ORAL ARGUMENT NOT YET SCHEDULED

No. 24-7168

IN THE UNITED STATES COURT OF APPEALS
FOR THE D.C. CIRCUIT

ERIC J. FLANNERY, and DRANE FLANNERY RESTAURANT, LLC, T/A THE BIG BOARD,

Plaintiffs-Appellants,

v.

MARK ECKENWILER, in his personal capacity, KAREN WIRT, in her personal capacity, CHRISTINE HEALEY, in her personal capacity, DREW COURTNEY, in his personal capacity, JOEL KELTY, in his personal capacity, and JAY ADELSTEIN, in his personal capacity,

Defendants-Appellees.

On Appeal from the U.S. District Court for the District of Columbia, No. 23-cv-2804-ABJ

APPELLANTS' OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS & RELATED CASES

A. Parties and Amicus Curiae and Disclosure Statement

Appellants (collectively "The Big Board") are (1) Eric J. Flannery ("Flannery") and (2) Drane Flannery Restaurant, LLC, T/A The Big Board. Appellant Flannery is an individual and resident of the District of Columbia, who owns and operates The Big Board restaurant. Appellant Drane Flannery Restaurant, LLC is an LLC that operates The Big Board restaurant. Both Appellants are subject to, and responsible for, The Big Board restaurant's compliance with District of Columbia regulations.

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant Drane Flannery Restaurant, LLC states that it does not have a parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

Appellees are Mark Eckenwiler, Karen Wirt, Christine Healey, Drew Courtney, Joel Kelty, and Jay Adelstein, in their personal capacities. There are no intervenors or amici to date.

B. Rulings Under Review

Appellants seek review, pursuant to 28 U.S.C. § 1291 and Fed. R. App. P. 3 and 4, of the final order issued by U.S. District Judge Amy Berman

Jackson of the U.S. District Court for the District of Columbia, Order, *Flannery v. Eckenwiler*, No. CV 23-2804 (ABJ) (D.D.C. Sept. 30, 2024), and the accompanying memorandum opinion, *Flannery v. Eckenwiler*, No. CV 23-2804 (ABJ), 2024 WL 4345832 (D.D.C. Sept. 30, 2024), both of which were entered on the court's docket on September 30, 2024.

C. Related Cases

Appellants are not aware of any related cases, as defined by Circuit Rule 28(a)(1)(C).

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GLOSSARY

ABRA	District of Columbia Alcoholic Beverage Regulation Administration
ABCB	District of Columbia Alcoholic Beverage Control Board
Alcohol Board	The Alcoholic Beverage Regulation Administration and the District of Columbia Alcoholic Beverage Control Board.
ANC 6C	Defendants-Appellees Mark Eckenwiler, Karen Wirt, Christine Healey, Drew Courtney, Joel Kelty, And Jay Adelstein
KDABC	Kentucky Department of Alcoholic Beverage Control
The Big Board	Plaintiffs-Appellants Eric J. Flannery, and Drane Flannery Restaurant, LLC, T/A The Big Board

INTRODUCTION

> If the First Amendment means anything, it means citizens have a right to criticize the government. But when [Eric Flannery] spoke out against COVID-19 restrictions, the government broke that cardinal rule. It [threatened once again to take] away his ability to earn a living—all because it didn't like his speech.

Cooperrider v. Woods, 127 F.4th 1019, 1045 (6th Cir. 2025) (Thapar, J., concurring in part and dissenting in part). Defendants (collectively "ANC 6C") as commissioners of the Advisory Neighborhood Commission 6C used the commission's enforcement power to punish The Big Board for its political speech. The district court granted ANC 6C's motion to dismiss based on an erroneous "but-for" causation test, which is different from the Supreme Court's *Mt. Healthy* "but-for" causation test. In a recent case remarkably like this one, the Sixth Circuit reversed a dismissal of a First Amendment retaliation claim against the Kentucky Department of Alcoholic Beverage Control ("KDABC"), because the KDABC attempted to revoke the plaintiff's alcohol license in retaliation for the plaintiff's critical statements about the Kentucky Governor's COVID related orders. *Cooperrider*, 127 F.4th at 1036–37. This court should do the same here.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 because The Big Board asserted claims that allege violations of the U.S. Constitution and federal law. *See also* 28 U.S.C. § 2201. And because The Big Board brought this suit to vindicate the deprivation of "rights, privileges, or immunities secured by the Constitution," 42 U.S.C. § 1983, the district court also had jurisdiction under 28 U.S.C. § 1343.

This Court has jurisdiction under 28 U.S.C. § 1291 because The Big Board appeals a final decision of the district court. The district court granted Defendants' motion to dismiss by opinion and order dated September 30, 2024. "[T]he dismissal of an action—whether with or without prejudice—is final and appealable." *Ciralsky v. C.I.A.*, 355 F.3d 661, 666 (D.C. Cir. 2004). The Big Board timely filed a notice of appeal on October 29, 2024. App. 85.

STATEMENT OF THE ISSUES

I. Whether the district court erred in finding that The Big Board's conduct was not protected expressive conduct under the First Amendment.

II. Whether the district court erred by not finding that The Big Board adequately alleged that its protected speech was a but-for cause of

ANC 6C's retaliation.

III. Whether the district court erred in granting ANC 6C's motion to dismiss The Big Board's complaint.

STATEMENT OF THE CASE

I. D.C.'s Covid Response

In early 2020, the D.C. Mayor issued orders declaring a public emergency and public health emergency due to the COVID-19 pandemic. App. 08, 11 (Compl. ¶¶ 1, 26). These initial orders were followed by dozens of orders over the course of the following two years, imposing and modifying a variety of restrictions on people, schools, businesses, and government offices, impacting all aspects of civic life. App. 08 (Compl. ¶ 1). Two of these subsequent emergency orders negatively impacted The Big Board. One imposed "an indoor mask requirement (including at bars and restaurants)" and another imposed "a proof of vaccination requirement." App. 08 (Compl. ¶ 2); *see also* App. 11 (Compl. ¶ 27). Both orders were issued for an initial 60-day period. App. 08 (Compl. ¶ 2).

The Big Board disagreed with the Mayor's orders and expressed this disapproval and disagreement "by posting on Twitter, giving media interviews, refusing to obey orders [the owner of the Big Board

restaurant] understood to be unlawful, and filing a lawsuit challenging the constitutionality of such orders." App. 15 (Compl. ¶ 54); *see also* App. 09 (Compl. ¶ 3). Among these expressions, in January 2022, two days before the mask requirement and proof of vaccination requirement went into effect, Plaintiff Flannery tweeted through the Big Board restaurant's Twitter account that "everyone is welcome" at the Big Board restaurant. App. 12 (Compl. ¶ 30).

In February 2022, the D.C. Department of Health issued a summary suspension of The Big Board's operating license for alleged violations of the Mayor's indoor mask and proof of vaccination requirements. App. 09 (Compl. ¶ 4). D.C. regulators likewise suspended The Big Board's liquor license. App. 12 (Compl. ¶ 31). The suspension forced The Big Board to cease operations. App. 12 (Compl. ¶ 31); *see also* App. 09 (Compl. ¶ 4).

Following the Mayor's decision to lift the vaccination requirement effective February 15 and the indoor mask requirement effective March 1, The Big Board was required to pay a $100 restoration fee to obtain permission from the District Health Department to re-open. App. 09 (Compl. ¶ 4). The Big Board challenged the underlying suspension and the restoration fee through the administrative process, and eventually,

the courts. Following negotiations, the District's Alcohol Board[1] accepted the offer to compromise and lifted the suspension of The Big Board's liquor license. App. 12 (Compl. ¶ 32).

II. ANC 6C's Response to The Big Board's Challenge of the Mayor's Orders

"Through all of this, Mr. Flannery continued to express his views opposing the mandates and the government's treatment of his restaurant by posting on Twitter and giving media interviews." App. 12 (Compl. ¶ 33). At the same time, Defendant Mark Eckenwiler posted tweets that denigrated and lambasted The Big Board's openly stated views on social media and elsewhere. App. 09 (Compl. ¶ 5).

For example, Defendant Eckenwiler's 2022 tweets include:

a. screenshots of two Big Board tweets with Eckenwiler's comment "When you've decided to flout the vaccine mandate taking effect on Jan. 15 at DC bars & restaurants, but don't quite have the stones to say so & instead resort to anti-vaxxer dog-whistling";

b. a screenshot of [the Alcohol Board's] notice of a meeting regarding The Big Board's liquor license with

[1] The Alcoholic Beverage Control Board ("ABCB") has been renamed the Alcoholic Beverage and Cannabis Board. *See* D.C. Code § 25–201. Similarly, the Alcoholic Beverage Regulation Administration ("ABRA"), referenced by the lower court, has had its powers transferred to the Alcoholic Beverage and Cannabis Administration. *See* D.C. Code § 25–203. All references to ABCB and ABRA have been changed to the "Alcohol Board" to avoid confusion.

Eckenwiler's comment "Actions have consequences"; and

c. a picture of District Health Department's closure notice on The Big Board with Eckenwiler's comment "Play stupid games, win regulatory prizes!"

App. 12–13 (Compl. ¶ 35).

Defendant Mark Eckenwiler is—along with the other Defendants[2]—a commissioner on Advisory Neighborhood Commission 6C. App. 10–11 (Compl. ¶¶ 18–23). Advisory Neighborhood Commissions play a unique role in local D.C. administration. The local commissions are established by the D.C. Council—pursuant to D.C. law—and their commissioners are elected by popular election. App. 10 (Compl. ¶ 16). ANC 6C is one of the commissions established by the D.C. Council and covers the geographic area where The Big Board does business. App. 10 (Compl. ¶ 17).

Often, "District agencies are required to give the ANCs' recommendations 'great weight.' Moreover, District law says that agencies cannot take any action that will significantly affect a neighborhood unless they give the affected ANCs 30 days advance

[2] At all relevant times, all Defendants were commissioners of ANC 6C. Defendants Wirt, Adelstein, and Eckenwiler remain commissioners. *See Advisory Neighborhood Commission 6C*, DC.gov, perma.cc/2FHG-UWAG (last visited Apr. 4, 2025).

notice." App. 10 (Compl. ¶ 16) (quoting *About ANCs*, Advisory Neighborhood Commissions, anc.dc.gov/page/about-ancs (last visited May 23, 2023)). When it comes to the Alcohol Board, ANC 6C possesses unique statutory authority to protest liquor licenses—giving it preferential treatment with the Board. App. 19 (Compl. ¶ 87); D.C. Code §25-609(a) ("Whether the ANC participates as a protestant, the Board shall give great weight to the ANC recommendations as required by subchapter V of Chapter 3 of Title 1."). If a protest is well taken, Alcohol Board may revoke an establishment's liquor license. App. 13 (Compl. ¶ 38).

In late October 2022, The Big Board requested a renewal of its liquor license. App. 13 (Compl. ¶ 36). In early September 2022, "ANC 6C's Alcoholic Beverage Licensing Committee held a meeting at which it discussed the liquor license of The Big Board. This meeting was open to the public, and Mr. Flannery attended . . . ." App. 13 (Compl. ¶ 40). At the meeting, Defendant "Eckenwiler stated that The Big Board's license should be revoked because, '*I mean just some of the things he's said publicly, we should go ahead and protest the license.*'" App. 13 (Compl.

¶ 43) (emphasis added).[3] "None of the other committee members disagreed or challenged that statement." App. 13 (Compl. ¶ 44).

Two days later, ANC 6C held another meeting. App. 14 (Compl. ¶ 46). At that meeting, the ANC 6C commissioners discussed whether to—and universally voted to—protest The Big Board's liquor license. App. 14 (Compl. ¶¶ 47–48). Three days later, ANC 6C, filed a protest against The Big Board's liquor license, listing Defendant Eckenwiler as ANC 6C's representative. App. 14 (Compl. ¶ 49). The written protest cited three grounds—the *only* three statutory grounds on which a renewal application can be protested. *See* App. 14 (Compl. ¶ 51); D.C. Code § 25–313. The protest claimed that

a. The Big Board's operations have had a negative effect "on real property values."

b. The Big Board has had a negative impact "on the peace, order, and quiet, including the noise and litter provisions set forth in Section 25-725 and 25-726 of the D.C. Code."

c. The Big Board has had a negative "effect upon the residential parking needs and vehicular and pedestrian safety."

App. 14 (Compl. ¶ 51).

[3] Curiously, although ANC 6C generally posts recordings of its meetings on its website, it has not posted a recording of this meeting. App. 13 (Compl. ¶¶ 41–42).

It soon became clear that these assertions were false—having no basis in law or fact. Rather, they were a pretext for retaliation against The Big Board's protected expressions. *See, e.g.*, App. 14–15 (Compl. ¶¶ 53–54). Following the filing of the protest, Mr. Flannery attempted to discuss and resolve the issues alleged in the protest with Defendant Eckenwiler. App. 15 (Compl. ¶ 55). Defendant Eckenwiler "refused to discuss the matter with Mr. Flannery, stating that he would only discuss it with The Big Board's attorney." App. 15 (Compl. ¶ 56). "Yet, Mr. Eckenwiler avoided all attempts by The Big Board's attorneys to negotiate the ANC's withdrawal of the protest." App. 15 (Compl. ¶ 58).

> On Friday, January 27, 2023, The Big Board's attorney contacted Mr. Eckenwiler via email seeking to discuss the withdrawal of the protest and asked for Mr. Eckenwiler's phone number.
>
> On Tuesday, January 31, 2023, Mr. Eckenwiler responded that he was too busy but may have time the following week.
>
> On Tuesday, February 7, 2023, The Big Board's attorney again asked Mr. Eckenwiler for his phone number and to set up a time to discuss the protest. Mr. Eckenwiler did not respond.
>
> On Friday, February 10, 2023, The Big Board's attorney again attempted to contact Mr. Eckenwiler without success.
>
> On February 14, 2023, the day before a scheduled status conference regarding the protest—and three months after filing the protest—Mr. Eckenwiler provided, on behalf of the

> ANC 6C, a proposed settlement agreement under which the ANC 6C would agree to withdraw its protest.
>
> In that same February 14, 2023 e-mail, Mr. Eckenwiler stated that "the status hearing doesn't really have any bearing on your review timing. We needn't move heaven & earth to reach an agreement by tomorrow."

App. 15 (Compl. ¶¶ 59–63).

Yet, heaven and earth would need to be moved to reach an agreement. ANC 6C's proposed settlement agreement did not address the alleged problems raised in its protest. App. 16 (Compl. ¶ 65). "Rather, it demanded that The Big Board take actions inconsistent with its license." App. 16 (Compl. ¶ 65). For example, the proposal

> would have required The Big Board to close early, to provide food at all hours when it is open—thus converting it into a restaurant with a different license classification—prohibit live music, eliminate outdoor seating (for which The Big Board has separate permission from the District Department of Transportation), change food delivery times which would impede vendor deliveries, and more. None of these additional restrictions are required by District law, and all of them would impede the legitimate business operations of The Big Board and negatively affect its profitability.

App. 16 (Compl. ¶ 66).

On February 26, 2023, The Big Board's attorney responded to ANC 6C with a revised proposed settlement agreement. App. 16 (Compl. ¶ 68). The revision explained "in detail that the [ANC 6C's] proposal did not

address the items listed in the protest and was inconsistent with The Big Board's liquor license." App. 16 (Compl. ¶ 68). The revision included changes to bring the agreement into line with D.C. law and provided detailed explanations for why the proposed changes were made. App. 16–17 (Compl. ¶ 69). "Neither Mr. Eckenwiler nor anyone else from the ANC 6C responded to The Big Board's revised proposed settlement agreement. App. 17 (Compl. ¶ 70). The Big Board's attorney also requested—in writing—that ANC 6C provide any evidence supporting the three items listed in the ANC 6C's protest. App. 16 (Compl. ¶ 67). The Big Board's attorneys never received any of the requested evidence. App. 17 (Compl. ¶ 71).

Between the date when ANC 6C sent its proposed settlement agreement and when The Big Board responded with its revisions, the Alcohol Board "had conducted an independent investigation into the claims in the ANC 6C's protest. It found nothing to support the claims in the protest." App. 17 (Compl. ¶ 77).

> Specifically, "[Alcohol Board] investigators monitored The Big Board on eight (8) separate occasions from February 16, 2023, until February 28, 2023. No [ ] violations were observed during these visits," including, "[n]o [p]eace, order and quiet issues, no loitering, no trash or parking concerns." "During these monitoring efforts, [the Alcohol Board] did not observe

> issues with vehicular and pedestrian safety, in the vicinity of The Big Board. No pedestrians were observed exiting The Big Board in an intoxicated state That [sic] would have caused issues for other innocent by standers or vehicular traffic, on H Street, N.E." [Alcohol Board] Protest Report, Ex.

App. 17–18 (Compl. ¶ 78).

In March of 2023, the Alcohol Board scheduled a statutorily required mediation. App. 17 (Compl. ¶ 72). Defendant Eckenwiler "appeared at the mediation on behalf of the ANC 6C." App. 17 (Compl. ¶ 73). Defendant Eckenwiler acknowledged the exchange of the proposed settlement agreement and The Big Board's revisions. App. 17 (Compl. ¶ 74). However, he "stated that the parties were far apart." App. 17 (Compl. ¶ 74). Defendant Eckenwiler then "stated that he had attended the call 'as required' and was now 'bowing out' . . . ." App. 17 (Compl. ¶ 75). Defendant Eckenwiler "spoke for less than 45 seconds and hung up without so much as waiting for a response from the mediator." App. 17 (Compl. ¶ 75).

The day after Defendant Eckenwiler's refusal to actively participate in the mediation—and after the Alcohol Board's independent investigation found no substance to the issues claimed in the protest—ANC 6C voluntarily withdrew its protest. App. 18 (Compl. ¶ 79).

III. District Court Proceedings

On September 25, 2023, The Big Board brought the current action. The Big Board's complaint alleged that to

> retaliate against Mr. Flannery for his First Amendment-protected expressions of disagreement with the District's COVID policies, Mr. Eckenwiler—while holding an official position as commissioner and representative of ANC 6C—posted disparaging comments about The Big Board on Twitter. Additionally, Defendants—through their official positions as commissioners and of the ANC 6C—filed and prosecuted a frivolous protest challenging The Big Board's liquor license renewal.

App. 19 (Compl. ¶ 85). The Big Board sought a declaration that ANC 6C violated its First Amendment rights, an award of damages, and reasonable costs and attorneys' fees. App. 20 (Compl. pg. 14.)

ANC 6C moved to dismiss for failure to state a claim and based on qualified immunity. App. 74. The Big Board opposed the motion. On September 30, 2024, the District Court for the District of Columbia issued a memorandum opinion and accompanying order granting ANC 6C's motion to dismiss.

The district court found The Big Board's "allegations concerning the flimsy and unsupported nature of the protest quite troubling." App. 70. Despite this, the court found that The Big Board "failed to plausibly

allege a necessary element of a First Amendment retaliation claim: that plaintiffs' constitutional speech was the but-for cause of the defendants' actions." App. 70. Specifically, the district court found that The Big Board's refusal to obey the allegedly unlawful orders was not expressive conduct protected by the First Amendment. App. 81–82. Even though the district court found that The Big Board had alleged protected First Amendment speech, the court concluded that by simply alleging what the court determined to be an additional unprotected activity, The Big Board had not plausibly alleged that its speech was the but-for cause of the retaliation. App. 83–84.

The Big Board timely filed a notice of appeal to challenge that opinion and order.

SUMMARY OF THE ARGUMENT

To state a claim for retaliation in response to First Amendment activities, a plaintiff must plausibly allege

> (1) that he engaged in protected conduct, (2) that the government "took some retaliatory action sufficient to deter a person of ordinary firmness in plaintiff's position from speaking again;" and (3) that there exists "a causal link between the exercise of a constitutional right and the adverse action taken against him."

Doe v. District of Columbia, 796 F.3d 96, 106 (D.C. Cir. 2015) (quoting

Aref v. Holder, 774 F. Supp. 2d 147, 169 (D.D.C. 2011)). The district court found that the Plaintiffs satisfied the first two elements.

The district court correctly concluded that some of The Big Board's "activities like posting on social media and offering media interviews on a topic of public concern lie at [the First Amendment's] core." App. 80–81. The court noted that ANC 6C did not—"nor could they"—dispute that many of The Big Board's activities were protected speech. *See* App. 80. The district court, thus, correctly concluded that The Big Board satisfied the first First Amendment retaliation element. It also concluded that the "threat of losing a license essential to one's business – and the resulting loss of revenue that revocation would entail – is sufficiently onerous to deter a business owner from speaking out again." App. 80 (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963)). The district court, thus, correctly concluded that The Big Board satisfied the second First Amendment retaliation element.

However, the district court's reasoning then went astray. The district court determined that The Big Board's refusal to obey the Mayor's and D.C. Department of Health's orders were not protected expressive

conduct. The court applied an outdated and ill-suited test to the situation alleged.

The court then doubled down on its error by holding that "the complaint does not plausibly allege that plaintiff's exercise of his First Amendment rights was the but-for cause of the defendant's protest, since he explicitly alleges that the protest was in reaction to his unprotected actions – that is, his refusal to obey the orders – *among other things*." App. 82 (emphasis added) (citing App. 19 (Compl. ¶ 85)). The court noted that "[a]t best, plaintiffs allege that Flannery engaged *in both speech and* a violation of law that he calls expressive conduct, and that defendants were reacting in varying ways to the combination of his statements and his defiance of the Mayor's Orders." App. 83 (emphasis added) (citing App. 19 (Compl. ¶ 88)). The district court, however, did not apply the Supreme Court's but-for-test. Under that test, the existence of a plausible non-retaliatory reason begins, rather than ends, the but-for analysis.

The district court's opinion creates a de facto proscription on filing complaints that allege retaliation for both (1) clearly protected speech and (2) expressive conduct that could be deemed to be unprotected. Indeed, if a plaintiff plausibly believes that his conduct is protected

expressive conduct, he should not add it to the complaint or else he may doom his arguments that his clearly protected speech was a but-for cause. This is *not* how the Supreme Court's but-for test operates.

STANDARD OF REVIEW

When evaluating a motion to dismiss, the Court generally accepts allegations in the complaint as true. *Washington All. of Tech. Workers v. United States Dep't of Homeland Sec.*, 892 F.3d 332, 339 (D.C. Cir. 2018) (quoting *Hughes v. Rowe*, 449 U.S. 5, 10 (1980)). This Court reviews de novo a district court's dismissal of a complaint for failure to state a claim. *Id.* (citing *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994)).

ARGUMENT

I. The district court erred in finding that The Big Board's conduct was not expressive conduct protected by the First Amendment.

"People convey meaning and ideas in a multitude of ways. In other words, sometimes people communicate with certain actions, such as the choice of clothes or the treatment of an object (i.e. burning the flag) or protesting a certain type of action (i.e. a sit-in or a sleep-in)." David L. Hudson, Jr., *The First Amendment: Freedom of Speech* § 2:9 (2012). When analyzing whether The Big Board's refusal to abide by the Mayor's

vaccine and masking orders were expressive conduct, the district court erred in two ways. First, using an outdated standard, the district court determined that The Big Board's refusal to abide by the Mayor's vaccine and masking orders did not qualify as expressive conduct. But the Court no longer requires "a particularized message" for conduct to be considered "expressive conduct."

Second, *O'Brien* is inapplicable to First Amendment retaliation by government officials with no jurisdiction to punish the challenged expressive conduct.

A. The district court applied the wrong standard to The Big Board's expressive conduct.

Not all conduct can be labeled "speech" "whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). However, "[t]he First Amendment affords protection to symbolic or expressive conduct as well as to actual speech." *Virginia v. Black*, 538 U.S. 343, 358 (2003) (citations omitted). Contrary to the district court's recitation, the Supreme Court no longer requires the observer to understand the speaker's "particularized message," so long as the observer realizes that there is a message being conveyed.

Nonetheless, the district court applied the "particularized message" standard to The Big Board's refusal to abide by the D.C. Department of Health's mask and vaccine mandates, which implemented the Mayor's orders. According to the district court,

> [i]n deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it.

App. 83 (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (1989)).

The problem is that the Supreme Court has abandoned this outdated, excessively stringent standard. The Court has since clarified that an observer need not understand the speaker's "particularized message," so long as such an observer would reasonably recognize that the conduct conveys *a* message. *Hurley v. Irish-American Gay*, 515 U.S. 557, 569 (1995); *see also Masterpiece Cakeshop, LTD v. Colorado Civil Rights Comm'n*, 584 U.S. 617, 657 (2018) (Thomas, J., concurring) (citing *Hurley* to support the proposition that expressive conduct only requires that the action "intended to be communicative" and, "in context, would reasonably be understood by the viewer to be communicative"). "[A] narrow, succinctly articulable message is not a condition of constitutional

protection, which if confined to expressions conveying a 'particularized message' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." *Hurley*, 515 U.S. at 569. An observer need not understand the message that The Big Board meant to convey, just that it intended to convey a message. The message of defiance and civil disobedience displayed would have been apparent to an onlooker, even one who had no knowledge of The Big Board's expository statements. The district court erred in determining—as a matter of law—that an observer would not have been able to discern that The Big Board's act of protest meant to convey a message because masks were not required under the Mayor's orders while actively eating or drinking. App. 83 (citing *Coronavirus 2019 (COVID-19): Mask Guidance*, DC Health (Dec. 23, 2021), perma.cc/R2YC-JFW7. Absent from the district court's consideration were all other points in time when patrons were present in the Big Board restaurant and would have been subject to the Mayor's masking order because they were simply talking with friends or family while not actively eating or drinking, waiting to be seated, or getting up to use the

restroom—and that observers would be aware that the Mayor's order applied during those times.

Indeed, the act of not wearing a mask was well understood at the time to be a form of protest. In 2021, not far from the Big Board restaurant, numerous members of Congress were being fined daily for their refusal to wear masks in the Capitol. Annie Grayer et al., *House GOP Lawmakers fined after defying mask mandate*, CNN (May 18, 2021), perma.cc/C2DG-JEU4; Luke Broadwater, *2 Georgia Republicans Rack Up Fines for Defying House's Mask Mandate*, N.Y. Times (Dec. 29, 2021), bit.ly/4ldJdaJ; *see also* Kari Campeau, *Who's a Vaccine Skeptic? Framing Vaccine Hesitancy in Post-Covid News Coverage*, 40 Written Commc'n 976, 976–977 (2023) (finding that the New York Times framed nonvaccination "as a product of individual wrong belief, portrayed vaccine skeptics as gullible, ignorant, and/or selfish, and framed nonvaccination as a problem of individuals' wrong beliefs"). An observer during the pandemic, a time rife with COVID-related regulations and mandates, reasonably would have recognized that the maskless Congressmen and Congresswomen were conveying a message—that they were protesting the mask-wearing mandates, even if the observer did not

understand the depth, breadth, or reason behind the protest. That same is true with The Big Board.

A customer entering the Big Board restaurant without having to present the requisite vaccination certificate and observing that no customers were required to wear a mask would reasonably recognize that patrons were engaging in a civil protest. Even a passerby (presumably masked per the Mayor's order) peering through the Big Board restaurant's front window and seeing patrons chatting without masks, likely would have reached the same conclusion. Indeed, it is reasonable to infer from the Complaint that Defendant Eckenwiler recognized that The Big Board's *conduct* was a form of protest when he tweeted "*actions* have consequences," and when he posted a picture of the "closure notice on The Big Board with Eckenwiler's comment 'play stupid games, win regulatory prizes!'" App. 12–13 (Compl. ¶ 35) (emphasis added). Certainly, the understanding of Defendant Eckenwiler, patrons, and passersby requires discovery. This is a factual determination, not a supportable conclusion as a matter of law. This Court should accordingly find that the district court erred in its determination that The Big Board's refusal to abide by the mask mandate did not meet the standard for

expressive conduct because (1) the refusal to wear masks or enforce the mandate was done with the intention of sending a message, and (2) an observer would have reasonably understood that the actors' conduct was conveying a message.

B. The *O'Brien* test does not justify ANC 6C's retaliation.

The district court took the square peg of the O'Brien test and crammed it into the round hole of First Amendment retaliation by government officials. "When 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in *regulating the nonspeech element* can justify *incidental* limitations on First Amendment freedoms." *O'Brien*, 391 U.S. at 376 (emphasis added). In *O'Brien*, the Court clarified its test on when the government can regulate speech:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; *if the government interest is unrelated to the suppression of free expression*; and if the *incidental* restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.

Id. at 377 (emphasis added). "Incidental to" means "happening by chance and subordinate to some other thing; peripheral" Bryan A. Garner,

Garner's Modern English Usage 498 (4th ed. 2016).

So, *O'Brien* allows the government to incidentally restrict speech if the government has an important governmental interest in regulating the conduct itself rather than the speech element that is entwined with the conduct. App 81. *O'Brien* may justify the D.C. Department of Health's issuance of fines and other punishment for violation of the mask and vaccine mandates—assuming, *arguendo*, that they were lawful orders.[4] The Department of Health regulation and its application to The Big Board's expressive conduct was not a question before the district court. The relevant question is instead if there was an important interest in the *ANC 6C's* retaliation against The Big Board's expressive conduct.

But ANC 6C has no jurisdiction to punish The Big Board for either the conduct itself or the speech associated therewith. ANC 6C does not have the authority to enforce D.C. Department of Health regulations. Indeed, ANC 6C did not even try to punish the non-speech element of the conduct. As the district court recognized, no evidence has been presented

[4] There remains a question of whether the D.C. Department of Health was acting within its lawful authority. That question is pending with this Court in The Big Board's challenge to D.C. Health's underlying sanctions. *Flannery v. D.C. Health*, No. 24-7005 (D.C. Cir.).

to support ANC 6C's protest. ANC 6C was explicitly punishing the speech element of the conduct. *See, e.g.*, App. 70.

To determine if ANC 6C's penalization of expressive conduct is permissible on the basis of a regulation that it has no ability to enact or enforce would allow one government agency to punish speech because another governmental agency regulates conduct. *O'Brien* says nothing condoning retaliation, let alone retaliation by government officials with no authority to punish the violations of the regulated conduct.

While *O'Brien* did not address the situation now before this court, it provides an excellent platform to analyze this situation. In *O'Brien*, David Paul O'Brien was charged under 50 U.S.C. § 462(b) for the knowing destruction of his Selective Service Card. *O'Brien*, 391 U.S. at 370. That law passed constitutional muster because it was directed at the act of destroying the card rather than O'Brien's anti-war sentiment expressed through the act. *Id.* at 382. But suppose that after his demonstration O'Brien had applied to the city zoning office for a permit to add an addition to his home. Assume that the zoning administrator—a veteran—had heard of O'Brien's demonstration and told his colleagues in the zoning office: "I'm a vet. This guy's actions show that he is

unpatriotic. He will never get a permit to build in my town as long as I am in charge!" And he denies O'Brien's requested permit for pretextual and baseless reasons. The zoning administrator admittedly would be retaliating because of O'Brien's political message. Even though the federal government properly prosecuted O'Brien for violating 50 U.S.C. § 462(b), that does not grant other government officials the right to persecute O'Brien for his war protest.

Similarly, burning the American flag is expressive conduct, *see Johnson*, 491 U.S. at 405–06. If Joe Flagburner goes into a restaurant and sets the place on fire by burning an American Flag, the government can prosecute him for arson, but not flag burning. *See id.* at 410 (noting that "Texas already has a statute specifically prohibiting breaches of the peace . . . which tends to confirm that Texas need not punish this flag desecration in order to keep the peace."). Suppose when Joe finishes his arson jail time and goes to the Department of Motor Vehicles to get his driver's license renewed, the official says, "you're the guy who burned the flag, no driver's license for you." The DMV is retaliating because of Joe's expressive conduct in violation of the First Amendment.

"[T]he First Amendment prohibits government officials from wielding

their power selectively to punish or suppress speech, directly or . . . through [ ] intermediaries." *NRA v. Vullo*, 602 U.S. 175, 198 (2024). Here, ANC 6C is wielding its power in retaliation to both The Big Board's expressive conduct and its oral and written statements.

The speaker—via conduct—may be subject to prosecution by one government agency, but that does not make it fair game for all government officials to attack him on the basis of the message conveyed by that conduct. If *O'Brien* is to be applied at all to this case, the proper formulation would be to ask if the expressive conduct in question *is the type of conduct* that would be incidentally burdened by the law or regulation that is being enforced. Nothing in the pleadings could remotely justify a conclusion that The Big Board's refusal to abide by the Mayor's orders negatively affected property values, had a negative impact on the peace and order of the surrounding area, or on the parking needs or pedestrian safety. Indeed, the Alcohol Board conducted an independent investigation and "found no violations to support the ANC's allegations." App. 73 (citing App. 17–18 (Compl. ¶¶ 77–78)). The Big Board's conduct was expressive conduct in the context of the ANC 6C protest, even if other governmental bodies or agencies could regulate that

conduct.

Even if the O'Brien test were relevant, its application could not support ANC 6C's actions. ANC 6C's stated justifications for the protest were "flimsy and unsupported." App. 70. There is nothing "incidental" connecting the trumped-up claims in the protest and the expressive conduct of The Big Board. Indeed, the Complaint provides facts sufficient to reasonably infer that the purpose of ANC 6C's protest was to punish The Big Board, rather than the harm to The Big Board being incidental to a lawful exercise of ANC 6C's authority. This Court should find either that the *O'Brien* test does not apply to this retaliation claim or that under the *O'Brien* test, ANC 6C had no right to regulate, retaliate or punish The Big Board for its expressive conduct.

II. The district court erred by not applying the proper but-for test.

The district court erred by not applying the proper but-for test. Under the proper but-for test, The Big Board properly alleged that its protected speech was *a* but-for cause of ANC 6C's retaliation. The Big Board's protected speech need not be *the only* but-for cause. The key is if it was a substantial or motivating factor.

A. The district court applied the wrong but-for test.

Under Supreme Court precedent, courts

> analyze First Amendment retaliation claims under the two-step framework set out in *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977).[5] At the first step, the plaintiff must demonstrate that he engaged in protected speech and that his speech was *a 'substantial' or 'motivating'* factor in the defendant's decision to take action against him. Once the plaintiff makes this showing, the burden shifts to the defendant at the second step to show that he would have taken the same adverse action even in the absence of the protected speech.

Gonzalez v. Trevino, 602 U.S. 653, 662–63 (2024) (Alito, J., concurring) (emphasis added).

Here, the district court concluded that

> because plaintiffs' own complaint explicitly asserts that members of the ANC 6C were motivated, *at least in part*, to protest The Big Board's liquor license due to plaintiffs' unprotected conduct . . . the complaint fails to state a plausible claim that [The Big Board's] constitutionally protected

[5] While *Mt. Healthy's* burden shifting test comes from, and is familiar to, retaliatory employment actions, both inside and outside of the First Amendment context, it is not limited to such actions. This is exemplified by *Nieves v. Bartlett*, 587 U.S. 391, 404 (2019), which The Big Board, App. 56, the Defendants, App. 35, and the district court, App. 81, cited. In *Nieves*, the Court held that in a First Amendment retaliatory arrest case, the plaintiff must first establish a lack of probable cause, and "then the *Mt. Healthy* test governs." *Nieves*, 587 U.S. at 404 (quoting *Lozman v. Riviera Beach*, 585 U.S. 87, 97 (2018)).

expression was the but-for cause of the defendants' action.

App. 84 (emphasis added). The district court's test has it backward. The district court's conclusion is tantamount to a requirement that a plaintiff prove at the complaint stage that its protected speech was the *only* possible cause of the defendant's actions.

But *Mt. Healthy* anticipates multiple possible causes for a defendant's challenged actions. *See Media Matters for Am. v. Bailey*, No. 24-CV-147 (APM), 2024 WL 3924573, at *14 (D.D.C. Aug. 23, 2024) ("[I]n the typical retaliation case, there is both protected speech and unprotected conduct."). At the first step, in the pleading stage, a plaintiff need only aver facts that support the conclusion "that this conduct was *a* 'substantial factor' or to put it in other words, that it was *a* "motivating factor." *Mt. Healthy*, 429 U.S. at 287 (emphasis added); *see also Nieves*, 587 U.S. at 399 (noting that the retaliatory motive "must be *a* 'but-for' cause" (emphasis added)). The plaintiff need not plead that it was *the only* factor. *See Clark v. Libr. of Cong.*, 750 F.2d 89, 101 n.25 (D.C. Cir. 1984) (discussing *Mt. Healthy* and noting that the plaintiff "need not demonstrate that the failure to promote was based solely on an impermissible basis"); *accord McKinley v. City of Eloy*, 705 F.2d 1110,

1115 (9th Cir. 1983) ("[I]t is not necessary to demonstrate that the dismissal was based solely on these [protected] activities.").

"The opinion in *Mt. Healthy* clearly contemplates that a decision may be the product of more than one substantial factor; it refers to 'a substantial factor.'" *Bowen v. Watkins*, 669 F.2d 979, 984–85 (5th Cir. 1982) (quoting *Mt. Healthy*, 429 U.S. at 287). Rather the defendant must show that if there is both a proper and improper reason for the defendant's actions, the defendant would have taken the same adverse action even in the absence of the protected speech. *Thompson v. D.C.*, 832 F.3d 339, 347 (D.C. Cir. 2016) (reversing grant of summary judgment for the defendant because the district court did not require the defendant to show that the injury would have occurred anyway and citing six other circuits for the same proposition); *see also Mt. Healthy*, 429 U.S. at 287 ("[T]he District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct."). Thus, where there are multiple possible causes for the defendant's actions, and the plaintiff plausibly pleads that protected speech was one of those substantial causes, *Mt.*

Healthy applies. The district court committed legal error by not applying *Mt. Healthy*, requiring reversal.

B. The Big Board properly alleged that its protected speech was *a* but-for cause of ANC 6C's retaliation.

The Big Board's complaint satisfies the *Mt. Healthy* but-for test because there is no dispute that The Big Board engaged in protected speech. The Big Board plausibly alleged that its protected speech was a substantial or motivating factor for ANC 6C's actions, and ANC 6C has not presented any evidence that it would have taken the challenged actions absent the protected speech.

1. The Big Board engaged in protected speech.

Under *Mt. Healthy*, a plaintiff must first show that he is engaged in protected speech. *Mt. Healthy*, 429 U.S. at 287. As the district court recognized, The Big Board "allege[d] that [The Big Board] 'invoked [its] First Amendment rights in expressing [its] disagreement with the District's COVID policies by posting on Twitter, giving media interviews, refusing to obey orders [it] understood to be unlawful, and filing a lawsuit challenging the constitutionality of such orders.'" App. 80 (quoting App. 18–19 (Compl. ¶ 84)). Regardless of whether The Big Board's *conduct* of "refusing to obey orders [it] understood to be unlawful" was

protected expressive conduct, ANC 6C did not

> dispute that at least some of these activities are protected conduct, nor could they; "[t]he First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,'" *Snyder v. Phelps*, 562 U.S. 443, 452 (2011), quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), and activities like posting on social media and offering media interviews on a topic of public concern lie at its core.

App. 80–81. Similarly, The Big Board's use of the "legal processes is protected by the First Amendment," *Harrison v. Fed. Bureau of Prisons*, 298 F. Supp. 3d 174, 182–83 (D.D.C. 2018); *see also Sanders v. D.C.*, 85 F. Supp. 3d 523, 534 (D.D.C. 2015) ("A lawsuit filed by a public employee constitutes speech protected under the First Amendment if it 'address[es] a matter of public concern.'" (citation omitted)); *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 584 (D.C. Cir. 2002) ("This right extends not just to court filings but also to the various preliminary filings necessary to exhaust administrative remedies prior to seeking judicial review."). "And there is no dispute that the protest was filed after the plaintiff made [its] views known." App. 81.

Thus, there is no dispute that The Big Board satisfied its first burden of demonstrating that it engaged in protected speech.

2. The Big Board plausibly alleged that its protected speech was a substantial or motivating factor in ANC 6C's decision to file the protest.

Under *Mt. Healthy*, a plaintiff's second burden is to allege facts that plausibly show that its speech was a "substantial" or "motivating" factor in the defendant's decision to take action against it. "[A]t the pleading stage, [the plaintiff] need only 'allege facts "that would allow a jury to find that the adverse action was motivated at least in part by" [the plaintiff's] speech.'" *Cooperrider*, 127 F.4th at 1040 (cleaned up) (quoting *Bright v. Gallia County*, 753 F.3d 639, 653 (6th Cir. 2014)).

In a recent case remarkably similar to this one, the Sixth Circuit addressed *Mt. Healthy's* causation requirement as it relates to enforcement actions. In *Cooperrider*, the plaintiff "engaged in protected speech when he wrote critically of the Kentucky Governor and his administration's response to the COVID-19 pandemic," *id.* at 1036, on his and his business's social media, *id.* at 1025. In retaliation, the Kentucky Department of Alcoholic Beverage Control initiated proceedings to revoke the plaintiff's alcohol license. The Sixth Circuit ultimately reversed the district court's grant of a motion to dismiss the plaintiff's

First Amendment retaliation claim, finding that the plaintiff had sufficiently alleged the cause of action.

In deciding the causation question, the Sixth Circuit found that the plaintiff's complaint met the *Mt. Healthy* requirements because the facts in the complaint alleged that all relevant defendants "(1) knew about [the plaintiff's] critical social-media posts and (2) decided to initiate the enforcement action against Brewed because of [the plaintiff's] comments." *Id.* at 1038. Specifically, the complaint made "several allegations relating to the causation element," including that:

- "Defendants were each aware of, and angered by, the social media activity of the Plaintiffs";
- Governor Beshear had, "in public statements and speeches, directly addressed the speech of Plaintiffs, usually in a manner that expresse[d] his anger at such speech";
- "Email communications by and between Defendants . . . , in particular reflect a concerted effort to deprive Plaintiffs of their alcohol licenses";
- Defendants "each directed that no . . . settlement be offered to [the Plaintiff], because the Defendants desired to punish [the Plaintiff and his business] for their First Amendment protected speech"; and

- Two Defendants, in revoking the license, "acted 'in accord with directives they received from [other] Defendants.'"

Id. at 1038–39 (cleaned up) The Sixth Circuit determined that

> [a]t this stage of the proceedings, these allegations are adequate to allow a district court 'to draw the reasonable inference that the Defendants are liable for the misconduct alleged,' that is, that [the relevant Defendants] were substantially motivated to pursue alcohol license-revocation proceedings against [the Plaintiff's business] because of [the plaintiff's] statements.

Id. at 1039 (cleaned up) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

Similarly, here, the Complaint specifically "alleges that defendants, 'through their official positions as commissioners and of ANC 6C – filed and prosecuted a frivolous protest challenging The Big Board's liquor license renewal' in order to 'retaliate against Mr. Flannery for his First Amendment-protected expressions of disagreement with the District's COVID policies.'" App. 78 (quoting App. 19 (Compl. ¶ 85)). It also alleges that The Big Board "disagreed with the District's decision to impose the mandates, and [it] allege[d] that [it] 'express[ed] [its] disapproval and disagreement on social media and elsewhere.'" App. 70–71 (citing App. 09 (Compl. ¶ 3)).

As recounted by the district court, citing the Complaint:

- "'[t]hrough all of this, Mr. Flannery continued to express his views opposing the mandates and the government's treatment of his restaurant by posting on Twitter and giving media interviews.' Compl. ¶ 33."
- "And [The Big Board] allege[d] that defendant Mark Eckenwiler, a commissioner of the ANC 6C, 'showed his disdain for Mr. Flannery's expressed views and his animosity and animus towards Mr. Flannery through a series of attack tweets.' Compl. ¶ 34."
- Eckenwiler "shared screenshots of The Big Board's own tweets and commented, 'When you've decided to flout the vaccine mandate taking effect on Jan. 15 at DC bars & restaurants, but don't quite have the stones to say so & instead resort to anti-vaxxer dog-whistling.' Compl. ¶ 35a."
- "Eckenwiler posted [a screenshot] of an [Alcohol Board] notice of a meeting concerning The Big Board's liquor license with the comment, 'Actions have consequences,' Compl. ¶ 35b, and his tweet containing a picture of the District Health Department's closure notice on the establishment with the added comment, 'Play stupid games, win regulatory prizes!' Compl. ¶ 35c."

App. 71–72.

When The Big Board's license later came up for renewal, ANC 6C seized on the opportunity to act on the animus it had toward The Big Board's protected conduct.

During ANC 6C's Alcoholic Beverage Licensing Committee's public meeting, The Big Board's liquor license was discussed. App. 72 (citing

App. 13 (Compl. ¶ 40)). The Big Board alleges that during this meeting Defendant Eckenwiler stated, "I mean just some of the things he's said publicly, we should go ahead and protest the license." App. 72 (quoting App. 13 (Compl. ¶¶ 40, 43)). "[N]one of the other committee members expressed disagreement with or challenged that statement. App. 13 (Compl. ¶ 44).

Following the Committee meeting, "[A]ll members [of ANC 6C] voted to file a formal protest of the restaurant's license renewal." App. 72. (citing App. 14 (Compl. ¶¶ 48, 50)). Defendant Eckenwiler was designated as ANC 6C's representative for the protest. App. 72 (citing App. 14 (Compl. ¶ 49)). Although Defendant Eckenwiler was designated to represent ANC 6C, he refused to participate in the required mediation. App. 17 (Compl. ¶ 75).

The Big Board's allegations plausibly show that The Big Board's public statements—which are clearly protected speech—were at least a substantial or motivating factor in the Defendants' retaliatory actions. Indeed, the district court repeatedly pointed out that The Big Board alleged that it "engaged in both speech and . . . expressive conduct, and that [ANC 6C was] reacting in varying ways *to the combination of [The*

Big Board's] statements and [its] defiance of the Mayor's Orders." App. 83 (emphasis added). Again, the district court recognized that The Big Board alleged that the protest was in reaction to The Big Board's protected speech, referring to that as "other things," App. 82, and the supposedly unprotected conduct as only part of the motivation, App. 84.

Thus, The Big Board satisfied its second burden of plausibly demonstrating that its protected speech was a substantial or motivating factor in ANC 6C's decision to file the protest.[6]

3. The district court should have denied ANC 6C's Motion to Dismiss because it did not satisfy ANC 6C's burden of showing that it would have protested the alcohol license absent the protected speech.

Consistent with "the flimsy and unsupported nature of the protest," App. 70, ANC 6C did not argue in its Motion to Dismiss that it would have filed the protest absent The Big Board's protected speech. Under *Mt. Healthy*, once the plaintiff has met its burdens, the burden shifts to the *defendant* to show that it "would not have taken the same adverse

[6] Because the district court found that the Complaint alleges that protected speech was at least *a* factor, the Court should, at the very least, reverse and remand for a determination under the proper analysis of whether the Complaint plausibly alleges that protected speech was a substantial or motivating factor.

action even in the absence of the protected speech." *Gonzalez*, 602 U.S. at 662–63 (Alito, J., concurring). As other courts have noted, "[t]he Government 'must show more than that they "*could* have" punished the plaintiffs in the absence of the protected speech; instead, "the burden is on the defendants to show" that they "*would* have" punished the plaintiffs under those circumstances.'" *Bello-Reyes v. Gaynor*, 985 F.3d 696, 702 (9th Cir. 2021) (emphasis in original) (citations omitted). Of course, the movant is not obligated to present evidence with a motion to dismiss. However, the burden placed on the defendants in a First Amendment retaliation action makes it incumbent on them to persuade the court—based on the pleadings—that they would have satisfied this burden to obtain a dismissal. *See Thompson*, 832 F.3d at 347 (reversing grant of summary judgment for the defendant because the trial court did not require the defendant to show that the injury would have occurred anyway).

Here, it is unlikely that ANC 6C could show that it would have punished The Big Board in the absence of protected speech without presenting evidence, such as potential declarations under oath or deposition transcripts. And such evidence is only appropriate at the

summary judgment stage. Even so, the Complaint provides the reason that ANC 6C cannot, and will not be able to, submit any evidence to support such an argument.

ANC 6C initiated the protest of The Big Board's liquor license, claiming that (1) "The Big Board's operations have had a negative effect on 'real property values'"; (2) "The Big Board has had a negative impact 'on the peace, order, and quiet, including the noise and litter provisions set forth in . . . the D.C. Code"; and (3) "The Big Board has had a negative 'effect upon the residential parking needs and vehicular and pedestrian safety.'" App. 72–73 (quoting App. 14 (Compl. ¶ 51)). The Big Board and its attorneys attempted to resolve the protest with Defendant Eckenwiler, ANC 6C's chosen representative. App. 15 (Compl. ¶ 55–62). However, Defendant Eckenwiler refused to cooperate with the negotiations. App. 15–17 (Compl. ¶¶ 63–70).

In February 2023, The Big Board's attorney requested in writing that Eckenwiler provide "any evidence supporting the three items listed in the ANC 6C's protest." App. 16 (Compl. ¶ 67). Neither ANC 6C nor its representative ever provided any evidence. App. 16 (Compl. ¶ 67). Further, the Alcohol Board's own independent investigation into the

claims in the protest. App. 17 (Compl. ¶ 77). The Alcohol Board "found no violations to support the ANC's allegations." App. 73 (citing App. 17 (Compl. ¶¶ 77–78)).

Further, Defendant Eckenwiler, as ANC 6C's representative, refused to participate in a mandatory mediation session scheduled by the Alcohol Board, other than to appear on the phone for 45 seconds to declare that he had attended the call as required and then hung up. App. 17 (Compl. ¶ 75). Indeed, the district court found the "flimsy and unsupported nature of [ANC 6C's] protest quite troubling . . . ." App. 70. *See Loumiet v. United State*s, 255 F. Supp. 3d 75, 95 (D.D.C. 2017), *rev'd on other grounds*, 948 F.3d 376, 445 (D.C. Cir. 2020) (denying motion to dismiss where government defendants "improperly induce an enforcement action . . . in reprisal for critical statements that he made . . . . This view of the Complaint is corroborated by the fact that the ALJ, the Comptroller, and the D.C. Circuit ultimately concluded that the enforcement action was not meritorious."); *see also Hartman v. Moore*, 547 U.S. 250, 261 (2006) ("Demonstrating that there was no probable cause for the underlying criminal charge will tend to reinforce the

retaliation evidence and show that retaliation was the but-for basis for instigating the prosecution.").

Thus, not only has ANC 6C presented no arguments that it would have filed the protest absent The Big Board's protected speech, but the Complaint's allegations show that ANC 6C will not be able to meet its burden.

* * * *

Under the proper *Mt. Healthy* but-for test, The Big Board alleged that its protected speech was a but-for cause of ANC 6C's retaliation, and the district court erred in dismissing the complaint.

III. The district court's grant of ANC 6C's motion to dismiss was premature; the court should have allowed the case to proceed to the evidentiary stage.

The motion to dismiss stage is not the time for ANC 6C to present evidence or for the court to make factual findings. But that is what happened here. First, ANC 6C attached evidentiary materials to the Motion to Dismiss, which it relied on in four places. *See* App. 26–28, 37. The district court imposed a requirement that The Big Board prove that its "constitutional speech was *the* but-for cause of the defendants' actions." App. 70 (emphasis added). The court granted ANC 6C's motion

to dismiss because there could have been other "but-for" causes that were based on unprotected conduct. Because The Big Board "*plausibly allege[d]* that [The Big Board's] speech was a motivating factor of [ANC 6C's] enforcement action," *Cooperrider*, 127 F.4th at 1038 n.13, the district court erred by dismissing the Complaint.

The district court acted prematurely. "Whether or not the action would have been taken in the absence of [The Big Board's] speech is a quintessential fact question to be inquired into during the discovery process." *Id.* And for First Amendment retaliation cases applying *Mt. Healthy*, "[a] defendant's motivation for taking action against the plaintiff is usually a matter best suited for the jury." *Id.* at 1038 n.14.

ANC 6C's attachment of extra-pleading exhibits to the Motion to Dismiss further shows the problem of premature dismissal. ANC 6C asserted that the court could take judicial notice of ANC 6C's Exhibit 1, the minutes from ANC 6C's November 9, 2022, meeting, because it is a public record. App. 26. But this is a misuse of Rule 201 allowing the Court to take judicial notice of a public document. ANC 6C used this document to try to diminish Defendant Eckenwiler's role in the effort to deny the alcohol license renewal and to suggest that such denials were somehow

routine and not based on improper motives. App. 27, 37. ANC 6C went beyond the scope of judicial notice and asked the court to infer that because "Defendants voted to follow the recommendations of the ANC 6C Alcoholic Beverage and Licensing Committee across the board," which included other liquor license holders, it "cuts against any inference that there was a retaliatory motive for ANC 6C's vote on The Big Board's license alone." App. 37. This raises factual issues as to the retaliatory motive.

Indeed, factual questions are "not properly resolved at the motion-to-dismiss stage when all reasonable inferences must be drawn to the plaintiff's benefit." *Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 723 (D.C. Cir. 2007) (Rogers, J., with whom Ginsburg, C.J., joins, dissenting) (citation omitted). The Big Board responded to ANC 6C's assertion, stating, "Plaintiffs have no information if ANC 6C also protested those other licenses in retaliation for those establishments' protected speech or other impermissible reason[s]." App. 58. The Big Board further explained, "Discovery may yield information on this." App. 58.

In addition to the improper use of evidence at the motion to dismiss

stage, ANC 6C's suggestion that the court should make inferences against The Big Board is contrary to the mandate that all inferences must be made in the plaintiff's favor. And ANC 6C's introduction of evidence triggers Rule 12(d) and requires the court to either explicitly exclude that evidence or treat the motion as a motion for summary judgment. The court did neither.[7]

The court should have allowed the case to go forward, allowed the parties to conduct discovery, and required ANC 6C to satisfy their burden that their retaliatory actions would not have occurred absent The Big Board's protected speech. *See Gonzalez*, 602 U.S. at 662–63 (Alito, J., concurring); *see also Media Matters for Am.*, 2024 WL 3924573, at *19 (denying motion to dismiss and granting motion for preliminary injunction in First Amendment retaliation case). Indeed, even the summary judgment stage may be premature to decide the *Mt. Healthy* but-for question. That question

> is a "question of fact ordinarily for the jury," *Tao v. Freeh*, 27 F.3d 635, 639 (D.C. Cir. 1994), because "[w]ithout a searching inquiry into [defendants'] motives, those intent on punishing

[7] The use of judicial notice of documents referenced in a complaint is sometimes permissible. *See Vila v. Inter-Am. Inv., Corp.*, 536 F. Supp. 2d 41, 46 n.5 (D.D.C. 2008). However, ANC 6C went beyond that to ask the court to make inferences that could only be addressed through discovery.

> the exercise of constitutional rights could easily mask their behavior behind a complex web of post hoc rationalizations." *Peacock v. Duval*, 694 F.2d 644, 646 (9th Cir.1982).

Sanders v. D.C., 85 F. Supp. 3d at 537 (citations cleaned up) (alterations in original); *see also Mazaleski v. Treusdell*, 562 F.2d 701, 717 (D.C. Cir. 1977) ("When motivation is involved and credibility becomes of critical importance, or when essential facts are solely within the control of the moving party, summary judgment generally is inappropriate.").

Therefore, the district court erred by requiring plaintiffs to prove their case—not just plausibly plead a cause of action—to survive a motion to dismiss.

CONCLUSION

The district court erred in multiple steps of its analysis. First, it incorrectly determined that The Big Board's refusal to follow unlawful laws was not protected conduct. Second, even if there was protected speech and unprotected conduct, the court applied the wrong legal standard to determine a but-for cause. Had it applied the proper standard, The Big Board's Complaint easily met the standard. Finally, the district court required The Big Board to prove its case in the

complaint, not simply plead a plausible cause of action as required by the law.

Therefore, this Court should reverse the district court's opinion and order and remand for further proceedings.

Respectfully submitted,

Dated: April 7, 2025

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CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7)(B) because it contains 9,872 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it is prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Century Schoolbook font.

Dated: April 7, 2025

/s/ David L. Rosenthal
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above brief was served on all counsel of record via the Court's electronic filing system this 7th day of April 2025.

Dated: April 7, 2025

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