No. 23-CV-445

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

LAUREN D. BOUTAUGH, ET AL.
APPELLANTS,

V.

DISTRICT OF COLUMBIA,
APPELLEE.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE THE DISTRICT OF COLUMBIA

BRIAN L. SCHWALB
Attorney General for the District of Columbia

CAROLINE S. VAN ZILE
Solicitor General

ASHWIN P. PHATAK
Principal Deputy Solicitor General

THAIS-LYN TRAYER
Deputy Solicitor General

*HOLLY M. JOHNSON
Senior Assistant Attorney General
Offices of the Solicitor General

Offices of the Attorney General
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
(202) 442-9890
Holly.Johnson@dc.gov

*Counsel expected to argue

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STATEMENT OF THE ISSUES

Lauren and Joshua Boutaugh were both employed as District of Columbia Metropolitan Police Department ("MPD") officers when the COVID-19 pandemic hit the District in March 2020. That summer, Ms. Boutaugh learned that she was pregnant. MPD placed her on limited duty in the Fifth District administrative offices, where COVID-prevention measures were allegedly deficient.

Mr. Boutaugh contracted COVID in December after close contact with two contagious coworkers. Because he did not know that he had been exposed, he did not isolate himself from Ms. Boutaugh in their home. Within days, she also contracted COVID, and her illness led to the tragic death of their unborn child, SMB.

SMB, through her parents, brought this negligence action against the District. The Superior Court dismissed their complaint under the public duty doctrine, holding that, even if the District breached a special duty to Ms. Boutaugh by failing to enforce COVID-prevention measures in the workplace, that negligence was not the cause of her illness because the complaint alleges that she contracted COVID from Mr. Boutaugh in their family home. This appeal raises two issues:

1. Whether the complaint alleges that the District engaged in "direct" negligence (to which the public duty doctrine does not apply) by increasing the risk that Ms. Boutaugh would contract COVID than had the District done nothing at all to protect its employees; or, alternatively, whether the complaint forecloses liability

for "direct" negligence by affirmatively alleging that she most likely contracted COVID from Mr. Boutaugh in their family home.

2. Whether the public duty doctrine bars relief because any special duty the District could have owed SMB through Ms. Boutaugh was limited to protection from exposure to COVID in the workplace, and the complaint affirmatively alleges that Ms. Boutaugh contracted COVID from Mr. Boutaugh in their family home.

STATEMENT OF THE CASE

The Boutaughs sued the District on December 23, 2022, claiming liability for negligence under the District of Columbia Survival Act, D.C. Code § 12-101 *et seq.*, and the District of Columbia Wrongful Death Act, D.C. Code § 16-2701 *et seq*. JA 6-29. They also brought claims under Maryland's survival and wrongful death statutes, but they later abandoned those claims. JA 22-28, 52. The Superior Court dismissed their complaint on May 9, 2023, and they filed this timely appeal on May 23. JA 101-112, 116.

STATEMENT OF FACTS

1. Statutory Framework.

"Under the public duty doctrine, the District of Columbia has no duty to provide public services to any particular citizen." *Allison Gas Turbine v. District of Columbia*, 642 A.2d 841, 843 (D.C. 1994). Instead, that duty of care "is owed to the public at large." *Warren v. District of Columbia*, 444 A.2d 1, 3 (D.C. 1981) (en

banc). The public duty doctrine thus precludes recovery in negligence against the District unless it owed the plaintiff a "specific legal duty." *Id.*

Like any private entity, the District can be liable for negligence that directly causes a person's injury or affirmatively worsens her condition. *Johnson v. District of Columbia*, 580 A.2d 140, 142 (D.C. 1990). But it can only be liable for injury caused by an external source if it had a "special relationship" giving rise to a "special duty" of protection. *Allison Gas*, 642 A.2d at 843. The public duty doctrine thus allows the District to provide services that protect the public without incurring potentially cost-prohibitive exposure to liability.

Although the public duty doctrine began as judge-made law, it was codified in 2016 by D.C. Code § 5-401.02, which "ratifies the interpretation and application of the public duty doctrine by the District of Columbia Court of Appeals up through the decision of September 25, 2014, in *Allen v. District of Columbia*, No. 10-CV-1425," 100 A.3d 63 (D.C. 2014). The holdings of this Court in prior public duty doctrine decisions, from *Warren* through *Allen*, now have the force of statute. *See Hoodbhoy v. District of Columbia*, 282 A.3d 1092, 1098 (D.C. 2022).

2. The Boutaughs' Complaint.

Making all reasonable inferences in favor of the Boutaughs, as the Court must at this stage of the litigation, their complaint alleges the following facts:

A. In response to the COVID-19 pandemic, the District implements new workplace practices to reduce the spread of the deadly virus.

COVID-19 is a highly contagious, potentially fatal respiratory illness transmitted through airborne droplets, such as those produced by coughing or sneezing. *Kuciemba v. Victory Woodworks, Inc.*, 531 P.3d 924, 1004 (Cal. 2023). The disease was recognized in early 2020 and quickly spread across the globe. *Id.* On March 11, 2020, the World Health Organization declared the COVID-19 outbreak a pandemic. *See Rose's 1, LLC v. Erie Ins. Exch.*, 290 A.3d 52, 54 (D.C. 2023). The U.S. Department of Health and Human Services had already declared a public health emergency and, that same day, Mayor Muriel Bowser declared a public emergency in the District of Columbia. *See* Mayor's Order 2020-045 (March 11, 2020), *available at* https://tinyurl.com/vsvrmjfu.[1] Within days, more than half of the District's workforce retreated to their homes to reduce the spread of the deadly virus. *See* Mayor's Order 2021-099 (August 10, 2021), *available at* https://tinyurl.com/43dhbrpx. For the next 16 months, these employees worked remotely as the world waited for the development of safe and effective vaccines. *Id.*

The District, however, still needed to provide basic services to the public. As a result, throughout the pandemic, almost 40% of its employees were deemed

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[1] "[W]hen reviewing the grant of a motion to dismiss," this Court "may take judicial notice of . . . matters of public record." *Bostic v. District of Columbia*, 906 A.2d 327, 332 (D.C. 2006).

"essential" and required to work in-person. *Id.* Sworn police officers were among those essential employees—they continued to work in-person even though their civilian counterparts were sent home to work remotely. JA 67.

Throughout the next year, as health officials learned more about the virus, MPD implemented new practices to reduce its spread. Employees were required to wear face masks and be assessed for symptoms before entering MPD facilities. JA 84-85; 89-90. Those experiencing COVID symptoms were required to stay home and, if they tested positive for COVID, to notify the Police and Fire Clinic. JA 86-87. The complaint also suggests—although it provides no details—that MPD adopted a contact-tracing protocol requiring it to notify employees who had been in close contact with employees who had tested positive for COVID. *See* JA 11, 13.

B. Ms. Boutaugh is assigned to the Fifth District administrative offices, where MPD allegedly fails to enforce COVID-prevention measures.

The Boutaughs were both employed as MPD officers assigned to the Fifth District. JA 9. In June 2020, they learned that Ms. Boutaugh was pregnant with their second child. JA 4. To accommodate her pregnancy, MPD placed her on limited duty and assigned her to work in the Fifth District administrative offices. JA 9. According to the complaint, the officials managing those offices did not enforce MPD's policies regarding mandatory masking, contact tracing, social distancing, quarantining, health screening, and limitations on access. JA 11.

At some point during the pandemic, Ms. Boutaugh's pregnant coworker asked if she could telework due to concerns for the health of her baby, but MPD denied the request. JA 10-11. Ms. Boutaugh believed that had she asked to telework because of her pregnancy, her request would also have been denied. JA 11.

C. Ms. Boutaugh protects herself from COVID outside the home, but contracts the disease a few days after Mr. Boutaugh becomes ill, leading to SMB's *in utero* death.

After she learned she was pregnant, Ms. Boutaugh did everything she could to reduce her exposure to COVID outside of the home. JA 11. She "curtailed all outside activity, remained masked at all times outside the home, including in the office, and limited her contacts to work and home only." JA 11. She did not enter any grocery store or shopping outlet, instead relying on contactless pickup. JA 11. The complaint does not allege, however, that she took measures to protect herself from exposure to Mr. Boutaugh within their family home. *See* JA 11-13.

A surge of COVID cases in late 2020 led to the infection of many Fifth District police officers. JA 10.[2] On December 16, two officers in Mr. Boutaugh's crime suppression unit tested positive. JA 13. Although Mr. Boutaugh had been a "close contact," MPD did not immediately advise him about their test results. JA 13. Had

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[2] *See also* Nicole Acevedo, *December Was the Deadliest, Most Infectious Month Since the Start of the Pandemic*, NBC News (Jan. 1, 2021) https://tinyurl.com/55ryc37a.

he known, "he would have isolated himself away from Ms. Boutaugh, outside the family home, in order to protect her, and their baby, from exposure." JA 13.

By December 19, Mr. Boutaugh had developed COVID symptoms. After that, "[t]he family began masking at all times and [he] isolated himself on a separate floor of the family home." JA 13. He took a COVID test on December 20 and, on December 24, received a positive test result. JA 13.

In the meantime, on December 20—the day after Mr. Boutaugh became symptomatic—Ms. Boutaugh began developing her own COVID symptoms. JA 13. Two days later, she too tested positive for the virus. JA 14. Over the next week, she became very ill, requiring IV fluids and medication. JA 14. A week later, on December 30, SMB stopped moving; she was delivered stillborn the next day. JA 14-15. An autopsy found that SMB died because of Ms. Boutaugh's COVID infection. JA 16.

3. The Superior Court's Decision.

The Boutaughs sued on behalf of SMB under the D.C. Survival Act, D.C. Code § 12-101 *et seq.*, and the D.C. Wrongful Death Act, D.C. Code § 16-2701 *et seq.*, based on the District's failure to protect Ms. Boutaugh from exposure to COVID.[3] They claim that MPD negligently failed to: (1) permit its pregnant officers

[3] The Boutaughs' own injuries were compensated under the exclusive remedy provisions of the Police and Firefighters Retirement and Relief Act, D.C. Code

to telework; (2) enforce COVID-prevention measures in the workplace; and (3) timely inform Mr. Boutaugh of his close contact with officers who contracted COVID. JA 19-20.

The Superior Court dismissed the complaint under the public duty doctrine. *First*, it found that COVID was an "external threat," and that the District had not affirmatively worsened SMB's condition by increasing her mother's exposure to the virus. JA 106. As such, the court "[could] not find that the District took the sort of direct action that would make this a standard negligence case rather than one subject to the public duty doctrine." JA 106.

Second, the court found that Ms. Boutaugh did not have a "special relationship" with the District that created "a particular, individualized duty to [SMB] or a limited class of similarly-situated individuals." JA 107. The court did not decide whether the District had a special duty to protect its employees from workplace exposure because, it found, "the harm to SMB has no relationship to Ms. Boutaugh's status as an MPD employee." JA 108. Instead, "Plaintiffs allege that two MPD officers spread COVID-19 to Mr. Boutaugh, who then spread it to Ms. Boutaugh." JA 108. "The fact that Ms. Boutaugh also worked for MPD is irrelevant.

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§ 5-708.01 *et seq.*, which is comparable to a worker's compensation statute. *See* JA 77.

Ms. Boutaugh could have worked elsewhere, been on leave, or had no job at all—Mr. Boutaugh still would have spread COVID-19 to Ms. Boutaugh." JA 108.

STANDARD OF REVIEW

"This court reviews *de novo* a dismissal under Super. Ct. Civ. R. 12 (b)(6) for failure to state a claim on which relief can be granted." *Poola v. Howard Univ.*, 147 A.3d 267, 276 (D.C. 2016). "In doing so, [it] construe[s] the complaint in the light most favorable to the plaintiff and take[s] her factual allegations as true." *Id.* "[T]o survive a . . . motion to dismiss, a complaint must plead 'enough facts to state a claim to relief that is plausible on its face,'" *id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)), "i.e., 'factual content that allows the court to draw the reasonable inference that defendant is liable for the misconduct alleged,'" *id.* (quoting *Comer v. Wells Fargo Bank, N.A.*, 108 A.3d 364, 371 (D.C. 2015)).

SUMMARY OF ARGUMENT

1. The public duty doctrine applies because COVID was an external threat and the District's alleged negligence did not increase the risk that Ms. Boutaugh would contract COVID beyond what would have existed had the District done nothing to quell the spread of the deadly virus. The District's alleged failure to enforce its COVID-prevention measures did not put her in a worse position than had it never adopted the measures. Nor did the District increase her risk of contracting COVID by requiring her to work in person because, as a sworn police officer, she

was already required to work in person. Had the District done nothing in response to the pandemic, Ms. Boutaugh still would have worked in the Fifth District administrative offices—she simply would have shared that space with her civilian counterparts.

Alternatively, even if the District's requirement that Ms. Boutaugh work in allegedly unsafe conditions could be construed as "direct" negligence, the complaint does not plausibly allege that *this* negligence was the cause-in-fact of SMB's death. Although causation is normally a jury question, this Court will affirm dismissal of a complaint that alleges facts making such proof hopelessly speculative. And the Boutaughs' complaint affirmatively alleges that Ms. Boutaugh most likely contracted COVID from Mr. Boutaugh in their family home, thereby foreclosing any reasonable possibility that they can prove she most likely contracted COVID from the workplace. Because any purportedly "direct" negligence did not cause SMB's death, the Boutaughs are left to pursue only their indirect, failure-to-protect claims, to which the public duty doctrine applies.

2. The public duty doctrine bars these claims. Because COVID-19 was an external threat, SMB can recover against the District only if the District breached a special duty to protect her from the virus and that breach caused her death. The Boutaughs argue that Ms. Boutaugh's employment with the District created a special duty to reasonably protect SMB from workplace exposure, and the District concedes,

for purposes of this appeal, that the complaint plausibly alleges such a duty. But Ms. Boutaugh's employment could not have created a special duty to protect SMB from exposure in the Boutaughs' own home—which, as discussed, the complaint alleges was the most likely source of Ms. Boutaugh's illness. The alleged existence of an employment-based special relationship between the District and Ms. Boutaugh is thus irrelevant.

This Court therefore need not consider whether a special duty was created by the other sources of authority proffered by the Boutaughs: the Protecting Pregnant Workers Fairness Act, D.C. Code § 32-1231.01 *et seq*., which requires employers to provide reasonable accommodations to pregnant employees; and the Chief of Police's general and executive orders adopting COVID-prevention measures in the workplace. Any duty created by these authorities would be narrower than the alleged duty created by the employment relationship, so they would add nothing to the Boutaughs' claims. And, in any event, these alleged duties would likewise be irrelevant because the complaint alleges that Ms. Boutaugh most likely contracted COVID at home.

Alternatively, if the Court does reach these claims, it should reject them. The Protecting Pregnant Workers Fairness Act could not have created a special relationship because Ms. Boutaugh did not ask MPD for an accommodation and the Boutaughs do not allege that she had a known, pregnancy-based limitation on her

ability to perform her job. And MPD's internal policies are simply incapable of creating a special relationship—only statutes and regulations can.

ARGUMENT

I. The Public Duty Doctrine Applies Because The Complaint Does Not Allege "Direct" Negligence Or, Alternatively, That Any Such Negligence Was The Cause Of SMB's Death.

A. The complaint does not allege that the District's negligence increased the risk to Ms. Boutaugh beyond what would have existed had the District done nothing to quell the spread of COVID.

1. The public duty doctrine precludes liability for the District's failure to prevent harm caused by an external source.

"For a claim sounding in negligence, like wrongful death, the plaintiff must show: '(1) that the defendant owed a duty to the plaintiff, (2) breach of that duty, and (3) injury to the plaintiff that was proximately caused by the breach.'" *Hoodbhoy*, 282 A.3d at 1096 (quoting *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 793 (D.C. 2011)). Establishing a duty of care is therefore "imperative to a negligence cause of action, essential to a finding of negligence, and a prerequisite to any negligence action." 57A Am. Jur. 2d Negligence § 70 (May 2024 update).

It is axiomatic that every individual "has a duty of reasonable care when [his] conduct creates a risk of physical harm to others." Restatement (Third) of Torts: Phys. & Emot. Harm § 37 (2012). "The flip side of this universal duty" to "avoid affirmatively causing physical harm to others" is that an individual "generally does

not owe a duty to warn, protect, or rescue a person from risks created by another source." W. Jonathan Cardi, *Reconstructing Foreseeability*, 46 B.C. L. Rev. 921, 928 (2005). That is true no matter how foreseeable the harm might be if no action is taken. *See* Restatement (Third) of Torts § 37.

Consistent with the rules applicable to private actors, the public duty doctrine recognizes that the District "has no duty to provide public services to any particular citizen." *Allison Gas*, 642 A.2d at 843. Instead, "the duty to provide public services is owed to the public at large, and absent a special relationship between the [District] and an individual, no specific legal duty exists." *Id.* (quoting *Warren*, 444 A.2d at 3). This "no duty to protect" principle embodied in the public duty doctrine applies even when the government provides services to reduce the risk of harm to its citizenry. The doctrine thus bars liability for the District's failure to prevent a harm caused by an external source, be it illness, *see Woods v. District of Columbia*, 63 A.3d 551, 558 (D.C. 2013); accident, *see Allison Gas*, 642 A.2d at 846; fire, *see Platt v. District of Columbia*, 467 A.2d 149, 151 (D.C. 1983); improper construction, *see District of Columbia v. Forsman*, 580 A.2d 1314, 1318 (D.C. 1990); or a third party's criminal acts, *see Hoodbhoy*, 282 A.3d at 1097.

At the same time, "[w]hen the District or its agents take action that 'directly' harms an individual, the law of negligence applies to it as it would to any other tortfeasor." *Hoodbhoy*, 282 A.3d at 1096 (quoting *District of Columbia v. Evans*,

644 A.2d 1008, 1017 n.8 (D.C. 1994)); *see Powell v. District of Columbia*, 602 A.2d 1123, 1127 (D.C. 1992) (explaining that "every person" has a duty "to so conduct his business as to avoid exposing others to injury"). A duty may be established and the District held liable for conduct that "actually made [the plaintiff's] condition worse than it would have been had [its officials] failed to show up at all or done nothing after their arrival," *Johnson*, 580 A.2d at 142,[4] which is consistent with the Restatement's suggestion that, for private actors, courts "consider whether, if the actor had never existed, the harm would not have occurred," Restatement (Third) of Torts § 7 cmt. l.

In *Johnson*, this Court explained how to distinguish between the District's negligent failure to prevent injury, which is covered by the public duty doctrine, and its "direct" or "affirmative" negligence, which is not. 580 A.2d at 142-43. There, firefighters were slow to respond to a 911 call for a woman having a heart attack, then arrived with inadequate equipment and no apparent sense of urgency. *Id.* at 141. Eventually, after ordering her moved to another room, they "appeared to give her CPR [cardiopulmonary resuscitation] by pressing on her chest." *Id.* at 143. This Court applied the public duty doctrine to their "failure . . . to perform any particular step that might have alleviated [her] condition," such as their late arrival and failure

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[4] Sovereign immunity, however, may still insulate the District from suit. *See Hoodbhoy*, 282 A.3d at 1097 n.2 (citing *Powell*, 602 A.2d 1126).

to properly mitigate her injury. *Id.* But it did not apply the doctrine to any "affirmative acts" that "worsened [her] condition," *id.* at 142, such as, potentially, their order that she be moved and their attempts at CPR, *id.* at 143. The Court explained that direct, "affirmative" negligence required "some act . . . [that] actually made [her] condition worse than it would have been had the firefighters failed to show up at all or done nothing after their arrival." *Id.* at 142 (citing *Warren*, 444 A.2d at 7-8 (examples of "affirmative negligence" may include "negligent handling of a police dog, negligent operation of a police vehicle, [or] negligent use of a police weapon"); *Weeda v. District of Columbia*, 521 A.2d 1156, 1160-61 (D.C. 1987) (liability permitted where negligent extrication of accident victim caused additional spinal injury)).

Under the *Johnson* test, this Court has consistently applied the public duty doctrine to claims arising out of the District's alleged failure to enforce laws, policies, or practices adopted to protect the public from external threats. *See, e.g.*, *Platt*, 467 A.2d at 151-52 (applying public duty doctrine to the District's failure to enforce mandatory egress laws before issuing occupancy permit); *Forsman*, 580 A.2d at 1317 (failure to enforce regulation requiring demolition permit); *Wanzer v. District of Columbia*, 580 A.2d 127, 129-30 & n.1 (D.C. 1990) (failure to follow agency policy requiring 911 call takers to dispatch appropriate emergency personnel and equipment); *Warren*, 444 A.2d at 2, 9 (similar).

2. The public duty doctrine applies because the Boutaughs fail to identify any District action that could have directly harmed SMB.

The Boutaughs do not identify any District action that could have directly harmed SMB by increasing the risk that Ms. Boutaugh would contract COVID beyond what would have existed had the District done nothing to suppress the spread of COVID.

First, they argue that the District's refusal to allow Ms. Boutaugh to work from home was an affirmatively negligent act. But, as a sworn police officer, Ms. Boutaugh was *already* required to work in person. *See* JA 67 (March 13, 2020 Executive Order requiring sworn members to "continue to report to work"). Requiring her to "remain" in this status was not an affirmative act that changed her condition in any way. Br. 25; *see, e.g.*, *Varner v. District of Columbia*, 891 A.2d 260, 275-76 (D.C. 2006) (applying public duty doctrine to the District's botched investigation of a college student's murder even though this left the students who remained on campus—including the plaintiff's son—vulnerable to a second attack).

It therefore does not matter that the District's pandemic measures required civilian employees, and not sworn officers, to work remotely. Many claims barred by the public duty doctrine have arisen out of the District's alleged failure to protect the plaintiffs as well as it usually protects others. *See, e.g.*, *Nealon v. District of Columbia*, 669 A.2d 685, 691-93 (D.C. 1995) (applying doctrine to the District's decision to reduce fire-hydrant pressure in plaintiff's neighborhood, but not others);

Stoddard v. District of Columbia, 623 A.2d 1152, 1152-53 (D.C. 1993) (applying doctrine to the District's failure to deploy crossing guard where one was usually posted). Had the District "done nothing" in response to the pandemic, *Johnson*, 580 A.2d at 142, Ms. Boutaugh *still* would have had to work in person—she simply would have had to do so alongside *more* people, including MPD's civilian employees.

Second, the Boutaughs target the District's alleged failure to enforce COVID-prevention measures in the Fifth District administrative offices, arguing that the District's "response to the pandemic in its own facilities was a direct action entirely within the District's control." Br. 23. But the District's "response" to an external threat (which, assuming negligence, is always within its "control") does not create a particularized duty to the plaintiff unless that response made her condition worse. *See Johnson*, 580 A.2d at 142 (public duty doctrine applied even though firefighters had control over their response to medical emergency); *Stoddard*, 623 A.2d at 1152-53 (MPD had control over deployment of crossing guards to protect schoolchildren from oncoming traffic); *Forsman*, 580 A.2d at 1318-19 (building inspector had control over requirement of demolition permit to protect neighbors from uncompensated loss); *Platt*, 467 A.2d at 150-51 (permitting officials had control over issuance of occupancy permit to protect cinema patrons from external threat of fire).

The Boutaughs argue that neither *Forsman* nor *Platt* ruled on "the applicability *per se* of the public duty doctrine" because those cases "turned on the existence of the 'special relationship' exception." Br. 24. But this Court often analyzes "direct" negligence under that exception because "[t]he requirement that the [District's] active conduct actually and directly worsen the victim's condition also finds expression in the requirement that in order for a special relationship to arise there must be 'justifiable reliance by the plaintiff.'" *Johnson* 580 A.2d at 142-43 (quoting *Morgan v. District of Columbia*, 468 A.2d 1306, 1314 (D.C. 1983)). This makes sense because, "[w]hile a victim may arguably 'rely' on [governmental actors] not to worsen her condition, no such reliance can be fairly based on [their] inaction or futile action." *Id.* at 143 (footnote omitted); *see, e.g.*, *Allison Gas*, 642 A.2d at 845 (finding no special relationship because Harbor Patrol's refusal to allow civilian scuba divers to attempt a rescue did not "subject[] the [drowning] victims to a greater risk" than had Harbor Patrol done nothing at all).

This Court's rejection of a special relationship in *Forsman* and *Platt* thus directly supports application of the public duty doctrine here. In those cases, the Court found no justifiable reliance because the District did not cause or increase the risk of the plaintiffs' injuries. *See Forsman*, 580 A.2d at 1318-19 (finding no special relationship in part because plaintiffs did not claim that building inspector "negligently advised [construction company] concerning proper underpinning

techniques"); *Platt*, 467 A.2d at 151 (finding no special relationship because failure to require occupancy permit was not an "active misrepresentation of conditions"). This same test demonstrates the lack of "direct" negligence here.

Setting aside that the Boutaughs do not actually allege that Ms. Boutaugh contracted COVID at her workplace, *see infra* pp. 25-31, adoption of the precautions alleged in the complaint, such as mandatory masking, social distancing, quarantining, and health screening, was not an affirmatively harmful act. And, as a matter of common sense, the District's alleged failure to enforce those precautions could not have increased the risk that Ms. Boutaugh would contract COVID beyond what would have existed had the District never adopted those measures in the first place. *See* JA 11-12. None of these precautions existed before the pandemic, so the District's alleged failure to enforce them could not have made SMB's condition worse than it would have been had the District "done nothing" in response to the pandemic. *Johnson*, 580 A.2d at 142. At most, this alleged negligence was "a failure to act, not an affirmatively negligent act." *Snowder v. District of Columbia*, 949 A.2d 590, 604 (D.C. 2008).

Finally, the Boutaughs have forfeited any "direct" negligence claim based on Mr. Boutaugh's exposure to COVID—which the complaint alleges was the most likely cause of SMB's death—by failing to preserve it in the Superior Court. There, they narrowed their claims of "direct" negligence to the District's alleged refusal to

allow "pregnant officers . . . to telework," which forced "Ms. Boutaugh . . . to appear for work" in a facility where "policies and procedures put in place . . . to prevent COVID-19 infection . . . were routinely being broken or ignored." JA 48-49. They did not extend these arguments to the District's requirement that Mr. Boutaugh—a full-duty police officer—work in person, nor did they argue that he worked in the Fifth District administrative offices or contracted COVID as a result.[5] They have thus forfeited any direct negligence claim arising out of *his* exposure to COVID. *See Salmon v. United States*, 719 A.2d 949, 953 (D.C. 1997) ("Parties may not assert one theory at trial and another on appeal." (quoting *Cowan v. United States*, 629 A.2d 496, 503 (D.C. 1993)). These arguments are also forfeited by their opening brief, which does not directly argue that the District's affirmative negligence caused Mr. Boutaugh's exposure to COVID, much less ask this Court to excuse their forfeiture of this claim in the Superior Court. *See McFarland v. George Wash. Univ.*, 935 A.2d 337, 351 (D.C. 2007) ("Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."

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[5] Their Superior Court brief does suggest that the District's negligence created a "COVID hot spot," perhaps foreshadowing an argument that this caused the officers who infected Mr. Boutaugh to contract COVID. JA 55. But they do not raise and have thus forfeited this theory on appeal, which would be hopelessly speculative anyway.

(quoting *Wagner v. Georgetown Univ. Med. Ctr.*, 768 A.2d 546, 554 n.9 (D.C. 2001)).

3. There is no merit to the Boutaughs' proposals for new limitations on the applicability of the public duty doctrine.

The Boutaughs' remaining arguments, which proffer new limitations on the scope of the public duty doctrine, are precluded by applicable case law.

First, the Boutaughs suggest that the public duty doctrine applies only to the District's failure to protect people from "unexpected" threats. Br. 23. But the pandemic *was* unexpected—more so than many of the external harms identified in the Boutaughs' brief, such as violence, fire, or sudden illness. *See* Br. 23. Indeed, the District was still under a public health emergency when Ms. Boutaugh contracted COVID in December 2020, *see* Mayor's Order 2020-103 (Oct. 7, 2020), *available at* https://tinyurl.com/hwy25ybe, during an unprecedented surge in COVID cases, *see* Acevedo, *supra* (reporting that December 2020 was "the deadliest and most infectious month since the start of the coronavirus pandemic").

In any event, the premise of the Boutaughs' argument is wrong. The public duty doctrine applies to all external threats, even those that are entirely foreseeable. In *Snowder*, for instance, owners of stolen cars sued the District for failing to inform them when their cars were recovered. 949 A.2d at 604. There was nothing "unexpected" about the owners' injuries—because they were not told to collect their vehicles, they incurred storage fees or lost their vehicles altogether. *See id.* at 594-

95. Despite this, the public duty doctrine applied because they "allege[d] only a failure to act, not an affirmatively negligent act." *Id.* at 604; *see also Auto World v. District of Columbia*, 627 A.2d 11, 15 (D.C. 1983) (applying public duty doctrine to claim that the District issued a good title for a stolen car, causing predictable financial injury to purchaser); *Forsman*, 580 A.2d at 1318-19 (claim that building inspector failed to require demolition permit, causing predictable property loss when injured neighbors could not recover from insolvent construction company); *Platt*, 467 A.2d at 150-51 (claim that officials negligently issued occupancy permit for cinema despite only one available exit, causing predictable injuries when patrons could not evacuate).

To be sure, the COVID pandemic was a slower-moving emergency than a fire, sudden illness, or act of violence, but it was an external threat because it was not caused or exacerbated by the District. Even if, nine months into the pandemic, the District should have been better at protecting its employees from exposure, its alleged failure to do so could not have directly, affirmatively injured SMB. *See Hoodbhoy*, 282 A.3d at 1100 (applying the public duty doctrine "no matter how obvious or great the general danger—or how blameworthy the District's omissions with regard to that danger").

Second, the Boutaughs argue that the District's adoption of COVID-prevention protocols created an "independent tort duty" to enforce them. Br. 23

(citing *Long v. District of Columbia*, 820 F.2d 409 (D.C. Cir. 1986); *District of Columbia v. Freeman*, 477 A.2d 713 (D.C. 1984); *District of Columbia v. Woodbury*, 136 U.S. 450 (1890)); Br. 25 (citing *Wagshal v. District of Columbia*, 216 A.2d 172, 174 (D.C. 1966)). But this argument is based on cases recognizing the District's affirmative duty to maintain traffic-control signals, none of which involve the public duty doctrine. *See* Br. 23. In two of those cases, the District conceded that it owed a duty of care to the injured plaintiff. *See Long*, 820 F.2d at 418; *Freeman*, 477 A.2d at 715. And the third case holds only that the District enjoys sovereign immunity for discretionary acts (such as deciding whether to install a traffic-control device) but not ministerial acts (such as maintaining that device). *See Wagshal*, 216 A.2d at 174. This Court "[has] not applied [the discretionary/ministerial distinction] to the public duty doctrine." *Woods*, 63 A.3d at 556 (quoting *Hines v. District of Columbia*, 580 A.2d 133, 137 (D.C. 1990)). Rather, it "adopted the public duty doctrine to limit the District's liability in negligence cases where sovereign immunity is not a bar to suit." *Powell*, 602 A.2d at 1126.

Nor, in any event, is the installation of permanent, physical traffic-control devices remotely comparable to the adoption of temporary COVID-prevention practices. Having created a system of sidewalks and roadways, the District is liable for injuries caused by physical defects in that system, *see District of Columbia v.*

Caton, 48 App. D.C. 96 (1918), and this Court has found defective traffic-control devices to be physical defects that are "every bit as dangerous as a hole in the roadway," *Wagshal*, 216 A.2d at 174. But it has never extended this reasoning to the District's failure to enforce laws, policies, or practices adopted to protect the public from external threats. Instead, as discussed, the Court has consistently applied the public duty doctrine to such claims. *See, e.g.*, *Forsman*, 580 A.2d at 1317 (demolition permit requirement); *Platt*, 467 A.2d at 151-52 (mandatory egress law); *Wanzer*, 580 A.2d at 129-30 & n.1 (911 dispatch standards); *Warren*, 444 A.2d at 2, 9 (similar). The Boutaughs offer no reason to distinguish these laws and policies from the District's adoption of rules and practices to prevent the spread of COVID.

Third, the Boutaughs argue that a particularized duty arises out of the District's control over its facilities, just as any property owner is liable to invitees injured by unsafe conditions on their premises. Br. 25-26. But while a property owner is liable for risks it creates, it does not have a common-law duty to protect invitees from harm from *external* sources—for example, ice and snow. *See Murphy v. Schwankhaus*, 924 A.2d 988, 991 (D.C. 2007). The "one exception" this Court has contemplated for this "no-duty rule" would permit liability when a property owner "acts in any manner to increase the hazard," *id.* at 992 & n.6, which is

consistent with limiting the District's liability to negligence that "actually and directly worsen[s]" the plaintiff's condition, *Johnson*, 580 A.2d at 142-43.

The Boutaughs do not allege that Ms. Boutaugh was more likely to contract COVID from the Fifth District administrative offices than any other populated building. COVID was an omnipresent threat—in stores, theaters, restaurants, schools, houses of worship, "and everywhere else that people gather." *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., OSHA*, 142 S. Ct. 661, 665 (2022). "That kind of universal risk is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases." *Id.* As the Superior Court explained, "this is not a situation where the District had control of how COVID-19 spread. Regardless of how stringent MPD's policies were, some front-line officers and MPD employees with whom the Boutaughs came in contact were unfortunately going to contract COVID-19." JA 106. The court thus "[could not] find that the District took the sort of direct action that would make this a standard negligence case rather than one subject to the public duty doctrine." JA 106.

B. Alternatively, the complaint does not allege that the District's direct negligence was the cause-in-fact of SMB's death.

Even if the Boutaughs had alleged "direct" negligence, the complaint precludes any plausible inference that *this* negligence caused SMB's death, so the public duty doctrine still applies. "The cause-in-fact requirement assures that no defendant will be liable unless he has in fact caused the plaintiff's harm." *Lacy v.*

District of Columbia, 424 A.2d 317, 320 (D.C. 1980). "If the harm suffered by a plaintiff would have occurred even in the absence of the defendant's negligence, then the defendant's conduct was not a cause-in-fact of that harm." *District of Columbia v. Price*, 759 A.2d 181, 184 (D.C. 2000). A "mere possibility of such causation is not enough"—the defendant is entitled to judgment as a matter of law "[if] the matter remain[s] one of pure speculation or conjecture, or the probabilities [are] at best evenly balanced." *Garby v. George Wash. Univ. Hosp.*, 886 A.2d 510, 514 (D.C. 2005) (quoting *Gordon v. Neviaser*, 478 A.2d 292, 296 n.2 (D.C. 1984)).

Although causation is "[n]ormally . . . a question of fact for the jury," *Freeman*, 477 A.2d at 716, this Court will affirm dismissal at the outset of litigation if it is clear from the complaint that the plaintiff will never satisfy this burden. In *Powell v. District of Columbia*, 634 A.2d 403 (D.C. 1993), parents of a schoolchild hit by a car in a busy intersection argued that the District affirmatively worsened his condition by placing his family in a nearby shelter and then failing to carry out its promise to provide a school bus so he would not need to cross that road. 634 A.2d at 407. The plaintiffs alleged that "but for the District's . . . promise" the shelter's residents would have sued to compel providing the school bus. *Id.* at 407 n.3. But this Court affirmed dismissal because "the promise was allegedly made . . . only a few weeks before the accident" without any lawsuit being filed, making "any connection between the District's failure to honor this promise and [the plaintiff's]

injuries . . . far too speculative." *Id.*; *see also Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697, 710 (D.C. 2013) (affirming dismissal of negligence claim brought by civil-rights litigant against former attorneys because his allegation that he would have prevailed but for their misconduct was "predicated on mere speculation"); *Herbin v. Hoeffel*, 806 A.2d 186, 196 (D.C. 2002) (affirming dismissal of negligence claim against defense attorney because "the complaint d[id] not allege that, but for [the negligence]," "[the plaintiff] would not have been charged" or "would have fared better in his criminal trial").

For injuries caused by a single source, such as viral or bacterial infection, the cause-in-fact element requires proof that the defendant's negligence was "more likely than not" the actual cause of the injury. *Grant v. Am. Nat'l Red Cross*, 745 A.2d 316, 319-20 (D.C. 2000) (noting that this standard "is firmly embedded" in the common law, citing cases).[6] In *Russell v. Call/D., LLC*, 122 A.3d 860 (D.C. 2015), this Court affirmed summary judgment against a plaintiff who contracted Legionnaires' disease, despite evidence that his landlord had negligently allowed sewage-contaminated water to stagnate near his apartment. *Id.* at 872-73. The

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[6] If "there are concurring causes," this Court instead applies a "substantial factor" test. *Lacy*, 424 A.2d at 322; *see, e.g.*, *Weakley v. Burnham Corp.*, 871 A.2d 1167, 1177 (D.C. 2005) (applying test to asbestos-related injury because "every encounter with an asbestos product contributes significantly to the contracting of asbestosis"). The Boutaughs do not allege or argue any such cumulative-exposure theory of transmission for COVID.

plaintiff bore the burden of proving that his apartment building was the "'most likely' source of his exposure." *Id.* at 870. But because he had visited "many different places" during the incubation period, "a jury would have had no basis other than speculation for finding that sewage-contaminated water or sewage vapors at the apartment building were the source of [his] *Legionella* exposure." *Id.* at 863, 873. Similarly, in *Quick v. Thurston*, 290 F.2d 360 (D.C. Cir. 1961), the court directed a verdict against a plaintiff who died from a bacterial infection after a medical procedure, despite evidence that his doctor had negligently used unsterile instruments. *Id.* at 363. There were "two possible theories as to the source of the infection: unsterile instruments or the chronic infection already present in the [body]," and "the jury could not be allowed to guess that the former was the source" when the latter was equally likely. *Id.* at 363.

The Boutaughs' claim is likewise incurably speculative. Their theory of "direct" negligence hinges on the District's requirement that Ms. Boutaugh work in a building where COVID-prevention measures were not enforced. *See* Br. 23 (arguing that the District's "response to the pandemic in its own facilities was a direct action" "akin to the duty to adequately maintain the safety of property under [its] control"), 25 (arguing that "the District undertook direct action" by "requiring MPD sworn officers to remain at their MPD worksites"). Even if this constitutes "direct" negligence (it does not), the complaint can only state a claim under this

theory if it alleges that Ms. Boutaugh contracted COVID *from the workplace*. *See Russell*, 122 A.3d 870; *Powell*, 634 A.2d at 407.

The complaint, however, affirmatively forecloses any such inference by alleging that Ms. Boutaugh contracted COVID from Mr. Boutaugh *in their home*. The complaint states that, on December 16, two officers who worked closely with Mr. Boutaugh tested positive for COVID. JA 13. Because he was not told about his exposure, he continued his close, unprotected contact with Ms. Boutaugh in their family home. *See* JA 13 (alleging that, had he been notified, "he would have isolated himself away from Ms. Boutaugh, outside the family home, in order to protect her, and their baby, from exposure"). It was only three days later, after he developed COVID symptoms, that "[t]he family began masking at all times and [he] isolated himself on a separate floor of the family home." JA 13. Ms. Boutaugh developed COVID symptoms the very next day. JA 13. As the Boutaughs' opening brief confirms, Ms. Boutaugh "was able to avoid COVID exposure until two officers in Mr. Boutaugh's 5D crime suppression unit tested positive for COVID-19 on or about December 16, 2020." Br. 14.

The Superior Court highlighted this fatal flaw in their complaint, finding that "the harm to SMB has no relationship to Ms. Boutaugh's status as an MPD employee." JA 108. "Plaintiffs allege that two MPD officers spread COVID-19 to Mr. Boutaugh, who then spread it to Ms. Boutaugh because MPD did not conduct

adequate and timely contact tracing, and then Ms. Boutaugh spread COVID-19 to SMB." JA 108. The requirement that Ms. Boutaugh work in person in the Fifth District offices was simply irrelevant. She "could have worked elsewhere, been on leave, or had no job at all—Mr. Boutaugh still would have spread COVID-19 to [her]." JA 108.

The Boutaughs have no response to this. They do not argue that it is more likely than not that Ms. Boutaugh contracted COVID from the workplace, or that discovery could possibly lead to nonspeculative evidence supporting such a conclusion. *See Comford v. United States*, 947 A.2d 1181, 1188 (D.C. 2008) ("It is the longstanding policy of this [C]ourt not to consider arguments raised for the first time in a reply brief."). As explained above, they have forfeited any direct negligence claim arising out of *Mr.* Boutaugh's exposure to COVID. *See supra* pp. 19-21. And while their statement of facts mentions MPD's classification of Ms. Boutaugh's injury as "performance of duty," they do not argue that this somehow relieves them of their burden to establish cause-in-fact in SMB's separate civil action. *See* Br. 16. Any such claim is thus forfeited. *See McFarland*, 935 A.2d at 351 ("Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (quoting *Wagner,* 768 A.2d at 554 n.9)).

Moreover, any such argument would fail. MPD's classification of Ms. Boutaugh's illness as "performance of duty" was based on the District's *policy* decision that, because of the "unique challenge to determining compensability" for COVID-related injuries, JA 73, employees working in "high risk" jobs would "have a rebuttable presumption that they contracted COVID-19 from the workplace," JA 75. The District did not, however, waive its right to insist that nonemployees like SMB satisfy their burden of proving causation in any derivative negligence action. *Cf. Newell v. District of Columbia*, 741 A.2d 28, 37 (D.C. 1999) (affirming the Superior Court's rejection of offensive collateral estoppel arising out of causation finding in worker's compensation proceeding).

II. No Special Relationship Between The District And Ms. Boutaugh Could Have Created A Special Duty To Protect Her From Exposure To COVID In Her Own Home.

The Superior Court properly found SMB's claims barred under the public duty doctrine regardless of whether Ms. Boutaugh had a special relationship with the District. "In any case where the public duty doctrine applies, 'a person seeking to hold the District of Columbia liable for negligence must allege and prove that the District owed a special duty to the injured party, greater than or different from any duty which it owed to the general public.'" *Hoodbhoy*, 282 A.3d at 1097 (quoting *Klahr v. District of Columbia*, 576 A.2d 718, 719 (D.C. 1990)); *see Powell*, 602 A.2d at 1127 n.4 ("The terms 'special relationship' and 'special duty' may be

used interchangeably."). This Court has recognized two potential sources of a special relationship. *First*, a common-law special relationship can be created by direct or continuing contact with the District, so long as the plaintiff justifiably relied on its particularized assurances of protection. *Hoodbhoy*, 282 A.3d at 1097 (quoting *Platt*, 467 A.2d at 151). *Second*, a statutory special relationship can be created "via a statute or regulation that 'describe[s] a special duty to a particular class of individuals.'" *Id.* (quoting *Turner v. District of Columbia*, 532 A.2d 662, 667 (D.C. 1987)). The Boutaughs have not alleged a special duty under either theory.

A. Any common-law special duty arising out of Ms. Boutaugh's employment relationship with the District was limited to protecting her in the workplace, which has no causal nexus to SMB's death.

The Boutaughs claim that SMB had a common-law special relationship with the District based on Ms. Boutaugh's employment with the District. Br. 28-30. That special relationship requires: (1) direct or continuing contact with the District, and (2) justifiable reliance on the District's assurances of protection. *See Hoodbhoy*, 282 A.3d at 1097. These combined elements create a special duty on the part of the District to follow through on its assurances of protection. *See, e.g.*, *Stoddard*, 623 A.2d at 1153 (finding a special relationship between the District and schoolchildren "who can show that they (and their parents) regularly relied upon the presence of [crossing] guards to escort children within designated crosswalks").

The District concedes, solely for purposes of this appeal, that the complaint plausibly alleges a special relationship with SMB through Ms. Boutaugh's employment with MPD. But critically, even assuming its existence, this relationship could not have created a duty to protect SMB from exposure to COVID (through Ms. Boutaugh) in their own home. As this Court's precedent makes clear, the duty created by a common-law special relationship is limited to the assurances of protection on which the injured party reasonably relied.

In *Forsman*, for example, the plaintiffs' home was destroyed by construction work on their neighbor's adjacent property. 580 A.2d at 1315. They had met with a District building inspector after the first phase of construction created "pinholes" in their walls. *Id.* at 1315-16. He promised to make their neighbor pay for repairs, and he followed through on that promise. *Id.* at 1315-16. Then, before the next phase of construction, the building inspector advised the construction company on how to apply "underpinning" to protect the plaintiffs' home, but his instructions were not followed and the home collapsed. *Id.* at 1316.

The plaintiffs claimed that the building inspector negligently failed to ensure that the construction company followed the "underpinning" instructions, and negligently failed to require the company to obtain a demolition permit, which would have guaranteed that it procure liability insurance. *Id.* at 1315, 1318 & n.8. This Court found both claims barred by the public duty doctrine—even assuming that the

building inspector had a special relationship with the plaintiffs—because any promise "concerning the completion of the repairs of the pinholes . . . would not encompass the underpinning, an entirely different operation." *Id.* at 1318. The "mere fact that the inspector assisted the [plaintiffs] in getting the [pinhole] repairs done could not have justified [their] reliance . . . on [him] to protect them from any and all harm arising out of the demolition and construction project." *Id.* at 1319.

This Court similarly limited the duty arising out of a special relationship in *Allen*, where a prospective firefighter became ill and died after completing the District's physical ability test. *Id.* at 67. The plaintiffs claimed that the District's paramedics, who were there to record participants' vital signs, negligently failed to assess the seriousness of the decedent's condition, which delayed his treatment. This Court found the claim barred by the public duty doctrine—even assuming that the District had a special relationship with the decedent "while he was acting as a prospective . . . employee"—because that relationship "would not also encompass the alleged [paramedic] errors during [his] medical emergency." *Id.* at 72. Those errors "occurred once their role evolved from basic monitors to emergency responders," so their duty to him was no different than it would have been to any other member of the public. *Id.* at 70; *see also Stoddard*, 623 A.2d at 1153 (recognizing a special relationship between the District and schoolchildren who rely on crossing guards but rejecting plaintiff's claim that "any such duty . . . extends to

children who attempted to cross the street . . . as much as 'two football fields' from the designated crosswalk").

The District's alleged special duty to SMB through Ms. Boutaugh is also limited. As the complaint itself acknowledges, even assuming that Ms. Boutaugh "justifiably relied on the COVID-19 protections purportedly offered by the MPD in the course of her employment," this would at most create a special duty "to use reasonable and ordinary care to maintain [Ms. Boutaugh's] MPD *workplace* in a reasonably safe condition for unborn children, such as SMB." JA 19 (emphasis added). After all, nothing in the complaint suggests the District promised to protect its employees from exposure to COVID in their private lives, much less that Ms. Boutaugh justifiably relied on such assurances.

Given this limitation, the existence of any special duty arising out of Ms. Boutaugh's employment with the District is simply irrelevant to SMB's claim. Even where there is a special relationship, a plaintiff still must establish proximate causation, which requires proof that the defendant's negligence was the cause-in-fact of her injury. *See District of Columbia v. Harris*, 770 A.2d 82, 92-93 (D.C. 2001) (considering whether the District's breach of a special duty to protect abused and neglected children was the proximate cause of their injuries); *Price*, 759 A.2d at 184 (establishing cause-in-fact as an essential element of proximate cause). And, as discussed *supra* pp. 29-31, the complaint makes it impossible for a factfinder to

conclude without speculating that Ms. Boutaugh contracted COVID from the workplace. *See* JA 11-13 (alleging that Ms. Boutaugh's "common-sense steps" to prevent exposure outside of the home kept her safe "through the end of 2020," when Mr. Boutaugh was infected by two coworkers); Br. 14 ("Mrs. Boutaugh was able to avoid COVID exposure until two officers in Mr. Boutaugh's 5D crime suppression unit tested positive for COVID-19 on or about December 16, 2020."). As such, regardless of whether the District owed a special duty to SMB to enforce COVID measures in the workplace, the complaint forecloses any conclusion that her injury was caused by the District's breach of that duty.

The Boutaughs do not attempt to cure this fatal flaw in their analysis. They make no effort to link Ms. Boutaugh's illness to the District's alleged special duty to enforce COVID-prevention measures in the workplace. They instead focus on their contact-tracing claim, asserting without authority that the District's special duty to protect SMB through Ms. Boutaugh "at work" included a duty to notify the entire "Boutaugh *family*" about Mr. Boutaugh's exposure from infected coworkers. Br. 29 (emphasis added). This, however, would impermissibly expand the special duty beyond the confines of its source—the employment relationship. *See Allen*, 100 A.3d at 72; *Stoddard*, 623 A.2d at 1153; *Forsman*, 580 A.2d at 1319. The Boutaughs offer no authority suggesting than an employment-based special duty creates a duty to protect the employee's entire family. Indeed, this Court has rejected special-duty

claims brought by family members of MPD officers. *See Morgan*, 468 A.2d at 1317-18 (rejecting special duty to protect the wife of a District police officer shot by her husband, even though she had asked his commanding officer to intervene); *cf. Flemmings v. District of Columbia*, 719 A.2d 963, 964 (D.C. 1998) (rejecting special duty to protect a District police officer shot by his girlfriend, who was also a District police officer).

At most, the District assumed a special duty to reasonably protect *each* of its employees from employment-related exposure. And when the Boutaughs' contact-tracing claim is properly analyzed for each individual parent, it quickly falls apart.

Duty to Ms. Boutaugh. The District is entitled to dismissal of Ms. Boutaugh's contact-tracing claim because the District had no special duty to notify her, *as the spouse of Mr. Boutaugh*, when officers in *his* crime-suppression unit tested positive for COVID. After all, the complaint does not allege that Ms. Boutaugh had any contact with the infected officers, or that the contact-tracing protocol required MPD to notify the household members of employees who had been exposed but had not themselves contracted COVID. JA 13. Nor could such a requirement be inferred, given the obvious privacy implications of such a practice. *See, e.g.*, 45 CFR 164.500 (establishing healthcare privacy standards). And Ms. Boutaugh was already ill by the time Mr. Boutaugh tested positive, so the District could not have violated any duty to warn her based on her close contact with him. *See* JA 13-14 (alleging that

Ms. Boutaugh received her positive test results before Mr. Boutaugh received his). As such, even if the District had a special duty to Ms. Boutaugh and SMB to properly implement contact-tracing protocols, the complaint does not allege that the District breached that special duty.

Duty to Mr. Boutaugh. Any special duty arising out of Mr. Boutaugh's employment was personal to him—it cannot be the basis for liability to SMB.[7] The Boutaughs do not argue that the District owed a special duty to SMB (or their older child) based on her father's employment with the District. Instead, their special-duty claim rests entirely on the District's relationship with Ms. Boutaugh. *See* Br. 27 (arguing that the District owed a special duty to SMB because an unborn child "can only act derivatively through the actions of her mother"), 28 (claiming "a special relationship . . . between SMB and the District while SMB's mother was on the job"), 29 (arguing that Ms. Boutaugh's "ongoing compelled presence at 5D necessarily created a direct and continuing contact between SMB and the District of Columbia for the duration of the pregnancy"), 29 (arguing that Ms. Boutaugh relied on representations that the District would implement COVID policies "to protect her . . . at work, and, by extension, protect[] SMB in the womb"), 30 (arguing that SMB enjoyed a statutory special relationship "by and through SMB's mother"). Any

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[7] As discussed, *supra* note 3, Mr. Boutaugh's own claims are preempted by the Police and Firefighters Retirement and Relief Act, D.C. Code § 5-708.01 *et seq.*

argument that the District owed a special duty to SMB because her *father* was an MPD employee is thus forfeited. *See McFarland*, 935 A.2d at 351.

Nor could such a duty be consistent with the narrow, limited nature of a special relationship. *See Allen*, 100 A.3d at 72; *Stoddard*, 623 A.2d at 1153; *Forsman*, 580 A.2d at 1319. As discussed, this Court has rejected special-duty claims brought by family members of MPD officers. *See Morgan*, 468 A.2d at 1317-18; *cf. Flemmings*, 719 A.2d at 964. As the Superior Court explained, a contrary holding would create a special class "so wide that it resembles the District's general duties to the community," which is far too broad "to impose upon the District a particularized duty of care." JA 109.

B. Neither the Protecting Pregnant Workers Fairness Act nor the Chief of Police's orders created a special relationship with Ms. Boutaugh.

The Boutaughs also claim that SMB had a statutory special relationship with the District, through Ms. Boutaugh, based on the Protecting Pregnant Worker's Fairness Act, D.C. Code § 32-123.01 *et seq*., and the Chief's general and executive orders establishing COVID-prevention measures in the workplace. Br. 30-34. This Court need not consider the existence of such relationships because any resulting duty would be *narrower* than the special duty allegedly created by the employment relationship—which, as explained, cannot encompass preventing the harm at issue

here. But if this Court does address these claims, it should hold that neither the Act nor the Chief's orders created a special duty.

Protecting Pregnant Worker's Fairness Act. A special relationship can be established by a statute or regulation that "set[s] forth 'mandatory acts clearly for the protection of a particular class of persons rather than the public as a whole.'" *Morgan*, 468 A.2d at 1314 (quoting *Cracraft v. City of St. Louis Park*, 270 N.W.2d 801, 807 (Minn. 1979)). In *Turner*, this Court held that the Child Abuse Prevention Act imposes "upon certain public officials specific duties and responsibilities which are intended to protect a narrowly defined and otherwise helpless class of persons: abused and neglected children." 532 A.2d at 668. The statute thus creates a "narrow and specific" special duty, which arises "when abused and neglected children have been individually identified to the government agency charged with their protection." *Harris*, 770 A.2d at 87. Similarly, in *Powell*, the Court found a statutory special duty where a District statute on car registration imposed an obligation to issue unique license plate numbers based on the owner's sworn application and payment of a registration fee. 602 A.2d at 1131.

As an initial matter, the Boutaughs' claim that the Protecting Pregnant Workers Fairness Act created a special duty is so insubstantial it should be deemed forfeited. *See McFarland*, 935 A.2d at 351. They devote one sentence to this argument, saying only that the Act "provides pregnant workers in the District of

Columbia, including those workers employed by the District of Columbia itself, with a range of workplace remedies well beyond those provided to non-pregnant workers." Br. 30. They do not argue that the Act sets forth a narrow and specific duty to protect pregnant employees from workplace injury, or that it required the District to offer Ms. Boutaugh an accommodation that she did not request. Nor did they even assert that she had a pregnancy-based limitation covered by the Act. *See* D.C. Code § 32-1231.01(2) (requiring accommodation for limitations affecting an employee's "ability to perform the functions of [her] job"). This is not enough to preserve a novel claim that the Act is the type of "exceptional" statute that can create a special duty of protection. *Turner*, 532 A.2d at 675 n.11.

Even if the Boutaughs had preserved this argument, it would be meritless. The Act prohibits employers from "[r]efus[ing] to make reasonable accommodations to the known limitations related to pregnancy." D.C. Code § 32-1231.03(1). To that end, it requires them to "engage in good faith in a timely and interactive process with an employee requesting or otherwise needing a reasonable accommodation to determine a reasonable accommodation for that employee." *Id.* § 32-1231.02(a). It is not clear whether those provisions—which also govern private employers and do not specify required actions—can ever create a statutory special duty to a pregnant employee who requests an accommodation. *See Turner*, 532 A.2d at 673 (finding a special relationship because the statutory duty "is quite narrow and specific" and

owed to "a precisely defined class"). But it could not have created a special duty to Ms. Boutaugh because she *did not request an accommodation*. *See* JA 11 (alleging that Ms. Boutaugh "knew that any request for telework on the basis of her pregnancy would be . . . denied" because MPD denied another pregnant officer's request). As such, she was not "individually identified to the government agency charged with [her] protection." *Harris*, 770 A.2d at 87; *see Turner*, 532 A.2d at 670 (finding a special duty because "the appropriate governmental agency was repeatedly notified of situations in which specific, named children were being mistreated"); *cf. Powell*, 602 A.2d at 1130 (finding a special duty in part because plaintiff sought statutory "protection by taking certain actions").

The Act does not require an employer to presume that an employee needs accommodation simply because she is pregnant. *Cf.* D.C. Code § 32-1231.03(4) (prohibiting an employer from requiring a pregnant employee to accept an accommodation if the employee "does not have a known limitation related to pregnancy"). And nothing in the complaint suggests that Ms. Boutaugh's pregnancy limited her "ability to perform the functions of [her] job," D.C. Code § 32-1231.01(2), much less that this limitation was "known" to the District, *id.* § 32-1231.03(1). Nor could the complaint possibly support a claim that the Act required every District employer—public or private—to send *every* healthy pregnant employee home for the duration of the pandemic.

The Chief's general and executive orders. If it reaches the question, this Court should also reject the Boutaughs' claim that the Chief's general and executive orders created a statutory special duty to MPD officers required to work in person during the pandemic. *See* Br. 30-34. This Court has repeatedly held that *only* statutes or regulations can create a special duty to protect an individual from external harm. In *Wanzer*, the plaintiff argued that the EMS "protocols and procedures"—which required dispatch of an ambulance in response to the decedent's 911 call—created a special relationship. 580 A.2d at 133. This Court rejected the claim, explaining that "[a]gency protocols and procedures, like agency manuals, *do not have the force or effect* of a statute or an administrative regulation." *Id.* (emphasis added; citing cases holding that such policies cannot establish a standard of care). "In the instant case, therefore, we hold that the EMS procedures and protocols are equivalent to the Metropolitan Police Department's 'general orders,' which, unlike a statute, cannot create a special duty to a protected class." *Id.* (citing *Morgan*, 468 A.2d at 1317-18); *see also Johnson*, 580 A.2d at 141 (similar).

The Boutaughs argue that this Court rejected such claims only because the agency's policies and practices duplicated the District's duty to the public at large, rather than guaranteeing protection to a narrower class of potential plaintiffs. Br. 34. Not so. In *Stoddard*, the plaintiffs claimed that MPD had a special duty "toward schoolchildren" based on a policy "specifically providing for deployment of crossing

guards." 623 A.2d at 1152-53. Any such duty would have been limited to a narrow and particularly vulnerable class—schoolchildren who used designated crosswalks in the hours before and after school. *Id.* This Court rejected that special relationship, not because the class would have mirrored the public at large, but because *Wanzer* "held that manuals of this sort (or 'procedures and protocols'), *unlike statutes or formal regulations*, 'cannot create a special duty.'" *Id.* at 1153 (emphasis added) (quoting *Wanzer*, 580 A.2d at 133).

This holding aligns the public duty doctrine with other case law distinguishing statutes and regulations—which are sufficient to establish negligence *per se*—from internal agency policies, practices, and directives. *Cf. Phillips v. District of Columbia*, 714 A.2d 768, 774 (D.C. 1998) (holding that an agency "directive is not a standard [of care] and may not be relied upon as such"); *Clark v. District of Columbia*, 708 A.2d 632, 636 (D.C. 1997) (holding that "agency protocols and procedures, like agency manuals," "cannot embody the standard of care under a negligence *per se* theory" because they "do not have the force or effect of a statute or an administrative regulation"); *Abney v. District of Columbia*, 580 A.2d 1036, 1040-41 (D.C. 1990) (noting that an MPD general order was the equivalent of an "internal operating manual" and not a rule or regulation that could expand the District's liability); *Briggs v. WMATA*, 481 F.3d 839, 848 (D.C. Cir. 2007) (holding that WMATA's internal manuals could not establish a standard of care for safe

lighting near a Metro station). "To hold otherwise would create the perverse incentive for the District to write its internal operating procedures in such a manner as to impose minimal duties upon itself in order to limit civil liability rather than imposing safety requirements upon its personnel that may far exceed" the baseline standard of care. *District of Columbia v. Arnold & Porter*, 756 A.2d 427, 435 (D.C. 2000); *see Varner*, 891 A.2d at 272 ("Aspirational practices do not establish the standard of care which the plaintiff must prove in support of an allegation of negligence.").

If the Chief's general and executive orders cannot even establish a standard of care, they certainly cannot create a particularized duty of care sufficient to hold the District liable for an injury otherwise barred by the public duty doctrine. The Superior Court thus rightly applied "the overarching rule that only a statute or regulation can create a particularized duty." JA 108.

Some combination of the two. Rather than separately analyze the Act and the Chief's orders, the Boutaughs attempt to bootstrap their one-sentence argument that the Act created a special duty by combining it with their argument that the Chief's orders created a special duty. *See* Br. 31 ("*Taken together*, these two sources constitute evidence of a duty . . . ." (emphasis added)). But they offer no authority—or even reasoned argument—suggesting that an agency policy can create a special duty in an unrelated statute, or vice-versa. This argument, too, is therefore forfeited.

See McFarland, 935 A.2d at 351. And even if it had been preserved, this approach is plainly inconsistent with binding case law because, as discussed, agency policies and practices do not have sufficient force of law to create a special duty.

In any event, even if the "taken together" approach had any legal basis, it makes no sense here because the Chief's orders have nothing to do with the Act. The Act is permanent legislation enacted years before the pandemic, and it requires all employers in the District to accommodate pregnancy-based limitations. D.C. Code §§ 32-1231.01(2), 32-1231.02(a), 32-1231.03(1). The Chief's orders were issued five years later, as a temporary response to the public health emergency, in an effort to protect all MPD employees and facility visitors, regardless of whether they are pregnant. *See* JA 84-98.

Of course, as discussed, this Court need not even consider this issue because the complaint does not allege that Ms. Boutaugh contracted COVID in the workplace. As the Superior Court explained, "[t]his is not a reasonable accommodations case" because the Boutaughs "are not alleging that MPD denied Ms. Boutaugh's request for pregnancy-related accommodation." JA 108. Rather, their claim is that "two MPD officers spread COVID-19 to Mr. Boutaugh, who then spread it to Ms. Boutaugh" at home, making *her* employment with MPD "irrelevant." JA 108.

CONCLUSION

The judgment of the Superior Court should be affirmed.

Respectfully submitted,

BRIAN L. SCHWALB
Attorney General for the District of Columbia

CAROLINE S. VAN ZILE
Solicitor General

ASHWIN P. PHATAK
Principal Deputy Solicitor General

THAIS-LYN TRAYER
Deputy Solicitor General

/s/ Holly M. Johnson
HOLLY M. JOHNSON
Senior Assistant Attorney General
Bar Number 476331
Offices of the Solicitor General

Offices of the Attorney General
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
(202) 442-9890
(202) 715-7713 (fax)
holly.johnson@dc.gov

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CERTIFICATE OF SERVICE

I certify that on June 27, 2024, this brief was served through this Court's electronic filing system to:

Matthew J. Focht
Patrick G. Senftle
Marc L. Wilhite

/s/ Holly M. Johnson
HOLLY M. JOHNSON