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No. 22-CV-760

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

ALEXA MOORE,
APPELLANT.

V.

DISTRICT OF COLUMBIA, *et al.*,
APPELLEES.

ON APPEAL FROM AN ORDER OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

# BRIEF FOR THE DISTRICT OF COLUMBIA APPELLEES

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## COUNTER-STATEMENT OF JURISDICTION

The Court lacks jurisdiction. Contrary to the assertion of the plaintiff-appellant, Alexa Moore, the Superior Court did not issue a final judgment in this case. *See* Br. 10. Following an interlocutory order granting the District of Columbia's motion to dismiss, Appellant's Appendix ("App.") 123-32, and after Moore voluntarily dismissed her live claims against some non-District defendants *without* prejudice, District of Columbia Appellees' Supplemental Appendix ("SA") 64, 83, 92, the Superior Court issued an order administratively closing the case, App. 150. Moore's subsequent notice of appeal was effectively taken from the court's administrative case-closing order. *See* SA 96-99.

A motions panel of this Court initially dismissed Moore's appeal for want of jurisdiction, holding that the case-closing order was not final. SA 100-01. Moore returned to the Superior Court and dismissed her claims against the remaining non-District defendants—again *without* prejudice. SA 102-03. This Court granted her motion to reinstate this appeal but invited the District to address appellate jurisdiction in its brief. SA 106. As explained below, because Moore dismissed her claims against the non-District defendants without prejudice, there is no final judgment in this case—one that disposes of all the claims against all the parties on their merit—and the Court lacks jurisdiction. *See* Part I, *infra*.

## STATEMENT OF THE ISSUES

In the wake of a Russian cyberattack on the District's Metropolitan Police Department ("MPD"), Moore, an MPD police officer, brought this putative class-action suit alleging that the District and several of its contractors negligently failed to adopt and institute a vast array of non-binding safety measures recommended by various information-technology entities. The Superior Court dismissed Moore's claims against the District based on sovereign immunity, and Moore voluntarily dismissed—without prejudice—her claims against the contractors. She now prosecutes this appeal from a Superior Court order that administratively closed the case. The issues are:

1. Whether a plaintiff may manufacture appellate jurisdiction to review an interlocutory order by voluntarily dismissing the remaining claims or defendants without prejudice where federal courts have uniformly rejected this tactic as a violation of the final-judgment rule.

2. Whether a programmatic lawsuit seeking a jury's review of the District's entire approach to information technology, and much beyond that, sidesteps the District's sovereign immunity merely because the plaintiff asserts that some unspecified complaint provisions allege "ministerial" acts or omissions.

## STATEMENT OF THE CASE

On October 21, 2021, Moore filed a four-count putative class action complaint against the District, MPD, the Office of the Chief Technology Officer ("OCTO"), and nine District information-technology contractors. App. 1-53. The Superior Court subsequently dismissed MPD and OCTO, with Moore's consent, as non sui juris. App. 127-28, 131; Clerk's Index/Certification Record Documents ("R.") 62 at 19. The Amended Complaint, filed on January 13, 2022, no longer pressed claims against four of the contractors but maintained suit against the five remaining contractors ("IT Contractors"). App. 57, 69. The Amended Complaint asserts claims of negligence against all defendants, App. 91-97, breach of confidentiality against the District, App. 97-101, and violations of the District of Columbia data-breach notification statute and negligence per se against the IT Contractors, App. 102-05.

Moore subsequently voluntarily dismissed without prejudice two IT Contractors on February 8, 2022 and May 18, 2022, respectively. SA 64, 83. Meanwhile, in February 2022, the District moved to dismiss. App. 110-21. On March 2, 2022, the Superior Court issued an interlocutory order granting the District's motion. App. 123-32. On June 17, the Superior Court denied Moore's motion to reconsider that ruling. App. 140-48. On September 7, Moore voluntarily dismissed her claims against one of the three remaining IT Contractors. SA 92. At

Moore's request, the Superior Court entered an order closing the case two days later, on September 9. App. 150. Moore noticed an appeal on October 3, 2022. SA 96-99.

On June 8, 2023, a panel of this Court granted the District's motion to dismiss the appeal, holding that the September 9 administrative order "did not dismiss two of the named defendants in the action" and did not "achieve finality." SA 100. On June 13, Moore filed in the Superior Court notices of dismissal, without prejudice, of the two remaining IT Contractors and subsequently moved this Court to reinstate her appeal. SA 102-03. This Court granted that motion on July 18, 2023, but invited the District to "brief" its "argument that . . . this appeal must be dismissed as taken from a non-final, non-appealable order." SA 106.

## STATEMENT OF FACTS

### 1. The District Responds To A Russian Cyberattack On Its Police Department.

In April 2021, the District became the victim of a Russian cyberattack. According to the operative complaint, the Russian-based crime syndicate Babuk launched a ransomware attack on MPD, gained illegal access to its electronic files, proceeded to publish stolen information on the Internet, and demanded that the District pay a $50 million ransom to prevent further publications. App. 69-70. The data included "a variety of highly sensitive information about confidential informants, persons of interest, employees of MPD, and others." App. 71.

In response, the District promptly notified the public "that the breach had occurred"; it "engaged the FBI to fully investigate the matter," as well as other "federal partners"; it provided frequent updates on the status of the investigation; and it issued real-time recommendations to impacted employees to mitigate breach-related risks. App. 71-74. The District also provided its employees "access to a complimentary credit monitoring service," "removed the legacy system the criminals used to access the network," conducted "a thorough review of how [MPD's] data is used and secured going forward," and "assigned a security detail to protect [an] officer" who "suffered a personal attack at his home by an individual who found his information online." App. 73, 76. The District's response furthermore allegedly included "negotiations" with the Babuk Group "as to the monetary demand." App. 74. Babuk purportedly reduced its demand to $4 million, but the District "offered an amount of $100,000" and ultimately paid no ransom. App. 74.[1]

**2. Moore Files This Suit With Far-Reaching Allegations Concerning The District's Information Technology And Other Policies.**

In October 2021, Moore filed this putative class-action suit in the Superior Court, asserting claims against the District of Columbia, MPD, OCTO, and,

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[1] The "FBI does not support paying a ransom in response to a ransomware attack" because this does not "guarantee" an "organization will get any data back." Federal Bureau of Investigation, *Scams and Safety: Ransomware*, https://tinyurl.com/paf97vva.

originally, nine IT companies with which the District is alleged to have coordinated its cybersecurity and data-breach response. App. 2. On January 13, 2022, Moore filed an Amended Complaint, which voluntarily dismissed several contractors and maintained suit only against the District and five remaining IT Contractors. App. 55-108. The IT Contractors are Avid Systems, Inc.; the Pittman Group DBA Vantix; Blackwood Associates; vTech Solutions; and MVS, Inc. App. 57. The Amended Complaint does not name Babuk or anyone responsible for stealing the District's data as a defendant. App. 55-108.

The Amended Complaint instead posits that the District "and its contractors did not reasonably protect [Moore's] and putative Class Members' data while in [their] custody and control" and that "[t]heir negligence and failure to implement proper security procedures allowed hackers to infiltrate electronic records and steal [Moore's] personal information." App. 70. The Amended Complaint focuses many allegations on the IT Contractors. In addition to alleging that the District retained them to provide sophisticated information security services, App. 59-69, it alleges that each "failed to meet expectations and requirements of the contract" with the District in ways that "contributed to the vulnerabilities that enabled the breach to occur" and was otherwise "negligent in its performance under the contract." App. 60, 63-69.

As to the District and its agencies, the Amended Complaint generally lumps them with the full group of "Defendants" and, in over 320 paragraphs, challenges virtually everything these "Defendants" did concerning information technology before, during, and after the data breach. As for how the breach happened, the Amended Complaint speculates, "[u]pon information and belief," that "the breach occurred through an employee's remote access computer" as a result of the remote-work policy the District adopted "in response to the pandemic." App. 68.[2]

From there, the Amended Complaint takes broader aim at the District's information-technology policies. In a section titled "Defendants' Negligence," it alleges that the District "had a duty to protect the District's data" and that "[c]ollectively, all of the Defendants were negligent in maintaining sufficient security of the information." App. 79. Next follow 26 paragraphs of allegations made "[o]n information and belief" that each refer to the "Defendants" collectively. App. 79-84. One such paragraph contains 14 subparts reciting a menu of different information-technology policy measures purportedly mitigating the risk of a data breach that Moore alleges the "Defendants" did not adopt. App. 82-84.

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[2] At another point, the Amended Complaint seems to blame the District's "legacy" computer system, but Moore makes no mention of this in her brief and has, therefore, abandoned any argument predicated on this system. App. 72, 77; *see* Br. 36 (asserting the breach occurred through a remote worker); *In re Shearin*, 764 A.2d 774, 778 (D.C. 2000) ("Points not urged in a party's initial brief are treated as abandoned.").

For example, the Amended Complaint maintains that "Defendants failed to segregate storage of information collected for background investigations (highly sensitive information) on a stand-alone network not connected to the Internet" as well as use an "encrypted gateway." App. 80. The Amended Complaint also contains a sampling of alleged best practices—like "[i]mplement an awareness and training program" and "[c]onfigure firewalls to block access to known malicious IP addresses"—and asserts "[o]n information and belief" that the "Defendants" did not institute these practices. App. 82-84.

The Amended Complaint does not identify which of these recommendations, if implemented, would have prevented the cyberattack. Nor does it allege that a policy or statute obligates the District to promulgate any set of cybersecurity best practices. At one point, the Amended Complaint refers to IT standards "recommended by the FBI," App. 82; at another, those "recommended by the United States Cybersecurity & Infrastructure Security Agency," App. 84; and, at another, those "recommended by the Microsoft Threat Protection Intelligence Team," App. 84.[3] The defendants' negligence, according to the Amended Complaint, was in

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[3] While the Amended Complaint appears to implicate about 27 security guidelines from these recommendations (depending on how one counts), App. 80-84, Moore's brief purports to find "over one hundred subcategories of tasks," taken from the "NIST Cybersecurity Framework," that are "described extensively through dozens of pages of allegations in the Complaint." Br. 21.

deciding not to "implement[] all of the [identified] measures to prevent and detect ransomware attacks." App. 93.

The Amended Complaint also challenges how the District communicated to stakeholders during and after the cyberattack. App. 79-82. It claims, for example: "Defendants failed to timely discover and disclose" the incident, App. 80, and that the District "only intermittently engaged in negotiations" with Babuk and "prematurely terminate[d] negotiations on the ransom demand," App. 81. According to Moore, "Defendants chose their own financial interests over protecting the Plaintiff's and Class Members' data." App. 81. The Amended Complaint also suggests that the District should have been more liberal in sharing information with the public during the breach response. App. 79-82.

Beyond these allegations, the Amended Complaint summarily accuses the District of being "negligent in maintaining sufficient security" and failing to "exercise reasonable care"; "act reasonably"; "adequately" "design," "maintain," and "test" its systems; or otherwise "engage in actions" to protect data. App. 79-82.

The Amended Complaint then turns to damages, App. 84-87, and class certification, App. 87-91. Following that, Moore alleges four causes of action. Relevant here against the District, the Amended Complaint alleges negligence in Count I and breach of confidentiality in Count II. App. 91-101. Relying on its factual allegations in support of its negligence claim, the Amended Complaint

maintains in Count II that the District failed to abide by the "minimum standard of care imposed on the Government Defendants in maintaining the confidentiality of the Plaintiff's Personal Information." App. 98. Moore alleges that this "minimum standard of care" is "expressed in multiple" unspecified "statutes, regulations, and judicial decisions." App. 98. She further faults the District for failure to "abide by [its] own privacy and internet polices" and "undertake reasonable and appropriate security precautions." App. 99, 101.

The prayer for relief requests, among other things, an array of damages, as well as "[i]njunctive relief[] precluding Defendants from further engaging in activity complained of herein." App. 106.

### 3. The Superior Court Dismisses Moore's Claims Against The District But Not Those Against The Remaining IT Contractors.

After filing the Amended Complaint, Moore voluntarily dismissed without prejudice two IT Contractors, Blackwood and MVS. SA 64, 83. Two additional IT Contractors, the Pittman Group and vTech, did not enter appearances, SA 94, even though service was accomplished on each of them in November 2021, SA 55-63. Moore did not ask the Superior Court to enter those defendants' defaults. *But see* Super. Ct. Civ. R. 55(a)(1) ("When a party against whom a judgment for affirmative

relief is sought has failed to plead or otherwise defend, the clerk or the court must enter the party's default.").[4]

Avid Systems appeared and vigorously defended itself. On February 23, 2022, it moved to dismiss, raising several challenges to the Amended Complaint. R. 64. On April 20, 2022, the Superior Court denied that motion. SA 78-81.

Meanwhile, on February 8, 2022, the District moved to dismiss on multiple grounds, including sovereign immunity. App. 109-22. On March 2, the Superior Court granted the District's motion. App. 123-32. In relevant part, the Court concluded that "[t]he District's decisions concerning which measure[s] to employ to prevent data security incidents and mitigate their effect are discretionary, and thus [Moore's] claims against the District are barred by sovereign immunity." App. 131. On March 28, Moore moved for reconsideration, App. 133-39, and the Superior Court denied that motion on June 17, App. 140-48. Those orders did not resolve Moore's claims against the Pittman Group, vTech, or Avid Systems.

**4. Moore Dismisses Her Remaining Claims Against The IT Contractors Without Prejudice While Pursuing An Interlocutory Appeal.**

On September 7, 2022, Moore filed a consent stipulation of voluntary dismissal of its claims against Avid Systems "*without* prejudice." SA 92. But she

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[4] *See also* Super Ct. Civ. R. 12(a)(5) ("Unless the time to respond to the complaint has been extended as provided in Rule 55(a)(3) or the court orders otherwise, failure to comply with the requirements of this rule will result in the entry of a default by the clerk or the court sua sponte.").

did not file a similar notice with respect to the Pittman Group or vTech. Instead, Moore asked the Superior Court to "close" her case. SA 94.

The Superior Court granted that motion two days later and issued an order closing the case on September 9 (the "September Order"). App. 150. On October 3, 2022, Moore filed a notice of appeal. SA 96. In her notice of appeal, she designated the appeal as taken from the order granting the District's motion to dismiss, "entered March 2, 2022," and the order denying Moore's motion for reconsideration, "entered June 17, 2022." SA 97.

On June 8, 2023, this Court granted the District's motion to dismiss the appeal "as taken from a non-final, non-appealable order." SA 100. The Court construed Moore's appeal as taken from the September Order (not the March and June orders designated in the notice of appeal) and determined that the September Order "did not dispose of the whole case on the merits" and was "non-final." SA 100. The panel reasoned that the September Order "did not dismiss two of the remaining defendants," and that Moore "had not filed a notice dismissing the two remaining defendants prior to requesting the case be closed." SA 100. The panel dismissed the appeal but noted that Moore might "file a motion to reinstate the appeal after filing the necessary notices in the Superior Court." SA 101.

On June 13, Moore filed notices of dismissal, without prejudice, of the two remaining IT Contractors in the Superior Court. SA 102-03. On June 22, in the

absence of any additional Superior Court order, and without filing a new notice of appeal, Moore moved to reinstate this appeal, *see* SA 106, which the District opposed on multiple grounds, including that Moore's June 13 dismissals without prejudice did not achieve the finality lacking in the September Order.

On July 18, the Court granted Moore's motion and reinstated this appeal. SA 106. It directed the District to file a response brief and to address its "argument that . . . this appeal must still be dismissed as taken from a non-final, non-appealable order." SA 106.

## STANDARD OF REVIEW

Whether this Court has appellate jurisdiction is a legal question committed to its de novo determination. *Evans v. Dreyfuss Bros., Inc.*, 971 A.2d 179, 185 (D.C. 2009).

This Court also reviews an order granting a motion to dismiss de novo, including the Superior Court's determination that the District is entitled to sovereign immunity, applying the same standard the trial court was required to apply. *See Hoff v. Wiley Rein, LLP*, 110 A.3d 561, 564 (D.C. 2015); *WMATA v. Nash-Flegler*, 272 A.3d 1171, 1180 (D.C. 2022). The District's "facial" jurisdictional attack, predicated on its claim of sovereign immunity, requires this Court "to determine jurisdiction by looking only at the face of the complaint and taking the allegations in the complaint as true." *Heard v. Johnson*, 810 A.2d 871, 877 (D.C. 2002); *see*

*Bible Way Church of Our Lord Jesus Christ of Apostolic Faith of Wash., D.C. v. Beards*, 680 A.2d 419, 426 n.4 (D.C. 1996). "At the pleading stage," Moore must "alleg[e] a claim that is facially outside of the discretionary function exception" for sovereign immunity. *Joiner v. United States*, 955 F.3d 399, 404 (5th Cir. 2020) (internal quotation marks and brackets omitted). Consequently, this case is governed by the familiar Super. Ct. Civ. R. 12(b)(6) motion-to-dismiss standard, *Heard*, 810 A.2d at 877-78, which requires that a complaint "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 544 (D.C. 2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)); *see also* 5B Charles A. Wright et al., *Federal Practice and Procedure* § 1357 (3d ed. 2023) (explaining that Rule 12(b)(6) permits dismissal when sovereign immunity appears on the face of the complaint).[5]

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[5] Moore erroneously asserts that "a motion to dismiss for failure to state a claim should be granted only if 'it appears beyond a doubt that [the plaintiff] can prove no set of facts in support of his claim which would entitle him to relief.'" Br. 17 (quoting *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006)). In *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), "the Supreme Court 'retired' the 'no set of facts' language in favor of [the] new 'plausibility' standard," which is now applied by this Court. *See Duk Hea Oh v. Nat'l Cap. Revitalization Corp.*, 7 A.3d 997, 1005 n.10 (D.C. 2010) (quoting *Twombly,* 550 U.S. at 553).

## SUMMARY OF ARGUMENT

This appeal is jurisdictionally flawed and should be dismissed. Alternatively, the Court should affirm the Superior Court's order dismissing the District on sovereign-immunity grounds.

1. The Court lacks jurisdiction because this appeal is taken from a non-final order administratively closing this case. A panel of this Court already recognized that Moore has taken this appeal from the September Order and that it is non-final and non-appealable. The Superior Court has entered no subsequent final order that could support appellate jurisdiction.

Moore contends that her tactic of dismissing the IT Contractors creates finality and appellate jurisdiction, but those dismissals were all "*without* prejudice," SA 106; Br. 13, leaving Moore free to bring another identical suit against the IT Contractors in the future. Federal courts have uniformly rejected this scheme to manufacture finality, and this Court should as well.

2. Assuming jurisdiction, the Superior Court was correct on the merits to hold that the Amended Complaint alleges discretionary—not ministerial—acts and omissions, and sovereign immunity bars this suit.

Sovereign immunity forbids suits against the District for its discretionary functions, which are those that require deliberation, decision, and judgment. This case alleges errors of discretion in a programmatic challenge to everything touching

on or concerning information security in the District. The Amended Complaint levels broad attacks on the District's policymaking, claiming the District should have adhered to cybersecurity best practices as defined by various information-technology entities. But weighing benefits, risks, and costs of different security measures under competing recommendations is discretionary, not ministerial. Moreover, Moore's challenge to the District's remote-work policies places at issue an array of discretionary choices governing employment, as do Moore's allegations about training. And Moore's complaints about what the District decided to say, to whom, and when implicate discretionary decisions that no jury is positioned to judge. Moore's remaining vague and conclusory assertions that the District acted negligently or unreasonably cannot salvage her complaint.

Moore's many attempts to recast this case as something other than a challenge to system design and policy are unpersuasive. Moore cites the expansive sweep of her Amended Complaint as a virtue, but this Court's precedent deems it an immunity vice. Moreover, Moore cites no policy, statute, or regulations cabining the District's discretion in designing and maintaing its information technology security systems. Moore errs in faulting the Superior Court for construing the Amended Complaint as a challenge to the District's discretion, when it was Moore who crafted this case as a sprawling challenge to the District's fundamental policy decisions. Moore is also wrong to contend that the Superior Court's immunity conclusion is premature.

Moore was obligated to state plausible facts demonstrating that some ministerial failure on the District's part caused her injury, but she did not. Further proceedings will not transform this case into anything other than the programmatic challenge to District policymaking that it clearly is.

## ARGUMENT

### I. The Court Should Dismiss This Appeal For Lack Of Jurisdiction, Having Been Taken From A Non-Final Order.

This Court should dismiss this appeal for lack of jurisdiction. A panel of the Court has already recognized that the September Order is non-final and non-appealable, the Superior Court has issued no subsequent final order, and Moore cannot cure her finality deficiency through the tactic of voluntarily dismissing defendants without prejudice.

"[T]his [C]ourt has jurisdiction only over appeals from 'all *final* orders and judgments of the Superior Court of the District of Columbia.'" *Anderson v. United States*, 754 A.2d 920, 922 (D.C. 2000) (quoting D.C. Code § 11-721(a)(1)). Section 11-721 "bars an appeal unless the order appealed from disposes of all issues in the case; it must be final as to all the parties, the whole subject matter, and all of the causes of action involved." *L.A.W. v. M.E.*, 606 A.2d 160, 161 (D.C. 1992); *see also Howard Univ. v. Pobbi-Asamani*, 488 A.2d 1350, 1353 (D.C. 1985). "The lack of finality is a bar to appellate jurisdiction." *Rolinski v. Lewis*, 828 A.2d 739, 745 (D.C. 2003) (en banc) (internal quotation marks omitted).

This Court has construed Moore's appeal as taken from the Superior Court's September Order, and Moore seems to agree. SA 100; Br. 13-14. The September Order, however, did nothing more than administratively close the case and is therefore non-final. SA 100. As this Court determined in its dismissal order, the September Order was non-final and non-appealable because it "did not dispose of the whole case on the merits." SA 100. That determination is correct. An administrative closing order "does not dispense with the technical requirements of finality." *Penn W. Assocs., Inc. v. Cohen*, 371 F.3d 118, 128 (3d Cir. 2004). Here, by the time the September Order was issued, Moore had voluntarily dismissed Blackwood, MVS, and Avid, but her claims against the Pittman Group and vTech remained pending. Moore neither sought an entry of default nor voluntarily dismissed them as parties. The Superior Court in its September Order did not even purport to dispose of the claims against the two remaining defendants and simply "remov[ed] [the] case[] from [its] active files without making any final adjudication." *Lehman v. Revolution Portfolio L.L.C.*, 166 F.3d 389, 392 (1st Cir.1999); *see United States v. 27.09 Acres of Land*, 1 F.3d 107, 111 (2d Cir. 1993).[6]

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[6] Moore initially sought to appeal from the March and June 2022 orders. *See* SA 97. However, as discussed, the Court construed Moore's October 2022 appeal as taken from the September Order, especially given that Moore had not filed any additional notice of appeal. In any event, the March and June orders were not final because they did not reach three of four causes of action, including two that had only

After this Court's dismissal order, Moore filed a notice of voluntary dismissal of the remaining two IT Contractors—again *without prejudice*—and she contends that this non-prejudicial dismissal, in combination with the September Order, and without any further Superior Court order, created the necessary finality for this appeal. *See* Br. 13-14. Moore's voluntary dismissal, however, is an "inventive litigation ploy[]" that does not create finality. *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1714 (2017). In fact, this case is in all material respects like the D.C. Circuit's decision in *Blue v. District of Columbia Public Schools*, 764 F.3d 11 (D.C. Cir. 2014), where a plaintiff voluntarily dismissed her claims against a teacher without prejudice in order to pursue an appeal of claims against the District. *Id.* at 14-15. The D.C. Circuit dismissed the appeal for lack of jurisdiction, holding that the order dismissing the District was not final. *Id.* at 19.

As the D.C. Circuit explained, there is a "broad consensus" among the federal circuits that dismissals without prejudice of some claims or some parties do not "finalize trial court proceedings for appellate review." *Id.* at 17 (collecting cases).[7]

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been stated against the IT Contractors in the first instance. App. 102-05, 123-32, 140-48. In addition, any appeal from these orders taken in October would have been untimely. *See* D.C. App. R. 4(a)(1).

[7] "The Superior Court shall conduct its business according to the Federal Rules of Civil Procedure . . . unless it prescribes or adopts rules which modify those Rules." D.C. Code § 11-946. Thus, "when one of the Superior Court's 'procedural rules is nearly identical to or the functional equivalent of a federal procedural rule, [this

The courts agree that "a party cannot use voluntary dismissal without prejudice as an end-run around the final judgment rule to convert an otherwise non-final—and thus non-appealable—ruling into a final decision." *84 Lumber Co. v. Cont'l Cas. Co.*, 914 F.3d 329, 332-33 (5th Cir. 2019); *see also Rowland v. S. Health Partners, Inc.*, 4 F.4th 422, 424 (6th Cir. 2021) ("[T]his attempt to manufacture finality by voluntarily dismissing certain claims without prejudice in order to pursue what would otherwise be an interlocutory appeal is . . . impermissible."); *ITOFCA, Inc. v. MegaTrans Logistics, Inc.*, 235 F.3d 360, 363-64 (7th Cir. 2000) ("[I]t would be disingenuous to suggest that by dismissing the claims without prejudice, the district court did dispose of all those issues."); *Collins v. Li*, 158 Md. App. 252, 274 (Md. Ct. Spec. App. 2004) ("The circuit court's grant of appellants' dismissal without prejudice is not a final appealable order, for appellants may choose to resurrect their dismissed claims.").

The result should be the same here. Moore dismissed her claims "*without* prejudice." SA 106; Br. 13. She remains free to bring another suit against the IT

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Court] look[s] to cases interpreting the federal rule for guidance on how to interpret our own.'" *Varnum Props., LLC v. D.C. Dep't of Consumer & Regul. Affs.*, 204 A.3d 117, 121 (D.C. 2019) (quoting *Estate of Patterson v. Sharek*, 924 A.2d 1005, 1009-10 (D.C. 2007)). The statute and rules here are like their federal counterparts, so federal decisions are probative. *See United States v. Facon*, 288 A.3d 317, 333 (D.C. 2023) (recognizing that D.C. Code § 11-721(a)(1) "is based on 28 U.S.C. § 1291"); *Talley v. Varma*, 689 A.2d 547, 557 (D.C. 1997) (looking to "federal courts for guidance" when interpreting Super. Ct. Civ. R. 54 because federal decisions interpreting Fed. R. Civ. P. 54 "are persuasive").

Contractors in the future based on the same nucleus of facts common to this action or even to amend her pleadings to reinstate those claims in this case, regardless of the outcome of this appeal. Allowing this appeal to proceed would permit "the manipulative plaintiff [to] hav[e] his cake (the ability to refile the claims voluntarily dismissed) and eat[] it too (getting an early appellate bite at reversing the claims dismissed involuntarily)." *Marshall v. Kan. City S. Ry. Co.*, 378 F.3d 495, 500 (5th Cir. 2004). And by consequence, this Court "may face repeated appeals that require an inefficient revisit to the same basic fact setting," not only in this case but also in others. 15A Charles A. Wright et al., *Federal Practice & Procedure* § 3914.8.1 (3d ed. 2023).

The Supreme Court in the class action context has rejected similar efforts to manufacture a final decision by plaintiffs who voluntary dismissed their individual claims—there *with* prejudice—to pursue appeal of an interlocutory class-certification decision. *Microsoft*, 137 S. Ct. at 1713-14. This case is even clearer than *Microsoft* because Ms. Moore dismissed her claims without prejudice. SA 64, 83, 92, 102-03. Like in *Microsoft*, Moore's "voluntary-dismissal tactic . . . invites protracted litigation and piecemeal appeals," leaves "the decision whether an immediate appeal will lie . . . exclusively with the plaintiff," and undermines the "careful calibration" of existing rules permitting interlocutory appeals in discrete circumstances. 137 S. Ct. at 1713-15. Indeed, "[t]he purpose of

Rule 54(b) is to prevent parties from taking over the 'dispatcher' function that the Rule vests in the trial judge to control the circumstances and timing of the entry of final judgment." *Blue*, 764 F.3d at 18; *see Luvata Grenada, L.L.C. v. Danfoss Industries S.A. DE C.V.*, 813 F.3d 238, 240 (5th Cir. 2016). That is what Moore is attempting here. To reach the merits of this appeal would ratify that tactic, which stands uniformly rejected by federal appellate tribunals.

Instead, to achieve finality in the Superior Court, Moore was required either to: (1) dismiss all claims against the IT Contractors *with prejudice*; (2) obtain a final determination on the merits of her claims against the IT Contractors through default judgments or litigation; or (3) seek a Rule 54(b) certification from the Superior Court and D.C. App. R. 5 approval from this Court to appeal the interlocutory orders dismissing her claims against the District. *See Blue*, 764 F.3d at 17; D.C. Code § 11-721(d). She declined to undertake any of those routes. Thus, this appeal remains one taken from the same non-final September Order, notwithstanding Moore's subsequent non-prejudicial dismissal of the remaining two IT Contractors, and this Court lacks jurisdiction.

## II. Alternatively, Sovereign Immunity Bars Moore's Claims Against The District.

On the merits, the Superior Court correctly concluded that sovereign immunity bars Moore's claims against the District. "In this jurisdiction, the doctrine of sovereign immunity acts as a bar to bringing suit against the District of Columbia

for its discretionary functions." *Nealon v. District of Columbia*, 669 A.2d 685, 690 (D.C. 1995). On the other hand, "[i]f the act is committed in the exercise of a ministerial function, the District is not immune." *Id.* Because "[t]his doctrine acts as a jurisdictional bar to bringing suit," *id.*, "[w]hether a function is discretionary or ministerial is a question going to the subject matter jurisdiction of the trial court," *Aguehounde v. District of Columbia*, 666 A.2d 443, 447 (D.C. 1995).

"Discretionary acts are generally defined as those acts involving the formulation of policy while ministerial acts are defined as those relating to the execution of policy." *Id*. However, "[d]iscretionary activity is not confined to the policy or planning level, and can include day-to-day operational activities, provided the decisions at issue involved an exercise of political, social, or economic judgment." *Nash-Flegler*, 272 A.3d at 1181 (internal quotation marks omitted). "Discretionary decisions typically affect large numbers of people and 'call for a delicate balancing of competing considerations.'" *District of Columbia v. Pace*, 498 A.2d 226, 229 (D.C. 1985) (quoting *Owen v. Independence*, 445 U.S. 622, 648 (1980)). Such decisions implicate "a concern for separation of powers," "because of the necessity and desirability of 'freeing policy decisions from jury speculation.'" *Id.* (quoting *Chandler v. District of Columbia*, 404 A.2d 964, 966 (D.C. 1979)); *see also Nash-Flegler*, 272 A.3d at 1181 ("Immunity extends to those discretionary acts to 'prevent judicial "second-guessing" of legislative and administrative decisions

grounded in social, economic, and political policy through the medium of an action in tort.'" (citation omitted)).

### A. The acts and omissions complained of here are discretionary, not ministerial.

Applied to this case, sovereign immunity compels affirmance of the Superior Court's dismissal order. The Amended Complaint challenges the District's entire approach to information-technology security, comprising a vast confluence of policymaking decisions. In fact, this case falls squarely within this Court's line of holdings that the "overall . . . safety design" of a complex system, or even "part" of it, is "a discretionary policy decision" within the District's immunity. *McKethean v. WMATA*, 588 A.2d 708, 715 (D.C. 1991). In *McKethean*, this Court deemed discretionary "the decision to relocate a bus stop." *Id.* In *Nealon*, it concluded the same of the "decision to reduce the water pressure in the fire hydrants and to increase its availability only for working fires." 669 A.2d at 691. And in *Chandler*, the Court found the District's choices in locating and closing fire stations immune from a jury's review. 404 A.2d at 965-66; *see also Dant v. District of Columbia*, 829 F.2d 69, 74-75 (D.C. Cir. 1987) (holding that the "complex design" of system-wide fare collection is "approved by WMATA in the exercise of its policy discretion.").

This case presents an even more expansive challenge to discretionary policy than those previously rejected. Moore directs the Court to paragraphs 183-202 of her Amended Complaint, App. 79-81, to find the factual allegations supporting her

claims, Br. 14, 17. There, at its core, the Amended Complaint places at issue everything remotely connected to MPD's information technology system at the programmatic level, which in turn implicates many related spheres of District governance. The Court will be hard pressed to find a clearer challenge to discretionary policymaking than this.

Beyond that, Moore's complaint seeks to challenge the District's decisions about what to communicate, to whom, and when. App. 79-81. But these choices, too, are discretionary. Finally, Moore's remaining high-level and conclusory allegations fail to rescue her complaint. App. 79-81.

1. The Amended Complaint's allegations concerning all information technology in the District challenge policymaking.

a. Cybersecurity.

The Amended Complaint broadly challenges the District's entire approach to information security. It alleges that "Defendants had numerous opportunities in advance of the breach to reasonably implement adequate cyber security measures . . . , but failed to do so." App. 93. And it identifies at least 27 different measures that allegedly could have been employed, App. 82-86, which, altogether, implicate "over one hundred subcategories of tasks," Br. 21. Moreover, the Amended Complaint identifies a plethora of ways to judge information-security best practices, including those measures "recommended by the FBI," App. 82, those "recommended by the United States Cybersecurity & Infrastructure Security

Agency," App. 84, and those "recommended by the Microsoft Threat Protection Intelligence Team," App. 84.

Moore's brief adds two more: "[t]he NIST Cybersecurity Framework" and recommendations of the Federal Trade Commission. Br. 21, 23 n.3. The Amended Complaint does not mention these examples. Thus, Moore may not rely on them now. *Hollins v. Fed. Nat. Mortg. Ass'n*, 760 A.2d 563, 572 (D.C. 2000) ("Ordinarily, arguments not made in the trial court are deemed waived on appeal."); *Hulse v. Kirk*, 329 N.E.2d 286, 292 (Ill. App. 1st Dist.1975) ("Just as a new theory or issue cannot be asserted for the first time on appeal, plaintiff cannot argue or rely upon facts which are totally absent from his complaint." (internal citation omitted)). In any event, their belated appearance only underscores how many different ways there are of evaluating whether or not a "party entrusted with sensitive information failed to safeguard the data to the injury of others." Br. 15.

Moore's menu of information technology possibilities proves that her complaint concerns "personal deliberation, decision and judgment." *Nealon*, 669 A.2d at 690 (citation omitted). It is no answer that benchmarks might be inferred from "industry standards," *see* Br. 14, when there are so many different standards and sources of standards. A reasonable information technology framework might follow one set of guidelines or another or mix and match recommendations. *See Aguehounde*, 666 A.2d at 448. And it might allocate resources in different ways

between and among discrete standards, such as by devoting substantial resources to the most sophisticated "anti-virus and anti-malware programs" and "conduct[ing] regular scans automatically" at the most frequent intervals possible, App. 83, but choosing not to utilize "Office Viewer software to open Microsoft Office files transmitted via email instead of full office suite applications," App. 83. An information-technology policymaker might deem "[s]can[ning] all incoming and outgoing emails" as invasive, expensive, or outweighed by contrary policies, but choose to compensate by selecting "other controls," App. 83.

"Such flexibility is the essence of discretion." *Cope v. Scott*, 45 F.3d 445, 450 (D.C. Cir. 1995). Like a challenge to the "decision to install or not to install traffic lights, roadway markings, guardrails, and like devices on public streets," which immunity forecloses, *McKethean*, 588 A.2d at 714, "[t]hese are all general attacks on the [information-technology] plan itself, not on the manner of [executing a plan] in a particular case." *Sanders v. WMATA*, 819 F.2d 1151, 1156 (D.C. Cir. 1987). That is especially clear given that the Amended Complaint does not identify which specific security measure would, if adopted, have prevented the incident. *See McKethean*, 588 A.2d at 714.

Moore's complaint that the District failed to "install timely updates to cyber security software" fares no better. Br. 33-35. This allegation is subsumed within her broader complaint about the District's discretionary failure to implement

measures recommended by the FBI. App. 82-84. Moreover, determining whether, when, and how to maintain, upgrade, or replace an information-technology system "involv[es] the consideration of many competing factors and large expenditures of scarce resources," to a greater degree than determining whether, when, and how to "redesign[] [a] barrier" on a highway ramp, which this Court deemed discretionary in *Pace*, 498 A.2d at 228-29. This allegation "is aimed at the design" of a complex system, requiring consideration of "safety" and "cost," not at alleged error in executing existing policy. *Abdulwali v. WMATA*, 315 F.3d 302, 305 (D.C. Cir. 2003).

Moore is "really seeking to establish as affirmative negligence what is essentially passive conduct," which would require a jury to "speculate on whether" a different choice "might have prevented the accident." *McKethean*, 588 A.2d at 714. Some types of upgrades, or some methods of implementing them, may not have prevented the alleged harms, others might (but might not) have, and litigating this question would necessarily call for competing positions about more than one hypothetical state of affairs—i.e., worlds in which different types of upgrades could have been selected. "The impossibility of such speculation is one of the main reasons why policy decisions receive immunity in the first place." *Id.*

There is, in short, no basis for a jury to apply Moore's proposed test: "Identify, Protect, Detect, Respond, and Recover." Br. 21. That is quintessential

policymaking. "[A]llowing a court or jury to" determine how the District makes those choices would "invade the legitimate sphere of a municipality's policymaking processes" and "infringe upon the powers properly vested in a coequal branch of government." *Pace*, 498 A.2d at 229 (cleaned up). "To hold otherwise would be effectively to impose a legal duty on the District to have 'state-of-the-art'" information-technology systems, which the judiciary cannot do. *Id.*

b. Remote work and training.

These same flaws inhere in the Amended Complaint's assertions that go beyond "adequate cyber security measures." App. 93.

First, the Amended Complaint alleges that "the breach occurred through an employee's remote access computer" when "nonessential units of MPD were teleworking in response to the pandemic," App. 78; *see* Br. 35-36, taking aim at the District's pandemic response, which is a paradigmatic "exercise of policy discretion." *Chandler*, 404 A.2d at 966. Moore's opening brief makes no attempt to defend the District's pandemic-related telework policy as a ministerial task, so any argument on that score has been forfeited on appeal. *See Stockard v. Moss*, 706 A.2d 561, 566 (D.C. 1997) ("It is the longstanding policy of this court not to consider arguments raised for the first time in a reply brief.").

Even assuming Moore has preserved her challenge to the District's decision to permit telework during a global health emergency, Br. 36, that decision was

discretionary. The COVID-19 pandemic presented a once-per-generation global crisis, and a response had to address the risks of infectious disease, the new employment-market demand for flexible-work options, and the downsides of remote work, including cybersecurity risks. Those decisions entail a "delicate balancing of competing considerations" in a way that "affect[s] large numbers of people." *Pace*, 498 A.2d at 229 (internal quotation marks omitted). One precaution to mitigate cybersecurity risks would be to prohibit remote work altogether. But the District's policymakers would need to weigh such benefits against the risks from an infectious and deadly virus and harms to the District's employment competitiveness in the face of market demand for flexible work options. Another set of precautions might come in the form of various technology solutions tailored to remote work. Yet there are many options to consider and costs, risks, and benefits accompanying each, which implicate "the District's allocation of financial . . . resources." *Nealon*, 669 A.2d at 691. The ultimate resolution could involve differentiating employees and tailoring solutions to each employee or division, which is quintessentially discretionary. *See id.* (referencing systems of "arrangement and coordination"); *Aguehounde*, 666 A.2d at 448 ("[T]he need to accommodate pedestrians may be paramount at some intersections, but of only secondary importance at other intersections.").

In this way, Moore's challenge is not cabined even to the broad sphere of information technology. Her theory implicates decisions impacting employment,

budgeting, public health, and taxing and spending policies, which are core discretionary matters. *See Burkhart v. WMATA*, 112 F.3d 1207, 1217 (D.C. Cir. 1997) ("The hiring decisions of a public entity require consideration of numerous factors, including budgetary constraints, public perception, economic conditions, individual backgrounds, office diversity, experience and employer intuition." (internal quotation marks omitted)).

Second, Moore also alleges negligence in the "[t]he failure to train and supervise employees." Br. 23; App. 82. But "decisions concerning the hiring, training, and supervising of [District] employees are discretionary in nature, and thus immune from judicial review." *Burkhart*, 112 F.3d at 1217. Here, Moore's only allegation about training alleges a failure to "[i]mplement an awareness and training program" specifically recommended by the FBI for *all* employees, App. 82, which is an impermissible assertion "that supervision shall take a particular form," *Dodge v. Stine*, 739 F.2d 1279, 1284 (7th Cir. 1984).

2. The Amended Complaint's allegations concerning District communications about the cyberattack similarly implicate policymaking.

Another set of allegations challenge the District's response to the cyberattack. Among other things, Moore suggests that the District's decision not to pay a $4 million ransom was tortious. App. 74, 76. Tellingly, Moore does not argue that these actions were ministerial in her opening brief, thereby forfeiting the contention.

*Stockard*, 706 A.2d at 566. But even assuming Moore has preserved this argument on appeal, *see* Br. 28-38, the delicate process of negotiating with an overseas crime syndicate obviously calls for "policy considerations" of the most sensitive order. *Chandler*, 404 A.2d at 966. This is also true of allegations concerning the timing and content of the District's responses to the breach and how freely it shared information with the public and MPD officers. App. 80-82; *see Minns v. United States*, 155 F.3d 445, 452 (4th Cir. 1998) (holding that "the decision whether to warn soldiers and their families of the potential effects of inoculations and pesticides" was a "judgment call" that "falls . . . at the core of the discretionary function exception"). No jury could judge the District's approach to these matters.

3. The Amended Complaint's conclusory allegations fail to rescue Moore's challenge to otherwise discretionary acts.

To the extent Moore seeks to rely on the high-level conclusory allegations in paragraphs 183-202 of her Amended Complaint (that apply to the District), App. 79-82, those allegations fail to identify any discrete ministerial acts that would salvage her complaint. For several reasons, the Court should reject Moore's attempt to rely on those vague provisions.

To begin, Moore's discussion of the allegations in paragraphs 183-202 is too conclusory to adequately preserve any related argument on appeal. *See* Br. 36-37; *Kamit Inst. for Magnificent Achievers v. D.C. Pub. Charter Sch. Bd.*, 81 A.3d 1282, 1289 n.25 (D.C. 2013) (emphasizing that "[i]ssues adverted to in a perfunctory

manner, unaccompanied by some effort at developed argumentation, are deemed waived" (quoting *Comford v. United States*, 947 A.2d 1181, 1188 (D.C. 2008))). As a result, the Court need not delve into this portion of the Amended Complaint.

In any event, these vague allegations are so broad as to necessarily encompass discretionary decisions. The Amended Complaint claims that an undifferentiated group of defendants, for example, "had a duty to protect the District's data"; "were negligent in maintaining sufficient security"; "failed to exercise reasonable care and implement adequate security systems"; "failed to detect the breach"; and "did not have an adequate emergency response plan." App. 79-80. But, as noted above, forming a plan to protect the District's data, or developing security systems, or developing an emergency response plan are all discretionary acts that involve balancing an array of fiscal and policy trade-offs. *See, e.g.*, *Pace*, 498 A.2d at 229. Despite listing multiple broad categories of action, Moore fails to identify a single concrete ministerial act that a District employee failed to take. That alone should doom her claims.

This conclusion is reinforced by the requirement that "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Potomac Dev.*, 28 A.3d at 544 (quoting *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted)). "Bare allegations of wrongdoing that are no more than conclusions are not entitled to the assumption of truth, and are insufficient

to sustain a complaint." *Logan v. LaSalle Bank Nat'l Ass'n*, 80 A.3d 1014, 1019 (D.C. 2013) (internal quotation marks omitted); *see Murray v. Motorola, Inc.*, 982 A.2d 764, 783 n.32 (D.C. 2009), *as amended on reh'g* (Dec. 10, 2009) (similar). To the extent that Moore alleges some unspecified failure to "maintain security," for example, that cannot convert her broadside attack on District policy to a more modest challenge to ministerial administration. *See, e.g.*, *Katz v. District of Columbia*, 285 A.3d 1289, 1317 (D.C. 2022) (holding that allegations that that the District failed to "properly train" officers about the "proper investigation procedures" and "procedures for arresting individuals" were insufficient to raise the right to relief above the speculative level).

The same is true for the "litany of allegations" reproduced in Moore's brief asserting, for example, that the District did not "reasonably protect" her data, "fail[ed] to prevent and avoid the Data breach from occurring," and "fail[ed] to abide by [its] own privacy and internet policies." Br. 36-37. The determination of how to reasonably protect data, how to best avoid the risk of a breach, and how to implement internet policies is broad and discretionary. In any event, conclusory allegations regarding the District's adherence to unspecified "privacy and internet policies" do not nudge Moore's claims of negligence and breach of confidentiality beyond conceivable to plausible. *See Tingling-Clemmons v. District of Columbia*, 133 A.3d 241, 246 (D.C. 2016) ("To satisfy Rule 8(a), plaintiffs must 'nudge [ ] their claims

across the line from conceivable to plausible.'" (quoting *Twombly*, 550 U.S. at 570)). Put simply, Moore cannot rescue her deficient pleading with bare conclusions, which the Court is entitled to discard under Rule 8.

### B. Moore's efforts to recast her Amended Complaint as challenging ministerial acts are unavailing.

In her opening brief, Moore attempts to recast this case as a challenge to ministerial choices devoid of policy implications. But her expansive pleading leaves no room for this revisionist position, and her arguments to the contrary lack merit.

#### 1. The breadth of allegations confirms that immunity applies.

Moore relies on the "wide variety of acts or omissions" alleged in her Amended Complaint, *e.g.*, Br. 30, but her own ambition dooms her claims. The more "general" the "attack[]," the more likely it is to challenge discretionary acts; the more relegated to "a particular case," the more likely it is to challenge ministerial acts. *See Sanders*, 819 F.2d at 1156. On that basis, this Court in *Nash-Flegler* distinguished the ministerial "decision to place a single warning cone on the Metro platform" not only from discretionary choices involved in "system planning," but also from discretionary choices concerning, "say, many cones, or broadcasting a warning message to deboarding passengers." 272 A.3d at 1181-82. The claim avoided immunity because it did not "involve[] relatively high-level, policy-laden decisions . . . ." *Id.* at 1182.

By contrast, Moore did not complain of a single act or omission, or a discrete set of acts or omissions, "which would implement [a] policy and limit [the District's] discretion." *McKethean*, 588 A.2d at 714. She lodged a programmatic challenge to the design of District's information technology, and much else, and her appeal brief only doubles down on this sweeping approach. *See* App. 93 (asserting that the District should have adopted and implemented "all" of the competing cybersecurity measures identified in the complaint). She admits the pleading is "broad" and embraces the "design" of the District information technology systems, Br. 17-18, involving an assessment of "over one hundred subcategories of tasks" that are "part of an organizations' [sic] cybersecurity posture" "described extensively through dozens of pages of allegations in the Complaint," Br. 21. "[T]he gist of the lawsuit," she says, "is germane to all other lawsuits asserting data breach liability: that the party entrusted with sensitive information failed to safeguard the data to the injury of others." Br. 14-15. She admits "some functions" identified in the Amended Complaint "could be described as discretionary," Br. 14-15, and that her case involves "every person" with information-technology privileges in the District's employment because they all "must be vigilant to guard against outside cyberattacks." Br. 23. This case does not, she readily concedes, "involve[] discrete incidents," but rather "includes a wide variety of alleged failures over an extended period of time." Br. 19. And she brings her claims on behalf of a group "so

numerous that their individual joinder is impracticable." App. 88; *see* Br. 20 (asserting that the District's actions "impact[ed] thousands of people").

This case alleges nothing like the "acts (or inaction)" of a single "bus driver" who failed to "follow[] WMATA's safety directives"; instead, Moore challenges "the adequacy of the rules themselves." *WMATA v. O'Neill*, 633 A.2d 834, 838 (D.C. 1993). Nor is it like *D.C. Housing Authority v. Pinkney*, 970 A.2d 854 (D.C. 2009), which held that the failure to place an "'out of order' sign" on a single broken residential elevator was a ministerial error, *id.* at 861-82; or like *Wagshal v. District of Columbia*, 216 A.2d 172 (D.C. 1966), which held that the failure to replace a single missing stop sign at "the place where it had stood for a considerable time" was likewise ministerial, *id.* at 174.

Moore's reliance on *J.C. v. District of Columbia*, 199 A.3d 192 (D.C. 2018), which was remanded so that the trial court might "more carefully analyze the issue of sovereign immunity," *id.* at 206, is equally misplaced. That case challenged District employees' handling of abuse allegations in a single household. *See id.* at 198-200. The case did not implicate the "overall" "design" of a complex system, as Moore's does. *Aguehounde*, 666 A.2d at 449. Moore's admission that her claims "affect large numbers of people" proves that it is jurisdictionally barred.

2. No relevant policy or statute converts policymaking choices into ministerial implementation of policymaking choices.

Because the government conduct alleged in the Amended Complaint is discretionary, the District is immune "unless the government has adopted a 'statute, regulation or policy that specifically prescribes a course of action for an employee to follow.'" *Aguehounde*, 666 A.2d at 448 (quoting *Berkovitz by Berkovitz v. United States*, 486 U.S. 531, 536 (1988)) (cleaned up)). Such a directive may convert an otherwise discretionary matter to a ministerial one, but only if it "specifically . . . speaks to the challenged conduct." *Usoyan v. Republic of Turkey*, 6 F.4th 31, 44 (D.C. Cir. 2021), *cert. denied*, 143 S. Ct. 395 (2022). Although Moore complains that the District failed to follow its own policies, Br. 36, App. 99, the Amended Complaint cites none. To the contrary, it criticizes the District for *not* having made the discretionary decision to adopt the policies recommended by the FBI, the U.S. Cybersecurity & Infrastructure Security Agency, and the Microsoft Threat Protection Intelligence Team. App. 82-84, 93.

In her briefing, Moore cites two statutes governing personnel records, Br. 40-41, but these "contain[] no specific . . . guidelines" related to data security. *McKethean*, 588 A.2d at 714. The first merely directs the District to maintain a "personnel record of each member of the Metropolitan Police force," D.C. Code § 5-113.01(a)(3), and the second—titled "Preservation and destruction of records"—provides that "[a]ll records of the Metropolitan Police Department shall be

preserved," *id.* § 5-113.07. These statutes do not codify information-technology best practices and do not supply directives in any respect relevant to the Amended Complaint or to any cyberattack scenario. *Compare Usoyan*, 6 F.4th at 403 ("a criminal assault ordinance operates at too high a level of generality"), *with Casco Marina Dev., L.L.C. v. D.C. Redevelopment Land Agency*, 834 A.2d 77, 81-82 (D.C. 2003) (specific contractual directives, made binding by statute, removed discretion and rendered discrete, complained-of actions ministerial). Besides, the Amended Complaint does not allege that the District violated these statutes, which (as noted) do not appear in the pleading.

3. The Superior Court was neither obligated nor entitled to pick out allegations in isolation in search of ministerial acts.

Moore next criticizes the Superior Court for the breadth of her own pleading, accusing it of "paint[ing] with too broad a brush," "mak[ing] a single evaluation of the overarching function of cybersecurity," and concluding "that *all aspects* of the District's computer security were discretionary functions," among other things. *E.g.*, Br. 18, 29. This ignores that Moore was "master of her complaint," *Van Allen v. Bell Atl.-Wash., D.C., Inc.*, 921 F. Supp. 830, 833 (D.D.C. 1996), and chose to fashion this class-action suit as a far-reaching challenge to the District's entire information-technology "posture," with the focus being on the District's decisions about the adoption and implementation of a wide variety of competing industry standards. Br. 21.

The Superior Court was obligated to, and in fact did, consider each "portion of the complaint in context and . . . the complaint as a whole." *Pannell v. District of Columbia*, 829 A.2d 474, 478 (D.C. 2003). It is therefore not true that the Superior Court chose to look at "broad categories," Br. 19, "cast a wide blanket of immunity over all cybersecurity and privacy functions," Br. 20, or deemed all "computer security" challenges forbidden, Br. 29. The Superior Court reviewed Moore's Amended Complaint as she wrote it and concluded—as it had to—that this undifferentiated challenge to "*all aspects*" (Br. 29) of District computer policy, and much else, is barred.

Undeterred, Moore proposes that the Superior Court should have rummaged through her Amended Complaint to break out "each of those steps" and "specific failures" in search of a ministerial act sufficient to pierce immunity. Br. 20. Even if that were legally permissible, this line of argument is insufficiently developed, given that Moore "does not believe it is necessary to recount the allegations" she deems ministerial. Br. 14. Moore can hardly blame the Superior Court for failing to undertake the analysis she refuses to perform here. On appeal, Moore was obligated to present her arguments clearly in her opening brief, *see, e.g.*, *Fells v. Serv. Emps. Int'l Union*, 281 A.3d 572, 579 n.3 (D.C. 2022), and should not be permitted to announce in conclusory fashion that somewhere among her 320 unfocused allegations, *something* might qualify as ministerial, particularly where

this Court's standard of review is de novo. *See, e.g.*, Br. 35 (asserting without further elaboration that "the overall day-to-day operations of the District's computer networks represents the essential 'ministerial tasks' of the information age"). "[J]udges are not like pigs, hunting for truffles buried in briefs or the record . . . ." *Jones v. Kirchner*, 835 F.3d 74, 83 (D.C. Cir. 2016) (internal quotation marks omitted). "This Court," like others, "is not in the habit of doing parties' lawyering for them," and it should "decline to take up that task now." *Jeffries v. Barr*, 965 F.3d 843, 860-61 (D.C. Cir. 2020).

Setting that aside, Moore's position stands rejected in this Court's precedent addressing sovereign immunity, which holds that it is "not required" that a trial court "isolat[e] each component of a decision" into "parts." *Aguehounde*, 666 A.2d at 450. Because "a decision that is a component of an overall policy decision protected by the discretionary function exception also is protected by this exception," this Court held that a challenge to "the length of yellow intervals" in traffic lights is barred because light intervals are "part of the overall traffic design" and "the overall policy of determining traffic flow in the District." *Id.* (quoting *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1542 (10th Cir. 1992)). Likewise, in *McKethean*, this Court rejected a plaintiff's effort to characterize a claim as one for failing "to follow [the defendant's] own standards by maintaining a hazardous bus stop and fail[ing] to train its staff properly in implementing these safety standards." 588 A.2d at 713. This Court

explained that "the gist of appellants' complaint is really that WMATA was negligent in not relocating the bus stop to a safer place after 1967." *Id.* Likewise, the gist of the Amended Complaint is that practically all District practices touching or concerning technology and those with technology privileges were badly conceived at the design level. *See Nealon*, 669 A.2d at 690 ("The provision of water service through a fire hydrant may be viewed as a part of the city's fire protection function.").

Moore's approach would facilitate circumvention of sovereign immunity by encouraging plaintiffs to commingle allegations regarding discretionary and non-discretionary functions and demand discovery into both types of allegations. Even assuming there are ministerial allegations to be found here, Moore admits she intermixed them with discretionary allegations, Br. 14, 30-31, and she demands discovery regarding everything in her Amended Complaint, Br. 17-18. But the District's "entitlement to sovereign immunity 'is an *immunity from suit* rather than a mere defense to liability.'" *Nash-Flegler*, 272 A.3d at 1178 (quoting *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993)). To permit suits to proceed where they admittedly target discretionary functions would violate the District's immunity.

Besides all that, there is no plausible allegation of any ministerial act to be found. *See generally* Part II.A.3. Moore's core contention, again, is that

undifferentiated defendants failed to "implement adequate security systems, protocols, and practices," SA 25, not that they failed to administer existing directives. The allegations are, at best, "merely consistent with" a failure to exercise ministerial functions with due care, but "stop[] short" of plausibly alleging such a failure. *Potomac Dev.*, 28 A.3d at 544 (internal quotation marks omitted); *see, e.g.*, Br. 28 (arguing generally that "[m]any of the allegations in the Complaint are outside the bounds" of the discretionary function exception); Br. 33 (challenging general and unspecified "maintenance operations" as "ministerial").

4. This case is ripe for dismissal on the pleadings.

Moore suggests (*e.g.*, Br. 21-26) that the immunity inquiry cannot occur on a motion to dismiss. This is incorrect. This Court's precedent looks to the well-pleaded allegations of the complaint to assess whether it can withstand an immunity-based motion to dismiss, *see Casco Marina Dev.*, 834 A.2d at 81-82, just as it does generally in reviewing jurisdictional challenges in the absence of evidentiary presentations by the parties, *Heard*, 810 A.2d at 877; *Bible Way Church*, 680 A.2d at 426 n.4. As a result, this Court has affirmed orders dismissing actions on the pleadings on sovereign-immunity grounds, notwithstanding that sovereign immunity is an affirmative defense on which the District bears the ultimate burden of proof and persuasion. *See, e.g.*, *Nealon*, 669 A.2d at 693; *Powell By & Through*

*Ricks v. District of Columbia*, 634 A.2d 403, 410-11 (D.C. 1993); *see also Abdulwali*, 315 F.3d at 303-05 (granting summary judgment before discovery).

Federal courts adjudicating the discretionary-function exception to the sovereign-immunity waiver of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(a), apply the same rule and frequently decide the question on the pleadings. *See, e.g.*, *Loughlin v. United States*, 393 F.3d 155, 162 (D.C. Cir. 2004); *Montijo-Reyes v. United States*, 436 F.3d 19, 24 (1st Cir. 2006); *Morales v. United States*, 895 F.3d 708, 711 (9th Cir. 2018) (affirming *Morales v. United States*, No. 14-cv-08110, 2017 WL 67546 (D. Ariz. Jan. 6, 2017)). The Supreme Court has instructed courts considering this issue to apply the generally applicable Rule 12(b)(6) pleading standard, which "accept[s] all of the factual allegations in petitioners' complaint as true and ask[s] whether, in these circumstances, dismissal of the complaint was appropriate." *Berkovitz*, 486 U.S. at 540. Moore concedes the FTCA's discretionary-function exception is an appropriate "analogy" to the standard applicable here, Br. 25, and this Court has held as much, *see Aguehounde*, 666 A.2d at 448 (drawing the District's sovereign-immunity standard from *Berkovitz*); *Nash-Flegler*, 272 A.3d at 1181 (looking to federal FTCA decisions for guidance).[8]

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[8] In addition, this Court's immunity precedents instruct that "it is important to resolve [an] immunity question at the earliest possible stage in litigation," or else "the privilege is effectively lost." *Young v. Scales*, 873 A.2d 337, 341 (D.C. 2005) (internal quotation marks omitted); *see Nash-Flegler*, 272 A.3d at 1178.

In this case, because the Amended Complaint identifies only discretionary functions as the basis of alleged wrongdoing or omissions, dismissal is warranted. And there is no procedural obstacle to dismissal, because whether immunity applies "is a legal question." *Nash-Flegler*, 272 A.3d at 1180. To be precise, the question is "whether the act *complained of* was discretionary or ministerial." *Nealon*, 669 A.2d at 690 (emphasis added), or, stated differently, whether the plaintiff's "*alleged* acts of negligence are characterized as discretionary decisions or ministerial execution of those decisions," *McKethean*, 588 A.2d at 713 (emphasis added). The "complaint," is a logical locus for that inquiry, even at later stages of litigation. *See id.*

In contending that immunity presents "a fact-specific determination," Br. 29, Moore ignores that "the pleading standards in Rule 8 contain no exception for complaints alleging a claim evaluated under a fact-intensive standard," *Potomac Dev.*, 28 A.3d at 544. Fact-specific or not, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Iqbal*, 556 U.S. at 678). "The ad hoc factual nature of the" immunity inquiry and "the lack of an easy-to-apply formula do not mean that allegation[s]" concerning discretionary functions can proceed to discovery on the hope that the case will, somehow, become a challenge to ministerial functions. *Id.* The Superior Court could, and this Court can, determine from the well-pleaded

allegations "whether the type of function at question is grounded in policy analysis." *Aguehounde*, 666 A.2d at 450; *see also Nash-Flegler*, 272 A.3d at 1181 (dismissal required "if the 'nature' of the decision itself is 'fraught with public policy considerations'" (quoting *Cope*, 45 F.3d at 449).

Finally, notwithstanding Moore's numerous references to the absence of discovery, Br. 17, 22, 24, 40, she makes no argument that the Superior Court erred in granting the District's motion without affording her discovery. Thus, any such contention is forfeited, if not waived. *May v. Cont'l Cas. Co.*, 936 A.2d 747, 750 n.2 (D.C. 2007) ("Because appellant did not present this contention . . . in his initial brief, we decline to consider it.").

In any event, such an argument would lack merit. Moore had the burden of demonstrating that discovery was necessary but did not make that showing. *See Joiner*, 955 F.3d at 407. Moore did not claim in the Superior Court that she needed discovery to rebut the District's sovereign immunity defense, and a litigant is "not entitled to use pretrial discovery to find out if they have a cause of action." *Gordo-Gonzalez v. United States*, 873 F.3d 32, 37 n.3 (1st Cir. 2017); App. 78; R. 56, 59, 60. Indeed, "Rule 8 'does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.'" *Potomac Dev.*, 28 A.3d at 545 (quoting *Iqbal*, 556 U.S. at 678-79). Instead, "[i]n all cases, 'the question presented

by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process.'" *Id*. (quoting *Iqbal*, 556 U.S. at 664.).

Moreover, a plaintiff is not entitled to jurisdictional discovery if the record indicates that the requested discovery is unlikely to produce the facts needed to withstand a motion to dismiss. *Joiner*, 955 F.3d at 407. The burden on the plaintiff is even greater when she seeks discovery to disprove an immunity defense because immunity is intended to shield the defendant from the burdens of defending the suit, including responding to discovery. *Id.* at 407-08. Given Moore's decision to cast her complaint as one challenging the District's discretionary decisions regarding the adoption and implementation cybersecurity measures, she cannot show that discovery would yield information to defeat the District's claim of sovereign immunity. *See Bulger v. Hurwitz*, 62 F.4th 127, 144 (4th Cir. 2023) ("Because prisoner transfer and placement decisions necessarily implicate policy considerations, discovery would serve no proper purpose in this case.").[9]

## CONCLUSION

The Court should dismiss this appeal for lack of jurisdiction or affirm the judgment dismissing the District on sovereign-immunity grounds.

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[9] If the Court determines that any aspect of the Amended Complaint is not barred by sovereign immunity, it should remand to the trial court to determine whether the case should nonetheless be dismissed for the additional reasons set forth in the District's motion to dismiss.

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**REDACTION CERTIFICATE DISCLOSURE FORM**

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:
   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:
     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayeridentification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); see also 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the

purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Stacy L. Anderson
Signature

22-CV-760
Case Number

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## CERTIFICATE OF SERVICE

I certify that on October 31, 2023 this brief was served through this Court's electronic filing system to:

Eric J. Menhart

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