forever limit the legislature's power to adjust the scope of collective bargaining.

Finally, the proposed complaint would not salvage the substantive due process claim, for none of its new allegations materially undercuts the analysis we have set forth above.

IV

The district court correctly concluded that the FOP's constitutional claims lack merit.

Affirmed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT (AUGUST 19, 2022)

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-7059

September Term, 2021

Filed August 19, 2022

FRATERNAL ORDER OF POLICE, METROPOLITAN POLICE DEPARTMENT LABOR COMMITTEE, D.C. POLICE UNION,

Appellant,

v.

DISTRICT OF COLUMBIA AND MURIEL BOWSER, IN HER OFFICIAL CAPACITY AS MAYOR OF THE DISTRICT OF COLUMBIA,

Appellees.

Appeal from the United States District Court for the District of Columbia (No. 1:20-cv-02130)

Before: ROGERS, MILLETT, and KATSAS, Circuit Judges.

JUDGEMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED that the judgment of the District Court appealed from in this cause be affirmed, in accordance with the opinion of the court filed herein this date.

PER CURIAM

FOR THE COURT:

Mark J. Langer
Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

Date: August 19, 2022

Opinion for the court filed by Circuit Judge Katsas.

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DENYING MOTION TO AMEND COMPLAINT (MAY 14, 2021)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRATERNAL ORDER OF POLICE, METROPOLITAN POLICE DEPARTMENT LABOR COMMITTEE, D.C. POLICE UNION,

Plaintiff,

v.

DISTRICT OF COLUMBIA. ET AL.,

Defendants.

Civil Action No. 20-2130 (JEB)

Before: James E. BOASBERG, United States District Judge.

MEMORANDUM OPINION

The Union that represents Metropolitan Police Department officers brought this action to enjoin the District of Columbia from changing its law to deprive the Union of the ability to collectively bargain over disciplinary procedures. Late last year, this Court dismissed the case without prejudice, finding that

Plaintiff had failed to state a claim. The Union now asks for another chance. It seeks to add facts to its Complaint that it contends better sustain each of its five counts. Before the Court may entertain that request, however, it must determine whether the Union has satisfied the stringent criteria Federal Rule of Civil Procedure 59(e) imposes to vacate a final judgment. As it plainly has not, the Court will deny Plaintiff's Motion to Alter or Amend the Judgment as well as its Motion to Amend the Complaint.

I. Background

The Court has previously set forth the underlying facts of the case and assumes the reader's familiarity with that Opinion. *See Fraternal Ord. of Police, Metro. Police Dep't Lab. Comm., D.C. Police Union v. D.C.,* 2020 WL 6484312, at *1 (D.D.C. Nov. 4, 2020). In brief, the Union has long negotiated with the City collective-bargaining agreements governing many topics, including disciplinary procedures. *Id.* Following the murder of George Floyd and the protests of "injustice, racism, and police brutality against Black people and other people of color," *id.* (quoting ECF No. 1 (Compl.), ¶ 8), the Council of the District of Columbia passed the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020. *Id.*; *see also* ECF No. 3-4 (Act). Section 116 of the Act provides that in any collective-bargaining agreement that the City and the Union enter into after September 30, 2020, "[a]ll matters pertaining to the discipline of sworn law enforcement personnel shall be retained by management and not be negotiable." *Fraternal Ord. of Police,* 2020 WL 6484312, at *1 (quoting Act at 12).

Plaintiff Fraternal Order of Police, Metropolitan Police Department Labor Committee, D.C. Police Union filed a Complaint alleging that Section 116 deprives its members of numerous constitutional rights and also violates D.C.'s Home Rule Act. *Id.*; *see also* D.C. Code § 1-203.02. Specifically, it asserted that the Act violates the Equal Protection Clause because it discriminatorily restricts the bargaining rights of sworn law-enforcement officers, but no other District employee or labor union, and lacks any rational connection to a legitimate government objective. *See* Compl., ¶¶ 17–24; *Fraternal Ord. of Police,* 2020 WL 6484312, at *2. Next, it alleged that the Act violates the Bill of Attainder Clause by imposing punishment on sworn law-enforcement officers. *See* Compl., ¶¶ 25–30; ECF No. 3-1 (Pl. MSJ) at 13–16; *Fraternal Ord. of Police,* 2020 WL 6484312, at *4. It also pled a Contract Clause claim, contending that the Act is unconstitutional because Article 12 of the Union's CBA covers disciplinary issues and the agreement provides that those measures "shall be incorporated into any successor [CBA]." ECF No. 3-5 (CBA) at 13–14; Compl., ¶¶ 31–38; *Fraternal Ord. of Police,* 2020 WL 6484312, at *1, 7–8. Rounding out its constitutional claims, it alleged that the Act deprives its members of their substantive-due-process rights to bargain and enter into a contract for terms related to discipline in their employment. *See* Compl., ¶¶ 39–44; *Fraternal Ord. of Police,* 2020 WL 6484312, at *9–10. It further asserted that those same deprivations violate D.C.'s Home Rule Act. *See* Compl., ¶¶ 20, 28, 33, 41; *Fraternal Ord. of Police,* 2020 WL 6484312, at *2.

The Union then moved for summary judgment on all claims, *see* ECF No. 3-1 (Pl. MSJ), and the Dis-

trict opposed and added a Cross-Motion to Dismiss or for Summary Judgment. *See* ECF No. 9 (Def. MTD). The Court granted Defendants' Motion to Dismiss, rendering the summary-judgment motions moot. *Fraternal Ord. of Police,* 2020 WL 6484312, at *1, 10. The Union now moves to correct or vacate the judgment and for leave to file an Amended Complaint. *See* ECF No. 17-1 (Motion to Alter Judgment); ECF No. 18 (Motion to Amend).

II. Legal Standard

Rule 60(a) permits a court to "correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record." It "only can be used to make the judgment or record speak the truth and cannot be used to make it say something other than what originally was pronounced." *Fanning v. George Jones Excavating, L.L.C.,* 312 F.R.D. 238, 239 (D.D.C. 2015) (quoting 11 C. Wright & A. Miller, *Federal Practice & Procedure Civil* § 2854 (3d ed. 2012)); *see also* 12 J. Moore et al., *Moore's Federal Practice* § 60.11[1][a] (3d ed. 2015) ("Rule 60(a) applies when the record indicates that the court intended to do one thing but, by virtue of a clerical mistake or oversight, did another.").

Rule 59(e), alternatively, permits the filing of a motion to alter or amend a judgment when such motion is filed within 28 days after the judgment's entry, as it was here. A court must apply a "stringent" standard when evaluating such motions. *Ciralsky v. CIA,* 355 F.3d 661, 673 (D.C. Cir. 2004). "A Rule 59(e) motion is discretionary and need not be granted unless the district court finds that there is an

intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Firestone v. Firestone,* 76 F.3d 1205, 1208 (D.C. Cir. 1996) (internal quotation marks and citation omitted); *see also* Wright & Miller, § 2810.1 (stating that "four basic grounds" for Rule 59(e) motion are "manifest errors of law or fact," "newly discovered or previously unavailable evidence," "prevent[ion of] manifest injustice," and "intervening change in controlling law"). Rule 59(e), moreover, "is not a vehicle to present a new legal theory that was available prior to judgment," *Patton Boggs LLP v. Chevron Corp.,* 683 F.3d 397, 403 (D.C. Cir. 2012), or "to relitigate old matters." *Exxon Shipping Co. v. Baker,* 554 U.S. 471, 485 n.5 (2008) (citation omitted); *see also New LifeCare Hosps. of N. Carolina LLC v. Azar,* 466 F.Supp.3d 124, 129 (D.D.C. 2020). "The strictness with which [Rule 59(e)] motions are viewed is justified by the need to protect both the integrity of the adversarial process in which parties are expected to bring all arguments before the court, and the ability of the parties and others to rely on the finality of judgments." *Mohammadi v. Islamic Republic of Iran,* 947 F.Supp.2d 48, 77 (D.D.C. 2013) (quoting *CFTC v. McGraw-Hill Cos.,* 403 F.Supp.2d 34, 36 (D.D.C. 2005)), *aff'd,* 782 F.3d 9 (D.C. Cir. 2015)

Finally, as to amending the complaint under Rule 15(a), leave to do so ordinarily "shall be freely given when justice so requires." *Ciralsky,* 355 F.3d at 673. "The entry of final judgment, however, is a game changer." *Trudel v. SunTrust Bank,* 325 F.R.D. 23, 25 (D.D.C. 2018), *aff'd,* 924 F.3d 1281 (D.C. Cir. 2019). At that point, "a court cannot permit an amendment unless the plaintiff 'first satisf[ies] Rule 59(e)'s more

stringent standard' for setting aside that judgment." *Ciralsky,* 355 F.3d at 673 (quoting *Firestone,* 76 F.3d at 1208); *see also DeGeorge v. United States,* 521 F.Supp.2d 35, 40–41 (D.D.C. 2007). In other words, "[l]eave to amend a complaint after judgment may be granted only after the Court *vacates* that judgment" under Rule 59(e). *Foster v. Sedgwick Claims Mgmt. Servs., Inc.,* 159 F.Supp.3d 11, 16 (D.D.C. 2015). If the plaintiff does not prevail on her motion to vacate the judgment, that is the end of the matter. The Court must deny the Rule 15(a) motion as moot. *Ciralsky,* 355 F.3d at 673; *Mohammadi,* 947 F.Supp.2d at 78–79; *Dun v. Transamerica Premier Life Ins. Co.,* No. 19 40, 2020 WL 4001472, at *6 (D.D.C. July 15, 2020) (finding motion to amend moot after denying Rule 59(e) motion).

III. Analysis

Because Plaintiff argues that the Court made a clerical error that, if corrected, would allow it to amend its Complaint without vacatur of the judgment, the Court begins there. Finding no such error, it then turns to Plaintiff's Motion to Alter the Judgment and concludes by addressing the Motion to Amend.

A. Clerical Error

The Union invokes Rule 60(a) in asking the Court to clarify or correct its Order dismissing the *case* without prejudice, as it believes the Court intended to dismiss only the *Complaint. See* Motion to Alter Judgment at 4–7; *see also* ECF No. 22 (Alter Judgment Reply) at 1–4. As the Circuit explained in *Ciralsky,* that minor difference has great effect: "[T]he dismissal without prejudice of a *complaint* [is] not

final . . . because the plaintiff is free to amend his pleading and continue the litigation[;] . . . dismissal without prejudice of an *action* (or 'case'), by contrast . . . end[s] th[e] suit . . . [and] is final." 355 F.3d at 666 (internal quotation marks and citations omitted); *see also N. Am. Butterfly Ass'n v. Wolf,* 977 F.3d 1244, 1253 (D.C. Cir. 2020) (explaining same). In the latter scenario, a plaintiff "may be able to re-file because the dismissal was without prejudice," *Ciralsky,* 355 F.3d at 667 (emphasis removed), but cannot amend his complaint without first succeeding on a Rule 59 motion to vacate. *Id.* at 673. From the briefing, it appears that the Union believes that the Court was mistaken or confused about this principle.

The Court was not—indeed, it is well aware of *Ciralsky* and has cited this holding numerous times. *E.g., Citizens for Resp. & Ethics in Washington v. Pompeo,* No. 19-3324, 2020 WL 1667638, at *7 (D.D.C. Apr. 3, 2020) (citing *Ciralsky,* dismissing "only the Complaint and not the entire case," and permitting filing of amended complaint); *Crawford v. Barr,* No. 17-798, 2019 WL 6525652, at *4 (D.D.C. Dec. 4, 2019) (citing *Ciralsky* and dismissing "First Amended Complaint and not the entire case"); *Farrar v. Wilkie,* No. 18-1585, 2019 WL 3037869, at *2 (D.D.C. July 11, 2019) (citing *Ciralsky* for "examining difference between dismissing complaint and entire action" and dismissing "only the Complaint" "[i]nstead of dismissing the entire action"); *Klein v. Mnuchin,* No. 18-769, 2019 WL 108878, at *2 (D.D.C. Jan. 4, 2019) (citing *Ciralsky* and dismissing "only the Complaint"). In granting the District's Motion, the Court wrote—in both the Opinion and the Order—that it was dismissing the *case*. *Fraternal Ord. of Police,* 2020 WL 6484312,

at *1 ("[T]he Court will dismiss the case."); *id.* at *10 ("For the foregoing reasons, the Court dismisses the case without prejudice."); *see also* ECF No. 15 (MTD Order) ("[T]he Court ORDERS that . . . [t]he case is DISMISSED WITHOUT PREJUDICE."). Although it did mention in the "Legal Standard" section that it "dismisse[d] all claims," *Fraternal Ord. of Police,* 2020 WL 6484312, at *2, no confusion could exist given the unequivocal language from both the Opinion and the Order dismissing "the case." In so proceeding, the Court left the Union with the options of moving to alter or amend the judgment or appealing. *See Ciralsky,* 355 F.3d at 666–67, 673. As Plaintiff has chosen door number one, the Court will turn now to that Motion.

B. Motion to Alter or Amend the Judgment

At the outset, the Court notes that Plaintiff has not sought to vacate the judgment in light of an "intervening change of controlling law" or the "availability of new evidence." *Firestone,* 76 F.3d at 1208. Instead, it asserts that the Court "need[s] to correct a clear error [and] prevent manifest injustice." *Id.*; *see also* Motion to Alter Judgment at 8–19; Alter Judgment Reply at 5–9. This argument must clear a high hurdle. *See Leidos, Inc. v. Hellenic Republic,* 881 F.3d 213, 217 (D.C. Cir. 2018) (describing Rule 59(e) grant as "an extraordinary measure"). Granting a Rule 59(e) motion for clear error requires the Court to conclude that the "final judgment [was] 'dead wrong.'" *Mohammadi,* 947 F.Supp.2d at 78 (quoting *Lardner v. FBI,* 875 F.Supp.2d 49, 53 (D.D.C. 2012)). Manifest injustice is likewise an "exceptionally narrow concept." *Slate v. Am. Broad. Cos., Inc.,* 12 F.Supp.3d 30, 35 (D.D.C. 2013). It "does not exist where . . . a

party could have easily avoided the outcome, but instead elected not to act until after a final order had been entered." *Roane v. Gonzales,* 832 F.Supp.2d 61, 64 (D.D.C. 2011) (quoting *Davis v. District of Columbia,* 413 F. App'x 308, 311 (D.C. Cir. 2011)); *see also Slate,* 12 F.Supp.3d at 35. The Union does not come close to satisfying those standards.

1. Clear Error

Plaintiff first argues that the Court committed clear error because it improperly "applied the presumptions given to the legislature under rational-basis review *over* the presumptions granted to [Plaintiff] under Rule 12(b)(6)." Motion to Alter Judgment at 8–9, 13. This was erroneous, according to the Union, because "deference given to legislation under rational-basis review must give way to the presumptions afforded to a plaintiff under Rule 12(b)(6)." *Id.* at 9. This mistake allegedly infected the dismissal of not only the equal-protection count, but also the due-process count (where the Court relied on its equal-protection analysis). Our Circuit, however, disagrees with the Union's proposed interaction of the two standards.

The court upstairs has been clear: "In order to defeat the [defendant's] motion to dismiss their equal protection claim, [plaintiffs] 'must allege facts sufficient to *overcome* the presumption of rationality that applies to government classifications.'" *Dixon v. District of Columbia,* 666 F.3d 1337, 1342 (D.C. Cir. 2011) (emphasis added) (quoting *Wroblewski v. City of Washburn,* 965 F.2d 452, 460 (7th Cir. 1992)). This means that, "[e]ven at the motion to dismiss stage, a plaintiff alleging an equal protection violation must

plead facts that establish that there is not 'any reasonabl[y] conceivable state of facts that could provide a rational basis for the classification.'" *Hettinga v. United States,* 677 F.3d 471, 479 (D.C. Cir. 2012) (quoting *Dumaguin v. Sec'y of Health & Human Servs.,* 28 F.3d 1218, 1222 (D.C. Cir. 1994)). That is the law that the Court applied. *See Fraternal Ord. of Police,* 2020 WL 6484312, at *2 (citing, *inter alia*, *Dixon* and *Hettinga* in setting forth standard).

The very cases Plaintiff cites belie its conclusion about how the rational-basis and motion-to-dismiss standards interact. *See* Motion to Alter Judgment at 12 (citing *Wroblewski* and *Giarratano v. Johnson,* 521 F.3d 298, 304 (4th Cir. 2008)). For example, the Union makes much of the Seventh Circuit's acknowledgement in *Wroblewski* that there is some tension between the rational-basis standard—which "requires the government to win if any set of facts reasonably may be conceived to justify [an act's] classification" of people—and the Rule 12(b)(6) standard—which "requires the plaintiff to prevail if 'relief could be granted under any set of facts that could be proved consistent with the allegations.'" 965 F.2d at 459 (quoting *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984)) (noting that confluence of standards presents a "perplexing situation"); *see also Abigail All. for Better Access to Developmental Drugs v. von Eschenbach,* 495 F.3d 695, 712 n.20 (D.C. Cir. 2007) (citing *Wroblewski* and recognizing possibility of "some tension"); *see also* Motion to Alter Judgment at 12. As the Seventh Circuit clarified, however, that all this means is that a court must "take as true all of the complaint's allegations and reasonable inferences that follow" and "apply the resulting 'facts' in light of

the deferential rational basis standard." *Wroblewski,* 965 F.2d at 460; *accord Giarratano,* 521 F.3d at 304; *Rucci v. Cranberry Twp., Pa.,* 130 F. App'x 572, 575 (3d Cir. 2005); *see also Dixon,* 666 F.3d at 1342. That is how this Court approached the claim.

In support of its equal-protection count, Plaintiff alleged that the Act "gives legal effect to the [private] biases and anti-police rhetoric currently being expressed by citizens" and "serves the illegitimate objective of punishing and discriminating against a class of people that are presently disfavored politically." *Fraternal Ord. of Police,* 2020 WL 6484312, at *3 (second alteration in original) (first quoting Pl. MSJ. at 9–10, then quoting Compl., ¶ 23); *see also id.* (alleging that Act "separated sworn law enforcement personnel into a new, distinct class" "for the sole purpose of discriminating against a disfavored class") (quoting Compl., ¶ 22). In dismissing the count, the Court acknowledged that it was required to "treat the complaint's factual allegations as true" and to "grant plaintiff the benefit of all inferences that can be derived from the facts alleged." *Id.* at *2 (quoting *Sparrow v. United Air Lines, Inc.,* 216 F.3d 1111, 1113 (D.C. Cir. 2000)) (cleaned up). Then, after spending a paragraph reciting Plaintiff's allegations, the Court gave full weight to the pleaded facts and concluded that they did not "negate [the District's] 'plausible reason[]'—namely, accountability—for enacting Section 116." *Id.* at *3 (second alteration in original) (quoting *FCC v. Beach Commc'n, Inc.,* 508 U.S. 307, 315 (1993)). In other words, dismissal was proper because, after accepting the factual allegations as true, there remained a "reasonably conceivable state of facts that could provide a rational basis for the [Act's] classification."

Id. at *2 (quoting *Cannon v. District of Columbia,* 717 F.3d 200, 207 (D.C. Cir. 2013)); *see also Hettinga,* 677 F.3d at 478–79. The Court relied on that same conclusion as an alternate basis for dismissing the due-process count. *Id.* at *9–10 (finding dismissal warranted because "any deprivation of [the alleged] interests is not unconstitutionally arbitrary"). This is not clear error.

Perhaps recognizing that the Court's conclusion relied on a proper application of binding precedent, the Union also argues that the Court should disregard the D.C. Circuit's decision in *Hettinga* and the standard that case set forth for considering dismissal of an equal-protection claim. *See* Motion to Alter Judgment at 12 n.3. According to Plaintiff, the case is "wrongly decided" because it failed to consider Supreme Court cases from the 1930s. *Id.* (discussing *Borden's Farm Products Co. v. Baldwin,* 293 U.S. 194 (1934), and *Nashville, C. & St. L. Ry. v. Walters,* 294 U.S. 405 (1935)). The Court is skeptical of this characterization of *Hettinga,* but no matter: it has no power to ignore binding precedent. *E.g., United States v. Torres,* 115 F.3d 1033, 1036 (D.C. Cir. 1997) ("[D]istrict judges, like panels of this court, are obligated to follow controlling circuit precedent until either [the Circuit], sitting en banc, or the Supreme Court, overrule it.").

Independent of its legal-standard argument—which is primarily relevant to the equal-protection analysis—the Union contends that the Court also erred in its dismissal of the remaining counts because it did not accept the Complaint's factual allegations as true. *See* Motion to Alter Judgment at 14–17. Many of the Union's contentions, however, relate to the Court's disregard of the legal conclusions and unsupported assertions within the Complaint, not of

pleaded facts. Whereas a court must accept alleged facts as true, it need not accept "a legal conclusion couched as a factual allegation," *Trudeau v. FTC,* 456 F.3d 178, 193 (D.C. Cir. 2006) (quoting *Papasan v. Allain,* 478 U.S. 265, 286 (1986)), nor "inferences . . . unsupported by the facts set out in the complaint." *Id.* (quoting *Kowal v. MCI Commc'ns Corp.,* 16 F.3d 1271, 1276 (D.C. Cir. 1994)). Here again, then, the Court finds no clear error.

On its bill-of-attainder count, the Union maintains that the Court did not accept as true its allegation that the Act was "offered as a punishment of sworn law enforcement officers." Motion to Alter Judgment at 14; *see also Fraternal Ord. of Police,* 2020 WL 6484312, at *4 (acknowledging that pleading). Whether the Act imposes punishment, however, is a legal conclusion, for which the Circuit has set forth three factors courts must weigh. *Selective Serv. Sys. v. Minn. Pub. Interest Rsch. Group,* 468 U.S. 841, 852 (1984) (historical test, functional test, and motivational test); *see also Kaspersky Lab, Inc. v. U.S. Dep't of Homeland Sec.,* 909 F.3d 446, 455 (D.C. Cir. 2018). The Court considered the Union's pleading under each of the factors and found none indicative of punishment. *See Fraternal Ord. of Police,* 2020 WL 6484312, at *5–7. As to whether the Act was "offered" as punishment, *see* Motion to Alter Judgment at 14, this allegation was relevant to the functional and motivational tests. On the former, the Court found that the Act's burden was not "so disproportionate that it belies any purported nonpunitive goals." *Fraternal Ord. of Police,* 2020 WL 6484312, at *6 (emphasis removed) (quoting *Kaspersky Lab, Inc.,* 909 F.3d at 455). As to the latter, the Court concluded

that the Complaint did not point to any "unmistakable evidence of punitive intent," as required for the motivational factor by itself to be indicative of punishment. *Id.* at *7 (quoting *Foretich v. United States,* 351 F.3d 1198, 1225 (D.C. Cir. 2003)). The remaining facts that the Union contends that the Court brushed off—such as the lack of studies to support the Act—were not relevant to the analysis. *See* Motion to Alter Judgment at 14; *Fraternal Ord. of Police,* 2020 WL 6484312, at *5–7.

Similarly, on the Contract Clause claim, Plaintiff protests that the Court neglected its allegation that the Act constitutes a "substantial and significant impairment" to its contractual rights. *See* Motion to Alter Judgment at 15 (cleaned up). That, too, is a legal conclusion—one the Court found unsupported. To determine whether "[a] state law has . . . operated as a substantial impairment of a contractual relationship," *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 244 (1978), courts consider "three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Gen. Motors Corp. v. Romein,* 503 U.S. 181, 186 (1992); *see also Fraternal Ord. of Police,* 2020 WL 6484312, at *7 (explaining same). The Court concluded that it had no basis to find a Contract Clause violation of a "pre-existing contract['s] promises about future contracts." *Fraternal Ord. of Police,* 2020 WL 6484312, at *8. It found, moreover, that the Union had not pled facts to support the legal conclusion that "any impairment of the pre-existing CBA is substantial." *Id.*

Finally, on the due-process count, the Union posits that the Court's conclusion that Section 116 of the Act "does not affect the Union members' employment status" contradicts the Complaint's allegation that the Union "ha[d] enjoyed the right to bargain with management concerning the disciplinary process" for over 40 years. *See* Compl., ¶¶ 13, 43; Motion to Alter Judgment at 15. The Court doubts that those statements are in conflict, but even if Plaintiff is correct, the Court dismissed the claim because it found that the Union's interest—the right "to bargain for terms inextricably linked to [members'] employment . . . as well as their property right to employment"—was not "'so rooted in the traditions and conscience of our people as to be ranked as fundamental' for substantive-due-process purposes." *Fraternal Ord. of Police,* 2020 WL 6484312, at *9 (first quoting Pl. MSJ at 19, then quoting *Reno v. Flores,* 507 U.S. 292, 303 (1993)). The Court only relied on the conclusion that Section 116 "does not affect Union members' employment status" as an alternative basis for dismissal. *Id.*

As none of the Union's arguments meets the "stringent" standard Rule 59(e) imposes, its Motion cannot be granted for clear error. *See Mohammadi,* 947 F.Supp.2d at 84 ("mere disagreement does not support a Rule 59(e) motion") (citation omitted) (cleaned up).

2. Manifest Injustice

Plaintiff alternatively asks the Court to grant its Rule 59(e) Motion to prevent manifest injustice. *See* Motion to Alter Judgment at 17. The entry of final judgment, it explains, "upsets the D.C. Police Union's

expectations that it would be permitted to amend its Complaint under Rule 15(a)." *Id.* This is particularly so, Plaintiff argues, because leave to amend the Complaint should ordinarily be "freely granted." *See* Motion to Alter Judgment at 17–18.

This argument lacks the wings to fly. Plaintiff seeks to amend its Complaint to include positions available to it from the outset, but Rule 59(e) is "not a vehicle to present a new legal theory that was available prior to judgment." *Leidos, Inc.,* 881 F.3d at 217 (quoting *Patton Boggs LLP,* 683 F.3d at 403); *accord Exxon Shipping Co.,* 554 U.S. at 485 n.5 ("Rule 59(e) . . . may not be used to . . . raise arguments or present evidence that could have been raised prior to the entry of judgment.") (quoting 11 C. Wright & A Miller, *Federal Practice & Procedure Civil* § 2810.1 (2d ed. 1995)). **While** the standard to amend is lenient, moreover, it is not incorporated within Rule 59(e)'s "stringent" requirements. *Ciralsky,* 353 F.3d at 673 (quoting *Firestone,* 76 F.3d at 1208); *see also Trudel,* 924 F.3d at 1287–88 (rejecting plaintiff's invocation of Rule 15(a) standard as basis to vacate judgment under Rule 59(e)). Plaintiff must first overcome Rule 59(e)'s requirements independently. *E.g., Firestone,* 76 F.3d at 1208; *Trudel,* 924 F.3d at 1288. It has not.

C. Motion for Leave to Amend

As previously noted, "Leave to amend a complaint after judgment may be granted only after the Court *vacates* that judgment." *Foster,* 159 F.Supp.3d at 16. Because Plaintiff does not prevail in that effort, its Motion to Amend must be denied as moot. *E.g., Mohammadi,* 782 F.3d at 18 ("Since the court declined to set aside the judgment under Rule 59(e), it properly

concluded that [plaintiffs'] motion to amend under Rule 15(a) was moot.") (alteration in original) (quoting *Ciralsky,* 355 F.3d at 673); *Dun,* No. 19-40, 2020 WL 4001472, at *6.

Even had the Union managed to obtain vacatur, amendment would still not be warranted. While permission for amendment "should [be] freely give[n] . . . when justice so requires," Fed. R. Civ. P. 15(a)(2), it need not be when amendment would be futile. *Foman v. Davis,* 371 U.S. 178, 182 (1962) (noting "futility of amendment" as permissible basis for denial); *see also Dun,* No. 19-40, 2020 WL 4001472, at *6 (same). In other words, if the new or amended causes of action would still be deficient notwithstanding the proposed amendment, courts need not grant leave. *In re Interbank Funding Corp. Sec. Litig.,* 629 F.3d 213, 218 (D.C. Cir. 2010) ("[A] district court may properly deny a motion to amend if the amended pleading would not survive a motion to dismiss."); *James Madison Ltd. v. Ludwig,* 82 F.3d 1085, 1099 (D.C. Cir. 1996) ("Courts may deny a motion to amend a complaint as futile . . . if the proposed claim would not survive a motion to dismiss."). The Union's additional factual allegations would not change the legal deficiencies of its pleading.

On its equal-protection claim, Plaintiff now seeks to plead that "[t]he District lacks a rational basis for the Act's differential treatment of the D.C. Police Union from other District employees and other armed officers in unions in the District"—"[s]pecifically, officers in the Department of Corrections and the Protective Services Division." ECF No. 18-2 (Am. Compl.), ¶ 31. Although its first Complaint did not contain this specific allegation, Plaintiff raised the

argument in briefing. *See* ECF No. 11 (Pl. Reply) at 3. The Court found that, even if those facts had been properly pled, the count still would not survive a motion to dismiss because MPD officers are not similarly situated to Department of Corrections and Protective Services Division officers. *Fraternal Ord. of Police,* 2020 WL 6484312, at *4. Its conclusion would thus hold true: "MPD officers' unique accountability, scope of powers, and jurisdiction thus support the position that there is a rational basis for the line that Section 116 draws between them and members of those other unions." *Id.*

Plaintiff also wishes to include statements from numerous Councilmembers, which it contends show that the Act is "designed to punish the police." ECF No. 23 (Am. Compl. Reply) at 4. According to the Union, many of these statements indicate that the Act was passed without the benefit of studies or community input, as a "reactionary measure" following the "killings of George Floyd and Breonna Taylor," and in response to concerns of racism in the department. *See* Am. Compl., ¶¶ 9–13, 38. In its prior Opinion, the Court addressed similar pleadings and explained that "[u]nder rational-basis review . . . 'legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.'" *Fraternal Ord. of Police,* 2020 WL 6484312, at *3 (quoting *Beach Commc'n, Inc.,* 508 U.S. at 315); *see also id.* at *6 (noting emergency declaration acknowledges "national movement around racism in policing"). This subset of statements thus would not move the needle.

The Union also points to newly added comments from Councilmember Trayon White, who said that

there are "bad actors" in the department "who have been going on without the proper penance." Am. Compl., ¶¶ 14, 36 (citation omitted) (emphasis removed); *see also* Am. Compl. Reply at 4–5. He also stated that the "thought is . . . to have some kind of retribution or some kind of justice in this criminal justice system." Am. Compl., ¶ 14 (citation omitted) (emphasis removed). The Court questions the relevancy of these statements to the issue before it, as the Union does not dispute that the Councilmember made them in reference to proposed amendments to other sections of the Act (which he later withdrew). *See* ECF No. 21 (Am. Compl. Opp.) at 5; *see also* Am. Compl. Reply at 6–7. In any event, in the context of considering reforms for "bad actors" in the public sector, these comments would not negate the District's "plausible reason" for Section 116: to "enhance the police accountability." *Fraternal Ord. of Police,* 2020 WL 6484312, at *3.

Nor would these statements alter the result on the Union's bill-of-attainder claim. *See* Am. Compl. Reply at 5–12 (contending otherwise). Even considering them, the Act "reasonably can be said to further nonpunitive legislative purposes," and the burden is not "so disproportionate that it belies any purported nonpunitive goals," as considered under the functional test. *Fraternal Ord. of Police,* 2020 WL 6484312, at *5–6 (first quoting *Selective Serv. Sys.,* 468 U.S. at 852, then quoting *Kaspersky Lab, Inc.,* 909 F.3d at 455) (cleaned up). The comments are immaterial to the historical test. *Id.* at *6; *see also Selective Serv. Sys.,* 468 U.S. at 852 (considering "whether the challenged statute falls within the historical meaning of legislative punishment"). Finally, there is no plausible

argument that the statements relevant to Section 116's enactment are "unmistakable evidence of punitive intent," as required for the motivational factor to be determinative on its own. *Foretich,* 351 F.3d at 1225 (citation omitted); *see also Fraternal Ord. of Police,* 2020 WL 6484312, at *7. Again, then, the amendments would be futile.

Quick work can be made of the Contract Clause claim. As mentioned above, the determination of whether a state law has "operated as a substantial impairment of a contractual relationship," *Allied Structural Steel Co.,* 438 U.S. at 244, turns on "three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Gen. Motors Corp.,* 503 U.S. at 186. While the Amended Complaint includes facts to better support this count, the Act—which is prospective, applying to CBAs entered into after the one at issue expired on September 30, 2020, *see* Act at 12; CBA at 1—could impair only the portion of the CBA that mandates that Article 12's disciplinary measures "shall be incorporated into any successor [CBA]." CBA at 14; *see also Fraternal Ord. of Police,* 2020 WL 6484312, at *8. Even given the additional facts, the Court would again decline to conclude that "the Contract Clause constitutionalizes pre-existing contracts' promises about future contracts." *Fraternal Ord. of Police,* 2020 WL 6484312, at *8.

Next, on the substantive-due-process count, Plaintiff's Amended Complaint pleads the same interest that the Court concluded substantive due process does not protect—namely, members' "right to bargain and enter into a contract . . . for terms directly related to discipline

stemming from their employment." Compl., ¶ 42; *see also id.,* ¶ 44; Am. Compl., ¶ 62; *Fraternal Ord. of Police,* 2020 WL 6484312, at *9. As the Court explained in the Opinion, substantive due process shields only a narrow class of interests: those "implicit in the concept of ordered liberty," *Palko v. Connecticut,* 302 U.S. 319, 325 (1937), and "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Reno,* 507 U.S. at 303 (quoting *United States v. Salerno,* 481 U.S. 739, 751 (1987)); *see also Fraternal Ord. of Police,* 2020 WL 6484312, at *9. The Court has already concluded that this interest is neither. *Fraternal Ord. of Police,* 2020 WL 6484312, at *9.

Finally, the Union's Amended Complaint lists only four counts but—like its first Complaint—can be liberally read to state a violation of the District's Home Rule Act. *See* Am. Compl., ¶¶ 33, 47, 57, 64; Compl., ¶¶ 20, 28, 33, 41; *Fraternal Ord. of Police,* 2020 WL 6484312, at *10 (construing Complaint in same manner). Once again, without an anchoring constitutional claim, the Union's Home Rule Act count would be futile. *See* Am. Compl. Reply at 16 (agreeing that Union's Home Rule Act claim "rises and falls with its constitutional claims") (cleaned up).

IV. Conclusion

For the foregoing reasons, the Court will deny Plaintiff's Motion to Alter or Amend the Judgment and its Motion to Amend the Complaint. A separate Order so stating will issue this day.

/s/ James E. Boasberg
United States District Judge

Date: May 14, 2021

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (MAY 14, 2021)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRATERNAL ORDER OF POLICE, METROPOLITAN POLICE DEPARTMENT LABOR COMMITTEE, D.C. POLICE UNION,

Plaintiff,

v.

DISTRICT OF COLUMBIA. ET AL.,

Defendants.

Civil Action No. 20-2130 (JEB)

Before: James E. BOASBERG,
United States District Judge.

For the reasons set forth in the accompanying Memorandum Opinion, the Court ORDERS that:

1. Plaintiff's Motion to Alter or Amend the Judgment is DENIED; and
2. Plaintiff's Motion to Amend the Complaint is DENIED.

/s/ James E. Boasberg
United States District Judge

Date: May 14, 2021

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA GRANTING DEFENDANTS' MOTION TO DISMISS WITHOUT PREJUDICE (NOVEMBER 4, 2020)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRATERNAL ORDER OF POLICE, METROPOLITAN POLICE DEPARTMENT LABOR COMMITTEE, D.C. POLICE UNION,

Plaintiff,

v.

DISTRICT OF COLUMBIA. ET AL.,

Defendants.

Civil Action No. 20-2130 (JEB)

Before: James E. BOASBERG,
United States District Judge.

The death of George Floyd in Minneapolis this past summer galvanized nationwide protests regarding police misconduct. It also precipitated debate in different cities about police accountability and potential avenues of reform. As part of this wave, the District of Columbia in July enacted the Comprehensive Policing and Justice Reform Second Emergency Amend-

ment Act of 2020. Section 116 of the Act reserves to the city all matters pertaining to the discipline of sworn law-enforcement personnel, thereby excluding such matters from negotiation in future collective-bargaining agreements. The Union that represents Metropolitan Police Department officers then filed this suit against the District of Columbia and Mayor Muriel Bowser, alleging that Section 116 violates the Equal Protection, Bill of Attainder, Contract, and Due Process Clauses of the Constitution as well as D.C.'s Home Rule Act. The Union now asks this Court for summary judgment on all claims, while the District cross-moves for dismissal or, in the alternative, for summary judgment. Believing that the city has the better position here, the Court will dismiss the case.

I. Background

The Council of the District of Columbia passed the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020 on an emergency basis, *see* ECF No. 3-4 (Act), in response to this summer's protests of "injustice, racism, and police brutality against Black people and other people of color." ECF No. 1 (Compl.), ¶ 8 (quoting Act at 2); *see also* ECF No. 9-1 (Def. MTD) at 34. Mayor Bowser signed the Act into law on July 22, 2020. *See* Compl., ¶ 7; Act at 1. Among the Act's wide-ranging reforms—from the prohibition on the use of neck restraints by law enforcement to the establishment of a Police Reform Commission, *see* Act at 2–3, 16–17—is Section 116, which amends the "Management rights; matters subject to collective bargaining" section of the District's Comprehensive Merit Personnel Act, *see* D.C. Code § 1-617.08, by adding the following:

> (c)(1) All matters pertaining to the discipline of sworn law enforcement personnel shall be retained by management and not be negotiable.
>
> (2) This subsection shall apply to any collective bargaining agreements entered into with the Fraternal Order of Police/Metropolitan Police Department Labor Committee after September 30, 2020.

Act at 12.

Prior to the enactment of Section 116, and since the passage of the CMPA in 1979, the Union had negotiated with the city collective-bargaining agreements governing, *inter alia*, the disciplinary procedures that apply to members of the Union. *See* Compl., ¶¶ 11, 14. Under the most recent CBA, effective through September 30, 2020, and automatically renewed for one-year periods thereafter, Article 12 covers issues of Discipline. *See* ECF No. 3-5 (CBA) at 1, 13, 41.

Plaintiff Fraternal Order of Police, Metropolitan Police Department Labor Committee, D.C. Police Union filed its Complaint on August 5, 2020, alleging that Section 116 deprives its members of their rights under the Equal Protection, Bill of Attainder, Contract, and Due Process Clauses of the Constitution and violates D.C.'s Home Rule Act. *See* Compl. at 1; D.C. Code § 1-203.02. Bringing its constitutional claims via 42 U.S.C. § 1983, the Union seeks declaratory and injunctive relief "[p]ermanently enjoining the approval, enactment and enforcement of Section 116 of the Act," *id.* at 9–12, 14–16, and has moved for summary judgment on all claims. *See* ECF No. 3-1 (Pl. MSJ). Opposing that Motion, the District filed a

Cross-Motion to Dismiss or for Summary Judgment. The parties' Motions are now ripe for resolution.

II. Legal Standard

Because the Court dismisses all claims, it need only set forth that standard. Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of an action where a complaint fails to "state a claim upon which relief can be granted." In evaluating Defendants' Motion to Dismiss, the Court must "treat the complaint's factual allegations as true . . . and must grant plaintiff 'the benefit of all inferences that can be derived from the facts alleged.'" *Sparrow v. United Air Lines, Inc.,* 216 F.3d 1111, 1113 (D.C. Cir. 2000) (quoting *Schuler v. United States,* 617 F.2d 605, 608 (D.C. Cir. 1979)).

Although "detailed factual allegations" are not necessary to withstand a Rule 12(b)(6) motion, *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007), "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 (2009) (quoting *Twombly,* 550 U.S. at 570). A court need not accept as true, then, "a legal conclusion couched as a factual allegation," *Trudeau v. FTC,* 456 F.3d 178, 193 (D.C. Cir. 2006) (quoting *Papasan v. Allain,* 478 U.S. 265, 286 (1986)), nor "inferences . . . unsupported by the facts set out in the complaint." *Id.* (quoting *Kowal v. MCI Commc'ns Corp.,* 16 F.3d 1271, 1276 (D.C. Cir. 1994)). For a plaintiff to survive a 12(b)(6) motion even if "recovery is very remote and unlikely," *Twombly,* 550 U.S. at 556 (quoting *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974)), the facts alleged in the complaint "must be enough to raise a right to

relief above the speculative level." *Id.* at 555. The Court may consider "the facts alleged in the complaint, any documents either attached to or incorporated in the complaint[,] and matters of which [courts] may take judicial notice." *Equal Emp't Opportunity Comm'n v. St. Francis Xavier Parochial Sch.,* 117 F.3d 621, 624 (D.C. Cir. 1997). Among other matters of public record, the Court here takes notice of the CBA and the Act, even though they are attached to Plaintiff's Motion rather than to its Complaint, as neither party questions their authenticity or admissibility.

III. Analysis

The Union alleges that Section 116's violations of the Constitution are actionable via 42 U.S.C. § 1983, which provides a remedy for the deprivation of such rights. *DuBerry v. District of Columbia,* 824 F.3d 1046, 1051 (D.C. Cir. 2016). It further contends that those same deprivations violate D.C.'s Home Rule Act. The Court thus considers each constitutional claim in turn and concludes with the Home Rule Act challenge.

A. Equal Protection

According to the Union, the Act violates the Equal Protection Clause of the Fifth and Fourteenth Amendments because it discriminatorily restricts the bargaining rights of sworn law-enforcement officers, but no other District employee or labor union, and lacks any rational connection to a legitimate government objective. *See* Compl., ¶¶ 17–24. The District, of course, contends otherwise. *See* Def. MTD at 11.

As set out in the Fourteenth Amendment, the equal-protection clause provides that "no state shall

deny to any person within its jurisdiction equal protection of the laws," and it applies to the District via the Fifth Amendment. *Women Prisoners of D.C. Dep't of Corr. v. D.C.,* 93 F.3d 910, 924 (D.C. Cir. 1996); *see also Jo v. District of Columbia,* 582 F.Supp.2d 51, 60 (D.D.C. 2008) (42 U.S.C. § 1983 allows equal-protection claims against District). "To prevail on an equal-protection claim, the plaintiff must show that the government has treated it differently from a similarly situated party and that the government's explanation for the differing treatment 'does not satisfy the relevant level of scrutiny.'" *Muwekma Ohlone Tribe v. Salazar,* 708 F.3d 209, 215 (D.C. Cir. 2013) (quoting *Settles v. U.S. Parole Comm'n,* 429 F.3d 1098, 1102 (D.C. Cir. 2005)). Here, the parties agree that rational-basis review applies. *See* Compl., ¶ 23; Def. MTD at 14–20. Under that "highly deferential" standard, *Dixon v. District of Columbia,* 666 F.3d 1337, 1342 (D.C. Cir. 2011), courts afford legislative actions a "strong presumption of validity." *Hedgepeth v. Wash. Metro. Area Transit Auth.,* 386 F.3d 1148, 1153, 1156 (D.C. Cir. 2004). The Act thus "must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Cannon v. District of Columbia,* 717 F.3d 200, 207 (D.C. Cir. 2013) (quoting *Hettinga v. United States,* 677 F.3d 471, 478–79 (D.C. Cir. 2012)). The Union "bear[s] the burden of showing that the [Act] [was] 'not a rational means of advancing a legitimate government purpose.'" *Id.* (quoting *Hettinga,* 677 F.3d at 478–79).

The District explains that the Act aims to address "police misconduct" and to "enhance the police accountability and transparency through the implementation

of numerous reforms and best practices," including Section 116. *See* Def. MTD at 16–17 (citing Comprehensive Policing and Justice Reform Second Emergency Declaration Resolution of 2020, PR 23–0872, § 2(b) (D.C. July 7, 2020)); *see also* Comprehensive Policing and Justice Reform Emergency Declaration Resolution of 2020, PR 23-0826, § 2(j) (D.C. June 6, 2020). Ensuring accountability of public employees—and particularly of police officers given their wide-ranging powers—is certainly a legitimate goal, and the Union does not contend otherwise.

Instead, the Union alleges that, "for the sole purpose of discriminating against a disfavored class," the Act "distinguished and separated sworn law enforcement personnel into a new, distinct class, separating them from every other District government employee." Compl., ¶ 22. The Act lacks a rational basis, according to the Union, because it "serves the illegitimate objective of punishing and discriminating against a class of people that are presently disfavored politically," *id.* ¶ 23, and "does nothing more than give legal effect to the [private] biases and anti-police rhetoric currently being expressed by citizens." Pl. MSJ at 9–10 (citing *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 449 (1985)). The lack of "findings, data, studies or research" to support Section 116, the Act's passage on an emergency basis in response to protests, and the Council's references to police misconduct in other jurisdictions (both in the Act and its meetings) show, the Union maintains, the lack of a legitimate interest. *Id.* at 9–10; ECF No. 11 (Pl. Reply) at 6–8.

Under rational-basis review, however, "legislative choice is not subject to courtroom fact-finding and

may be based on rational speculation unsupported by evidence or empirical data," *FCC v. Beach Commc'n., Inc.,* 508 U.S. 307, 315 (1993), and classifications can be, "to some extent[,] both underinclusive and overinclusive" as "perfect[ion] is by no means required." *Vance v. Bradley,* 440 U.S. 93, 108 (1979) (citation omitted); *see also Beach Commc'n, Inc.,* 508 U.S. at 316. The Union's contentions thus do not negate that "plausible reason[]"—namely, accountability—for enacting Section 116. *Beach Commc'n, Inc.,* 508 U.S. at 313–14 (quoting *U.S. R.R. Ret. Bd. v. Fritz,* 449 U.S. 166, 179 (1980)); *id.* at 315 ("[T]hose attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it.") (internal quotation marks and citation omitted); *Hedgepeth,* 386 F.3d at 1156. This case is thus unlike *City of Cleburne,* on which the Union relies to argue that Section 116 merely codifies private biases, as there, "the record [did] not reveal *any* rational basis" for the government's action. *See* 473 U.S. at 448 (emphasis added). To the extent that the Union asks this Court to find that the Council embraced protesters' anti-police rhetoric, the legislative history that the Union cites provides no basis for the Court to do so. *See* Pl. Reply at 6–7.

The Union raises a new argument in its Reply, but even were the Court to consider this late-breaking contention, it would not be viable. Plaintiff there maintains that the District lacks a rational basis for the Act's differential treatment of the Union from "other public employees and unions that engage in the same police-related activity"—namely, the Fraternal Order of Police unions that represent the public employees of the District's Department of Cor-

rections, Housing Authority, Department of General Services' Protective Services Division, and Department of Youth Rehabilitation Services. *Id.* at 3. According to the Union, there is no rational basis to treat the members of these four correctional-and law-enforcement-officer unions differently, as they are "equally responsible for public safety and given extraordinary powers to do their job," *id.* at 4, and can, like MPD officers, "make arrests, . . . carry non-lethal and lethal weapons, and . . . use physical force on the District's citizens." *Id.* at 3.

As the District explains, however, the members of those other unions "do not have the same accountability to the general public, or the same broad jurisdiction, as MPD officers do." ECF No. 14 (Def. Reply) at 4. For example, the Department of Corrections is responsible only for the "safekeeping, care, protection, instruction, and discipline of all persons" detained at specific District facilities, *see* D.C. Code § 24-211.02(a), and the Protective Services Division's special police provide security in a limited area, at District-owned and leased properties. *See* Dep't of Gen. Servs., DGS Protective Services Division, https://bit.ly/3oT5htV (last visited Nov. 2, 2020). MPD officers' unique accountability, scope of powers, and jurisdiction thus support the position that there is a rational basis for the line that Section 116 draws between them and members of those other unions.

The only remaining question, then, is whether Section 116's *means—viz.*, making all matters pertaining to the discipline of sworn law-enforcement personnel non-negotiable in future collective-bargaining agreements—is rationally connected to accountability. The District explains that, "[b]y ensuring that manage-

ment's right to discipline sworn officers is unencumbered by the CBA negotiations, the District can improve police accountability." Def. MTD at 17; *see also id.* at 8 ("Collective bargaining agreements are an essential tool for workers to negotiate and receive fair compensation, benefits, and workplace accommodations, but they should not be used to shield employees from accountability, particularly those employees who have as much power as police officers.") (emphasis removed) (quoting Mendelson Amendment to Comprehensive Policing and Justice Reform Emergency Amendment Act of 2020, B. 23–774, at 2, *https://bit.ly/3jQXd9r* (last visited Nov. 2, 2020)). Further explanation is not required. *See Hedgepeth,* 386 F.3d at 1156 (upholding government action "if there is any reasonably conceivable state of facts that could provide a rational basis") (citation omitted).

The Union again disputes this conclusion. *See* Pl. MSJ at 11–13. Beyond recycling its arguments for why the District lacks a legitimate interest, *see* Pl. Reply at 6–8 (taking issue with lack of studies and Council's discussion of out-of-District police misconduct and deaths), the Union primarily posits that the current disciplinary procedures are more effective than Section 116 will be at ensuring accountability. *Id.* at 8. The Union argues, for example, that the present disciplinary procedures better comport with due process and decrease the likelihood that an officer's discipline will be "overturned based on an error or a due process violation." *Id.* Rational-basis review does not, however, allow this Court to "second-guess [the District's] legislative judgments." *Hedgepeth,* 386 F.3d at 1157. Even if the judiciary were authorized to scrutinize "the wisdom of [the District's] policy

choice," *id.,* the Court does not have the factual basis here to do so. In other words, since the city has not yet promulgated new disciplinary procedures pursuant to Section 116 and neither party has explained how discipline will be addressed going forward, the Court has no way of making an informed comparison.

It will thus dismiss the equal-protection claim.

B. Bill of Attainder

The Union next alleges that the Act violates Article I, section 9, clause 3 of the Constitution, which states, "No Bill of Attainder . . . shall be passed." This rarely litigated provision "prohibits Congress from enacting 'a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.'" *Foretich v. United States,* 351 F.3d 1198, 1216 (D.C. Cir. 2003) (quoting *Nixon v. Adm'r of Gen. Servs.,* 433 U.S. 425, 468 (1977)). The Court assumes, as the parties do, that the clause applies to the District of Columbia. A law violates the clause "if it (1) applies with specificity, and (2) imposes punishment." *Kaspersky Lab, Inc. v. U.S. Dep't of Homeland Sec.,* 909 F.3d 446, 454 (D.C. Cir. 2018) (quoting *Foretich,* 351 F.3d at 1217). The Union asserts that the Act does so "because it specifically targets one group—sworn law enforcement—and it imposes punishment on that group," Pl. MSJ at 13, by "depriv[ing] [it] of a right previously enjoyed, namely the right to collectively bargain with management over discipline." *Id.* at 15; *see also* Compl., ¶ 27, 29. Because the District argues only that the Union's claim fails at the second element, *see* Def. MTD at 21–22, the Court narrows

its attention to whether the Act imposes punishment and concludes that it does not.

Although the traditional conception of this constitutional provision suggests that it applies only to criminal matters, courts have not interpreted the clause so narrowly. *Kaspersky Lab, Inc.,* 909 F.3d at 454. Instead, through the second element of the test, the Constitution concerns itself with punishment more broadly defined. *Id.* At that second element, the sole inquiry is whether the legislation is impermissibly punitive or permissibly burdensome, and courts weigh three factors to make that determination: "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and (3) whether the legislative record 'evinces a congressional intent to punish.'" *Selective Serv. Sys. v. Minn. Pub. Interest Rsch. Group,* 468 U.S. 841, 852 (1984) (quoting *Nixon,* 433 U.S. at 473, 475–76, 478); *see also Kaspersky Lab, Inc.,* 909 F.3d at 455. Each factor is an "independent—though not necessarily decisive—indicator of punitiveness." *Foretich,* 351 F.3d at 1218.

The Union contends that "[t]hrough the Act, the D.C. Council has effectively declared that sworn law enforcement officers in the District are guilty of racism and police brutality, and has stripped away their collective bargaining rights over discipline as punishment." Pl. MSJ at 13–14. While rhetorically stirring, neither that language nor the rest of the Union's Motion explains how the Bill of Attainder tests apply to its claim. Even if this Court considers the new arguments that Plaintiff raises for the first

time in its Reply, *see* Pl. Reply at 9–14, dismissal remains appropriate. Because the Union focuses on the second factor and because "compelling proof on this [factor] may be determinative," *Foretich,* 351 F.3d at 1218, the Court begins its analysis there before turning to the historical and motivational inquiries.

1. The Functional Test

The second factor—"the so-called 'functional test'—invariably appears to be the most important of the three," *id.* (quoting *BellSouth Corp. v. FCC,* 162 F.3d 678, 683 (D.C. Cir. 1998) *(BellSouth II))* (cleaned up), and asks the Court to consider "whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes." *Id.* (quoting *Nixon,* 433 U.S. at 475–76). The Court's task is to "identify the purpose, ascertain the burden, and assess the balance between the two." *Kaspersky Lab, Inc.,* 909 F.3d at 455.

Much like equal-protection analysis, the inquiry begins with the Act's purpose. Notably, however, the bill-of-attainder standard is somewhat "more exacting" than equal protection's rational-basis scrutiny "because it demands purposes that are not merely reasonable but [also] nonpunitive." *BellSouth Corp. v. FCC,* 144 F.3d 58, 67 (D.C. Cir. 1998) *(BellSouth I)* ("Punitive purposes, however rational, don't count."). The non-punitive purpose, according to the District, is "enhanc[ing] police accountability." Comprehensive Policing and Justice Reform Emergency Declaration Resolution of 2020, PR 23-0826, § 2(j) (D.C. June 6, 2020); *see also* Second Emergency Declaration Resolution, PR 23-0872, § 2(b) (incorporating intent of first resolution);

Def. MTD at 34 n.5. In response, beyond reviving arguments that this Court has already addressed about the lack of hearings and evidence, the Act's purpose being "rooted in the demands of protestors," and the Act's exclusion of similarly situated unions, *see* Pl. MSJ at 15–16; Pl. Reply at 10–12; *supra* at 6–7, Plaintiff raises two others. First, it contends that the "Council's intent is to deprive the D.C. Police Union of due process so that police officers can be fired summarily and without any procedural safeguards." Pl. MSJ at 16. But Plaintiff cites nothing to support this claim, and the procedural protections that the District cites and that remain in the D.C. Code indicate otherwise. *See, e.g.,* D.C. Code § 5-1031 (a-1)(1) (90-day time limit on commencement of discipline for MPD officers); *id.* § 1-616.54(c)–(d)(4) (requiring "written notice" that informs employee of "right to respond, orally or in writing, or both" when placed on administrative leave); *id.* § 1-616.51 (requiring issuance of rules to guarantee "[p]rior written notice of grounds" for discipline and "opportunity to be heard").

Separately, the Union attempts to reframe the Act's purpose as solely addressing "use of force" incidents. *See* Pl. Reply at 10–12. It maintains that Section 116 is both underinclusive (in that it addresses disciplinary procedures in the CBA but no other disciplinary procedures required of MPD) and overinclusive (in that it eliminates all disciplinary protections in the CBA when a more tailored approach could address use-of-force incidents alone). *Id.* The Court sees no basis to conclude that use-of-force incidents were the sole concern of Section 116. The Act does reference such incidents outside the District, *see* Act

at 2 ("On May 25, 2020, Minneapolis Police Department officer Derek Chauvin murdered George Floyd by applying a neck restraint to Floyd with his knee for 8 minutes and 46 seconds."), but it does so in the subsection that declares neck restraints to be "lethal and excessive force." *Id.* While the emergency declaration does acknowledge the "national movement around racism in policing [and the] use of force," moreover, it also discusses more generally the "lack of police accountability and transparency" and the "troubling relationship" many District residents have with law enforcement. *See* Def. MTD at 7 (citing Emergency Declaration Resolution, PR23–0826, § 2(j)). The Union's cherry-picked quotes thus do not support narrowing the purpose of the Act to addressing use-of-force incidents alone.

Next, the functional-test inquiry examines the burden of the Act, which is balanced against the purpose. The Circuit has declared that "the question is not whether a burden is proportionate to the objective, but rather whether the burden is *so disproportionate* that it 'belies any purported nonpunitive goals.'" *Kaspersky Lab, Inc.,* 909 F.3d at 455 (emphasis added) (quoting *Foretich,* 351 F.3d at 1222). The Union never states the weight of the burden that Section 116 imposes, but given its contentions that the "burden . . . is grossly disproportionate to [the Act's] purported nonpunitive purpose," Pl. Reply at 12, the Court assumes that the Union believes the burden to be great. The Court cannot agree, however, as the Act prohibits only the Union's negotiation of procedures related to disciplinary decisions in future CBAs, which are agreements that may never even come to fruition. *See* Def. Reply at 11–12; *see* Pl. Reply at 17

(acknowledging that future CBAs are not guaranteed). Even if the burden is somewhat significant, the Court sees no basis to conclude that it is "so disproportionate" to the District's stated goal of enhancing police accountability that the Act itself is punishment. *Kaspersky Lab, Inc.,* 909 F.3d at 455.

2. The Historical Test

The Court must next consider "whether the challenged statute falls within the historical meaning of legislative punishment." *Selective Serv. Sys.,* 468 U.S. at 852. As the Circuit has acknowledged, this inquiry is somewhat redundant to the functional test. *Kaspersky Lab, Inc.,* 909 F.3d at 460. The Court thus "double-check[s] [its] functional-test work by comparing" the Union's deprivation with the "ready checklist of deprivations and disabilities so disproportionately severe and so inappropriate to nonpunitive ends that they unquestionably have been held to fall within the proscription of [the Bill of Attainder Clause]." *Id.* (citing *Nixon,* 433 U.S. at 473). "This checklist includes sentences of death, bills of pains and penalties, and legislative bars to participation in specified employments or professions." *Foretich,* 351 F.3d at 1218.

The Union acknowledges that its claimed deprivation is not on that list. *See* Pl. Reply at 12–13. Rather, it argues that the Bill of Attainder Clause is concerned with "prevent[ing] [the government] from circumventing the clause by cooking up newfangled ways to punish disfavored individuals or groups." *Id.* at 12–13 (quoting *Kaspersky,* 909 F.3d at 454). To the extent that those "newfangled" manners of punishment are the concern of the historical inquiry, rather than

the functional or motivational tests, the Union's argument is not persuasive. Relying on *United States v. Brown,* 381 U.S. 437 (1965), in which the Supreme Court invalidated legislation that prohibited any Communist Party member from serving as an officer of any labor union, the Union argues that the Bill of Attainder Clause concerns itself with "laws that infringe upon a person's employment." Pl. Reply at 13. But Section 116 does not prohibit any Union member from employment; it addresses only the management of disciplinary procedures in the CBA. The Court finds no basis to conclude that the historical inquiry sees those great differences as analogous.

3. The Motivational Test

Finally, the Court "inquire[s] whether the legislative record evinces a [legislative] intent to punish." *Foretich,* 351 F.3d at 1225 (quoting *Nixon,* 433 U.S. at 478). This test relies upon the "legislative history, context or timing of the legislation, or specific aspects of the text or structure of the disputed legislation," to check whether the purpose was "to 'encroach[] on the judicial function of punishing an individual for blameworthy offenses.'" *Id.* (quoting *Nixon,* 433 U.S. at 478) (alteration in original). "Given the obvious constraints on the usefulness of legislative history as an indicator of [the legislative body's] collective purpose, this prong by itself is not determinative in the absence of 'unmistakable evidence of punitive intent.'" *Id.* (quoting *Selective Serv. Sys.,* 468 U.S. at 856 n.15).

The Union points to no such "unmistakable evidence." Rather, it contends that the Act's passage on an "emergency" basis "without regard to data-supported evidence, independent inquiry, or clear-headed

investigation," Pl. Reply at 14, and merely to appease "protestors espousing anti-police rhetoric," *id.* at 6, shows an intent to punish members of the Union. The Union points to statements of various Councilmembers, in which they acknowledged that "issues of brutality" were not prevalent in the District, *id.* at 7 (citing statement of Councilmember Anita Bonds), and explained that they felt a need to respond to "the outpouring of community demands for fundamental changes to the police." *Id.* (citing statement of Councilmember David Grosso). The cited history also indicates that the Act was passed on an emergency basis, given both an outpouring of communications from District residents and the need for "bold action" to "pare . . . back" "violence and racism" in policing. *Id.* (citing statement of Councilmember David Grosso). Standing on their own, these statements do not "evince punitive intent," *Foretich,* 351 F.3d at 1225 (quoting *BellSouth II,* 162 F.3d at 690), or hint at the District's concerns of accountability being a "smoke screen for some invidious purpose." *Kaspersky Lab, Inc.,* 909 F.3d at 459 (quoting *BellSouth II,* 162 F.3d at 689).

Plaintiff's bill-of-attainder challenge, consequently, does not get off the ground.

C. Contract Clause

The Contract Clause "restricts the power of States to disrupt contractual arrangements." *Sveen v. Melin,* 138 S. Ct. 1815, 1821 (2018). It provides that "[n]o state shall . . . pass any . . . Law impairing the Obligation of Contracts," U.S. Const. Art. I, § 10, cl. 1, and it applies to the District. *Washington Teachers' Union Local No. 6, Am. Fed. of Teachers, AFL-CIO v. Bd. of Educ. of D.C.,* 109 F.3d 774, 778 (D.C. Cir. 1997).

Despite the firm language of the constitutional provision, not all laws affecting existing contracts fall within its scope. Indeed, the Clause must leave room for the "'essential attributes of sovereign power,' . . . necessarily reserved by the States to safeguard the welfare of their citizens." *U.S. Trust Co. v. New Jersey,* 431 U.S. 1, 21 (1977) (quoting *Home Bldg. & Loan Ass'n v. Blaisdell,* 290 U.S. 398, 435 (1934)). To determine what interference is permissible, courts employ a two-step test. *Sveen,* 138 S. Ct. at 1821–22. The first inquiry asks "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 244 (1978). At this stage, courts consider "three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Gen. Motors Corp. v. Romein,* 503 U.S. 181, 186 (1992). The substantiality of any impairment turns on "[t]he extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights." *Sveen,* 138 S. Ct. at 1822. If substantiality is found, the second inquiry asks "whether the state law is drawn in an 'appropriate' and 'reasonable' way to advance 'a significant and legitimate public purpose." *Id.* (quoting *Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* 459 U.S. 400, 411–12 (1983)). If, as here, no such impairment is found, courts need not proceed to the second step. *Sveen,* 138 S. Ct. at 1822. Because the parties have a pre-existing relationship—namely, the CBA that was in effect when the Mayor signed the Act, *see* Compl., ¶ 34; *see also Sveen,* 138 S. Ct. at 1822 (considering only "pre-existing

contracts" and "pre-existing contractual arrangements")—their disagreements center around the second and third components of the first inquiry.

In looking at whether the Act impairs the contractual relationship (component two), the Court notes that Section 116 is prospective, applying only to CBAs entered into after the one at issue expired on September 30, 2020. The District thus asks for dismissal, explaining that the "Contract Clause's restriction on impairments of the obligations in contracts only applies to impairments of the obligations in *existing* contracts, not impairments of the obligations in any future contract." Def. MTD at 28 (citing *McCracken v. Hayward,* 43 U.S. (2 How.) 608, 612 (1844), and *Ogden v. Saunders,* 25 U.S. (12 Wheat.) 213, 262 (1827)). That line between existing and prospective contracts is somewhat blurred in this case, however, because the preexisting CBA makes promises about future CBAs. *See* Pl. MSJ at 18–19. Specifically, that CBA guarantees that "[t]he current Article 12"—which covers "Discipline"—"shall be incorporated into any successor [CBA]." CBA at 14. Relying on this provision, the Union asks this Court to conclude that Section 116 "substantially impair[s] the current CBA and all future collective bargaining agreements entered into between the parties." Pl. MSJ at 18–19.

As to any future contracts, it is well established that that Contract Clause only concerns itself with laws that retroactively impair current contract rights. *See, e.g., U.S. Trust Co.,* 431 U.S. at 18 n.15 (finding "States undoubtedly had the power to repeal the covenant prospectively") (citing *Ogden,* 25 U.S. (12 Wheat) 213); *Powers v. New Orleans City,* No. 13 5993, 2014 WL 1366023, at *4 (E.D. La. Apr. 7, 2014)

("[T]he Contract Clause applies only to substantial impairment of existing contracts and not prospective interference with a generalized right to enter into future contracts."), *aff'd sub nom. Powers v. United States,* 783 F.3d 570 (5th Cir. 2015); *Robertson v. Kulongoski,* 359 F.Supp.2d 1094, 1100 (D. Or. 2004) ("The Contract Clause does not prohibit legislation that operates prospectively."), *aff'd,* 466 F.3d 1114 (9th Cir. 2006). The Court thus does not consider the Act's relationship to future CBAs.

The harder question is whether, as the Union contends, the Act impairs the pre-existing CBA. As the District points out, at least one court has been skeptical of and rejected claims that laws with prospective effect impair the perpetual promises of pre-existing contracts. *See* Def. MTD at 30; *Local Div. 589, Amalgamated Transit Union, AFL-CIO, CLC v. Massachusetts,* 666 F.2d 618, 637–38 (1st Cir. 1981)) (finding no Contract Clause problem where state legislation eliminated "provisions of contract that provide for indefinite (or perpetual) extension (or renewal) of the contract's terms"). Notably, the Union cites no caselaw holding that the Contract Clause constitutionalizes pre-existing contracts' promises about future contracts. This Court is thus similarly hesitant to conclude that Section 116 infringes the CBA.

In any event, the Court agrees with the District that the Union has not adequately pled that any impairment of the pre-existing CBA is substantial (component three). The Union contends that the removal of the disciplinary protections from Article 12 meets this requirement, *see* Pl. MSJ at 18; *see also* Compl., ¶ 37, but it has not explained how the new

disciplinary procedures differ from what Article 12 had guaranteed. Nor is the clear that the Union could, given that the District has not yet implemented new procedures or indicated whether any beyond those in the CMPA will be forthcoming. Nor has the Union pled facts to show that the inclusion of Article 12 in future CBAs "substantially induced" it "to enter the contract," *City of El Paso v. Simmons,* 379 U.S. 497, 514 (1965), that Article 12's removal constitutes a "serious disruption" of its expectations, *U.S. Trust Co.,* 431 U.S. at 19 n.17, or that the change is to "an area where the element of reliance [is] vital." *Allied Structural Steel Co.,* 438 U.S. at 246 (finding legislative changes to pension-plan funding substantial).

The Court thus dismisses this claim, too.

D. Substantive Due Process

Deploying the final arrow in its constitutional quiver, the Union takes aim at Section 116 as a deprivation of substantive due process. But dismissal is again appropriate because, as the District notes, that doctrine does not recognize the Union's claimed interests; moreover, any deprivation of those interests is not unconstitutionally arbitrary. *See* Def. MTD at 38–41.

The threshold question in a substantive-due-process analysis is whether the government's action deprives the plaintiff of a constitutionally protected interest—namely, "life, liberty, or property." U.S. Const. amend. V. Substantive due process protects a narrow class of interests: those "implicit in the concept of ordered liberty," *Palko v. Connecticut,* 302 U.S. 319, 325 (1937), and "so rooted in the traditions and conscience of our people as to be ranked as funda-

mental." *Reno v. Flores,* 507 U.S. 292, 303 (1993) (quoting *United States v. Salerno,* 481 U.S. 739, 751 (1987)). Even if a plaintiff pleads that a government action affects a protected interest, substantive due process merely guards against "government power arbitrarily and oppressively exercised," *Jefferson v. Harris,* 285 F.Supp.3d 173, 184 (D.D.C. 2018) (quoting *County of Sacramento v. Lewis,* 523 U.S. 833, 846 (1998)), and "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *County of Sacramento,* 523 U.S. at 846 (quoting *Collins v. City of Harker Heights,* 503 U.S. 115, 129 (1992)). Indeed, a plaintiff must establish that the defendant's conduct "shock[s] the contemporary conscience." *Harvey v. District of Columbia,* 798 F.3d 1042, 1049 (D.C. Cir. 2015) (quoting *Estate of Phillips v. District of Columbia,* 455 F.3d 397, 403 (D.C. Cir. 2006)). Given this narrow scope of the doctrine, courts are generally "reluctant to expand the concept of substantive due process," as there are few clear "guideposts for responsible decisionmaking." *Collins,* 503 U.S. at 125. The Court is similarly unwilling to do so in this case.

The Union contends that Section 116 "violates the substantive due process rights of the D.C. Police Union and its members to bargain for terms inextricably linked to their employment . . . as well as their property right to employment. . . . " Pl. MSJ at 19; *see also* Compl., ¶¶ 42, 44. In briefing, it clarifies its "right to bargain" claim: the CMPA "creates a property interest" that Section 116 infringes by removing the collectively-bargained-for procedural safeguards. *See* Pl. MSJ at 20 (citing *Fonville v. District of Columbia,* 448 F.Supp.2d 21, 26–27 (D.D.C. 2006)) (discussing

procedural due process). Plaintiff cites no caselaw to show that this right to collectively-bargained-for disciplinary procedures is "so rooted in the traditions and conscience of our people as to be ranked as fundamental" for substantive-due-process purposes. *Cf. Range v. Douglas,* 763 F.3d 573, 588 n.6 (6th Cir. 2014) (explaining that substantive due process protects "narrower" class of interests than procedural, and "[m]ost state-created rights that qualify for procedural due process protections do not rise to the level of substantive due process protection"); *Local 342, Long Island Pub. Serv. Employees, UMD, ILA, AFL-CIO v. Town Bd. of Huntington,* 31 F.3d 1191, 1196 (2d Cir. 1994) (finding "simple, state-law contractual rights, without more, [not] worthy of substantive due process protection" because they are "not the type of important interests" that have been recognized) (internal citation and quotation marks omitted). Even assuming substantive due process recognizes the right to government employment and continued employment as fundamental interests, Section 116 does not affect Union members' employment status. *See* Def. MTD at 38. Rather, it simply removes "matters pertaining to the discipline of sworn law enforcement personnel" from the pile of bargaining chips. *See* Act at 12.

To the extent that the Union argues that there is "no rational connection" between the District's action and its asserted government interest, the Union has "fallen far short of meeting its burden of demonstrating" as much. *Wash. Teachers' Union Local No. 6, American Fed. of Teachers, AFL-CIO v. Bd. of Educ. of the D.C.,* 109 F.3d 774, 781 (D.C. Cir. 1997) (quoting *Harran Indep. Sch. Dist. v. Martin,*

440 U.S. 194, 198 (1979)). As this Court explained in considering the Union's equal-protection challenge, its claim that Section 116 lacks a rational basis in untenable. *See supra* at 5–9. Dismissal is thus warranted.

E. Home Rule Act

Finally, while the Union's Complaint lists just four counts, it can liberally be read to also state a violation of the District's Home Rule Act. *See* Compl., ¶¶ 20, 28, 33, 41. Section 1 203.02 of that Act provides that "the legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution. . . . " The Court dismisses this claim because the Union's Home Rule Act contentions rise and fall with its constitutional claims. *See* Pl. MSJ at 21 (contending that "the constitutional violations" "also constitute violations of the D.C. Home Rule Act").

IV. Conclusion

For the foregoing reasons, the Court dismisses the case without prejudice. It also denies the Union's Motion for Summary Judgment. A contemporaneous Order to that effect will issue this day.

/s/ James E. Boasberg
United States District Judge

Date: November 4, 2020

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (NOVEMBER 4, 2020)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRATERNAL ORDER OF POLICE,
METROPOLITAN POLICE DEPARTMENT
LABOR COMMITTEE, D.C. POLICE UNION,

Plaintiff,

v.

DISTRICT OF COLUMBIA. ET AL.,

Defendants.

Civil Action No. 20-2130 (JEB)

Before: James E. BOASBERG,
United States District Judge.

For the reasons set forth in the accompanying Memorandum Opinion, the Court ORDERS that:

1. Defendants' Motion to Dismiss is GRANTED;
2. Plaintiff's Motion for Summary Judgment is DENIED; and
3. The case is DISMISSED WITHOUT PREJUDICE.

/s/ James E. Boasberg
United States District Judge

Date: November 4, 2020

D.C. ACT 23-336.
COMPREHENSIVE POLICING AND JUSTICE REFORM SECOND EMERGENCY AMENDMENT ACT OF 2020

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

July 22, 2020

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

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

Title I. Improving Police Accountability and Transparency

Subtitle A. Prohibiting the Use of Neck Restraints

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

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

"Sec. 2. The Council of the District of Columbia finds and declares that law enforcement and special police officer use of neck restraints constitutes the use of lethal and excessive force. "This force presents an unnecessary danger to

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

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

(1) Paragraph (1) is repealed.

(2) Paragraph (2) is repealed.

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

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

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

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

"(a) It shall be unlawful for:

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

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

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

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

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

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

Subtitle B. Improving Access to Body-Worn Camera Video Recordings

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

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

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

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

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

"(B) The Mayor:

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

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

mitted the officer-involved death or serious use of force; and

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

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

"(2)

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

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

"(ii) For a body-worn camera recording of a serious use of force, the individual against whom the serious use of force was used, or if the individual is a minor

or unable to consent, the individual's next of kin.

"(B)

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

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

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

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

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

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

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

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

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

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

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

(a) Section 3900 is amended as follows:

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

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

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

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

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

"(A) Within 5 business days after an officer-involved death or the serious

use of force, publicly release the names and BWC recordings of all officers who committed the officer-involved death or serious use of force; and

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

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

"(b)

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

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

"(B) For a BWC recording of a serious use of force, the individual against whom the serious use of force was used, or if the

individual is a minor or is unable to consent, the individual's next of kin.

"(2)

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

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

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

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

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

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

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

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

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

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

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

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

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

Subtitle C. Office of Police Complaints Reforms

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

(a) Section 5(a) (D.C. Official Code § 5-1104(a)) is amended by striking the phrase "There is established a Police Complaints Board ("Board"). The Board shall be composed of 5 members, one of whom shall be a member of the MPD, and 4 of

whom shall have no current affiliation with any law enforcement agency." and inserting the phrase "There is established a Police Complaints Board ("Board"). The Board shall be composed of 9 members, which shall include one member from each Ward and one at-large member, none of whom, after the expiration of the term of the currently serving member of the MPD, shall be affiliated with any law enforcement agency." in its place.

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

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

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

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

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

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

"(A) Intervene in or subsequently report any use of force incident in which the subject police officer observed another law enforcement officer, including an MPD

officer, utilizing excessive force or engaging in any type of misconduct, pursuant to MPD General Order 901.07, its successor directive, or a similar local or federal directive; or

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

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

Subtitle D. Use of Force Review Board Membership Expansion

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

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

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

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

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

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

(4) The Commanding Official, Metropolitan Police Academy;

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

(6) The Commanding Official, Recruiting Division;

(7) The Commanding Official, Court Liaison Division;

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

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

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

(C) One District resident community member;

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

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

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

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

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

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

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

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

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

Subtitle E. Anti-Mask Law Repeal

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

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

(b) Section 5(b) (D.C. Official Code § 22-3312.04(b)) is amended by striking the phrase "or section 4

shall be" and inserting the phrase "shall be" in its place.

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

Subtitle F. Limitations on Consent Searches

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

"Sec. 23-526. Limitations on consent searches.

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

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

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

"(B) Advise the subject that:

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

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

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

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

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

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

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

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

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

"(c)

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

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

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

Subtitle G. Mandatory Continuing Education Expansion; Reconstituting the Police Officers Standards and Training Board

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"(A) Oversight of law enforcement;

"(B) Juvenile justice reform;

"(C) Criminal defense;

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

"(E) Violence prevention or intervention.".

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

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

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

Subtitle H. Identification of MPD Officers During First Amendment Assemblies as Local Law Enforcement

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

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

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

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

Subtitle I. Preserving the Right to Jury Trial

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

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

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

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

"(C)

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

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

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

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

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

Subtitle J. Repeal of Failure to Arrest Crime

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

Subtitle K. Amending Minimum Standards for Police Officers

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

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

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

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

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

Subtitle L. Police Accountability and Collective Bargaining Agreements

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

"(c)

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

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

Subtitle M. Officer Discipline Reforms

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

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

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

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

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

legal holidays, after the date that the Metropolitan Police Department had notice of the act or occurrence allegedly constituting cause.".

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

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

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

Subtitle N. Use of Force Reforms

Sec. 119. Use of deadly force.

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

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

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

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

(A) A substantial risk of death;

(B) Protracted and obvious disfigurement;

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

(D) Protracted loss of consciousness.

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

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

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

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

(c) A trier of fact shall consider:

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

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

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

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

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

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

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

Subtitle O. Restrictions on the Purchase and Use of Military Weaponry

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

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

(1) Ammunition of .50 caliber or higher;

(2) Armed or armored aircraft or vehicles;

(3) Bayonets;

(4) Explosives or pyrotechnics, including grenades;

(5) Firearm mufflers or silencers;

(6) Firearms of .50 caliber or higher;

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

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

(b)

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

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

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

Subtitle P. Limitations on the Use of Internationally Banned Chemical Weapons, Riot Gear, and Less-Lethal Projectiles

Sec. 121. The First Amendment Assemblies Act of 2004, effective April 13, 2005 (D.C. Law 15-352;

D.C. Official Code § 5-331.01 et seq.), is amended as follows:

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

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

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

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

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

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

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

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

"(a)

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

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

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

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

"(b)

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

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

"(c)

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

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

Subtitle Q. Police Reform Commission

Sec. 122. Police Reform Commission.

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

(b)

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

(A) Non-law enforcement District government agencies;

(B) The Office of the Attorney General for the District of Columbia;

(C) Criminal and juvenile justice reform organizations;

(D) Black Lives Matter DC;

(E) Educational institutions;

(F) Parent-led advocacy organizations;

(G) Student-or youth-led advocacy organizations;

(H) Returning citizen organizations;

(I) Victim services organizations;

(J) Social services organizations;

(K) Mental and behavioral health organizations;

(L) Small businesses;

(M) Faith-based organizations; and

(N) Advisory Neighborhood Commissions.

(2) The Chairman of the Council shall:

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

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

(c)

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

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

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

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

(C) Police discipline;

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

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

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

Subtitle R. Metro Transit Police Department Oversight and Accountability

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

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

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

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

"(i)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"(v) Any in-custody death.

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

"(A) Harassment;

"(B) Use of force;

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

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

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

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

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

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

"(13) The Police Complaints Board shall have the authority to dismiss, conciliate, mediate, investigate, adjudicate, or refer for further action to the Metro Transit Police a complaint

received under paragraph (10) of this subsection.

"(14)

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

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

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

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

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

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

"(19) When, in the determination of the Police Complaints Board, there is reason to believe that the misconduct alleged in a complaint or disclosed by an investigation of a complaint

may be criminal in nature, the Police Complaints Board shall refer the matter to the appropriate authorities for possible criminal prosecution, along with a copy of all of the Police Complaints Board's files relevant to the matter being referred; provided, that the Police Complaints Board shall make a record of each referral, and ascertain and record the disposition of each matter referred and, if the appropriate authorities decline in writing to prosecute, the Police Complaints Board shall resume its processing of the complaint.

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

Title II. Building Safe and Just Communities

Subtitle A. Restore the Vote

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

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

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

(2) Subparagraph (D) is repealed.

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

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

"(A) A voter registration form;

"(B) A voter guide;

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

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

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

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

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

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

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

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

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

Title III. Repeals; Applicability; Fiscal Impact Statement; Effective Date

Sec. 301. Repeals.

The Comprehensive Policing and Justice Reform Emergency Amendment Act of 2020, passed on

emergency basis on June 9, 2020 (Enrolled version of Bill 23-774), is repealed.

Sec. 302. Applicability.

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

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

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

Sec. 303. Fiscal impact statement.

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

Sec. 304. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), and shall remain in effect for no longer than 90 days, as provided for emergency acts of the Council of the District of Columbia in section 412(a) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 788; D.C. Official Code § 1-204.12(a)).

/s/ Phil Mendelson
Chairman
Council of the District of Columbia

/s/ Muriel Bowser
Mayor
District of Columbia

Approved
July 22, 2020

COLLECTIVE BARGAINING AGREEMENT, RELEVANT SECTIONS

COLLECTIVE BARGAINING AGREEMENT

BETWEEN

THE DISTRICT OF COLUMBIA GOVERNMENT
METROPOLITAN POLICE DEPARTMENT

AND THE

D.C. POLICE UNION (FRATERNAL
ORDER OF POLICE/ METROPOLITAN POLICE
DEPARTMENT (FOP/MPD) LABOR COMMITTEE)

(COMPENSATION UNIT 3)

EFFECTIVE
October 1, 2017 through September 30, 2020

[. . .]

ARTICLE 11
USE OF DEPARTMENT FACILITIES

Section 1-Union Meetings

Union representatives may request the use of facilities occupied by the Metropolitan Police Department for Union meetings during-non-working hours. Requests for the use of space must be made to the respective Commanding Officer. The Union agrees that reasonable care will be exercised in using the space provided and that the area will be left in a clean and orderly condition.

Section 2-Bulletin Boards

The Department agrees to furnish suitable space on Departmental bulletin boards for display of Union materials. All notices posted by the Union shall be signed by a Union official. The contents of the material must be related to the activities of the labor organization concerned, and may not contain personal attacks. A copy of each notice shall be sent to the Chief of Police or the Chief's designee. If material is posted that management believes violates this section the Commanding Officer will notify the Chief Steward. The Chief Steward will remove the material if he agrees there is an improper posting. The Chairman and the Chief of Police or the Chief's designee will resolve any disputes regarding improper posting. The Chief of Police shall notify the Union of the identity of the designee on January 1st of each year.

Section 3-Office Space

The Department agrees to furnish to the Union a suitable location in each District or at Department Headquarters which will normally be available to the Union in connection with the handling of employee grievances and complaints. If that area, however, is not then available, a like area will be made available.

Section 4

With specific approval by the Commanding Officer, the Union may utilize Departmental mailboxes, teletype, and electronic mail.

ARTICLE 12
DISCIPLINE

Section 1

The parties have agreed to form a Joint Labor-Management Committee ("Committee"), with no more than five (5) members per side, to discuss possible revisions to Article 12 (Discipline) of the parties' existing Collective Bargaining Agreement. Each side shall designate one (1) member as its committee chairperson who shall have the authority to formally make and agree to proposals. Upon agreement by the Committee's committee chairpersons, or, absent such agreement, the conclusion of the process set forth herein, the revised article shall be incorporated into the parties' Collective Bargaining Agreement.

Section 2

The current Article 12, as set forth in the parties' existing collective Bargaining Agreement, shall remain in full force and effect during the Committee's delib-

erations and shall be incorporated into any successor Collective Bargaining Agreement until such time as the Committee reaches agreement on any revisions to Article 12 or the process described herein is completed.

Section 3

The Committee shall have six (6) months to complete its negotiations; however, this deadline may be extended by mutual agreement of the committee chairs.

Section 4

If the Committee has not reached agreement on any revisions to Article 12 at the conclusion of this period, the parties shall proceed to mediation before a mediator selected by the FMCS for a period of 30 days, and this period of time may be extended by mutual agreement of the Committee Chairs.

Section 5

If the Committee fails to reach agreement by the conclusion of mediation, the parties shall proceed to impasse arbitration before a three—person panel, and this panel shall be appointed in the following manner: The Committee Chairs shall each appoint an arbitrator of its choice to the panel, and the third panel member shall be selected by mutual agreement of the Committee Chairs or by alternating the striking of names from a seven (7) person list provided by FMCS. In issuing its award at the conclusion of the arbitration, the arbitration panel shall be required to select one of the parties' final offers regarding Article 12 in its entirety.

The current language of Article 12 is listed below:

Section 1

1

(a) The parties agree that discipline is a management right that has not been abridged except as specifically outlined in this article.

(b.) Discipline may be imposed only for cause, as authorized in D.C. Official Code § 1-616.51.

2. Any employee who is engaged in either investigating or proposing corrective or adverse action on behalf of management shall maintain the appropriate confidentiality of an investigation.

Section 2

1. Corrective Action-A PD 750, a letter of prejudice, and an official reprimand.

2. Adverse Action-any fine, suspension, removal from service, or any reduction in rank or pay of an employee who is not serving a probationary period.

Section 3

An employee against whom corrective action is taken has the right to contest the action through Step 2 of the Grievance Procedure, beginning at the appropriate step and such action will not be subject to further appeal nor arbitration.

Section 4

The Chief of Police or his/her designee shall take adverse action after providing the employee with written notification of the charges and proposed action and after providing the employee with fifteen (15) business days to submit a written response to the charges. In the event the Department proposes termination, the employee shall have twenty-one (21) business days to submit his/her response. In his/her response, the employee shall also indicate whether he/she desires a Departmental hearing.

Section 5

If the employee elects to have a Departmental hearing, he/she shall be entitled to be represented by an attorney licensed to practice in the District of Columbia or by a Union representative.

Section 6

The employee shall be given a written decision and the reasons therefore no later than fifty-five (55) business days after the date the employee is notified in writing of the charges or the date the employee elects to have a departmental hearing, where applicable, except that:

(a) When an employee requests and is granted a postponement or continuance of a scheduled hearing, the fifty-five (55) business day time limit shall be extended by the length of the delay or continuance, as well as the number of days consumed by the hearing;

(b) When the employee requests and is granted an extension of the time allotted for answering the notice of proposed action, the fifty-five (55) business day time limit shall be extended by the length of the extension of time; and

(c) When an employee or management requests a 30-business day automatic extension, the fifty (55) business day time limit shall be extended by that 30-business day extension of time.

Section 7

The employee shall be given fifteen (15) business days advance notice in writing prior to the taking of adverse action. Upon receipt of this notice, the employee may within ten (10) business days, appeal the action to the Chief of Police. The Chief of Police shall respond to the employee's appeal within fifteen (15) business days. In cases in which a timely appeal is filed, the adverse action shall not be taken until the Chief of Police has replied to the appeal. The reply of the Chief of Police will be the final agency action on the adverse action.

Section 8

Upon receipt of the decision of the Chief of Police on Adverse Actions, the employee may appeal to arbitration as provided in Article 19. Employees must use the negotiated grievance procedure (NGP) for a suspension of less than ten (10) days. In cases where a Departmental hearing has been held, any further appeal shall be based solely on the record established in the Depart-

mental hearing. In such case, the appellate tribunal has the authority to review the evidentiary ruling of the Departmental Hearing Panel, and may take into consideration any documentary evidence which was improperly excluded from consideration by the Departmental Hearing Panel.

Section 9

The appeals allowed by Section 8 of this Article shall not serve to delay the effective date of the decision by the department.

Section 10

If the Employer suspends an officer without pay during the resolution of a criminal indictment and the criminal indictment is dropped or in any way resolved, then the Employer agrees to return the officer to a pay status or issue notification of the charges and proposed action within thirty (30) business days of the date the indictment was either dropped or resolved. Likewise, if the Employer suspends an officer without pay after the officer has been convicted of criminal charges, the Employer agrees to either return the officer to a pay status or issue notification of the charges and proposed action within thirty (30) business days of the date it removed the officer from the pay status.

Section 11

Disciplinary action will not preclude an employee from participating in the promotional process. Notwithstanding the foregoing, if, after the eligi-

bility list is formed, a final disciplinary penalty of a suspension of twenty (20) days or greater is imposed, the member need not be promoted from that list. In addition, notwithstanding the foregoing, if after the eligibility list is formed an adverse action is proposed, the promotion may be held in abeyance pending a final disposition. If the disposition is favorable to the member, or the penalty is less than a suspension of twenty (20) days, he/she shall be promoted forthwith with back pay retroactive to the date when the member would otherwise have been promoted.

Section 12

An employee shall be given administrative leave of up to: ten (10) hours to prepare for his/her defense against any proposed discharge or suspension of more than thirty (30) days; four (4) hours to prepare his/her defense against any proposed fine or suspension of ten (10) days through thirty (30) days; and, two (2) hours to prepare his/her defense against any proposed fine or suspension of less than ten (10) days. If the employee requests the assistance of a Union employee representative, the representative shall be granted official time within his/her regularly scheduled hours up to the same amount of time as the employee he/she is representing.

Section 13

A District or Division Commander shall attempt to resolve a disciplinary matter after a conference with an affected employee and his Union Representative (unless representation is voluntarily

waived by the employee) without resorting to the steps outlined elsewhere in this Article. If Discipline is recommended by an Administrative Board or by a Commander or Director other than the one to whom the employee is permanently assigned, the Conference shall be held with the Department Disciplinary Review Officer (DDRO). The employee, once notified and prior to the conference, may during the day-work tour review the investigative report of the incident that resulted in the proposal that is the subject of the conference. The following conditions apply to the conference:

1. The penalty does not exceed a fine or suspension of' ten (10) days. Transfer, reassignment, change of days off, and nontraditional penalties including, but not limited to, community service, counseling, etc. are specifically permitted under this Section;

2. The affected officer voluntarily agrees to the penalty and waives all appeal rights after having been given an opportunity in the conference to present his/her side of the matter;

3. Any statement made in the conference (including proposed settlement) or actual agreement shall not be used by either party as evidence or precedent in that case or any other; except that the outcome of such a conference may be considered in the future for purpose of progressive discipline.

4. If an agreement is not reached between the affected employee and the District or Division Commander (or the DDRO, where applicable),

normal disciplinary procedures shall be followed in imposing any penalty.

Section 14

When a member is placed in a non-contact status pending investigation of the use of deadly force, the member may remain in non-contact until the Department's investigation is completed and submitted to the U.S. Attorney's Office for presentment to a Grand Jury. If the Department's in-house review of this investigation determines at this stage that the use of deadly force appears to be justified and reveals no other areas of concern, upon a positive recommendation from the Police and Fire Clinic regarding the Officer's physical and mental health, the Department will restore the member to a full duty status.

The Department's decision whether or not to return a member to full duty status will not be subject to the contractual grievance procedure or any other appeal. After the Department has made the decision to return an officer to a full duty status and additional information is received that would dictate a different course of action, the Department reserves the right to place that member in a non-contact status.

The decision to place an officer in a duty status at any time does not preclude the Department from conducting an administrative investigation which may result in Adverse Action. When the Department determines to place an officer in non-contact status, the member shall not automatically be forbidden to carry his/her authorized weapon, except in the following circumstances.

1. The member is indicted by a Grand Jury;
2. The member has been found guilty by trail board and recommended for termination;
3. The Board of surgeons recommends that the member's authorization to carry a weapon be revoked on account of mental illness and/or an emotional or psychological condition or because a physical disability makes the member's use of a weapon hazardous; and,
4. Suspensions, except for those imposed for alleged activities carrying no demonstrated or potential threat to public safety, and disciplinary suspensions.

In all other circumstances, it shall be the Department's policy to permit an officer or sergeant to continue to carry the authorized weapon for self-protection, if he/she so requests, stating that he/she has good reason to fear injury to his/her person or property. Permission need not be granted by the Chief of Police or his/her agent reasonably determines, based upon the particular facts and circumstances of the case, that the permission should be denied for reason of public safety or welfare.

ARTICLE 13
INVESTIGATORY QUESTIONING

Section 1

The efficiency of the service of the Department, including internal security practices and the obligation of members to respond to questioning shall be governed

by existing Departmental policies and procedures unless abridged by this Agreement.

Section 2-Types of Questioning:

(a) Administrative Interview—Formal official questioning conducted by the Department to question an employee about an administrative matter.

(b) Criminal Interview-Formal official questioning conducted by the Department to question an employee about a criminal matter, where the member has not been identified as a target.

(c) Interrogation-Formal official questioning conducted by the Department of a member who has been, or may be, identified as a target of a criminal investigation.

Section 3

1. Where (1) an employee can reasonably expect discipline to result from an investigatory interview, or (2) the employee is the target of an administrative investigation conducted by the Employer, at the request of the employee, questioning shall be delayed for no longer than two (2) hours in order to give the employee an opportunity to consult with a Union representative. The two-hour limit will be strictly adhered to unless management agrees that the issue is sufficiently complex and therefore requires additional time for preparation. Where management agrees that additional time should be granted such additional time will not exceed four (4) hours. The Department shall not intentionally mislead a member or Union representative as to the purpose of the questioning.

(f) Once donated, the leave is forfeited by the donor and is transferred to the recipient only as sick leave;

(g) This program will only be utilized on an individual case-by-case basis.

ARTICLE 46
BACK PAY

The Employer shall issue to members their back pay checks within sixty (60) days from the date of the final determination that they are entitled to reimbursement. In the event the FOP arbitrates a claim of failure to comply with this Article, an arbitrator may, if appropriate, order interest.

[. . .]

ARTICLE 47
SAVINGS CLAUSE

Should any part hereof or any provisions herein contained be rendered or declared invalid by reason of any existing or subsequently enacted legislation or by decree of a court of competent jurisdiction such invalidation of such part or portion of this Agreement shall not invalidate the remaining portions hereof and they shall remain in full force and effect.

ARTICLE 48
DURATION AND FINALITY OF AGREEMENT

Section 1

This Agreement shall remain in full force and effect until September 30, 2020, subject to the provisions of Section 1715 of the Act. If disapproved

because certain provisions are asserted to be contrary to applicable law, the parties shall meet within thirty (30) days to negotiate a legally constituted replacement provision or the offensive provision shall be deleted.

Section 2

The parties acknowledge that this contract represents the complete Agreement arrived at-as a result of negotiations during which both had the unlimited right and opportunity to make demands and proposal's with respect to any negotiable subject or matter. The Department and the FOP/MPD Labor Committee agree to waive the right to negotiate with respect to any subject or matter referred to or covered or not specifically referred to or covered in this Agreement for the duration of this contract.

Section 3

In the event that a state of civil emergency is declared by the Mayor (civil disorders, natural disasters, etc.) the provisions of this Agreement may be suspended by the Mayor during the time of emergency.

Section 4

This Agreement shall remain in effect until September 30, 2020, after approval as provided in Section 1715 of the Act, and will be automatically renewed for one (1) year periods thereafter unless either party gives to the other party written notice of intention to terminate or modify the Agreement one hundred and fifty (150) days prior to its anniversary date. In the event that either party requests modification of any Article or part of any Articles or the inclusion of additional provisions, only the related Articles or part of

the Articles shall be affected and the unrelated Articles and/or parts of Articles shall continue in full force and effect.

Section 5

All terms and conditions of employment not covered by the terms of this Agreement shall continue to be subject to the Employer's direction and control. However, when a Departmental order or regulation directly impacts on the conditions of employment of unit members, such impact shall be a proper subject of negotiation.

Section 6

Any and all agreements with the Employer shall be reduced to writing and signed by both parties; provided, however, that the Agreement shall not be binding upon the Labor Committee unless and until a majority of the dues paying members in good standing present and voting at a special meeting-called solely for such purpose, shall ratify such Agreement by secret ballot vote. Every agreement entered into by the Labor Committee shall contain language setting forth the above requirement for bargaining unit ratification.