UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERIC J. FLANNERY, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL ACTION NO. 1:23-cv-02804-ABJ
	)	
MARK ECKENWILER, et al.,	)	
	)	
Defendants.	)	
	)	

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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INTRODUCTION

Eric Flannery owns (through Drane Flannery Restaurant LLC) and runs a tavern named "The Big Board" in Washington, D.C. He proudly declares that "everyone is welcome." Compl. at ¶ 30. But in 2020, the Mayor of Washington, D.C. began to undermine this welcoming atmosphere with mask and vaccine passport mandates. Mr. Flannery believed that the Mayor's mandates were unlawful and, through the exercise of his First Amendment rights, he made his disagreements with the Mayor's actions known via Twitter, media interviews, and otherwise. Consistent with his verbal and written statements, he further showed his disagreement by declining to enforce those mandates in his establishment and even took legal action challenging them. Compl. at ¶¶ 3, 33, and 84. He publicly expressed that he was not enforcing the mandates. *See* Compl. at ¶¶ 3, 30, 33, and 84.

Certain governmental officials—members of the local Advisory Neighborhood Comission-6C (ANC)—took notice of Mr. Flannery's public statements and at least one began to openly demean and mock Mr. Flannery on social media. The officials' reaction was particularly significant because they had the unique statutory ability to harm him by protesting his liquor license. And when it came time for Mr. Flannery to renew The Big Board's liquor license, the ANC in fact protested his license renewal in their official capacity.

During the November 7, 2022, official ANC meeting[1] discussing a possible protest of The Big Board's liquor license, one of the ANC commissioners—Defendant Mark Eckenwiler—

[1] "Each Commission, including each committee of a Commission, shall be subject to the open meetings provisions of § 1-207.42." D.C. Code § 1–309.11(g). § 1–207.42. "All meetings (including hearings) of any department, agency, board, or commission of the District government . . . at which official action of any kind is taken shall be open to the public." D.C. Code § 1-207.42(a). "A written transcript or a transcription shall be kept for all such meetings and shall be made available to the public . . . ." *Id.* at (b). Contrary to the D.C. Code and the ANC's policy to keep agendas and meeting minutes of its meetings, *see* Mot. to Dismiss at 4, n.4, the ANC did not maintain records of this meeting.

referenced Mr. Flannery's speech as the basis for protesting The Big Board's license, stating: "I mean just some of the things he's said publicly, we should go ahead and protest the license." Compl. at ¶ 43. No one at that meeting and none of the ANC Commissioners rejected or challenged this retaliatory rationale and no one gave any other rationale. The ANC subsequently filed its protest, using the statutory protest justifications as a pretext—which pretext later became apparent. A license protest inevitably works a hardship on the licensee, including hiring attorneys, responding to government inspectors, and preparing for hearings and mediations. Mr. Flannery has indeed endured each of those harms here. Compl. at ¶¶ 79–80. Mr. Eckenwiler certainly understood this when he publicly declared: "Play stupid games, win regulatory prizes." Compl. at ¶ 35.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. "While the Amendment refers to Congress, its prohibition against infringements on free speech applies equally to executive actions." *Frederick Douglass Found., Inc. v. D.C.*, 82 F.4th 1122, 1140 (D.C. Cir. 2023) (citing *Hartman v. Moore*, 547 U.S. 250, 254 (2006) (*Bivens* action against postal inspectors for inducing a prosecution in retaliation for speech)). The First Amendment's protections against executive infringements on free speech "was directed at the 'core abuse' of licensing laws that granted broad discretion to enforce vague legislative schemes." *Id.* (quoting *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 320 (2002)). "Any form of official retaliation for exercising one's freedom of speech, including prosecution, *threatened prosecution, bad faith investigation, and legal harassment*, constitutes an infringement of that freedom." *Lackey v. Cnty. of Bernalillo*, 166 F.3d 1221 (10th Cir. 1999) (emphasis added) (citing *Reporters Committee for Freedom of the Press v. AT & T Co.*, 593 F.2d 1030, 1064 (D.C. Cir. 1978)).

Defendants' initiation and prosecution of a frivolous protest of Plaintiffs' liquor licenses in

retaliation for Mr. Flannery's protected speech violates the First Amendment, and Plaintiffs have sufficiently pled as much.

LEGAL STANDARD

The Federal Rules of Civil Procedure require a complaint to contain "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). A complaint must contain sufficient factual allegations that, if accepted as true, "state a claim to relief that is plausible on its face." *Id.* at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

"In evaluating a Rule 12(b)(6) motion to dismiss for failure to state a claim, a court must construe the complaint in the light most favorable to the plaintiff and must accept as true all reasonable factual inferences drawn from well-pleaded factual allegations." *Wharf, Inc. v. D.C.*, 133 F. Supp. 3d 29, 33 (D.D.C. 2015) (citing *In re United Mine Workers of Am. Employee Benefit Plans Litig.*, 854 F.Supp. 914, 915 (D.D.C. 1994)). "A court must 'assess [ ] the legal feasibility of the complaint, but [may] not weigh the evidence that might be offered to support it.'" *Howard v. Off. of Chief Admin. Officer of U.S. House of Representatives*, 720 F.3d 939, 950 (D.C. Cir. 2013) (quoting *Global Network Commc'ns, Inc. v. City of N.Y.*, 458 F.3d 150, 155 (2d Cir. 2006)).

The Complaint gives the Defendants fair notice and the claim is facially plausible.

ARGUMENT

I. Plaintiffs have alleged sufficient facts to establish Defendants retaliated against them in violation of the First Amendment.[2]

For a First Amendment retaliation claim to survive a motion to dismiss, a plaintiff must plead sufficient factual allegations that (1) "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. D.C.*, 796 F.3d 96, 106 (D.C. Cir. 2015) (emphasis added) (quoting *Aref v. Holder*, 774 F.Supp.2d 147, 169 (D.D.C. 2011)). Courts have also recognized that a plaintiff satisfies the second element by establishing that "the defendant's actions would chill a person of ordinary firmness from *continuing to engage* in the protected activity." *Capp v. Cnty. of San Diego*, 940 F.3d 1046, 1053 (9th Cir. 2019) (emphasis added)).

Plaintiffs' Complaint meets this requirement.

A. Plaintiffs' Complaint sufficiently alleges that Plaintiffs engaged in protected conduct.

1. "Political speech lies at the core of speech protected by the First Amendment, as it is the means by which citizens disseminate information, debate issues of public importance, and hold officials to account for their decisions in our democracy." *Nat'l Ass'n for Gun Rts., Inc. v. Mangan*, 933 F.3d 1102, 1111 (9th Cir. 2019). Plaintiffs' twitter postings, media appearances, and other statements criticizing the Mayor's actions are speech—and they are political speech.

[2] Plaintiffs allege that the official actions of filing and prosecuting the protest against Plaintiffs are the primary retaliatory actions. Defendant Eckenwiler's Twitter posts, like his and other commissioners comments, are evidence that the filing and prosecuting of the protest was in retaliation for Plaintiffs' speech. However, newly discovered evidence suggests that at least some of Defendant Eckenwiler's posts were made in his official capacity as an ANC Commissioner. *See infra* at 8.

See, e.g., Compl. at ¶¶ 30, 84. Defendants do not attempt to deny that Plaintiffs' speech is protected by the First Amendment. This satisfies the first element of a First Amendment retaliation claim.

2. Defendants do challenge Plaintiffs' other expressive conduct as speech. Given that Plaintiffs have already satisfied the first element of the cause of action, it is unnecessary to address Plaintiffs' other conduct. Nevertheless, it is worth noting that Plaintiffs' other conduct is sufficiently expressive to be protected conduct under the First Amendment.

With conduct,

> the First Amendment comes "into play" only where "particular conduct possesses sufficient communicative elements," *Texas v. Johnson*, 491 U.S. 397, 404 (1989), that is, when an "*intent* to convey a particularized message [is] present, and *in the surrounding circumstances* the likelihood [is] great that the message would be understood by those who viewed it," *Spence v. Washington*, 418 U.S. 405, 410–11 (1974)."

United States Telecom Ass'n v. Fed. Commc'ns Comm'n, 825 F.3d 674, 741 (D.C. Cir. 2016) (emphasis added) (cleaned up). By disobeying the mandates, publicizing those actions, and filing lawsuits challenging them, Plaintiffs' intent to convey a particularized message is clear: "As has always been the case for us, everyone is welcome." Compl. ¶ 30; The Big Board (@thebigboarddc), Twitter (Jan 13. 2022), https://perma.cc/M3GP-JKAM.

As the Court has emphasized, the surrounding circumstances of the conduct are important when determining if the message would be understood by those who viewed it. *Johnson*, 491 U.S. at 406. ("Johnson burned an American flag as part—indeed, as the culmination—of a political demonstration that coincided with the convening of the Republican Party and its renomination of Ronald Reagan for President. The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent."); see also The Big Board (@thebigboarddc), Twitter (Jan 13. 2022), https://perma.cc/7NES-BSFH. (Tweet by The Big Board welcoming everyone notwithstanding the mandates with 50 retweets, 64 quote tweets, and 481 likes). At the time of the

expressive conduct, D.C. limited access to restaurants to those who wore a mask and proved that they had been vaccinated. Compl. at ¶¶ 2–5. This was the opposite of welcoming everyone. Welcoming everyone into your establishment with or without masks and vaccination cards when the government says you cannot do so is conduct that is expressive. In fact, Defendant Eckenwiler understood the meaning of the conduct: "When you've decided to flout the vaccine mandate taking effect on Jan. 15 at D.C. bars & restaurants, but don't quite have the stones to say so . . . ." Compl. at ¶ 35 (Defendant Eckenwiler commenting on The Big Board's "everyone is welcome" tweet). Defendant Eckenwiler's tweet suggests that he equated flouting the mandate and welcoming everyone into the bar regardless of whether they had the required vaccine cards with communicating a protest against the vaccine mandate.

Additionally, Plaintiffs' challenging these mandates through legal proceedings expressed their belief that these mandates were unlawful. As this Court has recognized, "the non-frivolous use of administrative grievance and legal processes is protected by the First Amendment," and the government cannot retaliate against that protected conduct. *Harrison v. Fed. Bureau of Prisons*, 298 F. Supp. 3d 174, 182–83 (D.D.C. 2018) (citing *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 584–88 (D.C. Cir. 2002)). *See also Scahill v. D.C.*, 271 F. Supp. 3d 216, 235 (D.D.C. 2017), *aff'd*, 909 F.3d 1177 (D.C. Cir. 2018) ("In moving for reconsideration of the Board's order, filing a petition for review, and then filing this suit, plaintiffs have clearly engaged in 'protected conduct.'") (citation omitted)).

Thus, construing the Complaint in the light most favorable to Plaintiffs, the Complaint sufficiently pleads that they engaged in protected spoken and written speech, as well as protected expressive conduct.

B. Plaintiffs' Complaint sufficiently alleges that Defendants took retaliatory action sufficient to deter a person of ordinary firmness in Plaintiffs' position from continuing to speak.

Plaintiffs allege that Defendants' official retaliatory action was filing and prosecuting the protest of Plaintiffs' liquor license renewal. This is no small thing. A liquor license has great value, and for a bar or tavern, it is self-evidently the lifeblood of the establishment. Defendants' efforts to take away Plaintiffs' liquor license is a dire threat. It is not an overstatement to say that if the protest were successful, it would destroy Mr. Flannery's business. And even if a protest is frivolous, it does not mean it will go away on its own. As Plaintiffs allege, "[b]ecause of Defendants' actions, Mr. Flannery suffered damages to his, and his tavern's, reputation, emotional distress, the expense of defending against the frivolous protest of his liquor license, and a violation of his First Amendment rights." Compl. at ¶ 86. *See also Toolasprashad*, 286 F.3d at 585 ("If, as we held in *Crawford-El*, small 'pecuniary losses . . . in the form of the costs of shipping . . . boxes and replacing clothing' are sufficient to 'deter a person of ordinary firmness . . . from speaking again,' then surely [ ] alleged deprivations [of the ability to obtain a prison job and be close to family] also meet this standard.").

Despite this, Defendants suggest that their actions would not deter a person from continuing to speak or speaking again by noting that Plaintiffs' establishment was still operating during the frivolous protest. Mot. to Dismiss at 11. This is a non sequitur. Plaintiffs' engaged in speech. Defendants filed a protest in retaliation. The protest alone does not revoke the liquor license or lose the establishment. But the threat of destroying someone's business, whether made by a government official or a non-governmental enterprise, will certainly give anyone pause to speak out again. *See, e.g.*, *Blankenship v. Manchin*, 471 F.3d 523, 525 (4th Cir. 2006) (affirming the denial of a motion to dismiss a complaint by a company chairman in which he asserted a First Amendment violation based on an official's threat to "scrutinize the affairs of" the chairman's

business "in retaliation for" his decision "to publicize his opposition through interviews" to the official's policy); *Zieper v. Metzinger*, 62 F. App'x 383, 386 (2d Cir. 2003) ("[A]s the Supreme Court explained in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963), the First Amendment prohibits government officials from using 'informal sanctions—the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation—. . . to achieve the suppression' of protected speech.").

Defendants' threat to Plaintiffs' lifeblood is exacerbated by the fact that "[t]he ANC 6C possesses statutory authority—giving it preferential treatment with ABRA to protest liquor licenses. This statutory authority, and the actual use of it for retaliatory purposes, [would] deter an ordinary person from speaking [again]." Compl. at ¶ 87. As Defendants point out, D.C. Code § 25-601 limits who may file such a protest, and ANCs are one such entity. This authorization gives them power—power which Defendants used and, in this case, abused.[3]

Defendants also assert that Mr. Eckewiler's tweets mocking, condemning, and belittling Mr. Flannery and The Big Board are his personal comments only. At the time Plaintiffs filed the Complaint, it was unclear if he made these comments in his individual capacity or as an ANC Commissioner. But it is reasonable to infer for purposes of viewing the Complaint in the best light that he was making these statements as a commissioner. *See, e.g.*, *Campbell v. Reisch*, 367 F. Supp. 3d 987, 995 (W.D. Mo. 2019) (reasonable to infer at the motion to dismiss stage that a public official's social media activity falls within "her capacity as a public official"). Post filing, however, Plaintiffs have learned of similar comments Mr. Eckenwiler posted elsewhere in which he concluded: "As your ANC commissioner, however, I want to be very clear about my own position

[3] This is not the only time an ANC has been accused of such abuse. *See* Amanda Michelle Gomez, *On H Street, Some Black Business Owners Say They're Fighting The Neighborhood*, dcist (Sept. 11, 2023), https://perma.cc/DG26-DYCP.

on [the] issue [of The Big Board] for whatever it may be worth. Mark Eckenwiler Commissioner, ANC 6C04 Vice-Chair, ANC 6C, www.anc6c.org."[4] But even if Eckenwiler tweeted in his personal capacity, his tweets demonstrate his retaliatory motive when he protested Plaintiffs' liquor license in his official capacity.

Thus, Plaintiffs' Complaint sufficiently alleges that Defendants took retaliatory action sufficient to deter a person of ordinary firmness in Plaintiffs' position from continuing to speak.

C. Plaintiffs' Complaint sufficiently alleges that there exists a causal link between the exercise of a constitutional right and Defendants' adverse action taken against Plaintiffs.

"To satisfy the causation link, a plaintiff must allege that his or her constitutional speech was the 'but for' cause of the defendants' retaliatory action." *Doe*, 796 F.3d at 107. "Specifically, it must be a 'but-for' cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019).

Plaintiffs' Complaint alleges that Defendant Eckenwiler—who Defendants' do not deny disparaged Plaintiffs online—"as the representative of ANC 6C, pushed the ANC 6C to vote for and file" the protest against Plaintiffs. Compl. at ¶ 10. As Plaintiffs' allege, Defendant Eckenwiler did so because of "some of the things [Plaintiffs'] *said* publicly." Compl. at ¶ 43 (emphasis added). This shows a causal link between Mr. Flannery's constitutionally protected speech and Eckewiler's actions to protest Plaintiffs' liquor license. And, none of the other Defendants, who all voted along with Eckenwiler, disputed that was the reason to file the protest. Plaintiffs' allegations establish

[4] Commissioner Eckewiler's comments posted on January 22, 2022 are available (after creating an account) on a publicly available listserve here: https://perma.cc/4SWB-UHUS. As Defendants have noted (Mot. to Dismiss at 3, n.2), the court may take judicial notice of certain facts. *See* Fed. R. Evid. 201. Commissioner Eckenwiler's publicly available post is generally known within the court's jurisdiction (i.e. on the internet) and "can be accurately and readily determined from [the listserve where posted and the] accuracy [of the post] cannot reasonably be questioned." *Id.*

the required "'causal connection' between the government defendant[s'] 'retaliatory animus'" and the harm they caused by filing the protest, against which Plaintiffs had to defend. *Capp*, 940 F.3d at 1053.

Plaintiffs also allege that Defendant Courtney "pushed the ANC 6C to vote for and file this protest because of The Big Board's 'bad behavior in recent years.'" Compl. at ¶ 11. Defendants suggest that this somehow excuses Courtney's vote to protest Plaintiffs' liquor license. But that does not excuse his failure to contest Eckewiler's statement. Rather it reinforces it. Courtney never suggested this "bad behavior" was something different than Mr. Flannery's speech. And even if he was referring to non-verbal behavior, *behavior* and *actions* include protected speech and protected expressive conduct. *Stilp v. Contino*, 613 F.3d 405, 409 (3d Cir. 2010) (The First Amendment protects more than just speech, "affording broad protection from governmental intrusion for conduct involving expression.").

Similar to this Court's findings in *Loumiet*—as evidenced by Defendants' statements—but for his protected speech, defendants in that case would not have brought an enforcement action against that plaintiff, and therefore, Plaintiffs' complaint survives a motion to dismiss. *Loumiet v. United States*, 255 F. Supp. 3d 75, 95 (D.D.C. 2017), *reversed on other grounds*, 948 F.3d 376, 445 (D.C. Cir. 2020). "This view of the Complaint is corroborated by the fact that" the District Alcoholic Beverage Regulation Administration (ABRA) "ultimately concluded that the enforcement action was not meritorious." *Id.* (citing, *Hartman*, 547 U.S. at 261 ("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.")). And, as Plaintiffs allege, this view is also strengthened by the fact that Defendants submitted a settlement agreement with no relationship to the items in the written protest, refused

to negotiate with counsel for Plaintiffs, refused to provide any evidence supporting the protest, refused to participate (in any meaningful way) in the mediation of the protest, and withdrew their protest shortly before the protest hearing. *See* Compl. at ¶¶ 55–79.

As Defendants noted, there were nine licenses—including Plaintiffs'—discussed at the November 7, 2022, ANC 6C's Alcoholic Beverage Licensing Committee meeting. Mot. to Dismiss at 5. The committee recommended—and Defendants later agreed—to take action on two licenses besides Plaintiffs' license. Of course, unlike this case, Plaintiffs have no information if ANC 6C also protested those other licenses in retaliation for those establishment's protected speech or other impermissible reason.[5] And the ANC's actions as to other bars' licenses do not evidence a lack of a retaliatory motive here. *See Branch Ministries v. Rossotti*, 211 F.3d 137, 144–145 (D.C. Cir. 2000) (quoting *United States v. Batchelder*, 442 U.S. 114, 125 (1979) ("Selectivity in the enforcement of criminal laws is, of course, subject to constitutional constraints.")).

Defendants' attempt to cast doubt on their own retaliatory motive for filing the protest by citing to cases dealing with the length of time between the plaintiff's constitutionaly-protected activity and the defendant's retaliatory action. However, "there is, of course, 'no "hard-and-fast rule" regarding the temporal proximity that must exist between protected activity and the adverse action.'" *BEG Invs., LLC v. Alberti*, 144 F. Supp. 3d 16, 22 (D.D.C. 2015) (quoting *Manuel v. Potter*, 685 F.Supp.2d 46, 68 (D.D.C. 2010)). Whether temporal proximity is important depends on the facts of the case. Here, unlike the only applicable[6] case cited by Defendants, Plaintiffs rely on Defendants' own statements, not on the temporal proximity. *See Scahill*, 271 F. Supp. 3d at 235, *aff'd*, 909 F.3d 1177 (D.C. Cir. 2018) ("There is no hard and fast rule as to how close in time the

[5] Discovery may yield information on this.

[6] Defendants cite to *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268 (2001), a case dealing with Title VII retaliation, which makes no reference to the First Amendment and is inapplicable.

protected action and the alleged retaliation must be, but *when plaintiffs rely on temporal proximity alone* to establish causation, the alleged retaliation must take place 'very close' in time to the protected conduct. ") (emphasis added) (citation omitted). Even so, Defendants took advantage of their first opportunity for retaliation, i.e. filing a protest as soon as The Big Board's license came up for renewal. Moreover, if temporal proximity is relevant, Commissioner Courtney set the temporal time frame when he explicitly stated that he was looking back in time at "recent years," Compl. at ¶ 11, when he chose to vote for the license protest.

Defendants also attempt to cast doubt on their retaliatory motive by passing the blame onto the Alcoholic Beverage and Licensing Committee. Defendants point to the fact that the committee was chaired by a "private individual" and Defendants' adopted all the committee's recommendations. Mot. to Dismiss at 3–4. However, these facts do not undermine Plaintiffs' claims. First, "[i]n accordance with District law, the chairmanship of each Commission committee . . . shall be appointed by the Commission." ANC6C Bylaws, Art. VIII, § 2, https://perma.cc/L26M-G6MQ (last visited Dec. 7, 2023); *accord* D.C. Code § 1–309.11(f). By virtue of an individual's appointment to the Commission, such individual is a public official. Second, "[c]ommittees . . . of a Commission shall be advisory only, except that a Commission may officially adopt committee . . . determinations. A Commission shall not delegate official decision-making authority to any committee or task force." D.C. Code § 1–309.11(f-1). Whether or not the committee took issue with the Plaintiffs is not relevant to the official action taken by Defendants. It is Defendants who made the final vote and it is Defendants' comments that evidence that the final vote was taken with a retaliatory motive.

Thus, Plaintiffs' Complaint sufficiently alleges that there exists a causal link between the exercise of a constitutional right to speak and the adverse action taken against them, and the

remaining First Amendment retaliation elements.

II. Plaintiffs' Complaint sufficiently alleges that all Defendants retaliated against Plaintiffs.

Plaintiffs' Complaint should not be dismissed as to any Defendant as it sufficiently alleges that *all* Defendants retaliated against Plaintiffs. Defendants request, "[a]t a minimum," dismissal of Plaintiffs' Complaint against "Defendants Wirt, Kelty, Adelstein, Healey, and Courtney. Mot. To Dismiss at 14. Plaintiffs named these five commissioners because they, along with Defendant Eckewiler, voted to protest Plaintiffs' liquor license. It appears that they all voted for the protest based on, as Commissioner Eckewiler asserted—"I mean just some of the things he's said publicly, we should go ahead and protest the license"—rather than for any legitimate reason.

"At the pleading stage, it is sufficient to allege facts from which a retaliatory intent on the part of the defendants reasonably may be inferred." *Safepath Sys. LLC v. New York City Dep't of Educ.*, 563 F. App' x 851, 857 (2d Cir. 2014) (cleaned up). "Indeed, Rule 9(b) of the Federal Rules of Civil Procedure provides that 'malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.'" *Gusler v. City of Long Beach*, 823 F. Supp. 2d 98, 131 (E.D.N.Y. 2011) (quoting *Soundview Assoc. v. Town of Riverhead*, 725 F.Supp.2d 320, 340 (E.D.N.Y. 2010)). Even in less deferential stages of litigation,

> "direct evidence in proving illegitimate intent is not required . . . in unconstitutional retaliation claims; circumstantial evidence will suffice." *Fowler v. Smith*, 68 F.3d 124, 127 (5th Cir. 1995). In fact, "direct evidence of improper motive is usually difficult, if not impossible, to obtain and requiring direct evidence would effectively insulate from suit public officials who deny an improper motive in cases such as this." *Id.* Thus, a circumstantial "trail of breadcrumbs" may suffice to support a jury's conclusion that a defendant harbored a retaliatory motive based on the plaintiff's protected speech. *Jordan v. Ector Cty.*, 516 F.3d 290, 301 (5th Cir. 2008).

Anderson v. Valdez, 293 F. Supp. 3d 636, 666 (S.D. Tex. 2017), *rev'd on other grounds*, 913 F.3d 472 (5th Cir. 2019).

First, all Defendants voted, as members of the ANC, to file a frivilous liquor license protest.

Further, Plaintiffs allege that "at the time that the [Defendants] voted for and filed the protest, every member of the commission knew that the[ ] grounds [for filing the protest] were false and had no basis in fact or law . . . ." Compl. At ¶ 54. Plaintiffs' further allege that all Defendants knew that the protest was "a pretext for retaliation against Plaintiffs' protected expression." *Id.* By alleging that all Defendants knew of the pretextual retaliatory motive, Plaintiffs' sufficiently alleged that all Defendants participated in this retaliatory motive by taking official action in voting for the protest. *See, e.g., Brewer v. Town of Eagle*, No. 20-CV-1820-JPS, 2023 WL 2592165, at *13 (E.D. Wis. Mar. 21, 2023) ("'[B]y showing a series of bad acts and inviting the court to infer from them that the policymaking level of government was bound to have noticed what was going on' and, therefore, 'by failing to do anything must have encouraged or at least condoned [the activity],'" the plaintiffs sufficiently alleged the policy makers shared in the retaliatory motive.) (quoting *Jackson v. Marion County*, 66 F.3d 151, 152 (7th Cir. 1995)).

Therefore, Plaintiffs' Complaint should not be dismissed as to any Defendant as it sufficiently alleges that *all* Defendants retaliated against Plaintiffs.

III. Defendants are not entitled to qualified immunity.

Defendants are not entitled to qualified immunity[7] as it is clearly established that retaliation against protected speech is unconstitutional. Whether a government agent is entitled to qualified immunity "depends upon the answers to two questions: (1) Did the [government officials'] conduct violate a constitutional or statutory right? If so, (2) was that right clearly established at the time of the violation?" *Daugherty v. Sheer*, 891 F.3d 386, 390 (D.C. Cir. 2018).

[7] The very concept of qualified immunity in the context of § 1983 claims is questionable. Recent scholarship and statements by justices of the Supreme Court suggest that the Court's qualified immunity doctrine is based on a misinterpretation of that statute. Alexander Reinert, *Qualified Immunity's Flawed Foundation*, 111 Cal. L. Rev. 201 (2023); *see also Hoggard v. Rhodes*, 141 S. Ct. 2421 (2021) (Thomas, J., respecting the denial of cert.) (suggesting the Court should reconsider the doctrine in the context of § 1983 claims).

First, Defendants' conduct of protesting Plaintiffs' liquor license in retaliation for Plaintiffs' clearly protected speech against government action is a violation of a constitutional right. Thus, the answer to the first question is yes.

As to the second question, the right to be free from retaliatory actions is clearly established. Though some courts have broadly interpreted the clearly established prong of qualified immunity, "the one-size-fits-all doctrine is [ ] an odd fit for many cases . . . ." *Hoggard*, 141 S. Ct. 2421 (2021) (Thomas, J., respecting the denial of cert.). This is especially true for cases, like here, where the government agent has time to consider whether what they are doing would violate someone's constitutional rights. *Id.*

> Whether qualified immunity can be invoked turns on the "objective legal reasonableness" of the official's acts. And reasonableness of official action, in turn, must be "assessed in light of the legal rules that were clearly established at the time [the action] was taken." This requirement—that an official loses qualified immunity only for violating clearly established law—protects officials accused of violating "*extremely abstract rights*."

Ziglar v. Abbasi, 582 U.S. 120, 151 (2017) (emphasis added) (citations omitted).

> It is not necessary, of course, that "the very action in question has previously been held unlawful." That is, an officer might lose qualified immunity even if there is no reported case "directly on point." But "in the light of preexisting law," the unlawfulness of the officer's conduct "must be apparent."

Id. (citations omitted). And, in some cases, the unlawfulness of Defendants' conduct is so obvious that it is sufficiently clear. *See Black Lives Matter D.C. v. Trump*, 544 F. Supp. 3d 15, 47, *aff'd sub nom. Buchanan v. Barr*, 71 F.4th 1003 (citing *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082–83 (10th Cir. 2015) (Gorsuch, J.) (reasoning that "some things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things

happen so rarely that a case on point is itself an unusual thing")).[8]

As Defendants acknowledge, there is no question that the First Amendment—as recognized by the Supreme Court and the courts in this circuit—prohibits First Amendment retaliation. Mot. to Dismiss at 6. Unlike "abstract rights," such as "whether a search or seizure will be deemed reasonable given the precise situation encountered," *Ziglar*, 582 U.S. at 151, "the general right to be free from retaliation for protected speech is clearly established," *Black Lives Matter D.C.*, 544 F. Supp. 3d at 47, *aff'd sub nom. Buchanan v. Barr*, 71 F.4th 1003. In the First Amendment context, "the touchstone remains whether the 'contours of the right are clear to a reasonable [official].'" *Daugherty*, 891 F.3d at 390 (quoting *Reichle v. Howards*, 566 U.S. 658, 665 (2012)). Thus, the question is whether it is clearly established that retaliation through an improper inducement or prosecution of an enforcement action violates Plaintiffs' First Amendment rights.

This Court has recognized that improperly inducing an enforcement action is a prohibited retaliatory action. *Loumiet*, 255 F. Supp. 3d at 95, *rev'd on other grounds*, 948 F.3d 376 (D.C. Cir. 2020).[9] *See also Moore v. Hartman,* 388 F.3d 871, 885 (D.C. Cir. 2004) (noting that prior precedent "established the elements of retaliatory prosecution, making plain that what the inspectors were doing—prosecuting a case they otherwise would have left alone—violated the First Amendment"), *rev'd and remanded on other grounds*, 547 U.S. 250 (2006) (abrogating D.C. Circuit precedent

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[8] Of course, government officials are always charged with knowing and following the law. Here, Mr. Eckenwiler's statements and retaliatory actions are even more egregious since he is a member of the D.C Bar, admitted in 2013, and previously served as an attorney at the Department of Justice. *Electronic Communications Privacy Act (Ecpa) (Part II): Geolocation Privacy And Surveillance: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Security, and Investigations of the H. Comm. on the Judiciary*, 113th Cong. 34 (2013) (Statement of F. James Sensenbrenner, Jr., Chairman, H. Comm. on the Judiciary) (introducing Defendant Eckenwiler).

[9] In *Loumiet*, the D.C. Circuit reversed the district court because the plaintiff attempted to enforce his rights through a *Bivens* action. The Circuit Court's refusal to extend *Bivens* does not place any doubt on the determination that inducing an enforcement action is a prohibited retaliatory action.

and clearly establishing that absence of probable cause must be pleaded for § 1983 actions brought against criminal investigators for inducing prosecution in retaliation for speech). In *Loumiet*, this Court denied a motion to dismiss where the government defendants "improperly induce[d] an enforcement action against [the] Plaintiff in reprisal for critical statements that he made against them and the [Office of the Comptroller of the Currency] more generally." *Loumiet*, 255 F. Supp. 3d at 95. This Court rejected the defendants' qualified immunity claim—relying on the above cited D.C. Circuit and Supreme Court retaliatory prosecution cases—noting the fact "[t]hat these cases did not involve an administrative proceeding is ultimately a distinction without a difference." *Id.* at 93.

> Based on these precedents, it has been clearly established, long before the [ANC] instituted the enforcement action against Plaintiff[s], that retaliatory action by [government] officials against protected speech is unconstitutional. And this general principle was further crystalized by authorities which held that retaliatory prosecutions were a particular example of this sort of unconstitutional behavior.

Id.

Likewise, the D.C. Circuit has recognized the difference between inducing an enforcement action for retaliatory purposes and other actions. In *Daugherty*, the plaintiff filed suit against FTC attorneys claiming that they "ramped up" their investigation of the plaintiff after the plaintiff criticized the FTC. *Daugherty*, 891 F.3d at 391. The D.C. Circuit noted that the FTC investigation had begun prior to the plaintiff's criticism of the FTC. *Id.* The plaintiff did not claim that the FTC had started its investigation because of his speech, but only that they ramped up the investigation. The court found that this was not a sufficient animus with the claimed injury.

In this case there had been no action against Plaintiffs' liquor license by the ANC prior to Plaintiffs' speech. It was only after Plaintiffs protected speech that ANC took retaliatory action by inducing the protest through the baseless filing. Defendant Eckenwiler's tweets confirm that he began taking issue with Plaintiffs' protected speech before ANC made any investigation (if ANC

did any investigation at all) and certainly before ANC filed the protest. Thus, consistent with *Loumiet*, at the time of Defendants' actions it was clearly established in D.C. that inducing an enforcement action in retaliation for protected speech violates the First Amendment.

Indeed, the mere threat of retaliatory action is enough to remove the protection of qualified immunity. In *Blankenship*, the public official "threat[ened] [] increased regulatory scrutiny . . . ." *Blankenship*, 471 F.3d at 529–530. There, the government official's statements suggested that the plaintiff "would receive more scrutiny from state regulators than other, similarly situated companies." *Id*. at 530. And *Blankenship* is far more applicable than Defendants' cited case of *Moore v. Garnand*, 83 F.4th 743 (9th Cir. 2023). In *Moore*, and unlike here, the party instigating the investigation did not state that he was going take governmental action based on the plaintiff's protected speech. Similar to the situation here, the Ninth Circuit has held that government action (or even the threat thereof) based on the plaintiff's speech violates a clearly established right. *See Kando v. City of Long Beach*, No. 21-56199, 2023 WL 3092304, at *1 (9th Cir. Apr. 26, 2023).

Thus, precedent from this Court and courts from other circuits hold that Defendants' actions violate a clearly established constitutional right. Therefore, Defendants are not entitled to qualified immunity.

CONCLUSION

Based on the foregoing, Defendants' motion to dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that a true and accurate copy of the foregoing Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss has been served by operation of this Court's electronic filing system this 20th day of December 2023.

/s/ David L. Rosenthal
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