22-2599

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The Clementine Company, LLC, DBA the Theater Center, West End Artists Company, DBA the Actors Temple Theatre
Plaintiffs-Appellants,

Players Theater Management Corp., DBA The Players Theater, Soho Playhouse Inc., DBA Soho Playhouse, Caral LTD., DBA Broadway Comedy Club,
Plaintiffs,

v.

Eric Adams, in his official capacity as Mayor of the City of New York,
Defendant-Appellee.

THE THEATERS' OPENING BRIEF

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Preliminary statement

The Theaters (Plaintiffs-Appellants) appeal from a final judgment which was entered by the United States District Court for the Southern District of New York (McMahon, J.) which dismissed all claims as moot. FRCP 12(b)(1); [Appendix 117].

Jurisdictional statement

On September 21, 2021, the Theaters and other similarly-situated plaintiffs filed a complaint with the District Court stating that the Mayor violated the Free Speech and Equal Protection Clauses. [Appendix 26-30.] The District Court had federal question subject matter jurisdiction over the complaint. 28 USC § 1331; see also 42 USC § 1983.

On December 13, 2021, the other plaintiffs voluntarily dismissed their claims without prejudice. [Appendix 63]. On September 7, 2022, the District Court dismissed the case in full as moot. [Appendix 117]. The Theaters noticed an appeal 29 days later, on October 6. [Appendix 123]. This was timely. FRAP 4 (a notice of appeal is due within 30 days).

Appellate jurisdiction is proper under 28 USC § 1291 because the District Court's order dismissing the case in full as moot was a final order. The voluntary dismissal by the other plaintiffs, coupled with their non-participation since, was an abandonment of their

claims. *See Slayton v. Am. Exp. Co.*, 460 F.3d 215, 224 (2d Cir. 2006), as amended (Oct. 3, 2006). A dismissal is "with prejudice" unless it explicitly states otherwise. FRCP 41(b). There was no leave to amend, and the dismissal order does not reflect "without prejudice." [Appendix 122].

For the foregoing reasons, it is my studied opinion that appellate jurisdiction is proper. *s/ Matt Kezhaya*

Statement of the issues

1: The Theaters suffered an actionable injury.

1.1: The regulations caused the Theaters to suffer financial losses.

Carter v. HealthPort Techs., LLC, 822 F.3d 47 (2d Cir. 2016)

1.2: The constitutional injury is an "injury-in-fact."

Roman Cath. Diocese of Brooklyn v. Cuomo,
208 L. Ed. 2d 206 (Nov. 25, 2020)

2: Monetary and declaratory relief would redress the injury.

Uzuegbunam v. Preczewski, 209 L. Ed. 2d 94 (Mar. 8, 2021)

3: Prudential considerations are irrelevant.

Warth v. Seldin, 422 U.S. 490 (1975)

Statement of the case

For review is an order of dismissal under Rule 12(b)(1). District Judge McMahon, writing an unreported decision for the United States District Court for the Southern District of New York, held that two theaters lacked standing to complain of regulations which affected the Theaters differently depending on the content of the speech they purveyed. [Appendix 41, 122].

At issue are the "Key to NYC" regulations, which required proof of vaccination for all patrons over the age of 12 and employees, interns, volunteers, and contractors at indoor recreational businesses in the City, including theaters and comedy clubs. [Appendix 13]. The vaccine mandate applied to "covered entities" such as movie theaters, music or concert venues, and commercial event and party venues. Id. These entities were required to refuse admission or service to individuals who did not have proof of vaccination. Id. Worship services, schools, and community centers were exempt. [Appendix 19].

The Theaters, plaintiffs below, hosted religious services and theatrical or comedy performances, alike. [Appendix 22]. On Sunday mornings, Clementine Company was rented by a church and was therefore not subject to the "Key to NYC" regulations; otherwise, the regulations were in effect. Id. The Actors Temple Theater offered both synagogue services and theatrical performances, and was subjected to the regulations during the latter. Id.

The Theaters' complaint was that the "Key to NYC" regulations was a content-based regulation of speech and an equal protection violation. [Appendix 26, 28]. Through the "Keys to NYC" regulations, the Mayor conscripted the Theaters under threat of prosecution into requiring proof of vaccinations, but not to the extent their venues were used to preach. [Appendix 13]. The Mayor required the Theaters to hire more employees to handle the unwanted administrative burden. [Appendix 24]. Because some customers either refused the vaccine or because they could not produce proof of vaccination, the Theaters had to issue refunds. Id. Because the "Keys to NYC" required the Theaters, under threat of

criminal sanctions, to refuse services to these customers, some of these customers "screamed at, physically threatened, or even spat on" the Theaters' employees; several quit. [Appendix 25]. Yet the church that rented Clementine Company had unvaccinated and unmasked congregants who were freely allowed to spread the same contagion in the same venue, solely because they were hearing from their pastor. [Appendix 22]. They demanded judgment for declaratory relief, injunctive relief, and nominal damages [Appendix 30].

The Theaters brought a motion preliminary injunction, which was denied. [Appendix 32]. Subsequently, the "Keys to NYC" regulations were vacated. [Appendix 99]. Thereafter, the District Court entered an order to show cause why the complaint should not be dismissed as moot. Id.

The Theaters opposed dismissal, importantly, because they suffered financial harm because of the regulations [Appendix 70-71]; and because they suffered a constitutional tort [Appendix 70-75].

The District Court dismissed the case on mootness grounds. [Appendix 117]. The order incorporates a prior discussion from the denial of preliminary injunction to support the District Court's finding that the only harm was suffered by the customers, not the Theaters. [Appendix 122] (citing [Appendix 45]). The same order denying preliminary injunction acknowledged the Theaters' "loss of ticket sales, revenue, and related costs … [which] are capable of being cured by monetary damages." [Appendix 61]. This appeal timely follows.

Summary of the argument

At issue is a complaint which asserted a constitutional violation arising from regulations which affected the Theaters differently depending on the nature of the show. The District Court dismissed the complaint, erroneously failing to accept the allegations of standing. The Court should vacate the judgment and remand.

The complaint alleges an injury-in-fact because the regulations caused the Theaters monetary losses in the form of increased employment costs, increased employment turnover, and increased refund expenses. The District Court conceded these monetary harms, but failed to properly apply the rule that monetary damages are an injury-in-fact, *per se*. The complaint also alleges a constitutional violation, which Congress elevated to an actionable injury through the Civil Rights Act of 1871 (encoded at 42 USC § 1983). The District Court was supposed to assume, *arguendo*, that the complained-of regulation was unconstitutional. Instead, it collapsed the standing inquiry into a merits analysis.

Argument

Standard of review

Standing is comprised of three elements: an injury-in-fact, traceability, and redressability. *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 55 (2d Cir. 2016). At issue is a dismissal upon a facial standing attack. A standing attack is "facial" when based solely on the complaint, *i.e.*, not supported by extraneous evidence. *Id.* at 56. Upon a facial attack, the plaintiff has no evidentiary burden. *Id.* The district court's task is to determine whether the complaint alleges facts that affirmatively and plausibly suggest that the plaintiff has standing to sue. *Id.* All material allegations of the complaint must be accepted as true, and the complaint must be construed in favor of the complaining party. *Id.* at 57. On appeal, the decision is reviewed *de novo*. *Id.* at 56-57. Upon *de novo* review, "no form of appellate deference is acceptable." *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991).

1: The Theaters suffered an actionable injury.

The District Court reversibly erred by missing the complaint's allegations of an "injury-in-fact." There are two injuries in this complaint: (1) the financial losses entailed in issuing refunds, losing employees, and hiring more employees; and (2) the constitutional injury entailed in content-based discrimination. The District Court failed to treat the allegations of the complaint as true, as required. *Carter*, 822 F. 3d at 57. Because the District Court ignored the allegations of the complaint, the proper relief is to vacate the judgment and remand the matter for trial proceedings. *Id.*, at 60.

1.1: The regulations caused the Theaters to suffer financial losses.

The complaint alleges that the regulations caused the Theaters to suffer financial losses. [Appendix 25]. Any monetary loss suffered by the plaintiff satisfies this element; "even a small financial loss suffices." *Carter*, 822 F.3d at 55 (cleaned up).

COVID was a difficult time. The people needed to pray with their congregations, *and* they needed to laugh and to cry with the Theaters. Just as it was a constitutional infringement to deprive the churches of their congregations, it was also a constitutional infringement to deprive the Theaters of their audience. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 208 L. Ed. 2d 206, 141 S. Ct. 63 (2020). The District Court held that this was the audience's problem, not the Theaters'. [Appendix 61]. This is false. Prior to filing the complaint, the Theaters lost revenues [Appendix 25] ¶ 57 (refunds), they lost employees [Appendix 25] ¶ 58, and they lost customers [Appendix 24-25] ¶¶ 54, 59. The District Court's own prior order contemplated these harms as compensable by monetary damages. [Appendix 61] ("Taken as true, these injuries [loss of ticket sales, revenue, and related costs] are capable of being cured by monetary damages.")

These monetary injuries were fully completed wrongs at the time of the complaint; they cannot be remedied by the Mayor simply stopping the tortious conduct complained of. *See Friends of*

the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) ("a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.") These injuries require monetary and declaratory relief. Because the injuries are completed and monetary in nature, they satisfy the "injury-in-fact" prong of the standing analysis. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021) ("If a defendant has caused physical or monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III.")

1.2: The constitutional injury is an "injury-in-fact."

Independent from the monetary harm, the complaint also pleads a deprivation of the fundamental rights to free speech and equal protection of the law. A standing analysis is not a substitute for a merits analysis: this Court has cautioned against arguments that "would essentially collapse the standing inquiry into the merits." *SM Kids, LLC v. Google LLC*, 963 F.3d 206, 212 (2d Cir. 2020).

To resolve standing, the District Court should have assumed, *arguendo*, that the Mayor crossed a constitutional line. *Dean v. Blumenthal*, 577 F.3d 60, 67 (2d Cir. 2009) (reversing because the district court "erroneously conflated the requirement for an injury-in-fact with the constitutional validity of Dean's claim"); *see also Barker v. Conroy*, 921 F.3d 1118 (D.C. Cir. 2019) (finding an injury-in-fact, but not an underlying constitutional violation).

And yet the District Court did precisely the opposite by errantly holding that a speaker does not suffer a First Amendment violation by being deprived of an audience. [Appendix 87-88] (finding no constitutional violation just because some members of the public "cannot attend their performances.") This holding starkly contrasts the Supreme Court's holding that the Free Speech Clause protects "the communication, to its source and to its recipients both." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976) (cited at [Appendix 72]).

The injury complained of is a constitutional tort. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999) ("42 U.S.C. § 1983 creates a species of tort liability.") The complained-of regulation changed depending on the nature of the speaker: if religious, no regulation; if secular, harmful restrictions apply. [Appendix 22] ¶¶ 40-44. By regulating the Theaters based upon the content of the speech they hosted (prayer in the morning *vs.* parody in the afternoon), the Mayor engaged in presumptively-unconstitutional enforcement activity. *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"); *see also R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid.")

Doubtlessly, the Mayor will emphasize that COVID was the worst pandemic in a century. But there is no "plague" exception to the First Amendment. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 208 L. Ed. 2d 206 (Nov. 25, 2020) ("even in a pandemic, the Con-

stitution cannot be put away and forgotten."); *see also Calvary Chapel Dayton Valley v. Sisolak*, 140 S.Ct. 2603, 2615 (Kavanaugh, J., dissenting) (July 24, 2020) ("This Court's history is littered with unfortunate examples of overly broad judicial deference to the government when the government has invoked emergency powers and asserted crisis circumstances to override equal-treatment and free-speech principles.")

When we tolerate an official preference for religion, we fail to heed a limit on the government's power which is "fundamental" to the very structure of our great republic. See U.S. Const. Amend. I (Free Speech and Establishment Clauses); *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2247 & n. 19 (June 24, 2022) (collecting cases). The subject fundamental right to be free from governmental distortions in the free market of ideas is one borne of a painful lesson from the Founding Generations' living memory: a government which intrudes upon the free market of ideas has taken the first step toward tyranny. The Founders deduced this lesson by reviewing the generations of back-and-forth attempts at geno-

cide, waged between the Protestants and the Catholics. See § 5:3. *Modern Constitutional Law* § 5:3 (3rd ed.) ("If viewed in historical terms, it [the First Amendment] may be understood primarily as a constraint on government, intended to assure independence of both the press and the church.")

It is not a "political question" that the Theaters are entitled to be free from regulations which delineate among the expression of ideas. *See Baker v. Carr*, 369 U.S. 186, 210 (1962) (regulation under color of State law do not give rise to a political question attack). Because the Theaters' right to free speech is "fundamental" to the continued survival of this republic, the Founders intentionally elevated them above tyranny by the majority. *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("One's right to … free speech … and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections"); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("Recognizing the occasional tyrannies of governing majorities, they amended the

Constitution so that free speech and assembly should be guaranteed.")

Congress enacted the Civil Rights Act of 1871 because the States had failed to live up to the foundational principles of this Nation. If these fundamental rights are to survive for future generations, the Court must take note that there is no *force majeure* clause in the Constitution. The Court should vacate the order of dismissal and remand for trial proceedings.

2: Monetary and declaratory relief would redress the injury.

In dismissing the action, the District Court distinguished *Uzuegbunam v. Preczewski*, 209 L. Ed. 2d 94 (Mar. 8, 2021). There, the Supreme Court held that a complaint which seeks nominal damages for a completed constitutional injury will save an otherwise-moot claim. The District Court distinguished *Uzuegbunam* because, it found, the Theaters lack an injury-in-fact. However, as addressed in § 1, the District Court conceded monetary damages and collapsed the standing analysis into a merits analysis. The District

Court should have found an injury-in-fact, which is compensable by at least nominal damages. *Amato v. City of Saratoga Springs, N.Y.*, 170 F.3d 311, 317 (2d Cir. 1999) (in absence of a compensable injury, a successful plaintiff is entitled to nominal damages).

3: Prudential considerations are irrelevant.

The District Court's preliminary injunction order held that prudential considerations barred addressing the complaint. [Appendix 42]. This holding was correctly omitted from the final order. The existence of a statutory cause of action precludes reliance on prudential considerations. *Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules"); *see also* 42 USC § 1983.

To the extent the Mayor relies on the prudential considerations raised in the order denying preliminary injunction, the Court should find the argument wholly unpersuasive.

Conclusion / prayer for relief

The District Court conceded that the Theaters suffered financial harm, yet held that they did not suffer an injury-in-fact. Financial harm is an injury-in-fact, *per se*. The District Court also collapsed the standing inquiry into a merits analysis. The District Court was supposed to assume, *arguendo*, that a constitutional violation occurred for purposes of resolving standing.

WHEREFORE the Court should vacate the order of dismissal and remand for trial proceedings.

[*remainder intentionally left blank*]

Respectfully submitted,

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Certificate of service

NOTICE IS GIVEN that I, Matt Kezhaya, efiled the foregoing document by uploading it to the Court's CM/ECF system on December 20, 2022, which sends service to registered users, including all other counsel of record in this cause. *s/ Matt Kezhaya*

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