United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 29, 2026 Decided September 4, 2026

No. 24-7168

ERIC J. FLANNERY AND DRANE FLANNERY RESTAURANT, LLC, TRADING AS BIG BOARD,
APPELLANTS

v.

MARK ECKENWILER, IN HIS PERSONAL CAPACITY, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:23-cv-02804)

David L. Rosenthal argued the cause for appellants. With him on the briefs were *Robert Alt*, *David C. Tryon*, and *Patrick Strawbridge*.

Chris E. Mendez, Assistant Attorney General, Office of the Attorney General for the District of Columbia, argued the cause for appellees. With him on the brief were *Brian L. Schwalb*, Attorney General, *Caroline S. Van Zile*, Deputy Solicitor General, *Ashwin P. Phatak*, Principal Deputy Solicitor General, and *Thais-Lyn Trayer*, Deputy Solicitor General. *Stacy Anderson*, Assistant Attorney General, entered an appearance.

Before: PILLARD, CHILDS, and GARCIA, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GARCIA.

GARCIA, *Circuit Judge*: Eric Flannery owns and operates The Big Board, a Washington, D.C. bar and restaurant. When the District imposed masking and proof-of-vaccination requirements due to the COVID-19 pandemic, Flannery publicly criticized those policies and The Big Board refused to comply with them. Months after the District lifted the requirements, Advisory Neighborhood Commission 6C (ANC 6C) formally opposed renewal of The Big Board's liquor license. Flannery and The Big Board sued, alleging that the members of the Commission violated the First Amendment by opposing the renewal in retaliation for Flannery's public criticism and his restaurant's noncompliance with the District's policies.

The district court dismissed the complaint, concluding that The Big Board's refusal to comply with the orders was not expressive conduct protected by the First Amendment and that the complaint failed to plausibly allege that Flannery's protected speech caused the Commission's protest. We agree with the first conclusion but not the second. We therefore reverse and remand.

I

Because we are addressing the grant of a motion to dismiss, "[w]e recount the facts as presented in the complaint, accepting them as true." *Doe 1 v. Apple Inc.*, 96 F.4th 403, 406 (D.C. Cir. 2024).

In late 2021, amid a surge in COVID-19 cases, District of Columbia Mayor Muriel Bowser issued emergency orders requiring indoor masking and proof of vaccination at restaurants and bars. The masking requirement took effect on December 21, 2021, and applied whenever patrons were "not actively eating or drinking." Mayor's Order 2021-147, 68

D.C. Reg. 13,954, 13,957 (Dec. 24, 2021). The proof-of-vaccination requirement took effect on January 15, 2022. Mayor's Order 2021-148, 68 D.C. Reg. 14,222, 14,224, 14,227 (Dec. 31, 2021).

Flannery publicly opposed the orders and The Big Board did not comply with them. Two days before the proof-of-vaccination requirement took effect, he posted on one of The Big Board's social media accounts that "everyone is welcome" at his establishment. Compl. ¶ 30. He also criticized the District's policies in other social-media posts and "media interviews." Compl. ¶¶ 33, 84. Flannery also filed an earlier, unsuccessful lawsuit against the District challenging the emergency COVID-19 policies' enforcement as contrary to due process and in excess of the District's authority under the D.C. Home Rule Act. Compl. ¶ 84; *see Flannery v. D.C. Dep't of Health*, 2023 WL 8716812, at *1 (D.D.C. Dec. 18, 2023).[1]

In February 2022, the District suspended The Big Board's operating and liquor licenses for alleged violations of the orders, forcing the restaurant to close temporarily. After the District lifted the proof-of-vaccination requirement effective February 15 and the masking requirement effective March 1, The Big Board paid a license restoration fee and reopened.

Flannery's criticism and The Big Board's noncompliance drew the attention of Mark Eckenwiler, a commissioner on ANC 6C, a local government body which represents the area encompassing The Big Board. Eckenwiler posted a series of messages on social media criticizing The Big Board and Flannery's public statements. In one, he shared screenshots of The Big Board's posts and wrote: "When you've decided to flout the vaccine mandate taking effect on Jan. 15 at DC bars

[1] The district court dismissed that complaint, *Flannery*, 2023 WL 8716812, at *8, and we affirmed, *Flannery v. D.C. Dep't of Health*, 2025 WL 1093106, at *1 (D.C. Cir. Apr. 8, 2025) (per curiam).

& restaurants, but don't quite have the stones to say so & instead resort to anti-vaxxer dog-whistling." Compl. ¶ 35. In another, he posted a photograph of the District Health Department's closure notice on The Big Board and wrote, "Play stupid games, win regulatory prizes!" *Id*.

In October 2022, several months after the policies expired, The Big Board applied to renew its liquor license. When an establishment seeks to renew its license, the Alcohol Board must notify any ANC within 600 feet of the establishment. *See* D.C. Code § 25-421(a)(4).[2] That ANC may then file a formal opposition—known as a "protest"—to the renewal. *See id*. § 25-601(a)(4). Although the Alcohol Board remains the final licensing authority, *see id.* § 25-201(c)(3), District law requires agencies to give ANC recommendations "great weight," *id*. § 1-309.10(d)(3)(A). An ANC protest also makes the renewal application a contested matter, triggering a process that includes mediation and, if the dispute remains unresolved, a hearing before the Board. *See id*. §§ 25-432(b)(2), 25-444(a), 25-445 to -446.

After receiving notice of The Big Board's liquor-license renewal application, ANC 6C began considering whether to protest the renewal. On November 7, 2022, ANC 6C's Alcoholic Beverage Licensing Committee held a public meeting where it reviewed and discussed The Big Board's renewal application. Flannery attended that meeting. During

---

[2] At the time relevant to this case, the District's Alcoholic Beverage Control Board received and evaluated license-renewal applications with the Alcoholic Beverage Regulation Administration's assistance. In 2023, those entities were renamed and reorganized as the Alcoholic Beverage and Cannabis Board and the Alcoholic Beverage and Cannabis Administration, respectively. *See* Medical Cannabis Amendment Act of 2022, § 5, 70 D.C. Reg. 1,582, 1,617 (Feb. 3, 2023). Because the distinction is immaterial here, we use "Alcohol Board" to refer to the District's alcohol-licensing authorities.

the discussion of The Big Board's application, Eckenwiler stated, "I mean just some of the things [Flannery has] said publicly, we should go ahead and protest the license." Compl. ¶ 43. No other committee member "disagreed or challenged that statement." *Id.* ¶ 44.

Two days later, the full ANC 6C met to consider whether to protest The Big Board's liquor-license renewal. At some point, Commissioner Drew Courtney urged the Commission to do so because of The Big Board's "bad behavior in recent years." *Id*. ¶ 11. ANC 6C then voted to file a protest. The written protest designated Eckenwiler as ANC 6C's representative and cited three grounds: "negative effect on real property values"; "negative impact on the peace, order, and quiet"; and "negative effect on residential parking needs and vehicular and pedestrian safety." *Id*. ¶¶ 51–52 (cleaned up).

Flannery and counsel for The Big Board repeatedly sought to resolve the protest, but Eckenwiler refused to discuss the matter directly with Flannery and was largely unresponsive to counsel. Despite counsel's written request, neither Eckenwiler nor ANC 6C provided any evidence supporting the protest's stated grounds. On February 14, 2023, the day before a scheduled status conference with the mediator regarding the protest, Eckenwiler sent a proposed settlement agreement on ANC 6C's behalf. The proposal would have required The Big Board to, among other things, close early, serve food whenever it was open, prohibit live music, eliminate outdoor seating, and alter its vendors' delivery times. The Big Board responded with a revised proposal and explained why ANC 6C's terms failed to address the stated protest grounds and conflicted with The Big Board's existing license. Neither Eckenwiler nor anyone else from ANC 6C responded.

Meanwhile, the Alcohol Board investigated the protest's allegations, monitoring The Big Board on eight occasions between February 16 and February 28, 2023. Investigators observed no Alcohol Board violations, and their report

identified no facts supporting the protest's stated concerns. The report specifically noted "[n]o [p]eace, order and quiet issues, no loitering, no trash or parking concerns," and no problems with vehicular or pedestrian safety. *Id*. ¶ 78 (alteration in original).

The matter nevertheless proceeded to mandatory mediation. At a March 7, 2023, telephonic mediation session, Eckenwiler appeared on ANC 6C's behalf, stated that he had attended "as required," announced he was "bowing out" after speaking for less than forty-five seconds, and "hung up without so much as waiting for a response from the mediator." *Id.* ¶ 75. The following day, ANC 6C voluntarily withdrew its protest.

Flannery and The Big Board then brought this action under 42 U.S.C. § 1983 against the ANC 6C commissioners in their personal capacities. As relevant here, the complaint alleges that the commissioners filed and prosecuted what Flannery and The Big Board characterize as a "frivolous protest" in retaliation for Flannery's speech and his and The Big Board's "refus[al] to obey orders" that they "understood to be unlawful." *Id.* ¶¶ 84–85. The commissioners moved to dismiss for failure to state a claim and alternatively asserted qualified immunity. The district court granted the motion without reaching the qualified immunity defense. Flannery and The Big Board timely appealed.

II

We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's dismissal of the complaint for failure to state a claim. *See Ho v. Garland*, 106 F.4th 47, 50 (D.C. Cir. 2024). We accept the "complaint's well-pleaded factual allegations as true and draw all reasonable inferences in" Flannery and The Big Board's favor. *Id.* (quoting *N. Am. Butterfly Ass'n v. Wolf*, 977 F.3d 1244, 1249 (D.C. Cir. 2020)).

To survive dismissal, the complaint must contain sufficient facts to state a claim for relief that is "plausible on its face." *Wash. All. of Tech. Workers v. DHS*, 892 F.3d 332, 343 (D.C. Cir. 2018) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). That standard demands more than "labels and conclusions": "The factual allegations must be enough to raise a right to relief above the speculative level" and must "allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. (cleaned up) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Iqbal*, 556 U.S. at 678).

III

The complaint asserts a claim under 42 U.S.C. § 1983, which provides a cause of action against any person who, acting under color of District of Columbia law, deprives another of "rights, privileges, or immunities secured by the Constitution" or federal law. The constitutional right at issue here is the First Amendment right to be free from government retaliation for protected speech. To state a claim, Flannery and The Big Board must plausibly allege that (1) they "engaged in" constitutionally protected activity; (2) "the government took retaliatory action capable of deterring another from the same protected activity"; and (3) a "causal link" exists between the protected activity and the adverse action. *Comm. on Ways & Means v. Dep't of the Treasury*, 45 F.4th 324, 340 (D.C. Cir. 2022).

The district court held—and the commissioners do not dispute on appeal—that Flannery's social-media posts and press interviews were protected speech, and that filing the protest was capable of deterring others from engaging in such speech. *See Flannery v. Eckenwiler*, 2024 WL 4345832, at *5–6 (D.D.C. Sept. 30, 2024). The key questions on appeal are (1) whether The Big Board's refusal to comply with the masking and proof-of-vaccination requirements was also protected by the First Amendment, and (2) whether, even if not,

the complaint plausibly alleges that Flannery's protected speech was itself a but-for cause of ANC 6C's protest, thus providing the requisite "causal link."

A

The Big Board's refusal to follow the District's orders was not protected by the First Amendment.

The First Amendment protects more than spoken and written words. It also protects conduct that is "sufficiently imbued with elements of communication" to qualify as expression. *Spence v. Washington*, 418 U.S. 405, 409 (1974). But that principle has limits. The Supreme Court has "rejected the view that conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 65–66 (2006) (*FAIR*) (cleaned up) (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). Instead, we must ask whether, in context, the conduct is "inherently expressive." *Id.* at 66. As the Court put it in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), conduct qualifies for constitutional protection if it "is intended to be communicative and . . . , in context, would reasonably be understood by the viewer to be communicative." *Id*. at 294; *see also Texas v. Johnson*, 491 U.S. 397, 405 (1989) (emphasizing that the Court "consider[s] the context in which" the conduct occurred).

That inquiry does not require observers to be able to discern "a narrow, succinctly articulable message" the actor intends to convey. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995). Thus, Jackson Pollock's abstract drip paintings, for example, remain "unquestionably shielded" expression even though they may not convey a readily identifiable message. *Id*. But a reasonable viewer must still be able to understand the conduct, in context, as communicating a message of *some* kind. *See*

Clark, 468 U.S. at 294. When, by contrast, observers would have "no way of knowing" whether conduct is communicative without additional "explanatory speech," that is strong evidence that the conduct is not "inherently expressive." *FAIR*, 547 U.S. at 66.

FAIR is instructive. There, law schools denied military recruiters access to campuses in protest of the government's "Don't Ask, Don't Tell" policy, forcing the recruiters to conduct interviews elsewhere. 547 U.S. at 52–53. The law schools argued that their conduct was inherently expressive because they intended to convey opposition to the government's policy. *Id.* The Court disagreed. An observer who saw military recruiters interviewing away from a law school would have "no way of knowing whether the law school [was] expressing its disapproval of the military, all the law school's interview rooms [were] full, or the military recruiters decided for reasons of their own that they would rather interview someplace else." *Id*. at 66.

Here, we accept as true the complaint's allegation that The Big Board refused to comply in order to express opposition to the District's policies. The question is whether, given the surrounding circumstances, reasonable onlookers would have understood that conduct to be communicative. The complaint's allegations do not plausibly support that conclusion. The complaint alleges nothing about how The Big Board's noncompliance would manifest itself to reasonable observers. It simply alleges that restaurants were required to enforce masking and check proof of vaccination, that The Big Board refused to do so, and that the District later suspended The Big Board's licenses for violating the orders. Those allegations do not support an inference that reasonable observers would understand The Big Board's conduct as communicative.

First, consider the masking requirement. The presence of unmasked patrons could, of course, be visible to an onlooker.

But a reasonable observer would not necessarily perceive a patron going maskless inside the establishment as communicative. By the terms of the order, patrons were permitted to remove their masks while actively eating or drinking. *See* 68 D.C. Reg. at 13,957. So the mere presence of unmasked patrons inside a bar or restaurant would not obviously suggest that anyone was violating the requirement.

And even if a reasonable observer would recognize that particular patrons *were* violating the order, it would require another inferential jump to conclude that such an observer would likely ascribe an intended message to those patrons' unmasked status. There are any number of equally, if not more, plausible reasons someone might have for being maskless at a given time—they may have forgotten a mask at home, for example, or simply preferred not to wear one. *See*, *e.g.*, *Zinman v. Nova Se. Univ., Inc.*, 2023 WL 2669904, at *5 (11th Cir. Mar. 29, 2023) (explaining that "[t]he likelihood is exceedingly remote and attenuated" that a reasonable observer would understand a person's "unmasked status as an attempt to convey some sort of message"); *see also Falcone v. Dickstein*, 92 F.4th 193, 208 n.10 (3d Cir. 2024) (collecting cases).

In fact, The Big Board's claim is weaker still, because it would require yet another, even more improbable inference for a reasonable observer of maskless patrons to conclude that The Big Board itself intended to convey an expressive message. There are myriad non-expressive reasons an establishment might choose not to enforce a masking requirement, ranging from indifference and lax oversight to a reluctance to initiate confrontations with paying customers. The complaint alleges no facts suggesting that a reasonable observer would, notwithstanding these alternative explanations, understand The Big Board's conduct to be "inherently expressive." *FAIR*, 547 U.S. at 66.

The proof-of-vaccination requirement is even less suited to an expressive-conduct theory. The average observer could

not know whether The Big Board checked vaccination cards merely by seeing patrons inside. And even if they could, that observation alone would not reveal that The Big Board was declining to check vaccination cards as a deliberate protest, rather than simply overlooking or inconsistently enforcing the requirement. Again, the complaint alleges no observable practice from which objectively reasonable viewers would understand that The Big Board was communicating opposition to the District's policy or any other expressive message. It alleges only that The Big Board did not comply with the requirement. Compl. ¶ 84.

Flannery and The Big Board's contrary arguments do not overcome those deficiencies. First, they invoke the broader pandemic context, arguing that refusing to wear a mask was widely understood at that time as protest, and that a restaurant's refusal to enforce masking and vaccination requirements would have been too. Those arguments are not supported by any allegations in the complaint. And in any event, the broader controversy over such requirements does not suffice to suggest to the objective onlooker that The Big Board was engaging in expressive conduct.

Flannery and The Big Board also emphasize Eckenwiler's reaction to The Big Board's conduct: By describing The Big Board's defiance of the orders as "anti-vaxxer dog-whistling," Flannery and The Big Board contend, Eckenwiler showed that the conduct was reasonably understood as expressive. But Eckenwiler's reaction does not establish that reasonable observers of The Big Board's operating practices would understand them as communicative. As discussed below, and as plaintiffs elsewhere emphasize, Eckenwiler is not an average observer precisely because he was intimately familiar with Flannery's public statements contextualizing The Big Board's conduct. To be "inherently expressive," conduct must be perceived as communicative without accompanying

"explanatory speech." *FAIR*, 547 U.S. at 66. The Big Board's conduct does not qualify.

We therefore agree with the district court that The Big Board's refusal to enforce the requirements was not protected expressive conduct.

B

The complaint can nevertheless proceed if it plausibly alleges that Flannery's social media posts and press interviews criticizing the District's policies—which everyone agrees are protected speech—caused ANC 6C to file the protest. It does.

At the motion-to-dismiss stage, a First Amendment retaliation plaintiff must plausibly allege but-for causation—that is, that the challenged action "would not have been taken absent the retaliatory motive." *Comm. on Ways & Means*, 45 F.4th at 340 (quoting *Nieves v. Bartlett*, 587 U.S. 391, 399 (2019)). The existence of another motive for the challenged action does not necessarily defeat but-for causation. The question is whether the government would have taken the same action "even in the absence of the protected conduct." *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). Here, the inquiry is whether the complaint's allegations support a reasonable inference that ANC 6C would not have filed the protest if Flannery had not publicly criticized the District's orders.

The complaint's strongest support for that inference is Eckenwiler's public statement just days before the protest vote. The complaint alleges that when ANC 6C's Alcoholic Beverage Licensing Committee considered The Big Board's renewal application at its November 7, 2022, meeting, "Mr. 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.'" Compl. ¶ 43. Per the complaint, no other committee member disagreed with or challenged Eckenwiler's statement.

Id. ¶ 44. Two days later, the full ANC 6C voted to file the protest. *Id.* ¶ 48. Those allegations, and reasonable inferences drawn from them, link the decision to file the protest to Flannery's speech in emphatic fashion. In effect, the allegation is that the Commission member taking the lead on this issue said, at a public meeting, "We should file a protest because of Flannery's protected speech," and the Commission did so just two days later. A smoking gun is typically harder to find.

The complaint's other allegations further support a reasonable inference that Flannery's protected public criticism was a necessary cause of the protest. ANC 6C's protest cited three grounds for protesting The Big Board's license, but the Alcohol Board allegedly found no evidence substantiating any of those concerns, despite monitoring The Big Board on eight separate occasions. Compl. ¶¶ 77–78. Further, Eckenwiler's alleged conduct during the settlement and mediation process, construed in the plaintiffs' favor, reflected no genuine interest in pursuing the stated grounds for objecting to license renewal: He refused to engage meaningfully with Flannery or counsel, failed to provide evidence that supported the protest, and abruptly left a mandatory mediation session after speaking for less than forty-five seconds. Compl. ¶¶ 55–76. Those allegations suggest that the protest's stated grounds were pretextual—or, as the district court put it, "flimsy," "unsupported," and "quite troubling." *Flannery*, 2024 WL 4345832, at *1. Combined with Eckenwiler's public statement linking the protest to Flannery's speech, those allegations support a reasonable inference that protected speech was a but-for cause of ANC 6C's action.

The commissioners' contrary arguments lack merit. In an attempt to blunt the impact of Eckenwiler's statements at the November 7 meeting, the commissioners argue that the complaint does not support attributing Eckenwiler's alleged motive to the other five commissioners, who all voted to file

the protest. We disagree. Eckenwiler made his statement at an official ANC meeting concerning whether to file a protest and, the complaint alleges, "[n]one of the other committee members disagreed or challenged that statement." Compl. ¶ 44. He was also the ANC's "chairman," *id.* ¶ 49; he "led" the ANC in voting to file a protest just two days later, *id.*; and he was listed as the ANC's representative on the protest, *id.* ¶ 52. Further, as explained above, the flimsiness of the stated grounds for the protest bolsters the inference of an improper motive; that rationale applies to the full Commission, not just Eckenwiler. As a whole, these allegations support a reasonable inference that Eckenwiler's retaliatory motive infected the full Commission's vote. Discovery may of course reveal that particular commissioners were unaware of Eckenwiler's statements, acted on independent motives, or that the complaint's allegations are untrue for other reasons. But the complaint need not rule out those speculative possibilities at the pleading stage.

The commissioners also argue that Flannery and The Big Board pleaded themselves out of court by alleging that the ANC was also motivated to file the protest because of The Big Board's conduct, which we have held is not protected First Amendment activity. They focus on the complaint's allegation that another commissioner pushed to file the protest based on The Big Board's "bad behavior in recent years." Compl. ¶ 11. The district court agreed. *Flannery*, 2024 WL 4345832, at *7. But the reference to "behavior" is ambiguous—in context, it could refer to The Big Board's refusal to comply with the public-health orders, or it could also refer to Flannery's repeated public criticism of the orders. As any parent knows, in common usage a critique of someone's "behavior" can include his or her speech. At the pleading stage, we read those ambiguities in plaintiffs' favor. *See Ho*, 106 F.4th at 50. And even assuming that this commissioner's statement referred exclusively to The Big Board's non-expressive conduct, that would only suggest that ANC 6C had

an additional motive for filing the protest. It does not rebut the reasonable inference that the Commission would not have filed the protest "in the absence of" Flannery's protected speech. *Mt. Healthy*, 429 U.S. at 287.

Because the alleged facts support a reasonable inference that Flannery's public criticism was a but-for cause of the protest, the district court erred by dismissing the retaliation claim for failure to plead but-for causation.

The commissioners invoke qualified immunity as an alternative basis for affirmance. But the district court did not reach that issue and we decline to decide it in the first instance. *See Bauer v. Fed. Deposit Ins. Corp.*, 38 F.4th 1114, 1126 (D.C. Cir. 2022) ("We are a court of review, not of first view," and our "general practice" is to remand issues unaddressed below. (cleaned up)).

IV

We reverse and remand for further proceedings consistent with this opinion.

So ordered.