[ORAL ARGUMENT NOT SCHEDULED]

APPEAL NO. 21-7108

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

Plaintiffs-Appellants,

v.

DISTRICT OF COLUMBIA,

Defendant-Appellee.

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

APPELLANTS' OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

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

Plaintiffs:

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Defendant:

District of Columbia

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B. Rulings Under Review

The ruling at issue in this appeal is the U.S. District Court for the District of Columbia Memorandum and Opinion and Order Granting Defendant's Motion to Dismiss dated September 1, 2021.

C. Related Cases

Plaintiffs/Appellants are not aware of any related cases currently pending before this court.

D. Corporate Disclosure Statement

There are no parent companies, subsidiaries or affiliates of any of the named Appellants with outstanding public securities.

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INTRODUCTION

This case is about the constitutionality of government officials taking sides in a public debate.

The District of Columbia was a hotbed of political expression in the summer of 2020 following George Floyd's tragic death. Individuals and organizations flooded the Capitol, protesting and painting messages like "Black Lives Matter" and "Defund the Police" on the District's streets, sidewalks, buildings, and monuments. The Metropolitan Police Department observed the creation of much of this so-called street art—such as the painting of a huge "Defund the Police" mural on city streets—but did nothing.

Yet when a handful of pro-life supporters gathered outside Planned Parenthood's Carole Whitehill Moses Center intending to paint "Black Pre-Born Lives Matter," in a manner identical to prior protest paintings, the District suddenly remembered District of Columbia Code § 22–3312.01, which prohibits the defacement of public and private property. The Department threatened all the Plaintiffs with arrest should they paint their disfavored message on City streets and arrested two Plaintiffs when they began to write a pro-life statement in washable chalk. The District twice used the Defacement Ordinance to stifle Plaintiffs' pro-life speech while allowing at least three similar instances of speech expressing a favored viewpoint.

Plaintiffs' First Amended Complaint states at least a plausible claim of viewpoint discrimination in violation of the First Amendment and selective enforcement in violation of the Fifth Amendment. The Complaint establishes that the District singled out pro-life messages for discriminatory treatment, subjecting them alone to its Defacement Ordinance. As enforced, the Ordinance reflects the government's disapproval of a subset of messages. The Metropolitan Police Department turned a blind eye towards favored speech while shutting down speech with which it disagreed. This is the essence of viewpoint discrimination and selective enforcement in violation of the First and Fifth Amendments. Plaintiffs' First Amended Complaint easily meets the low bar required to survive a motion to dismiss.

JURISDICTIONAL STATEMENT

Appellants brought viewpoint-discrimination and selective-enforcement claims in the district court pursuant to 42 U.S.C. § 1983. The district court granted Defendant's motion to dismiss in a memorandum opinion and order filed on September 1, 2021. Appellants timely filed a notice of appeal on September 30, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether Plaintiffs/Appellants stated a claim for municipal liability arising out of the violation of their First and Fifth Amendment rights?

STATEMENT OF FACTS

In the summer of 2020, the District of Columbia erupted in massive protests. In June, Mayor Muriel Bowser commissioned a mural stating "Black Lives Matter" in permanent yellow paint. Plaintiffs' First Amended Complaint ¶¶ 2, 35 ("F.A.C.") (JA59, 68). The mural extended the length of a city block, covering the width of the street and featured the D.C. flag (three stars over two bars). *Id*.

Less than one day after the mural was painted, protestors gathered and defaced the mural, blotting out the stars at the top of the D.C. flag and adding a new message "= Defund the Police" in large font alongside it. F.A.C. ¶ 2, ¶¶ 40–41 (JA59, 70). These protestors did not obtain a permit or give the Department notice. Rivera Decl. ¶ 6 (JA11).

And while Department officers were present, they did nothing to stop protestors from painting their message in large, permanent paint. F.A.C. ¶ 38 (JA69).

The effect, as the District Court found, was that the entire mural read "Black Lives Matter = Defund the Police." JA16. City employees restored the stars on top of the D.C. flag but did not remove the activists' "Defund the Police" mural until planned road work approximately two months later. JA16–17. During this litigation, the District expressed agreement with the message and attempted to adopt it as its own speech. JA120 (Mem. in Supp. Mot. to Dismiss).

Protests continued throughout the summer months accompanied by protest art, street art, chalking, and graffiti on numerous public sidewalks and streets. F.A.C. ¶¶ 35–49 (JA68–73). Construction scaffolding on the southern side of the U.S. Chamber of Commerce became a "gallery wall for a wide array of protest art." *Id.* ¶ 44 (internal

citations omitted) (JA71–72). Protest art also covered the adjacent street. The Chamber consented to the protest art after the fact, and it remained until August 2020. *Id.*

Later that summer, public sidewalks and city streets were again "marked with graffiti, street art, and street chalking." JA153. Protestors organized a "Reclaim DC" event, inviting individuals to create street art and "reclaim[ ] the H Street Art Tunnel at BLM Plaza." F.A.C ¶ 48 (JA72). On August 16th, graffiti was observed at numerous locations including 17th Street, NW, H Street, NW, and again near the Chamber's Building. F.A.C. ¶ 49 (JA72–73).

Plaintiffs allege that the protesters did not seek advance permission from the District or the owners of private property to mark the streets and sidewalks, *id.* ¶¶ 40–41, 45–46, 50–51 (JA70, 72, 74), that members of the Metropolitan Police Department were present during the painting of "Defund the Police" and the August 2020 street

art, *id.* ¶¶ 38, 52–53 (JA69, 74–75), and that no one was punished for these actions, *id.* ¶¶ 42, 47, 52 (JA70, 72, 74–75).

The District allows "peaceful First Amendment assemblies on the streets, sidewalks, and other public ways." D.C. Code § 5–331.03. But a group wishing to assemble is required to provide notice to the District and seek prior approval. D.C. Code § 5–331.05(b)–(c). The District's Defacement Ordinance also makes it unlawful for any person to "write, mark, draw, or paint" on public streets and other public and private property. F.A.C. ¶ 33 (citing District of Columbia Code § 22–3312.01) (JA67). According to the District, it enforces the Defacement Ordinance when it becomes aware of violations. Rivera Decl. ¶ 4 (JA10).

Even though none of the racial justice protestors gave the District notice of their intent to gather or obtained prior approval to assemble under D.C. Code § 5–331.05(b)–(c), and even though the Department was present during the painting of the Defund the Police and August 2020 street art, the District did not threaten to or apply the Defacement Ordinance (or any other Ordinance) against any protestor advocating for police defunding or use it to silence their speech in any way. F.A.C. ¶¶ 42, 47, 52, 65, 67, 70–72 (JA70, 72, 74–75, 78–80).

It was not until Plaintiffs—pro-life groups concerned about the hundreds of thousands of unborn Black children killed by abortion each year—requested a permit to gather and paint their own mural stating "Black Pre-Born Lives Matter," F.A.C. ¶ 55 (JA75), that the District

rediscovered its Defacement Ordinance. The Department approved a group of up to 49 people to assemble and to use a bullhorn, music stand, and painted signs, but denied permission to paint or otherwise mark the street. JA18. Though Plaintiffs received verbal confirmation that they could paint their mural if they used washable paint, F.A.C. ¶ 59 (JA76), when they arrived on August 1, 2020 to begin painting, they were "confronted by myriad police cars and law-enforcement officers" and told that if they marked the streets or sidewalk, "they would be arrested" for violating the District's ordinance against defacing property. *Id.* ¶ 3 (JA59). When two individuals began chalking on the sidewalk in washable chalk, they were arrested. *Id.* ¶ 70 (JA79).

In March 2021, Plaintiffs held another rally for which they again sought a permit in accordance with D.C. Code to paint (in temporary paint) or chalk "Black Pre-Born Lives Matter." *Id.* ¶ 71 (JA79). They were again allowed to assemble with a bullhorn, music stand, and signs but forbidden from painting or drawing their message. *Id.* The permit states, "You are not authorized or permitted to paint or mark the street and to paint or mark the sidewalk." *Id.* Before that event, Plaintiffs moved for and the lower court denied a preliminary injunction. JA12.

STATEMENT OF PROCEEDINGS BELOW

Having been twice denied the opportunity to express their message by painting or chalking, Plaintiffs brought this amended as-

applied challenge pursuant to 42 U.S.C. § 1983, alleging that the Defacement Ordinance has been unconstitutionally enforced to limit their activities, but not to punish others. F.A.C. ¶ 1 (JA59). They contend that the District targeted them because of their "religious and pro-life beliefs," *id.* ¶ 74 (JA80), while failing to enforce the Ordinance against other similarly situated individuals expressing messages with which it agreed. *See, e.g.*, *id.* ¶ 53 (JA75).

Defendants moved to dismiss, and the District Court granted it. Regarding Plaintiffs' as-applied, viewpoint-discrimination claim, the District Court acknowledged that the Courts of Appeals are "divided over how to categorize claims in which law enforcement is alleged to have selectively enforced restrictions on speech-related activities based on viewpoint." JA158. In the lower court's view, Plaintiffs' First Amendment claim was "better considered within the selective-enforcement framework of the Fifth Amendment than within that for as-applied First Amendment viewpoint-discrimination challenges." JA157. The court said that any difference between the two claims was "semantic," held that "Plaintiffs' success on" their First Amendment Free Speech claim "depend[ed] on their success" on Plaintiffs' selective-enforcement claim, and analyzed Plaintiffs' viewpoint discrimination claims under the Fifth Amendment's more demanding selective-enforcement standard. JA161. Specifically, the Court held that, as with a selective-enforcement claim, Plaintiffs claiming viewpoint

discrimination must show *both* "intentional discrimination" and "a pattern of unlawful favoritism." JA159; *id.* at JA160 ("[A] disproportionate effect on certain speakers is not enough to render a regulation content or viewpoint discriminatory, but that purpose will often need to be considered as well.").

To make out a selective-enforcement claim, the lower court held that plaintiffs must establish: "that (1) [they were] singled out for prosecution from among others similarly situated; and (2) that [the] prosecution was improperly motivated, i.e., based on race, religion or another arbitrary classification." JA162. The lower court found that Plaintiffs "have likely alleged enough . . . to support a plausible claim" that they were singled out from others similarly situated. It explained that (1) "protest art was placed on the Chamber by potentially similarly situated individuals in violation of the Ordinance and that no one was punished as a result," (2) "members of MPD, although present, did not enforce the Ordinance against potentially similarly situated protesters on August 16, 2020," and (3) "other similarly situated protesters expressing a message through writing on a street were not punished despite MPD's awareness of their activities." JA165–67. Nevertheless, the Court determined that it "need not resolve" the "similarly situated" inquiry. JA163.

Instead, the lower court held that Plaintiffs must establish that Defendants singled out Plaintiffs for different treatment "'because of,

not merely in spite of, [the action's] adverse effects upon an identifiable group.'" JA123 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 676–77 (2009)) (alteration in original). The lower court conceded that Plaintiffs may have "plausibly alleged" that there were "lapses in enforcement," but found "no indication … that these were attributable to impermissible discrimination." JA170. The Court also acknowledged that Mayor Bowser's alleged support for Planned Parenthood and the Black Lives Matter movement was "consistent with" an improper motive to direct the Department to enforce the Defacement Ordinance against Plaintiffs, yet the Court believed these allegations insufficient to show that Defendants were "improperly motivated by a desire to discriminate against the viewpoint or content of the proposed message." JA169.

With respect to municipal liability, the Court concluded that the "handful of instances of alleged nonenforcement by [Department] officers" did not "lead to a plausible inference that the District has a policy or practice of enforcing the Ordinance only against disfavored messages." The Court noted that Plaintiffs have at most alleged that Mayor Bowser commissioned a Black Lives Matter mural, *see* F.A.C. ¶ 2 (JA59), that she has supported Planned Parenthood, *id.* ¶ 64 (JA78), that the Department did not enforce the Ordinance against certain protesters in three instances closely linked in circumstances and location, *id.* ¶¶ 36, 44, 49 (JA68–69, 71–73), and that the District did not allow Plaintiffs to paint or chalk their message, *id.* ¶¶ 65, 71 (JA78–

79). But the lower court ignored Plaintiffs' allegation that "Mayor Muriel Bowser and/or District officials directed the District to enforce the Defacement Ordinance against Plaintiffs but not other speakers, so that enforcement became a policy and practice of the District," *id.* ¶ 78 (JA80), and thus concluded that no facts supported the claim that Bowser or another official was acting as a "policymaker." JA172.

SUMMARY OF ARGUMENT

The Constitution forbids the government from favoring certain messages over others because of their viewpoint. Yet the District of Columbia selectively enforces its Defacement Ordinance, which prohibits the defacement of public and private property, against disfavored messages. It twice singled out for punishment peaceful protestors expressing pro-life messages on City streets in washable chalk while repeatedly ignoring (or affirmatively supporting) favored messages inked in permanent paint throughout the summer of 2020.

Plaintiffs' claims of viewpoint discrimination in violation of the First Amendment and selective enforcement in violation of the Fifth Amendment are sufficient to withstand a motion to dismiss. The District Court first erred by collapsing Plaintiffs' First and Fifth Amendment claims and holding both claims to the latter's higher intent standard. Those claims are distinct. And this Court's precedent teaches that, even if some sort of intent is required for an as-applied viewpoint-

discrimination claim, it may be shown by a pattern of discriminatory enforcement like the pattern alleged here. The "lapses in enforcement" for admittedly similar conduct acknowledged by the lower court are sufficient to survive a motion to dismiss. JA170. As enforced by the Department, the Defacement Ordinance "reflects the Government's disapproval of a subset of messages it finds offensive." *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring in part and concurring in the judgment). This constitutes viewpoint discrimination. *Id.* In short, the lower court's elision of Plaintiffs' First and Fifth Amendment claims and its dismissal of the viewpoint-discrimination claim was reversible error.

The District Court also erred by dismissing Plaintiffs' selective-enforcement claim. The Complaint plausibly alleges every element. First, the District Court conceded that the Complaint likely "support[s] a plausible claim" that Plaintiffs were singled out from others similarly situated, namely the multiple instances over multiple months of nearly identical messages that were ignored by the Department. JA166. Second, the District Court recognized that Mayor Bowser's alleged support for Planned Parenthood and the Black Lives Matter movement was "consistent with" an improper motive. JA169. These allegations combined with Plaintiffs' evidence of an unlawful pattern of enforcement give rise to at least an inference of intent. The Complaint contains "enough fact[s] to raise a reasonable expectation that discovery

will reveal evidence" of Defendant's liability under § 1983, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007), including evidence of a municipal policy.

Plaintiffs' First and Fifth Amendment claims easily meet the low bar required to survive a motion to dismiss. This Court should reverse.

STANDARD OF REVIEW

To survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss, a complaint need only "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 claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). This standard "does not impose a probability requirement" and simply "calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" of Defendant's liability. *Twombly*, 550 U.S. at 556.

A complaint survives a motion to dismiss even where "there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible." *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015). Where the District Court grants a motion to dismiss under Federal Rules of Civil Procedure 12(b)(6), this Court "'construe[s] the complaint 'liberally,'

granting [plaintiff] 'the benefit of all inferences that can be derived from the facts alleged.'" *Zukerman v. U.S. Postal Serv.*, 961 F.3d 431, 436 (D.C. Cir. 2020) (quoting *Barr v. Clinton*, 370 F.3d 1196, 1199 (D.C. Cir. 2004)).

ARGUMENT

I. The district court erred in granting Defendant's motion to dismiss Plaintiffs' as-applied, viewpoint-discrimination claim.

Discriminating against speech because of its message "is presumed to be unconstitutional." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Id.* As a result, the Free Speech Clause "has no more certain antithesis" than when government interferes with speech to either "promot[e] an approved message or discourage[e] a disfavored one." *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 579 (1995); *Rosenberger*, 515 U.S. at 829. "It is precisely this element of taking sides in a public debate that identifies viewpoint discrimination and makes it the most pernicious of all distinctions based on content." *Id.* at 894–95 (Souter, J., dissenting).

It is not enough that the government enact neutral laws; it must also enforce them in a viewpoint-neutral way. As the Supreme Court explains, where a law is neutral, "[g]ranting waivers to favored

speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional." *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 324–25 (2002). Otherwise, "the First Amendment's guarantees would risk becoming an empty formality, as government could enact regulations on speech written in a content-neutral manner so as to withstand judicial scrutiny, but then proceed to ignore the regulations' content-neutral terms by adopting a content-discriminatory enforcement policy," *Hoye v. City of Oakland*, 653 F.3d 835, 854 (9th Cir. 2011), as here. This case is thus "a far cry from" *Mahoney v. Doe*, 642 F.3d 1112 (D.C. Cir. 2011), since Plaintiffs allege that a facially neutral ordinance has been applied in a viewpoint-discriminatory manner. JA29.

Of course, "the government rarely flatly admits it is engaging in viewpoint discrimination." *Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*, 901 F.3d 356, 365 (D.C. Cir. 2018). Thus, as this Court and most Courts of Appeals have held, even if some sort of intent is required, a plaintiff may demonstrate as-applied viewpoint discrimination based on a pattern of enforcement that evinces governmental favoritism. *Id.* at 366 ("most relevant is a lack of evenhandedness in the Government's actions"); *see infra* at 20–21 (listing cases).

Further, the Seventh Circuit has held that *no intent* is required for an as-applied viewpoint-discrimination claim but that a

"discriminatory effect" is sufficient even if "[t]he motive is innocent." *Chi. Acorn v. Metro. Pier and Exposition Auth.*, 150 F.3d 695, 701 (7th Cir. 1998). This conclusion finds support in Supreme Court precedent. For example, the *Reed* Court held that "illicit legislative intent is not the *sine qua non* of a violation of the First Amendment, and a party opposing the government need adduce no evidence of an improper censorial motive." *Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015) (cleaned up); *see also Nat'l Inst. of Fam. and Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (finding content-based discrimination without requiring intent).

A. The District Court erred by eliding Plaintiffs' viewpoint-discrimination claim.

The District Court held that "Plaintiffs' success on" their First Amendment Free Speech claim "depend[ed] on their success" on Plaintiffs' selective-enforcement claim, and that any difference between the claims was merely "semantic." JA161. It therefore erred by analyzing Plaintiffs' First Amendment claim under the Fifth Amendment's more rigorous standard. *Id.*

This was wrong. Plaintiffs' First and Fifth Amendment claims are distinct, not "essentially the same." *Cf.* JA157. Rather, in addition to a Fifth Amendment selective-enforcement claim, "a litigant may separately argue that discriminatory enforcement of a speech restriction amounts to viewpoint discrimination in violation of the First

Amendment." *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998). *Accord, e.g.*, *Berg v. Vill. of Scarsdale*, No. 20-4130-CV, 2021 WL 5751385, at *3 (2d Cir. Dec. 3, 2021) (recognizing distinct First Amendment as-applied, viewpoint-discrimination claim and Fifth Amendment selective-enforcement claim where government favored commercial over political signs in enforcement); *McGuire v. Reilly*, 386 F.3d 45, 61 (1st Cir. 2004) (treating claim where the "law itself is neutral and constitutional in all fact situations, but [plaintiff alleges] that it has been enforced selectively in a viewpoint discriminatory way" as as-applied viewpoint discrimination); *see also Cent. Radio Co., Inc. v. City of Norfolk*, 811 F.3d 625 (4th Cir. 2016) (analyzing a law separately under the content discrimination analysis of the First Amendment—finding liability—and the selective enforcement analysis under the Equal Protection Clause—finding no liability).

The District Court relied on *Sanjour v. EPA*, 56 F.3d 85, 92 n.9 (D.C. Cir. 1995), to argue that this Court has collapsed First Amendment viewpoint claims into Fifth Amendment selective-enforcement claims. Not so. In *Sanjour*, plaintiffs maintained separate First and Fifth Amendment challenges. In fact, the footnote relied on by the District Court here was included to distinguish between selective-enforcement and viewpoint-discrimination claims and explain why—unlike speech claims—there is no such thing as an "as applied" selective-enforcement claim. *Id.* As this Court explained, "'[s]elective

enforcement' is not, of course, a First Amendment cause of action." *Id.* By the same token, an as-applied, viewpoint-discrimination claim is not a Fifth Amendment claim.

In *Berg v. Village of Scarsdale*, the Second Circuit recently recognized this distinction. 2021 WL 5751385, at *3. That court concluded that, while there may be some overlap between viewpoint-discrimination and selective-enforcement claims, the contention that the government enforced its ordinance only against disfavored speech states a claim for as-applied viewpoint discrimination. *Id.*

In short, Plaintiffs' First and Fifth Amendment claims are distinct, and the District Court committed reversible error by collapsing those two claims and holding Plaintiffs' viewpoint discrimination challenge to the more demanding selective enforcement standard. *See McGuire*, 386 F.3d at 63 ("primary potential difference" between as-applied viewpoint discrimination and selective enforcement is that selective-enforcement "plaintiffs must show that the relevant government actor intended to discriminate against the disfavored group").

B. The District Court erred by holding that evidence of as-applied viewpoint discrimination cannot be shown by a pattern of conduct.

The District Court also erred by requiring Plaintiffs to establish the same type of discriminatory intent in their as-applied First

Amendment claims as the intent required in selective-enforcement equal protection claims. JA158 (requiring both "some degree of intent and a showing that certain speech is disproportionately affected"); JA162 (holding that Plaintiffs must allege discrimination "because of" adverse effects). In so doing, the lower court ignored not one, but two, on-point cases from this Court. Under this Court's precedent, Plaintiffs may establish discriminatory intent by plausibly alleging a pattern of disparate enforcement, nothing more. *Am. Freedom Def. Initiative*, 901 F.3d at 366; *Zukerman*, 961 F.3d at 446.

In this Circuit, a plaintiff states a claim for as-applied viewpoint discrimination when he alleges that "the government has singled out a subset of messages for disfavor based on the views expressed." *Zukerman*, 961 F.3d at 446 (citation omitted). Relying on Supreme Court precedent, this Court held the allegation that "[Plaintiff] was prevented from speaking … while someone espousing another viewpoint was permitted to do so" defeats a motion to dismiss. *Id.* (quoting *McCullen v. Coakley*, 573 U.S. 464, 485 n.4 (2014)) (cleaned up); *Am. Freedom Def. Initiative*, 901 F.3d at 366 ("a lack of evenhandedness" in enforcement can show discriminatory intent).

In *American Freedom Defense Initiative*, for instance, this Court held Plaintiffs may establish intent from "prospective evidence," namely post-enactment "evidence of what happened." 901 F.3d at 365–66. "A lack of evenhandedness" in enforcement is the "most relevant" criterion.

Id. And "inconsistent application of [an ordinance] [i]s strong evidence of viewpoint discrimination." *Id.* at 368 (citation omitted). Similarly, in *Zukerman v. United States Postal Service*, this Court reversed the lower court's grant of a motion to dismiss where Plaintiff alleged that he was "prevented from speaking while someone espousing another viewpoint was permitted to do so." 961 F.3d at 446 (cleaned up).

This Court's determination that a pattern of uneven enforcement can establish the requisite intent in an as-applied viewpoint-discrimination claim represents the majority rule. *See, e.g.*, *Hoye*, 653 F.3d at 855 (evidence of disparate enforcement may suffice to establish discriminatory intent); *Brown v. City of Pittsburgh*, 586 F.3d 263, 294 (3d Cir. 2009) (holding that "a pattern of enforcement activity evincing a governmental policy or custom of intentional discrimination on the basis of viewpoint or content" is evidence of intent); *Gerlich v. Leath*, 861 F.3d 697, 705 (8th Cir. 2017) (same); *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 96 (2d Cir. 2003) (while an inference of motive from differential impact is not automatically drawn, "[e]vidence that the defendants, without legitimate reason [selectively enforced a law] . . . might well be enough to preclude summary judgment"); *Phelps-Roper v. Ricketts*, 867 F.3d 883, 897 (8th Cir. 2017) ("To sustain an as-applied challenge based on viewpoint discrimination, [the plaintiff] must establish 'a pattern of unlawful favoritism' by showing that she 'was prevented from speaking while someone espousing another viewpoint

was permitted to do so.'") (citation omitted); *accord Chi. Acorn*, 150 F.3d at 701 (evidence of "discriminatory effect" can support an as-applied content-discrimination claim, even if the government's "motive is innocent").

But instead of looking to these cases and this Court's precedents, the District Court relied on two out-of-circuit cases to hold that a pattern of unlawful enforcement is *insufficient* to support an inference of discriminatory intent at the motion-to-dismiss stage. Neither of those summary judgment cases support that proposition. *McGuire* suggests that "a pattern of unlawful favoritism" *can* support an inference of intent. 386 F.3d at 64. Similarly, *Pahls v. Thomas* states that a "'pattern of unlawful favoritism'" *can* be "suggestive of a discriminatory motive" and support an "inference" of discriminatory intent. 718 F.3d 1210, 1239 (10th Cir. 2013) (citing *Thomas*, 534 U.S. at 325). Such an inference is all that is required at the motion-to-dismiss stage. And in contrast to the plaintiffs in *McGuire*, where the state had enforced the Act in a viewpoint neutral manner, here Plaintiffs credibly allege that Defendants "ignor[ed] the speech activities of favored speakers [while] prosecuting … only disfavored speakers." *McGuire*, 386 F.3d at 64 (cleaned up).

C. Plaintiffs allege an unlawful pattern of favoritism.

The District of Columbia engaged in blatant viewpoint discrimination by failing to enforce the Defacement Ordinance against persons expressing certain favored messages while prosecuting similarly situated individuals who expressed disfavored views. The Constitution prohibits this. Without the benefit of any discovery, Plaintiffs have clearly pled a pattern of unlawful favoritism. *See* F.A.C. ¶ 4 (JA60).

First, the Complaint details how, the day after the District's "Black Lives Matter" mural was painted, protesters defaced the mural, and added their own expression so that the message read "Black Lives Matter = Defund the Police." F.A.C. ¶ 36 (JA68–69). The Complaint alleges that the protesters did not seek a permit to paint "Defund the Police" or otherwise notify the District, *id.* ¶¶ 41–42 (JA70); that Department officers "were present during the painting of the" mural but did not punish anyone; *id.* ¶¶ 38, 42 (JA69–70); and that Department officers "refused to enforce the Defacement Ordinance against those creating the mural because of the District's agreement with the message," not "due to a concern for officer safety or due to being outnumbered by protestors." *Id.* ¶ 38 (JA69).

Second, the Complaint alleges that that "protest art" was placed along "construction scaffolding located on the southern side of the U.S. Chamber of Commerce headquarters ... without prior permission of the

property owner." F.A.C. ¶ 44 (JA71). A permit was not sought from the District. *Id.* ¶¶ 45–46 (JA72). And "no punishment resulted from [this] unlawful activity," either. *Id.* ¶ 47 (JA72).

Third, the Complaint alleges that graffiti and other paintings related to the Black Lives Matter movement were placed on and around 17th and H Streets, Northwest, on August 16, 2020. F.A.C. ¶¶ 48–49 (JA72–73). Again, no permission was sought for these messages. *Id.* ¶¶ 50–51 (JA74). "No arrests were made and no one was cited" even though the Department "was present ... and observed the violations of the Defacement Ordinance." *Id.* ¶ 52 (JA74–75). The Complaint also alleges that the District failed to enforce the Ordinance because it agreed with the messages expressed. *Id.* ¶ 53 (JA75).

In contrast, the District twice enforced the Defacement Ordinance against Plaintiffs. And the lower court concluded that each of the situations above likely "support[s] a plausible claim" that Plaintiffs were singled out from others similarly situated. JA166.

This Court's decision in *Zukerman* moves that needle from "likely" to unquestionably. There, the Postal Service declined to publish custom postage with a drawing of Uncle Sam being strangled by a snake labeled Citizens United because it conflicted with a ban on politically oriented postage. *Zukerman*, 961 F.3d at 438–39. Zukerman alleged that his design had been declined while designs advocating for Ted Cruz, Jeb Bush, Donald Trump, and Hilary Clinton had been allowed.

On a record more sparse than the present one, this Court held that allegation sufficient to state a claim for unlawful viewpoint discrimination and reversed the lower court's grant of defendant's motion to dismiss.

Zukerman had pled that "he was [(and is)] prevented from speaking [through the custom postage program] while someone espousing another viewpoint was [(and still is)] permitted to do so." *Id.* at 446 (quoting *McCullen*, 573 U.S. at 485 n.4). This allegation "pass[es] the 'most basic ... test for viewpoint discrimination,' which is 'whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed.'" *Id.* at 446 (quoting *Matal*, 137 S. Ct. at 1766 (Kennedy, J., concurring in part and concurring in the judgment)).

Similarly, in *Mahoney v. Babbitt*, this Court held that the National Park Service violated the First Amendment's viewpoint-neutrality requirement by threatening arrest of pro-life demonstrators but not demonstrators expressing other viewpoints. 105 F.3d 1452, 1456 (D.C. Cir. 1997). As this Court explained, in enforcing a facially neutral ordinance, "the government has no authority to license one side to fight freestyle, while forbidding the other to fight at all." *Id.* at 1454. *Accord Foti*, 146 F.3d at 635 (declaration that government arrested only anti-WTO protestors sufficient to defeat summary judgment on as-applied viewpoint-discrimination claim).

This case is on all fours with *Zukerman*. Plaintiffs have alleged that they were "prevented from speaking while someone espousing another viewpoint was permitted to do so." *See, e.g.*, F.A.C. ¶¶ 52–53, 65, 66, 67, 70, 75 (JA74–75, 78–80). This allegation "pass[es] the 'most basic ... test for viewpoint discrimination,' which is 'whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed.'" *Zuckerman*, 961 F.3d at 446 (citation omitted). Yet the decision below failed to cite any of this Court's as-applied viewpoint discrimination precedents and instead committed reversible error by eliding Plaintiffs' First and Fifth Amendment claims and requiring Plaintiffs to prove both intentional discrimination and a pattern of unlawful enforcement. JA157–61.

In sum, there is ample evidence—particularly at the pleading stage—that "police turned a blind eye toward [favored] speech while not turning a blind eye to [disfavored speech] by plaintiffs." *McGuire*, 386 F.3d at 65. The Department did not respond equally to equal speech. *See id*. Rather, as enforced, the Defacement Ordinance "reflects the Government's disapproval of a subset of messages it finds offensive." *Matal*, 137 S. Ct. at 1766 (Kennedy, J., concurring in part and

concurring in the judgment). "This is the essence of viewpoint discrimination." *Id.*[1]

II. The District Court erred in dismissing Plaintiffs' selective-enforcement claim

The Fourteenth Amendment's Equal Protection Clause requires the District "to treat similarly situated persons alike." *Women Prisoners of D.C. Dep't of Corr. v. District of Columbia*, 93 F.3d 910, 924 (D.C. Cir. 1996). In a selective-enforcement claim, Plaintiffs must show they were "singled out for prosecution from among others similarly situated" and that the "prosecution was improperly motivated, *i.e.*, based on race, religion or another arbitrary classification." *Branch Ministries v. Rossotti*, 211 F.3d 137, 144 (D.C. Cir. 2000) (citation omitted). Plaintiffs plausibly allege the elements of such a claim here.

A. Plaintiffs plausibly alleged they were singled out for prosecution among others similarly situated.

With respect to the similarly situated requirement, the District Court concluded that Plaintiffs "have likely alleged enough . . . to support a plausible claim." JA166. The Court noted that (1) "protest art was placed on the Chamber by potentially similarly situated individuals in violation of the Ordinance and that no one was punished as a result,"

[1] Though it is unnecessary to allege intentional discrimination to state a claim for an as-applied, viewpoint-discrimination claim, Plaintiffs have alleged intentional discrimination. See *infra* at 28–31.

(2) "members of [the Department], although present, did not enforce the Ordinance against potentially similarly situated protesters," and (3) "other similarly situated protesters expressing a message through writing on a street were not punished despite [the Department]'s awareness of their activities." JA165–167.

The District Court also correctly rejected Defendant's claim that the racial justice protestors were not similarly situated because they did not inform the District of their intent to deface public property. JA167–168. Because the Department enforces known violations, and because Plaintiffs allege that the Department was present for the racial justice protestors' actions, it does not matter that the police were not notified in advance. JA168.

The lower court's suggestion that Plaintiffs might not be similarly situated because the racial justice protests were larger in size and scale is nonsensical. JA168. While "legitimate" distinguishing factors may result in differential enforcement, it is irrational for government to impose greater punishment on speakers who seek to comply with notice and permitting requirements and less on speakers who flaunt those requirements. Similarly, it would be illegitimate to subject small, peaceful demonstrations to more stringent enforcement than large-scale protests complete with the permanent defacement of public and private property. *See Branch Ministries*, 211 F.3d at 145 ("legitimate

prosecutorial factors" can "justify making different prosecutorial decisions").

B. The Complaint plausibly alleges discriminatory intent.

The First Amended Complaint adequately alleges that Defendant acted with an intent to discriminate. F.A.C. ¶¶ 121–22 (JA86). Plaintiffs allege that Mayor Bowser "supports" Planned Parenthood's "pro-choice" agenda and opposes Plaintiffs' contrary viewpoint, *id.* ¶ 64 (JA78); that Defendant deliberately failed to enforce the Defacement Ordinance against the "Defund the Police" mural and other street art, *id.* ¶¶ 35–54 (JA68–75); that in enforcing the ordinance, "District officials targeted the Plaintiffs' religious and pro-life beliefs," *id.* ¶ 74 (JA80); that "Mayor Bowser and/or District officials ordered the Metropolitan Police Department to be present at the FDF and SFLA event in order to stop the painting and chalking," *id.* ¶ 66 (JA78); that the "enforcement of the Defacement Ordinance against Plaintiffs was improperly motivated by the desire to prevent Plaintiffs' exercise of their constitutional rights," *id.* ¶ 118 (JA85); that the District "singled out Plaintiffs for enforcement of the Defacement Ordinance but declined to enforce the Defacement Ordinance against substantially similar conduct and similarly situated actors," *id.* ¶ 119 (JA86); and that "[t]he District had a discriminatory purpose and intent when it enforced the Defacement Ordinance against Plaintiffs but not others similarly situated," *id.* ¶ 121 (JA86).

The District Court erred by holding these allegations insufficient on their face. Together, Plaintiffs' allegations raise at least "a reasonable expectation that discovery will reveal evidence" of Defendant's liability. *Twombly*, 550 U.S. at 556. Indeed, the lower court recognized that Mayor Bowser's alleged support for Planned Parenthood and the Black Lives Matter movement was "consistent with" an improper motive to direct the Department to enforce the Defacement Ordinance against Plaintiffs. JA169. And the Court conceded that Plaintiffs have plausibly alleged "lapses in enforcement." JA170.

Nonetheless, that court said there is "no indication" "that these were attributable to impermissible discrimination.'" *Id.* But at the motion-to-dismiss stage, the District Court was required to construe the complaint "liberally" and to grant Plaintiffs "the benefit of *all* inferences that can be derived from the facts alleged." *Zukerman*, 961 F.3d at 436 (emphasis added). And Plaintiffs' specific factual allegations—allegations that the Court correctly viewed as "consistent with" an improper motive—and the "lapses in enforcement" at minimum give rise to an inference of impermissible discrimination.

Further, there is direct evidence of discriminatory intent here. Whereas the District would not allow Plaintiffs to chalk their pro-life message in washable materials, it affirmatively sought to adopt and promote the racial justice protestors' speech. JA120 (Memo in Supp.

Mot. To Dismiss). In its motion to dismiss, the District admitted to agreeing with—to "accept[ing] and preserv[ing]" the mural "for purposes of sharing the message therein"—the message of racial justice protestors and tried to claim the "Defund the Police" mural as its own speech. *Id*. This bid to take ownership of and share certain speech shows the District's preference for favored viewpoints and is direct evidence of discrimination. *See Hoye*, 653 F.3d at 856 (no need to show unlawful enforcement where the government's "own pronouncements definitively articulate a content-discriminatory enforcement policy").

In short, the District Court erred in dismissing Plaintiffs' selective-enforcement claim because the Complaint plausibly alleges Plaintiffs were "singled out for [enforcement] from among others similarly situated" and that the enforcement was "improperly motivated." *Branch Ministries*, 211 F.3d at 144.

C. Plaintiffs sufficiently pled a policy or practice.

Plaintiffs' allegations contain "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence" of Defendant's liability under § 1983, *Twombly*, 550 U.S. at 556, including evidence of a municipal policy. Municipal policy may be shown through "the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Connick v. Thompson*, 563 U.S. 51, 61 (2011). In other words, the

complaint must state a claim for a predicate constitutional violation and a claim "that a custom or policy of the municipality caused the violation." *Baker v. District of Columbia*, 326 F.3d 1302, 1306 (D.C. Cir. 2003). "[I]f a complaint alleging municipal liability under § 1983 may be read in a way that can support a claim for relief, thereby giving the defendant fair notice of the claim, that is sufficient." *Id.* at 1307.

As explained above, the Complaint alleges two predicate constitutional violations—an as-applied viewpoint-discrimination claim and a selective-enforcement claim—and the District Court erred in dismissing them both.

Plaintiffs also alleged specific facts from which a court may infer a policy or practice. The lower court admitted that one "avenue[ ] through which the policy or practice alleged by Plaintiffs could have taken shape" is "through a policy or practice of punishing violations of the Ordinance only when the District disagreed with the message expressed." JA171. This is precisely what the Complaint alleges. It details two instances in which the Department enforced the Defacement Ordinance against pro-life speech and many other occasions when the Department chose not to enforce the policy against the District's favored speech. This is evidence of "a policy or practice of enforcing the Defacement Ordinance against speech it disagrees with and not enforcing against speech it prefers." *Id.*; *accord* F.A.C. ¶ 98 (JA83). Citing specific evidence, Plaintiffs also allege that Mayor Bowser

supports Planned Parenthood's "pro-choice" agenda and therefore opposes Plaintiffs' contrary viewpoint; *id.* ¶ 64 (JA78); that Defendant "adopted a policy and practice of enforcing the Defacement Ordinance against speech with which it disagrees when it knowingly failed to enforce the Defacement Ordinance against speech and expression of views the District prefers," *id.* ¶ 79 (JA80); that the District "showed a deliberate indifference to the risk that the enforcement of the Defacement Ordinance would result in violations to Plaintiffs' constitutional rights," *id.* ¶ 80 (JA81); and that District officials, acting under such policies and practices, "acted under color of state law when enforcing the Defacement Ordinance against the Plaintiffs." *Id.* ¶ 97 (JA83).

The District Court concluded that Plaintiffs did not allege "any facts" for their claim that "Bowser or another official was acting as a 'policymaker' or was even aware of the decision to enforce the Ordinance against Plaintiffs and not against racial-justice protesters." JA172. But this is a selective reading of the Complaint. That pleading states that "Mayor Muriel Bowser and/or District officials directed the District to enforce the Defacement Ordinance against Plaintiffs but not other speakers, so that enforcement became a policy and practice of the District," F.A.C. ¶ 78 (JA80), and that "Mayor Bowser and/or District officials ordered the Metropolitan Police Department to be present at the FDF and SFLA event in order to stop the painting and chalking," *id.*

¶ 66 (JA78). At the motion to dismiss stage, these allegations are more than sufficient "to raise a reasonable expectation that discovery will reveal evidence" of Defendant's liability. *Twombly*, 550 U.S. at 556. This Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should hold that the Complaint plausibly alleges sufficient facts to survive a motion to dismiss and remand for the consideration of Plaintiffs' viewpoint-discrimination and selective-enforcement claims.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32 because the brief contains 6,918 words, excluding the parts exempted by Fed. R. App. P. 32(f), as determined by the word counting feature of Microsoft Office 365.

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Dated: February 17, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2022, I electronically filed the foregoing Opening Brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

/s/ John J. Bursch
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ADDENDUM

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PERTINENT STATUTES AND REGULATIONS

§ 5–331.03. Policy on First Amendment assemblies.

It is the declared public policy of the District of Columbia that persons and groups have a right to organize and participate in peaceful First Amendment assemblies on the streets, sidewalks, and other public ways, and in the parks of the District of Columbia, and to engage in First Amendment assembly near the object of their protest so they may be seen and heard, subject to reasonable restrictions designed to protect public safety, persons, and property, and to accommodate the interest of persons not participating in the assemblies to use the streets, sidewalks, and other public ways to travel to their intended destinations, and use the parks for recreational purposes.

(Apr. 13, 2005, D.C. Law 15-352, § 103, 52 DCR 2296.)

5–331.05. Notice and plan approval process for First Amendment assemblies — Generally.

(a) It shall not be an offense to assemble or parade on a District street, sidewalk, or other public way, or in a District park, without having provided notice or obtained an approved assembly plan.

(b) The purpose of the notice and plan approval process is to avoid situations where more than one group seeks to use the same space at the same time and to provide the MPD and other District agencies the ability to provide appropriate police protection, traffic control, and other support for participants and other individuals.

(c) Except as provided in subsection (d) of this section, a person or group who wishes to conduct a First Amendment assembly on a District street, sidewalk, or other public way, or in a District park, shall give notice and apply for approval of an assembly plan before conducting the assembly.

(d) A person or group who wishes to conduct a First Amendment assembly on a District street, sidewalk, or other public way, or in a District park, is not required to give notice or apply for approval of an assembly plan before conducting the assembly where:

(1) The assembly will take place on public sidewalks and crosswalks and will not prevent other pedestrians from using the sidewalks and crosswalks;

(2) The person or group reasonably anticipates that fewer than 50 persons will participate in the assembly, and the assembly will not occur on a District street; or

(3) The assembly is for the purpose of an immediate and spontaneous expression of views in response to a public event.

(e) The Mayor shall not enforce any user fees on persons or groups that organize or conduct First Amendment assemblies.

(f) The Mayor shall not require, separate from or in addition to the requirements for giving notice of or applying for approval of an assembly plan for a First Amendment assembly, that persons give notice to, or obtain a permit or plan from, the Chief of Police, or other District officials or agencies, as a prerequisite for making or delivering an address, speech, or sermon regarding any political, social, or religious subject in any District street, sidewalk, other public way, or park.

(g) The Mayor shall not require, separate from or in addition to the requirements for giving notice of or applying for approval of an assembly plan for a First Amendment assembly, that persons give notice to, or obtain a permit or plan from the Chief of Police, the Department of Consumer and Regulatory Affairs, or any other District official or agency as a prerequisite for using a stand or structure in connection with such an assembly; provided, that a First Amendment assembly plan may contain limits on the nature, size, or number of

stands or structures to be used as required to maintain public safety. Individuals conducting a First Amendment assembly under subsection (d) of this section may use a stand or structure so long as it does not prevent others from using the sidewalk.

(h) The Mayor shall not require, separate from or in addition to the requirements for giving notice of or applying for approval of an assembly plan for a First Amendment assembly, that persons give notice to, or obtain a permit or plan from, the Chief of Police, the Director of the Department of Consumer and Regulatory Affairs, or any other District official or agency as a prerequisite for selling demonstration-related merchandise within an area covered by an approved plan or within an assembly covered by subsection (d) of this section; provided, that nothing in this subsection shall be construed to authorize any person to sell merchandise in a plan-approved area contrary to the wishes of the plan-holder.

(Apr. 13, 2005, D.C. Law 15-352, § 105, 52 DCR 2296.)

§ 22–3312.01. Defacing public or private property.

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

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

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

(Mar. 10, 1983, D.C. Law 4-203, § 2, 30 DCR 180; June 3, 1997, D.C. Law 11-275, § 7, 44 DCR 1408.)