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**Testimony of Mara Verheyden-Hilliard
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**Committee on the Judiciary & Public Safety
Public Roundtable on PR22-0144, the “Chief of the Metropolitan Police
Department Peter Newsham Confirmation Resolution of 2017”**

I wish to thank Councilmember Allen and this Committee for holding this roundtable and for the opportunity to speak on this matter.

I am Mara Verheyden-Hilliard, the Executive Director of the Partnership for Civil Justice Fund and a constitutional rights lawyer.

This is a pivotal moment in American life. With the election of President Donald Trump, the nation is witnessing a groundswell of political activity, in which people have taken to the streets, sidewalks and parks to engage in mass demonstrations, the likes of which have not been seen in decades and in some respects are unprecedented. People are coming together to speak out in opposition to racist, misogynist and environmentally devastating policies and programs, and in defense of targeted communities.

As we know, Washington, D.C., is the most important jurisdiction in the country for the expression of fundamental First Amendment rights and the petitioning of the government — the epicenter of all mass mobilizations for social change and civil rights.

The decision as to who will be the next Chief of Police must recognize that one of the most important responsibilities of that office will be unequivocal and steadfast obedience to the Constitution and protection of free speech rights. Peter Newsham has made clear not only by words but by action that he is unable and or unwilling to carry out that function and obey, without deviation, the requirements of the Constitution and the requirements delineated by this body under the First Amendment Rights and Police Standards Act.

During many years encompassing Peter Newsham's career and leadership positions within the MPD, the Partnership for Civil Justice Fund brought a series of lawsuits exposing extreme police misconduct in violation of First and Fourth Amendment rights of persons exercising their rights to free speech in D.C., including mass false arrests without particularized probable cause, sweeping hundreds of innocent people into jail; improper use of police lines to kettle, trap and detain peaceful and lawful protesters; failure to provide dispersal orders and opportunity to comply; unlawful, indiscriminate use of force and excessive force; and illegal MPD infiltration and provocateur operations against peaceful, lawful social justice groups.

We worked closely with the D.C. Council when it held extensive investigations and hearings into police misconduct in the handling of demonstrations, which resulted in a major report identifying clear violations of constitutional rights, including Peter Newsham's culpable role in those violations, and ultimately the enactment of the First Amendment Rights and Police Standards Act of 2004 (FARPSA).

The PCJF's litigation also resulted in major changes in police policy and procedures in addition to damages of \$25 million to persons who suffered constitutional deprivations.

As a result of the legal requirements governing the police under the FARPSA and the additional changes in policy and procedures and related police training we obtained, we have

been able to see the positive shift in policing of protests in Washington, D.C. In recent years, D.C. has stood apart from many other major jurisdictions in the handling of demonstrations. We could see it, for example, as the Black Lives Matter movement took to the streets and spoke out against racist policing and was able to have strong, powerful demonstrations – where in other jurisdictions such demonstrations were subject to brutal repression.

But with the assumption of authority by Peter Newsham as Interim Chief, it appears we are moving backward. In his first handling of major demonstrations as Interim Chief on January 20, 2017, at the Inauguration of Donald Trump, the MPD under his command directly violated not only the Constitution, but violated the law that this Council wrote specifically addressing the circumstances that occurred that day. The MPD, under Peter Newsham’s command, **violated the explicit and specific directives to the police under the FARPSA that mandate clear guidance in handling demonstrations when there are some persons who engage in property damage, that prohibit dragnet arrests,** and that if followed would have ensured that only those who broke the law were arrested rather than hundreds of persons in a mass arrest devoid of particularized probable cause. The MPD, under Peter Newsham’s command, violated the explicit and specific directives to the police under the FARPSA that prohibit the mass use of indiscriminate force, specifically chemical weapons.

These laws and constitutional obligations are critical in the protection of dissent. Under the policing regime recently re-implemented under Newsham in derogation of these obligations, any person lawfully exercising free speech rights, including those from vulnerable populations, may be subject to life-altering sudden false arrests and prosecution even if they did nothing wrong, simply by being in proximity to someone else — protester or provocateur — who shows up and breaks the law.

It is most problematic that even with these direct mandates governing police conduct, after the fact, Peter Newsham continues to discuss the events of January 20 as though these laws do not exist and as if the MPD was not bound by them, stating merely that *if* there were mistakes, there can be future evaluation, and the police will try to do better next time. The District of Columbia cannot afford to have a Chief of Police who acts in willful disobedience of the law and, after the fact, pretends that it does not exist.

Failure of Transparency: Withholding Information Important to the Nomination Process

Moreover, having effectuated the first major mass arrest and mass use of chemical and other weapons since the D.C. Council's enactment of the FARPSA, and thus triggering its record-keeping obligations and public disclosure requirements, Interim Chief Peter Newsham and the MPD are refusing to make public those responsive records.

This defies the police accountability and transparency that the D.C. Council intended in its careful enactment of the FARPSA.

The Partnership for Civil Justice Fund sought these records that the Council mandated within days of the January 20 police actions.

The MPD and Interim Chief Newsham are standing in willful disobedience of their lawful obligations to disclose information under the D.C. FOIA and under the FARPSA, including defiantly stating a refusal to disclose information where **such information is mandated by law that it "shall be made available to the public on request."** The law makes clear that this material is not subject to withholding on an investigative or any other basis.

The PCJF filed litigation on March 23 to force the disclosure of those records. That lawsuit, which delineates records being withheld, is appended to the written submission of our testimony today.

These records, which will shed light on whether Mr. Newsam complied with the Council's enacted law governing police conduct in the context of First Amendment activities, are critical to the evaluation of his fitness to be Chief of Police.

Yet, this information is being improperly and illegally withheld at the very moment when its release would inform the public and the D.C. Council in their evaluation of Peter Newsam's nomination to be Chief of Police

This Council should not agree to vote on Peter Newsam's nomination until these records are made public, and until the D.C. Council has had opportunity to conduct an investigation into police actions on January 20.

Free Speech Rights Are in the Balance

The responsibility of the police, in times of political expression, is first and foremost to uphold and protect the constitutional rights of persons who seek to engage in peaceable assembly and dissent. This free speech is the lifeblood of a democracy.

We are at a fork in the road. There are two choices: Do we go back to a period in D.C.'s recent past when attending a mass demonstration in Washington, D.C., carried a real risk of being subjected to mass false arrest and/or injury inflicted by the police? Or will D.C. move forward to stand out among major jurisdictions in the United States, and in its role as the nation's capital, as the place where the exercise of free speech is cherished, welcomed and supported?

The Danger of a Lesson Not Learned: The D.C. Circuit's Prior Ruling on Pershing Park and its Relevance to the January 20 Mass Arrests

Interim Chief Newsam's history conducting mass violations of constitutional rights of demonstrators is a matter of public record. The PCJF brought class action litigation vindicating the rights of those 400 persons who were mass arrested in Pershing Park.

In that class action, *Barham v. Ramsey*, the court found that Newsham's actions in conducting the sweeping arrest of nearly 400 peaceful demonstrators, who were subsequently hog-tied and held for 24 hours or more, were without lawful basis and denied his request for qualified immunity finding that **“[n]o reasonable officer in Newsham's position could have believed that probable cause existed to order the sudden arrest of every individual in Pershing Park.”** The courts found the charging of hundreds of protestors with failure to obey a police order without first ordering them to disperse was **“nothing short of ludicrous.”** The D.C. Circuit described in ample detail **“just how indefensible Newsham's actions were.”** The Court did not find that there had simply been a “mistake,” but rather that there had been a substantial and plainly evident violation of clearly established law. This is important in evaluating Newsham's current fitness to be Chief of Police because his unwillingness to this day to acknowledge the law governing his conduct and the significance of his illegal and unconstitutional acts renders future violations all the more likely.

In the *Barham* Pershing Park case, the PCJF also uncovered that the MPD engaged in a cover-up as to the arrests, and loss, destruction and apparent tampering of evidence, including radio runs, real time logs of events and video.

The Pershing Park case made clear that Newsham's actions in sweeping up and mass arresting groups of people based on proximity to demonstrations and the existence of criminal conduct by *others* are illegal actions, and constitute arrests devoid of particularized probable cause. The District of Columbia cannot, under the current leadership of Interim Chief Newsham, return to the unconstitutional tactics he commanded previously.

And after so many millions of taxpayer dollars spent, a D.C. Council investigation and the D.C. Circuit ruling finding Peter Newsham's actions flagrantly violated the Constitution, **Mr.**

Newsham stands by his decision. To this very day, Mr. Newsham is reiterating the same false factual statements as to what occurred the day of the Pershing Park arrests and **the same excuses that he made when the court called his presentation “ludicrous.”** He has been unable and unwilling to state without qualification that what he did was wrong and unconstitutional as determined by the Court.

Peter Newsham made a decision — it was not a “mistake,” but a calculated decision made during a lengthy period of observation - to illegally and falsely arrest nearly 400 peaceful persons — tourists, journalists, legal observers, protestors, passers-by — in violation of their Fourth Amendment rights and extinguishing their First Amendment rights.

This was a mass violation of civil rights that should shock the conscience. The failure to admit these violations and to **continue to excuse them with the same falsehoods that were debunked by this very Council** in its “Report on Investigation of the Metropolitan Police Department's Policy and Practice in Handling Demonstrations in the District of Columbia” (March 2004) should be enough recalcitrance for this body to reject Mr. Newsham’s nomination.

January 20, 2017, Protests at the Inaugural of Donald Trump

However, it is not merely a matter of history. The Council simply cannot overlook that in handling his first major demonstration as Interim Chief Newsham just two months ago directly engaged in the exact conduct that the U.S. Court of Appeals for the District of Columbia Circuit condemned him for, in no uncertain terms. It also cannot overlook the fact that his actions appear to have been in direct violation of the law that this Council enacted after his prior violations, the First Amendment Rights and Police Standards Act (FARPSA), which took effect in 2005.

Delineated requirements of proper police conduct under the FARPSA are explicitly applicable in situations where there are also acts of property damage or allegations of criminal

acts being carried out by some persons in proximity to First Amendment activity. At the end of this submitted testimony are a number of specific legal requirements of the FARPSA at issue. **These laws, which were disregarded, were put in place to ensure that the police properly distinguish between those for whom there is probable cause to arrest for criminal activity and others who happen to be proximity to such actions.** The decision was made by the MPD, under the command of Peter Newsham, not to follow the law.

The Council cannot, and should not, fail to require the Chief of Police of the District of Columbia to abide by the law.

Constitutional Requirements that Peter Newsham and the MPD Apparently Violated on January 20, 2017

Peter Newsham’s claim that because there were some persons who engaged in violence the police necessarily swept up hundreds in order to “restore order” is a statement far afield from constitutional requirements and should be of great concern to the Council.

In times of protest, even if violence occurs, the First Amendment requires police to act with precision and to not abridge or violate the constitutional rights of peaceful persons, especially through arrest or use of force. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 816 (1982) (“The First Amendment does not protect violence ... When such conduct occurs in the context of constitutionally protected activity, however, ‘precision of regulation’ is demanded.”) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). “[O]therwise there is a danger that one in sympathy with the legitimate aims of” a political movement but not “intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share.” *Id.* at 919.

The Constitution requires particularized probable cause. The person being arrested must be the person believed to have engaged in the offending conduct. *Maryland v. Pringle*, 540 U.S. 366, 370-71 (2003). A person cannot be arrested merely for being in proximity to others who engage in unlawful conduct. *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979).

Nor can the police's perception that people share a political cause, marching in protest to Donald Trump's inauguration or holding a particular ideology, be the basis for associating protesters who did not commit a criminal act with persons who have engaged in vandalism. *See NAACP v. Claiborne Hardware*.

Dragnet arrests are mass arrests made in the absence of particularized probable cause and are unlawful. The inaugural arrests have characteristics consistent with unconstitutional dragnet arrests. Indeed, the MPD released selected media who had become trapped by the indiscriminate and dragnet use of police lines, and the USAO has dropped charges against other selected media and other persons based on an after-the-fact evaluation of their *status* as media or observers. However, this fact establishes that the MPD's dragnet arrest was not based upon police observation of a person's conduct but was based upon a person's proximity, and that it was so sweeping as to trap wholly innocent persons.

The D.C. Circuit's ruling regarding Newsham's decisions in Pershing Park is relevant to the MPD's conduct on January 20: "With respect to Newsham, we affirm the trial court's ruling that his alleged actions violated the plaintiffs' clearly established constitutional rights. Undisputed evidence reveals that Newsham arrested an undifferentiated mass of people on the basis of crimes committed by a handful of individuals who were never identified. Because nothing in the record suggests that Newsham had particularized probable cause to arrest each of the 386 persons caught in the police sweep, *see Ybarra v. Illinois*, 444 U.S. 85, 100 S.Ct. 338, 62

L.Ed.2d 238 (1979), his claim to qualified immunity raises no genuine issue as to any material fact, *see* FED. R. CIV. P. 56(c). Newsham has no entitlement to qualified immunity.” *Barham v. Ramsey*, 434 F.3d 565, 568 (D.C. Cir. 2006)

“[Newsham] has made no effort to ascribe misdeeds to the specific individuals arrested. Nowhere have appellants suggested that the particular individuals observed committing violations were the same people arrested; instead, they refer generically to what ‘demonstrators’ were seen doing. This is the upshot of making arrests based on the plaintiffs’ occupancy of a randomly selected zone, rather than participation in unlawful behavior.” *Barham*, 434 F.3d at 574.

“The First Amendment does not conflict with the need for flexibility when dealing with large, unruly assemblies: ‘Confronted with a mob the police cannot be expected to single out individuals; they may deal with the crowd as a unit.’ [citing *Washington Mobilization Committee v. Cullinane*, 566 F.2d 107 (D.C.Cir.1977)] However, the *Cullinane* decision includes an important caveat: We do not suggest of course that one who has violated no law may be arrested for the offenses of those who have been violent or obstructive. As we have seen however the police may validly order violent or obstructive demonstrators to disperse or clear the streets. If any demonstrator or bystander refuses to obey such an order after fair notice and opportunity to comply, his arrest does not violate the Constitution even though he has not previously been violent or obstructive.” *Barham*, 434 F.3d at 575.

Laws Governing Police Conduct Violated and Disregarded: The January 20, 2017, Police Actions and the First Amendment Rights and Police Standards Act

D.C. Code § 5–331.07 and § 5–331.08 identify the steps that the police are to take when there is violence in conjunction with First Amendment activity, including how, and under what circumstances, a group may be handled as a group. This does not include sweeping mass arrests, but rather requires dispersal orders and particular use of police lines to arrest identified persons for whom there is particularized probable cause for arrest.

§ 5–331.10 requires particular documentation regarding each arrest made in the context of First Amendment activities except where an emergency is declared. However, if an emergency is declared the section requires that declaration be made in writing at the time with an explanation of the circumstances for the determination. As of yet, we are unaware of any such declaration existing.

§ 5–331.14 requires that the police allow media access to First Amendment demonstrations. Notably, the DCMPD itself decided to cease issuing credentials to media in 2015, which calls into question the USAO’s selective decisions as to which arrestees are members of the press, or that only “credentialed” media, will have their charges dropped.

§ 5–331.07 Dispersal Orders

(c) Where participants in a First Amendment assembly, or other persons at the location of the assembly, engage in unlawful disorderly conduct, violence toward persons or property, or unlawfully threaten violence, the MPD shall, to the extent reasonably possible, respond by dispersing, controlling, or arresting the persons engaging in such conduct, and not by issuing a general order to disperse, thus allowing the First Amendment assembly to continue.

(d) The MPD shall not issue a general order to disperse to participants in a First Amendment assembly except where:

(1) A significant number or percentage of the assembly participants fail to adhere to the imposed time, place, and manner restrictions, and either the compliance measures set forth in subsection (b) of this section have failed to result in substantial compliance or there is no reasonable likelihood that the measures set forth in subsection (b) of this section will result in substantial compliance;

(2) A significant number or percentage of the assembly participants are engaging in, or are about to engage in, unlawful disorderly conduct or violence toward persons or property; or

(3) A public safety emergency has been declared by the Mayor that is not based solely on the fact that the First Amendment assembly is occurring, and the Chief of Police determines that the public safety concerns that prompted the declaration require that the First Amendment assembly be dispersed.

(e) (1) If and when the MPD determines that a First Amendment assembly, or part thereof, should be dispersed, the MPD shall issue at least one clearly audible and understandable order to disperse using an amplification system or device, and shall provide the participants a reasonable and adequate time to disperse and a clear and safe route for dispersal.

(2) Except where there is imminent danger of personal injury or significant damage to property, the MPD shall issue multiple dispersal orders and, if appropriate, shall issue the orders from multiple locations. The orders shall inform persons of the route or routes by which they may disperse and shall state that refusal to disperse will subject them to arrest.

(3) Whenever possible, MPD shall make an audio or video recording of orders to disperse.

§ 5–331.08. Use of police lines.

No emergency area or zone will be established by using a police line to encircle, or substantially encircle, a demonstration, rally, parade, march, picket line, or other similar assembly (or subpart thereof) conducted for the purpose of persons expressing their political, social, or religious views except where there is probable cause to believe that a significant number or percentage of the persons located in the area or zone have committed unlawful acts (other than failure to have an approved assembly plan) and the police have the ability to identify those individuals and have decided to arrest them; provided, that this section does not prohibit the use of a police line to encircle an assembly for the safety of the demonstrators.

§ 5–331.14. Police-media relations.

(a) Within 90 days of April 13, 2005, the Chief of Police, pursuant to subchapter 1 of Chapter 5 of Title 2, shall issue rules governing police passes for media personnel.

(b) Within 90 days of April 13, 2005, the Chief of Police shall develop and implement a written policy governing interactions between the MPD and media representatives who are in or near an area where a First Amendment assembly is ongoing and who are reporting on the First Amendment assembly. The policy shall be consistent with the requirements of subsection (c) of this section.

(c) (1) The MPD shall allow media representatives reasonable access to all areas where a First Amendment assembly is occurring. At a minimum, the MPD shall allow media representatives no less access than that enjoyed by members of the general public and, consistent with public safety considerations, shall allow media representatives access to promote public knowledge of the assembly.

(2) The MPD personnel located in or near an area where a First Amendment assembly is ongoing shall recognize and honor media credentials issued by or officially recognized by the MPD.

(3) The MPD shall make reasonable accommodations to allow media representatives effectively to use photographic, video, or other equipment relating to their reporting of a First Amendment assembly.

[Note: The MPD determined that it would no longer issue any media credentials. Thus, media is not required to have — as it cannot possess — DC credentials in order for media to be recognized as such at demonstrations.]