No. 18-

IN THE

Supreme Court of the United States

MOGUL MEDIA, INC., *et al.*,

Petitioners,

v.

CITY OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Second Circuit affirmed, en banc, the Second Circuit's prior affirmance of the district court's dismissal, at the pleading stage, of the Amended Complaint which sought to challenge the New York City Zoning Resolution and provisions of the New York City Administrative Code and the Rules of the City of New York as they applied to outdoor advertising signs on the grounds the sign restrictions were content based, that allowed the defendants and their tenants to erect outdoor advertising signs in and about Citi Field without imposing on themselves the same restrictions imposed upon private landowners in areas in which private landowners were barred or restricted from erecting the same size and types of signs, the restrictions on private landowners were too restrictive, and the stated governmental rationale for the restrictions imposed on private landowners, namely esthetics and traffic control, were pretexts for restricting private, commercial speech, and were not reasonably related to the stated, pretextual reasons offered by the City of New York, while enriching the City and its tenants by reducing competition for outdoor signs, restricting others' commercial free speech rights, and preferring the speech, and the utterers of the speech, being the City and its tenants, at the expense of private individuals. In each instance, the Court considering the claims applied the incorrect standard of review and incorrectly viewed the City's conduct as having been permitted by the initial state legislation permitting the establishment of a major league baseball park.

Three questions are presented:

1. Does the First Amendment of the United States Constitution prohibit the City of New York from preferring

the commercial speech of its tenants to the exclusion of the First Amendment commercial and non-commercial free speech of private landowners and their tenants?

2. Is content-based restriction of commercial speech justified where the government itself allows its own tenants to use methods of communicating commercial speech to the public while it denies private landowners the same rights under similar circumstances?

3. Is it proper not to apply a heightened standard of scrutiny to review statutes, regulations, and policies of a municipal government designed to prefer its tenants' speech and methods of conveying that speech on public property while denying those same rights to private landlords?

LIST OF PARTIES

The Petitioners are Mogul Media, Inc., Mohammad Malik, Mogul Media LLC, Bruckner Outdoor Signs, Inc., Bruckner Outdoor Signs LLC, Mucho Media LLC, 34-06 73rd LLC, Outdoor Promoters & Traders Unlimited, Inc., Spoilers & Sundries Promotions, Inc., Monuments R Us, Inc., Elite Promotions Systems, Inc., Mogul Scrap Unlimited, Inc., Ryan Lee Properties LLC, MAM Properties LLC, Media Productions Unlimited, Inc., King Sundries Promotion Unlimited LLC, Prospect Media, L.L.C., Sprint Promotion Systems Inc., Omni Production Company, LLC, Yahoo Media Inc., Special Media Diner LLC, Outdoor Studio Promoters, LLC, 54-18 43rd Realty Corp., Lexus's Prospect Promotion LLC, and Van Dam Specialty & Promotion, Inc.

The Respondents are the City of New York, the Board of Standards & Appeals of the City of New York, the New York City Council, New York City Department of Buildings, New York City Environmental Control Board and New York City Department of Parks & Recreation.

CORPORATE DISCLOSURE STATEMENT

Mogul Media, Inc., Mogul Media LLC, Bruckner Outdoor Signs, Inc., Bruckner Outdoor Signs LLC, Mucho Media LLC, 34-06 73rd LLC, Bud Media LLC, Coors Media LLC, Outdoor Promoters & Traders Unlimited, Inc., Spoilers & Sundries Promotions, Inc., Monuments R US, Inc., Black Foot Properties LLC, Elite Promotions Systems, Inc., Mogul Scrap Unlimited, Inc., Ryan Lee Properties LLC, Mam Properties, LLC, Media Productions Unlimited, Inc., King Sundries Promotion Unlimited LLC, Prospect Media, LLC, Sprint Promotion Systems Inc., Omni Production System, Inc., Yahoo Media Inc., Gio Media I LLC, Gio Media II LLC, Special Media Diner LLC, Whitestone Media Mall LLC, Outdoor Studio Promoters, LLC, 54-18 43rd Realty Corp., Lexus's Prospect Promotion LLC, Moe Joe Sundries, Inc., Nyc Media III LLC, Paris Promotions And Studios, LLC, Sundries Promotions Systems, Inc., Eoin Michael Properties LLC, Omni Promotion Systems, Inc., Barrage Promoters LLC, MLK Media LLC, Media Entertainment Gallery of New York LLC, Media Mall Of New York LLC, 84-11 Elmhurst LLC, and Van Dam Specialty & Promotion Inc., are all privately owned corporations or limited liability companies that are all solely owned by Mohammad Malik, who is an individual.

The City of New York is a municipality.

The Board of Standards and Appeals of The City of New York, The New York City Department of Buildings, The New York City Environmental Control Board, and The New York City Department of Parks and Recreation are all municipal agencies or departments of The City of New York.

The New York City Council is the legislative body of the City of New York.

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OPINION BELOW

The initial opinion of the United States District Court for the Southern District of New York, dated December 22, 2017, is not reported in the Federal Supplement but is reported by WestLaw at *Mogul Media, Inc. v. City of New York*, 2017 WL 6594223 (S.D.N.Y. 2017). The Second Circuit affirmed the December 22, 2017 decision of the District Court by Summary Order dated December 7, 2018, reported at *Mogul Media, Inc. v. City of New York*, 744 Fed.Appx. 739 (Mem) (2nd Cir. 2018). The Second Circuit denied the petition for a rehearing en banc by Order dated January 25, 2019, n.o.r. *See* Appendices A-C.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

The Second Circuit denied the petition for a rehearing en banc by Order dated January 25, 2019, n.o.r.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment I of the United States Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV of the United States Constitution, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York City Administrative Code §18-118

Renting of stadium in Flushing Meadow park; exemption from down payment requirements.

a. Notwithstanding any other provision of law, general, special or local, the city, acting by the commissioner, with the approval of the board of estimate, is hereby authorized and empowered from time to time to enter into contracts, leases or rental agreements with, or grant licenses, permits, concessions or other authorizations to, any person or persons, upon such terms and conditions, for such consideration, and for such term of duration as may be agreed upon by the city and such person or persons, whereby such person or persons are granted the right, for any purpose or purposes referred to in subdivision b of this section, to use, occupy or carry on activities in, the whole or any part of a stadium, with appurtenant grounds, parking areas and other facilities, to be constructed by the city on certain tracts of land described in subdivision c of this section, being a part of Flushing Meadow park

and situated in the borough of Queens, city and state of New York, title to which tracts is now in the city. Prior to or after the expiration or termination of the terms of duration of any contracts, leases, rental agreements, licenses, permits, concessions or other authorizations entered into or granted pursuant to the provisions of this subdivision and subdivision b of this section, the city, in accordance with the requirements and conditions of this subdivision and subdivision b of this section, may from time to time enter into amended, new, additional or further contracts, leases or rental agreements with, and grant new, additional or further licenses, permits, concessions or other authorizations to, the same or any other person or persons for any purpose or purposes referred to in subdivision b of this section.

b. Any contract, lease, rental agreement, license, permit, concession or other authorization referred to in subdivision a of this section may grant to the person or persons contracting with the city thereunder, the right to use, occupy or carry on activities in, the whole or any part of such stadium, grounds, parking areas and other facilities, (1) for any purpose or purposes which is of such a nature as to furnish to, or foster or promote among, or provide for the benefit of, the people of the city, recreation, entertainment, amusement, education, enlightenment, cultural development or betterment, and improvement of trade and commerce, including professional, amateur and scholastic sports and athletic events, theatrical, musical or other entertainment presentations, and meetings, assemblages, conventions and exhibitions for any purpose, including meetings, assemblages, conventions and exhibitions held for business or trade purposes, and other events of civic, community and general public interest,

and/or (2) for any business or commercial purpose which aids in the financing of the construction and operation of such stadium, grounds, parking areas and facilities, and any additions, alterations or improvements thereto, or to the equipment thereof, and which does not interfere with the accomplishment of the purposes referred to in paragraph one of this subdivision. It is hereby declared that all of the purposes referred to in this subdivision are for the benefit of the people of the city and for the improvement of their health, welfare, recreation and prosperity, for the promotion of competitive sports for youth and the prevention of juvenile delinquency, and for the improvement of trade and commerce, and are hereby declared to be public purposes.

c. The tracts of land referred to in subdivision a of this section are more particularly described as follows:

1. The area of land bounded on the north by the south side of Northern boulevard, on the east by the west side of One hundred twenty-sixth street, on the south by the north side of Roosevelt avenue, and on the west by the east side of Grand Central parkway.

2. The area of land bounded on the north by the south side of Roosevelt avenue, on the east by the west side of One hundred twenty-sixth street, on the south by lands of the city of New York occupied by the New York city transit authority, and on the west by the east side of Grand Central parkway, excepting from such area of land, the portion thereof fronting on Roosevelt avenue occupied by such authority as a substation.

d. Notwithstanding the foregoing provisions of this section or the provisions of any other law, general, special or local, the commissioner, acting in behalf of the city, is hereby authorized and empowered, without the approval of the board of estimate, to enter into contracts, leases or rental agreements with or grant licenses, permits, concessions or other authorizations to any person or persons, upon such terms and conditions and for such consideration as may be agreed upon by the commissioner and such person or persons, for terms of duration, which, in the case of each such contract, lease, rental agreement, license, permit or other authorization, including renewals, shall not be in excess of one year, whereby such person or persons are granted the right to use, occupy or carry on activities in, the whole or any part of such stadium, grounds, parking areas and other facilities, for any purpose or purposes referred to in subdivision b of this section. Upon the expiration of the terms of duration of any of such contracts, leases, rental agreements, licenses, permits, concessions or other authorizations entered into or granted pursuant to the provisions of this subdivision, or within thirty days prior to such expiration or termination, the commissioner, in accordance with the requirements and conditions of this subdivision, acting in behalf of the city, and without the approval of the board of estimate, may from time to time enter into new, additional or further contracts, leases or rental agreements with, and may grant new, additional or further licenses, permits, concessions or other authorizations to, the same or any other person or persons for any purpose or purposes referred to in subdivision b of this section.

e. Notwithstanding the provisions of section 107.00 of the local finance law, for the purpose of financing and paying

the cost of the construction of such stadium, grounds, parking areas and facilities, and the construction of any additions, alterations or improvements thereto or to the equipment thereof, including a roof for such stadium and increased seating capacity therein, the city is hereby authorized and empowered, without providing from current funds any part of such cost or otherwise complying with the provisions of section 107.00 of such law, but upon compliance by the city with all other applicable provisions of the local finance law, to issue bonds and bond anticipation notes and to make expenditures from the proceeds of such bonds and bond anticipation notes or from any fund into which such proceeds are paid.

New York City Zoning Resolution §32-66 (quoted in relevant part below)

In all districts, as indicated, no #advertising sign# shall be located, nor shall an existing #advertising sign# be structurally altered, relocated or reconstructed within 200 feet of an arterial highway or of a #public park# with an area of one half acre or more, if such #advertising sign# is within view of such arterial highway or #public park#. For the purposes of this Section, arterial highways shall include all highways which are shown on the Master Plan of Arterial Highways and Major Streets, as "principal routes," "parkways" or "toll crossings," and which have been designated by the City Planning Commission as arterial highways to which the provisions of this Section shall apply. Beyond 200 feet from such arterial highway or #public park#, an #advertising sign# shall be located at a distance of at least as many linear feet therefrom as there are square feet of #surface area# on the face of such #sign#.

New York City Zoning Resolution §32-66

32-66

Additional Regulations for Signs Near Certain Parks and Designated Arterial Highways

C1 C2 C3 C4 C5 C6 C7 C8

In all districts, as indicated, all permitted #signs# are subject to the applicable regulations of this Section.

For the purposes of this Section, arterial highways shall include all highways that are shown on the Master Plan of Arterial Highways and Major Streets as "principal routes," "parkways" or "toll crossings," and that have been designated by the City Planning Commission as arterial highways to which the provisions of this Section shall apply.

New York City Zoning Resolution §32-661

Additional regulations for signs other than advertising signs

C6-5 C6-7 C7 C8

In the districts indicated, and within 200 feet of an arterial highway or a #public park# with an area of one-half acre or more, no permitted #sign# that is within view of such arterial highway or #public park# shall exceed 500 square feet of #surface area#. Beyond 200 feet from such arterial highway or #public park#, the surface area of such #signs# may be increased one square foot for each linear

foot such #sign# is located from the arterial highway or #public park#. Upon application, these requirements shall be waived, provided that the Chairperson of the City Planning Commission certifies that:

(a) such waiver is limited to a single, non-#flashing sign# that is located on a #zoning lot# not less than one and one-half acres; and

(b) all other permitted #signs# located on such #zoning lot# that are subject to the provisions of this Section conform with all the #sign# regulations applicable in C1 Districts.

New York City Zoning Resolution §32-662

Additional regulations for advertising signs

C6-5 C6-7 C7 C8

In all districts, as indicated, no #advertising sign# shall be located, nor shall an existing #advertising sign# be structurally altered, relocated or reconstructed within 200 feet of an arterial highway or of a #public park# with an area of one half acre or more, if such #advertising sign# is within view of such arterial highway or #public park#. For the purposes of this Section, arterial highways shall include all highways which are shown on the Master Plan of Arterial Highways and Major Streets, as "principal routes," "parkways" or "toll crossings," and that have been designated by the City Planning Commission as arterial highways to which the provisions of this Section shall apply. Beyond 200 feet from such arterial highway or #public park#, an #advertising sign# shall be located

at a distance of at least as many linear feet therefrom as there are square feet of #surface area# on the face of such #sign#. However, in all districts as indicated, the more restrictive of the following shall apply:

(1) Any #advertising sign# erected, structurally altered, relocated or reconstructed prior to June 1, 1968, within 660 feet of the nearest edge of the right-of-way of an arterial highway, whose message is visible from such arterial highway, shall have legal #non-conforming use# status pursuant to Section 52-83, to the extent of its size existing on May 31, 1968.

(2) Any #advertising sign# erected, structurally altered, relocated or reconstructed between June 1, 1968 and November 1, 1979, within 660 feet of the nearest edge of the right of-way of an arterial highway, whose message is visible from such arterial highway, and whose size does not exceed 1,200 square feet in #surface area# on its face, 30 feet in height, and 60 feet in length, shall have legal #nonconforming use# status pursuant to Section 52-83, to the extent of its size existing on November 1, 1979. All #advertising signs# not in conformance with the standards set forth herein shall terminate.

New York City Zoning Resolution §12-10 (Selected Definitions)

An "accessory use":

(a) is a #use# conducted on the same #zoning lot# as the principal #use# to which it is related (whether located within the same or an #accessory building or other structure#, or as an #accessory use# of land), except

that, where specifically provided in the applicable district regulations or elsewhere in this Resolution, #accessory# docks, off-street parking or off-street loading need not be located on the same #zoning lot#; and

(b) is a #use# which is clearly incidental to, and customarily found in connection with, such principal #use#; and

(c) is either in the same ownership as such principal #use#, or is operated and maintained on the same #zoning lot# substantially for the benefit or convenience of the owners, occupants, employees, customers, or visitors of the principal #use#.

When "accessory" is used in the text, it shall have the same meaning as #accessory use#.

***

(15) #Accessory signs#.

Sign, advertising (4/8/98)

An "advertising sign" is a #sign# that directs attention to a business, profession, commodity, service or entertainment conducted, sold, or offered elsewhere than upon the same #zoning lot# and is not #accessory# to a #use# located on the #zoning lot#.

New York City Zoning Resolution §52-61

General Provisions

If, for a continuous period of two years, either the #nonconforming use# of #land with minor improvements# is discontinued, or the active operation of substantially all the #non-conforming uses# in any #building or other structure# is discontinued, such land or #building or other structure# shall thereafter be used only for a conforming #use#. Intent to resume active operations shall not affect the foregoing. The provisions of this Section shall not apply where such discontinuance of active operations is directly caused by war, strikes or other labor difficulties, a governmental program of materials rationing, or the construction of a duly authorized improvement project by a governmental body or a public utility company. Except in Historic Districts as designated by the Landmarks Preservation Commission, the provisions of this Section shall not apply to vacant ground floor or #basement# stores in #buildings designed for residential use# located in R5, R6 or R7 Districts where the changed or reactivated #use# is listed in Use Group 6A, 6B, 6C or 6F excluding post offices, veterinary medicine for small animals, automobile supply stores, electrolysis studios and drive-in banks. In addition, the changed or reactivated #use# shall be subject to the provisions of Section 52-34 (Commercial Uses in Residence Districts).

New York City Zoning Resolution §52-83

Non-Conforming Advertising Signs

In all #Manufacturing Districts#, or in C1, C2, C4, C5-4, C6, C7 or C8 Districts, except as otherwise provided in

Sections 32-66 or 42-55 (Additional Regulations for Signs Near Certain Parks and Designated Arterial Highways), any #non-conforming advertising sign# except a #flashing sign# may be structurally altered, reconstructed or replaced in the same location and position, provided that such structural alteration, reconstruction or replacement does not result in:

(a) the creation of a new #non-conformity# or an increase in the degree of #non-conformity# of such #sign#;

(b) an increase in the #surface area# of such #sign#; or

(c) an increase in the degree of illumination of such #sign#.

However, in Community District 1 in the Borough of Brooklyn, a #non-conforming advertising sign# may be structurally altered, reconstructed or replaced in a different location, and may create a new #non-conformity# or #non-compliance#, or an increase in the degree of #non-conformity# or #non-compliance#, provided such #sign# is reconstructed pursuant to a Certificate of Appropriateness from the Landmarks Preservation Commission, is located on a landmark #building# that is part of a #general large scale development#, and there is no increase in the #surface area# or degree of illumination of such #sign#. Furthermore, the discontinuance provisions of Section 52-61 shall not apply to such #sign#, provided such #sign# is reconstructed on the landmark #building# prior to the issuance of a temporary certificate of occupancy for any #use# within such #building#.

No #sign# that exceeds or is otherwise in violation of any illumination standard established by rule of the Department of Buildings shall be #non-conforming# as to such illumination standard one year after such rule becomes effective.

To the extent that such structural alteration, reconstruction or replacement of #non-conforming advertising signs# is permitted under the provisions of this Section, the provisions of the following Sections are modified:

Section 52-22 (Structural Alterations)

Sections 52-51 to 52-55, inclusive, relating to Damage or Destruction.

STATEMENT OF THE CASE

Preliminary Statement

At one time, billboard signs and other signs on buildings entertained and informed drivers and passengers in motor vehicles, buses, and trains were entertained and informed while driving down (or, more likely, stopped in traffic while on) the Long Island Expressway, the Brooklyn Queens Expressway, the Whitestone Expressway, the Van Wyck Expressway, and other roadways in New York.

Now, that same duration of time spent travelling (or being stuck in traffic) on those same roadways offers no such entertainment or information. Instead, all that remains are the bare skeletons of a few signs and signs covered with graffiti — the empty, barren hulks of outdoor sign structures that once provided tax revenues, jobs, and ad revenues, along with information and entertainment.

Unless, of course, you are the City of New York (the "City") or one of its tenants, in which case, a different story is taking place near properties owned by the City, such as Citi Field, where the City and its tenants are free to put up whatever signs that they want without the crushing burden of the City's restrictive zoning and advertising sign regulations.

To Petitioners, the City's self-created statutory monopoly and carte blanche as to the location, size and type of signage that the City has given to itself and its tenants, as well as the right to put whatever copy they want on those signs, while denying those same rights to Petitioners, is inequitable, unjust, unfair, and contrary to Appellants' constitutional right of commercial (and non-commercial, political) free speech while unjustly enriching Appellees and their tenants.

Petitioners contend that the City's actions in allowing itself and its tenants to erect signs of a nature and size and in locations prohibited to Petitioners and other private parties proves that the stated justifications for enacting the harsh sign legislation and regulations, namely esthetics and traffic safety, are merely a pretext or subterfuge since the signage that the City permits on its properties are no different in kind, size, or location from those that Petitioners are barred from erecting or maintaining.

Petitioners contend that the District Court committed reversible error when it dismissed the action, at the pleading stage because Petitioners demonstrated that the City's stated justification for enacting strict signage regulations was a subterfuge since the signs that the

City permitted its tenants to erect at Citi Field and elsewhere were just as much "eyesores" and "traffic distractions" as the signs prohibited to Petitioners as private individuals and, once that subterfuge was established, a stricter scrutiny should have been applied in reviewing the applicable signage regulations (and the wholesale exemption of the City and its tenants from those regulations).

The City hypocritically permits its tenants to erect and maintain advertising signs, including, but not limited to, illuminated, animated outdoor advertising signs inside of City parks near arterial highways, such as Citi Field, that are prohibited outside of those parks on private property located similar distanced from those same arterial highways.

By discriminating against those who are not tenants of Appellees, Appellees have improperly interfered with and infringed upon Appellants' commercial free speech rights under the First and Fourteenth Amendments.

A. Nature of the Case

1. The gravamen of Petitioners' claim herein is the City's promotion of its preferred forms, and delivery methods, of commercial free speech, namely their tenants' outdoor advertising signage, while simultaneously suppressing competing commercial free speech.

Petitioners are several owners, former owners, or lessees of property on which outdoor advertising sign structures were and are located. Those properties are located within distances from arterial highways where

the City has prohibited outdoor advertising signs. Since 2010, Petitioners have also been forced to discontinue the use of their signs, on pain of prohibitive civil penalties and fines and the possibility of criminal prosecution.

Several of the properties Owned by some of the Petitioners herein are in Queens County, including at least one, owned by Mucho Media, is located in the Willets Point neighborhood.

In the Willets Point neighborhood, the New York Mets constructed a new stadium, known as Citi Field, which has been open for business since April 1, 2009.

At the Citi Field site, the Mets have erected outdoor advertising signs and accessory use signs that are located the same distances from arterial highways and parks as the outdoor advertising signs or accessory use signs of Petitioners.

The same size, location, and types of signs that the City claims lack esthetic value and are a traffic safety concern when on private land are deemed by the City to be perfectly appropriate if located on the City's property or erected by the City's tenants on the City's property.

Therefore, the City's actions in permitting these same distracting signs without any esthetic qualities on their properties while barring them on private property refute the City's stated justifications.

The outdoor signs permitted at Citi Field and in the park grounds around the ballpark (which the City prohibits elsewhere) face Northern Boulevard, the Whitestone

Expressway, and the Van Wyck Expressway (where vehicles exit from the Grand Central Parkway to merge into both expressways and Northern Boulevard) are just as distracting as they would be on private property.

Clearly, this distinction has one purpose only: To grant the City and its tenants an unfair competitive advantage at the cost of Petitioners' commercial free speech.

Even the exercise of police power can be applied in a discriminatory fashion, as the City has done here, by allowing those favored by the City to have outdoor advertising signs while banning others similarly situated from having outdoor advertising signs.

B. Procedural History

2. On December 19, 2016, Petitioners filed their complaint in District Court. On January 26, 2017, the District Court granted the City's consent application to extend their deadline to answer to April 6, 2017.

On February 28, 2017, the parties informed the District Court that Petitioners would be filing an amended complaint.

On March 10, 2017, Petitioners filed the Amended Complaint, bringing as-applied challenges to the signage regulations under the First Amendment and the Takings Clause of the Fifth Amendment.

The District Court again extended the City's deadline to answer. On April 26, 2017, Appellees filed a motion to dismiss, along with a memorandum of law and the

declaration of Emily K. Stitleman. On July 10, 2017, after the District Court granted a series of requests for extensions, Petitioners filed their memorandum of law in opposition, along with the declaration in opposition of Mohammad Malik (the "Malik Declaration"). On July 27, 2017, Appellees filed their reply memorandum of law.

There was no oral argument on the motion to dismiss.

The District Court then issued the Order in which the District Court incorrectly viewed Petitioners' claims as involving an objection to the "underinclusiveness" of the City's' zoning and other regulatory restrictions on outdoor advertising signs on private land and the utter absence of any similar restrictions on similarly located and sized signs on City properties and dismissed those claims for failure to state a claim on which relief can be granted.

This is not a case of "underinclusiveness" — rather, it is a case of exclusiveness solely for the benefit of the City and its tenants to the detriment of Petitioners.

Overlooked by the District Court was the fact that the sign regulations were and are intended to regulate the content of the signs, as well as the location and other features.

Accessory signs are permitted within 200 feet of an arterial highway or park if they are of a certain size, but advertising signs are not.

The difference between the two types is based solely on content.

A landowner is permitted to erect an accessory sign to advertise its on-site business, but is not permitted to erect an advertising sign promoting the business of a neighboring business.

Even whether or not to permit on private property political or advertising related to civic or charitable purposes is solely at the discretion of the City, but no such regulations impair the signs at Citi Field.

In a decision dated December 22, 2017, the District Court also dismissed the "takings" claims on subject matter jurisdictional grounds because Petitioners had failed to exhaust their state court remedies which determination is not being challenged herein.

3. Petitioners timely filed the Notice of Appeal from the Order. Petitioners timely perfected their appeal before the Second Circuit, filing their Brief and Appendix with the Clerk of the Court. The City timely filed its Appellee's Brief. Petitioners timely filed their Reply Brief.

The Second Circuit then heard oral argument and issued the Summary Order cited above affirming the District Court's Order. The Second Circuit incorrectly interpreted New York City Administrative Code §18-118 as giving the City carte blanche to do whatever it wanted for purposes of operating the park and the baseball stadium, when it is clear, that under State law, the City does not have free rein for doing whatever it wants.

4. Petitioners timely filed a petition for reargument and a rehearing *en banc*.

The Second Circuit denied the petition for reargument and a rehearing *en banc* in an Order dated January 25, 2019.

5. This Petition followed.

REASONS FOR ALLOWANCE OF THE WRIT

There are many reasons why this Court should allow the Writ.

The first is that the stated justifications for the restrictive sign regulations are esthetics and traffic safety. Neither of these stated justifications withstands even a deferential standard of review, let alone the strict standard of review that should be applied in content based sign restrictions.

To paraphrase this Court in *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993), the city has asserted an interest in esthetics, but Appellants' outdoor advertising signs are no greater an eyesore than the signs permitted to remain in place on other privately held properties or the ones that Appellees themselves allowed to be erected and maintained on City owned property.

Therefore, one of the City's stated justifications for enacting the sign restrictions at issue in this action is, in fact, merely a subterfuge and is not worthy of consideration by this Court. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993).

The second justification offered by the City was traffic safety.

This also does not withstand a closer examination.

Again, paraphrasing this Court in *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993), the city has asserted an interest in traffic safety, but Appellants' outdoor advertising are no more distracting or a cause of traffic accidents than the signs that Appellees have permitted to be erected at Citi Field and elsewhere on City owned property.

Since some of the signs at Citi Field and in the surrounding park are animated, electronic, illuminated signs, while others are variable message signs, Petitioners submit that the signs that the City allows its tenants to erect on City owned property are actually more distracting and more likely to cause traffic problems than the static content signs which Appellants have been barred from using.

Contrary to the decisions of the District Court and the Second Circuit, the action should not have been dismissed at the pleading stage.

Petitioners sufficiently articulated a claim for violation of their First Amendment rights to withstand a motion to dismiss under the standard laid out by this Court in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Free speech, even commercial free speech, is entitled to protection from an outright ban, where the reasons advanced for the ban, esthetics and traffic safety, are shown to be nothing more than a subterfuge to justify giving the City's tenants an unfair competitive advantage with respect to exercising their commercial free speech.

The City should not be permitted to ban all private owners from displaying outdoor advertising signs near arterial highways and city parks while simultaneously allowing its tenants to erect the same kind of outdoor advertising signs prohibited to private owners.

Contrary to the Summary Order of the Second Circuit, the City was not given free rein to do whatever it wants in the park by reason of New York City Administrative Code §18-118. *See*, *e.g.*, *Matter of Avella v. City of New York*, 29 N.Y.3d 425, 440, 58 N.Y.S.3d 236, 80 N.E.3d 982 (2017), the New York Court of Appeals held that the development of the parkland in which Citi Field is located for anything other than the stadium and the parking lot was not authorized by New York City Administrative Code §18-118 ("In sum, the text of the statute and its legislative history flatly refute the proposition that the legislature granted the City the authority to construct a development such as Willets West in Flushing Meadows Park.").

While the stadium and signage for advertising baseball games, and other events being held the ballpark, might be able to be reconciled with the provisions of New York City Administrative Code §18-118, use of that parkland area for business unrelated to the stadium and the Mets cannot be justified under New York City Administrative Code §18-118. *See Matter of Avella v. City of New York*, 29 N.Y.3d 425, 440, 58 N.Y.S.3d 236, 80 N.E.3d 982 (2017).

In essence, the City's park tenants are free to erect and display advertising signs inside City parks that are prohibited by the City outside of City parks but facing those parks.

The excuses offered by the City to justify its blatant discrimination against Petitioners are lame and hypocritical — in fact, the animated and illuminated outdoor advertising signs in and about Citi Field, for example, are far more distracting than the static advertising copy that were previously displayed (but are now prohibited from being displayed) on signs owned by Plaintiffs on lands owned by the other Plaintiffs elsewhere in the City.

Unfortunately, the District Court and the Second Circuit failed to apply the proper level of scrutiny to the legislation at issue.

"It was the city's burden to establish a 'reasonable fit' between its legitimate interests in safety and esthetics and its choice of a limited and selective prohibition of newsracks as the means chosen to serve those interests." *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993).

This is especially true where the restrictions are content based, as in the case of City's entire sign regulatory scheme. *See, e.g.*, *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993) and *Reed v. Town of Gilbert, Ariz.*, ___ U.S. ___, ___, 135 S. Ct. 2218, 2228, 192 L. Ed2d 386 (2015).

There is little doubt that the City has intentionally infringed on Petitioners' First Amendment rights.

In this instance, the Zoning Resolution is content based legislation, differentiating between off-premises advertising and on-premises advertising (defined as

accessory use). See New York City Zoning Resolution §12-10 (Definitions) in which an "advertising sign" is defined as a sign that directs attention to a business, profession, commodity, service, or entertainment that is conducted, sold, or offered elsewhere than upon the premises where the sign is located. A sign is not an "advertising sign" if it is "accessory to a use located on the zoning lot." New York City Zoning Resolution §12-10. An "accessory sign" directs attention to a business or profession conducted on the premises where the sign is located. New York City Zoning Resolution §12-10. Accessory signs are permitted in all commercial and manufacturing districts, subject to height, size, illumination, and projection limitations. New York City Zoning Resolution §32–62.

As the Supreme Court of the United States has held, "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech [citation omitted)." *Reed v. Town of Gilbert, Ariz.*, ___ U.S. ___, ____, 135 S. Ct. 2218, 2228, 192 L. Ed2d 386 (2015).

There is also no doubt that the sign regulations make distinctions based upon content since non-advertising, accessory use signs are treated differently from advertising signs.

There are some restrictions on a municipal government's power to regulate commercial free speech and non-commercial free speech. As this Court recognized in *Metro Media Inc. v. City of San Diego*, 453 U.S. 490, 512 (1981), "The fact that the city may value commercial messages relating to onsite goods and services more

than it values commercial communications relating to offsite goods and services does not justify prohibiting an occupant from displaying its own ideas or those of others."

In *Metro Media, Inc. v. City of San Diego*, 453 U.S. 490, 521 (1981), the United States Supreme Court then held that "If the city has concluded that its official interests are not as strong as private interests in commercial communications, may it nevertheless claim that those same official interests outweigh private interests in noncommercial communications? Our answer, which is consistent with our cases, is in the negative." (Holding the challenged ordinance unfairly prohibited non-commercial speech in violation of the First Amendment.)

In Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 571-572 (1980), the Supreme Court of the United States reversed the New York Court of Appeals, declared that a total ban against a public utility company's use of advertising was unconstitutional, and held that:

> "Our decision today in no way disparages the national interest in energy conservation. We accept without reservation the argument that conservation, as well as the development of alternative energy sources, is an imperative national goal. Administrative bodies empowered to regulate electric utilities have the authority—and indeed the duty—to take appropriate action to further this goal. When, however, such action involves the suppression of speech, the First and Fourteenth Amendments require that the restriction be no more extensive than is

> necessary to serve the state interest. In this case, the record before us fails to show that the total ban on promotional advertising meets this requirement. [Footnote omitted.]"]

"The general principle that has emerged from this line of cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others. (Citations omitted.)" *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)

In this case now before this Court, the City has concluded that its and its park tenants' commercial interests and commercial free speech rights outweigh the commercial interests of private parties. This is an improper exercise of the City's police power to address alleged esthetic issues because it does not prohibit all signs of the same size, category and location — only the signs of private parties — while it allows the City and its tenants free rein to erect and use advertising signs prohibited to everyone else.

Mr. Justice Brenan concurring opinion in *Metro Media Inc. v. City of San Diego*, 453 U.S. 490, 525-526 (1981), that, in his opinion that the ordinance in question was, in fact a total ban on the use of outdoor advertising, is applicable to the underlying facts herein:

> "In contrast, my view is that the *practical* effect of the San Diego ordinance is to eliminate the billboard as an effective medium of communication for the speaker who wants to express the sorts of messages described

> Joint Stipulation of Facts No. 23, and that the exceptions do not alter the overall character of the ban. Unlike the on-premises sign, the off-premises billboard 'is, generally speaking, made available to 'all-comers', in a fashion similar to newspaper or broadcasting advertising. It is a forum for the communication of messages to the public.' [Record citation omitted.] [Footnote omitted.] Speakers in San Diego no longer have the opportunity to communicate their messages of general applicability to the public through billboards. None of the exceptions provides a practical alternative for the general commercial or noncommercial billboard advertiser. Indeed, unless the advertiser chooses to buy or lease premises in the city, or unless his message falls within one of the narrow exempted categories, he is foreclosed from announcing either commercial or noncommercial ideas through a billboard." (Italics in original.)

This Court is presented with a zoning regulation that prohibits landlords and their tenants from erecting advertising signs within 200 feet of an arterial highway or a public park of at least one-half acre and imposes size restrictions based upon distance from those locations but does not impose any such restrictions on the City or its tenants for advertising signs located *inside* those same public parks that are also within 200 feet of an arterial highway. There are also no additional sign size limitations on the City or its park tenants based upon distance that are imposed on private parties located outside a public park.

The discriminatory treatment of private parties (the prohibition of advertising signs within 200 feet of an arterial highway or a public park of one-half acre size or more) as compared to the treatment of Appellees' tenants (allowing the erection of advertising signs inside a public park that are not subject to those same restrictions) does not advance any substantial governmental interest but, rather, improperly advances the viewpoints and free speech rights of Appellees and their tenants at the expense of others.

There can be no question that the regulatory scheme being challenged by Appellants is merely a subterfuge for depriving private parties who are not Appellees or tenants of Appellees of all of their commercial free speech rights.

What is actually happening is discrimination against commercial free speech of private parties by reason of the disparate impact that the outdoor signage regulatory scheme has on them while giving Appellees, Appellees' tenants, and Appellees' favorites an unfair advantage over private parties and an unfettered right to engage in advertising prohibited elsewhere to private parties.

This discrimination is further demonstrated by the City's efforts to cancel the status of non-conforming use for existing signs.

New York City Zoning Resolution §12-10 provides that: "A 'non-conforming' use is any lawful use, whether of a building or other structure or of a zoning lot, which does not conform to any one or more of the applicable use regulations of the district in which it is located, either on December 15, 1961 or as a result of any subsequent amendment thereto."

However, in practice, the City has been improperly depriving owners of existing, non-conforming use signs of their right to continue to use them by invoking New York City Zoning Resolution §52-61. *See*, for example, *OTR Media Group, Inc. v Board of Stds. & Appeals of the City of N.Y.*, 2018 NY Slip Op 50342(U) [59 Misc 3d 1201(A)] (Sup. Ct. 2018) ("Upon review of the BSA resolution and the evidence submitted in support of petitioners' application at each juncture, the Court finds the BSA's determination that the Subject Sign is not entitled to non-conforming use status due to the claim that the non-conforming advertising use had been discontinued, is arbitrary and capricious.").

Accordingly, the regulatory scheme has a disparate impact on the commercial free speech rights of Appellants and others similarly situated in violation of the law and cannot be sustained on the claimed grounds of esthetics or safety since Appellees' actions in permitting this same conduct on Appellees' properties or elsewhere where Appellees can profit by advertising signs.

CONCLUSION

Certiorari is warranted to address Petitioners' Constitutional Claims under the First and Fourteenth Amendments with respect to the deliberate discrimination against them perpetrated by the City in the form of burdensome speech restrictions on Petitioners compared to little or no restrictions being imposed by the City on its City park tenants. As discussed above, the City's stated reasons for the near total ban on advertising signs near arterial highways and City parks do not withstand strict scrutiny since the very same types of signs denied to Petitioners are permitted to the City's park tenants. For all of the above reasons, Petitioners respectfully request that this Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED DECEMBER 7, 2018

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

18-0193

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 7th day of December, two thousand and eighteen.

Appendix A

MOGUL MEDIA, INC., *et al.*,

Plaintiffs-Appellants,

v.

CITY OF NEW YORK, *et al.*,

Defendants-Appellees.[†]

December 7, 2018, Decided

Present:

RICHARD C. WESLEY,
DEBRA ANN LIVINGSTON
Circuit Judges.
GEOFFREY W. CRAWFORD
District Judge.[*]

SUMMARY ORDER

Appeal from the United States District Court for the Southern District of New York (Engelmayer, *J.*)

[†] The Clerk of the Court is directed to amend the caption as set forth above.

[*] Chief Judge Geoffrey W. Crawford, of the United States District Court for the District of Vermont, sitting by designation.

Appendix A

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment is **AFFIRMED**.

Plaintiffs, owners or lessees of property in the City of New York on which billboards are or have been displayed, appeal from an Opinion and Order of the United States District Court for the Southern District of New York (Engelmayer, *J.*) granting the City of New York's ("City") Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. Plaintiffs appeal the district court's judgment holding that the City did not violate their First Amendment rights.[1] We assume the parties' familiarity with the underlying facts, the procedural history, and the issues for review. The standard of review is well known.[2]

Plaintiffs challenge the constitutionality of New York City Zoning Resolution ("ZR") §§ 42-55 and 32-662,[3] as

1. Plaintiffs brought additional claims under federal law but do not challenge the dismissal of those claims on appeal.

2. We review "the dismissal of a complaint under Rule 12(b)(6) *de novo*, taking as true the material facts alleged in the complaint and drawing all reasonable inferences in favor of the plaintiff." *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 71 (2d Cir. 1998). To survive a motion to dismiss under rule 12(b)(6), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). A complaint is properly dismissed, where, as a matter of law, "the allegations in a complaint, however true, could not raise a claim of entitlement to relief." *Id.* at 558.

3. ZR §§ 42-55 and 32-662 prohibit arterial highway "offsite" advertising signs in high-density commercial and manufacturing districts, respectively, but permit so-called "onsite" signs.

applied to their properties. They contend that because the City "zon[ed] City owned parks and properties differently from other lands similarly situated and owned by private owners," J.A. 31-32, for the purpose of advancing "a money making scheme," Appellant Br. 24, the City violated their First Amendment rights. Plaintiffs point to offsite advertising signs permitted at the New York Metropolitans' Citi Field ballpark, located within the City-owned Flushing Meadows-Corona Park, to support their argument that ZR §§ 42-55 and 32-662 are unconstitutionally underinclusive.

However, the City neither exempted Flushing Meadows-Corona Park from ZR §§ 42-55 and 32-662, nor deliberately zoned the parkland so as to avoid those regulations. Flushing Meadows-Corona Park is not zoned, a designation that has not changed since at least 1961. City-owned parkland is governed by the public trust doctrine, a state common law theory under which "[o]nly the state legislature has the power to alienate parkland." *Avella v. City of New York*, 29 N.Y.3d 425, 431, 58 N.Y.S.3d 236, 80 N.E.3d 982 (2017). "Even though a municipality may own the land dedicated to public use, '. . . the power to regulate those uses [is] vested solely in the [state] legislature.'" *Id.* at 431 (first brackets in original) (quoting *Potter v. Collis*, 156 N.Y. 16, 30, 50 N.E. 413 (1898)). In 1961 the State authorized construction of Shea Stadium (later replaced by Citi Field) and appurtenant structures at Flushing Meadow Park (now Flushing Meadows-Corona Park), codified in section 18-118 of the Administrative Code of the City of New York. *See also id.* at 432-35 (outlining grant of alienation of Flushing Meadow Park).

Therefore, any challenge premised on the allegation that the City deliberately zoned Plaintiffs' property differently from its own parkland property has no basis in law or fact. The City does not have the authority to regulate Flushing Meadows-Corona Park. At most, New York *State* allowed construction of Citi Field and appurtenant structures, including the signs of which Plaintiffs complain.

We have considered Plaintiffs' remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED DECEMBER 26, 2017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

16 CIVIL 9794 (PAE)

MOUL MEDIA, INC. MAHAMMAD MALIK, MOGUL MEDIA, LLC, BRUCKNER OUTDOOR SIGNS, INC., BRUCKNER OUTDOOR SIGNS, LLC, MUCHO MEDIA LLC, 34-06 73RD LLC, OUTDOOR PROMOTERS & TRADERS UNLIMTED, INC., SPOILERS & SUNDRIES PROMOTIONS, INC., MONUMENETS R, US, INC., ELITE PROMOTIONS SYSTEMS, INC., MOGUL SCRAP UNLIMITED, INC., RYAN LEE PROPERITIES LLC, MAM PROPERTITIES LLC, MEDIA PRODUCTIONS UNLIMITED, INC., KING SUNDRIES PROMOTION UNLIMITED LLC, PROSPECT MEDIA, LLC, SPRINT PROMOTION SYSTEMS INS., OMNI PRODUCTION SYSTEM, LLC, YAHOO MEDIA INC., SPECIAL MEDIA DINER LLC, OUTDOOR STUDIO PROMOTORS, LLC, 54-18 43RD REALTY CORP., LEXUS PROSPECT PROMOTION LLC, and VAN DAM SPECIALTY & PROMOTION, INC.,

Plaintiffs,

-against-

Appendix B

THE CITY OF NEW YORK, THE BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK, THE NEW YORK CITY COUNCIL, NEW YORK CITY DEPARTMENT OF BUILDINGS, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, and NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION,

Defendants.

JUDGMENT

The City having moved to dismiss the First Amended Complaint ("FAC"), arguing that the City's zoning regulations comport with the First Amendment and Taking Clause and that the Court lacks jurisdiction to consider the Takings Clause claim because plaintiffs have not exhausted their state-law remedies, and the matter having come before the Honorable Paul A. Engelmayer, United States District Judge, and the Court, on December 22, 2017, having rendered its Opinion and Order granting the City's motion to dismiss, and directing the Clerk of Court to close this case, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion and Order dated December 22, 2017, the City's motion to dismiss is granted; accordingly, this case is closed.

Appendix B

Dated: New York, New York
December 26, 2017

RUBY J. KRAJICK
Clerk of Court

By: /s/
Deputy Clerk

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED DECEMBER 22, 2017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

16 Civ. 9794 (PAE)

MOGUL MEDIA, INC., MOHAMMAD MALIK, MOGUL MEDIA LLC, BRUCKNER OUTDOOR SIGNS, INC., BRUCKNER OUTDOOR SIGNS LLC, MUCHO MEDIA LLC, 34-06 73RD LLC, OUTDOOR PROMOTERS & TRADERS UNLIMITED, INC., SPOILERS & SUNDRIES PROMOTIONS, INC., MONUMENTS R US, INC., ELITE PROMOTIONS SYSTEMS, INC., MOGUL SCRAP UNLIMITED, INC., RYAN LEE PROPERTIES LLC, MAM PROPERTIES LLC, MEDIA PRODUCTIONS UNLIMITED, INC., KING SUNDRIES PROMOTION UNLIMITED LLC, PROSPECT MEDIA, LLC, SPRINT PROMOTION SYSTEMS INC., OMNI PRODUCTION SYSTEM, LLC, YAHOO MEDIA INC., SPECIAL MEDIA DINER LLC, OUTDOOR STUDIO PROMOTERS, LLC, 54-18 43RD REALTY CORP., LEXUS'S PROSPECT PROMOTION LLC, and VAN DAM SPECIALTY & PROMOTION INC.,

Plaintiffs,

Appendix C

-v-

THE CITY OF NEW YORK, THE BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK, THE NEW YORK CITY COUNCIL, NEW YORK CITY DEPARTMENT OF BUILDINGS, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, and NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION,

Defendants.

December 22, 2017, Decided
December 22, 2017, Filed

PAUL A. ENGELMAYER, District Judge:

The City of New York has long attempted to limit the visual blight and potential for danger that large billboards along its major thoroughfares may present. In this case, plaintiffs—owners or lessees of property on which billboards are or have been displayed—challenge two of the City's zoning regulations as discriminatory against them in violation of the First Amendment and as a regulatory taking without just compensation in violation of the Takings Clause of the Fifth Amendment. In particular, they contend that defendants—the City and several other municipal entities (referred to collectively as the "City")—impermissibly allow billboards at the Citi Field ballpark while prohibiting comparable billboards on nearby properties in the Willets Point neighborhood of Queens owned by plaintiffs. Plaintiffs' First Amended

Complaint ("the FAC") seeks declaratory, injunctive, and monetary relief.

The City has now moved to dismiss the FAC, arguing that the City's zoning regulations comport with the First Amendment and the Takings Clause and that the Court lacks jurisdiction to consider the Takings Clause claim because plaintiffs have not exhausted their state-law remedies. The Court grants the motion to dismiss, because on-point Second Circuit precedent forecloses the First Amendment claims and because this Court lacks jurisdiction to consider the Takings Clause claims.

I. Background

A. New York City's Zoning Regulations

1. The City's Billboard Regulations

In 1940, New York first promulgated a zoning regulation, the precursor to one at issue here, to address the visual blight and threat of distraction caused by large signs near parks and arterial roadways. New York, N.Y., Zoning Resolution ("ZR") § 21—B (1940), *renumbered* §§ 32-66, 42-53 (1961), *renumbered* §§ 32-662, 42-55 (2001); *see Clear Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94, 99-100 (2d Cir. 2010) ("*Clear Channel*") (detailing history of City's billboard zoning); *Infinity Outdoor, Inc. v. City of New York*, 165 F. Supp. 2d 403, 406-411 (E.D.N.Y. 2001) (same).[1] That regulation has

1. The blight of billboards along New York City's major roads, in fact, well predates 1940. *See* F. Scott Fitzgerald, The Great Gatsby

been revised several times since then, but at its heart has remained "the distinction between off-site commercial and on-site signs." *Infinity*, 165 F. Supp. 2d at 406; *see also Clear Channel Outdoor, Inc. v. City of New York*, 608 F. Supp. 2d 477, 482-83 (S.D.N.Y. 2009), *aff'd*, 594 F.3d 94 (2d Cir. 2010). An off-site sign, also known as an advertising sign, is "a sign that directs attention to a business, profession, commodity, service or entertainment conducted, sold or offered *elsewhere* than upon the same zoning lot and is not accessory to a use located on the zoning lot." ZR § 12-10 (2001) (emphasis added). On-site signs, formerly known as business signs and now referred to as "accessory use" signs, "direct attention to a business or profession conducted upon the premises." *Infinity*, 165 F. Supp. 2d at 406; *see* ZR § 12-10. The 1940 regulations prohibited signs in residential and commercial districts,

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23-24 (1925) ("But above the gray land and the spasms of bleak rust which drift endlessly over it, you perceive, after a moment, the eyes of Doctor T.J. Eckleburg. The eyes of Doctor T.J. Eckleburg are blue and gigantic—their retinas are one yard high. They look out of no face, but, instead, from a pair of enormous yellow spectacles which pass over a non-existent nose. Evidently some wild wag of an oculist set them there to fatten his practice in the borough of Queens, and then sank down himself into external blindness, or forgot them and moved away. But his eyes, dimmed a little by many paintless days, under sun and rain, brood on over the solemn dumping ground."). Fitzgerald's "valley of the ashes," above which Dr. Eckleburg's billboard loomed, is believed to be the Willets Point area at issue in this case. *See Mayor: Valley of Ashes in 'Great Gatsby' Was Inspired By Willets Point*, WNYC News, June 4, 2012, http://www.wnyc.org/story/216534-blog-mayor-valley-ashes-great-gatsby-was-inspired-willets-point (quoting then-Mayor Michael Bloomberg as saying Willets Point "was the inspiration for F. Scott's Fitzgerald's valley of the ashes, and it remains one of the city's most polluted sites.").

while (1) making exceptions for certain particularly busy commercial districts (such as Time Square), and (2) excluding on-site signs from the general prohibition. *Infinity*, 165 F. Supp. 2d at 406-07. "The basic prohibition contained in the 1940 Zoning Resolution remains in force today" in those manufacturing commercial districts where advertising signs are permitted at all. *Clear Channel*, 594 F.3d at 99.

In 1997, the New York Supreme Court, Kings County, held that the City's zoning regulation violated the First Amendment because it impermissibly favored commercial off-site advertisements over non-commercial advertisements. *City of New York v. Allied Outdoor Adver., Inc.*, 172 Misc. 2d 707, 659 N.Y.S.2d 390, 394-95 (Sup. Ct. 1997). In response, the City revised its regulations. *See Infinity Outdoor*, 165 F. Supp. 2d at 408; *Clear Channel*, 608 F. Supp. 2d at 482. "Thus, the amended Zoning Resolution continues to prohibit advertising signs near highways and parks and to permit accessory signs, but now provides for non-commercial signs. As with accessory signs, it permits non-commercial signs near highways and parks." *Infinity Outdoor*, 165 F. Supp. 2d at 408. "Thus, as a result of the 1998 amendments, both on-site accessory-use signs and off-site non-commercial signs were—and currently are—permitted within 200 feet of an arterial highway. Off-site advertising signs are still prohibited in those areas." *Clear Channel*, 608 F. Supp. 2d at 483.

In 2001, the City once again amended its sign regulations by adopting Local Law 14. *See Clear Channel*, 594 F.3d at 99-100. "The reason for these amendments was

the proliferation in the number and size of signs that had resulted from new technologies and the 'rampant illegality and lack of effective enforcement' that threatened the City's aesthetic appeal and traffic safety." *Infinity Outdoor*, 165 F. Supp. 2d at 409 (quoting *City Planning Commission Report* 2-8, 30 (Dec. 13, 2000); *Hearing Before the New York City Council Subcommittee on Zoning & Franchises* 11, 16-18 (Jan. 9, 2001)). The 2001 amendments (1) added certain limits on size, illumination, and projection for signs in manufacturing districts; (2) granted non-conforming use status to certain signs in manufacturing districts; and (3) limited the size of accessory signs. *See id.* at 410-11.

The current version of Zoning Regulation 32-662, applicable in commercial districts, provides that "no advertising sign shall be located, nor shall an existing advertising sign be structurally altered, relocated or reconstructed within 200 feet of an arterial highway or of a public park with an area of one half acre or more, if such advertising sign is within view of such arterial highway or public park." ZR § 32-662 (2016). Section 42-55 provides for substantially the same restriction in manufacturing districts.[2] Off-site advertising signs in residential districts are banned entirely. *See Clear Channel*, 608 F. Supp. 2d at 485 n.7.

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2. Zoning Regulation § 42-55 provides that, within 200 feet of an arterial roadway or public park: "(1) no permitted sign shall exceed 500 square feet of surface area; and (2) no advertising sign shall be allowed, nor shall an existing advertising sign be structurally altered, relocated or reconstructed." Z.R. § 42-55. Plaintiffs do not challenge § 42-55. But, because § 42-55 is substantially identical to § 32-662, any similar as-applied challenge to it would fail for the same reasons set out here.

"In sum, under the current Zoning Resolution, advertising signs are allowed, subject to regulation of size and other qualities, in some commercial districts and-all manufacturing districts, so long as they are not within 200 feet of an arterial highway or public park, or located at a distance from the highway or public park in linear feet equal to or greater than their size in square feet. Accessory signs and non-commercial signs are allowed in all commercial and manufacturing districts, but they are subject to stricter size regulations near highways and parks." *Infinity*, 165 F. Supp. 2d at 411.

2. The Special Willets Point District

In 2008, the City created a "Special Willets Point District" to "promote and protect public health, safety and general welfare" in the Willets Point neighborhood of Queens, with the specific purposes of, *inter alia*, "transform[ing] Willets Point into a diverse and sustainable community that enhances connections to its surroundings through a unique combination of uses," "creat[ing] a retail and entertainment destination that catalyzes future growth and strengthens Flushing's role as a nexus of economic, social and cultural activity," and "encourag[ing] a mix of uses that complement sporting venues within Flushing Meadows-Corona Park . . . ." ZR § 124-00. As part of the creation of the Special District, the City re-zoned the area, allowing for higher-density development on certain lots. ZR § 124-21; *see* FAC ¶ 68. ZR § 124-21 allows property owners of lots greater than 200,000 square feet to exceed the "floor area ratio" (FAR) of 2.0 that otherwise prevails in the Special District. Lots

under 200,000 square feet may not exceed a FAR of 2.0—that is, the total amount of floor space built on such a lot may not exceed twice the square footage of the lot itself. *See* ZR § 124-21. For lots greater than 200,000 square feet in the Special District, the maximum allowable FAR can be as high as 5.0. *See id.*

B. Plaintiffs' Properties At Issue Here[3]

Plaintiffs here are several owners, former owners, or lessees of property "on which outdoor advertising sign structures were and are located." FAC ¶ 49.[4] Those properties "are located within distances from Arterial highways where Defendants have prohibited outdoor

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3. The Court draws these facts principally from plaintiffs' first amended complaint (the "FAC"). The Court accepts all factual allegations in the FAC as true, drawing all reasonable inferences in plaintiffs' favor. *See Koch v. Christie's Int'l PLC*, 699 F.3d 141, 145 (2d Cir. 2012). "In considering a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), a district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint." *See DiFolco v. MSNBC Cable LLC*, 622 F.3d 104, 111 (2d Cir. 2010). "On a Rule 12(b)(1) motion challenging the district court's subject matter jurisdiction, the court may resolve the disputed jurisdictional fact issues by referring to evidence outside of the pleadings, such as affidavits, and if necessary, hold an evidentiary hearing." *Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 253 (2d Cir. 2000).

4. Plaintiffs include several business entities and a natural person, Mohammad Malik, who is the principal of each of the 40 entity plaintiffs in this action. FAC ¶ 8.

advertising signs . . . ." *Id.*[5] One plaintiff, Mucho Media LLC, had a permit to construct a sign structure and began construction on that sign. *Id.* ¶ 12. Mucho Media's permit was cancelled by the City. *Id.* ¶ 75. Since 2010, the other plaintiffs have also been "forced to discontinue the use of their signs, on pain of prohibitive civil penalties and fines and the possibility of criminal prosecution . . . ." *Id.* ¶ 86.

Several of plaintiffs' properties are located in Queens County, including at least one, Mucho Media's property, in the Willets Point neighborhood. *See id.* ¶¶ 12-21, 23, 29-31, 37-40, 45-8. In the Willets Point neighborhood, the New York Mets constructed a new stadium, known as Citi Field, which has been open for business since April 1, 2009. *Id.* ¶ 79. At the Citi Field site, the Mets have erected outdoor advertising signs and accessory use signs "that are located the same distances from arterial highways and parks as the outdoor advertising signs or accessory use signs of Plaintiffs." *Id.* ¶ 80.

Plaintiff Mucho Media LLC owns a piece of property within the Special Willets Point District. *See* FAC ¶¶ 12, 97. Mucho Media's property is "of insufficient size to enable" it to develop it. *Id.* ¶ 97.

C. Procedural History

On December 19, 2016, plaintiffs filed their complaint in this case. Dkt. 1. On January 26, 2017, the Court granted

5. Although the FAC does not allege as much, the Court assumes for the purposes of this decision that plaintiffs' properties are located within commercial districts subject to § 32-662, the regulation their complaint challenges.

defendants' request to extend their deadline to answer to April 6, 2017. Dkt. 7; *see* Dkt. 6. On February 28, 2017, the parties informed the Court that plaintiffs would be filing an amended complaint, Dkt. 9, and on March 10, 2017, plaintiffs did so, Dkt. 10, bringing as-applied challenges to the signage regulations under the First Amendment and the Takings Clause of the Fifth Amendment.

The Court again extended the defendants' deadline to answer. Dkt. 12. On April 26, 2017, defendants filed a motion to dismiss, along with a memorandum of law (the "Def. Br.") and the declaration of Emily K. Stitleman. Dkts. 13-15. On July 10, 2017, after the Court granted a series of requests for extensions, *see* Dkts. 16-23, plaintiffs filed their brief in opposition (the "Pl. Br."), along with the declaration of Mohammad Malik, Dkts. 24-25. On July 27, 2017, defendants filed their reply (the "Def. R. Br."). Dkt. 26.

II. Legal Standards

A. Motions to Dismiss for Lack of Jurisdiction (Rule 12(b)(1))

A claim is "properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000)). Relevant here to plaintiffs' Takings Clause claim, a district court lacks constitutional authority to adjudicate a claim that is unripe because "[r]ipeness is a jurisdictional inquiry . . . rooted in both Article

III's case or controversy requirement and prudential limitations on the exercise of judicial authority." *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 347 (2d Cir. 2005). To satisfy this "ripeness requirement, a plaintiff alleging a Fifth Amendment taking of a property interest must satisfy a two-prong test and show that (1) the state regulatory entity has rendered a 'final decision' on the matter, and (2) the plaintiff has sought just compensation by means of an available state procedure." *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 88 (2d Cir. 2002); *see Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172,186-97, 105 S. Ct. 3108, 87 L. Ed. 2d 126(1985).

"A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that jurisdiction exists." *Giammatteo v. Newton*, 452 Fed. App'x. 24, 27 (2d Cir. 2011) (citing *Makarova*, 201 F.3d at 113). In resolving a motion to dismiss for lack of subject matter jurisdiction, "the court must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of plaintiff," *Natural Res. Def. Council v. Johnson*, 461 F.3d 164, 171 (2d Cir. 2006) (internal quotation omitted), but "jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it," *Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998); *see also APWU v. Potter*, 343 F.3d 619, 623 (2d Cir. 2003); *Amidax Trading Group v. S. W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011). On such a motion, a court may consider evidence outside the pleadings, such as affidavits and exhibits. *See Makarova*, 201 F.3d at 113.

Appendix C

B. Motion to Dismiss for Failure to State a Claim (Rule 12(b)(6))

To survive a motion to dismiss under Rule 12(b)(6), a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). A claim will only have "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 663, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). A complaint is properly dismissed, where, as a matter of law, "the allegations in a complaint, however true, could not raise a claim of entitlement to relief." *Twombly*, 550 U.S. at 558. Accordingly, a district court must accept as true all well-pleaded factual allegations in the complaint, and draw all inferences in the plaintiff's favor. *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007). However, that tenet "is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678. A pleading that offers only "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555.

Appendix C

III. Analysis

A. Plaintiffs' First Amendment Claim

1. The *Clear Channel* Decision

The Second Circuit's decision in *Clear Channel* controls the First Amendment question presented here and requires dismissal of plaintiffs' claims.

In *Clear Channel*, a group of plaintiffs, owners of large billboards near arterial roadways in New York City, challenged the City's zoning regulations—ZR § 42-55 and ZR § 32-662—as applied to their billboards. 594 F.3d at 98. The *Clear Channel* plaintiffs' principal objection to the City's billboard zoning regulations was that the City had been improperly under-inclusive in its enforcement. *Id.* at 100. In particular, the *Clear Channel* plaintiffs objected to the City's decision not to enforce the billboard regulations on property owned by the Metropolitan Transit Authority, the Port Authority, and Amtrak. *See id.* at 101. They argued that "New York City viewed increased revenues for mass transit—not aesthetics or traffic safety—as the paramount concern in actively supporting an exemption for Transit Authority signs from its zoning regulations," and that "the City has made a concerted effort over several decades . . . not to enforce the Arterial Advertising Ban against billboards on any railroad property, including billboards on the MTA, LIRR, Conrail, Amtrak and other railroad or Port Authority property." *Id.* at 101. A separate plaintiff, an owner of smaller, illuminated signs, separately challenged the City's zoning regulations.

It argued that the regulations unfairly distinguished between its signs—which were prohibited—and those of a government contractor whose signs were allowed to be displayed on the outside of newsstands and street furniture pursuant to an exemption in the regulations. *Id.* at 101-02.

The Second Circuit in *Clear Channel* rejected both sets of challenges. It began its assessment by finding that the standards governing restrictions on commercial speech applied to the City's zoning regulations. *Id.* at 103 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563-66, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980)). The Circuit noted the *Central Hudson* requirement that the City "assert a substantial interest to be achieved" by its regulation of protected commercial speech, and recognized that the "'twin goals' of protecting the aesthetic appearance of a city and maintaining traffic safety are 'substantial government goals.'" *Id.* (quoting *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981)). Further, the Circuit explained, to satisfy the *Central Hudson* test, the City must also show that (a) the restriction "directly advances" the City's interest, and (b) it is not "more extensive than is necessary to serve that interest." *Id.* But those requirements do not demand that the City "adopt the 'least restrictive means' of advancing its asserted interest." *Id.* at 104. Instead, the Circuit stated, "what is 'require[d] is a fit between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose

scope is in proportion to the interest served.'" *Id.* (quoting *Bd. of Tr. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989)). In sum, the Circuit explained, Supreme Court precedent instructs that "if the City's determination about how to regulate outdoor commercial advertising is 'reasonable'—and we find that it is in this case—then we should defer to that determination." *Id.*[6]

Against that legal backdrop, the Second Circuit examined the First Amendment claims brought by the two sets of plaintiffs.

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6. The Second Circuit's later decision in *IMS Health Inc. v. Sorrell*, 630 F.3d 263, 279-80 (2d Cir. 2010), *aff'd*, 564 U.S. 552, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011), distinguished *Clear Channel* and its holding that a court ought to defer to the City's reasonable determination regarding how to regulate commercial speech. It did so on the grounds that the *Clear Channel* decision "specifically addresse[d] a regulation of commercial billboards, a distinctive method of speech that poses unique problems such as the potential to distract drivers and is therefore particularly amenable to government regulation." But given the basis for the *IMS* court's distinction—that regulations on billboard Communications implicate a type of speech distinct from the pharmaceutical marketing communications at issue in *IMS*—nothing in *IMS* undercuts the continued application of the holding in *Clear Channel*. In the field of First Amendment law, each mode of communication "is a law unto itself." *Kovacs v. Cooper*, 336 U.S. 77, 97, 69 S. Ct. 448, 93 L. Ed. 513 (1949) (Jackson, J., concurring); *see Metromedia*, 453 U.S. at 501. Nor does the Supreme Court's decision affirming the Circuit's decision in *IMS*, call into question the holding or reasoning of *Clear Channel*. *See* 564 U.S. 552, 131 S. Ct. 2653, 180 L. Ed. 2d 544.

First, the Circuit considered the plaintiffs' argument "that the City violates the protections afforded commercial speech when it distinguishes between their signs or billboards and those located on government property." *Id.* at 106. That argument was foreclosed, the Circuit explained, because the Supreme Court "has already rejected 'the argument that a prohibition against the use of unattractive signs cannot be justified on [a]esthetic grounds if it fails to apply to all equally unattractive signs wherever they might be located.'" *Id.* (quoting *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 810, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984)). A restriction on commercial billboards is not invalid, the Circuit stated, merely "because it does not *fully* accomplish the articulated objectives." *Id.* at 107. And, the Circuit held, it was "clear that, despite its exceptions, New York City's Zoning Resolution directly advances its interests in traffic safety and aesthetics." *Id.*

The Circuit next addressed plaintiffs' argument that the Zoning Regulations were unlawfully under-inclusive because they allowed the City to contract with a third party to put coordinated advertisements on street furniture. *Id.* The Circuit found persuasive the Ninth Circuit's decision in *Metro Lights*, which had addressed "the question of 'whether a city violates the First Amendment by prohibiting most offsite commercial advertising while simultaneously contracting with a private party to permit sale of such advertising at city-owned transit stops.'" *Id.* (quoting *Metro Lights, LLC v. City of Los Angeles*, 551 F.3d 898, 900 (9th Cir. 2009), *cert. denied*, 558 U.S. 1091, 130 S. Ct. 1014, 175 L. Ed. 2d 618 (2009)). That situation,

the Circuit stated, was "similar to the one presented here," in which the City had contracted with a third party for "for the installation, operation, and maintenance of bus shelters, automatic public toilets, newsstands, and other 'public service structures'" and had allowed that third party to display advertisements that would have otherwise run afoul of the zoning regulations. *Id.*

The Circuit concluded:

> The distinctions drawn by the Zoning Resolution between permissible and impermissible locations for outdoor commercial advertising are meaningful and do not defeat the purpose of the City's regulatory scheme. The City may legitimately allow limited and controlled advertising on street furniture, while also reducing clutter on City sidewalks. Allowing some signs does not constitutionally require a city to allow all similar signs. The zoning scheme does not result in a mere channeling effect. The City's interests in aesthetics, preservation of neighborhood character, and traffic safety continue to be advanced, even though limited and controlled advertising is permitted on street furniture.

Id. at 110.

2. Analysis of the Claims Here

Plaintiffs here argue that their claims are not controlled by *Clear Channel*. They present their claims

as challenging the City's decision to allow its own tenant "to erect signs that are barred elsewhere," a decision that "cannot be justified under any esthetics or valid governmental purpose." Pl. Br. at 11. Plaintiffs argue that the City's decision to allow a sign at Citi Field is "a money making scheme" for the City and its tenant "at the expense of private parties who would be barred from the same conduct." *Id.* A claim based on that practice, plaintiffs argue, was not before the Second Circuit in *Clear Channel. Id.*

Plaintiffs are mistaken. The *Clear Channel* plaintiffs presented exactly this argument: A principal contention of the plaintiffs there was that the zoning regulations impermissibly favored signs on City- and State- controlled property. *See* 594 F.3d at 101. And the *Clear Channel* court rejected it: The Court held that the City's interest in traffic safety and aesthetics justified its regulation of off-site advertising, and held foreclosed by Supreme Court precedent the argument that the "City violates the protections afforded commercial speech when it distinguishes between [plaintiffs'] signs or billboards and those located on government property." *See id.* at 106-07 (citing *Taxpayers for Vincent*, 466 U.S. at 810, and *Metromedia*, 453 U.S. at 495); *see also id.* at 105 n. 12 (rejecting claim that City had impermissibly favored its *own* speech over private speech).

Plaintiffs also contend that *Clear Channel* is "inapplicable" because the signs permitted at Citi Field "are no more esthetically pleasing" than plaintiffs' signs and are "more distracting and overt than static

advertising signs being prohibited elsewhere." Pl. Br. at 11-12. Again, *Clear Channel* is indistinguishable. As the Circuit there explained, "the Supreme Court has already rejected 'the argument that a prohibition against the use of unattractive signs cannot be justified on [a]esthetic grounds if it fails to apply to all equally unattractive signs wherever they might be located.'" *Clear Channel*, 594 F.3d at 106 (quoting *Taxpayers for Vincent*, 466 U.S. at 810). "It is clear that, despite its exceptions, New York City's Zoning Resolution directly advances its interests in traffic safety and aesthetics." *Id.*

Even if *Clear Channel* were distinguishable, plaintiffs' complaint would fail to state a claim under the First Amendment for a separate reason. That is because, as plaintiffs allege, the sign at Citi Field to which they object is *not* located within an area subject to ZR § 32-662 (or ZR § 42-55). Zoning Regulation § 32-662 applies within Commercial Districts (and the substantially similar Zoning Regulation § 42-55 applies in manufacturing districts). Citi Field, however, is located in neither. *See* ZR § 11-13. Plaintiffs' objection, therefore, is really directed at the City's decision to zone one area as commercial and another area—Citi Field—as a park not subject to the same restrictions. But, under settled law, the fact that a zoning regulation such as ZR § 32-662 is, arguably, under-inclusive does not offend the First Amendment. A City may enforce its regulation on "the use of unattractive signs . . . on [a]esthetic grounds" even "if it fails to apply to all equally unattractive signs wherever they might be located." *Taxpayers for Vincent*, 466 U.S. at 810; *see Clear Channel*, 594 F.3d at 106. Accordingly, even if the Second

Circuit in *Clear Channel* had not expressly rejected the very First Amendment claims made in the FAC, this Court would nevertheless dismiss those claims.[7]

B. This Court Lacks Jurisdiction to Consider Plaintiffs' Takings Claim

Plaintiffs' claim under the Takings Clause fails for a separate reason. Plaintiffs have not availed themselves of the procedures under New York state law to seek compensation for the taking alleged here. As a result, their claim under the Takings Clause is not ripe for review in federal court.

As the Second Circuit has explained, "a plaintiff alleging a Fifth Amendment taking of a property interest must satisfy a two-prong test and show that (1) the state regulatory entity has rendered a 'final decision' on the matter, and (2) the plaintiff has sought just compensation by means of an available state procedure." *Dougherty*, 282 F.3d at 88; *see Williamson*, 473 U.S. at 186-97. Here, the City argues that plaintiffs have failed to avail themselves of "at least two potential state based remedies for seeking just compensation." Def. R. Br. at 6; *see also* Def. Br. at 3, 23.[8]

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7. In light of this holding, the Court has no occasion to reach defendants' alternative argument, *see* Def. Br. at 3 n.4, that—irrespective of the merits of plaintiffs' First Amendment challenge—the FACs' claims must be dismissed against several defendants whom defendants claim are not adequately alleged to have caused any unlawful action.

8. These remedies are: (1) initiating a proceeding, under New

Plaintiffs, notably, do not dispute that they have not pursued state remedies. *See* Pl. Br. at 13-16. Nor does the FAC allege that plaintiffs have sought compensation by means of an available state remedial procedure, or that such procedures do not exist under New York law. *See id.* And no such claim could validly be made. *See Country View Estates @ Ridge LLC v. Town of Brookhaven*, 452 F. Supp. 2d 142, 156-57 (E.D.N.Y. 2006); *see also Kurtz v. Verizon N. Y., Inc.*, 758 F.3d 506, 514 (2d Cir. 2014) ("It is well-settled that New York State has a reasonable, certain and adequate provision for obtaining compensation." (quoting *Country View Estates*, 452 F. Supp. 2d at 157)); *Vandor*, 301 F.3d at 39. Thus, whether the City's challenged actions represent a final regulatory action, plaintiffs fail the second prong of the *Dougherty* test: They have not sought just compensation by means of the state procedures available to them. Accordingly, this Court lacks jurisdiction to consider plaintiffs' takings claim and must, pursuant to Rule 12(b)(1), dismiss it.

York CPLR Article 78, to compel the city to undertake a formal condemnation proceeding; and (2) filing an inverse condemnation proceeding for a de facto taking. *See Gounden v. City of New York*, No. 10 CIV. 3438 (BMC), 2011 U.S. Dist. LEXIS 158357, 2011 WL 13176048, at *3 (E.D.N.Y. Apr. 22, 2011) (describing these procedures); *Vandor, Inc. v. Militello*, 301 F.3d 37, 39 (2d Cir. 2002) ("Article 78 is a form of proceeding available to compel public officials to comply with their responsibilities."); *United States v. Clarke*, 445 U.S. 253, 257, 100 S. Ct. 1127, 63 L. Ed. 2d 373 (1980) (noting that an inverse condemnation action describes "the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted").

Appendix C

CONCLUSION

For the foregoing reasons, the City's motion to dismiss is granted. The Clerk of Court is respectfully directed to close this case.

SO ORDERED.

/s/ Paul A. Engelmayer
Paul A. Engelmayer
United States District Judge

Dated: December 22, 2017
New York, New York

APPENDIX D — DENIAL OF REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED JANUARY 25, 2019

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 18-193

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 25th day of January, two thousand nineteen.

MOGUL MEDIA, INC., *et al.*,

Plaintiffs-Appellants,

v.

CITY OF NEW YORK, *et al.*,

Defendants-Appellees.

ORDER

Appellants filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

Appendix D

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

/s/Catherine O'Hagan Wolfe,
Catherine O'Hagan Wolfe, Clerk