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

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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
The Big Board	Plaintiffs-Appellants Eric J. Flannery, and Drane Flannery Restaurant, LLC, T/A The Big Board

SUMMARY OF THE FACTS

The parties agree that The Big Board publicly opposed, and protested, the D.C. Mayor's orders for restaurant masking and the proof-of-vaccine requirement prior to entry. There is no dispute that The Big Board protested "by posting on Twitter [and] giving media interviews." App. 12 (Compl. ¶ 84). For example, in January 2022, Plaintiff Flannery tweeted through the Big Board restaurant's Twitter account in response to the Mayor's orders that "everyone is welcome" at the Big Board restaurant. App. 12 (Compl. ¶ 30). The parties all agree that these tweets and interviews are protected speech. The district court also agreed that The Big Board "engaged in certain protected activities, including posting on social media, giving interviews, and even initiating lawsuits challenging the legality of the District's COVID regulations." App. 83–84.

The Big Board also protested by "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). ANC 6C claims these expressive actions do not constitute protected speech. ANC 6C is wrong.

The Big Board filed this lawsuit after ANC 6C retaliated against The Big Board for its protected speech by filing a protest of The Big Board's liquor license, asserting false claims about The Big Board's operations. App. 19–20 (Compl. ¶ 89).

SUMMARY OF THE ARGUMENT

ANC 6C incorrectly claims that The Big Board has not met the pleading standards to state a claim. To the contrary, The Big Board's Complaint complies with Rule 8 of the Federal Rules of Civil Procedure to set forth a plausible claim of First Amendment retaliation under the standards of *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009), *Bell A. Corp. v. Twombly*, 550 U.S. 544, 554–55 (2007), and *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 279 (1977).

There is no argument that The Big Board's tweets and filing a lawsuit against Washington, D.C., challenging the Mayor's COVID mandates are protected speech; ANC 6C's retaliatory liquor license protest is not. Likewise, and contrary to ANC 6C's assertions, The Big Board's refusal to follow the Mayor's orders that restaurants deny entry to non-vaccinated persons and force customers to wear masks is expressive conduct protected by the First Amendment. Applying *Texas v.*

Johnson, 491 U.S. 397, 404 (1989), expressive conduct is protected when (1) the actor intends to convey a message and (2) observers are likely to understand that the actor is conveying a message.

To satisfy *Johnson*, not all message recipients must interpret the message to mean the same thing. The First Amendment does not require universal comprehension. As the Supreme Court held in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995), expression need not communicate a narrow, uniformly interpreted message to warrant protection. *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"). And at least one person, ANC 6C Commissioner Eckenwiler, recognized that The Big Board was sending a message when he referred to The Big Board's conduct as "anti-vaxxer dog-whistling." App. 12–13 (Compl. ¶ 35).

The Complaint plausibly alleges causation and retaliatory motive under *Mt. Healthy*, 429 U.S. at 286–87, and *Nieves v. Bartlett*, 587 U.S.

391, 398 (2019). Direct evidence of retaliatory intent includes statements from ANC officials suggesting that The Big Board's license protest was prompted by the owner's public comments. The record further reflects pretextual justifications, inconsistent explanations, and missing meeting recordings, all of which support an inference of retaliatory animus. The temporal proximity between The Big Board's protected speech and ANC 6C's adverse action further reinforces the reasonableness of this inference.

Further, the district court should have denied ANC 6C's motion to dismiss to allow discovery because the Complaint's factual allegations go beyond conclusory assertions. Under *Iqbal*, 556 U.S. at 678, discovery is permitted unless a complaint offers nothing but labels and conclusions. Here, the Complaint provides substantial factual detail that, when proven, entitles The Big Board to relief.

ANC 6C claims that the Complaint does not plead that all ANC 6C members knew of The Big Board's protected statements and conduct. That is both not required and, in any event, not true. *See* App. 9, 15 (Compl. ¶¶ 12, 54). Further, ANC 6C spoliated the voice recordings that would have proven their individual knowledge. App. 14 (Compl. ¶ 45).

The spoliation of ANC meeting recordings supports adverse inferences regarding officials' knowledge and motives, making dismissal at the pleading stage even more inappropriate.

Finally, ANC 6C is not entitled to qualified immunity. The right to be free from government retaliation for protected speech was clearly established at the time of the events, as recognized in *Black Lives Matter D.C. v. Trump*, 544 F. Supp. 3d 15, 47 (D.D.C. 2021), *aff'd sub nom. Buchanan v. Barr*, 71 F.4th 1003 (D.C. Cir. 2023). In fact, "the right to be free from government [retaliation] for the peaceful exercise of protected speech is so fundamental to our system of ordered liberty that it is 'beyond debate.'" *Id.* The government may not punish or deter citizens for engaging in expressive defiance or public criticism of official action. *E.g.*, *Media Matters for Am. v. Paxton*, 138 F.4th 563, 580 (D.C. Cir. 2025) (quoting *Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 474 (2022)) ("[A]s a general matter, the First Amendment prohibits government officials from subjecting individuals to retaliatory actions after the fact for having engaged in protected speech.").

By retaliating against The Big Board's protest activity through a liquor license challenge, ANC 6C violated a right that was clearly

established "beyond debate." *Black Lives Matter D.C.*, 544 F. Supp. 3d at 47. The Complaint thus states a valid claim for First Amendment retaliation. Accordingly, this Court should reverse the district court's dismissal and remand for discovery and adjudication on the merits.

ARGUMENT

As an initial matter, ANC 6C fundamentally mischaracterizes what is necessary to state a claim under the notice pleading standard. *Iqbal,* 556 U.S. at 677–78. And ANC 6C claims that The Big Board's recitation of facts does not satisfy *Iqbal*. Again, ANC 6C is wrong.

In accordance with Rule 8, the Complaint included "a short and plain statement of the claim showing that [The Big Board] is entitled to relief." Fed. R. Civ. P. 8. "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." *Iqbal*, 556 U.S. at 678. "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)).

In sum, The Big Board alleged that: (1) it engaged in speech and expressive conduct protected by the First Amendment, (2) ANC 6C knew about The Big Board's speech and expressive conduct and disapproved of it, (3) ANC 6C took adverse action because it disapproved of The Big Board's message, and (4) this harmed The Big Board. Each of these assertions is supported by factual allegations, showing that it is more than "plausible" that ANC 6C acted unlawfully. *Id.* at 679. Thus, the Complaint satisfies Rule 8 and clears the low bar to avoid dismissal.

I. Eric Flannery's tweets are protected speech; Defendant Eckenwiler's retaliatory actions are not.

ANC 6C ignores the three most important aspects of this case. First, Eric Flannery engaged in protected oral and written speech. App. 9, 15 (Compl. ¶¶ 3, 12, 54). Second, Defendant Eckenwiler's official statement, "I mean just some of the things he's said publicly, we should go ahead and protest the license," App. 13 (Compl. ¶ 43), is not protected. Third, ANC 6C's effort to strip The Big Board of its liquor license via official protest was baseless. App. 15–17 (Compl. ¶¶ 54, 65, 75, 77). Very simply, "the 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). Further, ANC 6C suggestion that the government can take action to enforce the law, Appellee's brief at 19–20, does not apply here because ANC 6C had no authority to enforce D.C.'s COVID mandates. *See* Appellants' Br. at 24–25. Indeed, the D.C. Department of Health did enforce those mandates, and the resulting fines were rejected by another court. *D.C. Dep't of Health v. Drane Flannery Restaurant LLC/Big Board (The)*, D.C. OAH, Case No. 2022-DOH-C21046 at 12–13 (NOI No: C21046).

Mr. Flannery's speech, followed by Defendant Eckenwiler's demands to protest The Big Board's liquor license based on that speech, and the actual protest, are enough to resolve this case. The court need not address the question of whether Mr. Flannery's expressive conduct is protected speech to find for The Big Board.

Nevertheless, the question of whether The Big Board's non-written or non-oral conduct was protected expressive conduct is important, but not key to reversing the lower court. This is because the *Mt Healthy* but-for test requires that a plaintiff plead that the protected speech only be a

"substantial or motivating factor" for defendant's illegal retaliation. *Mt. Healthy*, 429 U.S. at 287. ANC 6C has no legitimate answer.

II. Contrary to ANC 6C's assertions, The Big Board's expressive conduct is protected by the First Amendment.

ANC 6C is mistaken in its analysis of the second part of the *Johnson* test—the likelihood that viewers will understand that the person speaking or acting is expressing a message. *Johnson*, 491 U.S. at 404. ANC 6C does not dispute that The Big Board intended to convey a message with its open defiance of the Mayor's restaurant masking and vaccination card checking mandates. ANC 6C wrongly insists that *all* observers must understand not only that a message is being conveyed, but also the *exact* message intended. Appellee Br. at 25. That is not the law.

First, ANC 6C ignores *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, which teaches that the recipient of the message need not understand the particular message, but only that a message is being conveyed. *See* Appellants' Br. at 19–20; *see also Masterpiece Cakeshop, LTD*, 584 U.S. at 657 (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"). The fact that at least one person, Defendant Eckenwiler, understood that The Big Board intended to convey a message satisfies the *Johnson* test. *See Blanford v. Dunleavy*, 566 F. Supp. 3d 969, 990 (D. Alaska 2021) (finding that third parties' *actual* understanding that plaintiff was protesting helped satisfy the second *Johnson* factor). Second, ANC 6C ignores that conduct can receive First Amendment protection for some purposes, but not others. Third, ANC 6C does not rebut the prevalent understanding in 2020 that not wearing a mask—and defying a law that restaurants require patrons to be masked—is a protest. Appellants' Br. at 20–22.

A. The Big Board pled that third parties understood that The Big Board's actions communicated a message.

Contrary to ANC 6C's assertions, The Big Board pled that even ANC 6C recognized The Big Board's actions as a form of protest. App. 19–20 (Compl. ¶ 89). Defendant Eckenwiler in particular recognized that The Big Board was conveying a message, characterizing The Big Board's actions of "flout[ing] the vaccine mandate" to be "anti-vaxxer dog-whistling." App. 12–13 (Compl. ¶ 35).

Dog whistling is "an expression or statement that has a secondary meaning intended to be understood only by a particular group of people." *Dog Whistle*, Mirriam-Webster, perma.cc/WZ6N-KGJY (last visited Sept. 26, 2025). Defendant Eckenwiler referred to The Big Board's conduct as "dog-whistling" in the course of criticizing The Big Board's decision "to flout the vaccine mandate taking effect on Jan. 15 at DC bars & restaurants." App. 12–13 (Compl. ¶ 35) (emphasis added). The fact that Defendant Eckenwiler *knew* that The Big Board was protesting government action contradicts ANC 6C's argument that The Big Board's pleading fails to satisfy the second *Johnson* factor.

A court must also consider the context of the actions at the time of the events. The Big Board's actions were its "refusal to obey [the mayor's] orders [it] understood to be unlawful," App. 8, 18–19 (Compl. ¶¶ 2, 84), demonstrated by The Big Board's allowing entry by all patrons without proof of vaccination and by its refusal to enforce the Mayor's oppressive masking requirements. While many thought these mandates were reasonable, Mr. Flannery disagreed. He manifested his disagreement via conduct, tweets, refusal to follow the mayor's orders, and other methods of communication. At the time of The Big Board's refusal to enforce the

mandates, third parties viewed similar actions by others as expressing a political position. *See, e.g.*, Jessica Luther Rummel, *Removal of Denton County Sheriff Tracy Murphree*, Change.org, perma.cc/EUC8-5V8H (last visited Oct. 16, 2025) (petition to remove the Denton County Sheriff after his refusal to enforce the Texas Governor's mask mandates, noting that the sheriff's "statements and actions" express the sheriff's view "that if a Sheriff doesn't agree with a state law, he simply doesn't have to enforce it"). Decisions surrounding masking were perhaps the quintessential political protest during the pandemic. *See* Appellants' Br. at 20–21.

Defendant Eckenwiler understood what was going on—The Big Board's actions sent a message. And expressive conduct need not be understood by all. *See Hurley*, 515 U.S. at 569. Importantly, Defendant Eckenwiler not only understood that The Big Board was conveying a message, but he also acted upon it by initiating ANC 6C's pretextual liquor license protest against The Big Board.

B. ANC 6C's cited cases for the proposition that going maskless is not protected conduct are irrelevant and contra the facts here

ANC 6C tries to distract the Court with cases regarding individuals protesting by not wearing masks. That is not the issue here. ANC 6C's

brief incorrectly focuses not on the conduct of The Big Board *itself*, but on the conduct of The Big Board's patrons. Whether The Big Board's conduct is expressive conduct for First Amendment purposes does not depend on its customers' conduct. Yet the customers' conduct *is* evidence that The Big Board's conduct was expressive in nature. To the extent The Big Board's patrons' masklessness is relevant as a protest, the culture *at the time*—refusing to wear a mask—was generally considered a protest. Appellants' Br. at 20–21.

ANC 6C does not dispute The Big Board's multiple media and other references explaining that "the act of not wearing a mask was well understood at the time to be a form of protest." Appellants' Br. at 21. To that end, CNN, the New York Times, and others both recognized and denigrated such protests. Appellants' Br. at 20–21; *see also* Wilson Wong, *Hundreds Protest Closing of Staten Island Bar that Refused Covid-19 Measures*, NBC News (Dec. 3, 2020), perma.cc/T6E6-EMJ7; *Second In-N-Out Burger Restaurant in California Shut for Ignoring Covid Rules*, The Guardian (Oct. 27, 2021), perma.cc/M3QK-LCXB (describing restaurants that were punished for protesting COVID emergency orders by ignoring those orders).

Moreover, refusing to wear a mask during a pandemic *is* a historically recognized form of protest, starting long before COVID, and hence protected conduct in the context of a retaliation claim. Over 100 years before COVID, the Spanish flu ripped across the world. Steven Taylor & Gordon J. G. Asmundson, *Negative Attitudes about Facemasks during the COVID-19 Pandemic: The Dual Importance of Perceived Ineffectiveness and Psychological Reactance*, PLOS One 2, (Feb. 17, 2021), perma.cc/3TJX-2JP6. Even then, "[t]he Anti-Mask League was formed, which was a short-lived protest movement in which the proponents argued that masks were ineffective, inconvenient, and that mandatory mask wearing violated their civil liberties." *Id.* Likewise, "[a] similar situation has arisen during the COVID-19 pandemic." *Id.*

Further, unlike ANC 6C's cited cases, The Big Board alleges that at least one observer, Defendant Eckenwiler, knew that The Big Board was engaging in protest. ANC 6C's cases do not contain that crucial fact—that observers actually perceived the actor's conduct as a protest.

Because a court must accept the plaintiff's factual allegations as true at this stage, ANC 6C's cases are inapposite. Ultimately, in this case, individual customers' protestations do not matter. The Big Board's

speech and expressive conduct do.

III. The Big Board's Complaint satisfies its burden under the *Mt. Healthy* but-for test.

A. *Mt. Healthy* requires only that the protected speech be a substantial or motivating factor—not the only factor.

ANC 6C all but ignore Defendant Eckenwiler's statements—the ones that count: "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"; followed by his later urging for retaliation: "I mean just some of the things he's said publicly, we should go ahead and protest the license." App. 12–13 (Compl. ¶¶ 35, 43).

ANC 6C does not and cannot rebut the pleading standard in a First Amendment retaliation case: The plaintiff must only show that the protected speech was *a* cause, not *the only* cause. *See* Appellants' Br. at 30–32. Nor does it contest that in such cases there can be both protected and unprotected speech. *See* Appellants' Br. at 30–32. *Mt. Healthy* and its progeny make it clear that "[a]t 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." *Gonzalez v. Trevino*, 602 U.S. 653, 662–63 (2024)

(Alito, J., concurring) (emphasis added). Yet ANC 6C seems to adopt the district court's backwards view of First Amendment retaliation law that if the defendants' retaliation was based in part on unprotected speech, it does not count even if there was also protected conduct. *See* Appellees' Br. at 30–32; App. 82. Even if the retaliation must be due to only protected speech, Defendant Eckenwiler's statement (agreed to sub silencio by the other committee members) that they must protest Mr. Flannery's license "just [because of] some of the things he's said publicly," satisfies this element by establishing that retaliation was ANC 6C'S true motivation.[1]

ANC 6C next misstates that the Complaint pleads that ANC 6C's liquor license protest was based on the statutorily allowable grounds for a protest. Appellees' Br. at 30. False. The plain truth is that The Big Board properly pled that the stated grounds for the protest were pretextual, and that, "upon information and belief," all the

[1] ANC 6C claims that The Big Board only alleged retaliation based on "bad behavior." Appellees' Br. at 29. That is incorrect. *See* App. 83–84 (district court noting that ANC 6C could not deny that The Big Board "engaged in certain protected activities, including posting on social media, giving interviews, and even initiating lawsuits challenging the legality of the District's COVID regulations.").

commissioners knew the stated grounds were false. App. 9–10 (Compl. ¶¶ 10–13). That is not conclusory; it is proper pleading when discovery is necessary to prove the plausible allegation. Courts have routinely held allegations on information and belief "to be permissible, even after the *Twombly* and *Iqbal* decisions." 5 Wright & Miller, Fed. Prac. & Proc. Civ. § 1224 (4th ed. 2024) (collecting cases).

ANC 6C also asserts that courts dismiss First Amendment retaliation claims when the complaint raises an alternative explanation for the defendants' actions "and then offer nothing to rebut" it. Appellees' Br. at 31 (citing *Joyner v. Morrison & Foerster LLP*, 140 F.4th 523, 534 (D.C. Cir. 2025)). ANC 6C claims that its pretextual reasons qualify as such an alternate explanation. If so, the Complaint fully rebuts that "explanation," alleging that (1) it was pretextual, App. 15 (Compl. ¶ 54); (2) ANC 6C's proposed settlement agreement addressed none of ANC 6C's claimed problems, App. 16 (Compl. ¶ 65); (3) Defendant Eckenwiler refused to even discuss a resolution at the mediation, App. 17 (Compl. ¶ 75); (4) the minutes of ANC 6C's meeting were spoliated, App. 14 (Compl. ¶ 45); and (5) the Alcohol Board's investigator found absolutely no evidence to support ANC 6C's protest, App. 17 (Compl. ¶ 77).

Moreover, it is hardly surprising that ANC 6C tries to justify its retaliatory behavior post hoc. If courts dismissed complaints based on the defendants' assertions that their actions were proper, no First Amendment retaliation claims would ever survive a motion to dismiss.

Lastly, *U.S. v. O'Brien*, 391 U.S. 367 (1968), is no shield for ANC 6C. While "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms," no such interests exist for ANC 6C. *Id.* at 376. Government regulation is only justified if (1) "it is within the constitutional power of the Government;" (2) "it furthers an important or substantial governmental interest;" (3) "the governmental interest is unrelated to the suppression of free expression;" and (4) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377. ANC 6C's retaliation fails this test.

ANC 6C did not have the authority to punish The Big Board for its violations of the mayor's orders. There was no important, non-retaliatory interest furthered by ANC 6C's protest of The Big Board's liquor license, evidenced by ANC 6C's lack of authority. Further, ANC 6C's conduct

related to mediation shows the protest was unrelated to the stated purposes or any post hoc articulated health concerns. And attempting to prevent The Big Board from getting its license was, in a word, excessive.

B. The Big Board met the causal burden; ANC 6C did not.

ANC 6C properly cites *Nieves v. Bartlett*, 587 U.S. 391, for the proposition that to succeed in a retaliation case, "a plaintiff must establish a causal connection between the government defendant's retaliatory animus and the plaintiff's subsequent injury." Appellees' Br. 27–28 (citation omitted). The *Nieves* Court also explained that, at least in some cases, the Court has "'simply taken the evidence of the motive and the discharge as sufficient for a circumstantial demonstration that the one caused the other,' shifting the burden to the defendant to show he would have taken the challenged action even without the impermissible motive." *Nieves,* 587 U.S. at 399 (quoting *Hartman v. Moore*, 547 U.S. 250, 260 (2006)). The Big Board agrees with ANC 6C that this Court should apply the *Nieves* standard, which builds on the *Mt. Healthy* standard, here.

The Big Board alleged facts at least sufficient to establish "circumstantial demonstration" that ANC 6C's objections to Mr.

Flannery's protected speech caused ANC 6C's vote to protest The Big Board's liquor license. This shifted the burden to ANC 6C to show that ANC 6C would have voted to file the protest "even without the impermissible motive." *Id.* There is nothing in the pleadings to support that ANC 6C would have acted without the impermissible motive. And that at least raises a fact question relevant for discovery. Indeed, ANC 6C would have to present facts to support that it would have taken the same action even without the impermissible motive. Such a presentation can only be given at the summary judgment stage.

ANC 6C claims that one could infer such an alternative motive—namely that the pretextual reasons for the protest were the real motives. The pleadings do not support ANC 6C's claim, and any suggestion that those reasons actually motivated ANC 6C are speculative and refuted by the Complaint's allegations. All allegations point to ANC 6C's justification being pretextual.

First, ANC 6C's proposed settlement was completely unrelated to the group's claimed grievances with The Big Board. App. 16 (Compl. ¶ 65). Not only does that show how ANC 6C acted in bad faith from the start, but it confirms that the liquor license protest was never genuine. A

legitimate settlement proposal following a protest should have requested curing the supposed problems. Instead, ANC 6C's settlement proposal addressed none of the problems alleged in the protest; rather it demanded that The Big Board run its business under the rules of a different license. App. 16–17 (Compl. ¶¶ 66–69).

Second, ANC 6C acknowledged that the Alcohol Board "concluded that no violations 'were observed during [its investigation].'" Appellees' Br. 10 (quoting App. 17 (Compl. ¶ 79)). This additional factual allegation supports The Big Board's motive and causation allegations—not ANC 6C's suggestion of a legitimate motive.

Third, the temporal proximity of events also supports causation. "For purposes of establishing a prima facie case of retaliation, temporal proximity can indeed support an inference of causation, but only where the two events are very close in time." *Hamilton v. Geithner*, 666 F.3d 1344, 1357–59 (D.C. Cir. 2012) (finding that two months between plaintiff's protected conduct and defendant's retaliation was close enough to draw an inference of causation). In this case, the timing speaks for itself. Before The Big Board filed this lawsuit, it filed another lawsuit challenging the constitutionality of the emergency orders—part of its

protest. App. 18–19 (Compl. ¶ 84). That lawsuit was filed October 13, 2022. *Flannery v. D.C. Dept. of Health*, No. CV 22-3108 (ABJ), 2023 WL 8716812, at *1 (D.D.C. Dec. 18, 2023), *aff'd*, No. 24-7005, 2025 WL 1093106 (D.C. Cir. Apr. 8, 2025).

Less than a month later, ANC 6C filed its protest, App. 14 (Compl. ¶ 49), which is well within the *Hamilton* window. *See* 666 F.3d at 1358 (finding that temporal proximity is a fact-specific inquiry). And "courts should consider later protected activity in determining whether evidence of temporal proximity satisfies the causation element." *Id.* Thus, the temporal proximity of events supports an inference of causation.

ANC 6C protested The Big Board at the earliest possible time because it had to wait for The Big Board to apply to renew its license before filing a protest. App. 14 (Compl. ¶¶ 46–47). Because The Big Board did not apply to renew its license until October 21, 2022, ANC 6C could not protest any sooner than when it did. Otherwise, it would have acted even closer to when The Big Board and Mr. Flannery sent out tweets, did media interviews, and protested the executive orders. And Defendant Eckwenwiler's tweets during the period between The Big Board's protected activities and ANC 6C's protest evidence a preexisting animus

toward The Big Board. At the very least, it is sufficient to get past a motion to dismiss and into discovery.

IV. The court should have denied the motion to dismiss and allowed discovery.

ANC 6C would foist upon The Big Board a requirement that the Complaint state every fact with particularity. But such particularity is not required for the allegations in the Big Board's Complaint. Rule 8 requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).[2]

ANC 6C cites *Iqbal*, 556 U.S. at 678–79, for the proposition that "the doors of discovery" are closed to a litigant "armed with nothing but conclusions." Appellees' Br. at 32. But ANC 6C omitted the most relevant part of the quote: "*Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era*, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 556 U.S. at 678–79 (emphasis added). The Complaint alleges facts and reasonable inferences, thus satisfying *Iqbal*. *Baird v. Gotbaum*, 662 F.3d 1246, 1248 (D.C. Cir. 2011) ("[T]he allegations of

[2] Pleading with particularity is only required for complaints alleging fraud. *See* Fed. R. Civ. P. 9(b).

plaintiff's complaint are presumed true, and all reasonable factual inferences must be drawn in [plaintiff's] favor.") The Court should reverse the dismissal order and remand this case to proceed with discovery.

V. The Complaint adequately pleads that all the Defendants knew of The Big Board's words and expressive actions.

ANC 6C would have this Court infer that only Defendant Eckenwiler knew of Flannery's activity on social media. Appellees' Br. at 33–34. But the proper inference, based on Flannery's knowledge and his statements to the other ANC 6C members, is that they all knew. The Big Board's allegations that they all knew is not a legal conclusion, it is a reasonable inference from the alleged facts and based on ANC 6C's spoliation of evidence that would prove that they all knew.

First, ANC 6C does not contest that Defendant Eckenwiler knew of The Big Board's speech and expressive actions—he did. Appellees' Br. at 34–35. Nor do they contest that all the other Defendants were present at the meeting when Defendant Eckenwiler stated that ANC 6C should protest The Big Board's liquor license *because* of "some of the things [Flannery] said publicly." App. 10–11, 13 (Compl. ¶¶ 18–23, 40–43). Nor do they contest that the Complaint further alleges that none of the other

voting members—the other Defendants—disagreed with or challenged that statement. App. 13–14 (Compl. ¶¶ 44–48). It is a "reasonable factual inference" that the other Defendants were also aware of Defendant Eckenwiler's "public" statements. The fact that all the other commissioners followed Defendant Eckenwiler's lead in voting to protest the liquor license strengthens that inference. App. 14 (Compl. ¶¶ 49–50). Not surprisingly, the Commission then appointed Defendant Eckenwiler as representative for ANC 6C in the protest. App. 14 (Compl. ¶ 52)

Second, any ambiguity or lack of information about what happened in the November 7 meeting and resulting information about the commissioner's knowledge must be construed against—not for—the commissioners because the Complaint alleges that they apparently destroyed the damning meeting recordings, which might have conclusively proven their knowledge. The November 7, 2022, meeting should have been recorded, just as other ANC 6C meetings were, but it was not or else the recording was destroyed. App. 14 (Compl. ¶ 45).

Federal courts recognize and impose sanctions for spoliation of evidence. Indeed, courts "seem united in their belief that spoliation of evidence deserves sanctions." 22 Wright & Miller, Fed. Prac. & Proc.

Evid. § 5178 (2d ed. 2025). A typical sanction is the imposition of an adverse inference as to what the spoliated evidence would have shown. "To justify the issuance of an adverse inference instruction, the spoliation of evidence need not be purposeful . . . negligent spoliation may suffice." *Zhi Chen v. D.C.*, 839 F. Supp. 2d 7, 13 (D.D.C. 2011); *accord Gerlich v. U.S. Dept. of J.*, 711 F.3d 161, 173 (D.C. Cir. 2013). To be sure, adverse instructions are typically imposed after discovery and to a jury. But here, ANC 6C attempts to use the absence of the spoliated evidence to its advantage—demanding that The Big Board show at the pleading stage what occurred at the November 7 meeting, which conveniently was not recorded, or the recording destroyed, even though the Webex notice said it was being recorded. App. 14 (Compl. ¶ 45). Given the spoliation of the recording, it is "reasonable" to infer that the discussion at the meeting would have shown that the other commissioners knew which of Mr. Flannery's public comments Defendant Eckenwiler referred to when he recommended contesting The Big Board's liquor license based on those statements.

VI. The Big Board addressed Defendant Eckenwiler's tweets and did not waive those arguments.

Finally, ANC 6C attempts to preclude this Court from considering

all the facts by arguing that The Big Board waived its argument related to Defendant Eckenwiler's tweets. Appellees' Br. at 39. This is a confusing claim. The Big Board has not claimed that Defendant Eckenwiler's tweets were a form of retaliation; rather, that his tweets evidence Defendant Eckenwiler urged his colleagues to protest The Big Board's liquor license out of spite and in retaliation for Mr. Flannery's speech. The Big Board has explained this multiple times. *See* App. 53–56 (Br. in Op. to MTD, pp. 6, 8, 9, 17); Appellants' Br. at 5, 22, 37. And courts consider the defendant's expression of opposition to the protected speech "[i]n assessing whether this causal element [in a retaliation claim] is met." *Media Matters for Am. v. FTC*, No. CV 25-1959 (SLS), 2025 WL 2378009, at *19 (D.D.C. Aug. 15, 2025). Defendant Eckenwiler's tweets and public statements are particularly strong evidence showing his expression of opposition to Mr. Flannery's protected speech. And being included in the Complaint, the tweets and public statements should be considered on appeal. App. 12–13 (Compl. ¶ 34–35, 43).

VII. ANC 6C members are not entitled to qualified immunity because The Big Board's First Amendment right was clearly established.

If this Court considers ANC 6C's qualified immunity at all, it should

simply remand that issue to the district court. While parties have briefed the subject, the district court, being closest to and most familiar with this case, is best situated to address qualified immunity in the first instance. In any event, ANC 6C is not entitled to qualified immunity.

ANC 6C ignores that the Complaint alleges at least three separate instances of First Amendment-protected speech and expressive conduct. Each of which alone gets over the qualified immunity hump. First is The Big Board's lawsuit against the D.C. Health Board. App. 18–19 (Compl. ¶ 84). The Supreme Court has affirmed that the Petition Clause of the First Amendment "protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes." *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 387 (2011); *see also id.* at 382 ("Petitions are a form of expression, and [individuals] who invoke the Petition Clause in most cases could invoke as well the Speech Clause of the First Amendment.").

Second, Mr. Flannery's tweets and media interviews that expressed disapproval for the Mayor and her emergency orders, App. 9, 18–19 (Compl. ¶¶ 3, 84), "fall[] easily within the First Amendment's muscular protection for 'criticism of government and public officials . . . .'" *Jenner*

& Block LLP v. U.S. Dept. of J., 784 F. Supp. 3d 76, 94 (D.D.C. 2025) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964)).

And third, the expressive conduct of disobeying the emergency orders. App. 18–19 (Compl. ¶ 84).

"No doubt, 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. "The appropriately tailored question is whether a peaceful protestor has the right to be free from government violence in retaliation for the message of their protest." *Id.* While *Black Lives Matter D.C.* involved police violence against a protester, it applies equally to all government retaliation.

"[T]he right to be free from government [retaliation] for the peaceful exercise of protected speech is so fundamental to our system of ordered liberty that it is 'beyond debate.'" *Id.* (citing *D.C. v. Wesby*, 583 U.S. 48, 63 (2018)). Although The Big Board did not take to the streets to protest the emergency orders, it peacefully protested in its own way by disobeying the orders.

To compare this to other First Amendment retaliation contexts, this Court "has expressly recognized that there is a First Amendment right

not to be arrested in retaliation for one's speech where there is otherwise no probable cause for the arrest." *Patterson v. U.S.*, 999 F. Supp. 2d 300, 310 (D.D.C. 2013) (Jackson, J.) (citing *Dellums v. Powell*, 566 F.2d 167, 195 (D.C. Cir. 1977)); *accord Nieves*, 587 U.S. 391. The law does not afford qualified immunity to an officer who punishes, without authority, someone whose speech the officer dislikes. Similarly, the law does not afford qualified immunity to any ANC 6C member who punishes, without authority, The Big Board because the member dislikes The Big Board's speech.

CONCLUSION

Because (1) The Big Board's speech and conduct are constitutionally protected, (2) The Big Board's Complaint adequately pleads that its protected activity was a substantial or motivating factor for ANC 6C's protest, (3) ANC 6C has shown nothing in the pleading that shows that it would have protested without the improper motive, and (4) ANC 6C is not entitled to qualified immunity, this Court should reverse the district court's opinion and order and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7)(B) because it contains 6,166 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.

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this brief was served on all counsel of record via the Court's electronic filing system on November 3, 2025.

Dated: November 3, 2025

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