20-3187

United States Court of Appeals for the Second Circuit

NATIONAL RIFLE ASSOCIATION OF AMERICA,

Plaintiff-Appellant,

v.

ANDREW CUOMO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; NEW YORK STATE DEPARTMENT OF ECONOMIC DEVELOPMENT, D/B/A EMPIRE STATE DEVELOPMENT; ERIC GERTLER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; NEW YORK STATE DEPARTMENT OF LABOR, ROOM 134, BUILDING 12, STATE CAMPUS, ALBANY, NY 12240; AND ROBERTA REARDON, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of New York

BRIEF FOR DEFENDANTS-APPELLEES

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PRELIMINARY STATEMENT

In March 2020, immediately after the COVID-19 pandemic took hold in the State of New York, Governor Andrew M. Cuomo issued Executive Order 202.8, which required all businesses but those considered "essential" to cease in-person operations. Accompanying the executive order was administrative guidance enumerating categories of businesses considered essential. However, the guidance did not specify whether firearms and ammunition dealerships were essential or not.

Plaintiff-appellant the National Rifle Association of America, proceeding on behalf of its members—some of whom were firearms and ammunition dealers and their customers—filed a complaint, and then a first amended complaint, against defendants-appellees Governor Cuomo and other State actors in the United States District Court for the Northern District of New York, under 42 U.S.C. § 1983, challenging Executive Order 202.8 as unconstitutional. Plaintiff claimed that the executive order left firearms and ammunition dealers to guess whether their dealerships were allowed to continue in-person operations, in violation of their Fifth and Fourteenth Amendment due process rights to be free from overly vague laws. Plaintiff also claimed that the uncertainty

created by the executive order was so great that it forced dealerships to close en masse—lest they later be found to have remained open unlawfully—which in turn allegedly caused a violation of customers' Second Amendment rights to keep and bear arms. Plaintiff sought declaratory and injunctive relief allowing firearms and ammunition dealerships, as well as certain other gun-industry businesses, to operate in-person. Plaintiff also sought nominal damages on its members' behalf.

Defendants moved to dismiss the complaint for lack of standing under Federal Rule of Civil Procedure 12(c). Plaintiff opposed and cross-moved for leave to file a second amended complaint adding allegations that the NRA itself was being injured by Executive Order 202.8, along with requests for declaratory, injunctive, and nominal-damages relief on its own behalf. The district court (D'Agostino, J.) granted defendants' motion, denied plaintiff's cross-motion, and entered final judgment for defendants accordingly. Plaintiff has appealed.

Insofar as plaintiff challenges the denial of injunctive and declaratory relief, the appeal should be dismissed as moot. Executive Order 202.8's statewide ban on the in-person operation of non-essential businesses is no longer in effect. In May 2020, after that measure had

helped bring the State's COVID-19 problem more under control, the State implemented a program for gradually reopening the affected sectors of the State's economy. Under that program, the businesses that plaintiff asks be allowed to operate in-person are indisputably allowed to operate in-person. And there is no reasonable likelihood that the State will revert to a regime that will lead those businesses to cease all manner of in-person operation. To the contrary, as time has advanced and the State has gained more experience dealing with the pandemic, it has generally acted to further ease COVID-19-related restrictions, not to tighten them.

The district court's judgment for defendants should otherwise be affirmed. The first amended complaint does not plausibly plead plaintiff's standing. An organizational litigant that sues under § 1983 to vindicate its members' rights must clear two hurdles, neither of which plaintiff cleared here. Under this Court's controlling precedent, § 1983 requires that an organization suing under that statute to vindicate its members' rights must, without relying on its members' injuries, plausibly allege its own injury-in-fact sufficient to satisfy Article III of the United States Constitution. Plaintiff failed to allege any such injury. Additionally, for prudential reasons, an organization suing to vindicate its members'

rights must identify an impediment that hinders such third parties from suing to vindicate their own rights. No such impediment appears to exist here, and plaintiff has not suggested one.

Finally, albeit for reasons other than those relied upon by the district court, plaintiff's motion for leave to file the second amended complaint was correctly denied as futile, to the extent it sought nominal damages. That complaint names as defendants only State officials in their official capacities. The Eleventh Amendment gives such actors immunity from damages actions, however. And separately, the text of § 1983 makes an award of damages against such actors statutorily unavailable.

JURISDICTIONAL STATEMENT

As explained more fully below, subject-matter jurisdiction was lacking in the district court, and is lacking in this Court, in certain respects. The district court did not have jurisdiction over plaintiff's first amended complaint, because that complaint does not adequately plead standing. *See infra* 34-40. The district court also lacked jurisdiction over plaintiff's proposed second amended complaint to the extent that complaint requests nominal damages, because such request is barred by

the Eleventh Amendment. *See infra* 42-44. This Court lacks jurisdiction over the appeal insofar as plaintiff challenges the district court's denial of declaratory and injunctive relief, because as to that relief the appeal is moot. *See infra* 27-34.

QUESTIONS PRESENTED

1. Whether plaintiff's appeal from the denial of declaratory and injunctive relief is moot because the State's administrative regime of COVID-19 restrictions that is now in effect indisputably does not bar in-person operation of the gun-industry businesses at issue and there is no reasonable likelihood that the State will institute a regime that does bar such operation in the foreseeable future.

2. Whether the denial of other relief was proper because (a) plaintiff's first amended complaint does not plausibly plead standing and (b) plaintiff's proposed second amended complaint seeks monetary relief against State officials in their official capacities, which is barred by the Eleventh Amendment and not authorized by 42 U.S.C. § 1983.

STATEMENT OF THE CASE

A. In the Early Days of the COVID-19 Pandemic, the State Issues Executive Order 202.8 Prohibiting the In-Person Operation of All But "Essential" Businesses.

On March 1, 2020, New York confirmed its first case of COVID-19, the potentially deadly respiratory illness that is caused by a coronavirus called SARS-CoV-2.[1] Soon after that first case of COVID-19 was confirmed, the total number of cases in the State began to skyrocket, and on March 7, 2020, Governor Andrew M. Cuomo declared a state disaster emergency. N.Y. Exec. Ord. 202 (Mar. 7, 2020). Within weeks, confirmed cases exceeded 7,000.[2]

The exponential explosion of COVID-19 cases was pushing the State's healthcare system to its limits. Some projections estimated that by the end of May 2020, 110,000 New Yorkers would require

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[1] Gov. Andrew M. Cuomo, *Governor Cuomo Issues Statement Regarding Novel Coronavirus in New York* (Mar. 1, 2020), https://www.governor.ny.gov/news/governor-cuomo-issues-statement-regarding-novel-coronavirus-new-york.

[2] Gov. Andrew M. Cuomo, *Governor Cuomo Signs the "New York State on PAUSE" Executive Order* (Mar. 20, 2020), https://www.governor.ny.gov/news/governor-cuomo-signs-new-york-state-pause-executive-order.

hospitalization due to COVID-19, 37,000 of whom would need treatment in intensive care units.[3] Across the entire State, however, there were a total of only 53,000 hospital beds, just 3,000 of which were in intensive care units.[4] Additionally, medical professionals were experiencing a shortage of personal protective equipment, including masks, gloves, and gowns.[5]

And to make matters worse, the science of SARS-CoV-2 and COVID-19 was largely unknown. The U.S. Centers for Disease Control and Prevention cautioned that there was "much to learn about the newly

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[3] Gov. Andrew M. Cuomo, *Video, Audio, Photos & Rush Transcript: Amid Ongoing Covid-19 Pandemic, Governor Cuomo Announces Deployment of 1,000-Bed Hospital Ship "USNS Comfort" to New York Harbor* (Mar. 18, 2020), https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-amid-ongoing-covid-19-pandemic-governor-cuomo-announces.

[4] *Id.*

[5] *Governor Cuomo Signs the "New York State on PAUSE" Executive Order*, *supra*.

emerged COVID-19, including how and how easily it spreads."[6] And no vaccine was available.

Against that backdrop, on March 20, 2020, the State implemented "New York State on PAUSE," an initiative designed to curb COVID-19's spread.[7] Part of that initiative was Executive Order 202.8, which was designed to reduce the sort of person-to-person interactions through which SARS-CoV-2 was thought to be most readily transmitted. (J.A. 65-67.) The executive order provided: "Each employer shall reduce the in-person workforce at any work locations by 100% no later than March 22 at 8 p.m." (J.A. 67.) "Any essential business or entity providing essential services or functions shall not be subject to the in-person restrictions," however. (J.A. 67.) Those businesses and entities were permitted to continue in-person operations "at the level necessary" to perform their essential work. (J.A. 67.)

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[6] U.S. Centers for Disease Control and Prevention, *What healthcare personnel should know about caring for patients with confirmed or possible coronavirus disease 2019 (COVID-19)* (Mar. 12, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/caring-for-patients-H.pdf.

[7] *Governor Cuomo Signs the "New York State on PAUSE" Executive Order*, *supra*.

Violations of the executive order were punishable as violations of orders promulgated pursuant to the New York State Public Health Law. (J.A. 67.) This meant that a first violation carried a civil penalty of up to $2,000—with the maximum amount increasing to $5,000 for second and subsequent violations that posed "a serious threat" to a person's health and safety. N.Y. Public Health Law § 12(a), (b). Suspected violations could be reported via a website maintained by the New York State Department of Labor. (J.A. 49.)

The New York State Department of Economic Development issued guidance to help employers meet their Executive Order 202.8 obligations. (J.A. 69-75.) The guidance explained that *all* businesses—including essential businesses—were required to adhere to guidelines promulgated by the New York State Department of Health that prescribed a number of workplace-safety protocols, including social distancing. (J.A. 69, 73.[8]) The guidance also explained that the term "essential" meant businesses operating in one or more of 12 enumerated sectors of the economy,

[8] The Health Department would subsequently issue guidelines prescribing many additional protocols, including mask-wearing and occupancy-limitation. *See infra* 18-19 & nn.

including certain subsets of the retail industry, like grocery stores and hardware stores; certain types of infrastructure, like utilities and public transportation; and certain manufacturing activities, like food processing and semi-conductor production. (J.A. 69-73.) But the guidance did not explicitly address firearms and ammunition dealers. It did not specify whether or not they were essential businesses.

B. Plaintiff's First Amended Complaint Alleges that the Executive Order Unconstitutionally Injures Firearms and Ammunition Dealers and Their Customers.

In April 2020, plaintiff the National Rifle Association of America ("NRA"), a non-profit corporation that engages in firearms advocacy and education, proceeding on behalf of its members—some of whom were firearms and ammunition dealers and their customers—filed a complaint (J.A. 6-38), and then a first amended complaint (J.A. 39-77), in the United States District Court for the Northern District of New York, challenging Executive Order 202.8. The first amended complaint named as defendants Governor Cuomo, in his official and individual capacities; the Department of Labor; Roberta Reardon, the department's commissioner, in her official and individual capacities; the Department

of Economic Development; and Eric Gertler, that department's acting commissioner, in his official and individual capacities.[9] (J.A. 39, 43.)

Plaintiff alleged that the executive order caused firearms and ammunition dealers throughout the State of New York to close their businesses. Many dealers had written to the Department of Economic Development requesting that it clarify whether their businesses were essential for purposes of the executive order. (J.A. 47.) However, none received a definitive response. (*See* J.A. 47.) A New York State senator's request to the Governor that firearms and ammunition dealerships be designated essential also went unanswered. (*See* J.A. 53, 77.) Firearms and ammunition dealers thus did not know whether their businesses could lawfully continue in-person operations under the executive order. (J.A. 53.) As a result of this uncertainty, they closed their dealerships en masse for fear of being found in violation. (J.A. 53.)

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[9] The first amended complaint additionally described Gertler as the Department of Economic Development's President and CEO. (J.A. 43.) However, Gertler's President and CEO roles are actually with the New York State Urban Development Corporation, a public corporation created by the New York State Legislature. *See* New York State Urban Development Corporation, *Meeting Minutes of Sept. 19, 2019*, at 60, https://esd.ny.gov/sites/default/files/news-articles/091919%20ESD%20Board%20Meeting%20Materials%20-v2.pdf.

Plaintiff further alleged that this closure in turn impaired the ability of New Yorkers to lawfully obtain firearms and ammunition. Plaintiff acknowledged that some "big box" stores in the State were permitted to continue their in-person operations (J.A. 50); they qualified as essential retail, serving as, among other things, grocery stores and hardware and appliance stores (*see* J.A. 71). And some of those big box stores carried firearms and ammunition. (J.A. 50.) But plaintiff alleged that, for independent reasons, the vast majority had already stopped selling those items before Executive Order 202.8 was issued. (J.A. 50.) Plaintiff thus claimed that the closure of firearms and ammunition dealerships had the effect of eliminating the main source through which New Yorkers could lawfully purchase those products. (J.A. 50.)

Proceeding under 42 U.S.C. § 1983, plaintiff, on its members' behalf, challenged the constitutionality of Executive Order 202.8 on two grounds. First, plaintiff alleged that the executive order violated firearm and ammunition dealers' Fifth and Fourteenth Amendment rights to due process. (J.A. 57-58.) According to plaintiff, the executive order was unconstitutionally vague concerning whether firearms and ammunition dealerships were indeed required to cease in-person operations, because

it left dealers to guess whether their businesses were essential or not. (J.A. 57.) Second, plaintiff alleged that the executive order violated customers' Second Amendment rights to keep and bear arms. (J.A. 55-57.) Because the uncertainty generated by the order caused firearms and ammunition dealerships to close, customers were unable to lawfully purchase those products. (J.A. 55.)

Plaintiff sought declaratory, injunctive, and monetary relief. It sought a declaration that "firearm and ammunition product manufacturers, retailers, importers, distributors, and shooting ranges constitute essential businesses and services under the Executive Order and are allowed to operate," or alternatively that "Defendants' prohibition of the operation of firearm and ammunition product manufacturers, retailers, importers, distributors, and shooting ranges violates the Second, Fifth and Fourteenth Amendments." (J.A. 59.) It sought an injunction preventing defendants from "enforcing the Executive Order to prohibit the operation of firearm or ammunition product manufacturers, retailers, importers, distributors, and shooting ranges." (J.A. 59.) And it sought nominal damages against defendants "on behalf of members of the NRA who are consumers and that have been

prevented by Defendants' actions from purchasing ammunition or firearms." (J.A. 59.)

C. Plaintiff Moves for Leave to File a Proposed Second Amended Complaint Alleging that the Executive Order Unconstitutionally Injured It, Too.

Defendants moved to dismiss the first amended complaint under Federal Rule of Civil Procedure 12(c). (J.A. 95-102.) They argued that plaintiff failed to plausibly plead standing because it failed to allege its own injury-in-fact; it had alleged only injuries suffered by firearms and ammunitions dealers and their customers. (J.A. 99-100.) Plaintiff opposed and also cross-moved for leave to file a second amended complaint that, it argued, would cure any such deficiency. (J.A. 103-144.)

The proposed second amended complaint would have reduced the number of defendants, as it named only Cuomo, Reardon, and Gertler—and only in their official capacities. (J.A. 117, 120-121.) But it would have added an additional basis for plaintiff's constitutional challenge to Executive Order 202.8.

In the proposed second amended complaint, plaintiff alleged that, under the executive order, "providers of firearm education and training"—including plaintiff itself—were placed in largely the same

predicament as firearms and ammunition dealerships. That is, the executive order created so much uncertainty about the legality of in-person firearms education and training programs as to render it unconstitutionally vague in violation of the Fifth and Fourteenth Amendments. (J.A. 136-137.) And because the uncertainty caused providers of firearms education and training programs to shut down their in-person programs rather than risk being found in violation, the executive order in turn violated individual New Yorkers' Second Amendment rights to access those programs. (J.A. 124-126, 133-135.)

Plaintiff alleged that it was among the firearms education and training providers adversely affected. The executive order caused it to cancel education and training events it had been planning to hold in the State. (J.A. 130.) Additionally, plaintiff had diverted resources away from other activities to handle the thousands of telephone calls it received from members seeking advice related to the executive order. (J.A. 129-130.)

The proposed second amended complaint also included a revised prayer for relief. Plaintiff requested a declaration and injunction expanded to add providers of firearms education and training to the list of businesses it asked be allowed to operate in-person. (J.A. 138.) Plaintiff

also modified its request for monetary relief to demand nominal damages "on behalf of the NRA." (J.A. 138.)

D. The District Court Dismisses the First Amended Complaint for Lack of Standing and Denies Leave to File the Proposed Second Amended Complaint.

In August 2020, the district court (D'Agostino, J.) granted defendants' motion to dismiss plaintiff's first amended complaint and denied plaintiff's cross-motion for leave to file the proposed second amended complaint. (J.A. 171-187.)

The court held that, in the first amended complaint, plaintiff failed to plausibly plead standing. Standing was absent for two separate reasons, the court explained.

First, 42 U.S.C. § 1983 requires that when proceeding under that statute, an organizational litigant asserting violations of its members' rights still must allege that those asserted violations caused *it* to sustain an injury-in-fact sufficient to satisfy Article III of the United States Constitution. (J.A. 177-178.) Plaintiff's first amended complaint contained no such allegation. (J.A. 178.) In that complaint, plaintiff asserted only injuries sustained by firearms and ammunition dealers and their customers. (J.A. 178.)

Second, as a prudential matter, an organizational litigant seeking to vindicate its members' rights must also show some barrier impeding its members' ability to attempt to vindicate their own rights for themselves. (J.A. 178.) And there was no suggestion that plaintiff's members who were affected by Executive Order 202.8 would have had any difficulty bringing their own legal challenges. (J.A. 178-179.)

The district court denied as futile plaintiff's request for leave to file the proposed second amended complaint. The court reasoned that plaintiff's new allegations of harm were insufficient to confer standing. (J.A. 182-187.)

The court entered judgment for defendants accordingly (J.A. 188), and plaintiff filed a notice of appeal (J.A. 190-191).

E. Over Time, the State Adjusts Its Approach to Combatting COVID-19.

Meanwhile, the State had been significantly adjusting its approach to combating COVID-19. In late April 2020, as the science of COVID-19 was becoming better understood and the spread of the disease was becoming more contained, the State announced "New York FORWARD": a four-phase plan for reopening the "paused" sectors of the economy on a

region-by-region basis.[10] Under that plan, which took effect in May 2020, regions progressed through the phases by achieving various COVID-19-containment benchmarks.[11] As regions did so, increasingly more businesses were allowed to resume in-person operation so long as they continued to comply with applicable Health Department guidelines.[12]

By late July 2020, all regions of the State had entered Phase 4, and they remain in Phase 4 today.[13] Now, all retail stores—essential and non-essential—may operate in-person, subject to Health Department guidance requiring that all people present in the store wear masks when

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[10] Gov. Andrew M. Cuomo, *Amid Ongoing Covid-19 Pandemic, Governor Cuomo Outlines Phased Plan to Re-open New York Starting With Construction and Manufacturing* (Apr. 26, 2020), https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-outlines-phased-plan-re-open-new-york-starting; Gov. Andrew M. Cuomo, *NY FORWARD: A Guide to Reopening New York & Building Back Better* (May 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYForwardReopeningGuide.pdf.

[11] *Id.*

[12] *Id.*

[13] Gov. Andrew M. Cuomo, *Governor Cuomo Announces New York City Cleared by Global Health Experts to Enter Phase Four of Reopening Monday, July 20th* (July 17, 2010), https://www.governor.ny.gov/news/governor-cuomo-announces-new-york-city-cleared-global-health-experts-enter-phase-four-reopening.

interacting with others and practice social distancing of at least six feet whenever possible, and that the number of persons occupying any given area of the store not exceed 50 percent of that area's certified maximum occupancy. Indeed, retail stores were permitted to open under these conditions by Phase 2.[14] Professional offices, manufacturing plants, and certain sports and recreation enterprises, including shooting ranges, may now conduct in-person operations as well, subject to similar health protocols.[15]

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[14] *See generally* New York State Department of Health, *Interim Guidance for Essential & Phase II Retail Business Activities During the COVID-19 Public Health Emergency* (July 1, 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/RetailMasterGuidance.pdf.

[15] *See generally* New York State Department of Health, *Interim Guidance for Office-Based Work During the COVID-19 Public Health Emergency* (Mar. 12, 2021), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/offices-interim-guidance.pdf; New York State Department of Health, *Interim Guidance for Sports and Recreation During the COVID-19 Public Health Emergency* (Mar. 25, 2021), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/SportsAndRecreationMasterGuidance.pdf; New York State Department of Health, *Interim Guidance for Manufacturing Activities During the COVID-19 Public Health Emergency* (June 26, 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/ManufacturingMasterGuidance.pdf.

In September and October 2020, clusters of COVID-19 infections started emerging in certain regions of the State, particularly in New York City.[16] But the State did not implement any measure comparable to the statewide ban on in-person operation of non-essential businesses mandated by Executive Order 202.8. All regions of the State remained in Phase 4 of New York FORWARD and continued the reopening process. To address the COVID-19 resurgence, the State implemented the "Cluster Action Initiative," which authorizes the imposition of heightened restrictions only in those geographic micro-areas in which clusters are detected—and only for the length of time necessary to bring the clusters under control.[17] Under that initiative, non-essential businesses are required to cease in-person operations only in designated

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[16] *See* Gov. Andrew M. Cuomo, *Governor Cuomo Announces New Cluster Action Initiative* (Oct. 6, 2020), https://www.governor.ny.gov/news/governor-cuomo-announces-new-cluster-action-initiative.

[17] *See* Gov. Andrew M. Cuomo, *Governor Cuomo Announces Updated Zone Metrics, Hospital Directives and Business Guidelines* (Dec. 11, 2020), https://www.governor.ny.gov/news/governor-cuomo-announces-updated-zone-metrics-hospital-directives-and-business-guidelines; Gov. Andrew M. Cuomo, *Governor Cuomo Details COVID-19 Micro-Cluster Metrics* (Oct. 21, 2020), https://www.governor.ny.gov/news/governor-cuomo-details-covid-19-micro-cluster-metrics; *Governor Cuomo Announces New Cluster Action Initiative*, *supra*.

"red zones," where clusters are detected, as opposed to surrounding "orange zones" or outlying "yellow zones."[18] There are no areas currently designated as red zones, and no areas have been so designated since November 2020.[19]

The federal government has now approved the use of not one but *three* vaccines shown to be highly effective at combatting COVID-19—either by blunting the symptoms of the illness or preventing its onset altogether.[20] In December 2020, New York was the first state in the country to begin facilitating the administration of authorized COVID-19 vaccines to eligible residents,[21] and it has since opened dozens of mass

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[18] *See id.*

[19] Nor are there any areas currently designated orange zones or yellow zones. Gov. Andrew M. Cuomo, *Governor Cuomo Updates New Yorkers on State's Progress During COVID-19 Pandemic* (Mar. 17, 2021), https://www.governor.ny.gov/news/governor-cuomo-updates-new-yorkers-states-progress-during-covid-19-pandemic-145.

[20] U.S. Centers for Disease Control and Prevention, *Different COVID-19 Vaccines*, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines.html (last visited Mar. 29, 2021).

[21] Gov. Andrew M. Cuomo, *Video, Audio, Photos & Rush Transcript: Governor Cuomo Announces First Dose of COVID-19 Vaccine Administered in the United States* (Dec. 14, 2020), https://www.gov

vaccination sites to speed the vaccination process.[22] As of March 29, 2021, nearly 3.5 million New Yorkers have been fully vaccinated, and more than 1 million vaccine doses are being administered each week.[23]

SUMMARY OF ARGUMENT

Insofar as plaintiff seeks declaratory and injunctive relief, the appeal should be dismissed as moot, because plaintiff has now in effect received all the relief sought in its request for an injunction and declaratory judgment. Executive Order 202.8's statewide ban on the in-person operation of non-essential businesses is no longer in force. In April 2020, after that measure had done its job helping bring the State's

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ernor.ny.gov/news/video-audio-photos-rush-transcript-governor-cuomo-announces-first-dose-covid-19-vaccine.

[22] Gov. Andrew M. Cuomo, *Governor Cuomo Announces Appointments Now Available at Ten New State-run Mass Vaccination Sites* (Mar. 17, 2021), https://www.governor.ny.gov/news/governor-cuomo-announces-appointments-now-available-ten-new-state-run-mass-vaccination-sites; Gov. Andrew M. Cuomo, *Governor Cuomo Announces Three Additional Mass Vaccination Sites to Open on Long Island this Week* (Mar. 15, 2021), https://www.governor.ny.gov/news/governor-cuomo-announces-three-additional-mass-vaccination-sites-open-long-island-week.

[23] New York State Department of Health, *COVID-19 Vaccine Tracker*, https://covid19vaccine.health.ny.gov/covid-19-vaccine-tracker (last visited Mar. 29, 2021).

COVID-19 problem significantly more under control, the State introduced a program for gradually reopening the affected sectors of its economy. Under that program, which took effect in May 2020, the gun-industry businesses that plaintiff asks be allowed to operate in-person *are* allowed to operate in-person. Most notably, firearms and ammunition retailers are given the same authorizations as all retailers, essential and non-essential: They may conduct in-person operations subject to health and safety protocols requiring masking, social distancing, and limiting the number of persons in the store at any one time to 50 percent of maximum occupancy.

Further, there is no reasonable likelihood that the State will revert to a regime resembling Executive Order 202.8's statewide ban on the in-person operation of non-essential businesses that will lead the aforementioned gun-industry businesses to close. The State's track-record in dealing with the pandemic shows that, over time, it has generally acted to ease COVID-19-related restrictions, not to tighten them.

The district court's judgment in defendants' favor should otherwise be affirmed.

The district court correctly dismissed plaintiff's first amended complaint for failure to plausibly plead standing. This is so because plaintiff failed to clear either of the two hurdles that must be cleared by an organizational litigant proceeding under § 1983 to vindicate the rights of its members. First, under § 1983 an organizational litigant seeking to vindicate its members' rights cannot establish "representational standing," *i.e.*, standing on the basis of its members' injuries. Rather, the organization must allege that *it* sustained an injury-in-fact sufficient to satisfy the standing requirements of Article III of the United States Constitution. But plaintiff's first amended complaint alleged only injuries to plaintiff's members: firearms and ammunition dealers' closing rather than risking enforcement action, and their customers' being prevented from lawfully purchasing firearms and ammunition as a result of those closings.

Second, for prudential reasons, an organizational litigant seeking to vindicate its members' rights must additionally show that a barrier impeded its members' ability to attempt to vindicate their own rights. But plaintiff has never suggested that firearms and ammunition dealers and their customers would have had any difficulty bringing their own

legal actions complaining of the injuries that Executive Order 202.8 supposedly caused them to suffer.

Finally, plaintiff's proposed second amended complaint does not plausibly allege an entitlement to nominal damages, because such damages are unavailable against the only defendants named therein: state officers sued in their official capacities. Although not the ground relied upon by the district court, this failure is apparent from the record and supports affirmance of the court's judgment denying leave to amend as futile, to the extent damages were requested. First, damages are jurisdictionally barred by the Eleventh Amendment when sought in federal court against state officials in their official capacities. And the proposed second amended complaint names as defendants only Governor Cuomo and two other State officials, and only in their official capacities. Second, even if those defendants had consented to be subject to damages claims and thereby waived their Eleventh Amendment immunity, their official-capacity status nevertheless renders damages against them statutorily unavailable under § 1983.

STANDARDS OF REVIEW

The portion of the district court's judgment granting defendants' motion to dismiss plaintiff's first amended complaint under Federal Rule of Civil Procedure 12(c) for lack of standing is reviewed de novo. *See Rajamin v. Deutsche Bank Nat'l Trust Co.*, 757 F.3d 79, 84-85 (2d Cir. 2014).

The portion of the district court's judgment denying plaintiff's cross-motion for leave to file its proposed second amended complaint as futile is reviewed for abuse of discretion. *Krys v. Pigott*, 749 F.3d 117, 134 (2d Cir. 2014). An abuse of discretion requires a finding that the judgment is premised upon "an erroneous view of the law, a clearly erroneous assessment of the facts, or a decision that cannot be located within the range of permissible decisions." *Id.* (quoting *Anderson News, L.L.C. v. American Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012)).

Defendants also ask this Court to dismiss the appeal as moot insofar as it challenges the district court's denial of injunctive and declaratory relief. This request is being made originally in this Court, because the circumstances giving rise to mootness arose during the pendency of the appeal.

ARGUMENT

POINT I

THE APPEAL OF THE DISTRICT COURT'S DENIAL OF DECLARATORY AND INJUNCTIVE RELIEF SHOULD BE DISMISSED AS MOOT

Article III of the United States Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const., Art. III, § 2. As a result, jurisdiction is generally absent when a case becomes moot, *Van Wie v. Pataki*, 267 F.3d 109, 113-14 (2d Cir. 2001), such as when the plaintiff has received "all of the relief that [it] sought," *Doyle v. Midland Credit Mgmt.*, 722 F.3d 78, 80 (2d Cir. 2013); *accord, e.g.*, *Abrams v. Seneci*, 817 F.2d 1015, 1017 (2d Cir. 1987). That, in substance, is what has happened here as to plaintiff's requested declaration and injunction.

Plaintiff requests a declaration stating that firearms and ammunition dealers, manufacturers, retailers, importers, and distributors, as well as shooting ranges and providers of firearms education and training, are "allowed to operate" under Executive Order 202.8, or, alternatively, that the "prohibition of the operation" of those entities is unlawful. (J.A. 59 [first amended complaint], 138 [proposed second amended complaint].) Plaintiff similarly requests an injunction preventing defendants from enforcing the executive order to "prohibit the

operation" of such entities. (J.A. 59 [first amended complaint], 138 [proposed second amended complaint].) However, Executive Order 202.8's statewide ban on the in-person operation of non-essential businesses is no longer in effect, and has not been in effect for some time. The request for injunctive and declaratory relief relating to either the interpretation or the lawfulness of that ban is therefore moot. *See New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1526 (2020) (dismissing as moot an appeal challenging a municipal rule that had been amended in a manner that afforded "the precise relief that petitioners requested in the prayer for relief in their complaint").

In May 2020, Executive Order 202.8's prohibition was superseded by New York FORWARD's four-phase plan for reopening the sectors of the economy that the prohibition had affected.[24] The reopening plan operates on a region-by-region basis; regions progress through the phases by achieving various benchmarks concerning COVID-19 containment.[25]

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[24] *Amid Ongoing Covid-19 Pandemic, Governor Cuomo Outlines Phased Plan to Re-open New York Starting With Construction and Manufacturing*, *supra*; *NY FORWARD: A Guide to Reopening New York & Building Back Better*, *supra*.

[25] *Id.*

And as regions progress, increasingly more businesses are allowed to resume in-person operation subject to applicable Health Department guidelines.[26]

Since August 2020, all regions of the State have been in the plan's fourth and final phase.[27] All retail stores—essential and non-essential—may now operate in-person, subject to Health Department guidance requiring that all people present in the store wear masks when interacting with others and practice social distancing of at least six feet whenever possible, and that the number of persons occupying any given area of the store not exceed 50 percent of that area's certified maximum occupancy. Indeed, retail stores have been authorized to operate under these conditions since the second phase of that plan.[28] Professional offices, manufacturing facilities, and certain sports and recreation

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[26] *Id.*

[27] *Governor Cuomo Announces New York City Cleared by Global Health Experts to Enter Phase Four of Reopening Monday, July 20th*, *supra*.

[28] *See generally Interim Guidance for Essential & Phase II Retail Business Activities During the COVID-19 Public Health Emergency*, *supra*.

enterprises, including shooting ranges, may now conduct in-person operations as well, subject to similar health protocols.[29] Thus, the businesses that plaintiff requests be allowed to operate in-person may indeed do so.

Plaintiff does not argue otherwise. Rather, plaintiff contends (Br. 31-33) that this appeal should be adjudicated on the merits—even insofar as plaintiff seeks injunctive and declaratory relief—because "[t]he COVID pandemic has surged back in New York, creating the ever-present threat of shutdowns" that the State is, in theory, authorized to impose. This contention is incorrect. Whether framed as an argument against finding the appeal moot or as an argument for finding a basis to retain the appeal under the exception to the rule that moot cases must be dismissed, it fails because there is no "reasonable expectation," *Van Wie*, 267 F.3d at 113-14, that the State will institute a regime that would

[29] *See generally Interim Guidance for Office-Based Work During the COVID-19 Public Health Emergency*, *supra*; *Interim Guidance for Sports and Recreation During the COVID-19 Public Health Emergency*, *supra*; *Interim Guidance for Manufacturing Activities During the COVID-19 Public Health Emergency*, *supra*.

lead the gun-industry businesses plaintiff identifies to cease all manner of in-person operation.

Plaintiff chides defendants for not making a mootness argument below (*see* Br. 32), but there was a good reason for that: The best evidence that the State will not again impose an order having the effect of Executive Order 202.8's statewide ban on the in-person operation of non-essential businesses emerged *after* the district court's decision. In response to the COVID-19 clusters that the State observed in September and October 2020, the State *refrained* from re-imposing any such ban. New York FORWARD's phased reopening was allowed to continue. To address the clusters, the State implemented the "Cluster Action Initiative," which authorizes the imposition of heightened restrictions only in those geographic micro-areas in which problematic COVID-19 clusters are detected—and only for the length of time necessary to bring the clusters under control.[30] Under that program, non-essential businesses need only pause in-person operations for such time as the area

[30] *See Governor Cuomo Announces Updated Zone Metrics, Hospital Directives and Business Guidelines*, *supra*; *Governor Cuomo Details COVID-19 Micro-Cluster Metrics*, *supra*; *Governor Cuomo Announces New Cluster Action Initiative*, *supra*.

in which they are located is designated a "red zone"—essentially, an infection cluster itself.[31] There are no red zones today.[32]

Indeed, advances in medical science that render future COVID-19 surges less likely, or at least less extensive, make it speculative to assume that the State would again impose a ban like that of Executive Order 202.8. There are now three vaccines that have been shown to be highly effective at blunting the symptoms of COVID-19 or preventing the illness's onset altogether.[33] The State is in the process of facilitating the administration of these vaccines to eligible residents.[34] And it has opened dozens of mass vaccination sites to speed the process along on a large

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[31] *Id.*

[32] Nor are there any orange or yellow zones, the two other types of geographic micro-areas in which, under the Cluster Action Initiative, non-essential businesses are subject to heightened COVID-19-related restrictions. *Governor Cuomo Updates New Yorkers on State's Progress During COVID-19 Pandemic*, *supra*.

[33] *Different COVID-19 Vaccines*, *supra*.

[34] *Video, Audio, Photos & Rush Transcript: Governor Cuomo Announces First Dose of COVID-19 Vaccine Administered in the United States*, *supra*.

scale.[35] Indeed, as of March 29, 2021, nearly 3.5 million New Yorkers have been fully vaccinated, and more than 1 million vaccine doses are being administered each week.[36] In parallel with these advances, the State has acted to further ease restrictions, including restrictions on activities once thought to present an unmanageable COVID-19 transmission risk.[37]

In sum, the gun-industry businesses that plaintiff identifies in its request for declaratory and injunctive relief may operate in-person today,

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[35] *Governor Cuomo Announces Appointments Now Available at Ten New State-run Mass Vaccination Sites*, *supra*; *Governor Cuomo Announces Three Additional Mass Vaccination Sites to Open on Long Island this Week*, *supra*.

[36] *COVID-19 Vaccine Tracker*, *supra*.

[37] *See, e.g.*, Gov. Andrew M. Cuomo, *Video, Audio, Photos & Rush Transcript: Governor Cuomo Announces New York Yankees and New York Mets to Start the Season with Fans in the Stands Beginning April 1* (Mar. 18, 2021), https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-cuomo-announces-new-york-yankees-and-new-york-mets; Gov. Andrew M. Cuomo, *Governor Cuomo Announces Restaurants Outside New York City Can Move to 75 Percent Indoor Capacity Starting March 19* (Mar. 7, 2021), https://www.governor.ny.gov/news/governor-cuomo-announces-restaurants-outside-new-york-city-can-move-75-percent-indoor-capacity; Gov. Andrew M. Cuomo, *Governor Cuomo Announces Event, Arts and Entertainment Venues Can Reopen at 33 Percent Capacity Beginning April 2* (Mar. 3, 2021), https://www.governor.ny.gov/news/governor-cuomo-announces-event-arts-and-entertainment-venues-can-reopen-33-percent-capacity.

and there is no reasonable prospect that they will be prevented from doing so in the foreseeable future by a regime comparable to the statewide ban on in-person operation of non-essential businesses that had been instituted via Executive Order 202.8. Thus, insofar as plaintiff seeks declaratory and injunctive relief, the appeal should be dismissed as moot.

POINT II

INSOFAR AS PLAINTIFF REQUESTS NOMINAL DAMAGES, THE DISTRICT COURT'S JUDGMENT FOR DEFENDANTS SHOULD BE AFFIRMED

A. Plaintiff's First Amended Complaint Does Not Plausibly Plead Standing.

The district court correctly dismissed plaintiff's first amended complaint for failure to plausibly plead standing. It is settled in this Court that when an organizational litigant commences an action under 42 U.S.C. § 1983 to vindicate the rights of its members, it cannot establish standing on the basis of its members' injuries, *i.e,* "representational standing." Rather, § 1983 requires that the organizational litigant in that circumstance allege that *it* sustained an injury-in-fact sufficient to satisfy the standing requirements of Article III of the United States Constitution. *New York State Citizens' Coalition for*

Children v. Poole, 922 F.3d 69, 74-75 (2d Cir. 2019). Further, even if the organizational litigant satisfies that requirement, as a prudential matter it must additionally identify a barrier that impeded its members' ability to attempt to vindicate their own rights. *Id.* Plaintiff's first amended complaint, brought under § 1983 to vindicate the rights of its members who are firearms and ammunition dealers and their customers, does not clear either of these two hurdles.

1. Plaintiff Lacks Standing Because It Does Not Allege—As § 1983 Requires—that the Supposed Violations of Its Members' Rights Caused It to Sustain a Constitutionally-Sufficient Injury.

As a result of Article III's case-or-controversy limitation, generally a plaintiff has standing to sue a defendant only if the plaintiff has suffered an "injury-in-fact," *i.e.*, a concrete, particularized harm. *See Montesa v. Schwartz*, 836 F.3d 176, 195 (2d Cir. 2016). Although in some circumstances organizational litigants suing to vindicate their members' rights are permitted to establish standing on a representational basis by invoking those members' injuries, this Court holds that § 1983 precludes organizational litigants from doing so in actions brought under that statute.

Section 1983 creates a cause of action for "any citizen of the United States or other person within the jurisdiction thereof" who has been deprived under color of state law "of any rights, privileges, or immunities secured by the Constitution and laws." The cause of action is "personal to those purportedly injured." *League of Women Voters v. Nassau County Bd. of Supervisors*, 737 F.2d 155, 160 (2d Cir. 1984); *see also Aguayo v. Richardson*, 473 F.2d 1090, 1099 (2d Cir. 1973) (Friendly, C.J.). Thus, when proceeding under § 1983, an organizational litigant seeking to vindicate the rights of its members cannot establish standing on the basis of its members' injuries, *i.e,* "representational standing." Instead, § 1983 requires that "organizations suing under [that statute] must, without relying on their members' injuries, assert that their own injuries are sufficient to satisfy Article III's standing requirements." *New York State Citizens' Coalition for Children*, 922 F.3d at 74-75 (citing *Nnebe v. Daus*, 644 F.3d 147, 156-58 (2d Cir. 2011); *League of Women Voters*, 737 F.2d at 160-61; *Aguayo*, 473 F.2d at 1099-1100).

As plaintiff does not deny, the only injuries alleged in its first amended complaint are those that its members—firearms and ammunition dealers and their customers—supposedly suffered. Plaintiff

argues, however (Br. 11-17), that this Court's precedent precluding organizational litigants proceeding under § 1983 from invoking representative standing is no longer good law. Plaintiff is mistaken.

Neither of the two decisions on which plaintiff relies—*Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993), and *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254 (2015)—holds that an organizational litigant seeking to vindicate its members' rights has standing to prosecute a § 1983 action on the basis of those members' alleged injuries. Those cases *presumed* the validity of that proposition; there was "no suggestion" of any contrary rule. *See Northeastern Fla. Chapter of Assoc. Gen. Contractors of America*, 508 U.S. at 669 n.6; *Alabama Legislative Black Caucus*, 575 U.S. at 269. The litigants in those cases simply asked the Court to decide whether the presumed-valid theory of representational standing had been satisfied under the circumstances presented. The Court did just that, and nothing more.

The Supreme Court decisions on which plaintiff relies are unavailing for another reason, as well. Even after those decisions were issued, this Court reaffirmed the rule that § 1983 requires that an

organizational litigant suing under that statute to vindicate its members' rights must establish standing on the basis of its own injury-in-fact. Indeed, this Court has reaffirmed the rule multiple times since then. *See New York State Citizens' Coalition for Children*, 922 F.3d at 74-75 (post-dating both Supreme Court decisions); *Knife Rights, Inc. v. Vance*, 802 F.3d 377, 387 (2d Cir. 2015) (same); *see also Nnebe*, 644 F.3d at 156 n.6 (reaffirming rule in 2011). Accordingly, that rule governs unless and until the Supreme Court or this Court sitting en banc subsequently holds otherwise.

In conclusion, because plaintiff's first amended complaint seeks to prosecute a § 1983 action asserting that its members' rights were violated, yet fails to allege that those violations caused *it* to sustain a constitutionally-sufficient injury, standing is absent.

2. Standing Is Additionally Absent for the Prudential Reason that Plaintiff Has Not Identified any Barrier to Its Members' Ability to Attempt to Vindicate Their Own Rights.

Standing is absent in connection with the first amended complaint for another reason, as well: Plaintiff failed to identify any obstacle that impaired the ability of its members to seek to vindicate their own rights. Although not flowing directly from Article III, there is a prudential

limitation on standing that "a litigant must assert its own rights, not those of a third party." *Keepers, Inc. v. City of Milford*, 807 F.3d 24, 42 (2d Cir. 2015). This limitation yields only when there exists, among other things, "a barrier" to the third party's ability to assert its own rights for itself.[38] *Id.* at 41 (quoting *Smith v. Hogan*, 794 F.3d 249, 255 (2d Cir. 2015)). Plaintiff has not suggested the existence of any such barrier faced by its members here.

Nothing in the first amended complaint plausibly suggests the presence of "a significant disincentive" for firearms and ammunition dealers and their customers to file their own § 1983 actions complaining of the constitutional violations they supposedly endured as a result of Executive Order 202.8. *New York State Citizens' Coalition for Children*, 922 F.3d at 75. Indeed, at least one dealer and two of its customers have in fact brought their own such lawsuit. *See Dark Storm Indus. LLC v. Cuomo*, 471 F. Supp. 3d 482 (N.D.N.Y. 2020), *appeal pending*,

[38] Although this prudential limitation on standing was arguably called into question by the Supreme Court's decision in *Lexmark v. Static Control Components, Inc.*, 572 U.S. 118 (2014), this Court has continued to apply it. *See, e.g.*, *Keepers*, 807 F.3d at 42; *Smith*, 794 F.3d at 255; *United States v. Suarez*, 791 F.3d 363, 367 (2d Cir. 2015).

No. 20-2725 (2d Cir.). It is thus not surprising that plaintiff has never suggested that dealers and their customers "would have any difficulty asserting their own interests." *Keepers*, 807 F.3d at 42.

B. The Proposed Second Amended Complaint Is Futile Insofar as It Does Not Plausibly Plead an Entitlement to Nominal Damages.

As for the proposed second amended complaint, a decision issued by this Court after the district court's ruling casts some doubt on the holding that plaintiff in that complaint lacks Article III standing because of a failure to allege the requisite injury-in-fact. The new allegations of harm that plaintiff itself supposedly sustained as a result of Executive Order 202.8 arguably constitute the requisite injury under *Moya v. United States Dep't of Homeland Security*, 975 F.3d 120 (2d Cir. 2020). *See id.* at 137-38 (Jacobs, J., concurring in part and concurring in the judgment) (arguing that *Moya* "renders Article III standing negligible" and "needs intervention").

Moya does not, however, cure the prudential standing problem that plagues most of the proposed second amended complaint. For the reasons explained above, *supra* 38-40, under the circumstances of this case, even if plaintiff plausibly pleads its own constitutionally-sufficient *injury*,

prudential standing would remain absent except to the extent that plaintiff seeks to vindicate its own *rights*. And in the context of the proposed second amended complaint, that extent is limited: Plaintiff's only such claim is that Executive Order 202.8 violated its own Fifth and Fourteenth Amendment rights, as a provider of firearms education and training, to be free from overly vague regulations. Thus, even after *Moya*, plaintiff lacks standing to assert the proposed second amended complaint's Second Amendment claims, which are brought on behalf of—and could only have been brought on behalf of—individual New Yorkers. *Cf. Teixeira v. City of Alameda*, 873 F.3d 670, 673 (9th Cir. 2017) (en banc) ("A textual and historical analysis of the Second Amendment demonstrates that the Constitution does not confer a freestanding right on commercial proprietors to sell firearms.").

Even the claims in the proposed second amended complaint in which plaintiff does assert its own rights and injuries are futile to the extent they seek nominal damages—the only form of relief as to which this appeal is not moot. The claims fail in this regard for two distinct yet related reasons that the district court did not rely upon. First, the Eleventh Amendment jurisdictionally bars claims in federal court

seeking damages from state officials acting in their official capacities, and such officials are the only defendants the proposed second amended complaint names. And second, even if those defendants had consented to be subject to damages claims and thus waived their Eleventh Amendment immunity, they are not suable for nominal damages in this § 1983 action because under that statute their official-capacity status renders damages unavailable.[39]

1. The Eleventh Amendment Bars an Award of Damages Because the Only Defendants Named Are State Officials Sued in Their Official Capacities.

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." This provision has been construed to effect a "withdrawal of jurisdiction"

[39] Defendants raised these constitutional and statutory arguments in their memorandum of law in support of their motion to dismiss the first amended complaint (J.A. 101) and incorporated them by reference into their memorandum of law in opposition to plaintiff's cross-motion for leave to file the proposed second amended complaint (J.A. 148). In any event, this Court may affirm the denial of plaintiff's cross-motion "on any ground with support in the record, even one raised for the first time on appeal." *United States v. Morgan*, 380 F.3d 698, 701 n.2 (2d Cir. 2004).

over claims brought in federal court against States without their consent. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993); *see also NAACP v. Merrill*, 939 F.3d 470, 475 (2d Cir. 2019) ("[T]he Eleventh Amendment goes to the jurisdiction of the federal court."). For Eleventh Amendment purposes, "[a]n action against a state official in his official capacity is deemed an action against the state itself." *Libertarian Party v. Cuomo*, 970 F.3d 106, 122 (2d Cir. 2020). There is an exception under which such claims may go forward for injunctive relief, but "a state official sued in his official capacity is entitled to invoke Eleventh Amendment immunity from a claim for damages." *Id.* This includes claims for nominal damages. *See Simmons v. Conger*, 86 F.3d 1080, 1086 (11th Cir. 1996) ("[T]he district court erred in awarding nominal damages against [a state court judge] in his official capacity because that relief is barred by the Eleventh Amendment.").

Plaintiff's proposed second amended complaint names as defendants only State officials: Governor Cuomo; Reardon, Commissioner of the Department of Labor; and Gertler, Acting

Commissioner of the Department of Economic Development.[40] (J.A. 117, 120-121.) And it names them only in their official capacities. (J.A. 117, 120-121.) Under the Eleventh Amendment, the proposed second amended complaint's request for nominal damages is therefore barred.

2. The Named Defendants' Official-Capacity Status Renders Nominal Damages Unavailable Under § 1983.

Defendants, including those named in the proposed second amended complaint, asserted Eleventh Amendment immunity below.[41] (*See* J.A. 101, 148.) But even if the defendants named in that complaint are regarded as having consented to be subject to damages claims, still nominal damages cannot be awarded against them. This is because, as a statutory matter, plaintiff's decision to name those defendants only in their official capacities renders nominal damages unavailable under § 1983. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 68-69

[40] Like the first amended complaint, the proposed second amended complaint additionally describes Gertler as the Department of Economic Development's President and CEO (J.A. 121), when in fact his President and CEO roles are with the New York State Urban Development Corporation, *see Meeting Minutes of Sept. 19, 2019*, *supra*, at 60.

[41] Parties "may assert Eleventh Amendment sovereign immunity at any time during the course of proceedings," however. *McGinty v. New York*, 251 F.3d 84, 94 (2d Cir. 2001).

(1997) (finding that a state had waived its Eleventh Amendment immunity yet could not be sued for damages under § 1983).

By its terms, § 1983 confers a right of action only upon individuals whose federal rights are violated by a "person." And although "state officials literally are persons," that fact does not make a legal difference because "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). As is the case under the Eleventh Amendment, "a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" *Id.* at 71 n.10 (quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985)). But state officials are not statutory "persons" under § 1983 when they are sued in their official capacities for damages. *Id.*; *see, e.g.*, *Cruz v. Gomez*, 202 F.3d 593, 595 n.2 (2d Cir. 2000).

It follows that, even putting the Eleventh Amendment to one side, the request for nominal damages under § 1983 set forth in plaintiff's proposed second amended complaint is not cognizable.

CONCLUSION

To the extent plaintiff challenges the district court's denial of declaratory and injunctive relief, the appeal should be dismissed as moot. The district court's judgment for defendants should otherwise be affirmed.

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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32.1(a)(4)(A) because it is proportionately spaced, has a typeface of 14 points or more, and contains 8,378 words, not counting the portions of the brief excepted by Federal Rule of Appellate Procedure 32(f).

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