No. 22-CV-567

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

CLAUDIA ALLEN,
APPELLANT,

V.

DISTRICT OF COLUMBIA DEPARTMENT OF MOTOR VEHICLES,
APPELLEE.

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

BRIEF FOR APPELLEE

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STATEMENT OF THE ISSUES

Appellant Claudia Allen attempted to pay a speeding ticket using the pre-addressed envelope provided by the Department of Motor Vehicles ("DMV").[1] Her envelope was returned as undeliverable, and she eventually paid her ticket plus a late fee by phone, waiving her right to contest either the ticket or the penalty. She then brought a putative class action, contending that the use of red ink on the envelope was negligent and made her initial payment undeliverable. However, Allen's own expert conceded that there was only a "very remote" chance that red ink would cause an envelope to be returned. And although the DMV issued nearly three million citations during the class period, Allen was unable to identify a single other person who experienced the same alleged problem. The Superior Court declined to certify a class and entered summary judgment for the District. The issues presented are:

1. Whether the Superior Court erred in granting summary judgment where Allen's claim was barred by collateral estoppel and where she failed to produce evidence that the use of red ink breached a legal duty or caused her injury.

2. Whether the Superior Court abused its discretion in declining to certify a class where there were no common issues of law or fact, Allen's claim was not typical of the class, and it was inappropriate for Allen to seek a class-wide injunction.

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[1] The case caption should be corrected to reflect the District of Columbia as the appellee, in line with the amended complaint and notice of appeal.

STATEMENT OF THE CASE

Allen filed her complaint on July 31, 2020 and an amended complaint on November 12, 2020. SA 2, 5. The amended complaint asserted a claim for "negligence and/or breach of statutory duty" on behalf of a putative class and sought damages, injunctive relief, attorney's fees, and costs. SA 21-24. The District filed a motion to dismiss based on failure to provide proper notice under D.C. Code § 12-309 and for failure to state a claim upon which relief could be granted, but the motion was denied on December 22, 2020. SA 5-6. The Superior Court denied Allen's motion for class certification on November 17, 2021. App. 1-12. On June 29, 2022, the court granted the District's motion for summary judgment because Allen failed to raise a genuine dispute of material fact that red ink caused the envelope with her initial payment to be returned. App. 13-24. The court entered judgment on a separate document on July 11, 2022, App. 25, and Allen timely appealed on July 29, 2022, SA 15.

STATEMENT OF FACTS

1. Allen Attempts To Pay A Traffic Ticket By Mail, But Her Envelope Is Returned As Undeliverable, And She Concedes Liability To A Late Fee.

Allen resides in Ohio and owns a vehicle registered in Ohio. SA 19. In September 2018, Allen received a Notice of Infraction sent on behalf of the DMV, citing her for driving 47 miles per hour in a 35-mile-per-hour zone. SA 27. The notice informed Allen of a $100 fine and that the fine would be doubled if not paid

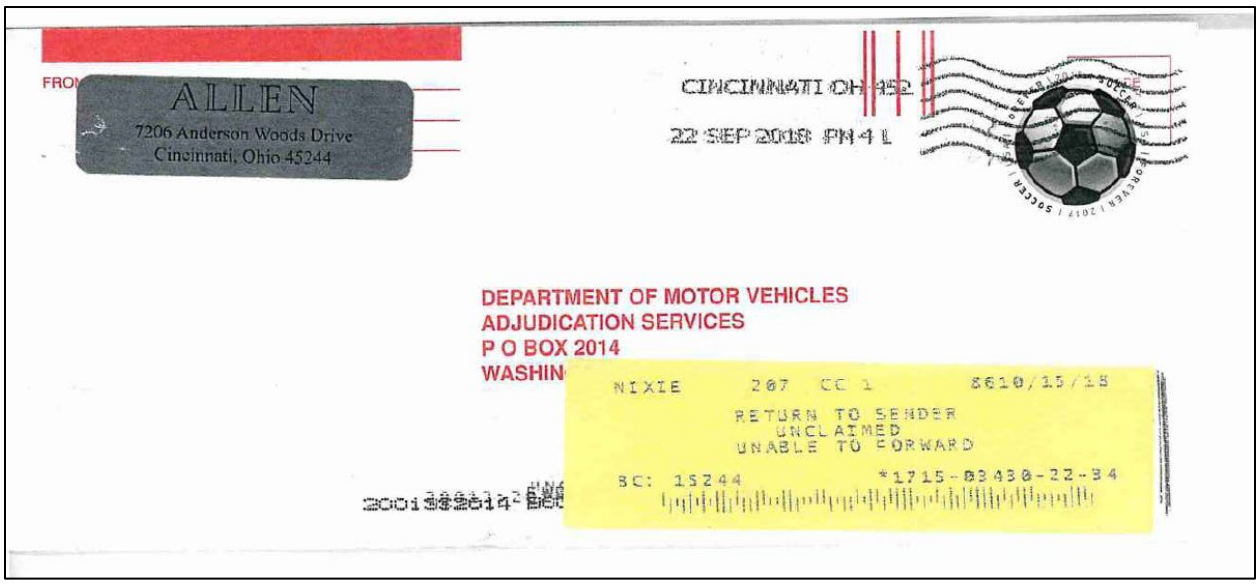
or contested within 30 days. SA 28. The notice also included an envelope pre-addressed to the DMV in red ink that could be used to send payment. *See* SA 29. On September 22, 2018, Allen used the envelope to send her $100 payment to the DMV. Br. 5; SA 20, 29, 56-57. Allen sent the payment to admit liability, as she had no reason to deny or contest the ticket. SA 54-55. Allen's envelope bore a first-class postage stamp and the DMV's valid mailing address. *See* SA 29.

A few weeks later, Allen received a Notice of Unsatisfied Photo Enforcement Ticket. SA 32. The notice stated that an answer had not been received to the original notice within thirty days, so Allen had incurred a $100 late fee under D.C. Code §§ 50-2302.05(d), 50-2301.05(a). SA 32. The Notice of Unsatisfied Photo Enforcement Ticket provided detailed instructions for contesting the ticket or the penalty, as well as the deadline to do so. SA 32. The notice advised Allen that if she wished "to contest the ticket, penalty or both," she should "not pay the ticket until a decision has been reached." SA 32. In bold letters, the notice explained that "[p]ayment of a ticket and/or penalty is an admission of liability that prevents consideration of [her] case." SA 32.

Allen called a telephone number on the Notice of Unsatisfied Photo Enforcement Ticket and told the DMV representative that she had mailed the $100 fine weeks earlier. SA 58-60. The DMV representative stated that the DMV had not received the payment and that the fine was doubled as a result. SA 60-61. Allen

decided not to contest the imposition of the late fee because, in her words, she "was not interested in prolonging a battle with the DMV." SA 62. Instead, she submitted a $200 payment by credit card over the phone. SA 62-63.

Approximately two weeks later, the envelope Allen used to send the initial $100 payment was returned to her in the mail by the United States Postal Service ("USPS"), containing a sticker stating that the envelope was "unclaimed" and being returned to the sender:



SA 29.

2. Allen Sues The District To Recover The Penalty For Late Payment.

On March 4, 2019, Allen's attorney notified the District of a potential claim allegedly resulting from the use of red ink on the DMV's pre-addressed return envelopes. SA 30-31. The letter did not identify Allen by name or citation number, and thus the DMV was unable to investigate her specific claim. SA 113. Wanda

Butler, Administrator of the DMV's Adjudication Services Division since 2004, had never previously encountered a complaint contending that the red ink on the return envelopes had caused USPS to return a payment. SA 121. The DMV nonetheless instructed the vendor who prepares the pre-addressed return envelopes to switch to using black ink. SA 106. On September 16, 2019, the DMV ceased using red ink in its return envelopes. SA 106. Following the switch to black ink, the rate by which citations incurred late fees stayed essentially the same—moving from 37.22% to 37.45%. SA 107-08.

Nearly a year after the DMV's vendor ceased using red ink on the courtesy return envelopes, Allen filed this putative class action against the District. SA 2. Allen contended that printing the address using red ink was negligent and made the envelope undeliverable. SA 22. Using red ink was negligent, she alleged, because it did not comply with USPS Publication 177, which recommends using black ink to address flat-sized mail (large envelopes and magazines) to optimize automated sorting. SA 21-22. This negligence, she contended, violated the District's duty under D.C. Code § 50-2209.02 to mail notices of infraction and D.C. Code § 50-2302.04's requirement that the DMV prescribe the form of notices. SA 21-22.

For herself, Allen sought $100 in damages for the late penalty she paid over the phone. She also sought relief for a class defined as:

> All persons who (1) received notice of an infraction from the District of Columbia; (2) that included a pre-addressed envelope with the return

> address printed in red ink; (3) who had the fine for their traffic infraction doubled for not paying the fine within thirty days; (4) within three years of the filing of the complaint . . . .

SA 22-23. Allen sought $10 million in damages on behalf of the class, as well as injunctive relief preventing the DMV from using red ink on its return envelopes going forward. SA 17, 24.

3. The Superior Court Denies Class Certification.

Following denial of the District's motion to dismiss, the case proceeded to discovery, and Allen moved to certify the class. As defined in the complaint, the proposed class included every individual who failed to timely answer a speeding ticket (for whatever reason) between August 1, 2017 and September 16, 2019, the date the DMV's contractor stopped mailing return envelopes printed in red ink. The undisputed evidence shows that the DMV's contractors mailed approximately 2.7 million citations during this period, and approximately one million citations incurred late fees. *See* SA 109-10, 126-29.

The District opposed the class certification motion, explaining that, although the proposed class (as broadly defined) was sufficiently numerous, Allen could not satisfy any of the other requirements for class certification. For instance, Allen could not demonstrate that the class was united by any common legal or factual questions, or that her claim was typical, as required by Rule 23(a)(2) and (3), because there was no requirement that any class member's late fee be caused by red ink, as opposed to

any other reason. Def.'s Opp'n to Pl.'s Mot. for Class Certification 8-12. To prove injury, each class member would need to establish through individualized evidence, at a minimum, that the class member had (1) attempted to pay the ticket by mail, (2) used the envelope provided, (3) timely mailed the envelope with proper postage, (4) received the envelope returned as undeliverable, and (5) incurred a late fee as a result. *Id.* at 10-11. Because such individualized questions would predominate over any common issues, Allen could also not establish the requirements to certify a damages class under Rule 23(b)(3). *Id.* at 14-15.

The District further argued that Allen could not establish that she could pursue injunctive relief. *Id.* at 12-13. The DMV stopped using red ink on its envelopes years earlier, so any request for injunctive relief was moot. *Id.* at 13. Moreover, Allen could not show that she (or any other class member) was likely to again receive a speeding ticket in the District, again attempt to pay by mail using a red-inked envelope, that the envelope would be returned, and that this would trigger another late fee. This made injunctive relief on behalf of the class inappropriate. *Id.* at 13-14.

The Superior Court agreed with the District and declined to certify a class. App. 1-12. The court found that Allen had produced no evidence that any other putative class member had experienced the same series of events and incurred a late penalty due to a red-ink envelope. App. 7-8. Allen therefore failed to demonstrate

commonality, show that her claims were typical of the class, or establish the predominance necessary to certify a damages class. App. 7-9, 11-12. The court also found that Allen had not produced any evidence that she was likely to suffer the same injury again, so she could not pursue injunctive relief on behalf of the class. App. 9-11.

4. The Superior Court Grants Summary Judgment To The District.

The parties cross-moved for summary judgment on Allen's individual negligence claim. The District argued that Allen could not prevail because she could not prove that the use of red ink breached any legal duty or caused her envelope to be returned. The District's expert, John Mashia, explained that USPS routinely delivers mail addressed in red ink. SA 77-78. Although Allen had identified some USPS guidance documents expressing a preference for black ink, those recommendations are not binding and apply to other types of mail (e.g., flat-sized mail, such as magazines), not first-class envelopes like Allen's. SA 77-78. So long as a piece of mail has a valid address and postage (which Allen's envelope did), it should be delivered, regardless of the ink color used. SA 70, 77-78. Examining Allen's envelope, Mashia explained that USPS appears to have sprayed multiple incorrect barcodes over the accurate, pre-printed barcode, which caused the envelope to be returned. SA 76-77. The failure to deliver the envelope was thus a "fluke"

caused by USPS's processing error, not the result of any systemic inability to read envelopes addressed in red ink. SA 71.

Allen's proffered expert, Peter Wade, ultimately agreed with these conclusions. Although he initially opined that Allen's envelope was returned because the address was printed in red ink, SA 92, he subsequently retracted this opinion.[2] In his deposition, he conceded that it is possible for USPS machines to read red ink. SA 97. He also opined that the chance any envelope will not be delivered because of its ink color is minimal. For instance, he estimated that the chance that an envelope addressed in black ink will not be delivered is around two percent, and that similarly there is "a very remote chance that an envelope printed in red ink will fail to reach its destination." SA 99-102. He also explained that readability depends on factors like the contrast between the ink and the paper, not color per se. SA 97. He also agreed that USPS has a multi-level triage process, so even if an envelope cannot be read by a machine, it will be transferred to a human. SA 99-100. Allen's envelope contained a valid, legible address and proper postage, so it should have been delivered. SA 102-03. Ultimately, Wade conceded that he

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[2] Wade also initially opined that Allen's envelope was returned because the pre-printed barcode was "invalid" and did not match the intended address. SA 92. But he conceded in his supplemental report that he had simply misread the barcode when he prepared his initial report, and that the original pre-printed barcode *did* correspond to the correct address. SA 118; *see also* Br. 10 (excising this portion of Wade's opinion).

could not "say for sure" whether USPS machines were unable to read the red ink on Allen's envelope, nor could he give "a final definitive opinion" on why Allen's envelope was not delivered. SA 97-98, 102.

The District argued that Allen's claim also failed because her injury was not caused by the DMV's envelope design, but by her own decision to admit liability for the late penalty. *See* Def.'s Mot. for Summ. J. 8-9. After receiving notice that her initial payment had not been received, Allen had the opportunity to contest the $100 late penalty, but she declined to do so. She instead chose to admit liability, thereby causing her penalty to become final. The District argued that Allen should not be allowed to relitigate her liability for the penalty years later after failing to take advantage of the adjudication procedures available to her. *See id.* at 9 & n.3.

The Superior Court denied Allen's motion for summary judgment and granted the District's motion. App. 13-24. Although it found a material dispute of fact regarding whether the District had breached a duty of care, App. 19-20, it concluded that Allen had identified "no evidence in the record where a reasonable jury could find that the red ink was a 'substantial factor' in causing her injury." App. 22. Indeed, Allen's "own expert opined that the likelihood that the envelope would not be delivered because of the red ink was 'very remote,' which falls far short of the red ink being a 'substantial factor.'" App. 23.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment de novo, applying Rule 56's familiar standard. *Tolu v. Ayodeji*, 945 A.2d 596, 601 (D.C. 2008). A party is entitled to summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Id.* at 600. The "mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient to defeat a motion for summary judgment." *Smith v. Swick & Shapiro, P.C.*, 75 A.3d 898, 902 (D.C. 2013) (quoting *Aziken v. District of Columbia*, 70 A.3d 213, 218 (D.C. 2013)). Rather, "there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

The Court reviews the Superior Court's denial of class certification for abuse of discretion. *FDS Rest., Inc. v. All Plumbing Inc.*, 241 A.3d 222, 227 (D.C. 2020). A court abuses its discretion in denying certification if it fails to consider a relevant factor, relies upon an improper factor, gives reasons that do not reasonably support the conclusion, or fails to follow proper legal standards. *Ford v. ChartOne, Inc.*, 908 A.2d 72, 84 (D.C. 2006).[3]

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[3] In her brief (at 19), Allen suggests that this Court's review is "noticeably less deferential" to orders denying class certification than those certifying a class, citing *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283, 291 (2d Cir. 1999). This Court has never endorsed this language from *Caridad*, nor apparently has any other

SUMMARY OF ARGUMENT

1. The Court should affirm the Superior Court's grant of summary judgment to the District on Allen's individual negligence claim.

To start, Allen's claim is barred by collateral estoppel. Although her lawsuit challenges the $100 penalty imposed for not timely responding to her speeding ticket, Allen has already admitted her liability for that penalty. Instead of contesting her ticket or the penalty, she paid both, even though her notice clearly stated this constituted an admission of liability and would forfeit the opportunity for administrative and judicial review. That admission resolves, as a matter of law, liability for the only injury that she claims in this case, so the District was entitled to summary judgment. Although the District previously labeled this issue as a problem of causation rather than collateral estoppel, the Court should reach the issue because it would cause Allen no unfair prejudice and is a straightforward legal basis for affirming the judgment below.

In any event, the undisputed facts also show that Allen could not prove that the DMV violated any legal duty by printing the address on its courtesy return envelopes in red ink. Allen's expert failed to establish the relevant standard of care,

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court outside the Second Circuit. So long as "the trial court made a reasoned decision that was based on the evidence, considered all relevant factors, and applied the correct legal principles," the denial of class certification will be affirmed. *FDS Rest.*, 241 A.3d at 242.

and the four USPS publications that her expert cited do not establish such a standard because they are merely non-binding recommendations that largely apply to other types of mail. And even those recommendations do not advise against printing in red ink or suggest that doing so risks making mail undeliverable.

Finally, Allen also could not prove causation because she could not show that red ink was a "direct and substantial" factor in bringing about her alleged injury. The undisputed facts show that her envelope was returned, not because of red ink, but because USPS sprayed multiple, inaccurate barcodes over the accurate preprinted barcode. Even Allen's own expert conceded that he was not confident that red ink was the culprit, and he characterized the chance that any envelope would be returned due to red ink as a "very remote" possibility. What is more, Allen's injury was self-inflicted because she chose to admit liability and pay the $100 penalty rather than pursue available administrative remedies.

2. Even if the Court were to reverse the grant of summary judgment, it should affirm the trial court's denial of class certification, which was not an abuse of discretion.

First, Allen failed to demonstrate commonality, typicality, or predominance for the simple reason that she could not identify a *single* other putative class member who experienced her same problem, let alone show that all class members did so. Most class members probably incurred late fees simply because they failed to timely

pay or contest their tickets, meaning they suffered no injury whatsoever, much less one connected to red ink. To separate those uninjured class members from any member similarly situated to Allen, the trial court would need to conduct extensive mini-trials on what caused each class member to incur a late fee. That would defeat the entire purpose of class adjudication.

Second, Allen also could not show that a class-wide injunction would be appropriate. The DMV started using envelopes printed with black ink almost a year before Allen filed her lawsuit, and there is no indication it plans to switch back. Even if it did, neither Allen (nor anyone else) can show that they are imminently likely to again receive a speeding ticket, much less that they will again incur a late fee because of an envelope printed in red ink, so they cannot demonstrate an entitlement to an injunction.

ARGUMENT

I. The Superior Court Properly Granted Summary Judgment To The District.

"Because [a plaintiff] must have an individual cause of action of his own to assert before he may be permitted to maintain a class action," the Court should "address the summary judgment ruling first" before assessing the class certification decision, if necessary. *Ford*, 908 A.2d at 80. The District was entitled to summary judgment on Allen's negligence claim for three independent reasons. *First*, by not contesting the late penalty with the DMV, Allen is estopped from pursuing any

claims related to that penalty. *Second*, the undisputed facts establish that the DMV breached no duty of care in allowing its vendor to print envelopes using red ink. *Third*, the undisputed facts establish that the District's actions did not cause Allen any injury—Allen could not show that red ink caused her envelope to be returned, and her decision to pay the late penalty means her damages were self-inflicted.

A. Collateral estoppel bars Allen's claim because she failed to contest her penalty with the DMV.

Under a straightforward application of the rule of collateral estoppel, Allen's negligence claim is barred because she has already admitted liability for the $100 late penalty. "The doctrine of collateral estoppel generally precludes the relitigation of factual or legal issues decided in a previous proceeding and essential to the prior judgment." *Borger Mgmt., Inc. v. Sindram*, 886 A.2d 52, 59 (D.C. 2005). It applies to the results of administrative proceedings when the reviewing agency "is acting in a judicial capacity, resolving disputed issues of fact properly before it which the parties have an adequate opportunity to litigate." *Id.* (quoting *Oubre v. D.C. Dep't of Emp. Servs.*, 630 A.2d 699, 703 (D.C. 1993)).

Here, Allen's Notice of Unsatisfied Photo Enforcement Ticket stated that the fine for the infraction had been doubled because she had not answered within 30 days. SA 32. It clearly explained that she could contest either the ticket or the late penalty, and that if she wished to do so, she should not pay the ticket until a decision was reached. SA 32. Under District law, Allen could have contested the citation,

including any penalty, by mail, online, or in person. D.C. Code § 50-2302.05(b)(1); *see* 18 DCMR § 1004. If she had done so, she would have been entitled to introduce evidence at a hearing before a hearing examiner, and the District would have borne the burden of proving her liability by clear and convincing evidence. D.C. Code § 50-2302.06(a); *see generally* 18 DCMR ch. 10. If Allen was unsatisfied with the result of that hearing, she could have sought an administrative appeal, *see* 18 DCMR § 1043, and judicial review, D.C. Code § 50-2304.05.

Allen, however, did not pursue any of those options. She chose not to contest the ticket or the penalty and paid them over the phone. She did so even though the Notice of Unsatisfied Photo Enforcement Ticket explained, in bold, that "[p]ayment of the ticket and/or penalty is an admission of liability that prevents consideration of [her] case." SA 32; *see* D.C. Code § 50-2302.05(c)(1) ("Payment of the fine for the infraction shall be deemed a finding of liability."). By voluntarily paying the $100 late penalty instead of contesting it, Allen admitted that she had failed to answer her original ticket on time and waived her opportunity to contest the penalty's validity. Thus, the legal question of Allen's liability for the $100 late penalty—the damages she seeks to recover in this lawsuit—has already been decided. Allen is collaterally estopped from re-litigating that question now. *See Kovach v. District of Columbia*, 805 A.2d 957, 962-63 (D.C. 2002) (holding that driver's admission of liability by

paying the fine collaterally estopped him from challenging the validity of the fine in a subsequent civil action against the District).

True, the District did not label its summary judgment argument in terms of collateral estoppel, but the Court may reach the issue because it is a purely legal question premised on undisputed facts in the record that provides an alternative ground to uphold the Superior Court's judgment. *See Franco v. District of Columbia*, 3 A.3d 300, 307 (D.C. 2010). Despite not using the term "collateral estoppel," the District pressed essentially the same point by arguing that Allen could not establish causation. In its summary judgment motion, the District stressed that Allen had the chance to contest the $100 late penalty, "but instead she simply admitted liability." Def.'s Mot. for Summ. J. 9. It argued that Allen "should not be allowed to circumvent the adjudication procedures and contest the penalty several years later, especially after admitting liability for both the ticket and the penalty." *Id.* at 9 n.3. In other words, the District argued that Allen's liability for the $100 late penalty was already determined by the prior administrative proceeding and could not be collaterally attacked now—the essential premise of a collateral estoppel defense.

Even assuming the District failed to adequately present this argument below, the Court should not apply forfeiture. Issue and claim preclusion defenses "can be raised by an appellate court for the first time on appeal" if they serve as an alternative basis to affirm a lower court's judgment. 18 Charles Alan Wright, et al., *Federal*

Practice and Procedure § 4405 (3d ed. 2023); *see, e.g.*, *Kovach*, 805 A.2d at 961 (addressing defense *sua sponte*); *Bechtold v. City of Rosemount*, 104 F.3d 1062, 1068 (8th Cir. 1997) (same); *Rosendahl v. Nixon*, 360 F. App'x 167, 168 (D.C. Cir. 2010) (same); *Lerch v. City of Green Bay*, 406 F. App'x 46, 47 (7th Cir. 2010) (same); *Hutcherson v. Lauderdale County*, 326 F.3d 747, 757 (6th Cir. 2003) (same); *Russell v. SunAmerica Sec., Inc.*, 962 F.2d 1169, 1172 (5th Cir. 1992) (same). This is permissible because an animating purpose of preclusion is "the avoidance of unnecessary judicial waste," which creates a "special circumstance" that justifies reaching the unpreserved issue, even on the court's own initiative. *Arizona v. California*, 530 U.S. 392, 412 (2000) (internal quotation marks omitted). And where the parties are fully aware of the issues and are not prejudiced by the earlier failure to raise the defense, consideration of the defense is proper. *Goldkind v. Snider Bros.*, 467 A.2d 468, 473 (D.C. 1983). Recognizing that Allen's claim is barred by collateral estoppel would be the easiest method of resolving this appeal because it is a simple application of law to undisputed facts.

B. The DMV did not breach any duty of care by using red ink on its return envelopes.

If the Court reaches the merits of Allen's claim, it should affirm the grant of summary judgment to the District because the undisputed evidence establishes that Allen could not prove that the DMV breached a legal duty. To prevail on a claim of common-law negligence, a plaintiff must successfully prove "(1) a duty of care

owed by the defendant to the plaintiff, (2) a breach of that duty by the defendant, and (3) damage to the plaintiff, proximately caused by the breach of duty." *Powell ex rel. Ricks v. District of Columbia*, 634 A.2d 403, 406 (D.C. 1993). Even assuming that Allen could show that the statutes requiring the DMV to design and send traffic citations, D.C. Code §§ 50-2209.02, 50-2302.04, meant that the DMV owed her some "special duty, greater than or different from any duty which it owed to the general public" to act with "reasonable caution," *Powell*, 634 A.2d at 406-07 (cleaned up), she could not establish that the use of red ink on the return envelopes breached that duty.

Allen bore the burden of establishing the scope of the DMV's duty of care and the nature of its breach. *See Beard v. Goodyear Tire & Rubber Co.*, 587 A.2d 195, 199 (D.C. 1991). That required expert testimony because the technical issue of whether using a particular ink color on an envelope is "reasonable" is "beyond the ken of the average layperson." *Id.* at 200 (quoting *Toy v. District of Columbia*, 549 A.2d 1, 6 (D.C. 1988)). To establish the standard of care, her expert had to point to either "the practices in fact generally followed by other comparable governmental facilities or to some standard nationally recognized by such units." *Phillips v. District of Columbia*, 714 A.2d 768, 773 (D.C. 1998) (quoting *Clark v. District of Columbia*, 708 A.2d 632, 635 (D.C. 1997)).

Allen offered no evidence about industry standards with regard to designing courtesy return envelopes. The District's expert did, however, and that testimony was unrebutted. The District's expert testified that "numerous organizations use colored ink" for return envelopes to make them more recognizable, and that he is "not aware of any complaints from the USPS about this or problems with the practice." SA 77-78. Allen's expert did not contradict this testimony. He did not dispute that red ink is routinely used, or that USPS's machines can read envelopes addressed in red ink. In fact, he opined that the DMV's subcontractor likely "submitted a proposed envelope design to a USPS mailpiece design analyst for approval." SA 91, 143. By definition, an envelope design cannot be unreasonable if it was affirmatively pre-approved by USPS.

Instead of offering expert testimony about standards in the industry, Allen cited four USPS publications providing non-binding USPS recommendations, mainly about other types of mail. Those guidance documents cannot establish a standard of care because, as Allen's own expert conceded, they are merely "recommendation[s]" expressing USPS's "preference[s]," not requirements. SA 91, 118, 141-42. Her expert did not opine that it is industry standard to follow *all* of USPS's non-mandatory guidelines (even those for other kinds of mail); nor did he indicate that deviating from the recommendations risks making mail undeliverable.

Even reviewing these four guidance documents, they would not establish that the DMV breached any standard of care because the recommendations do not caution against using red ink to address letter-sized envelopes like Allen's. Allen primarily relies on USPS Publication 177, "Guidelines for Optimizing the Readability of Flat-Size Mail." Br. 9-10; *see* SA 33-40. Flat-size mail refers to large envelopes, newsletters, and magazines, not letter-sized envelopes. SA 77. That USPS Publication 177 recommends printing addresses on magazines in black ink to facilitate automation could not establish a standard against printing addresses on letter-sized envelopes in another color.

Allen also cites portions of USPS Publication 28 and Section 202 of the Domestic Mail Manual, provisions that do not apply to envelopes like hers. Br. 10. As to Publication 28, she cites an appendix related to automated mail, not first-class mail like her envelope. That appendix merely recommends printing addresses in "dark ink on a light background." USPS, *Publication 28: Postal Addressing Standards* app. A1, https://pe.usps.com/text/pub28/28apa_002.htm (last visited Apr. 20, 2023). There is no evidence that Allen's envelope contravenes this recommendation. As to Section 202 of the Domestic Mail Manual, she cites a provision related to repositionable notes (essentially, pieces of paper glued onto the envelope) that recommends against using "phosphorescent or red fluorescent colorants." USPS, *Domestic Mail Manual* § 202 ¶ 7.3(b), https://pe.usps.com/text/

dmm300/202.htm#ep1085575 (last visited Apr. 20, 2023). There is no evidence that Allen's envelope contained a repositionable note or that anything on it could glow in the dark.

Finally, Allen cites a portion of USPS Publication 25 that discusses the required print reflectance difference between the envelope and the pre-printed Face Identification Mark (FIM). Br. 9. A FIM "is a pattern of vertical bars printed in the upper-right portion of a mailpiece" that assists with automated sorting, and it is required only to obtain certain kinds of automation and machinable discounts. *See* USPS, *Publication 25: Designing Letter and Reply Mail* 7, 53 (Nov. 2018), https://about.usps.com/publications/pub25.pdf; SA 77. Allen's envelope, which bore a full-price first-class stamp, did not require such discounts. SA 77.

Regardless, Allen did not allege (much less offer any evidence) that the FIM on her envelope lacked the recommended print reflective difference. And even if she had, this would not have anything to do with the ink color used to print the address, which is what she claims was unreasonable. *See, e.g.*, SA 21-22 (alleging that the DMV was negligent for failing to print the "delivery address" in black ink and saying nothing about a FIM). In fact, other provisions of this publication make clear that red ink is allowed. The guidance on business reply mail, for instance, states that "[a]ll ink colors are acceptable" so long as they meet the applicable

reflectance standard. USPS, *Publication 25: Designing Letter and Reply Mail* 37 (Nov. 2018), https://about.usps.com/publications/pub25.pdf.

To be sure, the Superior Court declined to grant summary judgment on the breach element of Allen's claim because it concluded that a jury could find it "unreasonable not to follow guidelines set forth by USPS." App. 20. But the expert testimony that Allen offered failed to establish that these guidelines are industry standard for letter-sized mail or that the DMV actually deviated from any relevant USPS recommendation in using envelopes pre-approved by USPS itself. Allen failed to raise a triable issue of fact about whether the DMV breached a duty of care, and all other evidence in the record suggests that the DMV acted reasonably. Thus, the District was entitled to summary judgment on this element as well.

C. Allen could not establish causation because red ink did not cause her envelope to be returned and her ultimate injury was self-inflicted.

Summary judgment was also warranted because the undisputed facts show that Allen could not prove causation. "To establish proximate cause, the plaintiff must present evidence from which a reasonable juror could find that there was a direct and substantial causal relationship between the defendant's breach of the standard of care and the plaintiff's injuries and that the injuries were foreseeable." *Convit v. Wilson*, 980 A.2d 1104, 1125 (D.C. 2009) (quoting *District of Columbia v. Zukerberg*, 880 A.2d 276, 281 (D.C. 2005)). "[P]roximate causation [is] that

cause which, in natural and continual sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred." *Zukerberg*, 880 A.2d at 281 (quoting *St. Paul Fire & Marine Ins. Co. v. James G. Davis Constr. Corp.*, 350 A.2d 751, 752 (D.C. 1976)). Even viewing all the evidence in the light most favorable to Allen, she could not meet her burden for two critical reasons.

First, both parties' experts agreed that Allen's envelope was returned because of a USPS error, not because it was addressed in red ink. Examining Allen's envelope, the District's expert opined that USPS repeatedly applied a different (inaccurate) barcode over the pre-applied (accurate) barcode along the bottom edge of the envelope, leading the envelope to be delayed and ultimately returned to Allen. SA 76-77, 84-86. Although he could not explain why this USPS error occurred, he ruled out red ink as the culprit, stating that the "use of red ink on a custom return envelope like Ms. Allen's would not cause it to be unreadable or returned." SA 77-78. Even if a USPS machine had difficulty reading the envelope, there is a process to divert the mail to a human reviewer so that it is properly delivered. SA 85.

Allen's expert concurred with all these points. He agreed that USPS sprayed additional barcodes over the preprinted barcode. SA 118. He agreed that Allen's envelope should have been delivered regardless of the ink color used because it bore a valid, legible address and proper postage. SA 102-03. He agreed that USPS's

machines can read red ink. SA 97. And he agreed that, if a machine cannot read an address, USPS's processing triage will route it to a human reviewer. SA 99-100. Allen's expert also conceded that the likelihood that an envelope addressed in red ink would not be delivered was "very remote," which is not meaningfully greater than the two percent chance he estimated that an envelope with black ink would not be delivered. SA 99-102. Therefore, Allen could not prove by a preponderance of the evidence that red ink proximately caused her envelope to be returned, even by her own expert's admission.

The other evidence at summary judgment only confirms this conclusion. The DMV's Adjudication Services Division Administrator, Wanda Butler, testified that she had never encountered a case like Allen's in her seventeen years running the division, and that she had no record or memory of any other individual complaining that their payment was not delivered because of the color of the address on the envelope. SA 121. Indeed, when the DMV's subcontractor switched to using black ink on the envelopes in September 2019, there was virtually *no change* in the rate at which citations incurred late fees. SA 106-08. If using red ink would "natural[ly]" and "direct[ly]" lead to envelopes being returned and cause more than a third of all individuals to incur a late fee, one would expect that switching the ink color to black would have dramatically reduced the rate of late penalties. *Zukerberg*, 880 A.2d at 281. The fact that there was no meaningful change in the rate strongly indicates that

the ink color had no effect on the likelihood that an envelope would be returned as undeliverable or that a particular person would incur a late fee.

Second, Allen also could not prove causation because her injury—the $100 late penalty—was not caused by her envelope being returned, but by her own concession of liability. As explained, rather than contest the late penalty, Allen chose to pay it, thereby admitting that she was liable for failing to answer her citation within the thirty days as required by law. *See supra* Part I.A.; SA 32. In other words, even though Allen's lawsuit seeks to recover "penalties wrongly imposed by the District," Br. 4, her penalty was, as a matter of law, not "wrongly imposed." She admitted liability for the penalty, meaning that she, not the DMV, caused her penalty to become binding and final.

Allen's actions were unreasonable and thus make her contributorily negligent for her injury. A reasonable individual in Allen's position who thought that she should not be obligated to pay the $100 penalty because she had timely mailed her payment would have contested the penalty using the available administrative review procedure. She would not have conceded liability for the penalty and waived her opportunity for administrative and judicial review. Because Allen "proximately

contributed" to her own injury through her unreasonable conduct, she "cannot recover." *Phillips v. Fujitec Am., Inc.*, 3 A.3d 324, 328 (D.C. 2010).[4]

Allen's arguments to the contrary fail to raise a genuine dispute of material fact as to causation. She attempts to characterize the issue of causation as a "battle of the experts" because her expert initially opined that Allen's envelope was returned because "the return address is printed in red ink." Br. 12-19; *see* SA 92. But her expert effectively withdrew that opinion in his deposition, stating that he could not "say for sure" whether the USPS's machines were unable to read the red ink on Allen's envelope and that he could not render "a final definitive opinion" on why her envelope was returned. SA 97-98, 100-02. In general, he opined that there is "a very remote chance that an envelope printed in red ink will fail to reach its destination," SA 101, which is far from sufficient to establish a genuine dispute as to proximate cause.

Allen attempts to shift her theory by noting that her expert's supplemental report speculated that Allen's envelope might not have been delivered because the

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[4] As an alternative ground for summary judgment, the District also argued that Allen's pre-suit notice was insufficient to satisfy the requirements of D.C. Code § 12-309 because it did not identify Allen by name or her citation number, making it impossible for the District to investigate her claim. *See* SA 113. The DMV reserves the right to raise this defense in the event the case is remanded. *See Thompson v. Armstrong*, 134 A.3d 305, 310 (D.C. 2016) (confirming that an appellee is not obliged to raise every alternative ground for affirmance on appeal, and that failure to do so does not forfeit the issue for future proceedings).

USPS's machines could not read the pre-printed barcode "due to it being printed in red ink." Br. 14. This of course contradicts her expert's initial report, where he said the envelope was undeliverable because the *address* was printed in red, which has been Allen's theory from the start. *See* SA 92 (previously opining that the envelope was undeliverable because "the return address is printed in red ink"). But in any event, Allen's expert offered no explanation or evidence for why using red ink would make the barcode unreadable. USPS Publication 25, which Allen has often quoted, explains that a barcode is readable regardless of the ink color so long as it sufficiently contrasts with the envelope color. USPS, *Publication 25: Designing Letter and Reply Mail* 59-61 (Nov. 2018), https://about.usps.com/publications/pub25.pdf; *see also id.* at 37 ("All ink colors are acceptable."). Allen's expert has never opined that her envelope's barcode failed that standard.

In granting summary judgment to the District, the Superior Court did not improperly weigh the dueling opinions of the parties' two experts. Instead, it simply recognized that Allen's expert had not offered any opinion, or any sufficient factual basis for an opinion, that addressing her envelope in red ink was a direct and substantial factor in her envelope's non-delivery. And even if her expert had done so, it would not establish that the DMV caused Allen's ultimate injury, the $100 penalty, which resulted from her own admission of liability. It was not enough for Allen to raise "some metaphysical doubt as to the material facts"; to avoid summary

judgment, she had to produce "evidence on which the jury could reasonably find" in her favor. *LaPrade v. Rosinsky*, 882 A.2d 192, 196 (D.C. 2005) (cleaned up). Allen did not do that here, so summary judgment was proper.

II. Alternatively, The Superior Court Did Not Abuse Its Discretion In Declining To Certify A Class.

Because Allen has no viable claim of her own, the Court does not even need to reach the class certification decision. *See Ford*, 908 A.2d at 80; *Randolph v. ING Life Ins. & Annuity Co.*, 973 A.2d 702, 708 n.8 (D.C. 2009). But if it does, it should affirm because the Superior Court did not abuse its discretion. As the party seeking to certify a class, Allen bore the burden of proving that her proposed class met all four requirements of Rule 23(a) and at least one subdivision of Rule 23(b). *See Ford*, 908 A.2d at 84.[5] Allen failed on virtually every ground.[6] In particular, Allen could not establish that the class experienced her same injury—thereby failing the requirements of commonality, typicality, and predominance, D.C. Super. Civ. R.

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[5] Because Superior Court Civil Rule 23 is virtually identical to Federal Rule of Civil Procedure 23, the Court construes it consistently with the federal rule. *Ford*, 908 A.2d at 85 n.14.

[6] The only requirement of Rule 23 that Allen arguably satisfied was numerosity. D.C. Super. Civ. R. 23(a)(1). The DMV issued almost three million tickets during the class period, and approximately one million citations incurred late fees. *See* SA 109-10, 126-29. Although it is unknown how many individual people incurred these one million late fees, the District concedes that the class, so broadly defined, is a sufficient number to make joinder of all putative class members impracticable. *See FDS Rest.*, 241 A.3d at 240.

23(a)(2)-(3), (b)(3)—and Allen lacked standing to pursue injunctive relief—thereby failing to prove the requirements of adequacy and an entitlement to an injunction, D.C. Super. Civ. R. 23(a)(4), (b)(2). The Superior Court carefully examined each of these requirements and reasonably concluded that Allen could not meet her burden. App. 1-12.

A. Allen failed to demonstrate that any other class member experienced the same sequence of events.

1. Allen could not prove commonality or typicality.

The commonality and typicality requirements serve as important "guideposts" for determining whether "maintenance of a class action is economical" and whether "the interests of the class members will be fairly and adequately protected in their absence." *Ford*, 908 A.2d at 85 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 158 n.13 (1982)). A class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). It "allows courts to use a representative plaintiff's individual claims as a basis to adjudicate claims of multiple parties at once, instead of in separate suits." *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1920 (2022) (cleaned up).

Commonality requires there to be "questions of law or fact common to the class," D.C. Super. Civ. R. 23(a)(2), meaning that "the same evidence will suffice

for each member to make a prima facie showing of the defendant's liability." *Ford*, 908 A.2d at 86 (cleaned up). In other words, the class proceeding must be capable of generating, not just common questions, but "common *answers*" about the defendant's liability as to the entire class. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). "If, however, proving a defendant's liability requires the members of a proposed class to present evidence that varies from member to member, then it is an individual question.'" *Ford*, 908 A.2d at 86 (cleaned up). Similarly, the typicality requirement requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." D.C. Super. Civ. R. 23(a)(3). This requires the class representative and class members to have suffered "a similar injury from the same course of conduct" and have claims "based on the same legal theory." *Ford*, 908 A.2d at 86 (cleaned up).

Here, Allen failed to show that common evidence could resolve the District's liability as to all class members. Allen's proposed class included every person who received a late penalty between August 2017 and September 2019 *regardless of the reason for the late penalty*. SA 22-23. Even assuming (contrary to the undisputed evidence, *see supra* Part I) that Allen could prove her negligence claim by showing that (1) printing the return envelopes in red ink breached a duty of care and (2) this caused her to incur a wrongful $100 late fee, this comes nowhere near to establishing a prima facie case for all class members. Instead, one would have to assume that, of

the tickets that incurred a late fee (approximately 37%), *all* of those late fees were caused by red-inked envelopes. That assumption is simply implausible. Even after the DMV stopped printing envelopes with red ink, the rate at which tickets incurred late fees remained unchanged.

Accordingly, liability would turn on individualized questions about causation. Each class member would need to show that her late penalty was due to the same reason as Allen's, and not some other reason. This would require each class member to prove that she (1) mailed her initial payment sufficiently in advance of the 30-day deadline, (2) used the pre-addressed envelope, (3) included proper postage, (4) had the envelope returned due to it being printed in red ink, and (5) incurred a late penalty as a result. Further, to demonstrate damages, each class member would need to show that she actually paid her late fee rather than contest it—but in that case, she would then have to somehow explain why collateral estoppel does not bar her claim. *See supra* Part I.A. All of these individualized "in-depth factual determinations" about when and how each class member attempted to pay her ticket would be the primary focus of the litigation. *Snowder v. District of Columbia*, 949 A.2d 590, 598 (D.C. 2008).

Moreover, even after extensive discovery, Allen was unable to identify even *one* individual who experienced the same sequence of events that she did. Neither her expert's opinion nor any of the other evidence remotely suggests that the DMV's

envelopes were routinely returned due to their ink color. *See, e.g.*, SA 121. Indeed, the statistical evidence strongly suggests that the vast majority of other class members (if not all of them) incurred a late fee for some other reason, most likely because the person simply failed to timely remit payment. *See* SA 106-08. Allen's unusual (perhaps unique) case is certainly not typical of the class.

2. Allen could not show predominance.

Because Allen could not show the existence of even a *single* common question, she by definition could not establish that common questions would "predominate over any questions affecting only individual members," such that a damages class could be certified under Rule 23(b)(3). *Ford*, 908 A.2d at 88 (quoting D.C. Super. Ct. Civ. R. 23(b)(3)); *see* App. 11-12; *Wal-Mart*, 564 U.S. at 359. But even if Allen could satisfy commonality, she would still fail predominance. "Meeting the predominance requirement demands more than common evidence the defendants [violated the law]. The plaintiffs must also show that they can prove, through common evidence, that all class members were in fact injured by the [violation]." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013). In other words, the class adjudication must "settle the question of a defendant's liability to the class members." *Yarmolinsky v. Perpetual Am. Fed. Sav. & Loan Ass'n*, 451 A.2d 92, 96 (D.C. 1982).

Here, individualized inquiries about causation, *see supra* p. 32, would predominate over any common issues about the scope of the DMV's duty. As even Allen's expert conceded, USPS routinely *does* deliver envelopes addressed in red ink, SA 97, 100-01, so even class members who had their envelopes returned as undeliverable would need to show that the return was due to the red ink, rather than inadequate postage or some other USPS processing error. It is unlikely that any class member could establish such proof—since the undisputed evidence shows that the DMV has no record of any individual other than Allen experiencing this alleged problem, SA 121—but regardless, such proof would be individualized. As in Allen's case, the class member would need to produce their returned envelope showing the postmark and the reason the envelope was returned, so that it could be determined why that particular envelope was not delivered. Individual mini-trials about each class member defeats the entire purpose of class adjudication.

Given this, "the main issues in [the] case require the separate adjudication of each class member's individual claim," making a Rule 23(b)(3) action inappropriate. *Ford*, 908 A.2d at 88. The superior way to resolve class members' claims is through individual adjudications. If an individual attempts to timely pay a traffic citation but the initial payment is not received for some reason outside their control, that person can use administrative review procedures to contest the imposition of the penalty with the DMV and seek judicial review if necessary. *See supra* Part I.A.

3. Allen's arguments to the contrary are unpersuasive.

On commonality, Allen ignores that this element requires the common question to be "central to the validity of each one of the claims." *Wal-Mart*, 564 U.S. at 350; *see Ford*, 908 A.2d at 86 (common questions must be sufficient to make a prima facie showing of the defendant's liability). Here, the central liability issue for each class member is whether the use of red ink on the return envelope *caused* that class member any injury. Accordingly, it is not enough that each class member "received" such an envelope (Br. 23), the member must have actually *used* the envelope—and had it returned as undeliverable due to red ink—to have any chance of establishing a claim of negligence. Whether a class member's late fee was in any way connected to the pre-addressed envelope accompanying the citation cannot be answered on a class-wide basis "in one stroke," *Wal-Mart*, 564 U.S. at 350, so the element of commonality is not satisfied.

Wal-Mart stresses the importance of being able to prove claims through common evidence. There, plaintiffs sought to certify a large class of employees who challenged as gender-discriminatory Wal-Mart's practice of granting discretion to local supervisors. The Court explained that this class lacked commonality because the plaintiffs had not "not identified a common mode of exercising discretion that pervades the entire company" such that the class members could show that discrimination played a role in any particular employment decision. *Id.* at 356; *see*

id. at 352. Even if common evidence could be used to answer some basic questions—including about how the discretionary policy worked across the company—it could not answer the "crucial question" of why a particular employee was disfavored. *Id.* at 352.

Here, the proposed class suffers from a similar problem. Even if Allen proved (contrary to the evidence) that the use of red ink breached the standard of care, that would not "demonstrate that the class members have 'suffered the same injury.'" *Wal-Mart*, 564 U.S. at 349-50 (quoting *Gen. Tel. Co. of Sw.*, 457 U.S. at 157). Indeed, it would not be clear that any other class member suffered *any* injury, let alone one related to the red ink. Most individuals who incur a late fee through no fault of their own will contest that penalty rather than admit liability like Allen did. Accordingly, the number of class members with a legitimate justification for failing to timely respond to their ticket is likely to be exceedingly small. Allen's proposed class adjudication would be unable to separate that rare subset from the vast majority of class members who incurred late fees because of their own tardiness, or for some other reason unrelated to red ink.

Allen's criticism of the Superior Court's reliance on *Parker v. Bank of America, N.A.*, 99 F. Supp. 3d 69 (D.D.C. 2015), is misplaced. Br. 23-25. Although *Parker* largely turned on the lack of evidence of any uniform policy, *see* 99 F. Supp. 3d at 82-89, the critical point was that the plaintiff must provide "significant proof"

not just that a policy or practice exists, but also that such policy or practice "has consistently and uniformly injured the putative class members." *Id.* at 81. Allen cannot meet that standard because she cannot show that the use of red-ink envelopes injured any other class member (or even, as discussed above, herself). Accordingly, Allen could not establish commonality because she could not show that the DMV's use of red-ink envelopes was a "'policy or practice [that] affects all members of the class' in the same way." *Id.* at 80 (quoting *DL v. District of Columbia*, 713 F.3d 120, 126 (D.C. Cir. 2013)).

On typicality, Allen resists the Superior Court's conclusion that her case was atypical by stressing that a class representative's claim need not be an exact "clone" of other class members' claims. Br. 27-28. But even the cases that Allen cites emphasize that the "substance" of the class representative's claim must be "the same as it would be for other class members." *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 261 (D.D.C. 2002) (quoting *In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1036 (N.D. Miss. 1993)). Here, there is no reason to believe that is the case. Allen has identified no other class member who mailed a pre-addressed envelope and had it returned as undeliverable by USPS. Most class members' late fees therefore had nothing to do with the return envelope or its ink color. Class members may have incurred the late penalty for different reasons, some obviously legitimate and some conceivably not. Even if an individual class member had some grounds for relief

from the late penalty, those grounds could not be proved using Allen's case as a representative example.

On predominance, Allen contends that the "only" individualized issue is whether individual class members "attempted to pay their original fine via the red-ink, pre-printed, return envelopes provided to them," a question that she contends can be answered by accepting the class members' "say-so" on a claim form. Br. 39. This is incorrect. *First*, causation is not merely peripheral to damages; it is central to whether any class member has any injury at all, and whether that injury is even remotely related to the choice of ink color on the envelopes. *Second*, even if a class member attested that she used the pre-addressed envelope, this alone would not resolve whether she experienced any injury. She would also need to establish that she mailed the payment on time, that she used the correct postage, that the mail was returned as undeliverable, that the undeliverability could somehow be traced to the use of red ink (as opposed to some other issue), that this caused her to incur the penalty, and that she is not collaterally estopped from seeking damages. Those inquiries could not be conducted just by accepting class members' "say-so" on a claim form.

B. Allen and the class lacked the ability to pursue injunctive relief.

Beyond seeking damages, Allen requested an injunction on behalf of the class preventing the DMV from using red ink on its courtesy return envelopes. But neither

Allen nor any other class member could obtain this form of relief because they could not show that it is imminently likely that they would again incur injury due to red-ink envelopes. This means that Allen could not adequately represent the class's claim for an injunction, per Rule 23(a)(4), or establish that an injunction would be appropriate with respect to the class as a whole, per Rule 23(b)(2).[7]

First, to establish adequacy under Rule 23(a)(4), a "class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997) (cleaned up). "That a suit may be a class action adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 n.6 (2016) (cleaned up).

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[7] In her brief, Allen also speculates about some other forms of injunctive relief that could be granted, including requiring that the DMV "not impose untimely-payment penalties so long as the payment is postmarked within thirty days," or otherwise "adjust its procedures in some other manner [that] would be appropriate, feasible, and of significant value to the class as a whole." Br. 33. Allen never previously requested these forms of relief and thus forfeited the issue. Regardless, these requests would not remedy the specific harm she alleges here—late penalties caused by red-inked envelopes—and are wholly speculative because there is no evidence that any class member will again incur a speeding ticket.

Second, to certify a class under Rule 23(b)(2), the plaintiff must establish that "final injunctive relief or corresponding declaratory relief" could be awarded to "the class as a whole." D.C. Super. Ct. Civ. R. 23(b)(2). When seeking prospective relief, such as an injunction, an injury must be "certainly impending" to satisfy the imminence requirement; "allegations of *possible* future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (cleaned up). "An injunction should not be issued unless the threat of injury is imminent and well-founded." *YMCA of City of Wash. v. Covington*, 484 A.2d 589, 592 (D.C. 1984).

Applying these two requirements here, neither Allen nor any class member could appropriately pursue an order enjoining the DMV from providing courtesy reply envelopes printed in red ink along with its traffic citations. It is undisputed that, at the DMV's direction, its sub-contractor stopped printing such envelopes in red ink over four years ago, in 2019, which was almost a year before Allen filed her suit. An injunction from this Court ordering the DMV to stop using red ink would thus exceed the Court's authority and serve no purpose. *See Crawford v. First Wash. Ins. Co.*, 121 A.3d 37, 39 (D.C. 2015).

Allen contends that her request for an injunction would not be "moot" because of the voluntary cessation doctrine, Br. 33-37, but this argument misses the mark.[8] "When injunctive relief is sought, 'the necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive.'" *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 895 F.3d 770, 783 (D.C. Cir. 2018) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1952)). Here, nothing in the record suggests that the DMV had any particular interest in the selection of red ink, so there is no indication that the DMV has any incentive to "return to [its] old ways," Br. 33, upon resolution of this case. Allen has produced no evidence that the DMV's decision to stop using red ink was made in bad faith; nor is there anything inherently suspicious about a government agency taking corrective action in response to an alleged problem.

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[8] Allen's argument (at 37) misquotes *Apple Inc. v. Samsung Elec. Co.*, 735 F.3d 1352, 1374 (Fed. Cir. 2013). Although Allen claims that the case holds that it is legal error to consider a defendant's voluntary cessation as a reason to deny injunctive relief, the case actually says the opposite. A complete quote of the relevant passage states: "However, *it does not follow* that a court commits legal error if, in conducting an injunction analysis, it considers a defendant's voluntary cessation of diluting behavior as a reason to deny injunctive relief. Indeed, Ninth Circuit precedent *indicates the opposite*." *Id.* (emphases added). The court then affirmed the district court's denial of an injunction based on voluntary cessation because there was "no evidence suggesting" that the defendant would resume the challenged activity. *Id.* at 1375.

Even assuming Allen had shown a cognizable danger that the DMV would revert to using envelopes with red ink, she still could not pursue class-wide injunctive relief. The class members could not establish that they are imminently likely to incur another traffic citation, again attempt to submit payment through the envelope, again have the envelope returned, and again incur a late penalty (that they fail to contest). Even that Allen incurred a traffic citation once does not establish a likelihood that she will do so again in the future. *See, e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-07 (1983). For instance, Allen lives in Ohio and does not allege that she frequently visits the District—let alone routinely drives here in excess of the speed limit. *See* SA 52 (estimating that she had driven in the District six or seven times over the past three years). And since Allen's own expert conceded that USPS can deliver mail printed in red ink, and that there is a "very remote" likelihood that any particular piece of mail printed in red ink would fail to reach its destination, neither Allen nor any class member could show it is *likely* that the use of red ink would again cause them injury—much less that the injury is "certainly impeding." *Clapper*, 568 U.S. at 409.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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April 2023

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 taxpayer identification 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/ Jeremy R. Girton
Signature

22-CV-567
Case Number

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April 20, 2023
Date

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CERTIFICATE OF SERVICE

I certify that on April 20, 2023, this brief was served through this Court's electronic filing system to:

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