No. 23-CV-0278

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

LAUREN SZYMKOWICZ, *ET AL.*,

Appellants,

v.

THE PRESIDENT AND DIRECTORS OF THE COLLEGE OF GEORGETOWN UNIVERSITY

Appellee.

On Appeal from the Superior Court of the District of Columbia
Civil Division, Case No. 2022 CA 003391 B
Hon. Maurice A. Ross

BRIEF OF APPELLEE GEORGETOWN UNIVERSITY

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September 18, 2024

RULE 28(a)(2)(A) STATEMENT

The Appellants are Lauren and John Paul Szymkowicz. Appellee is the President and Directors of the College of Georgetown, within the District of Columbia ("Georgetown" or "Georgetown University").

Before the Superior Court, Appellants were represented by John T. Szymkowicz. Appellee was represented by Bruce M. Berman, Leon T. Kenworthy, and Ariel E. Warner.

Appellants are represented in this Court by John T. Szymkowicz. Appellee is represented by Bruce M. Berman, Jeremy W. Brinster, and Natalie Kirchhoff.

CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. App. R. 26.1, Appellee Georgetown University certifies that no publicly held corporation owns 10% or more of Georgetown University stock.

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INTRODUCTION

Georgetown is a stranger to the short-lived dispute between Appellants Lauren and J.P. Szymkowicz and their one-time neighbor, an adult woman who lived in a privately owned, off-campus townhouse sharing a wall with Appellants' home. Appellants allege that, over a period of less than three months in the fall of 2021, their neighbor habitually smoked marijuana, causing unwanted smoke and an unpleasant odor to enter Appellants' home through the porous, century-old wall connecting the residences and damaging Appellants' health. After directly approaching the neighbor just once to inform her about the issue, Appellants asked Georgetown—where the neighbor was enrolled as a student—to intervene.

Appellants first contacted Georgetown midway through the fall semester, and over the next forty-six days, Appellants called, emailed, and texted Georgetown administrators and safety officers each time they were bothered by what they perceived to be marijuana smoke and fumes in their home. On no fewer than ten occasions, Georgetown responded to Appellants' concerns—often in person, and often in the middle of the night. Georgetown informed Appellants of the actions it would and would not take, and explained to Appellants the university's considered judgment that appealing to their neighbor as a person would be more likely to result in a satisfactory resolution of the issue than would Georgetown's threat of disciplinary action. Appellants were unsatisfied. Bothered

by the smoke and odor drifting into their home, Appellants demanded that Georgetown require their neighbor to move to a Georgetown dorm, that Georgetown test her urine for controlled substances, and that Georgetown investigate and discipline her for violating its student code of conduct. Georgetown arranged for Appellants' neighbor to live elsewhere after the fall semester.

Appellants then brought this suit, asserting claims against Georgetown for negligence, negligent infliction of emotional distress, nuisance, and breach of contract based on the university's alleged failure to stop Appellants' neighbor from causing marijuana smoke and odor to migrate into their home. Principally, Appellants argued that the D.C. government order approving Georgetown's long-term development plans somehow obligated the university to investigate and discipline Appellants' neighbor under Georgetown's code of conduct.

The Superior Court recognized Appellants' claims for what they are: a squabble between neighbors in search of a legal theory to hold a third party, Georgetown, responsible. The Superior Court rightly dismissed Appellants' suit for failure to state a claim.

The Superior Court correctly held that Georgetown had no duty to protect Appellants from their neighbor's conduct in an off-campus residence that Georgetown neither owned nor controlled. Under common-law tort principles,

Georgetown owed no affirmative duty to control the conduct of Appellants' neighbor. And Appellants did not—and could not—allege that Georgetown placed them in a worse position through its reasonable attempts to resolve their concerns. The neighbor's status as a Georgetown student changes nothing, as this Court's holdings have recognized that no affirmative duty to third parties arises from the relationship between a university and its student. Nor did the D.C. government's approval of Georgetown's development plans impose on Georgetown a duty to Appellants to enforce its code of conduct. The administrative documents Appellants point to are not enforceable in a private damages suit and, in any case, are far too generalized to impose on Georgetown a duty to take any specific investigatory or disciplinary steps.

The Superior Court also correctly determined that Georgetown had no control over—and thus no responsibility for—the conduct alleged to have produced a nuisance. This Court has repeatedly reaffirmed that nuisance theories must be rooted in traditional tort claims, and the fact that Georgetown owed no duty to protect Appellants from their neighbor dooms their nuisance claims. Appellants' contention that lawful activity can constitute a nuisance is beside the point. Lawful or not, the conduct alleged to be a nuisance here was the neighbor's—not Georgetown's—and Georgetown cannot be held liable for it.

Finally, the Superior Court correctly held Georgetown owed no contractual obligations to Appellants. Appellants assert that they are intended third-party beneficiaries of contractual commitments Georgetown made to the District of Columbia to enforce the university's code of conduct. But the agency order Appellants cite is not a contract between Georgetown and the District of Columbia. Even if it were, the purported contract evinces no intent to benefit Appellants directly, making Appellants (at most) incidental beneficiaries with no right to sue for breach.

Appellants therefore failed to state a plausible claim that Georgetown must compensate them—they sued the university for compensatory and punitive damages of more than $1 million—for the harm they allegedly suffered from exposure to their neighbor's smoke. But Appellants have not been without recourse. As noted, Georgetown repeatedly responded to Appellants' complaints and even found alternative housing for Appellants' neighbor. Moreover, in a separate suit, Appellants secured an injunction against the owner of the neighbor's residence to prohibit her tenants from smoking marijuana on the property. Since Appellants have no cognizable claim against Georgetown, this Court should affirm the Superior Court's order dismissing the Complaint.

JURISDICTION

This appeal is from a final order of the Superior Court (Ross, J.) dismissing all counts of the Complaint for failure to state a claim under Rule 12(b)(6) of the Superior Court Rules of Civil Procedure. JA370. This Court has jurisdiction to review that final judgment under D.C. Code § 11-721(a)(1).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether Georgetown owed a duty under tort law, its Campus Plan, or the D.C. Zoning Commission order approving it, to protect Appellants from secondhand smoke migrating into Appellants' home from a student's private, off-campus residence that was neither owned nor controlled by Georgetown. And relatedly, whether Georgetown can be liable for an alleged nuisance that it did not create, occurring on property it did not own or control, and involving personal conduct by a student living off-campus.

2. Whether the Campus Plan and Zoning Commission order—administrative documents created by Georgetown and the District of Columbia and submitted as part of a regulatory process to approve campus land-development plans in residential areas—gave rise to any contractual obligations of which Appellants are intended beneficiaries.

STATEMENT OF THE CASE

This case involves tort and contract claims brought against Georgetown by residents of a Northwest D.C. townhouse over alleged damages resulting from their

exposure to secondhand smoke that migrated into their home from the abutting, privately-owned rental property that was occupied by a Georgetown undergraduate student in the fall 2021 semester. Appellants filed their Complaint in August 2022, and Georgetown moved to dismiss the Complaint in September 2022 for failure to state a claim. The Superior Court held a hearing on Georgetown's motion and granted the motion in March 2023. Appellants timely appealed, and the case was screened out of the Court's mediation program in June 2024.

STATEMENT OF FACTS

A. Appellants' Dispute With Their Neighbor Over The Migration Of Secondhand Smoke From A Privately Owned, Off-Campus Residence

Appellants are residents of a townhouse built in the 1920s and located in the Foxhall Village neighborhood of Northwest D.C. JA2 ¶¶ 1, 3; JA4 ¶ 14. Appellants' home is "physically attached" to another townhouse and thus shares a "common wall" that is "semi-porous in places" with "small cracks and holes that permit air to pass between the two townhouses." JA4 ¶¶ 12, 15. The neighboring townhouse is a private residence owned by an "absentee landlord"; Georgetown does not own, rent, or have any control over the property. JA6 ¶ 21.

In mid-September 2021, a Georgetown undergraduate student moved into the neighboring townhouse. JA4 ¶ 12. Appellants, who had noticed secondhand smoke entering their home from the outside on "a small number of occasions"

prior to the neighbor's arrival, JA5 ¶ 18, smelled "secondhand marijuana smoke" in their home on September 28, 2021, JA7 ¶ 27. This smoke allegedly originated from the neighbor's residence and migrated into Appellants' home through the common wall. JA5 ¶ 17. Appellants complained to the neighbor's housemate, who said he would "do [his] best" to address the issue. JA7 ¶ 28. Appellants again smelled smoke in their home on October 7 and asked the housemate to ask the neighbor to stop smoking. JA7 ¶ 29-30. Between October 7 and October 21, Appellants smelled smoke on "many" unspecified occasions but do not allege that they took any action in response to it. JA7 ¶ 30.

On October 28, 2021, Appellants attempted for the first and only time to contact the neighbor directly about her marijuana smoking. They first asked her housemate for her phone number, but the neighbor reportedly "was mad that [they] asked him to be the 'middleperson' and instructed him not to give out" her contact information. JA7-JA8 ¶¶ 31-32. On October 29, Appellant Lauren Szymkowicz went to the neighbor's door herself to tell the neighbor that smoke was entering Appellants' home and resulting in adverse health effects. JA8 ¶ 33. The neighbor replied, "I am on a Zoom call … and I can't help you." *Id.*

B. Georgetown's Response To Appellants' Concerns

On October 29, 2021, Appellants raised concerns about the smoke to Georgetown for the first time. JA8 ¶ 34. Over the next six and a half weeks,

Appellants reported marijuana smoke to Georgetown on ten occasions. *See* JA9-21. As alleged in the Complaint, Georgetown personnel responded promptly—often in the middle of the night—and explained what actions they would and could take in response to Appellants' concerns. Georgetown's Student Neighborhood Assistance Program ("SNAP") dispatched officers to Appellants' home five times. *See* JA9 ¶ 38; JA10-11 ¶ 44; JA13 ¶ 55; JA16 ¶ 67; JA18 ¶ 73. On several of these occasions, off-duty Metropolitan Police Department ("MPD") officers responded to Appellants' home and explained to them that MPD policy "does not permit them to investigate claims of marijuana smoking in private homes." JA10-11 ¶ 44; *see also* JA13 ¶ 55.

Appellants also received extensive attention from Georgetown's Office of Neighborhood Life. After Appellants first called the Office of Neighborhood Life to report the secondhand smoke on October 29, 2021, the Neighborhood Life Director called them back and left a voice message. JA8 ¶¶ 34-35. On November 9, one day after Appellants called the Neighborhood Life Director again, the Director "spoke at length about the marijuana smoke" with Appellants, and the Director said he "would speak to the student." JA10 ¶ 42. When Appellants raised the issue again on November 23, the Director responded in person and even entered the neighboring townhouse to speak with the neighbor, who "was rude to him and would not discuss the matter in a professional manner." JA11 ¶ 47. The

next day, the Director "[turn]ed around from his own trip outside of the District" to drive to Appellants' home in response to another request. JA12 ¶ 50. And on December 1, the Director responded to a request from Appellants by sending an employee to knock on the neighbor's door. JA14 ¶¶ 60-61.

On December 3, Georgetown informed Appellants that its Student Affairs office would meet with the neighbor based on its professional judgment that "appealing to her as a person—and not having to threaten conduct issues—will be more effective," and could "result in a change in behavior." JA15 ¶ 64; JA18 ¶ 72; *see also* JA23 ¶ 90. Appellants urged Georgetown to instead "test her urine" for marijuana and "move her back on campus." JA23 ¶ 90.

The neighbor moved out of the adjoining townhouse at the start of winter break on December 14, 2021, a little more than six weeks after Appellants first contacted Georgetown. JA21-22 ¶ 87. Appellants concede that the neighbor was moved to another residence by Georgetown. JA5 ¶ 20; *see also* JA363.

C. Georgetown's Code Of Student Conduct

Appellants claim that the neighbor's behavior implicated Georgetown's Code of Student Conduct (the "Code"), which Appellants incorporated by reference in their Complaint and which was before the Superior Court in this case. JA9 ¶ 39; JA25 ¶ 94 n.2; JA95-144. The Code bars students from using marijuana and prohibits "disorderly conduct," meaning "[a]ctions that disturb others." JA26

¶¶ 96-97. Individuals can "initiate a formal complaint" under the Code by "contact[ing] the Office of Student Conduct," which "has the ability to find a student responsible for violations … and assign sanctions." JA27 ¶¶ 99-100.

The Code in place in fall 2021 explains how reported incidents typically are handled. Under the Code, "The Office of Student Conduct will determine the most appropriate manner to handle each individual complaint." JA122. In addition to administrative resolution of a complaint by a Conduct Officer or referral of a complaint for a hearing, "[t]he Director for Student Conduct … may also suggest attempting to resolve a complaint via an alternative method of resolution, such as mediation, at any time during the process." *Id.* The Code explains that, "[u]nder most circumstances, within 30 days of [the Office of Student Conduct] receiving an incident report that will likely result in judicial action," Georgetown "will notify the identified student(s) that the matter is under investigation and Code charges are pending." JA123. The Code's Standard Adjudication Process Flowchart explains the process by which incidents reported to the Office of Student Conduct typically are adjudicated. JA139. The Flowchart expressly notes that "[t]he Office of Student Conduct reserves the right to determine the most appropriate manner in which to handle each individual complaint." *Id.*

D. Georgetown's Campus Plan And Its Approval By The Zoning Commission

Appellants also contend that their neighbor's conduct raised issues under Georgetown's Campus Plan, which Appellants incorporated by reference in their Complaint and which was before the Superior Court. JA145-265. The Campus Plan is a development planning document prepared by Georgetown to "set[] forth a long-term vision for the campus that embodies Georgetown's core mission" with attention to "the broader context of a harmonious relationship with the surrounding community." JA150. It explains that "the University's long-range planning initiatives … have sought to more fully understand the campus and its potential in the context of its surrounding community." JA155. And it recognizes that "residents of the neighborhoods surrounding the campus are not only stakeholders but critical partners in this effort—partners who share a strong interest in the continued vitality of the University as well as in ensuring that its impacts are appropriately and effectively minimized and managed." JA155-156. The Campus Plan expresses a commitment to "educat[ing] students about the responsibilities associated with off campus living, and to address[ing]—proactively where possible—neighborhood concerns regarding noise, trash, and other impacts." JA177.

The District of Columbia Zoning Commission approved the Campus Plan in an order dated December 1, 2016. JA267-284. The Zoning Commission

concluded that the "Campus Plan is in harmony with the general purpose and intent of the Zoning Regulations and Map, and it will not tend to affect adversely the use of neighboring property." JA270. The Zoning Commission order also set forth conditions. Under one of these conditions, Georgetown must "commit sufficient resources … to the University's Quality of Life Initiative to support a safe community, educate students to be good neighbors, and successfully mitigate the impacts of trash, noise and student behavior," including by maintaining the SNAP program and a partnership with MPD. JA275. As part of this commitment, Georgetown must "continue to maintain policies that … reduce the impacts of off campus student parties." JA276. One such policy must "state[] that living off-campus is a privilege, not a right, taking into account conduct and seniority; students who have engaged in serious or repeated misconduct shall not be permitted to live off-campus." *Id.* Under the order, Georgetown "shall investigate reports of improper off-campus student conduct and respond to behavior found to violate the [Code] promptly with appropriate sanctions." JA277. "Egregious or repeat violations of the [Code] shall be subject to serious sanctions up to and including separation from the University." *Id.*

E. Procedural History

Appellants sued Georgetown on August 1, 2022, asserting that, based on its alleged failure to stop the migration of secondhand smoke into their residence,

Georgetown is liable for negligence, negligent infliction of emotional distress, private nuisance, public nuisance, and breach of contract. JA49-66. Appellants sought $250,000 in compensatory damages and $1 million in punitive damages from the university. JA65-66. In a separate action, Appellants also sued Carol Brauninger, the owner of the neighboring townhouse. In March 2023, a Superior Court judge ordered Ms. Brauninger to have her residents vacate the premises, and if they remained as guests, to prohibit them from smoking on the property. Order, *Szymkowicz v. Brauninger*, No. 2022-CA-001067-B (Mar. 10, 2023).

Georgetown moved to dismiss for failure to state a claim under D.C. Superior Court Rule 12(b)(6). Georgetown argued that it could not be liable on any of Appellants' tort claims because it did not owe any duty to protect Appellants from the effects of their neighbor's smoking in a private, off-campus residence that the university neither owned nor controlled. Nor did Georgetown owe Appellants any contractual obligations, as Appellants identified no contract to which they were parties or intended third-party beneficiaries. Georgetown also argued that none of Appellants' claims supported punitive damages.

The Superior Court held a hearing and concluded that Appellants failed to state a claim. At the hearing, the Superior Court held that Georgetown "owed no duty" to Appellants as required to state a tort claim. JA365. At bottom, the court explained, Georgetown "can't be liable for student conduct in a property they don't

own." *Id.* Nor did the Campus Plan "create[] any type of legal duty or obligation." JA335. Instead, "there's no duty … owed" because "[e]verything in the [C]ampus [P]lan is discretionary." JA356. The Superior Court thus rejected Appellants' theory that Georgetown's alleged noncompliance with provisions of the Campus Plan gave rise to a tort claim: "[T]o the extent that it's a breach of the [C]ampus [P]lan, you go before the [Zoning] Board." JA335; *see also* JA355.

Relatedly, the Superior Court held that Georgetown "can't be liable for a nuisance created by someone else in a property they don't own or control." JA357. "[E]ven if the student's conduct [was] … a nuisance," the court observed, Appellants "should be suing the student," not Georgetown, JA355, because Georgetown "didn't create the nuisance," JA362, "do[es]n't own the property," *id.*, and "can't control" the neighbor's conduct, JA355.

Lastly, the Superior Court held that Appellants could not state a breach of contract claim because "there's no contract here." JA365. In particular, the court held that "the Campus Plan is not a contract." JA361. Instead, the Campus Plan "is an administrative document," "not a contractual document." JA355. "[T]o the extent that you want to enforce that, you go before the Zoning Board." *Id.* Moreover, the Superior Court concluded that Appellants could not state a claim "even if it was a contract." JA361. That is because Appellants are not "a particularized beneficiary" of the Campus Plan. JA337. Under Appellants' theory,

the court observed, "every person who lives in proximity to any Georgetown property … is an intended beneficiary of their [C]ampus [P]lan." JA351. That would mean that no residents could show "a particularized benefit" owed under the purported contract. JA337.

In its order dismissing the case, the Superior Court adopted the reasoning set forth at the hearing. JA329. Appellants timely appealed.

SUMMARY OF THE ARGUMENT

The Superior Court properly dismissed Appellants' Complaint.

First, each of Appellants' tort claims (negligence, negligent infliction of emotional distress, private nuisance, and public nuisance) fails because Georgetown did not owe Appellants any duty.

Appellants' negligence claim cannot go forward because Georgetown owed no affirmative duty to protect Appellants from the off-campus conduct of the student who lived in the neighboring townhouse. Appellants' references to the duties of property owners are irrelevant, as Georgetown did not own or control the neighbor's residence. Appellants do not even claim that Georgetown's response to their grievances was an affirmative undertaking that created a duty to prevent harm to them; such a claim would fail because Appellants do not plausibly allege that Georgetown made them more vulnerable to harm. Nor do Georgetown's Campus Plan or the D.C. Zoning Commission order approving it—administrative

documents routinely submitted as part of the regulatory process for land use and development—give rise to any duty to investigate or discipline purported violations of Georgetown's Code. Those documents are not privately enforceable in a damages suit, and they do not otherwise obligate Georgetown to protect Appellants from the harm alleged here through any specific action.

Appellants' claim for negligent infliction of emotional distress fails as well. Unable to point to any duty at all, Appellants certainly cannot plead the existence of a duty to protect them from serious emotional harm.

The failure to plausibly allege a duty also forecloses Appellants' nuisance claims. This Court has declined to untether nuisance theories from the requirements of duty, causation, and breach characterizing traditional tort claims. And the Superior Court explained why, in the absence of a duty, Georgetown cannot be held liable under a nuisance theory here: the university did not control the conduct alleged to have caused a nuisance. While Appellants argue that the Superior Court erroneously based its holding on the proposition that lawful conduct cannot give rise to nuisance claims, they are mistaken. The Superior Court did not dismiss Appellants' nuisance claims on those grounds. And in any case, their suit is fundamentally distinguishable from this Court's precedent recognizing that lawful activity can constitute a nuisance. Ultimately, Appellants

cannot sidestep the reality that, in the absence of a duty owed by Georgetown to them, each of their tort claims fails.

Second, Appellants' breach-of-contract claim fails because Appellants were not the intended beneficiaries of any contract between Georgetown and the District of Columbia. Appellants identify no such contract. The Campus Plan is an application for approval, and the Zoning Commission order is a decision granting it. These administrative documents do not constitute contracts, and their contents are not enforceable, material terms. Nonetheless, even if a contract did exist, Appellants could not benefit from it. Appellants are not parties to the Campus Plan or the Zoning Commission order, and they are not in privity with Georgetown or the District of Columbia. And Appellants fail to show that any material terms in the underlying documents clearly demonstrate a direct intent to benefit them, as this Court's precedents require. Appellants' status as residents of a neighborhood near Georgetown, and the Campus Plan's oblique references to Georgetown's neighbors as "stakeholders" and "partners" in the success of the relationship between the university and the community, does not establish the existence of contractual obligations or benefits.

STANDARD OF REVIEW

This Court reviews *de novo* the Superior Court's dismissal of a complaint for failure to state a claim upon which relief can be granted under Rule 12(b)(6).

Potomac Dev. Corp. v. District of Columbia, 28 A.3d 531, 543-544 (D.C. 2011) (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). To survive a motion to dismiss, a complaint must "'contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face,'" meaning that the complaint "must plead 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Close It! Title Servs., Inc. v. Nadel*, 248 A.3d 132, 138 (D.C. 2021) (quoting *Potomac Dev. Corp.*, 28 A.3d at 544). "'In examining the sufficiency of the complaint, the court may consider the complaint itself and any documents it incorporates by reference.'" *Bell v. First Invs. Servicing Corp.*, 256 A.3d 246, 251 (D.C. 2021) (quoting *Abdelrhman v. Ackerman*, 76 A.3d 883, 887 (D.C. 2013)).

ARGUMENT

I. The Superior Court Correctly Held That Appellants Failed To Plead A Tort Claim

A. Appellants' Failure To Plead A Duty Is Fatal To Their Negligence Claim

To state a negligence claim, Appellants were required to plausibly allege that Georgetown owed them a duty and caused them harm by breaching that duty. *See Freyberg v. DCO 2400 14th Street, LLC*, 304 A.3d 971, 976 (D.C. 2023). Appellants' negligence claim fails out of the gate because, as the Superior Court correctly concluded, Georgetown owed them no duty. JA365. Neither traditional tort-law principles nor the Campus Plan or Zoning Commission order establishes

any obligation on Georgetown's part to protect Appellants from the harm they allege resulted from their neighbor's smoking.

1. Georgetown owes no common-law duty

As a general matter, Georgetown has no affirmative duty to protect residents of nearby neighborhoods from harm caused by off-campus student conduct. D.C. law does not recognize any "general duty … 'to control the conduct of a third person as to prevent him from causing physical harm to another.'" *Hoehn v. United States*, 217 F. Supp. 2d 39, 45-46 (D.D.C. 2002) (citing Restatement (Second) of Torts § 315 (1965)). This Court therefore is "'cautious … in extending liability to defendants for their failure to control the conduct of others.'" *District of Columbia v. Beretta*, 872 A.2d 633, 644 (D.C. 2005) (quoting *Hamilton v. Beretta*, 96 N.Y.2d 222, 240 (N.Y. 2001)).

Such caution is especially warranted in this case. Appellants seek to hold Georgetown liable for "mere omissions"—Georgetown's alleged failure to respond adequately to their concerns about secondhand smoke. *Freyberg*, 304 A.3d at 978. Of course, Georgetown *did* respond to Appellants no fewer than ten times, and even arranged for the neighbor to be moved from the neighboring townhouse within weeks of Appellants' first report. *See supra* pp.7-9. But D.C. law makes clear that Georgetown had no obligation to respond at all: "[W]here the negligence

of the actor consists in a *failure to act* for the protection or assistance of another, there is normally no liability." *Freyberg*, 304 A.3d at 978 (emphasis added).

Appellants also seek to impose a duty on Georgetown despite the absence of any relationship or affirmative undertaking requiring Georgetown to prevent foreseeable harm. But "whether a duty exists … is determined, in large part, by the nature of the relationship between the parties." *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 794 (D.C. 2011). Generally, "there is only a minimal duty—if any—owed to a party who is at arm's length." *Id.* Where, as here, "plaintiffs and defendant are 'strangers to one another,' the defendant cannot be said to owe any duty of care to the plaintiffs." *Gray v. Harco, Inc.*, 2024 WL 3026537, at *9 (D.D.C. June 17, 2024) (quoting *Sampedro v. Anyado Grp., LLC*, 2023 WL 1398577, at *6 (D.D.C. Jan. 31, 2023)). Appellants do not even argue that, in responding to their reports about the smoke, Georgetown "committed to an undertaking" that could give rise to a duty. *See Hedgepeth*, 22 A.3d at 800. In any case, Georgetown did not assume a duty by responding to Appellants' concerns because Appellants do not allege that Georgetown in any way "created a dangerous condition" or "increased or added to the dangerous condition." *Haynesworth v. D.H. Stevens Co.*, 645 A.2d 1095, 1099 (D.C. 1994).

In line with this caution against extending tort liability, this Court has made clear that there generally is no affirmative duty requiring universities to take any

specific steps designed to protect against harm caused by others. In *Varner v. District of Columbia*, this Court considered a claim that Gallaudet University owed a duty to a student who was murdered by a classmate in his on-campus dormitory. 891 A.2d 260, 272-273 (D.C. 2006). The Court rejected the notion that "any specific standard of care" required Gallaudet to take particular investigative steps to prevent harm inflicted by a student on the university's own property. *Id.* at 273. And in *Board of Trustees of the University of D.C. v. DiSalvo*, this Court considered a claim that UDC owed a duty to a student who was assaulted in a campus parking garage. 974 A.2d 868, 870 (D.C. 2009). Once again, this Court rejected the argument that the university owed a "heightened duty of protection," such that UDC could be held liable for the conduct of an assailant on the university's property, even though that conduct harmed one of its students. *Id.* at 872. Like the university defendants in *Varner* and *DiSalvo*, Georgetown had no duty to protect Appellants from their neighbor's smoke—particularly given that the harm they allegedly sustained resulted from conduct in an off-campus residence over which Georgetown had no control. As the Superior Court held, Georgetown "can't be liable for student conduct in a property they don't own." JA365.

Appellants point to no authority establishing a university's duty, under *any* circumstances, to protect nearby residents from the conduct of its students, let alone conduct that occurred in a private, off-campus residence. Instead, Appellants

cite clearly inapposite cases that imposed a duty on *property owners* who failed to prevent foreseeable criminal assaults occurring *on their own property*. Br. 46-47. In *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, for example, a duty "to take steps to protect tenants from foreseeable criminal acts" was imposed on a landlord that employed insufficient security measures despite being aware of an "increasing number of assaults" inside the building. 439 F.2d 447, 479, 484 (D.C. Cir. 1970). And in *Doe v. Georgetown Center (II)*, this Court similarly observed that the victim of an assault in the elevator lobby of her condo building had established that the building, which had "exclusive control" over the lobby, owed her "a duty of care in maintaining … security" there and that the assault "was foreseeable" to the building. 708 A.2d 255, 258 n.8 (D.C. 1998).

Appellants nowhere explain how *Kline*, *Doe*, or any other case they cite supports imposing an affirmative duty on Georgetown here. Even a cursory review of their facts shows otherwise. As this Court recently admonished, courts must "limit the extent to which defendants become the insurers of others' safety from criminal acts" lest they "invite an absurd sprawl of liability whereby everyone is responsible for preventing all crimes at all times." *Freyberg*, 304 A.3d at 978. This Court therefore should decline to find a duty here.

2. Georgetown assumed no duty under the Campus Plan and Zoning Commission order

Perhaps recognizing that the duty they seek to impose on Georgetown is incompatible with traditional tort-law principles, Appellants argue that Georgetown "assumed" the "duty to protect them against the migration of secondhand smoke from its student's home" when Georgetown "entered into the Campus Plan that the Zoning Commission approved in its order." Br. 44. Appellants are incorrect. The Superior Court correctly held that these documents did not "create[] any type of legal duty or obligation" on the part of Georgetown to prevent harm caused by off-campus student conduct, let alone a duty to take specific disciplinary measures against the offending student. *See* JA335; *see also* JA356.

The Campus Plan and Zoning Commission order are "administrative document[s]" that do not give rise to privately enforceable duties. *See* JA355. They arise out of the process by which the District of Columbia approves land use and development plans for universities; they are designed to "[p]romote well planned and designed educational campuses" while "minimiz[ing] negative impacts" on residential communities. 11-X D.C. Mun. Reg. § 100.2. A university such as Georgetown first submits a campus plan to obtain government approval of "its general intentions for new land use over a substantial period." *See George Wash. Univ. v. District of Columbia*, 318 F.3d 203, 205 (D.C. Cir. 2003). The

Zoning Commission then considers the campus plan and may approve it "subject to a set of conditions designed to minimize the impact of the proposed development." *Id.* at 205-206. Here, the Zoning Commission voted to approve Georgetown's Campus Plan after a public hearing, with the "unanimous support" of the District of Columbia Office of Planning and the campus area's Advisory Neighborhood Commission representatives. JA267-270.

The Zoning Commission order does not suggest that residents who are dissatisfied with Georgetown's compliance with the order's conditions may bring a private damages suit against Georgetown. In fact, the order specifies that Georgetown's compliance with those conditions is to be monitored by the Georgetown Community Partnership, a body "established … to facilitate consensus-based decision-making among University administrators, students, and members of the surrounding residential communities through a collaborative process." JA268. Georgetown must "file an annual compliance report" with the Georgetown Community Partnership addressing its adherence to conditions related to the impacts of student behavior. JA283.

Appellants fail to state a cognizable theory of tort liability stemming from the Zoning Commission order approving the Campus Plan.

To begin with, Appellants cite no precedent supporting their claim that the Campus Plan or Zoning Commission order can be enforced in a private damages

action. Instead, Appellants argue that they can state a claim against Georgetown because D.C. zoning law provides them "standing with regard to Georgetown University's violations of the Campus Plan and Zoning Order." Br. 36. They are wrong. The statute Appellants cite does not impose any tort duties or create a right to bring a damages action. Rather, it authorizes "injunction, mandamus, or other appropriate action" to "correct or abate" a zoning violation. D.C. Code § 6-641.09(a). As this Court has explained, this provision therefore concerns "who may bring suit to *enjoin* zoning violations." *President & Dirs. of Georgetown Coll. v. Diavatis*, 470 A.2d 1248, 1250 (D.C. Cir. 1983) (emphasis added); *see also Northeast Neighbors for Responsible Growth, Inc. v. Appletree Inst. for Educ. Innov., Inc.*, 92 A.3d 1114, 1122 n.15 (D.C. 2014) (discussing "what constitutes 'special damages' to *seek an injunction* under D.C. Code § 6-641.09(a)" (emphasis added)); *Lund v. Watergate Investors Ltd. P'ship*, 728 A.2d 77, 83 (D.C. 1999) (neighbors who "demonstrate that they would be specially damaged … have *standing to seek injunctive relief*" (emphasis added)); *B&W Mgmt., Inc. v. Tasea Inv. Co.*, 451 A.2d 879, 883 n.8 (D.C. 1982) ("A private plaintiff must assert 'special damage' in order *to enjoin* a zoning violation" (emphasis added)).

Where a damages remedy already exists, Section 6-641.09(a) preserves it, allowing a plaintiff to pursue "other remedies available outside § 6-641.09(a)." *Northeast Neighbors*, 92 A.3d at 1123-1124 n.17. This Court accordingly has

suggested that, in an appropriate case, a plaintiff may pursue a tort claim against a defendant who violates the zoning laws. In *B&W Management*, for example, this Court assumed that a property owner created a nuisance by "operating a surface parking lot on its property, in violation of the zoning regulations," but held that a neighboring property owner could not state a nuisance claim because it did not suffer any special damages. 451 A.2d at 881-884. Appellants' suit in no way resembles the claim in *B&W Management*. Unlike the construction of a surface lot in the face of zoning regulations that prohibit it, *see id.* at 881 & n.2, any failure on Georgetown's part to comply strictly with the Campus Plan "is not a zoning violation," *see* JA344. And even if Georgetown's conduct could amount to a zoning violation, the harm Appellants describe in their Complaint was created by Appellants' neighbor in an off-campus residence neither owned nor controlled by the university and is not "attributable to" Georgetown. *B&W Mgmt.*, 451 A.2d at 881. Because Appellants cannot state a tort claim against Georgetown, there are no "other remedies available outside § 6-641.09(a)" for Appellants to pursue. *Northeast Neighbors*, 92 A.3d at 1123-1124 n.17.

The Superior Court therefore was correct to hold that alleged violations of the Zoning Commission order must be taken up, if at all, before the Zoning Commission. *See* JA344. As explained, the Zoning Commission provided that Georgetown's compliance with the conditions of the order approving the Campus

Plan would be reviewed by the Georgetown Community Partnership, not individual residents of the surrounding neighborhood. And in addition to addressing their concerns to the Georgetown Community Partnership, Appellants could have raised any complaints with the District of Columbia government. This Court's decision in *Nathanson v. D.C. Board of Zoning Adjustment* demonstrates that allegations of noncompliance with a zoning order can be adjudicated through the administrative process. 289 A.2d 881, 883 (D.C. 1972). There, the zoning board held a hearing to show cause why a special exception granted to a liquor license holder should not be revoked for failure to comply with the condition imposed by the zoning board's order. *Id.* Appellants offer no reason why they should be permitted to bypass such a process here. They simply argue that they should not have to go before the Zoning Commission because they are seeking a "monetary award" the Commission cannot grant. Br. 37. But that is the precise issue: Appellants seek a damages remedy to which they are not entitled.

Even if the Campus Plan or Zoning Commission order could be privately enforced, these documents do not impose on Georgetown a duty to Appellants to take any particular action, under its Code of Student Conduct or otherwise. Courts have rejected claims, like this one, asserting that a university's general policies create a duty actionable in tort to conduct a reasonable investigation of complaints. *See Cavalier v. Catholic Univ. of Am.*, 513 F. Supp. 3d 30, 62-63 (D.D.C. 2021).

Instead, plaintiffs must point to "specific terms" of an undertaking by the university, and courts may find a duty only when there is a "discrete" obligation assumed by the university. *Id.* at 63 (citing *Hedgepeth*, 22 A.3d at 811). And that is for good reason—attaching liability to the kind of broad, aspirational statements Appellants point to would fly in the face of this Court's recognition that "courts must respect the authority of a university to select the appropriate discipline to be meted out to a student who has violated the university's rules." *Varner*, 891 A.2d at 270. Courts must "tread carefully and exercise restraint" before determining that plaintiffs can show "an identifiable standard of care or its breach" in tort claims arising out of university disciplinary decisions. *Id.* at 270-271.

Both the Campus Plan and Zoning Commission order are far too generalized to impose any "discrete" obligations on Georgetown in favor of Appellants, let alone a duty in tort to protect Appellants from harm by enforcing its Code. The Campus Plan describes the interests that Georgetown shares with its neighbors in ensuring the "continued vitality" of both the university and the surrounding community. JA155-156. Georgetown's neighbors are "stakeholders" and "critical partners" in the "effort" to "more fully understand the campus and its potential in the context of the surrounding community." *Id.* Nowhere does the Campus Plan make any representation, explicit or implicit, that Georgetown will take any specific actions to protect neighboring residents from harm.

The Zoning Commission order similarly does not require Georgetown to make any specific response to concerns raised by its neighbors. It states that Georgetown "shall investigate reports of improper off-campus student conduct and respond to behavior found to violate the [Code] promptly with appropriate sanctions." JA277. That language hardly imposes on Georgetown a duty to all nearby residents, actionable in tort, to enforce its Code in a manner those residents consider appropriate. Even if the Zoning Commission order imposed on Georgetown a duty to adhere to the Code, the Code preserves Georgetown's flexibility in investigating and resolving student-conduct issues. As the Superior Court held, it remains "discretionary" under the Zoning Commission order and Campus Plan how Georgetown may enforce its Code to "appropriately handle[]" and "minimize[] the impact of [its] student." JA350.

Appellants' attempt to articulate how the Campus Plan and Zoning Commission order impose a duty on Georgetown underscores that those documents do no such thing. Appellants argue that Georgetown had a duty, "[u]pon receiving [Appellants'] complaint against the student … to initiate procedures for the 'Resolution of Complaints'" in the Code of Student Conduct. Br. 42 (citing JA121-125). But under the Code, a complaint is filed by "contact[ing] the Office of Student Conduct," JA121—a step Appellants do not allege they ever took. Even if Appellants had filed a complaint, the Code cannot

be read to impose on Georgetown a duty to Appellants "to determine if the student admits or denies committing offenses that violate the Code of Student Conduct, to determine whether the allegations are of sufficient seriousness as to warrant the imposition of interim measures such as an interim suspension or temporary removal from off-campus housing, and finally to resolve [Appellants'] complaint via 'Administrative Action taken by a Conduct Officer' or referral to a Hearing Board[.]" Br. 42.

The Code instead makes clear that Georgetown retains discretion to decide the most appropriate methods for resolving individual complaints. While complaints "may be resolved … via Administrative Action or referral to a Hearing Board," Georgetown "will determine the most appropriate manner to handle each individual complaint," and may "suggest attempting to resolve a complaint via an alternative method of resolution … at any time during the process." JA122. The Code does not, as Appellants contend, obligate Georgetown to determine if a student should be removed from off-campus housing while a complaint is investigated. The Code does not even identify housing relocation as an interim disciplinary measure Georgetown may take during an investigation—it states only that an individual may be temporarily suspended (and thus "prohibited from being *on campus*") if she "appears to pose a risk of significant danger or disruption to the community or any individual." JA124 (emphasis added). And nowhere does the

Code suggest that Georgetown must, as Appellants argue, "ascertain whether the student smoked a [controlled] substance." Br. 43.

Appellants' argument that Georgetown owed a duty to take specific steps to resolve their dispute with their neighbor thus has no support in the language of the Code. At each stage of the process, Georgetown reserves discretion to handle complaints in the manner it sees fit. In recognition of this discretion, the Code does not commit Georgetown to initiate or resolve a complaint within a particular time period. It instead provides that "[u]nder most circumstances," Georgetown will first notify the relevant student that a matter is under investigation within 30 days of "receiving an incident report that will likely result in judicial action." JA123. The Code does not require Georgetown to meet with students, determine if they admit or deny allegations, or impose sanctions on Appellants' preferred timeline.[1] The Code thus permits Georgetown to make the kind of determination it made here: that "appealing to [the neighbor] as a person—and not having to threaten conduct issues—will be more effective," and could "result in a change in behavior." JA15 ¶ 64; JA18 ¶ 72; JA23 ¶ 90. Georgetown's "authority … to

[1] Nor do Appellants plausibly allege that, even if Georgetown had taken these actions, the university would have resolved the matter sooner than it was resolved. *See* JA123 (noting it may take up to 30 days after an incident report before students are even notified of an investigation).

select the appropriate discipline to be meted out to a student who has violated [its] rules" is entitled to deference. *Varner*, 891 A.2d at 270.

Finally, while Appellants have abandoned any negligence *per se* argument by failing to raise it in their opening brief, *see Graure v. United States*, 18 A.3d 743, 761 n.23 (D.C. 2011), the discretion reserved to Georgetown under the Campus Plan and Zoning Commission order also forecloses any tort liability under a negligence *per se* theory. Because these documents do not "set forth specific guidelines to govern behavior," they do not impose any standard of care. *See Night & Day Mgmt., LLC v. Butler*, 101 A.3d 1033, 1040 (D.C. 2014).

B. Appellants Fall Far Short Of Stating A Claim For Negligent Infliction Of Emotional Distress

Like an ordinary negligence claim, a claim for negligent infliction of emotional distress fails where plaintiffs cannot plausibly allege the existence of a duty—in particular, "a duty to avoid inflicting emotional distress." *Hedgepeth*, 22 A.3d at 811. This Court has explained that there is no "'general' duty of care to avoid causing emotional distress." *Id.* at 796. A duty to avoid emotional distress exists only where "(1) the defendant has a relationship with the plaintiff, or has undertaken an obligation to the plaintiff, of a nature that necessarily implicates the plaintiff's emotional well-being" and "(2) there is an especially likely risk that the defendant's negligence would cause serious emotional distress to the plaintiff." *Id.* at 810-811.

No such situation is present here. Appellants do not plausibly allege any relationship between them and Georgetown "of a nature that necessarily implicates [Appellants'] emotional well-being." *Hedgepeth*, 22 A.3d at 810-811. Appellants' only relationship with Georgetown is that a Georgetown student briefly lived next door to them in a private, off-campus residence neither owned nor controlled by the university. That is nothing like the "doctor-patient relationships" that this Court has described as implicating emotional well-being. *Id.* at 812-813. Appellants are instead "stranger[s]" to whom Georgetown owes no duty to avoid emotional distress. *Id.* at 811.

Nor was Georgetown's adoption of the Campus Plan the undertaking of "an obligation to [Appellants]," let alone an obligation that "necessarily implicates [their] emotional well-being." *Hedgepeth*, 22 A.3d at 810. The Campus Plan's recognition that local residents are "partners" in ensuring that campus impacts "are appropriately and effectively minimized and managed," JA156, does not plausibly implicate emotional well-being, and certainly does not suggest that it is "especially likely that *serious* emotional distress will result from negligent performance" of any undertaking, *Hedgepeth*, 22 A.3d at 813. The Superior Court therefore correctly dismissed this claim.

C. Appellants' Nuisance Claims Fail On Similar Grounds

Appellants' failure to plausibly allege that Georgetown owed them any enforceable duty is likewise fatal to their nuisance claims. "As an independent tort, claims of nuisance have … not been viewed favorably by this [C]ourt." *Beretta*, 872 A.2d at 646. Rather, to succeed on a nuisance claim, a plaintiff must plead "some underlying tortious conduct, such as negligence." *Tucci v. District of Columbia*, 956 A.2d 684, 697 (D.C. 2008); *see Ortberg v. Goldman Sachs Grp.*, 64 A.3d 158, 167 (D.C. 2013) (noting that where "a plaintiff has claimed that unintentional conduct resulted in a nuisance, [the court] require[s] proof of negligence."). By virtue of this requirement, this Court has declined "to loosen the tort [of nuisance] from the traditional moorings of duty, proximate causation, foreseeability, and remoteness" that underlie negligence claims. *Beretta*, 872 A.2d at 646 (public nuisance claim); *see Ortberg*, 64 A.3d at 166-167 (private nuisance claim). As the Superior Court properly held, Georgetown owed Appellants no duty—and, accordingly, the university "can't be liable for a nuisance created by someone else in a property they don't own or control." JA357.

Rather than contest the Superior Court's holding that there was no connection between Georgetown and the alleged nuisance, Appellants improperly characterize the Superior Court's basis for dismissing their nuisance claims. They contend that the Superior Court's holding relied on an incorrect theory that lawful

conduct, such as smoking marijuana in the District of Columbia, cannot support nuisance claims.[2] Br. 34-35. Appellants are wrong. The Superior Court's ruling was fully consistent with this Court's decision in *Ippolito-Shepherd v. Farserotu*, which held that it is reversible error to dismiss a nuisance claim solely because the conduct alleged to have created a nuisance—like here, smoking marijuana in one's own home and causing secondhand smoke to drift onto a neighboring property—was lawful. No. 21-CV-172, at *1, *4 (D.C. Dec. 23, 2021).

To start, there are key factual distinctions between this case and *Ippolito-Shepherd*. While both cases involved complaints about secondhand smoke, the plaintiff in *Ippolito-Shepherd* brought suit directly against her offending neighbor. Op., No. 21-CV-172, at *1-2. Here, Appellants have not brought their nuisance claim against the party that created the alleged nuisance. They have instead sued Georgetown, even though Georgetown did not own or control the residence from which the smoke allegedly migrated.

The conduct alleged to have caused a nuisance in *Ippolito-Shepherd* was also far more severe. In that case, the plaintiffs' neighbor testified that he had *smoked every day for the past eight years*, and the plaintiff attested that she had

[2] Appellants suggest that the Superior Court dismissed their nuisance *and* negligence claims on this theory. Br. 34. However, as the hearing transcript reflects, the court only discussed this proposition when addressing Appellants' nuisance claims. *See* JA335-39.

been unable to enjoy her home for four years and had sent over 200 emails to her neighbor requesting that he cease smoking. Findings of Facts and Conclusions of Law, No. 2020-CA-004616-B, at *18, *32 (D.C. Super. Ct. June 6, 2023). These facts demonstrated "'some degree of permanence'" and "'continuousness or recurrence,'" as required to establish an actionable nuisance. *Id.* at *32 (quoting *Wood v. Neuman*, 979 A.2d 64, 78 (D.C. 2009)). The conduct at issue here, by contrast, bears no such markers of permanence. According to Appellants, it lasted less than three months, during which time they experienced secondhand smoke on their property only intermittently. JA7 ¶ 27; JA20 ¶ 81. And by Appellants' own admission, they did not attempt to directly raise the issue with their neighbor or with Georgetown until October 29, 2021. JA8 ¶¶ 33-34. That leaves *just a month and a half* during which Appellants claim Georgetown was aware of the secondhand smoke drift before the problem was resolved.

Moreover, *Ippolito-Shepherd* stands only for the proposition that a nuisance claim cannot be dismissed on the sole ground that the alleged nuisance involved lawful conduct. This Court observed there that "the trial court did not address any other possible grounds for dismissing appellant's several causes of action, and appellees have not argued alternative legal grounds for doing so." Op., *Ippolito-Shepherd*, No. 21-CV-172, at *4 n.6. Given the Superior Court's narrow decision

in that case, this Court expressly held that it needed to "go no further … in addressing [the appellant's] claims." *Id.*

Here, unlike in *Ippolito-Shepherd*, the Superior Court did not dismiss Appellants' nuisance claims on the basis that smoking marijuana is lawful. At the hearing, the Superior Court initially questioned whether a legal activity can be a nuisance. JA335; JA337-339. But, after Appellants cited *Ippolito-Shepherd* for the proposition that a "complaint can state an actual nuisance claim based on conduct that is not inherently against the law," *see* JA339-342, the court articulated an independent ground for its decision: "[E]ven if you could make a nuisance claim, why isn't it against the student? How does the university get roped in to your nuisance claim?" JA343. The court ultimately concluded that the university *could not* be legally responsible for any nuisance claims, as "[Georgetown] can't be liable for a nuisance created by someone else in a property they don't own or control." JA357; *see* JA355 ("I don't think Georgetown … even if the student's conduct … was high enough to be a nuisance … can be liable for her conduct.").

Of course, this Court can affirm the Superior Court's ruling on any ground substantiated by the record. *See Wilburn v. District of Columbia*, 957 A.2d 921, 924 (D.C. 2008) ("As an appellate court, we may affirm the trial court's dismissal order 'on any basis supported by the record.'"). And here, as Georgetown has argued and the record supports, there are alternative legal grounds that warrant

dismissal of Appellants' nuisance claims. As previously discussed, under traditional tort-law principles, Georgetown owed no common-law affirmative duty to protect Appellants from their neighbor's alleged off-campus conduct, and no duty arises from the Campus Plan and the Zoning Commission order. *See supra* pp.18-32. In the absence of such a duty, there is nothing to connect Georgetown to the alleged nuisance created by the neighbor's smoking, and Appellants' nuisance claims fail.

D. The Superior Court Did Not Base Its Dismissal On Factual Questions About Actions Taken By Georgetown

During the relevant weeks of the fall 2021 semester, Georgetown made great efforts to address Appellants' grievances. Appellants' Complaint itself thoroughly recounts the actions Georgetown took each time it was contacted by Appellants about their neighbor, including the multiple times university administrators and officers personally responded to Appellants' home, including in the middle of the night. *See, e.g.*, JA9-10 ¶¶ 38-39; JA10-11 ¶ 44; JA11 ¶ 47; JA12 ¶ 50; JA13 ¶ 55; JA14 ¶ 61; JA16 ¶ 67; JA18 ¶ 73. Appellants' Complaint moreover demonstrates that, even though the neighbor who caused the alleged harm lived in an off-campus residence that was not owned or controlled by Georgetown, the university stepped in and "eliminated the problem in seven weeks" by moving the neighbor to new housing. JA365. These facts alone, as alleged by Appellants and accepted as true

for the purposes of resolving Georgetown's motion to dismiss, supported dismissal for failure to plausibly allege a breach of duty.

Nonetheless, the Superior Court made clear that it based its dismissal of Appellants' tort claims on purely legal grounds—namely, that Appellants failed to plausibly allege any duty owed, or any nuisance caused, by Georgetown. *See* JA355-356; JA361; JA365. The Superior Court's ruling can be sustained on that basis alone, and the court's observations about "whether the University's action was reasonable, or, whether the University should have acted more promptly," Br. 50, were unnecessary to its judgment that Appellants failed to state a claim.

II. The Superior Court Correctly Held That Plaintiffs Are Not Intended Beneficiaries Of Any Contract With Georgetown

The Superior Court also correctly held that Appellants failed to state a contract claim. The court first recognized that, simply put, the Campus Plan and Zoning Commission order are not contracts. JA354-355; JA357. It then concluded that, even if those documents were contracts between Georgetown and the District of Columbia, Appellants were not their intended beneficiaries. JA361; JA365. Appellants' contrary claims are both unsupported and unsupportable. Their assertion that the government agency order approving Georgetown's long-term development plans created an enforceable contract with the District cannot be squared with the nature or the face of those documents. And to the extent that any contract *does* exist, Appellants cannot enforce it, as they lack privity with any party

to the purported contract and fail to demonstrate that any terms of that contract show a clear intent to benefit them.

A. The Campus Plan And Zoning Commission Order Are Not Contracts

Appellants' contract claim runs aground on the basic principle that "[a] successful breach-of-contract claim" requires "'a valid contract between the parties.'" *Caesar v. Westchester Corp.*, 280 A.3d 176, 184 (D.C. 2022) (quoting *Tsintolas Realty Co. v. Mendez*, 984 A.2d 181, 187 (D.C. 2009)). It is "axiomatic that '[a] third party seeking to recover on a contract must establish that a binding contract exists.'" *Silberberg v. Becker*, 191 A.3d 324, 336 (D.C. 2018). Appellants do not establish that a binding contract exists—a question of law this Court reviews *de novo*, *Dyer v. Bilaal*, 983 A.2d 349, 355 (D.C. 2009)—and therefore cannot plead a contract claim.

First, Georgetown's Campus Plan is not a contract. Properly characterized by the Superior Court as "an administrative document," JA355, the Campus Plan was prepared by the university as part of a long-term development planning process to fulfill a regulatory obligation. Pursuant to D.C. zoning requirements, a university must submit a campus plan "describ[ing] its general intentions for new land use over a substantial period," *George Wash. Univ.*, 318 F.3d at 205, in order to then obtain the Zoning Commission's "special exception approval" to develop land in residential districts, *Foggy Bottom Ass'n v. D.C. Zoning Commission*, 979

A.2d 1160, 1168 (D.C. 2009). Nowhere do the zoning regulations suggest that the campus-planning process is a contractual undertaking or that it somehow imbues a university's neighbors with contractual rights.

Second, the Zoning Commission order approving Georgetown's Campus Plan is not a contract—and certainly not a contract that commits Georgetown to take any specific student disciplinary actions. The order reflects a unilateral decision made by a government agency after applying "regulatory criteria" to its factual findings regarding the likely impacts of proposed development. *Glenbrook Road Ass'n v. D.C. Bd. of Zoning Adjustment*, 605 A.2d 22, 26 (D.C. 1992). The Zoning Commission "may impose reasonable restrictions to minimize any adverse impacts on the neighborhood," but it must base its decision on "'due regard for the [u]niversity's needs and prerogatives.'" *Spring Valley-Wesley Heights Citizens Ass'n v. D.C. Zoning Comm'n*, 88 A.3d 697, 705 (D.C. 2013) (quoting *Spring Valley-Wesley Heights Citizens Ass'n v. D.C. Zoning Comm'n*, 856 A.2d 1174, 1176 (D.C. 2004)) (alteration in original). The Zoning Commission order approving Georgetown's Campus Plan set forth the Commission's "conclu[sion]," based on "the record before the Commission," that Georgetown had "met the burden of proof" required to establish that its Campus Plan "will not tend to affect adversely the use of neighboring property." JA270. As another court has recognized, where an agency decision is "issued unilaterally by the government," it

cannot be construed as a "bilateral agreement[]" or a "manifestation[] of mutual consent." *See Boston Taxi Owners Ass'n, Inc. v. City of Boston*, 180 F. Supp. 3d 108, 119 (D. Mass. 2016). That is the case here and forecloses Appellants' contract claim.

Appellants' argument to the contrary hinges on their incorrect assertion that the conditions imposed by the Zoning Commission in its order approving the Campus Plan are material terms of a contract between Georgetown and the District. Appellants claim that the order reflects an agreement by Georgetown to "investigate complaints against students … under procedures set forth in the Code of Student Conduct," "in exchange for the license to continue to operate its university in the District of Columbia." Br. 37-38. But Appellants cite no authority suggesting that a private entity's acquiescence to the conditions imposed by a regulator establish the consideration or manifestation of mutual assent necessary to form a contract. Indeed, Appellants ignore that the order identifies itself, not as an agreement between contracting parties, but as a "decision" memorializing the Commission's vote to grant Georgetown's "application for approval" of its Campus Plan. JA270. And Appellants do not grapple with the legal regime governing Zoning Commission orders, which makes clear that the orders are unilateral agency actions subject to judicial review, not to private contract suits. *Spring Valley*, 88 A.3d at 705. This Court in fact hears direct

challenges to orders approving campus plans—typically brought by universities objecting to certain conditions imposed—and may hold that the Zoning Commission's "decisions are arbitrary, capricious, or otherwise not in accordance with law." *Id.*

Nor do Appellants explain why any particular provision of the Campus Plan or Zoning Commission order should be considered a "material term[]" of any contract, Br. 38-39, which must be "sufficiently definite" that "the promises and performance to be rendered by each party are reasonably certain." *Rosenthal v. National Produce Co.*, 573 A.2d 365, 370 (D.C. 1990). It strains reason to suggest a document that "describes [a university's] general intentions for new land use," or that document's subsequent approval by order of a regulatory body, *George Wash. Univ.*, 318 F.3d at 205, could create reasonably certain contractual commitments. Certainly, Appellants failed to plausibly allege that the order contains any definite promise by Georgetown to follow certain procedures to investigate or punish students smoking in off-campus residences neither owned nor controlled by the university.

B. Appellants Were Not Intended Beneficiaries Of Any Contract With Georgetown

Even if the Campus Plan and the Zoning Commission order approving it were a contract, Appellants could not sue over its alleged breach. "'In order to sue for damages on a contract claim, a plaintiff must have either direct privity or third

party beneficiary status.'" *Fort Lincoln Civic Ass'n, Inc. v. Fort Lincoln New Town Corp.*, 944 A.2d 1055, 1064 (D.C. 2008) (quoting *Alpine County v. United States*, 417 F.3d 1366, 1368 (Fed. Cir. 2005)). Appellants are not and do not claim to be in privity with Georgetown or the District of Columbia. Appellants also were not intended third party beneficiaries; they were, at most, "merely incidental beneficiaries" who have no claim for breach of contract. *Id.* at 1065. This Court has made clear that strangers to a government contract cannot sue for breach: "'[T]hird party beneficiaries of a Government contract are generally assumed to be merely *incidental* beneficiaries, and may not enforce the contract absent clear intent to the contrary.'" *Id.* (quoting *Moore v. Gaither*, 767 A.2d 278, 287 (D.C. 2001)). Appellants' argument that they were intended beneficiaries of a purported contract between Georgetown and the District therefore fails.

Most fundamentally, Appellants cannot demonstrate that the Campus Plan or Zoning Commission order "reflect[ed] an 'express or implied intention to benefit … [them] directly.'" *Fort Lincoln*, 944 A.2d at 1065 (quoting *Alpine County*, 417 F.3d at 1368). And this Court recently reaffirmed that nothing short of a "direct benefit" can establish a third-party beneficiary's right to sue: "'Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must, at least, show that it was intended for his direct benefit.'" *Freyberg*, 304 A.3d at 981 (quoting *German Alliance Ins.*

Co. v. Home Water Supply Co., 226 U.S. 220, 230 (1912)). Appellants' failure to make this showing thus defeats their contract claim.

Appellants fail to cite any language in the Campus Plan or Zoning Commission order granting any enforceable rights against Georgetown to residents of nearby neighborhoods like them. They point only to language that, at best, acknowledges common interests between neighboring residents and the university by describing "residents of the neighborhoods surrounding the campus a[s] not only stakeholders but critical partners." Br. 41. Generally recognizing Georgetown's neighbors as "stakeholders" and "partners" interested in the university's success and residential harmony falls far short of the requisite "clear intent" to "directly" benefit Appellants. *Fort Lincoln*, 944 A.2d at 1065-1067. In *Freyberg*, for example, this Court found "no viable claim that [a resident] was an intended beneficiary" of his neighbors' leases. *Freyberg*, 304 A.3d at 981. Critical to this Court's decision was its observation that the resident could "cite[] only to prohibitions in the lease" that "restrict[ed] what lessees can do," not to any "provisions that purport to grant enforceable rights to other residents." *Id.*

Indeed, as the Superior Court noted, Appellants' theory would make *all* residents "who live[] in proximity to Georgetown housing" beneficiaries of a contract between Georgetown and the District, eliminating any "particularized benefit" required to establish that Appellants are intended beneficiaries. *See*

JA337. This Court recognized the danger of such an outcome in *Fort Lincoln*. There, the Court rejected a claim that civic association members were intended beneficiaries of a redevelopment agreement, where the record showed the members were instead "part of the public and the 16,000 residents of the … community who might realize some benefit from implementation" of the agreement. 944 A.2d at 1067. Here, as in *Fort Lincoln*, the Campus Plan and Zoning Commission order do not "single out" any particular residents of the neighboring community and thus cannot be read "as conveying a promise … specifically earmarked for" Appellants. *Id.* Appellants are no more intended beneficiaries than any resident living in any number of communities surrounding the university—and Appellants articulate no principle limiting the number of residents who could sue under the Campus Plan and Zoning Commission order under their theory.

Given the absence of direct privity or beneficiary status, Appellants' "'indirect interest in the performance of the undertakings' is insufficient" to allow them, as strangers to the purported contract, to bring a claim for breach. *Fort Lincoln*, 944 A.2d at 1064 (quoting *German Alliance*, 226 U.S. at 230). As "only an intended beneficiary can sue to enforce a contract existing 'between two others,'" the Superior Court properly dismissed Appellants' contract claims. *Hossain v. JMU Properties, LLC*, 147 A.3d 816, 820 (D.C. 2016).

CONCLUSION

The Court should affirm the judgment of the Superior Court.

Dated: September 18, 2024

Respectfully submitted,

/s/ Bruce M. Berman

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-page limitations of D.C. Ct. App. R. 32(a)(5), (6).

1. Exclusive of exempted portions of the brief, as provided in D.C. Ct. App. R. 32(a)(6), the brief contains 47 pages.

2. The brief, including footnotes, has been prepared in 14-point Times New Roman font.

/s/ Bruce M. Berman
BRUCE M. BERMAN

ADDENDUM OF STATUTES AND REGULATIONS

D.C. Code § 6–641.09. Building permits; certificates of occupancy.

(a) It shall be unlawful to erect, construct, reconstruct, convert, or alter any building or structure or part thereof within the District of Columbia without obtaining a building permit from the Director of the Department of Buildings, and said Director shall not issue any permit for the erection, construction, reconstruction, conversion, or alteration of any building or structure, or any part thereof, unless the plans of and for the proposed erection, construction, reconstruction, conversion, or alteration fully conform to the provisions of this subchapter and of the regulations adopted under said sections. In the event that said regulations provide for the issuance of certificates of occupancy or other form of permit to use, it shall be unlawful to use any building, structure, or land until such certificate or permit be first obtained. It shall be unlawful to erect, construct, reconstruct, alter, convert, or maintain or to use any building, structure, or part thereof or any land within the District of Columbia in violation of the provisions of said sections or of any of the provisions of the regulations adopted under said sections. The owner or person in charge of or maintaining any such building or land or any other person who erects, constructs, reconstructs, alters, converts, maintains, or uses any building or structure or part thereof or land in violation of said sections or of any regulation adopted under said sections, shall upon conviction for such violation on information filed in the Superior Court of the District of Columbia by the Attorney General for the District of Columbia or any of his assistants in the name of said District and which Court is hereby authorized to hear and determine such cases be punished by a fine of not more than $100 per day for each and every day such violation shall continue. The Attorney General for the District of Columbia of the District of Columbia or any neighboring property owner or occupant who would be specially damaged by any such violation may, in addition to all other remedies provided by law, institute injunction, mandamus, or other appropriate action or proceeding to prevent such unlawful erection, construction, reconstruction, alteration, conversion, maintenance, or use, or to correct or abate such violation or to prevent the occupancy of such building, structure, or land. Civil fines, penalties, and fees may be imposed as alternative sanctions for any infraction of the provisions of this subchapter, or any rules or regulations issued under the authority of these sections, pursuant to Chapter 18 of Title 2. Adjudication of any infraction of this chapter shall be pursuant to Chapter 18 of Title 2.

(b) A building permit shall not be issued to or on behalf of the District government unless proper notice has been given under § 1-309.10. The Department of Buildings shall issue a cease and desist order to enjoin any construction project that is issued in noncompliance with this section.

(c) Repealed.

D.C. Municipal Regulations Title 11 – Zoning, Subtitle X - General Provisions

Chapter 1 Campus Plans, School Plans, and Medical Campus Plans

100 General Provisions

100.1 The provisions of this chapter shall apply to the following:

(a) Education uses as a university or college when permitted as a special exception;

(b) Private schools when permitted as a special exception; and

(c) Medical campus plans when permitted as a special exception.

100.2 The intent of regulating campus facilities is to:

(a) Promote well planned and designed educational campuses;

(b) Encourage long-term facilities planning for these uses;

(c) Minimize negative impacts of campuses on surrounding residential areas; and

(d) Provide consistency and transparency to the campus planning process

CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2024, a copy of the foregoing brief was served electronically, through the appellate e-filing system, upon Appellants' counsel of record:

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